"REVISITING RAMSEYER: THE CHICAGO SCHOOL OF LAW AND ECONOMICS COMES TO JAPAN"[1*]

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ABSTRACT

Mark Ramseyer has been a leading force in bringing to bear the methods of Law and Economics to an increasingly ambitious analysis of the Japanese legal and economic systems. He has deliberately assumed an iconoclastic position in debunking a number of widely held beliefs about Japan. More recently he has engendered a bitter degree of controversy by idiosyncratically analysing Korean "comfort women" and residents in Tokyo before and during World War II. In this paper we examine Ramseyer's long contribution to Japanese studies and conclude that he has too frequently let ideological objectives, paralleling three key tenets of the Chicago School of economics, interfere with what should be cool-headed analysis. While asking many of the right questions, prompting often helpful responses and further research, he unfortunately has let *a priori* assumptions determine his answers. Ramseyer has proven reluctant to review his assessments or implications, largely dismissing contrary evidence.

Keywords: comparative law, Asian law, corporate governance, consumer law and policy, Japanese studies, economic history, market fundamentalism, rational choice theory, social science methodology

I. INTRODUCTION

> Teachers are entitled to full freedom in research and in the publication of the results ... College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others ...[4]

Media and academic controversy erupted early in 2021 within Japan and Korea around published work by Harvard Law School's Mitsubishi Professor of Japanese Legal Studies Professor J. Mark Ramseyer. Predictably, it then spread to the US and around the world, providing even more oxygen to a growing sense of outrage. A pre-print of his article entitled "Contracting for Sex in the Pacific War," accepted and published online in December 2020 by the peer-reviewed International Review of Law and Economics[5] suggested that Korean "comfort women" had voluntarily consented to providing sexual services for the Japanese military around World War II on a contractual basis. Factually, however, critics began pointing out that such claims were buttressed by insufficient, or even dubious, evidence. Such trespasses led to calls for the article's retraction. On 10 February 2021 the Review issued an Expression of Concern to alert readers that the matter was being investigated.[6]

Theoretically, Ramseyer's article was criticized by hundreds of professors in an Open Letter objecting to Ramseyer's application of economic or game theory.[7] Empirically, leading historians protested about factual weaknesses, including two

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[4] AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940).

[5] J. Mark Ramseyer, *Contracting for Sex in the Pacific War*, 65 INT'L R.L. & ECON. 105971 (2021).

[6] *Expression of Concern* (Mar. 19, 2021), initially available at https://www.journals.elsevier.com/international-review-of-law-and-economics/announcements/expression-of-concern and now instead added as an "Update" at the end of the pre-print for the article and in the online table of Contents for this issue, available via https://www.sciencedirect.com/journal/international-review-of-law-and-economics/vol/65/suppl/C:

> "The International Review of Law and Economics is issuing an Expression of Concern to inform readers that concerns have been raised regarding the historical evidence in the article listed above. These claims are currently being investigated and the International Review of Law and Economics will provide additional information as it becomes available. Available online 10 February 2021."

[7] *Letter by Concerned Economists Regarding 'Contracting for Sex in the Pacific War' in the International Review of Law and Economics*, http://chwe.net/irle/letter/ (last updated May 11, 2021).

professors from Harvard University[8] and another from the Australian National University.[9] Student and other groups at Harvard and elsewhere also rejected Ramseyer's conclusions.[10] Some of these critics began to revisit and query his other recent works, such as a chapter on Koreans attacked after the 1923 Kanto Earthquake,[11] as well as an early article arguing that Japanese prostitutes had voluntarily entered into "indentured servitude" in brothels.[12] A virtual cottage industry of academic critiques has surfaced in direct response to such works, especially his "Contracting for Sex" article.[13]

