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Japanese Thought and Western Law: A Tangential View of the Japanese Bengoshi and the Japanese American Attorney

I. INTRODUCTION

Attorneys from the United States are dealing with the Japanese on an increasingly frequent basis due to the steady increase in international business transactions between the two countries. Results, however, are often unsatisfactory because of the recurrent problems of ineffective negotiation and rampant misunderstanding. The problem cannot be resolved through the constricted comparison of relevant laws of the United States and Japan. The problem is more fundamental. Based upon the conclusion that cultural insularism and pontification only serve to preclude communication, United States attorneys must first expand their awareness of the fundamental socio-cultural disparities between the two countries to more fully comprehend the present Japanese legal consciousness.

An understanding of the historical and cultural background of the Japanese is of primary importance in the formulation of a broader perspective. Traditional characteristics of group orientation, obedience, acceptance of reality, and societal harmony have all affected Japanese personal relations and the underlying ideas of duties and obligations. These intrinsic traits characterize the foundation of Japanese society and are accountable for the transformation of adopted foreign ideas—even inherently conflicting ones—into an end product which is peculiarly Japanese.

The second part of this comment will demonstrate the subliminal impact of Japanese tradition on their society's legal sphere through an examination of the gradual rise of the Japanese lawyer. In the final section of this comment, the far-reaching ramifications of traditional Japan on the Japanese American community of the United States will be gauged. Through analyzing the emergence of the attorney in modern Japan, a historical look at the Japanese American lawyer's progression will indicate to what extent traditional Japanese maxims have persisted in America after their confrontation with Western law.

II. BACKGROUND OF JAPANESE TRADITION AND THOUGHT

A. A Group-Oriented Society

The Japanese people have historically preferred group over individual identification and action. This tendency can be attributed to external forces as well as adopted philosophies which have influenced Japanese thought.

1. The geographic constraint of the rice culture

The origin of the societal trait of group orientation in Japanese history dates back to the 3rd Century B.C.¹ Irrigated rice cultivation, which originated near ancient southern China, found its way into Japan during this era.² Intricate man-made watering systems required for wet-field cultivation demanded close cooperation in order to efficiently allot limited water resources.³

Several reasons may be attributed to the demanding character of rice cultivation. Since Japan is predominantly mountainous, the limited number of small flood plains and narrow valleys was a major obstacle in locating rice paddies.⁴ This problem compounded the already existing labor intensiveness of wet-field rice cultivation. In addition, Japan has historically been densely populated.⁵ Thus, the Japanese have relied on cooperation and collective action for maximal production of rice and, consequently, their own survival.

Group orientation became an enduring social trait which persisted and was reinforced while rice remained an integral part of Japanese agriculture.⁶ Local hereditary units called *uji*, which emerged

1. E. REISCHAUER, *THE JAPANESE* 16 (1980).

2. *See id.* at 16.

3. *Id.* at 17.

4. E. REISCHAUER, *THE UNITED STATES AND JAPAN* 54 (3d ed. 1969). Presently only 16% of Japan's total land area is cultivated. *See also* F. BUNGE, *JAPAN: A COUNTRY STUDY* 56 (4th ed. 1983). "The Japan islands are basically the summits of mountain ridges that were uplifted near the outer edge of the Asian continental shelf. Consequently, the country is extremely mountainous, and the plain and intermontane basins scattered throughout the country make up only about 25% of the national land area."

5. E. REISCHAUER, *supra* note 4, at 60. Reischauer notes that in 1800, Japan had 30 million inhabitants—the equivalent of three times as many people that inhabited England and Wales at that time. In 1981, the density for the country as a whole was greater than 300 persons per square kilometer. The population per square kilometer of arable land in 1980 was 2,256 persons compared to 103 in the United States. *See* F. BUNGE, *supra* note 4, at 67.

6. F. BUNGE, *supra* note 4, at 190. Even in 1979-80, agriculture in Japan favored paddy rice. Of the 13.6 million acres of farmland, 7.7 million were wet paddy fields.

around 6th Century Japan,⁷ were as much an outgrowth of the Japanese rice culture as the present group-emphasizing business management techniques of modern Japanese corporations.⁸

2. Underlying philosophies: Ancestor worship, confucianism, and buddhism

The atmosphere of cooperation within the group structure was a conducive medium for the adoption and development of different, and seemingly irreconcilable, philosophies which eventually fused together to form the foundation of Japanese society. Throughout Japan's history, most fundamental and influential on Japanese thought were three basic philosophies: ancestor worship,⁹ Confucianism, and Buddhism.

Nobushige Hozumi¹⁰ focused on ancestor worship as a key to understanding the conflict between the East and the West.¹¹ Much of what Hozumi professed during the Meiji Period¹² impacted the future philosophical direction of Japan.¹³ Thus, his favoritism of Japanese tradition may be analyzed to understand, more thoroughly, the present society.

Hozumi pointed to basic conflicts arising out of the East-West

7. Japan was divided into semi-autonomous tribal units called *uji* during the Yamato Period. See *supra* note 1, at 42.

8. See Stevens, *Japanese Law and the Japanese Legal System: Perspectives For the American Business Lawyer*, 27 BUS. LAW. 1259 (1972).

9. For our analysis of Japanese thought, ancestor worship will be specifically addressed instead of the broader Shinto religion. See *infra* note 35.

10. Hozumi (1855-1926), an eminent legal scholar and one of the most influential policy-makers of the Meiji Period, founded a school of thought in the early 1900s which favored Japanese tradition at the expense of the Western idea of law. R. MINEAR, *JAPANESE TRADITION AND WESTERN LAW* 6 (1970). Hozumi studied law in Tokyo as one of the first regular students of Western legal science in Japan. Leaving his homeland, he became a student of English jurisprudence in London and journeyed to study Roman law and German and French law in Berlin. Hozumi also helped draft and compile the Civil Code of 1898 as well as other legal codes of Japan. See generally N. HOZUMI, *ANCESTOR-WORSHIP AND JAPANESE LAW* 187-88 (6th ed. 1940).

11. R. MINEAR, *supra* note 10, at 8. Western law in Hozumi's comparative reasoning was equated with German positivism—a dominant philosophy during the late 1800s and early 1900s.

12. The Meiji Period (1868-1912) marked the opening of Japan to the Western World. With the fall of the Tokugawa Shogunate, came the simultaneous end of Japan's close door policy which extended over 250 years. R. TSUNODA, W. DE BARY & D. KEENE, *2 SOURCES OF JAPANESE TRADITION* 131-32 (1958).

13. Much of what Hozumi professed influenced policies of the Ministry of Education. See generally N. HOZUMI, *supra* note 10.

confrontation.¹⁴ Japanese society was not founded upon social contract, but rather racial unity. Hozumi specifically emphasized the role of ancestor worship in preserving this racial unity.¹⁵ He reasoned that since these two were the expression of ancestor worship,¹⁶ the absence of ancestor worship meant that the worship of power must exist.¹⁷

In Hozumi's eyes, law could not be separated from ethics in Japanese society. He distinguished Japan from Western nations in that Japan was able to maintain racial homogeneity throughout its history. Hence, law and ethics did not have a need to separate as in the West where each was derived from its own source.¹⁸ Power became the source of law in the West and simultaneously the source of morals.¹⁹ In Japan, however, ancestor worship forced a different result in the coerced molding of a societal trait of obedience.²⁰

Introduced as early as the 5th Century, Confucianism was not recognized as an official ideology until the Tokugawa Period.²¹ Japanese Confucianism provided guidance to the identical consequence of a close-knit relationship between law and ethics. Conceptualization of the idea of law was a major difference between Japanese tradition and Western law.²² Confucianism did not recognize the idea of a universal principal of natural law. As a result, Japan never cultivated its own politics and ethics.²³ An autonomous science of law conse-

14. See generally N. HOZUMI, *supra* note 10 and N. HOZUMI, *THE NEW JAPANESE CIVIL CODE AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE* (1912).

