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Private Lives and Public Eyes: Privacy in the United States and Japan

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I. INTRODUCTION

One hundred years ago, Louis Brandeis and his law partner Samuel Warren gave birth to the tort of invasion of privacy in the United States.[1] In their now famous law review article, they wrote:

> Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[2]

Warren and Brandeis were reacting to the Boston papers of the day, but they might just as well have been inspired by the coverage of comedian Beat Takeshi in the Japanese press of the late twentieth century.

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* Professor of Law, Loyola University, New Orleans. I am debted to many colleagues on the law faculties of Kobe and Osaka Universities, where I was a Fulbright lecturer, for guiding my thinking on this subject, especially Professor Shigenori Matsui. Professors Hiroyuki Oota of Doshisha University and Satoru Osanai of Chuo University helped focus my ideas, while Sumiko Yabe assisted with translations. Professor Michael Collins of Tulane Law School provided technical assistance. Thanks also go to Professors Mark Ramseyer, Arthur Rosett, and to the Center for Pacific Rim Studies at UCLA, whose invitation to present a paper finally led me to confront the blank screen on my Macintosh. The standard disclaimer is in order: blame me for any mistakes and be thankful that my colleagues and friends prevented me from making any more.

1. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).
2. *Id.*

Takeshi is perhaps the most ubiquitous person in Japan. He appears both on the Nippon Television Network and Fuji TV, and at one time was on as many as eight prime-time programs a week.[3] Something of an amalgam of David Letterman and John Belushi, his most well-known show is "Raid on Takeshi Castle," in which he works with a "Saturday Night Live"ish ensemble. Although he is over 40 himself, Takeshi (real name Takeshi Kitano) is most popular amongst Japan's *shinjinrui*, the "new species of human beings."[4] Thus, it was not surprising that he had a 21-year-old girlfriend.

Friday magazine, one of the numerous photo magazines in Japan,[5] decided that the public should have a glimpse of the woman who had caught the eye of Japan's favorite comedian and whom he diverted from his wife. However, Takeshi and the woman preferred to keep their relationship private. The more they resisted the press, the more the press persisted. Like the Western *paparazzo* Ron Galella, who

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3. *Beat Takeshi Found Guilty of Assaulting Friday Staffers*, MAINICHI DAILY NEWS, June 11, 1987, at 14, col. 1 [hereinafter *Beat*]. At the end of 1991, two of the top five nonfiction bestsellers in Japan were books by Takeshi: *That's Why People Hate Me* and *Century-End Slanderous Tongue. Nonfiction Bestsellers*, THE JAPAN TIMES WEEKLY OVERSEAS EDITION, Nov. 4, 1991, at 21, col. 4.

4. One of Takeshi's longest-running gags involves grandmothers and their isolation from modern life. For example:

> Things to do with a Gran.
>
> In the case of a Gran with a sweet tooth. Spread honey or syrup (either will do) all over your crockery. When she has finished licking it off, the crockery will sparkle like new.
>
> In the case of a Gran whose face is covered in wrinkles. How about using it as a puzzle? Pretend it's a maze and trace the lines with a toothpick. Alternatively, put an ant into one of the wrinkles and try to guess where it will come out.
>
> In the case of a Gran who is no good for anything. Use her as bait when you go fishing for piranha or sharks.

PETER TASKER, THE JAPANESE 106 (1987).

5. *Friday*'s circulation at the time was about 1.5 million weekly. *Beat*, *supra* note 3. Other competitors in the same market include *Focus*, *Touch*, *Flash*, and *Waterloo*, "which feature 'Peeping Tom' photos of the famous and not-so-famous." Glenn Davis, Charles T. Whipple, & Junko Sakakibara, *The Keepers of the Gate*, TOKYO J., Aug. 1988, at 4, 10. Another, *Emma*, has gone out of business.

It should be said that the magazine business is remarkably diverse in Japan, and the photo weeklies are but one part of it. In 1984, 95 magazines were published weekly and 2,379 monthly. JAPAN STATISTICAL ASSOCIATION, STATISTICAL HANDBOOK OF JAPAN 132 (1986). The earliest weekly was started in 1922, one year before Henry Luce founded *Time* magazine in the United States. It was then that the *Asahi* newspaper began publishing the biweekly *Junkan Asahi*, which quickly became the weekly *Shukan Asahi*. The *Mainichi* newspaper launched its weekly one month later. *See Weekly Magazines: Keys to an Information Society*, JAPAN UPDATE, Spring 1988, at 8.

made a career of photographing Jacqueline Kennedy Onassis,[6] the *Friday* photographers stalked their prey. One reporter from the magazine was even charged with assault for allegedly injuring the woman when she refused to discuss her relationship.[7]

For Takeshi, who certainly was no recluse, all this was too much. In the early morning hours, he and his troupe descended from Takeshi Castle and stormed the *Friday* editorial offices at Kodansha Ltd., one of Japan's most respected publishing houses. The ostensible purpose of the visit was to protest the magazine's aggressive tactics. However, discussion soon turned to flying fists. When the dust settled, five *Friday* staffers had been injured, one seriously enough to require a month of medical treatment.[8]

Self-help being no more acceptable in Japan than in the United States, Takeshi (but not his followers) was charged with assault, and he pleaded guilty. However, the court was sympathetic to his plight as was the public, which sent in a large number of letters asking for leniency.[9] Presiding Judge Yoshifusa Nakayama of the Tokyo District Court imposed a six-month sentence but suspended it reasoning that the magazine had caused the trouble, but Takeshi's actions were excessively violent.[10]

Ironically, more than 1,000 people lined up outside the courthouse to see Takeshi's trial in which he tried to keep his private life private.[11] "Nobody wins, everybody is a loser in this case. . . . We are all victims," Takeshi said in a news conference after the sentencing.[12] And in a strange twist of fate, the publisher of *Friday* magazine, Koremichi Noma, became a victim himself. On the very day that Takeshi spoke those words, Noma died of subdural bleeding at the age of 49.[13]

At first glance, the problems of Beat Takeshi seem no different from the lament of any number of celebrities in the United States.

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6. Galella eventually was enjoined from getting within 25 feet of Mrs. Onassis and 30 feet of her children. Galella v. Onassis, 487 F.2d 986, 998-99 (2d Cir. 1973). Galella violated the court order at least twelve times and eventually was found to have acted in contempt of court. Galella v. Onassis, 533 F. Supp. 1076 (S.D.N.Y. 1982).

7. *Takeshi Admits He Assaulted 'Friday' Staffers*, MAINICHI DAILY NEWS, Apr. 18, 1987, at 12, col. 1 [hereinafter *Takeshi*].

8. *Id.*

9. *Beat*, *supra* note 3.

10. *Id.*

11. *Takeshi*, *supra* note 7.

12. *Beat*, *supra* note 3.

13. *Friday Publisher Dead at 49*, MAINICHI DAILY NEWS, June 11, 1987, at 14, col. 1.

Former Prime Minister Sosuke Uno and ex-geisha Mitsuko Nakanishi[14] would have the same complaint as Gary Hart and Donna Rice. However, the tort of invasion of privacy arrived in Japanese law after the Occupation, in the post-war enthusiasm for all things Western. As Professor Beer states, it "was taken from United States law with little initial support in legal and social tradition."[15] Indeed, Professor (later Supreme Court Justice) Masami Ito, an early champion of privacy law, observed that in Japan "a sense of respect for the private life of the individual is lacking."[16]

Perhaps more than any other tort, invasion of privacy depends on a people's daily experience and life. People in the United States and Japan might well agree that there is a zone into which the public may not peer, but the dimensions of that zone and its content may be dramatically different. To a great extent, notions of privacy result from space, and the United States and Japan are quite differently situated in that regard. There is also the question of whose privacy is invaded by a particular statement. In a country such as the United States, where individual autonomy reigns supreme, privacy causes of action are restricted to the very person about whom the statement was made. Family members have no standing.[17] Should this also be true in a country like Japan in which relationship is the fundamental principle of society?[18]

In short, what is at issue is the very definition of self and other. In the following pages, my goal is to explore these questions, tracing the evolution of privacy law in the United States and Japan. The fact that the tort of invasion of privacy is imported is not fatal to its success in Japan, for much of what is thought of today as traditional Japanese culture also originated elsewhere. The challenge is to identify an authentically Japanese version of the interest, one that will resonate in the consciousness of the people long after the fad of affinity for Western law has faded.

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14. The woman told reporters that they had had a longstanding relationship. *See, e.g.*, Bill Powell, Hideko Takayama & Dorian Benkoil, *The End of The Affair?*, NEWSWEEK, July 10, 1989, at 22; David E. Sanger, *Reports That Premier Might Quit Plunge Tokyo Into Renewed Crisis*, N.Y. TIMES, June 29, 1989, at 1, col. 4.

15. LAWRENCE WARD BEER, FREEDOM OF EXPRESSION IN JAPAN 325 (1984).

16. Misami Ito, *Issues in the "After the Banquet" Decision*, 1 L. IN JAPAN 141 (C.C. Bradshaw trans. 1967)(original published in Japan in 1964).

17. *See* W. PAGE KEETON *et. al.*, PROSSER AND KEETON ON TORTS 940, 943 (5th ed. 1984).

18. *See generally* TAKEO DOI, THE ANATOMY OF DEPENDENCE 1973).

II. THE AMERICAN PARADIGM

Although Warren and Brandeis are today celebrated as prophets, it took more than ten years for their theory to be tested in court, and then they lost. In *Roberson v. Rochester Folding Box Co.*, the New York Court of Appeals denied the existence of any such right.[19] The company had used the image of what Prosser calls a "pulchritoudinous young lady" in flour advertisements. The woman sued, saying she had never consented. In a four-to-three decision, the court said that consent was irrelevant. The injury, the majority said, was merely mental and unrecognizable under the law. Moreover, the court feared opening the floodgates of litigation, in which it would be required to distinguish between public and private persons and necessarily curtail rights of expression.