Law professors and other friends from Korea and elsewhere even began asking us whether Ramseyer was a racist (or at least a pro-Japan nationalist) or even a misogynist. Yet we are unaware of any evidence for that. Nor are we qualified historians able to assess the large primary and secondary literature around the "comfort women" issue, although we briefly come back to this controversial issue in our conclusions (*infra* Part IV).[14] Rather, we mainly argue *infra* that Ramseyer has long been driven by a market fundamentalist ideology, quite often skewing his arguments and/or factual analysis, with more recent work (such as those on Koreans) going into new and more sensitive fields that highlight such weaknesses for a wider audience. Ramseyer's recent forays may also be reacting to the rise of postmodernist theory and practice, which also play hard and loose with logic and facts but in their own ways.[15] There has also been a reported gradual shift to the

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8 Andrew Eckert & Gordon Carter, *Statement by Andrew Gordon and Carter Eckert Concerning J. Mark Ramseyer, 'Contracting for Sex in the Pacific War'* (Feb. 17, 2021), https://dash.harvard.edu/handle/1/37366904.

9 Tessa Morris-Suzuki, *Letter* (Mar. 11, 2021), http://chwe.net/irle/morris_suzuki_letter.pdf.

10 Jeannie Suk Gerson, *Seeking the True Story of the Comfort Women*, THE NEW YORKER (Feb. 25, 2021), https://www.newyorker.com/culture/annals-of-inquiry/seeking-the-true-story-of-the-comfort-women-j-mark-ramseyer.

11 J. Mark Ramseyer, *Privatizing Police: Japanese Police, the Korean Massacre, and Private Security Firms*, *in* THE CAMBRIDGE HANDBOOK OF PRIVATIZATION (Avihay Dorfman & Alon Harel eds., 2021); *see* Song Sang-Ho, *Harvard Professor Ramseyer to Revise Paper on 1923 Massacre of Koreans in Japan: Cambridge Handbook Editor*, YONHAP NEWS AGENCY, (Feb. 20, 2021), https://en.yna.co.kr/view/AEN20210220002451325.

12 J. Mark Ramseyer, *Indentured Prostitution in Imperial Japan: Credible Commitments in the Commercial Sex Industry*, 7 J.L., ECON. & ORG. 89, 89–90 (1991).

13 *See, e.g.,* Yong-Shik Lee et al., *The Fallacy of Contract in Sexual Slavery: A Response to Ramseyer's "Contracting for Sex in the Pacific War"*, 42 MICH. J. INT'L L. 291, 291 (2021).

14 *See* James Claxton et al., *Litigating, Arbitrating and Mediating Japan-Korea Trade and Investment Tensions*, *in* NEW FRONTIERS IN ASIA-PACIFIC DISPUTE RESOLUTION 261 (Luke Nottage et al. eds., 2021), with a manuscript version at https://ssrn.com/abstract=3497299, for an aspect of the related ongoing bilateral tension spilling over into cross-border trade and investment law and practice issues.

15 *See* HELEN PLUCKROSE & JAMES LINDSAY, CYNICAL THEORIES: HOW UNIVERSITIES MADE EVERYTHING ABOUT RACE, GENDER, AND IDENTITY - AND WHY THIS HARMS EVERYBODY (2020).

political left among some teachers, particularly on US university campuses.[16] At the least, such tendencies, along with greater political polarization and wider socio-economic tendencies in the USA,[17] now turn Ramseyer's methodological approach and conclusions into literal touchpaper in terms of igniting heated controversy.

Already in March 2021, moreover, a junior scholar approached one of us with bemusement because an editor of a Japanese studies journal (outside Japan) had recommended deleting all citations to Ramseyer's works. The pointed suggestion was made despite the fact those works dealt with very different and general topics in Japanese law. Such a reaction strikes us as unfortunate and unproductive. Even if one or a few papers from an author are proven to be hopelessly flawed, other published work should not be necessarily tarred with the same brush. Each of these needs to be separately evaluated instead of condemning the entirety to some shadow existence. Weaker papers that still meet basic academic standards can remain useful for researchers, teachers, and the wider public—prompting work in response and generating deeper insights. Much of the voluminous work by Ramseyer, including his many books by reputable publishers and almost two hundred peer-reviewed articles and chapters,[18] cannot be dismissed—sight unseen—as simply worthless. His academic career, including a professorship at Harvard (from 1998), with others earlier at Chicago Law School (1992-97) and UCLA (1986-92), did not happen randomly or by accident.