15. R. MINEAR, *supra* note 10, at 73.

16. Ancestor worship does not define power of the father simply as force, but additionally the "solicitude of a father for his child." Thus, obedience became a "sacred obligation, the piety of a filial son." *Id.* at 73-74.

17. Hozumi believed the authority of ancestors united a racial group. In societies where homogeneity of a group is destroyed, ancestor worship similarly is destroyed. With this, argued Hozumi, law and ethics divide. *Id.* at 74.

18. *Id.*

19. *Id.* See generally N. HOZUMI, *supra* note 10.

20. R. MINEAR, *supra* note 10, at 73-4.

21. F. BUNGE, *supra* note 4, at 265.

With the advent of the Tokugawa Period, reaction to the gloom of medievalism spread to the intellectual field and stimulated a great Confucian revival. With the transition to early modern Japan, Buddhism remained an integral component of daily life of the people but it ceased to hold appeal for the Japanese intellectuals. Neo-Confucian philosophy can summarily be described as a doctrine of reason or principle which focuses on humanism. Social order required a rigid hierarchical structuring of classes and conformance by all people with obligations imposed by five primary human relationships: (1) father-son; (2) ruler-subject; (3) husband-wife; (4) older-younger brother; and (5) two friends. H.P. VARLEY, *JAPANESE CULTURE: A SHORT HISTORY* 116-18 (1973).

22. R. MINEAR, *supra* note 10, at 4-5.

23. *Id.*

quently failed to materialize in Japanese tradition.²⁴

Confucian tradition relied upon a "harmonious social order" to ensure effective government.²⁵ This was a natural order which could only be accomplished through "the intuition of good men."²⁶ Societal preference in dispute settlement, therefore, "has been for the judgment of good men rather than for the rule of laws."²⁷

The underlying principle of Buddhism should not be ignored in the analysis of Japanese society's perception of the law. Article II of Prince Shotoku Taishi's (573-621 A.D.) Seventeen Article Constitution,²⁸ which set forth the basic principles of Japanese government, specifically mentions Buddhism.²⁹ Although Shotoku was heavily influenced by Confucian ethical and political doctrines,³⁰ commentator Hajime Nakamura hints that the "harmony" advocated by Shotoku has its roots in the Buddhist concept of "benevolence."³¹

Shotoku stressed harmony and concord as the principle of human behavior.³² He did not advocate submissiveness, but rather encouraged discussion in a harmonious manner to solve disputes.³³

24. Similarly, China was also unable to conceptualize law as it applies to nature or mankind. *Id.* at 5-6. *But cf.* De Vos, Hauswald & Borders, *Cultural Differences in Family Socialization: A Psychocultural Comparison of Chinese and Japanese*, in *JAPAN: A COMPARATIVE VIEW* 214 (A. Craig ed. 1979). In viewing personal relationships and social behavior patterns, however, all Asiatic cultures with roots in Confucian thought should not be assumed homogeneous.

Confucianism, considered either as an ideology or as a model for social organization, has had a profound effect on the cultures of China, Korea and Japan. . . . This common Confucian heritage, however, has not prevented radical differences in the patterning found today in mainland China or Taiwan, North or South Korea, and Japan.

Id. at 214.

25. R. MINEAR, *supra* note 10, at 154. *See generally* R. TSUNODA, W. DE BARY & D. KEENE, *SOURCES OF CHINESE TRADITION* 176 (1960).

26. R. MINEAR, *supra* note 10, at 155.

27. *Id.*

28. 1 R. TSUNODA, W. DE BARY & D. KEENE, *SOURCES OF JAPANESE TRADITION* 49 (1958). The Seventeen Article Constitution, proclaimed in A.D. 604, represented the first legislation in Japan.

29. Article II reads: "Sincerely reverence the three treasures. The three treasures, viz. Buddha, the Law, and the Monastic Orders. . . ." *Id.* at 50.

30. *Id.* at 49.

31. Nakamura, *Basic Features of the Legal, Political, and Economic Thought of Japan*, in *THE JAPANESE MIND* 143, 145 (C. Moore ed. 1967). Nakamura takes a combined cultural and psychological approach to define the elements of Japanese thought.

32. *Id.* at 145.

33. *Id.* at 146.

According to Buddhist philosophy, "[t]his goal [called nirvana] cannot be reached so long as man thinks in terms of his own identity." G. SANSOM, *A HISTORY OF JAPAN TO 1334* 61

Nakamura quotes an appropriate Japanese proverb that exemplifies the non-adversarial Japanese nature: "In a quarrel both parties are to blame."³⁴

B. *The Rules of Giri and the Japanese Character*

Although the major philosophical concepts of Shinto,³⁵ Confucianism, and Buddhism were distinct in their doctrines, all three were fused into Japanese society to assist in the evolution of Japanese tradition.³⁶ The Japanese did not view law as an arranged system of rights and duties.³⁷ The basic teachings of Confucianism and Buddhism³⁸ prepared the way for a system of non-legal social rules called *giri*.³⁹ Even with the establishment of the modern system of state law, *giri* still has survived to a surprising extent.

Many have struggled to define *giri* in a satisfactory and all-encompassing manner. The traditional rules of *giri* can be generally described as "a duty or the state of a person who is bound to behave in a prescribed way toward a certain other person."⁴⁰ If a duty is owed to another, the person to whom the duty is owed cannot demand its fulfillment from the other. The obligation or duty is not enforced by public constraints, but by a belief that personal honor/dishonor will make people perform their promises on their own volition.⁴¹ The Japanese feeling of honor has served as the governing force behind the rules since the Japanese have traditionally prioritized honor as that of primary importance.⁴² Thus, those who violate its rules "lose face"

(1958). Hence, Buddhism encountered negligible resistance in its acceptance by a non-individualistic society.

34. *Id.* at 147.

35. Shinto or "the way of the *kami* (gods)" is Japan's indigenous faith which recognizes divinity in nature. The *kami* that fill the world may be living or can be a setting in nature such as a specific mountain, waterfall, etc. TSUNODA, DE BARY & KEENE, *supra* note 28, at 21.

36. The primitive character of Shinto is evidenced not singularly in its *kami* polytheism but also in its lack of an ethical code. See H.P. VARLEY, *supra* note 21, at 6.

37. Y. NODA, INTRODUCTION TO JAPANESE LAW 174 (1976).

38. Confucianism emphasized rigidly defined and hierarchical social relationships and the critical necessity of obedience to one's lord or parent. F. BUNGE, *supra* note 4, at 265.

Buddhism teaches all things are changing and impermanent and that one can attain an absolute reality of perfect quietude and self-realization by losing desires for pleasure in this world of change.

39. Y. NODA, *supra* note 37, at 174. See generally R. BENEDICT, THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE 195-227 (1947).

40. Y. NODA, *supra* note 37, at 175.

41. *Id.* at 175.

42. The Japanese effort to save face at any cost may be attributed to the close social nexus

within their respective communities.⁴³

The rules of *giri* are an illustration of the Japanese tendency for the oblique and "non-logical."⁴⁴ In Japanese culture, intuitive and emotional tendencies have historically shunned legal proclivity.⁴⁵ Clearly defined subjective rights which characterized Western law were viewed as an infringement on the rules of *giri* since its intuitive aspects would be diminished.⁴⁶ Thus, rules of a purely legal nature experienced considerable resistance when imposed upon the Japanese.⁴⁷

C. Other Variables of Japanese Non-Litigiousness

1. Customs

The tradition of *giri* has had far-reaching implications particularly in the development of certain customs. Many of these customs provide societal functions that perform as substitutes for numerous Western practices. An example is in a tort or wrongful death action where a ritualistic custom exists for the tortfeasor to visit the family of the deceased.⁴⁸ A required element of the visit is an apology offered to the family of the deceased⁴⁹ along with an appropriate sum of

associated with a familial society and the permanency of settlement involved with rice cultivation. See Nakamura, *supra* note 31, at 148.

43. See BENEDICT, *supra* note 39, at 223. See generally Maruyama, *Thought and Behavior in Modern Japanese Politics* (1974).

44. See Nakamura, *supra* note 31, at 143.

45. NODA, *supra* note 37, at 179. The individual did not possess a legal existence in feudal Japan. Perpetuation of the class structure was valued; duty, not vindication, was expected.