However, the common law is an expression of society, not simply society's judges; and in New York, the people were overwhelmingly in favor of some protection of privacy. As a result, the legislature enacted a statute outlawing the appropriation of a person's image without consent for "advertising purposes or for the purposes of trade."[20] Thus, the positive law of invasion of privacy began not with the 1890 law review article but rather with the 1903 statute.

Soon thereafter, other states began to fall into line, and while there was some disagreement, privacy became entrenched in the American legal mind by the 1930s.[21] However, the interest was not restricted to advertising or appropriation, as in *Roberson*. That was but one example of a broader concept. The comment to the original Restatement of Torts revealed the true nature of the protected interest:

> [L]imits are exceeded where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public, or where photographs of a person in an embarrassing pose are surreptitiously taken and published. . . . In determining liability, the knowledge and motives of the defendant, the sex, station in life, previous habits of the plaintiff with reference to publicity and other similar

19. 171 N.Y. 538, 64 N.E. 442 (1902).

20. N.Y. Sess. Laws 1903, ch. 132, §§ 1-2 (now codified at N.Y. Civ. Rts. Law §§ 50-51).

21. Even RESTATEMENT (FIRST) OF TORTS § 867 (1939) recognized invasion of privacy: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." *See generally* KEETON, *supra* note 17, at 851.

> matters are considered . . . . It is only when the defendant should know that the plaintiff would be justified in feeling seriously hurt by the conduct that a cause of action exists."[22]

A more recent writer reached essentially the same conclusion: "'*Personal information' consists of those facts, communications, or opinions which relate to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold or at least to restrict their collection, use, or circulation.*"[23]

Privacy, then, is any public disclosure that a reasonable person would find embarrassing or offensive. It is, exactly as the *Roberson* court feared, a psychological tort. However, the psychology in question is not that of the particular plaintiff but rather that of any reasonable member of society who would be in that situation. Thus, it necessarily depends on societal notions of what is intimate, embarrassing or offensive.

The growth of the institutional press in the twentieth century brought greater challenges to the notion of privacy. Media became so ubiquitous that the late Andy Warhol predicted that everyone would be famous for fifteen minutes. Television talk shows have been transformed into group therapy with Oprah, Phil, and Geraldo serving as resident psychiatrists. Indeed, by the end of the 1980s, home video cameras had turned the United States and Japan into nations of television performers. The concept for *America's Funniest Home Videos*, in which people expose their most embarrassing moments to the rest of the country, began on Japanese television. With such a penchant for self-exposure, who can say with certainty where privacy begins?[24]

Not only has the electronics industry brought video production equipment into the home, it also has made home taping of telephone conversations possible. Twenty-eight percent of all American house-

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22. *Id.* RESTATEMENT (SECOND) OF TORTS § 652D (1977) defines the tort this way:
> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.

23. RAYMOND WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW 26 (1989) (italics in original).

24. By the mid-60s, serious scholarly concern developed over the core concept of privacy, especially in "newsworthy" situations. *See, e.g.*, Edward J. Bloustein, *Privacy, Tort Law, and The Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611 (1968); Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966).

holds had phone answering machines in 1989, and many of those machines can be used to tape entire conversations without the knowledge of the other party. "Right now, we're offended when that occurs," says Professor David F. Linowes, the chairman of a Presidential Commission that studied privacy issues in the wake of the Watergate tapes revelations. "[B]ut we're becoming less and less so. We're becoming hardened, emboldened. We're learning to reflect on what we say in communications, especially on the telephone."[25]

Computers, too, have brought great changes in what information can reasonably be kept secret.[26] These changes are not different in kind from those that occurred during the rise of the mass media earlier in the century; they are only the latest examples of technology altering social attitudes. "Numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.'"[27] Those words, too, came from Warren and Brandeis.

As reflected (or foreshadowed) by the Restatement, privacy law was further refined in the 1930s to meet these challenges. As with so much of twentieth century tort law, Dean Prosser was leading the charge. In a 1960 law review article, he identified four distinct branches of invasion of privacy: 1) intrusion upon seclusion, 2) public disclosure of private facts, 3) false light, and 4) appropriation.[28]

Intrusion is the tort of the Peeping Tom, the photographer with the long lens photographing Princess Di on the beach from miles away. Public disclosure of private facts is the domain of the gossip. Who's sleeping with whom? False light is the stock in trade of the second-rate journalist who has to hype the story to make it "better."[29] Appropriation is the trick of the *Roberson Folding Box Co.*[30]

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25. *That Private Phone Conversation May Be on Tape*, N.Y. TIMES, Dec. 17, 1989, § I, at 1, 21, col. 1.

26. As early as 1971, the threat to privacy was recognized in ARTHUR RAPHAEL MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS (1971). In Japan, 572 municipalities have ordinances restricting the disclosure of personal information in computers. *More Local Personal Privacy Laws Enacted*, JAPAN TIMES WEEKLY OVERSEAS EDITION, July 8, 1989, at 3, col. 2.

27. Warren & Brandeis, *supra* note 1, at 195.

28. William Lloyd Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

29. *See, e.g.*, Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), in which a reporter wrote a story on the impact of a bridge disaster on the people of a town. In the article, he stressed the abject poverty of one victim's family and described the widow as "wear[ing] the same mask of non-expression she wore at the funeral." In fact, the family was not poverty-struck, and the widow was not even home when the reporter visited. In Time v. Hill, 385 U.S. 374 (1967), *Life* magazine showed photos from a play purporting to depict the saga of the Hill family, which had been held hostage by escaped convicts for almost a day. The play and the

In all but false light privacy, the damage is done not by false statements but by true ones. In that major respect, it is worlds apart from defamation, in which truth is an absolute defense[31] or, in some cases, part of the plaintiff's affirmative case to disprove.[32] At common law, before privacy had been separately recognized, this was not so, and the essence of the tort of libel was the diminishment of the plaintiff's personal reputation, regardless of whether the statement was true or false. Indeed, it was said, the greater the truth, the greater the libel.[33]

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article showed depictions of acts of violence against the father and sexual insults aimed at the daughter. Those details never happened, but the Supreme Court — borrowing the constitutional protection afforded the press in defamation cases after New York Times Co. v. Sullivan, 376 U.S. 254 (1964) — ruled for the defendant. *See* Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

30. A related but separate interest is that of invasion of the right of publicity. Appropriation cases concern a private person whose image is used for commercial gain against his or her will. The offense is to the person's solitude. In contrast, right of publicity cases deal with public people who are concerned, not about their solitude, but rather about the unauthorized use of their commercially valuable image. It is akin to a property interest. *See, e.g.*, Factors, Etc. v. Pro Arts Inc., 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

31. *See* Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964).

32. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

33. In the pre-Revolutionary trial of John Peter Zenger, a newspaper publisher was accused of libeling the Royal Governor of New York in his New York Weekly Journal. Zenger's lawyer, Hamilton, wanted to show in his defense that the statements were true, but the Court was unmoved:

> *Mr. Chief Justice*: You cannot be admitted, Mr. Hamilton, to give the truth of a libel in evidence. A libel is not to be justified; for it is nevertheless a libel that is true. . . .
>
> *Mr. Hamilton*: I know it is said that truth makes a libel the more provoking, and therefore the offense is the greater, and consequently the judgment should be the heavier. Well, suppose it were so, and let us agree for once *that truth is a greater sin than falsehood*: Yet as the offenses are not equal, and as the punishment is arbitrary, *that is*, according as the judges in their discretion shall direct to be inflicted; is it not absolutely necessary that they should know whether the libel is *true* or *false*, that they may by that means be able to proportion the punishment? For would it not be a sad case if the judges, for want of a due information, should chance to give as severe a judgment against a man for writing or publishing a lie as for writing or publishing a truth? And yet this (with submission), as monstrous and ridiculous as it may seem to be, is the natural consequence of Mr. Attorney's doctrine *that truth makes a worse libel than falsehood*, and must follow from his not proving our papers to be *false*, or not suffering us to prove them to be *true*.

The court did not allow Hamilton to show truth and instructed the jury that it should only concern itself with whether the libelous words were in fact printed, a fact the defendant had already admitted. However, as Zenger (through his ghostwriter) recalled,

If the tort were simply injury to reputation, then this fusion of truth and falsity, or privacy and defamation, makes sense. The problem is that there are other interests at stake. From the plaintiff's perspective, there may be disclosures that do not hurt his reputation but violate his sense of personal boundaries, "the right to be let alone."[34] From the point of view of the defendant, there may be good reason to speak truthfully about others (including their faults), especially public officials and public figures.

Thus, American tort law delicately separated the strands of this double helix.[35] Libel would become false statements that injure one's reputation. Privacy would be true statements (not necessarily harmful to reputation) that intrude on one's reasonable expectation of solitude. The exception, false light privacy, would concern false statements that are not defamatory but which, nonetheless, place the plaintiff in an uncomfortable situation. In Japan, however, as we shall see, the law has taken a different course, and libel and privacy are to a great extent, still intertwined.

> The jury withdrew and in a small time returned and being asked by the Clerk whether they were agreed of their verdict, and whether John Peter Zenger was guilty of printing and publishing the libels in the information mentioned?
>
> They answered by Thomas Hunt, their foreman, *Not Guilty*, upon which there were three huzzas in the hall which was crowded with people and the next day I was discharged from my imprisonment.

JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (S. Katz, ed., 1963), *reprinted in* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND AMERICAN HISTORY 34, 42-43, 53 (1980). For a similar example of juries in England refusing to convict for truthful libels, see The Trial of Mary Ann Tocker, for an Alledged Libel, on Mr. R. Gurney, Jun (2d ed. 1818).

34. THOMAS COOLEY, THE LAW OF TORTS 29 (2d ed. 1888).

35. Even Warren and Brandeis considered them distinct.

> The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellowmen, — the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity.

Warren & Brandeis, *supra* note 1, at 197.