Accordingly, in this article, we seek to set some of Ramseyer's output and general approach in a wider context. We highlight in particular the strong parallels with three methodological tenets of the Chicago School of economics.[19] This developed over the 1950s and 1960s especially under the leadership of Milton Friedman, George Stigler, Aaron Director[20] and later Gary Becker.[21] As detailed in

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16 *See* Sam Abrams & Amna Khalid, *Are Colleges and Universities Too Liberal? What the Research Says About the Political Composition of Campuses and Campus Climate*, HETERODOX: THE BLOG (Oct. 21, 2020), https://heterodoxacademy.org/blog/are-colleges-and-universities-too-liberal-what-the-research-says-about-the-political-composition-of-campuses-and-campus-climate/.

17 *See*, *e.g.*, GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE (2018).

18 *See generally J. Mark Ramseyer*, HARV. L. SCH., https://hls.harvard.edu/faculty/directory/10697/Ramseyer/publications (last visited Feb. 10, 2022).

19 CRAIG F. FREEDMAN, CHICAGO FUNDAMENTALISM: IDEOLOGY AND METHODOLOGY IN ECONOMICS (2008); DAVID COLANDER & CRAIG FREEDMAN, WHERE ECONOMICS WENT WRONG: CHICAGO'S ABANDONMENT OF CLASSICAL LIBERALISM (2018).

20 GEORGE STIGLER: ENIGMATIC PRICE THEORIST OF THE TWENTIETH CENTURY (Craig Freedman ed., 2020).

21 Aaron Director was something of the *eminence grise* of the Chicago School, choosing to publish very little. Yet he is rightfully acknowledged as the father of Law and Economics at the Chicago Law School. Director was appointed to the position in 1946 upon the untimely death of Henry Simons, and was the initial editor of THE JOURNAL OF LAW & ECONOMICS. *See* Douglas Martin, *Aaron Director, Economist, Dies at 102*, N.Y. TIMES (Sept. 16, 2004), https://www.nytimes.com/2004/09/16/us/aaron-director-economist-dies-

Part II.A *infra*, the first tenet is the *a priori* conviction that markets work. This presumption consequently generates as quest to uncover data proving that any ostensible challenge to this contention was erroneous. In essence, "everything you think you know is wrong." The second tenet is an unstinting skepticism (Part II.B), particularly about stated intentions or attitudes of socio-economic actors that ran counter to narrow self-interest. Economists therefore know more, at a deeper level, than actual economic agents do. Completing this trinity is an impregnable ideological commitment that caused an almost automatic and combative reaction against the scourge of communism, economic planning and its welfare state offshoots (Part II.C). Basically, any variant of collectivism nurtures a slippery slope leading to an authoritarian loss of liberty. This drives an explicit, or often implicit, normative preference for market-based approaches to socio-economic ordering—even in supposedly descriptive or empirical analyses.

These three cardinal principles were extended to the economic analysis of law, developed by Aaron Director after he joined the Chicago Law School from 1946, but extended by Robert Bork (1978) and Richard Posner (1972) over the 1970s and 1980s. Ramseyer, completing his JD degree at Harvard Law School in 1982, caught the end of this "first wave" of law and economics thinking and has doggedly applied it to Japanese law. He has missed or deliberately avoided subsequent waves,[22] especially the legal academy's belated engagement also with "behavioural economics." The latter draws particularly on social psychology to question core tenets of the "rational decision making" underpinning neoclassical economics and hence its faith in markets rooted in narrowly self-interested behavior.[23]

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at-102.html.