46. *Id.* at 179.

47. Benedict distinguishes true guilt culture from the Japanese "shame culture." A society that relies on shame is governed by external sanctions involving other people's reactions unlike Western cultures which function on an internalized conviction of sin.

"In a culture where shame is a major sanction, people are chagrined about acts which we expect people to feel guilty about. This chagrin can be very intense and it cannot be relieved, as guilt can be, by confession and atonement." BENEDICT, *supra* note 39, at 222-23.

48. See Von Mehren, *The Legal Order in Japan's Changing Society: Some Observations*, 76 HARV. L. REV. 1170, 1175-76 (1963).

49. Von Mehren states:

Traditionally the apology served as an expiation for the injury and allowed reintegration of the wrongdoer into the social group of which both he and the victim were members. . . . Of course, the vindication of the injured party's rights under the written law is of less functional significance in Japan than it is in Western societies, particularly the United States. The persistence of traditional values means that no psychic cost attaches to the failure to vindicate; indeed, vindication would presumably entail such costs. To the extent that cohesive family unity still provides a substitute for compensation or social security, the injured party is effectively cared for.

Id. at 1176.

money.⁵⁰ A violation of any component of this procedure, may have dour repercussions⁵¹ where *giri* still dictates behavior.

Community-based sensitivities which perpetuate traditional Japanese ideals have endured and are especially noticeable in many rural areas of Japan. An example is the recent case of *Yamanaka v. Kondo*.⁵² In that case, a four-year-old child drowned in a reservoir while playing with a neighbor whose mother was supposed to be supervising them. The facts, however, are not as significant as the strong public resentment that arose after the aggrieved parents decided to sue the supervising mother without any material evidence of gross negligence.⁵³ The defendant, on the other hand, did not apologize in the customary fashion and also failed to offer an adequate sum of money. The parents sued primarily for punitive reasons due to the defendant's obstinance in apologizing. The Mie prefecture community⁵⁴ where the parties resided, however, criticized the deceased child's parents more severely than the defendants for not settling their dispute via traditional avenues short of litigation. Apparently, the rural community has yet to accommodate dispute resolution through channels of the court system.⁵⁵

Another manifestation of the disparity between Japanese and Western thought is underscored in a comparison of Japanese and American contracts. To the Japanese, a contract permits flexibility

50. The sum of money, called *koden*, provides a well-defined procedure of insurance where compensation (typically less than the hospitalization costs and loss of income) is offered. The amount of money offered is oftentimes dependent on factors such as family status and previous indebtedness. In contrast, "Western tort law's function of compensating the victim for his out-of-pocket expenses is performed, for medical expenses, by legislation [which provides] a comprehensive insurance scheme." *Id.* at 1176.

51. Deviation from the expected norm, prompts controversy since the societal mainstream eschews those who ignore their subtle duties. "*Giri* remains today a virtue with great authority and to say of a man that 'he does not know *giri*' is one of the most drastic condemnations in Japan." BENEDICT, *supra* note 39, at 212.

52. *Yamanaka v. Kondo*, Hanrei Jiho (No. —) (Tsu District Ct. 1983).

53. This case attracted national media attention as a result of widespread public outcry. Subsequent to the court's award of \$24,000 in damages to the parents of the child, the parents received hundreds of calls a day criticizing them not only for accepting the court award, but for bringing the suit in the first place. The parents eventually returned to court a month later and returned the money. Reed, *Land Without Lawyers*, TIME, August 1, 1983, at 65.

54. The Mie Prefecture is located on the generally rural southeastern coast of the main island of Honshu. The Yamanakas resided near the town of Nagoya. *Id.*

55. In tracing the rise of individualism in family law as opposed to the hierarchical nature of the traditional Japanese family, Von Mehren states that although changes have somewhat occurred in the countryside, rural areas remain significantly less individualistic than the cities. Von Mehren, *supra* note 48, at 1194.

and growth.⁵⁶ Above all else, the Japanese seek to establish a good working relationship; the contract serves as an affirmation of that understanding.⁵⁷ In contrast to a country as diverse as the United States, where greater disparity of attitudes exist, Japan's homogeneity does not demand rigid agreements where rights must be clearly delineated in order for a contractual relationship to exist and function.

Within Japan's domestic business world, the focus is still on "goodwill and friendship"⁵⁸ embodied in the contract.⁵⁹ Vague terms are permissible since Japanese businessmen value the nurturing of a proper relationship which permits a pragmatic expansion of the contractual parameters. The contract is not relied upon as the final word on the relationship, but rather as a foundation for growth and adaptation as the parties' relationship mature.⁶⁰

Aside from the role of custom in contractual situations, custom may at times function as a practical substitute for litigated damages in Japanese society. In one such example, a mentally ill Japan Air Lines pilot intentionally crashed a DC-8 in Tokyo Bay on February 7, 1982.⁶¹ Twenty-four passengers died in the tragedy. A few days later, the president of Japan Air Lines made personal visits to the relatives of the deceased, humbly apologized on his knees and offered substantial amounts of money.⁶² Although the Japan Air Lines legal staff had prepared a cost-benefit analysis preceding the apology,⁶³ the motivation dictated by custom in presenting a generous offer cannot

56. Lansing and Wechselblatt, *Doing Business in Japan: The Importance of the Unwritten Law*, INT'L LAW. 647, 655 (1984).

57. *Id.* at 654.

58. *Id.* at 655.

59. Most domestic Japanese contracts provide very little from a Western legal perspective. The basis underlying Japanese business transactions is not equality, but "patronage and dependence." T. HANAMI, LABOR RELATIONS IN JAPAN TODAY 46 (1979). A clause of significant bearing to the Japanese is one which concludes almost every contract and is called a "good faith" clause. This principle is derived from Civil Code Art. 1 (2) which provides for "fidelity and good faith." H. TANAKA, THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 123 (1976).

A clause similar to the following is religiously attached to the end of domestic agreements: "All controversies and disputes arising out of or relating to this agreement shall be settled by mutual agreement in an amicable way. . . ." (excerpt from a domestic Mitsubishi Corporation sales contract). For other examples of the good faith clause, see Kawashima, *The Legal Consciousness of Contract in Japan* in 7 LAW IN JAPAN: AN ANNUAL 1 (1974).

60. See Hanami, *supra* note 59, at 53. See also Kawashima, *Nihonjin no Ho Ishiki (Legal Rights Consciousness of the Japanese)* 199 (1967).

61. Mayer, *Japan: Behind the Myth of Japanese Justice*, AM. LAW. 115 (1984).

62. The sum offered to each person was reported to be as much as \$450,000—twice the amount that is customarily offered. *Id.* at 115.

63. *Id.* at 116.

be overlooked. Japan Air Lines was pressed to come forward with a substantial offer not simply for the economic objective of avoiding overall court costs, but also to maintain its image and honor⁶⁴ which are both immensely critical in the determination of a business' success or failure in Japan today.⁶⁵

2. Obedience and the acceptance of reality

Another principal characteristic of Japanese thought is the acceptance of reality or "actuality."⁶⁶ The acceptance of human limitations and overall societal tolerance is not solely a direct product of Buddhist philosophy, but also a consequence of Japan's physical environment. After repeated exposure to severe natural disasters such as earthquakes,⁶⁷ *tsunami*, typhoons, and devastating fires, the Japanese became accustomed to accepting the results of external forces. The social turmoil of civil wars similarly contributed to the people's resignation.⁶⁸ The severe outcomes came to be seen as inevitable—in accord with the Buddhist concept of impermanence.⁶⁹

The Japanese acceptance of authority may also be attributable to another source independent of its rice culture and legacy of ancestor worship. Reischauer proposes that the relative willingness of an individual to hold his personal interest secondary to that of the group and the general obiesant nature of the Japanese are attributable to the Chinese writing system from which the Japanese system evolved.⁷⁰

Over time, the degree of difficulty of the language system had indirect implications on the Japanese people. Reischauer comments, three milleniums ago, the pictographic characters had developed into

64. In all such ways, and in many more, the Japanese avoid occasions in which failure might be shameful. Though they lay such emphasis on the duty to clear one's name of insult, in actual practice this leads them to arrange events so that insult need be felt as seldom as possible. R. BENEDICT, *supra* note 39, at 157.