However, overarching both torts in America is the constitutional question of First Amendment rights. The question becomes especially acute in privacy cases regarding public officials and public figures, people who have chosen to give up much of their private life. As early as 1892, a New York court recognized the tension between a public person and his claim to privacy: "The moment one voluntarily places himself before the public, either in accepting public office, or in becoming a candidate for office, or as an artist or literary man, he surrenders his right to privacy, and obviously cannot complain of any fair or reasonable description or portraiture of himself."[36]

At one time, the American press was willing to look away from the private peculiarities of public people. There was a conspiracy of silence during the Kennedy Administration to withhold information about his extra-marital relationships. The same is true with respect to President Roosevelt who, while less voracious than Kennedy, nonetheless was not faithful to his wife Eleanor. However, today be it Gary Hart's dalliances on the *Good Ship Monkey Business*, or Judge Douglas Ginsburg's experimentation with marijuana, the American press is no longer willing to restrain itself.

Consider the case of John Fedders, chief of the enforcement division of the Securities Exchange Commission. Fedders and his wife were involved in divorce proceedings. *The Wall Street Journal* and *The New York Times* published the details: Fedders was a wifebeater. The next day, under pressure from the White House, Fedders resigned.

Without defending Fedder's conduct, which he described as occasional and regrettable, one can nevertheless ask the question, for what reason is the public entitled to know about the marital discord of a high (but certainly not cabinet level) public appointee? "This is the toughest call I've had to make since I've been in the job," said the managing editor of the Journal, Norman Pearlstine. He made his decision based on the fact that Fedders was a law enforcement official who had admitted the charges and said that he would quit his job if his wife would take him back. Moreover, the White House had expressed concern. "When you put all that together [with other questions about debts and his involvement in a corporate bribery case], it seemed that we had to run the story."[37]

Entertainers have had to learn the same lesson. Complaints from the stars about invasion of privacy often ring hollow, especially when

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36. Schuyler v. Curtis, 15 N.Y.S. 787, 788 (1892).

37. The episode is recounted in RICHARD F. HIXSON, PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT 159-61 (1987).

they are made in conjunction with a publicity tour for a new book or movie. Still, who can deny the anguish that "Cheers" actor Woody Harrelson must have felt when *The National Enquirer* revealed that his father, Charles Harrelson, was the man convicted of murdering a federal judge in San Antonio some years before. Having lived in San Antonio myself, I stopped in my tracks when I saw the headline at the supermarket checkout line, and I read the story from cover to cover. Thus is my own love-hate attitude about the story revealed.

The public was treated to similar news about Miss America Vanessa Williams and model Brooke Shields. Both sued over the publication of nude photographs taken several years before, in Miss Shields' case when she was ten years old. Both lost. The fact that Miss America had posed nude with another woman was indeed news. And Brooke Shields had only her mother to blame. She had signed an unlimited release to use the photos when they were taken.[38]

With this hurried trip through privacy, something of a *Shinkansen* (the Japanese bullet-train)-speed view of the legal landscape, I now turn to Japan for a similar sightseeing expedition.

III. THE JAPANESE EXPERIENCE

Shortly after returning from a year's study in the United States, Tokyo University Law Professor (later President) Ichiro Kato pronounced himself "strongly impressed by American tort law."[39] He wrote:

> American tort law may be described as a treasure chest for the purpose of exploring new actual cases, new ideas, and new legal precepts hitherto unknown to us. Many of these can be put into practice in our own country, and even those instances which we cannot put directly into practice can be utilized by us as materials from which we can discover that a problem exists and work out our own method of dealing with it.[40]

Six months after Professor Kato's article appeared in *Horitsu Jiho* (The Law Journal), the Tokyo District Court handed down the first decision recognizing the right of privacy in Japan.[41] Whether or not

38. *Id.* at 161-63.

39. Ichiro Kato, *The Concerns of Japanese Tort Law Today*, 1 LAW IN JAPAN 79 (R. Coleman trans. 1967)(original published in Japan in 1964).

40. *Id.* at 83.

41. Arita v. Hiraoka, Hanrei Jiho No. 385, at 12 (Tokyo D. Ct. 1964).

the Court was directly influenced by Professor Kato, it is certainly true that enthusiasm for Western law was running high, and Kato was but one (albeit more influential than most) of many supporters of "westernizing" Japanese law.[42]

Professor (later Supreme Court Justice) Masami Ito had, for some time, been thinking along the same lines. Barely a month after the District Court's decision in *Utage no Ato* (*After the Banquet*), Ito published an enthusiastic endorsement in the pages of *Juristo* (Jurist).[43] He wrote:

> [T]here are some dissenters in the field of literature who object to the degree of restriction thus imposed on their writing, but, in general, it seems to have been welcomed here in our country, where a sense of respect for the private life of the individual is lacking, due to its significance as a warning against those — particularly in the mass media like some weeklies — who have often meddled in personal matters and sacrificed them to commercialism.[44]

Although, as the District Court noted in its opinion, privacy already was recognized in some contexts such as voyeurism (akin to the American notion of "intrusion"),[45] overlooking adjacent lands,[46] and opening a sealed letter,[47] these interests involved the rights of one individual against another. The *After the Banquet* decision is all the more remarkable (and, in some sense, out of character) because it dealt with the rights of an individual against not only the writer and publisher, but also against the public that wished to read the information.

The plaintiff in *After the Banquet* was a Socialist candidate for governor of Tokyo, Hachiro Arita. Yukio Mishima wrote a novel in which only minimal attempts were made to hide the character's true

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42. This penchant for Western things had begun shortly after Commodore Perry arrived on Japan's shores with evidence of the technological advanced state of Western nations. Japan rushed to embrace Western technology as well as the French and German civil law systems. At the outset, the Meiji era motto was "Western techniques, Oriental morality." YOSHIYUKI NODA, INTRODUCTION OF JAPANESE LAW 60 (1976). After the defeat in World War II, though, the country's self-confidence reached its nadir and technique and content both poured in, most notably in the Constitution written by General MacArthur's staff.

43. Ito, *supra* note 16.

44. *Id.* at 142.

45. Minor Offenses Law, No. 39 of 1948, art. 1(1)(xxiii).

46. Civil Code, Laws No. 89 of 1896 & 9 of 1898, art. 235(1).

47. Penal Code, Law No. 45 of 1907, art. 133. All three of the preceding laws are discussed in Ito, *supra* note 16, at 143.

identity. The novel is what today might be called "faction," a fictionalization of factual people and events. It concerned the relationship of the main character and the owner of a high-class restaurant, the two of whom became married in the story and later divorced. The former Mrs. Arita consented to the writing of the novel; her husband had not. Both were outraged at the story that resulted, and Mishima was ordered to pay what was then the single largest post-war damage award: 800,000 yen ($2,200 at that time).[48] The judge said that the decision was "necessary in order to secure the individual's dignity and pursuit of happiness in this advanced mass-communication society."[49]

For Japan's first right of privacy case to arise in this context was somewhat unfortunate, for such writing hardly is the core of the privacy problem. On the other hand, it might well have been fortuitous. It allowed the court to establish the precedent in a limited context that could serve as a beachhead for further expansion.

It should be said that Mishima was hardly the first to use this form of expression. In America, the films *Citizen Kane* and *Inherit the Wind* were based on, and fully understood to refer to, the lives of William Randolph Hearst and the *Scopes* monkey trial,[50] even though the names of all the characters had been changed. In the United States, however, almost all litigation of this sort has occurred under the defamation cause of action. Most notorious of the ilk was *Corrigan v. Bobbs-Merrill Co.*,[51] in which the author portrayed Judge Cornigan of the Jefferson Market Court in New York as being "ignorant brutal, hypocritical, corrupt, shunned by his fellows, bestial of countenance, unjust, dominated by political influences in making decisions, and grossly unfit for his place."[52] The real judge of the Jefferson Market Court was named *Corrigan* and apparently had irritated the author in a case in which the writer actually appeared before him. The court in the defamation action had no trouble in finding liability in such an instance of literary revenge.

Still, *Corrigan* is the exception to the rule.[53] Was Mishima, surely no champion of socialism, out to get Arita? Or was Arita just the

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48. *See* Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, 53 L. & CONTEMP. PROB. 39 (1990).

49. SHIGENORI MATSUI, MASS MEDIA TO HO (MASS MEDIA AND LAW) 162 (1988).

50. State v. Scopes, No. 5231, 5232 (Circuit Ct., Rhea County, Tenn. 1925), *aff'd* 289 S.W. 363 (Tenn. 1927).

51. 228 N.Y. 58, 126 N.E. 260 (1920).

52. 228 N.Y. at 63, 126 N.E. at 262.

53. *See generally* Dan Rosen & Charles L. Babcock, *Of and Concerning Real People and Writers of Fiction*, 7 COMM. ENT. L.J. 221 (1985).

springboard to a good story? Moreover, if the published material be true, then why should a person in the political arena be entitled to sue for damages? If it be false, then why did the court rely on a novel theory of privacy rather than the well-tested tort of defamation? The court specifically seemed to discount the defamation theory, for it declined to order an apology on the grounds that in a privacy case, in contrast to an instance of defamation, restoration of the *status quo ante* is impossible.[54] There was no shortage of troubling questions following *After the Banquet.*[55]

More recently, the Tokyo District Court fined the writer Chihiro Isa 500,000 yen for violating the privacy rights of a 52-year-old bus driver now living in Setagaya Ward, Tokyo. The driver, along with four others, was tried in August of 1964 for the murder of two American soldiers in Okinawa. The man was acquitted of murder but convicted of assault and served a two-and-a-half year prison sentence. He then came to Tokyo on parole, trying to leave his past behind him.[56]

But the past refused to die. Isa, the writer, had served on the jury in Okinawa and in 1977, relied on that experience to publish a book entitled *Gyakuten* (*Reversal*). By that time, one of the four defendants had died. Isa contacted the other two and obtained permission to use their names, but he could not find the fourth man. Nevertheless, Isa named all the names, as had the contemporaneous television and newspaper reports of the trial back in the 1960s. The book was well-received and even won the prestigious *Soichi Oya* award.[57]

Judge Hisashi Nemoto was not impressed. Relying on Article 13 of the Constitution,[58] the Judge said that the use of the plaintiff's real name was unnecessary given the amount of time that had passed since the crime occurred. According to the court, the right to keep serenity and peace in one's private life should be fully respected.[59] The Tokyo High Court affirmed and Judge Toru Tanno wrote that the use of a name is acceptable only if it is "indispensable to achieving a goal in

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54. BEER, *supra* note 15, at 326.