> "Milton Friedman, Dr. Director's brother-in-law and his long-time colleague, said in an interview yesterday that his achievement was 'to apply economic analysis to the kind of issues that had been treated on the basis of supposed common sense before'.
> A central idea of law and economics is to promote efficiency, not equitable distribution, making results, not actions, the criteria for legal judgments. From the field of antitrust, what its adherents call a 'movement' has expanded to most legal arenas and beyond. Robert H. Bork, who was a student of Dr. Director and later a judge and antitrust expert, said Dr. Director was 'the first one anywhere to question the economics of antitrust as the courts developed it'."

[22] THE SECOND WAVE OF LAW AND ECONOMICS (Gillian Hadfield & Megan Richardson eds., 1999).

[23] *See*, *e.g.*, BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000) (showcasing the work of Mr. Sunstein,who completed his JD at Harvard in 1978, but was much longer at the University of Chicago (1981-2008) before joining Harvard Law School and working for the Obama Administration); *see* EYAL WINTER, FEELING SMART: WHY OUR EMOTIONS ARE MORE RATIONAL THAN WE THINK (2014), for more recent combinations of psychology and game theory, uncovering complex interactions between rationality, emotions and wider cultural differences. In addition, Harvard Professor Joseph Patrick Henrich charts how culture and history – particularly the dramatic explosion of literacy in the West following the Protestant Reformation – have interacted with psychological development, tending to make individuals in Europe and North America comparatively "WEIRD"

Instead, consistent with the post-war Chicago School of economics, Part III explains how the topics and data selected by Ramseyer and his co-authors almost always seem to show that markets and self-interested behavior operate in Japan, no differently than they do—or perhaps must—in other countries.[24] Ramseyer easily finds alternative explanations to debunk commonly held views.

For example, criticizing accounts of corporate governance (*infra* Part II.A.1), he blames Marxist sympathizers within Japan, and readily-duped foreign commentators, for believing in a seemingly observable concentration of capital via institutions such as vertical or horizontal "*keiretsu*" (corporate groups).[25] Price theorists of the Chicago School persuasion [26] would similarly find such

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(Western, Educated, Industrialized, Rich and Democratic); *see also* JOSEPH PATRICK HENRICH, THE WEIRDEST PEOPLE IN THE WORLD: HOW THE WEST BECAME PSYCHOLOGICALLY PECULIAR AND PARTICULARLY PROSPEROUS 424-27 (1st ed. 2020) (showing such empirically-based theoretical complexity is anathema to the older Chicago School prioritization of narrow and universal rational behavior).

[24] *See*, *e.g.*, YOSHIRO MIWA & J. MARK RAMSEYER, *Asking the Wrong Question? Changes of Governance in Historical Perspective?*, CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATE, AND MARKETS IN EUROPE, JAPAN, AND THE US 73 (Klaus Hopt et al. eds., 2005). Thus, what works in theory, works in practice. Rationality is not just a heuristic assumption, but rather reflects an observable reality.

> "It's getting more and more, more and more part of him as he got older actually, this whole view. He insists it's rational. He would tell you, 'There is some rational explanation for it. It's just that you haven't looked completely into it and found it.'… I don't think it was clear in his mind what the distinction was, between stating a powerful position that covers a lot of the cases, and what happens in a particular event. When confronted with a particular application he literally almost believed it. He wouldn't back off and say 'Well, look, that's part of the remaining 10 or 20 percent, which is doing better than explaining just fifty percent - tossing coins, that's just part of the noise. Methodologically he understood that, but in his gut I don't think he really understood that."
> (Craig Freedman in conversation with Sam Peltzman, October 1997).

This and subsequently cited quotes come from interviews of many of the leading lights in and around the Chicago School, conducted by Craig Freedman over late 1997 and recorded and then transcribed (on file with the authors). Several of these transcribed interviews have also been published in other published works.