65. "To avoid shame and win approval the Japanese must preserve 'face' and self-respect. He must avoid errors; he must fulfill all his obligations however onerous; and, above all, he must live up to his own concept of his position and duties." E. REISCHAUER, *supra* note 4, at 144.

66. Nakamura, *supra* note 31, at 143-44.

67. F. BUNGE, *supra* note 4, at 66. More than 1,500 earthquakes are recorded yearly. The most severe of this century was the Kanto Quake of 1923 which took over 130,000 lives.

68. Y. NODA, *supra* note 37, at 181-82.

69. Impermanence may be loosely defined as a principle which presumes an ever-changing world. See generally Teitaro, *Reason and Intuition in Buddhist Philosophy*, in THE JAPANESE MIND: ESSENTIALS OF JAPANESE PHILOSOPHY AND CULTURE 66 (C. Moore ed. 1967).

70. E. REISCHAUER, *supra* note 4, at 152.

a complex system.⁷¹ Hence, the educational process in Japan required a great deal of rote memorization which resulted in the reinforcement of traditional authority.⁷² The demanding educational process of the language left little room for reasoning or the exercise of judgment.⁷³ Thus, obedience was accentuated as indispensable for an educated society.

D. Defining "Right"

The notion of a "human right" by Western definitions did not exist in traditional Japan.⁷⁴ The actual value of interpersonal obligations was wholly dependent upon the goodwill and friendliness of those obligated.⁷⁵ Since benevolence was crucial in the unexpressed valuation process, social obligations were basically intuitive and unexpressed.⁷⁶ The concept of a delineated right, therefore, could not exist coterminously within that framework.

Western philosophy is founded on the ideal that every individual is endowed with certain well-defined, inviolable "human rights."⁷⁷ Both Confucianism and Buddhism extoll the virtues of honor, life and "human heartedness,"⁷⁸ but the ability to demand that another act in conformity to one's vested right was a foreign concept to the Japanese. Up to the Meiji Period, there was no equivalent in the Japanese vocabulary to a vested "right."⁷⁹ The Dutch word "Regt" was even-

71. *Id.*

72. *Id.* at 153.

73. Reischauer states: "Knowledge and wisdom have become essentially the accumulation of facts from books and teachers, not a dual process of study and thought." *Id.* This may explain the reliance of the Japanese on difficult examinations as the only criterion for admission into government-run institutions such as the one that trains lawyers and the judiciary in Japan.

74. Kawashima, *The Status of the Individual in the Notion of Law, Right, and Social Order in Japan*, in *THE JAPANESE MIND: ESSENTIALS OF JAPANESE PHILOSOPHY AND CULTURE* 264 (C. Moore ed. 1967). See also Blakemore, *Post-War Developments in Japanese Law*, *WIS. L. REV.* 649 (1947).

75. Kawashima, *supra* note 74, at 263.

76. *Id.*

77. Noda, *Nihon-jin no Seikaku to Sono Ho-Kannen (The Character of the Japanese People and Their Conception of Law)* in *THE JAPANESE LEGAL SYSTEM* 304-05 (H. Tanaka ed. 1976).

Noda acknowledges that for the Romans, "the concept of right always presupposes the existence of the rights of others, and that recognition of the rights of others came to be established only after a long and painstaking process." *Id.* at 304. He suggests that Japan has just begun in its long journey towards the recognition of the rights of others.

78. Kawashima, *supra* note 74, at 265.

79. *Id.* at 263-64. See also Noda, *supra* note 77, at 305.

tually translated to the word *kenri*⁸⁰ and is found today in Civil Code Article I (3).⁸¹

Kawashima notes:

[W]hat makes these notions differ from the idea of "human rights" in Western society is that the essential element of the concept of "human rights" is the emphasis on the notion of "right" in the sense that every individual is endowed as a human being *per se* with human "rights" by which he can *demand* that other people, particularly his own government, respect, or refrain from infringement upon, the interests which are vital for his existence as a human being.⁸²

E. Limited Mobility

The development of social obligations and duties was closely correlated with the traditional Japanese community structure. The geographic mobility of Japanese society has invariably been restricted due to its limited area⁸³ and population density.⁸⁴ Accordingly, social obligations arose out of intimate community-based relationships which tended to be long-lasting in nature.⁸⁵

The notion of a long-term relationship has survived in the modern corporate business world as well as in remote rural agricultural villages. Employees in Japan exalt loyalty and many in fact make lifetime commitments to particular companies. (Those most sought after by these corporate employers have college degrees from certain targeted universities.)⁸⁶ A person with a history of changing compa-

80. The definition of *kenri* exposes terminological difficulties in translation since this word used as "right" also connotes a pecuniary sense of greed to the Japanese public. A Tokyo attorney recently stated: "In the past we hesitated to even use the word *kenri* with laymen because it was too strong." Reed, *supra* note 53, at 65.

For the broader concept of Western "law," the word *ho* is presently used. Noda, *supra* note 77, at 301.

81. Kawashima, *supra* note 74, at 264.

The Civil Code states that "abuse of right is not permitted." Minshu (Civil Code) Art. I (3).

82. *Id.* at 265.

83. REISCHAUER, *supra* note 4, at 56-58.

84. *Id.* at 60.

85. Permanency of settlement and the consequent stable society were due to a lifestyle involving rice cultivation which demanded consistent and continual care. Nakamura, *supra* note 31, at 147-48.

86. Graduates of major universities, therefore, select interviews with prospective corporate employers with great detail and seriousness. See generally R. CLARK, THE JAPANESE COMPANY (1979).

nies is very likely to be labeled an unloyal employee and will undoubtedly face greater scrutiny and adversity in subsequent hirings.

Due to the fact that rural communities were bound by a network of persevering personal relationships, conflict within the community often had severe implications. Unlike the migration options available to Americans, the Japanese of the rural hinterlands were significantly limited in their migrational choices.⁸⁷ In a well-publicized instance, a peasant who filed a complaint to have a joint ownership dispute resolved, was condemned by his village community.⁸⁸ He was thereafter denied the right to marry from among the villagers, as were three generations of his descendants.⁸⁹

People who were confronted with a conflict could not readily pack up and continue onward to new frontiers as was possible during America's westward expansion. Moreover, standing up for one's rights was a commendable virtue in the Wild West tradition. This conduct was internally inconsistent with the Japanese concept of harmony. Instead, the Japanese sought "to establish a harmonious situation with which both parties neither satisfied nor dissatisfied, where there is no loser or winner."⁹⁰

In summary, Japan has successfully preserved its traditional cultural values while "accommodating itself to the moral and social imperatives of Western culture."⁹¹ Japan has selectively adopted foreign concepts and has tinkered with these ideas in order that they fulfill a role in Japanese society. The law's function in modern Japanese society is indeed markedly different from its role in Western societies.

III. THE IMAGE OF THE JAPANESE LAWYERS

A. *Historical Evolution of the Bengoshi: The Pre-Meiji Era*

Prior to the Meiji Period, there is a dearth of recordation about those who functioned as lawyers in Japanese society. Since law and ethics were not distinguishable in early Japanese history, judicial of-

87. Nakamura, *supra* note 31, at 148. Not limited only by geographical and agricultural constraints, the Japanese familial society played an important role in restricting migration. Individuals were closely bound as a result of generations of working with the same families' geneologies and kinships.

88. Kawashima, *Dispute Resolution in Contemporary Japan* in *THE JAPANESE LEGAL SYSTEM: CASES AND MATERIALS* 278 (H. Tanaka ed. 1976). Those who resorted to litigation were labeled "morally wrong," "subversive" and "rebellious." *Id.* at 278.