55. YUKIO MISHIMA, AFTER THE BANQUET (D. Keene trans. 1963).

56. *Man Named in Book Wins Damages*, MAINICHI DAILY NEWS, Nov. 27, 1987, at 12, col. 2.

57. *Id.*

58. "Article 13 of the (Japanese) Constitution provides that 'All of the people shall be respected as individuals' with the 'right to life, liberty, and the pursuit of happiness.'" BEER, *supra* note 15, at 325.

59. MATSUI, *supra* note 49.

line with the public interest." That, he said, was not the case with this book.[60]

The decision, coupled with *After the Banquet*, puts writers in a predicament. If they write accurately about public affairs (and surely a murder trial is nothing if not that), then they must disguise the names of the characters, according to the *Reversal* decision. On the other hand, if they disguise the names, but the public still can determine the true subject of the book, they are culpable under the *After the Banquet* holding.

The only way out of this dilemma is not to write about embarrassing public matters at all, but that surely is an untenable position in a democracy, especially in light of Article 21 of the Constitution, which explicitly guarantees speech and press rights and disclaims censorship.[61] The writer is not the only one with a stake in such information. The public has an important interest in being informed of what its government has done and the actions of those involved in matters of public importance. History is no less important than journalism, although the *Reversal* decision would make it seem so. Indeed, often the most illuminating accounts of events are impossible to produce until time has passed. Ultimately, it is to the history books, not in the nightly news, that we entrust our records of the past.

This critique, however compelling, is shamelessly ethnocentric. As my stated goal is to assess Japanese privacy law in terms of Japanese society and not that of the United States, the analysis is completely irrelevant except to show how different American and Japanese notions of privacy can be. I am quite convinced that most American constitutional law scholars would evaluate the two cases as I have. Indeed, there are cases directly on point.[62] I am equally convinced that the

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60. *Court Upholds Publishing Names with Criminal Records Invades Privacy*, JAPAN TIMES WEEKLY OVERSEAS ED., Sept. 23, 1989, at 4, col. 1. An appeal to the Supreme Court is said to be planned. *Id.*

61. BEER, *supra* note 15, at 325.

62. The leading "Where Is He Now?" case in the United States has far less compelling facts than "Reversal," but even under those circumstances the Second Circuit was unwilling to find a violation of privacy rights. At issue was an article in *The New Yorker* about one William James Sidis. Sidis was neither a public official nor one involved in official public business. Until 1910, Sidis was a child prodigy and the subject of great interest by the press and the public. He then slipped into obscurity until 1937 when *The New Yorker* printed an article about him. J. L. Manley, *Where Are They Now? April Fool!*, *The New Yorker*, Aug. 14, 1937. Sidis sued, but the court sided with the magazine.

> Regretably (sic) or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise

result in *After the Banquet* and *Reversal* is understandable in Japanese society.[63] An exploration of the reason for those conclusions must wait until the final section of this article.

Just as there is direct American precedent contradicting the decision in *Reversal*, so, too, does United States privacy law conflict with another landmark Japanese case involving criminal records. The plaintiff was a driving school instructor who had been fired. The instructor challenged the dismissal and sued the school. The school, as part of its defense, requested the bar association to obtain the instructor's official government records, if any.[64] There were plenty, including past

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for a court to bar their expression in the newspapers, books, and magazines of the day.

Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940). *But cf.* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (plaintiff who pled guilty to contempt of court in connection with grand jury spy investigation was not a public figure for libel purposes 20 years later).

J. D. Salinger, the author of *Catcher in the Rye* and other works, is America's best-known literary recluse. He lives in Cornish, New Hampshire and guards his privacy jealously, not having published anything since 1965. In 1988, a free-lance photographer staked out Salinger for six days and snapped a picture of the writer. *The New York Post* bought it and put it on the front page as the lead story with the headline, *Catcher Caught*, N.Y. POST, Apr. 21, 1988, at 1, col. 1. *See 6-Day Hunt Nets Photos of Reclusive J.D. Salinger*, USA TODAY, Apr. 22, 1988, at 24, col. 3.

Another writer, Ian Hamilton, found out how serious Salinger wanted to remain out of the public eye. Hamilton wrote a biography of Salinger, relying in part on Salinger's letters in library collections. Salinger found out about the book, sued, and won a landmark copyright ruling which prevented Hamilton from using the "unpublished" materials. Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir.), *modified* 818 F.2d 252 (2d Cir.), *cert denied*, 484 U.S. 890 (1987). The book, stripped of the letters, eventually was published to unenthusiastic reviews. IAN HAMILTON, IN SEARCH OF J.D. SALINGER: A WRITING LIFE (1988). *See, e.g.*, *The Phantom of Cornish*, NEWSWEEK, May 23, 1988, at 73 (calling it "a soured, plaintive book").

63. *But see* Kamichika v. Yoshida, 23 Kosai Minshu (no. 2) 172 (Tokyo High Ct. 1970), where the court declined to find an invasion of privacy in a 1970 movie about an elderly ex-Dietwoman. The woman was jailed as a result of the Hikage Chaya Incident of 1916 where an anarchist politician died, and the ex-Dietwoman sued to keep the incident from being revisited on the screen. Nevertheless, the court ruled against her. The Court held that incident was a matter of public knowledge and had been previously written about by the plaintiff, Ichiko Kamichika, and others. The case is also known as the Eros Plus Massacre Case. *See* BEER, *supra* note 15, at 327-28.

64. The request was made pursuant to art. 23-2 of the *Lawyers Law*, which states:

> A lawyer may, with regard to the cases in his charge, make application to the bar association to which he belongs in seeking information he needs by referring to public offices or public or private organizations. Upon receiving the application, the bar association may reject it if it deems [it] inappropriate.
>
> 2. The bar association may, upon the application as mentioned in the preceding paragraph, request public offices or public or private organizations to present necessary information.

BEER, *supra* note 15, at 334 n.89.

criminal convictions. The school then justified its actions on the grounds that the instructor had been less than candid about his past when hired.[65]

The instructor then sued the bar association for violating his privacy. The Kyoto District Court ruled for the bar association, but the Osaka High Court reversed, and the Supreme Court agreed, saying that criminal records are directly related to one's honor. Therefore, ex-criminals shall be protected from improper disclosure,[66] which apparently is limited to cases in which there is no compelling public interest in the information being revealed.[67] Curiously, however, the Court did not explicitly use the word "privacy," although it obviously accepted the plaintiff's privacy argument.

The Kyoto Records case is noteworthy for a variety of reasons, not the least of which is that it establishes restraints on the government to prevent invasion of privacy. This, in turn, is a restriction on the right of the public to receive information kept by its officials concerning public matters. Combining the Kyoto Records case with the decision in *Gyakuten*, it becomes evident that in Japan, an individual's interest in his reputation exceeds the public's right to know much of what its government does or has done — in this case, convicted a citizen of crimes.[68]

In the United States, in contrast, official government records are *per se* public, absent some special authorization to keep them private.[69] The entire structure of the Federal Administrative Procedure Act is premised on openness, including access to public records.[70] The same approach is used in the courts.

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65. *Id.* at 329.

66. Sai 3 shoban, Showa 56.4.14, minshu 35.3, at 620. *See* MATSUI, *supra* note 49, at 165. This is not to say that the government may not collect such information itself. Hasegawa v. Japan, Sai shoban, Showa 44.12.24, keishu 12, at 1625 (police officers may take photos of students involved in illegal demonstration without violating the right to likeness (shozoken) included in article 13 of the Constitution).

67. Justice (formerly Professor) Ito's concurring opinion clarifies the conditions under which disclosure may be justified. *See* BEER, *supra* note 15, at 330.

68. In a survey of 30 Japanese people found to have been falsely accused of crimes, 25 said that police interrogators threatened to ruin their family's reputation by pasting red paper over the family register entry. Igarashi Futaba, *Forced to Confess*, KYOTO J. 12, 17 (G. McCormack trans. 1989). It is common practice to check the family register of a potential marriage partner or employee to ensure that person's lineage is free of taint. *See* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 80 (1987).

69. *See, e.g.*, 5 U.S.C. § 552(a)(privacy) and § 552(b)(1)-(9)(exceptions to public information).

70. 5 U.S.C. § 552(public information) and § 552(b)(open meetings). For an example of the difficulty faced by an individual who wants to prevent disclosure of government documents about himself, see Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

The American Supreme Court was faced with a challenge to such openness in *Cox Broadcasting Corp. v. Cohn.*[71] A news reporter discovered the name of a six-year old rape and murder victim from the official public record of the accused assailants' indictment. The reporter broadcast the name on television, and the victim's father sued, alleging an infringement of his right to privacy. While not without sympathy for the father's plight, the Court rejected his claim.

> Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. . . . Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.[72]

The Supreme Court reaffirmed this approach rather recently and overturned the civil conviction of a newspaper that had run the name of a rape victim.[73] The paper got the name from the offense reports that were routinely placed in the press room by the local police. The publication violated a state statute, but the Court ruled that statute unconstitutional. The negligent party, the Court seemed to say, was not the press but rather the government. "Where, as here, the government has failed to police itself in disseminating information, it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity."[74]

Even Beat Takeshi might well have prevailed in Japanese courts had he filed a lawsuit instead of launching an attack. More than twenty

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71. 420 U.S. 469 (1975).

72. *Id.* at 496-97. *See also* Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977)(holding unconstitutional a pre-trial order which enjoined publication of name and photo of 11-year-old boy because reporters had attended juvenile proceeding); Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979)(holding unconstitutional a statute which prohibited publication of accused juvenile offender's name because information was lawfully obtained from witnesses, police, and prosecutor).