[25] *Cf.* CRAIG FREEDMAN & TOOMAS TRUUVERT, THE JAPANESE ECONOMY: FROM BLACK SHIPS TO DARK DEPRESSION (2021); *cf.* BRUCE ARONSON, *Japanese Corporate Law and Corporate Governance in Historical Perspective,* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE LAW 401, 406-11 (Harwell Wells ed., 2018).

[26] "Price theory" essentially argues that all relevant information is encapsulated in market prices, and economic actors respond passively to such signals. *See* GEORGE STIGLER, ENIGMATIC PRICE THEORIST OF THE TWENTIETH CENTURY (Craig Freedman ed., 2020) (focusing on applications by a leading proponent). The Chicago School is also characterized by arguing that all transactions can and/or should be seen in terms of markets and price signals, including for example adopting babies, entering into marriage or engaging in prostitution. *Cf.* GORDON MENZIES, WESTERN FUNDAMENTALISM: DEMOCRACY, SEX AND THE LIBERATION OF MANKIND 84 – 92 (2020). In other words, explicit or implicit contracts are the basis for all exchanges, directly monetized or not. Since rationality is the basis for all human decision-making, all contracts have the same basis. Accordingly, a market is a market

competitively constrained constructs hopelessly hard to swallow. For Ramseyer, Japan is uncontrovertibly a market-based economy, essentially undifferentiated from any other. He can therefore largely equate product safety law and practice in Japan and the United States, explaining away some obvious differences say in litigation patterns (Part II.A.2). Although we select for analysis topics in market regulation, the focus of most of Ramseyer's voluminous writing, we also show how he applies simple assumptions of narrow economic rationality to debunk conventional wisdom about Japan's political economy, arguing that legislators dominate bureaucrats and judges lack political independence (Part II.A.3). Throughout his work, Ramseyer insists not only that markets clear in Japan, but that expressed opinions count for naught—only observable outcomes are relevant (Part II.B). The normative agenda, largely implicit, is that free market solutions are always preferable (Part III.C).

As we conclude in Part IV, this approach does continue to help shake up the field of Japanese law study, prompting more independent thinking and innovative ways to find and integrate data sources.[27] Ramseyer's rhetoric is also a delight, unlike much writing by economists (or lawyers!), although rhetoric has been increasingly recognized as another marketing tool in trade among influential economists.[28] However, Ramseyer's iconoclastic and ever-more encompassing analysis of Japanese law and related phenomena is likely to encounter ever-more resistance as he treads into more emotionally and politically charged areas. This is indeed already shown by the furor over his work on "comfort women," likely also to extend to his other recent studies of Koreans in Japan since the colonial

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is a market whether economic, political or sociological.

[27] *See*, *e.g.*, MARK D. WEST, LAW IN EVERYDAY JAPAN: SEX, SUMO, SUICIDE, AND STATUTES (2005); Eric Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CAL. L. REV. 313 (2006); Eric Feldman, *The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan*, 27 MICH. J. INT'L L. 743 (2006).

[28] DEIRDRE N. MCCLOSKEY, KNOWLEDGE AND PERSUASION IN ECONOMICS (1994); CRAIG FREEDMAN, IN SEARCH OF THE TWO-HANDED ECONOMIST: IDEOLOGY, METHODOLOGY AND MARKETING IN ECONOMICS (2016). The Chicago School has not been recognized, at least not sufficiently, for its ability to market its ideas. This knack at least partially explains its post war success. Certainly, Milton Friedman and George Stigler were past masters of this trade. Friedman could have successfully sold sand to a Bedouin if he had focused on the challenge.

> "George Stigler, I remember when I was a young person, wired and said 'Selling is very important in your research. So write better. Work on writing because that is important. You've got to sell what you are doing.' I think he's exactly right. You've got to sell what you are doing. It may be that in the long run good ideas do surface but they surface faster, if written in a persuasive fashion. Moreover, bad ideas may be put persuasively. And they may gain the necessary threshold. However, taking that same analogy in competition among ideas, there is a presumption, although not a certainty, that in the longer run, the good ideas are going to compete out the bad ideas. But that may take a long time and may not even always operate. There's nothing necessary about that. Nothing guaranteed about that."