89. Compare *supra* note 52 and accompanying text.

90. Noda, *supra* note 77, at 306.

91. See Von Mehren, *infra* note 127, at 1492.

ficers were not recognized as a separate profession apart from government officials.⁹² A status of low repute attached to the early predecessor of the Japanese professional attorney,⁹³ and this presented a major obstacle for the profession in future years. The first predecessors of the modern lawyer were known as *kujishi*⁹⁴ during the Genroku Era.⁹⁵ The *kujishi* were innkeepers who were located near courthouses or tourist-attracting temples.⁹⁶ They functioned as British-type solicitors and assisted litigants by drawing up court documents and providing aid in other procedural matters.⁹⁷ Those who received advice from the *kujishi* usually stayed at the *kujishi's* inn during their pending litigation. Thus the *kujishi* thrived on prolonged litigation.⁹⁸

Government authorities of this period did not look favorably upon the *kujishi*. These *kujishi* were frowned upon as undesirable because they stimulated litigation and were generally derived from a lower social stratum. The general public regarded the *kujishi* as the medium through which government officials were bribed;⁹⁹ hence, their reputation progressively eroded. Consequently, those attracted to this pseudo-profession were usually of questionable character.

The function of the *kujishi* was professionalized in 1876, when the Ministry of Justice placed regulations upon the newly-named "lawyers" called *daigennin*.¹⁰⁰ The issued regulations, however, proved superficial in nature and effect as the role of the representatives continued to be performed by those without any formal legal education. In May of 1880, the guidelines of the profession were again thoroughly revised.¹⁰¹ For the first time, the Diet set forth com-

92. Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 111 (A. Von Mehren ed. 1963).

93. The attorney is now known as a *bengoshi*.

94. Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HAR. L. REV. 62-3 (1956).

95. The Genroku Era (1688-1703) was a sub-period of the Tokugawa Period (1603-1868). *Id.* at 62.

96. *Id.*

97. *Id.* at 63.

98. *Id.*

99. *Id.* at 64.

100. *Id.* at 65. The Ministry of Justice prescribed the *Daigennin Kisoku* (Advocate Regulations). Applicants had to pass a character examination—a reflection of the quality of representatives at that time. See *supra* note 92, at 118.

101. Rabinowitz, *supra* note 94, at 66.

prehensive legislation concerning the *daigennin*.¹⁰² A significant revision was that the examination for the profession was thereafter administered under the direction of the Ministry of Justice.¹⁰³

These legislative attempts by the government to bolster the level of competence of the *daigennin* were ineffective in substantially altering popular opinion. The *daigennin* still suffered from a lack of formal recognition and also from the consequences of being historically rooted to the *kujishi*. The prevalent opinion towards the profession remained that of low esteem as evidenced by the label *sanbyaku daigen*.¹⁰⁴ The new label originated because the public believed the *daigennin* stirred up trouble in order to profit from such small amounts as three hundred cents.¹⁰⁵

B. A Movement Toward Respectability

Public opinion of the *daigennin* could not be raised without initially gaining the respect of the government. A turning point in elevating the status of lawyers, from the government's perspective, was the Attorneys Law of 1893.¹⁰⁶ In addition to greater governmental evaluation of the lawyers' role, the title *bengoshi* was created.¹⁰⁷ In order to attain this title, a demonstration of formal legal knowledge was required for the very first time. Problems ensued, however, as the examination was separate and not as difficult as the one essential for judges and procurators.¹⁰⁸ Consequently, the Diet encountered difficulty in raising the status of attorneys to the level of respect enjoyed by judges and government officials.¹⁰⁹

The Japanese bar struggled in the 1920s, and the profession floundered in a state of severe crisis.¹¹⁰ According to a survey by the Japanese Bar Association, over fifty percent of its lawyers were unable to meet their living expenses.¹¹¹ Moreover, the problems of low pres-

102. *Id.* at 66.

103. *Id.* Another principal provision required formal organization of the bar. *Id.* at 65.

104. *Sanbyaku daigen* may be translated literally as "three-hundred-cent spokesmen" and connoted the meaning of a "shyster or pettifogger." *Id.* at 67.

105. Y. NODA, *supra* note 37, at 145.

106. Hattori, *supra* note 92, at 126-27.

107. *Bengoshi* literally defined is "one who takes on the defense of others." Also, the *daigennin* were permitted to transfer their registration to the lawyers roll. This permitted the *kujishi* who had become *daigennin* without examination to continue their practice without any demonstration of legal competence. *See generally id.*

108. Hattori, *supra* note 92, at 126-27. *See also* H. TANAKA, *supra* note 59, at 550.

109. *Id.* at 126-27.

110. Rabinowitz, *supra* note 94, at 73.

111. *Id.* at 73. Of 4,100 lawyers surveyed, 2,400 could not meet their living expenses.

tige were difficult to overcome due to the tumultuous internal struggle which persisted within the Tokyo Bar Association during this period.¹¹² The Attorneys Law was revised again in 1933.¹¹³ However, the fundamental character of the profession remained unaltered. The Act required an oath of honesty by the lawyers while one was not necessary for judges or government officials.¹¹⁴ The lawyer-apprentice system was also disadvantaged since judicial and governmental apprentices received state stipends whereas the lawyer apprentices had no such assistance.¹¹⁵

Several major modifications of the Attorneys Law of 1949 were implemented during the Post-War Era.¹¹⁶ First, the Japanese bar became an autonomous unit—no longer manipulated by the Ministry of Justice.¹¹⁷ Second, the lawyer and judicial apprentice systems were combined, and the Legal Research and Training Institute was established by the Supreme Court.¹¹⁸ Also, the general scope of the lawyers' activities was expanded to cope with constitutional guarantees of human rights.

C. *The Modern Era—A Rise in Prestige*

In 1980, 88 private and public Japanese universities offered a faculty of law. Each year roughly 35,000 applicants take a rigorous entrance test for the Legal Research and Training Institute, but fewer than 500 pass the difficult three-part examination.¹¹⁹ This accounts for the relatively minute number of practicing *bengoshi* in Japan—presently about 12,000.¹²⁰ The status of attorneys recently ascended to that of high prestige in the eyes of government officials and the

112. *Id.* at 71-73. The "English law" faction could not reconcile with the "French law" faction within the Tokyo Bar Association. (The Lawyers Law of 1893 required their unification.) The minority "English law" faction demanded a national bar organization free of government control. Division of the bar continued to occur as separate bar associations were formed until the outbreak of World War II. *Id.*

113. *Id.* at 73.

114. *Id.* at 75.

115. *Id.* See also TANAKA, *supra* note 59, at 550.

116. See generally Woodruff, *The Japanese Lawyer*, 35 NEB. L. REV. 429 (1956).

117. Rabinowitz, *supra* note 94, at 76-7.

118. *Id.* at 77. Japanese Constitution art. 77 (1) provides that the Supreme Court is vested with rule-making power to determine rules of "procedure and practice, and of matters relating to attorneys. . . ."

119. Mayer, *supra* note 61, at 114. The limited number of spaces available in the Institute has forced many applicants to take the exam several times. Consequently, the average age of those entering the Institute has been quite high. In 1970, the average age of admittees was about 27 while the age of those graduating averaged close to 30. Stevens, *supra* note 8, at 1270.