73. The Florida Star v. B.J.F., 491 U.S. 524 (1989).

74. *Id.* at 538. However, the court noted the government retained the ability to classify certain information as sensitive and, thus, prevent it from being "officially" disclosed at all.

years ago, the Tokyo High Court awarded damages and required the *Shukan Jitsuwa* (Weekly Candid) to apologize to two entertainers, Tsuyoshi Kato and his wife Makiko. The magazine had reported, without criticism, that the Katos had lived together before they were married. The Court found that the statements were false and defamatory but also said that even if true, they would have been violative of the Katos' privacy. The Court said that general public attitudes do not support cohabitation outside of marriage, and thus, this was the kind of information that a reasonable person would not want disclosed. In spite of their public careers, the Katos maintained privacy rights, and the Court said these rights outweighed any benefit the public may have derived from reading about off-screen lives.[75]

The fact that ex-Prime Minister Uno did not sue over the revelations of his private life reveals some of the limitations, both jurisprudential and practical, to the Kato doctrine. Public officials offer their entire character to the voters for approval. Thus, one could say that such matters are of public importance, especially with the top echelon of leadership. In the United States, late in the Reagan presidency, it was revealed that the President and Nancy's first child, who was not premature, was born less than nine months after their wedding. Would this have affected voting toward a man who presented himself as a champion of traditional morality? Certainly, at least it would have been relevant information for voters, and its disclosure could not have been considered an illegal invasion of the Reagan's privacy.[76]

In Japan, privacy and defamation both spring from the same source: Articles 709 and 710 of the Civil Code.

> Article 709: A person who violates intentionally or negligently the right of another is bound to make compensation for the damage arising therefrom.
>
> Article 710: A person who is liable in compensation for damages in accordance with the provisions of the preceding Article shall make compensation therefore even in respect of a non-pecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to his property rights.[77]

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75. *See* BEER, *supra* note 15, at 326-27.

76. Mrs. Reagan herself later admitted the fact in her memoirs. NANCY REAGAN, MY TURN 103 (1989).

77. BEER, *supra* note 15, at 319.

As a result of this common heritage, the line between defamation and privacy in Japan is not at all clear. Consider, for example, the case of a defeated political candidate Mitsuhide Fujito. After the election, the *Yomiuri Shimbun* reported that the ex-candidate had been convicted of murder 13 years before.[78] Fujito sued for defamation but built his case on a privacy theory, contending that his conviction was a private matter.[79]

The *Yomiuri* also had stated that Fujito was of Korean heritage, a statement that the plaintiff also considered defamatory. To an American observer, this too seems more akin to a privacy complaint, specifically that of false light. To be of Korean stock would hardly seem the kind of allegation that would disgrace someone[80] or lower him in his estimation of the community.[81] However, this, too, would be an ethnocentric conclusion, for in the Japan of 1955 (if not today), Korea and its people were none too appreciated.[82] The same is true of the

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78. In addition, the newspaper misrepresented his academic background. *See* BEER, *supra* note 15, at 320.

79. The Supreme Court decided in favor of the newspaper and cited the public's strong right to know about persons who offer themselves for elected office. Sai shoban, Showa 41.6.23, 20 minshu (no. 5), at 1118.

80. KEETON, *supra* note 17, at 773.

81. RESTATEMENT (SECOND) TORTS, *supra* note 22, at § 559.

82. Discrimination against Koreans in Japan, actual and perceived, is more than just a matter of history. One of the most criticized Japanese practices is the requirement that all foreigners be fingerprinted. Since Koreans constitute a substantial percentage of the foreign population, they are among the most vocal opponents of this practice. In 1989, the government granted amnesty to 34 persons, mostly Koreans, who refused to be fingerprinted. However, the defendants said they would reject the largesse and hoped to force a court to strike down the Alien Registration Law as a violation of human rights. *See Fingerprint Refusers to Reject Amnesty*, THE JAPAN TIMES WEEKLY OVERSEAS ED., Feb. 25, 1989, at 7, col. 1. The Supreme Court, however, seized upon the pardon to dismiss the case. *See Supreme Court Invokes Pardon for First Fingerprint Refuser*, KYODO NEWS SVC., July 14, 1989, available on Nexis (internt'l file).

Of course, the feeling is mutual. A recent translation of selections about Japan in Korean textbooks portrays as heroes the leaders of the anti-Japanese resistance during the occupation of Korea, including the man who shot the first leader of the occupation force in 1909. *See Book Offers Different View of Japanese in Korean History*, JAPAN TIMES WEEKLY OVERSEAS ED., Apr. 8, 1989, at 4, col. 1. Some progress is being made, however. In 1989, a Korean historian named Kang Tok Sang became a full professor at Japan's Hitotsubashi University, the first Korean resident to hold such a position at a national university. Sang had lived in Japan for 55 years. Prior to 1982, however, foreigners were not allowed to be full-time teachers at national universities in Japan. *See Historian Becomes First Korean Resident in Japan to be Appointed to University Post*, JAPAN TIMES WEEKLY OVERSEAS ED., Apr. 22, 1989, at 2, col. 3.

burakumin, who are distinguishable not by ethnicity but rather by historical occupation.[83]

Cultural blinders notwithstanding, Japanese conceptions of defamation and privacy are fuzzy. Professor Matsui has noted the confusion and observes that many plaintiffs, not understanding the distinction, simply allege both defamation and invasion of privacy resulting from the same facts and leave it to the courts to decide which theory is correct.[84] Frequently, the courts add to the confusion by relying on both theories in reaching a decision.

The major distinction in American law between the two torts — defamation deals with false statements, privacy with true ones (and false light ones that do not actually damage reputation) — is blurred in Japan because a falsity requirement is noticeably absent from Article 723 of the Civil Code: "If a person has injured the reputation of another, the Court may, on the application of the latter, make a order requiring the former to take suitable measures for the restoration of the latter's reputation either in lieu of or together with compensation for damages."

In practical terms, the principal difference between defamation and privacy in Japan turns out to be the remedy. Retractions are often ordered in defamation cases pursuant to Article 723.[85] However, a

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83. *See* UPHAM, *supra* note 68, at 78-123. A *roman a' clef* published in Japan suggested that Nobel Prize-winning author Yasunari Kawabata committed suicide in part because of relations with a *burakumin* domestic that he employed. The family sued for invasion of privacy, but the case was settled out of court. *See* BEER, *supra* note 15, at 328.

84. MATSUI, *supra* note 49, at 166.

85. The Japanese Supreme Court upheld forced retractions as a constitutional remedy in Sai shoban, July 4, 1957, Hanreishu X, No. 7, at 785, *translated in* COURT AND CONSTITUTIONS IN JAPAN 47 (J. Maki ed. 1964). On First Amendment grounds, news organizations in the United States have vehemently opposed any reform of libel damages that would include court-ordered apologies as part of the remedy. Voluntary retractions, of course, can be made and frequently will serve to mitigate the damages. *See, e.g.*, CAL. CIV. CODE § 48(a)(limiting recovery to special damages unless a correction is requested and refused). The reliance on monetary damages, however, ultimately is unsatisfactory both for the plaintiff and the defendant. The plaintiff's main concern is the redemption of his reputation, and money cannot accomplish that. On the other hand, with money as the only possible remedy, the plaintiff is forced to sue for damages and often for a multimillion dollar amount, placing the defendant publication in financial jeopardy.

Recent proposals have attempted to circumvent the press' antipathy by creating a declaratory judgment option. The Libel Reform Project of the Annenberg Washington Program recommends giving either party the option of making the proceeding one for a declaratory judgment of the truth or falsity of the statement. The plaintiff gives up the possibility of money but gains the possibility of a quick restoration of her reputation, freed of the constitutional fault standards that now make actions for damages difficulty. The press, on the other hand, gains the elimination of potentially crushing damages but loses the insulation of the constitutional fault rules. If the

retraction is inappropriate in the privacy arena because the gravamen of the complaint is not that what was reported was wrong, but rather that it was correct. Thus, a correction can mitigate the damage done by defamation, but it can do nothing but exacerbate an invasion of privacy.

In a 1986 symposium, the Kinki Bar Association[86] investigated the problem of inappropriate press coverage. In almost all cases involving defamation, an apology was ordered in addition to money damages, sometimes even in publications other than the one in which the misstatement was made.[87] One notable exception involved a person who had been suspected of a crime. The offending articles gave the impression that he was guilty, but the evidence proved insufficient to reach that conclusion. As a result, the Tokyo District Court awarded a total of 1,300,000 yen damages to be paid by the *Shincho* and *Shogakkan* press companies but declined to order an apology, stating that the truth subsequently had been reported nationwide, making an apology unnecessary.[88]

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defendant voluntarily publishes a retraction or allows a reply, whichever the plaintiff requests, then any lawsuit will be foreclosed. *See* The Libel Reform Project of the Annenberg Washington Program, *Proposal for the Reform of Libel Law*, 7 COMMUNICATIONS LAWYER 1, 26-30 (1989); Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Project: The Case for Enactment*, 31 WM. & MARY L.J. 25 (1989).

Other similar proposals have been made. *See, e.g.*, Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986); Marc A. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983)(limiting option to election to plaintiff); David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847 (1986)(allowing plaintiff or defendant to elect). *See generally* Randall P. Bezanson, Gilbert Cranberg & John Soloski, *Libel Law and the Press: Setting the Record Straight*, 71 IOWA L. REV. 215 (1985).

86. The Kinki region includes Osaka, Kobe, Kyoto, and Nara.

87. For example, the Tokyo District Court recently ordered Shinchosha Co. to print an apology in its *Shukan Shincho* (Weekly Shincho) and pay one million yen damages to a man it suggested killed his wife for insurance money. The magazine compared the death to that of an alleged murder-for-insurance case in which a Japanese businessman's wife was shot in Los Angeles. The article was entitled "The True Character of the Husband of the Woman Who Drowned in the Maldives, Who is Suspected as a 'Second Miura'" (Miura is the husband in the Los Angeles case). The court said the magazine failed to gather enough proof to substantiate the suspicion it raised and, thus, was liable. *Weekly Must Pay Damages for Story Alleging Man Killed Wife for Profit*, JAPAN TIMES WEEKLY OVERSEAS ED., Sept. 23, 1989, at 3, col. 1.

One of the problems in reigning in the weekly publications is that the courts have shown no appetite for assessing damages that serve as a deterrent. Surely *Shincho* gained much more than one million yen (about $8,000) in sales and publicity by publishing the sensationalistic story. Such a penalty could be viewed merely as a cost of doing business. The plaintiff, by the way, had asked for 10 million yen in damages.

88. KINKI BAR ASSOC., HODO TO JINKEN 58 (1986).

In another case, the Tokyo District Court found that the defendant, Shincho Publishing Co., had not actually reported a falsehood about a labor union. Rather, it had criticized the union by use of a metaphorical expression. Still, the Court found the defendant's conduct blameworthy, stating that even with freedom of comment, there must be consideration for those who are commented upon. Comment, the Court said, must not turn into ridicule. As a result, the Court rejected the request for an apology and awarded damages, but only 110,000 yen.[89]

If courts can recognize the difference between libel and privacy for the purpose of fashioning a remedy, then they ought to be able to speak more clearly in announcing the basis of liability. At least that is what seems right to this Western lawyer. But perhaps that, too, is ethnocentrism at work, not only the Occidental appetite for theory but also the common law lawyer's desire for a clear lineage for each tort. I am equally troubled, from time to time, by my Louisiana civil law colleagues' fusion of various elements of contract and tort. Let it be said that while it is possible (and I believe useful) to separate the notions of untrue statements that damage reputation from true statements that make a person feel unduly exposed, it is equally possible to lump them together in the category of acts that offend the individual.

It may be that in Japan, all such offenses are relational, that there is no concept of a disclosure that offends only oneself without reference to significant others, while American civilization can quite comfortably differentiate between self and other.[90] The Japanese film director Juzo Itami seems to believe the former, agreeing with the philosopher Yusei Mori "who says that for the Japanese, there is no individuality, the smallest human unit is two people."[91] The statement is all the more significant because it comes not from an American observer with a suitcase full of stereotypes about Japanese culture, but rather from one of the most successful modern film directors in Japan — no lackey for romantic notions of traditional culture.[92]

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89. *Id.* at 55. *Cf.* Milkovich v. Lorain Journal Co., 110 S. Ct 2695 (1990) (refusing to find a clear line between fact and opinion in all cases).

90. *Compare* John Carman Smith, *Ajase and Oedipus: Ideas of the Self in Japanese and Western Legal Consciousness*, 34 OSAKA U. L. REV. 1(1987) *with* Mitsukuni Yasaki, *Feeling and Reason as a Recurrent Topic of Legal Culture: A Comment on Professor J. C. Smith's Paper*, 34 OSAKA U. L. REV. 37 (1987).

91. *On a Bridge to Rediscovery with Itami Juzo*, KYOTO J. 9, 11 (Spring 1988) [hereinafter *Bridge to Rediscovery*].

92. Some of Itami's films, such as *Marusa no onna* (A Taxing Woman) and *Tampopo* have been well-received in the United States. My own favorite is *Ososhiki* (The Funeral), a dark comedy.

It should come as no surprise that Prosser champions the dichotomous American view, distinguishing the relational interest of defamation from other complaints. "Defamation is not concerned with the plaintiff's own humiliation, wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action."[93] But Prosser is not without allies across the ocean, notably Professor Matsui, who clearly states that "the right of privacy can be [separately] understood as a right of controlling private information about oneself."[94]

Yet, there is other evidence for the strength of the "all is relationship" view. In Japan, the family of a dead person may sue over defamation or invasion of privacy of the deceased. In the United States, the common law rule is that libel and invasion of privacy are personal offenses, and when the person dies, there is no person left to sue.[95]

To illustrate the contrast, the family of the first woman in Japan to die of AIDS sued a newspaper that published her name after her death. Around that same time in the United States, *Newsweek* published a special issue on AIDS victims, offering a yearbook-style photo of everyone who had succumbed to the disease that year, along with a few lines about his or her life. Japanese people to whom I mentioned the *Newsweek* article were genuinely shocked. To them, such a revelation could not help but reflect on the victim's family. Americans, I suppose, would — for the most part — keep their attention focused on the victim him or herself. There is something telling in this little story. In the final section of this article, it is my intention to talk more about the underlying societal differences that make privacy American style somewhat different from the Japanese version.

IV. Society and Self

At the outset of this exploration, I pledge not to become a conscript in the *Nihonjinron* infantry.[96] There is no shortage of able-bodied

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93. KEETON, *supra* note 17, at 771.

94. MATSUI, *supra* note 49, at 166. Matsui's gloss on Prosser is that privacy is best understood as intrusion and public disclosure of private (true) facts. False light, he suggests, more correctly belongs in defamation, and appropriation under copyright. *Id.*

95. KEETON, *supra* note 17, at 940-43. The notable exception is the right of publicity, which many courts and commentators consider to be akin to a property right rather than a right of personality and, thus, descendable. *Compare* Factors Etc., Inc. v. Pro Arts Inc., 579 F.2d 215 (2d Cir. 1978), *cert denied*, 440 U.S. 908 (1979)(Elvis's right survives death under New York common law) *with* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979)(Bela Lugosi's right does not survive death under California law). Perhaps the Elvis cases ought to be reopened now that sightings of him exceed those of UFOs.

96. *Nihonjinron* is the species of literature in which authors write about the ways in which Japan is unique. It is not an affliction that is limited to Japanese writers. *See, e.g.*, KAREL

volunteers who willingly write about Japan's uniqueness, actual and illusory. My approach, instead, is to speculate about some ways in which Japanese and Americans are different, without adding the explosive claim that Japan is one of a kind. I leave to anthropologists the task of determining whether other cultures are more or less like Japan's with respect to notions of privacy.

It is a cliché that losing face is a serious matter in Japan. Like most clichés, there is truth in this one. In fact, the translated phrase, "lose face," may well be too weak. In Japanese, the expression is *kao o tsubusu*, literally not to lose face but rather to "smash one's face." In a society that emphasizes relationship, image is everything.

To quote film director Juzo Itami again: "A Japanese feels most secure when there is good feeling between himself and other people. They can't rely on themselves as individuals. Although a Westerner might think that the freedom that goes with individuality is good, when a Japanese becomes an individual he is no longer Japanese."[97]

In other words, what a person thinks of himself depends not on some fixed internal truth but rather what others reflect back to him. Anything that jeopardizes the good feelings (*kimochi*) affects not only the relationship but what Westerners would call the sense of self. Westerners are not immune from concern about the opinions of others (any teenager will provide a ready example). However, in Western culture this is viewed not as normal but rather pathological.[98] Fritz Perls, father of Gestalt Therapy, devoted a great deal of attention to dislodging these "introjections," most powerfully formed in the parent/child relationship.[99] Japanese psychiatrist Takeo Doi — who himself

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VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER (1989), in which the author inveigles against one type of *Nihonjinron* — that of Japanese superiority — but proceeds to write more than 400 pages dedicated to the proposition that Japan is radically different.

97. *Bridge to Rediscovery*, *supra* note 91, at 11. Itami wrote on this theme at length in several books and presented a psychoanalytic appraisal of Japanese society.

98. One leading handbook on child-raising includes a section entitled "Recipe for Dependency" which, of course, is intended to be a negative prescription:

> Imagine that your blueprints are such that your child can fit them, but only with strenuous effort. You churn out the designs for his feelings, attitudes, values, and goals. You know best, and you teach your child *not* to listen to his inner promptings. He becomes a highly dependent puppet, moving as you pull the strings. His reward? Your approval. (Remember, approval is an oxygen line, particularly for the young child.) The youngster then places his psychological center of gravity outside himself. Others have his answers and his own *self*-confidence never has a chance to flourish. Rigid parental images and tightly held expectations put huge hurdles in the way of movement toward genuine selfhood. They are the causes of the "lost self."

DOROTHY C. BRIGGS, YOUR CHILD'S SELF-ESTEEM 51 (1970).

99. FRITZ PERLS, GESTALT THERAPY 222-47 (1977).

was influenced by Western psychiatry — also traces things back to early childhood, but notes that in Japan, the stated goal is to foster *amae* or interdependence.[100]

Thus, Japanese child-raising techniques are designed to inculcate a sense of interdependence of family. For example, children sleep with the parents. Punishment is being locked out of the house. American techniques, contrarily, are aimed at producing an independent child. We punish our kids by locking them in. Moreover, parents are urged to separate from the infant during sleep hours, lest it become too accustomed to being between the adults.

Countless volumes have been written counselling parents on how to resist the temptation to bring a crying baby into bed.[101] Speaking from recent experience (being the father of a 6-year-old and a 2-year-old), it is perfectly clear that what the child would like most is to snuggle in bed with mom and dad and feel the reassuring warmth of their bodies. Perhaps even mom and dad would like that too, had they not been socialized themselves since early childhood to reject it. So, in my house, sometimes we give in to *amae*, but often we have lived with the anxiety that only cries from the crib can create, following the gospel according to Spock:

> Sometimes a small child is going through a period of waking up frightened at night — perhaps coming repeatedly into the parents' room, perhaps crying persistently — and is taken into the parents' bed with them so that they can all get some sleep. This seems like the most practical thing to do at the time, but it usually turns out to be a mistake. Even if the child's anxiety lessens during the following weeks, he is apt to cling to the security of his parents' bed, and there is the devil to pay getting him out again. So always bring him promptly and matter-of-factly back to his own

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100. TAKEO DOI, THE ANATOMY OF DEPENDENCE 28 (J. Bester trans. 1981). The Japanese title is *Amae no Kozo*. My own view is that "dependence" is a somewhat misleading translation of *amae*, as it connotes to Westerns a kind of helplessness. I think "interdependence," or perhaps "trust" comes closer to the true meaning.