120. Mayer, *supra* note 61, at 114.

urban public largely due to the tremendous difficulty of the examination itself. Other factors include the large number of distinguished law scholars and judges who have become *bengoshis*, the steady rise in income of those in the profession, and the appeal of Western law to the recent generations.¹²¹

The historically unfavorable attitude toward lawyers may, however, persist in modern times despite these recent alterations. The *sanbyaku daigen* had residual ramifications on the general populace as recently as the early 1950s and may still be widespread in rural areas.¹²² Hattori espouses the belief that the *bengoshi* is generally confined to litigation with little involvement in overall counseling.¹²³ Although the role of the *bengoshi* was altered with the arrival of voluminous international business transactions, a constraint on the domestic use of Japanese attorneys can be attributed to the fact that their mere presence at a domestic business negotiation is often viewed as an antagonistic maneuver.¹²⁴

In the Japanese business world, litigation is in many instances considered such an aberration from the business community's accepted sphere of normal practice that it is viewed as an indication of incompetence. As recent trends in the United States indicate, mediation is becoming a more viable alternative to the delays and sky-rocketing costs of litigation. In contrast, conciliation has been the norm and litigation the exception in Japan.¹²⁵ Thus, litigation is a last resort and is often viewed as a failure of the company or businessman since the courts could not be avoided. This perspective is a product of the mediative tendency of the Japanese which lies inapposite to the adversarial underpinnings of the role of American attorneys.¹²⁶

121. Stevens, *supra* note 8, at 1272.

122. Rabinowitz, *supra* note 94, at 78.

123. Hattori, *supra* note 92, at 138. In 1972, corporate advice had yet to be recognized as a lawyer function. Legal specialists of companies were often more experienced and efficient in contract drafting and in corporate legal matters. Stevens, *supra* note 8, at 1271. A Tokyo attorney recently admitted, "Lawyers are considered undertakers. . . . The mere appearance of a lawyer in a business transaction is an unfriendly action. Even if I were asked to advise on a negotiation, to show up at the signing would be the last thing I'd do." Mayer, *supra* note 42, at 115.

124. In Japan a person who asserts rigid legal rights is thought to be 'inflexible' and selfish. The businessman never introduces a lawyer into a domestic business conference. Introduction of a lawyer into a business conference is thought to be an unfriendly act, an act equal to an explicit threat of litigation. . . .

Stevens, *supra* note 8, at 1272.

125. See Kawashima, *supra* note 74, at 266-67. See generally 2 D. HENDERSON, CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN 191-200 (1965).

126. Because of the adversarial nature of a lawyer's work and the strictures of the lawyer-

IV. AN EXTENSION OF JAPANESE TRADITION: THE JAPANESE AMERICAN EXPERIENCE

The legal profession in Japan struggled throughout its existence to attain the level of respectability it presently enjoys. The character and mentality of the Japanese people were largely responsible for their general reluctance in accepting the legal profession as well as the Western legal system *in toto*. The degree of acceptance has not been a *per se* adoption, but rather a transformation into a system with peculiarly Japanese characteristics. The ramifications of traditional Japan may also be readily viewed in the Japanese American community in the United States. The tracing of the development of the Japanese American attorney in the United States and the changing legal views of the Japanese American community provide an interesting viewpoint in the analysis of the confrontation between Western law and Japanese tradition.

Through this observation, the far-reaching effects of Japanese tradition can be gauged. Derivatively, this comment will improve the understanding of the historical behavior and reactions of the Japanese American community.

A. Profile of the Issei—The First Generation

Opening its doors to Western civilization after the Meiji Restoration,¹²⁷ Japan initiated its progressive transformation from an agricultural economy to industrialism.

Japanese national policy was geared towards efforts to revise the unequal treaties imposed on Japan.¹²⁸ Since Japan's equal status among the world powers was a major prerogative of the Meiji government, it was very conscious about its initial emigrants to the United States.¹²⁹ Japan took inordinate interest in the lives of the Issei to

client relation, few lawyers are in a position to "mediate" as a neutral third party, and once one party brings a lawyer into the dispute the other side usually does likewise. Thus it is probably more accurate to view a lawyer's intervention as a form of direct negotiation. Hence, conflicts arise when the attorney is present during initial negotiations. See generally Haley, *The Myth of the Reluctant Litigant* (1978).

127. The Meiji Restoration of 1868 marked the end of the Tokugawa regime. Free emigration had been prohibited for over two-and-a-half centuries. Von Mehren, *Some Reflections on Japanese Law*, 71 HAR. L. REV. 1486 (1958).

128. R. WILSON & B. HOSOKAWA, *EAST TO AMERICA: A HISTORY OF THE JAPANESE IN THE UNITED STATES* 34 (1980).

129. Von Mehren, *supra* note 127, at 1486-87. See also R. WILSON & B. HOSOKAWA, *supra* note 128, at 34.

“uphold [her] national glory and prestige.”¹³⁰ Cognizant of the discrimination experienced by the Chinese on the West Coast, the Japanese government believed the image of its emigrants would impact the United States’ view of Japan and therefore made efforts to see that its emigrants behaved “properly.”¹³¹

The Japanese government provided both legal and behavioral advice through direct and indirect means.¹³² The legal advice was channeled through local American attorneys who were often subsidized through intermediaries by the Japanese government.¹³³ These lawyers were specialists in federal immigration law and other legislation aimed at Asians. They advised the Issei to obey all the laws of the land—even those that were blatantly discriminatory, such as laws denying them the right to own real property.¹³⁴ In this manner, the Japanese government advised the Issei to assume as low a social profile as possible to avoid attracting attention and to attempt a harmonious existence in the United States. This background was to set the tone of the Japanese experience in America.

By 1892, the number of emigrating students was superseded by those emigrating as farmers, craftsmen, and laborers.¹³⁵ Virtually all the students sent to the United States at government expense arrived before 1891.¹³⁶ Therefore, once the initial wave of scholars and stu-

130. Daniels, *Japanese Immigrants on a Western Frontier: The Issei in California, 1890-1940*, in *EAST ACROSS THE PACIFIC: HISTORICAL AND SOCIOLOGICAL STUDIES OF JAPANESE IMMIGRATION AND ASSIMILATION* 80 (H. Conroy & T. Miyakawa ed. 1972).

131. *Id.* at 81. Daniels states that the Japanese government adopted the control over the quality of emigrants as a general national policy. *Id.* at 81. *But see* R. WILSON & B. HOSOKAWA, *supra* note 128, at 28.

However, it seems clear Japan at this time had no firm policy regarding the movement of its citizens abroad. . . . In addition, in the years between 1868 and 1881, the records show 260 passports were issued to craftsmen and laborers. That some were issued suggests the absence of any real policy against emigration abroad. In fact, there is reason to believe the government was thinking less in terms of permanent departure of its citizens than in the tradition of *dekasegi*—people who left home temporarily for employment to supplement agricultural income—a common practice in old Japan.

Id.

132. Daniels, *supra* note 130, at 81-82. Issei were urged to dress in Western fashion, not to carouse in public, etc.

133. *Id.* at 82. *See also* A. ELLIOT & G. CALDEN, *THE LAW AFFECTING JAPANESE RESIDING IN THE STATE OF CALIFORNIA v. (1929)* in *THREE SHORT WORKS ON JAPANESE AMERICANS* (R. Daniels, ed. 1978).

134. Daniels suggest, “In practice, however, the function of these attorneys was to help the Issei circumvent the spirit if not the letter of these laws.” He also suggests these acts fostered the Americanization process. Daniels, *supra* note 130, at 82.

135. R. WILSON & B. HOSOKAWA, *supra* note 128, at 35.

136. Not all students were subsidized by the government. Most of those sponsored by the

dents subsided, the next group consisted of workers who eventually would constitute the nucleus of the Japanese American community.

Numerous push/pull factors were involved in the ordinary emigrants' decision to cross the Pacific. The major influences included the following: (1) socio-economic dislocation at the end of Japan's major wars;¹³⁷ (2) agrarian disasters and famines; and (3) the lure of the United States through success stories of fellow villagers who returned to pay off family debts.¹³⁸ Japan's transition towards industrialization detrimentally affected its farmers and rural workers, and thus they represented the majority of those who emigrated to the United States.

The Issei brought their own value system stemming from Japanese tradition and thought. They "formed their community by viewing America through lenses derived from their homeland."¹³⁹ The meshing of polar philosophies and ideologies that occurred in establishing communities in the United States presented inevitable conflicts. The parents of the Issei had been part of the rigidly-defined social structures of old Japan where behavior was prescribed according to subtle yet rigid directions. Issei themselves grew up at a time marked by the formation of the early industrial revolution in Japan.¹⁴⁰ Consequently, the Issei community was based on primary-group relations and values which stressed the subordination of the individual to the family.¹⁴¹

The newly founded Issei community faced a multitude of barriers in its attempt to function within American society. As an initial matter, the assertion of legal rights was not a primary concern of the

government were from an elite class and attended East Coast Ivy League universities. Those students who were self-supportive found themselves on the West Coast working by day and attending school through night programs. *Id.* at 29.