For example, Chie Nakane argued that superiors are equally likely to rely on inferiors. She notes that in the corporate setting, many Japanese directors "rely cheerfully on their beloved and trusted subordinates to run the business; the greater concern to them is the maintenance of happy relations among the men, for in this they believe lies the key to business success." CHIE NAKANE, JAPANESE SOCIETY 69 (1970).

101. *See, e.g.*, RICHARD FERBER, SOLVE YOUR CHILD'S SLEEP PROBLEMS (1985).

> bed. I think it is a sensible rule not to take a child into the parents' bed to sleep for any reason (even as a treat when one parent is away on a trip).[102]

Still, I wonder whether those cries from the crib are not the same ones that return later in life as alienation and disaffection. We raise our children to leave the family, but in Japan a child is socialized to remain joined. A Japanese person moves from household (*ie*) to "household" throughout his life, from his parents' home to his school, club, and later company.[103] He is not Fujikama working for Toyota. He is Toyota's Fujikama (*Toyota no Fujikama*) and will so introduce himself. What's more, his primary name is not his individual given name but rather that of his family. He is not Katsumi of the Fujikama family. He is Fujikama Katsumi. As such, whatever is said about his biological or corporate family is said about him, for his identity and that of the "household" are inseparable.

Throughout the education of a child, indeed even an adult, Japan stresses modeling. Only after years of following the example set by the teacher can the student even hope to begin finding his own way. These *kata* or forms are thought to be crucial to learning and essential to identification.[104]

Thus, not only do Japanese schoolchildren all learn to do things the same way, they learn them at the same time. Deviation from the model prescribed by the teacher (who, in turn, is simply following the model set by the education ministry) is failure. Difference in the timetable for acquiring skills likewise is unacceptable. Each child must be the same as all others, who must be the same as the teacher.

This master/disciple relationship is particularly evident in the traditional arts of Japan. The great swordsman and calligrapher Tesshu, for example, at the age of 28, met the master swordsman Gimei Asari. Asari was the leader of the *Nakanishi-ha Itto Ryu* school. Asari defeated Tesshu in a match, and Tesshu immediately became his dis-

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102. BENJAMIN SPOCK & MICHAEL ROTHENBERG, DR. SPOCK'S BABY AND CHILD CARE 220 (1985). By comparison, a recent article in a Japanese mothers' magazine says children should sleep with parents until age 5 or 6. At that time, the article counsels, the child himself will want to separate. *Itsu made soine?*, PETIT ENFANT, Feb. 1, 1989, at 122.

103. NAKANE, *supra* note 100, at 4-5.

104. *See* John Stevens, *Good Form*, PHP INTERSECT, July 1989, at 8. The article observes that the kata extend to the proper dress, for there is a kind of uniform for every job. (In other words, the person fits into the job; he does not define it.). Viewed as an end unto themselves, kata can kill initiative. But used correctly, they are the unifying link between form and content that can lead beyond both. A Zen master's saying states that "One enters Zen through kata and leaves it through kata — only then is there complete freedom." *Id.*

ciple. Seventeen years later, while seated in meditation, Tesshu's great enlightenment occurred. He rushed to Asari's dojo and crossed swords with his teacher. Asari immediately put his down and said, "You have arrived." He then named Tesshu his successor as thirteenth headmaster of the school.[105]

> Shortly thereafter, Tesshu established the *Muto Ryu*. *Mu-to*, "no-sword," was not a new concept. Tesshu considered himself a restorer, rather than an innovator — his favorite quotation from the Confucion Analects was: "Do not make up your own teachings but cherish the ways of the ancients."[106] Thus, Tesshu's system (*Ryu*) was firmly based in the traditions of the past.

So strong is the relationship of initiated and initiate that it frequently trumps even that of parent and child. Soshitsu Sen XV is the fifteenth grandmaster of the Urasenke School of Tea Ceremony. As the first son of the fourteenth master, it was known since birth that he would succeed his father. Nevertheless, in his younger years he was often taught by other senior teachers of the school, a practice about which he once complained to his father. The son recalls:

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105. JOHN STEVENS, THE SWORD OF NO-SWORD 18 (1989). It is said that after Asari named Tesshu his successor, he never again picked up a sword. *Id.*

106. *Id.* at 19. *Aikido* (the way of harmonious energy), sometimes described as the peaceful martial art, is a modern example of tension between allegiance to "founding fathers" and development of individual differences. Morihei Ueshiba (now called *Osensei* — or great teacher) developed *Aikido* in the 1920s as a synthesis of various martial arts and spiritual philosophies. *See generally* JOHN STEVENS, *AIKIDO* — THE WAY OF HARMONY (1984) (Stevens is a disciple of Rinjiro Shirata, who himself is a disciple of Ueshiba.). Ueshiba's son, Kisshomaru, succeeded him as master of the school in 1967. As such, he became the official keeper of the flame of tradition.

> [A]*ikido* did not suddenly appear from nowhere. It is the product of a long chain of events, beginning with the Founder and his original disciples whose legacy has been inherited by those who practice *Aikido* today. . . . [W]e have become a large extended family working together for the same goal and having Master Ueshiba as its ancestral head.

KISSHOMARU UESHIBA, THE SPIRIT OF *AIKIDO* 61 (T. Unno trans. 1984).

This admonition notwithstanding, a substantial number of alternatives to *Aikido* developed over the years and the masters of these schools are quite convinced of the superiority of their ways. Without taking sides in the controversy, one can say that Osensei himself was an innovator. It is unrealistic (and perhaps counter to the very spirit of *Aikido*) to expect knowledge to be frozen in the form Ueshiba developed. As in most things in life, a healthy balance between stability and change is best. In other words, the middle way.

> By the look on his face I could tell I was in trouble. He told me to follow him to the room where a wooden statue of Sen Rikyu[107] is enshrined. He made me sit before the altar and pay my respects to my ancestors. Then he reprimanded me for taking my training so lightly.
>
> "Just because you were born to this house does not mean that you will become its master effortlessly. You must, from the start, be strict and severe in developing the Way for yourself. To that end, although the man who stands before you is your father, in these things I am not your father but the Grand Tea Master, practicing and training in the Way of Tea. Simply stated, as long as you pursue this path, I am your teacher . . . ."
>
> At that moment I saw him not as my father but as a great master of the Way. From then on . . . in things pertaining to my learning, the new relationship of teacher and disciple was born.[108]

The tea ceremony itself is a paradigm of form. Its beauty and meaning come from the ritualized economy of gesture. Yet with the prescribed form, an infinite variety of expression is possible. It is this interplay of fixed form and variation of environment that makes the art of tea enduring.[109]

To Westerners and especially Americans, this preoccupation with form may seem imprisoning. Our culture rushes through the fundamentals so that one may rapidly develop his own style. Robert Whiting

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107. Sen Rikyu (1522-91) is the father of the "tea ceremony." In fact, he blended and systematized a variety of styles that had been practiced and emphasized the simplicity of form favored by his teacher Takeno Jo-o (1502-55).

108. SOSHITSU SEN XV, TEA LIFE, TEA MIND 19-20 (Urasenke Foundation trans. 1979). A novel about the fourteenth century creators of the Noh theatre traces the evolution of a boy from apprentice to master of the school. The boy followed the forms set forth by his father until he eventually surpassed them. NOBUKO ALBERY, THE HOUSE OF KANZE (1985).

109. In addition to the prescribed form of how to drink from the bowl, when to turn it, and the like, Rikyu handed down seven rules for the host. They are simple and, for that reason, all the more profound:

1. Make a delicious bowl of tea.
2. Lay the charcoal so that it heats the water.
3. Arrange the flowers as they are in the field.
4. In summer suggest coolness; in winter, warmth.
5. Do everything ahead of time.
6. Prepare for rain.
7. Give those with whom you find yourself every consideration.

SEN, *supra* note 108, at 31-41.

has chronicled this clash of cultures in his two books about foreign baseball players in Japan.[110] Americans, especially pitchers, ease in and out of training, alternating periods of stress and rest. Coaches give advice, but it is up to the player to find his own style and reach his personal peak. In Japan, on the other hand, the coach is not simply a helper but a ruler, the samurai to the shogun, who of course is the manager. The player is made to fit the mold and endlessly practice the prescribed forms.

No doubt the apotheosis of such training is that encountered in Zen monasteries. There, all remnants of individuality are stripped from the student monks. Their heads are shaved; their clothes are exchanged for uniform robes; and their practice follows the strict rules handed down from generation to generation. However, what is implicit in many of the traditional arts is explicit in Zen. The goal is to transcend the form, to cast off all that one has identified with in the past and, in an explosive moment, recognize one's unlimited Buddha nature. This done, the enlightened person resumes his life in a world of form, but now — he is master of the form rather than one who is in its grip, for he has experienced the form beyond form. In the words of the *Hanya Shin Gyo* sutra:

> Form is exactly Mu [openness], Mu exactly form;
> Feeling, thought, discrimination, perception
> Are likewise like this . . .
> So in Mu there is no form,
> Not stained, not pure,
> Without loss, without gain . . .
> Therefore the Bodhisatva [Buddha successor] relies on Prajna Pramita
> With no hindrance in the mind
> No hindrance, therefore no fear. . . .[111]

The result is the man of no rank, who can be anywhere. "[H]e is individualistic, yet he is transcending the individuality."[112]

Such people, of course, are rarities in any society. In Japan, however, the conventional wisdom is even the lesson of casting off lessons must be learned from a master of the lessons themselves. And even

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110. ROBERT WHITING, THE CHRYSTANTHEMUM AND THE BAT (1977); ROBERT WHITING, YOU GOTTA HAVE WA (1989).

111. INSTITUTE FOR ZEN STUDIES, HOW TO PRACTICE ZAZEN (undated).

112. Daisetsu Suzuki, *quoted in* ZENKEI SHIBAYAMA, A FLOWER DOES NOT TALK 57 (S. Kudo trans. 1970).

the enlightenment experience must be verified by the master, although there is no doubt in the person to whom it happened. All things are made real by reference to another.