137. Directly after both the Sino-Japanese War (1894-1895) and the Russo-Japanese War (1904-1905), Japanese emigration figures rose sharply. *Id.* at 48.

138. *Id.* at 48-49. See generally Yoshida, *Sources and Causes of Japanese Emigration*, in 34 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 377-87 (1909).

139. G. LEVINE & C. RHODES, *THE JAPANESE AMERICAN COMMUNITY: A THREE GENERATION STUDY* 8 (1981).

140. G. DE VOS, *ACCULTURATION AND PERSONALITY STRUCTURE: A RORSCHACH STUDY OF JAPANESE AMERICANS* 10 (1951) (unpublished dissertation). De Vos refers to a "culture lag" where character traits and modes of human relationship continue to exist in spite of changes in governing legal codes.

141. The community in America was viewed as a primary group, much like the extended kinship group of rural Japan. G. LEVINE & C. RHODES, *supra* note 139, at 8-9. This was evidenced by the perpetuation of *koden* and the creation of *tanomoshi*—informal community credit unions.

immigrants.¹⁴² In addition to cultural and historical traits of the Issei (discussed *supra*), other obstacles faced by most immigrant groups also confronted the Japanese pioneers.¹⁴³ These included language, low socio-economic status, lack of education, and prejudice.

Although the forementioned factors may be considered highly determinative of the Issei's non-litigious nature, ideals of traditional Japan journeyed across the Pacific and were implanted in American soil where the Issei community and character were molded. Many attitudes prevalent in lower economic status groups were present in the early Issei, yet the Issei were to be labeled a "non-debt group."¹⁴⁴ The members of this community shied away from loans and focused on long-term goals and objectives over immediate gratification.¹⁴⁵ Japanese tradition had prepared the Issei well for the harsh pioneer life in America. The group-orientation and rice paddy work ethic provided them with the tools necessary to withstand external prejudice and oppression.¹⁴⁶

Before the Exclusion Act of 1924 which prohibited the Japanese from entering the United States, about 160,000 immigrants left Japan during the Meiji Period while 127,000 departed during the subsequent Taisho Period.¹⁴⁷ These Issei brought with them traditional values of their respective eras. Generally coming from rural villages in Western and Southern Japan,¹⁴⁸ the Issei view toward Western law was very limited in scope. Since the legal profession of the *bengoshi* did not materialize until 1893,¹⁴⁹ and since general public opinion of attorneys in Japan was low, the immigrants from this pre-1924 period may be presumed to have carried over an opinion categorizing the legal profession as one of inferior repute.

Harry Kitano comments that the Issei looked to the law with

142. R. WILSON & B. HOSOKAWA, *supra* note 128, at 245.

143. H. KITANO, JAPANESE AMERICANS: THE EVOLUTION OF A SUBCULTURE 51 (1969).

144. A non-debt group is defined by Kitano as a group "not entrapped in the cycle of high interest rates and continued poverty." *Id.*

145. *Id.*

146. The Issei were able to develop organizations within their community to meet general or specific needs of the immigrant generation. The Issei community became self-perpetuating with little reliance upon other organizations or institutions. The *kenjinkai* or prefectural organization is a well-mentioned example. See *id.* at 66. See also R. WILSON & B. HOSOKAWA, *supra* note 128 at 110-11.

147. R. WILSON & B. HOSOKAWA, *supra* note 128, at 35.

148. *Id.* at 49. See also M. TOGO, NIHON SHOKUMIN RON 269-71 (1906).

149. See *supra* note 94, at 126-27.

respect.¹⁵⁰ "Police were viewed not as enemies, as is typical in many ghettos, but as agents of justice and order."¹⁵¹ This observation is consistent with the traditional tendency of the Japanese to equate law and ethics. An enforcer of the law was, therefore, looked to as an ally and respected. Obedience to officers of the law was presumed by the Issei, and consequently, discriminatory acts enforced by the police or governmental authorities were complied with by the Japanese Americans with little resistance.¹⁵²

As the temporary immigrant mentality¹⁵³ dissipated and the Issei accepted the fact that their residency was permanent, tolerance of anti-Asian legislation grew precarious. With the great disparity between rights for U.S. citizens as compared to aliens, litigation was an inevitable conclusion.¹⁵⁴ Many Americans of Japanese ancestry became involved in landmark lawsuits in attempts to challenge these anti-Asian laws.¹⁵⁵

B. *The Nisei Dilemma*

[The Issei were] unable to hold public office and were denied careers in the one profession which would have enabled them to confront their tormentors effectively—the law. In addition, many states reserved for citizens, or those who had declared intent to become naturalized citizens, licenses to practice various other professions.¹⁵⁶

Since the Issei were barred from practice of law in the U.S., the burden on the Nisei to step into the legal profession carried more emphasis. Overall, the Nisei improved the emigrants' position dramati-

150. H. KITANO, *supra* note 143, at 51.

151. *Id.* An explanation for this variance in attitude may be attributed to the role of the police in Japan. A contrast in police attitudes in Japan and the United States pointed out by David H. Bayley is especially interesting in this respect. Japanese commonly rely on the police for assistance in settling disputes. But despite similar popular demand in the United States, "what is different," says Bayley, "is that American police organizations have not adapted willingly to perform this function." Haley, *supra* note 126, at 378-79. See generally Bayley, *Forces of Order: Police Behavior in Japan and the United States* 87 (1976).

152. H. KITANO, *supra* note 143, at 51-52. The Japanese attitude toward officers is intertwined with that society's ethical standards. As a result, Japanese crime statistics are disparate in comparison to that of the United States. In Japan, the incidence of robbery, for example, was 1.9 per 100,000 people compared with 234.5 in the United States. See *supra* note 53, at 65.

153. This mentality is also known as *dekasegi*. See *supra* note 131.

154. R. WILSON & B. HOSOKAWA, *supra* note 128, at 245.

155. See generally F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS* (1976) (for summaries of landmark decisions concerning Japanese Americans).

156. R. WILSON & B. HOSOKAWA, *supra* note 128, at 245.

cally in occupying professional or technical occupations. Nevertheless, the number of Nisei attorneys remained relatively small.¹⁵⁷

This result may have been in part due to the unwillingness of the American legal profession to accept Japanese Americans. It may also have been an indication that the influence of traditional Japan, filtered down through the Issei, had greater than anticipated repercussions on the Nisei. In comparison to the number of Japanese Americans in the medical profession, the Nisei have been proportionally under-represented in the legal profession.¹⁵⁸ This may be partially accounted for because the Japanese emigrants who were allowed to practice after passing the American board examinations. The totals in themselves may also indicate that the Nisei followed the wishes of their Issei parents¹⁵⁹ who had encouraged pursuits in the health sciences, engineering, and accounting fields in particular.¹⁶⁰

The traditional tendencies and views of the Issei and the subsequent Nisei generation were not, however, to be readily altered despite the willingness of the Japanese American community to assimilate. The Issei encountered hostility, and anti-Japanese animosity was perpetuated in legislation on the West Coast.¹⁶¹ Some exam-

157. See *infra* note 158 and accompanying chart.

158.

Year	JA Pop.	JA Lawyer/Judges	JA Physicians/Surgeons
1920	111,010	13 1:8,547	106 1:1,047
1930	138,834	29 1:4,808	187 1: 742
1940	285,116	- -	- -
1950	353,384	- -	- -
1960	464,468	282 1:1,647	1081 1: 430
1970	591,290	530 1:1,116	1654 1: 357

FOURTEENTH CENSUS OF THE UNITED STATES: 1920, Vol. IV (Table 5) 357 (1923); FIFTEENTH CENSUS OF THE UNITED STATES: 1930, Vol. V (Table 6) 97 (1933); UNITED STATES CENSUS OF THE POPULATION: 1960, *Subject Reports: Characteristic of Professional Workers* (Table 2) 9 (1964); UNITED STATES CENSUS OF POPULATION: 1970, *Subject Reports: Occupational Characteristics* (Table 2) 12 (1973); [hereinafter cited as "CENSUS"].