Thus, one need not be a monk or a student of Tea or the sword to experience the importance of molding personality to fit the established template. It is present all the days of a Japanese person's life. In written language, it is important not only to produce a correctly-formed ideograph but also to form it correctly. Indeed, many would say that unless the strokes are brushed in exactly the right sequence in exactly the same direction, a proper character cannot be drawn. In the spoken language, too, a thought is to be expressed in the proper form, taking account of the relationship between the speaker and the listener as well as the person the speech is about.[113]

It is my observation that Japanese people are also much more canonical about pronunciation than Americans. Listening to a foreigner mispronounce our language, we usually can discern what words are being invoked. However, Japanese people seem much less able to relate a slight mispronunciation to its intended one. Such errors frequently result in only blank stares. I would attribute this solely to the unique poverty of my own pronunciation, except that I have seen it with other people, too. Thus, it strikes me as another example of adherence to the norm.[114]

The import of all this for privacy law is that it shifts the focus from the individual to the contextual, for the Japanese individual is less likely to have one enduring personality, appropriate to all occasions. As such, an invasion of privacy occurs when something alters one or more of those relationships, changing its form. The harm is not so much the loss of control of personal information but rather the disruption in relationships that the information brings about. In the case of Beat Takeshi, for example, the stories of his girlfriend affected relations with her, his wife, his employers, and his audience. So viewed, privacy is a bit of a misnomer in the Japanese context. The essence of the offense is something more like lack of consortium.

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113. *See generally* Richard B. Parker, *Law, Language, and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179, 194 (1988).

114. Japan, of course, has regional dialects — *ben*. However, these dialects are but a discrete number of standardizations and frequently involve little more than choice of word rather than pronunciation. For example, in Tohokuben (the dialect in northern Honshu), good evening is *Oban desu* rather than *Kon'ban wa*. In Kansaiben (around Osaka), thank you is frequently said *Okini* instead of *Doomo* or *Arigatoo*. In Kyoto, addresses are even given in a different form, *agaru* and *sagaru* (above or below a given point), than that used in other parts of the country.

This is underscored by the general lack of privacy in daily life in Japan. A visit to a physician, for example, is a radically different experience than its counterpart in the United States. Medical care, even the best medical care, is administered clinic-style, with a number of patients seated inside a common room. The doctor moves from patient to patient, taking their case histories and discussing their complaints, all within earshot of the others. Not only would most middle-class Americans find this public disclosure to be uncomfortable, they would also be able to insist that the physician keep their conversations private under an evidentiary privilege.[115]

One time I visited a practitioner of *hari* — accupuncture — for relief from a sinus problem. It's difficult to describe my surprise when I was led to the treatment room. There in front of me sat an old woman with needles stuck up and down her bare back. Around the sides were about a dozen beds, each occupied by someone whose body resembled nothing so much as a pin cushion. The doctor led me to a bed somewhere in the middle of all this, where he heard my complaint and proceeded to poke me in a large number of hitherto unnoticed venues — the most uncomfortable of which was in the hand midway between the thumb and first finger. He then circulated around the room, talking at normal volume with the other patients about their complaints and, every few minutes, coming around to turn everybody's needles, lest one become too comfortable.[116] The combination of body exposure, public revelation of medical distress, and open expressions of discomfort were unlike anything I had experienced in the United States.

Yet, such a scene was not at all unlike many others in Japanese society. In the office, workers are rarely separated into private spaces. Instead, they perform their duties at long tables, side by side, always under the watchful eye of the boss, who sits near the front.[117] No one could make a personal phone call, for example, without all of his neighbors knowing.

The crowding of the subways and trains in Japan is frequently discussed by Westerners, probably because the degree of bodily contact is so foreign to them. Even in New York, it is possible to keep one's distance a bit. Not so in Japan, at least in the major cities during

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115. *See generally* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 243-60 (3d ed. 1984).

116. When he did this, I saw sparks fly in my closed eyes, as though my electrical system were shorting out.

117. *See generally Offices Without Walls*, PHP INTERSECT, April 1989, at 12.

rush hour. Indeed, I suspect many people find the crushing together somewhat comforting as the mass body sways back and forth as one with every turn of the track. Even at home, it is hard to be by oneself. Space is at a premium,[118] and mom and dad generally share sleeping quarters with the kids.

If "[p]rivacy is control over when and by whom the various parts of us can be sensed by others,"[119] it is hard to avoid the conclusion that there is very little privacy at all in Japan, at least privacy of the sort that we have become accustomed to in the West. One cannot avoid being seen, and touched, and heard, and smelled publicly. Thus, it is unrealistic to expect to keep much to oneself. How can we reconcile this observation with the fact that the Japanese courts have been somewhat more protective of "privacy" interests than those of the United States? The answer, I suggest, is found not so much in the psychological pain of the plaintiff but rather the breach of etiquette by the defendant.

In a crowded country such as Japan, where so much by necessity happens in public, there is an understood social duty not to take advantage of the situation. In the doctor's office, one could gawk at the other patients, but it is impolite to do so. On the train, the lowest of lowlife is the masher who unnecessarily slips his hand around a woman's private parts. Should the woman overcome her reserve and scream out what has happened, the offender will be totally humiliated. Even in the office, one is expected to pay attention to his or her own work and tune out that of the others. And anyone who has visited a public bath knows it is rude to stare.

That, and the disruption of relationships, it seems to me, is why Yukio Mishima lost in *After the Banquet* and more recently Chihira Isa in *Reversal*. The Kyoto Records case, too, is made comprehensible in this manner. The focus is on the breach of decorum, the code of civility that is unwritten but nonetheless present. Certainly, plenty of people could see the Socialist politician's relationship with the woman in *After the Banquet*, but that in no way excused Yukio Mishima from pointing it out to others. One could dig through the criminal records and find out what had happened to the man convicted in the *Reversal* case, but that does not mean one should do so.

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118. Much of Japanese architecture is devoted to creating the feeling of space in cramped quarters, for example the *tsubo niwa* — literally, a 3.3 square meter garden. *See Tsubo Niwa: Japanese Courtyard Gardens*, KYOTO J. 38 (1989). For a broader view of the shortage of space, see *Tokyo and the Land Crisis*, JAPAN ECHO 35-54 (1987).

119. Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974).

In the United States, in contrast, the First Amendment provides a broad license to snoop and tell, especially when public people are involved.[120] And if public records are involved, the information cannot even pass the threshold test of being private at all. The public has a right to know, unless the plaintiff can show some compelling reason why it should not.

The Japanese public, on the other hand, is not all that sure it wants to know. In the wake of the Recruit and Uno-geisha revelations, a survey by the Asahi newspaper revealed that 73% of a random sample of voters disagreed with the notion that the press ought to actively report politicians' scandals. Even the young people were against it. Among women in their 20s and 30s, 80% opposed such vigorous reporting. Almost all of those who favored active reporting of political scandals supported the opposition parties, and these people, by definition, are in the minority.[121]

This is not to say that people in Japan will not read the stories once they are presented. To the contrary, they will. But what they, and the courts, seem to be saying is that the publishers ought to save the public from giving in to this temptation. Few will turn away from gossip, but fewer still hold any affection for the gossiper.

V. CONCLUSION

Japan and America both enjoy mass media that are vigorous and, often, entertaining and informative. In their zeal, however, the media are prone to undervalue the effect their reporting has on its subjects. Privacy law acts as a curb against these excesses, but the understanding of privacy is significantly different in these two countries.

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120. Two recent works by American scholars suggest that privacy law in the United States is contextual, too. Robert Post argues that essence of the tort is a disclosure's offense to the moral sense of the community. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989). Kim Scheppele asserts that the proper definition of privacy emanates from "which rules people would agree to live by *if they might be anyone* in a particular society." She calls this the contractarian approach. KIM L. SCHEPPELE, LEGAL SECRETS 311 (1988).

Without endorsing or rejecting these formulae, I feel they still differ from my characterization of Japanese privacy law. Post and Scheppele, although they have added society to the mix, remain focused on which disclosures society would consider objectionable to an individual who is the subject of the story. My view of Japan, in contrast, focuses as much on the discloser and whether he abused his position in society, as on the subject. Moreover, the harm in Japan is to the subject's relationships (more like American defamation law), not to his atomized sense of personal outrage or violation.

121. *Public Opinion Survey on News Reporting*, ASAHI SHIMBUN, Oct. 30, 1989, at 8.

As the United States has a hundred-year history of privacy jurisprudence, there may be a strong temptation to borrow these decisions for guidance in the Japanese courts. However, America is a country where individuals can easily lead private lives. Its rush hour consists of separate persons enclosed in individual cars headed to the workplace or home. At the office, at least an individual cubicle is usually available. At home, at least for the middle and upper classes, the space is sufficient to allow everyone to get away from each other. We are a nation of independent contractors, moving our psychological bubbles with us from place to place. The social imperative, as reflected in our First Amendment, is to cure us of our separateness by telling us about the doings of one another.

Japan is quite different. Save for a few *yamabushi* — mountain monks — almost no one can avoid the crowd.[122] Japanese people are experts at turning inward when forced together outwardly. Geography throws them together by necessity. Indeed, their identity is formed almost exclusively by the relationships they encounter. Thus, the pressing need, one might say, is not for more relationship but rather for more psychological space.

As such, American ideas of privacy may well be misplaced in Japan. The more accurate understanding of the Japanese concept is abuse of relationship that disrupts other relationships. It is a breach of trust, a rejection of *amae*. "The press is the mass public on the train. It can see, but it ought not look."[123]

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122. Those that do sometimes become folk heroes — the monk Ryokan, for example. *See* ONE ROBE, ONE BOWL: THE ZEN POETRY OF RYOKAN (J. Stevens ed. 1977).

123. *See* (how appropriate a signal for this citation) W. Michael Reisman, *Looking, Staring and Glaring: Microlegal Systems and Public Order*, 12 DENVER J. INT'L L. & POL. 165 (1983).