The most substantial leap in Japanese American professionals occurred between 1950 and 1960. See Varon, *The Japanese Americans: Comparative Occupational Status, 1960 and 1950* in 4 DEMOGRAPHY (No. 2) 809 (1967). Only 1.6 percent of Japanese Americans were attorneys while 4.6 percent of white male professionals were lawyers or judges. CENSUS, *supra* note 158.

159. This tendency was also evident in the Nisei-Sansei relationship. See G. LEVINE & C. RHODES, *supra* note 139, at 120.

160. In 1960, engineers constituted 36.6 percent of Japanese American professional male work force. 14.6 percent were accountants. From 1960 to 1970, the Japanese American engineer work force increased from 2,787 professionals to 6,626. An increase was also evident in the accountants rise from 2,039 in 1960 to 3,518 accountants in 1970. CENSUS, *supra* note 158.

161. Daniels, *supra* note 130, at 76.

ples of legislative and judicial discrimination directed at the Issei included the Alien Land Laws of 1913 and 1920,¹⁶² the confirmation by the United States Supreme Court in 1922 that Japanese were ineligible for citizenship,¹⁶³ and the Exclusion Act 1924.¹⁶⁴ This anti-Japanese sentiment played a dominant role in the growth of a close-knit Japanese American community based on traditional values.

Executive Order 9066,¹⁶⁵ which incarcerated Japanese Americans during World War II was not only a financial and material blow, but also was devastating to the assimilationist psyche. The Nisei made rapid strides to fit into American mainstream, but the treatment by United States citizens of these Americans of Japanese ancestry forced a reconsideration of the assimilation process.¹⁶⁶

The inherently non-litigious nature of the Japanese has been a topic of heated debate for many commentators. Takeyoshi Kawashima, one of Japan's leading legal sociologists, views Japanese aversion to litigation as a result of their "social-cultural background."¹⁶⁷ Other commentators downplay the Japanese reluctance

162. See Cal. Stats. 1913, Ch. 113 (May 19, 1913); Cal. Stats. 1921, Initiative Act of 1920; 45 Cal. Stats. 1020 (June 20, 1923). The Alien Land Acts were an attempt to drive California Issei farmers off their land. See *Porterfield v. Webb*, 263 U.S. 225 (1923) (Butler, J.) (The Court upheld the constitutionality of the California Alien Land Law). *But cf.* *Oyama v. California*, 332 U.S. 633 (1948) (The U.S. Supreme Court's later decision that the California Alien Land Law violated the Equal Protection Clause of Section 1 of the 14th Amendment as to American citizens of alien ancestry). See F. CHUMAN, *supra* note 155, at 206-14. See also M. FUKUDA, *LEGAL PROBLEMS OF JAPANESE-AMERICANS: THEIR HISTORY AND DEVELOPMENT IN THE UNITED STATES* 138-70 (1980).

163. See *Ozawa v. United States*, 260 U.S. 178 (1922). Japanese aliens were adjudicated ineligible for U.S. citizenship. This remained unchanged until the naturalization laws were amended in 1952. The Court in *Ozawa* concluded that Congress had intended the privilege of naturalization specifically for "white" persons and for persons of "African ancestry." F. CHUMAN, *supra* note 155, at 70-1.

164. Officially known as the Immigration Act of 1924, Pub. L. No. 43 Stat. 153 (1924). See F. CHUMAN, *supra* note 155, at 101-03.

165. U.S. Code, Congressional Service, 77th Cong. 2d Session 157, Executive Order 9066 (February 19, 1942). Order was rescinded by Presidential Proclamation No. 2714 on February 19, 1976 by President Gerald R. Ford.

166. G. LEVINE & C. RHODES, *supra* note 139, at 12-13. The general theory of assimilation "maintains that group relationships in pluralistic societies show a tendency for minority groups to take on the culture . . . of the majority group." In contrast, the emerging theory among Japanese Americans is that recognized as cultural pluralism. This theory contends that "ethnic groups in the U.S. will continue to support certain differences between them and the larger American society." Harmonious co-existence of unique identities is the goal within this framework. *Id.*

167. Kawashima, *supra* note 88, at 275-77. Kawashima espouses his belief that "[t]raditionally, the Japanese people prefer extra-judicial, informal means of settling a controversy. Litigation presupposes and admits the existence of a dispute and leads to a decision

to sue, claiming it is predicated upon numerous factors related to specific circumstances of the disputes, and not on an unwillingness to sue in general.¹⁶⁸ The general aversion to litigation and the preference for informal dispute settlement, commentators argue, is common to most societies.¹⁶⁹

The stereotype of a non-litigious people, however, also shadowed the Japanese Americans. Controversy erupted within the Japanese American community as the Nisei questioned their identity as "quiet Americans."¹⁷⁰ A stereotype was created that labeled "the Japanese American victim of oppression during World War II [as one] who met his fate with stoic resignation and responded only with superpatriotism."¹⁷¹ Although not all Japanese Americans submitted passively, the majority "honestly felt that the only way they could ever win a place for themselves in America was by being better Americans than most."¹⁷² Like their parents and Japanese ancestors, most Nisei found more heroism in patient resignation than resistance.

C. *The Sansei Attorney*

A commentator suggests the traditional response of the Japanese to avoid litigation is gradually fading.¹⁷³ The traditional concept of *giri* similarly appears to be dissipating within the younger generation.¹⁷⁴ The experience of the third generation Japanese Americans, or Sansei, parallels that of the Japanese; they both manifest a transition away from traditional mental attitudes. The acculturative progression of the Sansei is reflected in their high rate of interracial marriage¹⁷⁵ and the dispersion of families away from established areas of previous Japanese American concentration. The rise of the Sansei attorney demonstrates increased adoption of American ideals.

which makes clear who is right or wrong in accordance with standards that are independent of the wills of the disputants." *Id.* at 277.

168. Haley, *supra* note 126, at 367.

169. *Id.* at 389.

170. R. WILSON & B. HOSOKAWA, *supra* note 128, at 292-93. Members of the community charged that the title of Bill Hosokawa's *THE NISEI: THE QUIET AMERICANS* (1969) perpetuated a negative stereotype of Japanese Americans.

171. R. WILSON & B. HOSOKAWA, *supra* note 128, at 244 quoting R. DANIELS, *CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II* 129 (1972).

172. *Id.*

173. Kawashima, *supra* note 74, at 271-74.

174. Y. NODA, *supra* note 37, at 183.

175. See generally Kikumura & Kitano, *Interracial Marriage: A Picture of the Japanese Americans*, in 2 *ASIAN-AMERICANS: SOCIAL AND PSYCHOLOGICAL PERSPECTIVES* 26 (R. Endo, et al ed. 1980).

The Nisei have initiated the trends and the direction in which the Sansei are presently headed. Today, the Sansei are becoming better educated and are entering more professional occupations in greater numbers.¹⁷⁶ Compared to other professions, Japanese Americans have historically avoided the legal profession.¹⁷⁷ As Issei and old Japan's perceptions of attorneys fade, however, the new generations will look more favorably on the legitimacy of the legal profession. Therefore, as Japanese Americans attain positions of respect within the community, they will act as role models for the young, and future generations will not sense the climate of constraint that pervaded the lives of their predecessors.

V. CONCLUSION

This comment was intended to convince American attorneys of the need for a widened perspective especially when dealing in international affairs. The Japanese legal system has been and is still in a state of transition. While the system appears to be Westernizing, it will inevitably be a product unique and peculiar to the Japanese.

Intercultural understanding must begin at the basic level before a legitimate study of comparative law can begin. Presumptions made by American attorneys based on superficial appearances will be inaccurate as long as rules of traditional Japan underly the surface. The Japanese American experience serves as a special example of the influence of traditional Japanese values on American society. More importantly, an analysis of the impact of Japanese cultural values in the United States will assist Americans in understanding its own people and culture.

Ken R. Minami

176. G. LEVINE & C. RHODES, *supra* note 139, at 109.

177. *See supra* note 158.