(Craig Freedman in conversation with Gary Becker, October 1997).

era[29] and "buraku" outcastes.[30]

After all, it was much easier for Friedman and others at Chicago to argue that markets always did work—or, at least, should be allowed to—during the Cold War era when the debate could be transmuted straightforwardly into a struggle between freedom (choice) and totalitarianism (planning). Now that even Japan has deregulated significantly, from the 1990s in particular,[31] it becomes harder and harder to push for that last measure of ostensibly complete market liberalization.[32] Similarly, as Tanase argues,[33] partly by comparing developments in US law, it becomes harder and harder to achieve a pure liberal or indeed libertarian model of law. In addition, the best economists these days tend to be unafraid to boldly go where topical issues and good data lead them, even if this means acknowledging limitations of their work, or if conclusions are generated at contradictory ends of the ideological spectrum.[34] Lastly, the worlds or disciplines of economics itself, and law as a whole, retain elements of their own logic or ways of conceiving things even as they are increasingly perturbed by each other. Both tend to co-evolve with politics and policymaking rather than

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[29] J. Mark Ramseyer & Eric Rasmusen, *Outcaste Politics and Organised Crime in Japan: The Effect of Terminating Ethnic Subsidies*, 15 J. EMPIRICAL LEGAL STUD. 192 (2018); J. Mark Ramseyer, *On the Invention of Identity Politics: The Buraku Outcastes in Japan*, 16 REV. L. ECON. 1 (2020).

[30] J. Mark Ramseyer, *Social Capital and the Problem of Opportunistic Leadership: The Example of Koreans in Japan*, 51 EUR. J.L. & ECON. 1 (2021).

[31] *See* FREEDMAN & TRUUVERT, *supra* note 25.

[32] Applying the sort of cost-benefit analysis widely used at Chicago, the marginal costs of increasing market liberalization should eventually overwhelm the marginal benefits. The standard assumption is the same one that guides basic supply and demand.

[33] *See generally* TANASE TAKAO, COMMUNITY AND THE LAW: A CRITICAL REASSESSMENT OF AMERICAN LIBERALISM AND JAPANESE MODERNITY (L. Nottage & L. Wolff trans., 2010).

[34] Indeed, a good example is a well-known economics professor still at Chicago University, Steven Levitt. His co-authored 2001 study linked the reduction in crime over the 1990s to wider legalization of abortion from the 1970s in the US. This finding attracted criticism from those both those on the political right (more opposed to liberalizing abortion) and on the political left (as the analysis addressed issues of race). In essence, the study stubbed a number of ideological toes. However, the basic study was built on the insight that abortion lessened the number of unwanted children. Such offspring would tend to receive a lower level of parental care for a variety of reasons. The study also controlled for other possible causes of a lower crime rate. Abortions statistically explained a significant amount of the observed drop in crime. John J. Donohue and Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON 379, *extended recently in* John J. Donohue & Steven Levitt, *The Impact of Legalized Abortion on Crime over the Last Two Decades*, 22 AM. L. & ECON. REV. 241 (2020). Certainly today, there is some level of consensus that changes in demography did affect crime rates, prompting statistical research in other countries including Australia. *See generally* DONALD JAMES WEATHERBURN & SARA RAHMAN, THE VANISHING CRIMINAL: CAUSES OF DECLINE IN AUSTRALIA'S CRIME RATE (2021)). For other wide-ranging hypotheses, innovative data sources and sometimes politically controversial conclusions, *see, e.g.*, STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING (1st ed. 2005).

the latter being overwhelmed by either law or economics.[35]

The following analysis is based on our Working Paper (2006-4) for Macquarie University's Centre for Japanese Economic Studies, presented in 2006 at conferences held by the Australian Network for Japanese Law (ANJeL), the Asian Studies Association of Australia and the Australian Society of Heterodox Economists.[36] Despite a positive reception at those conferences and from others who read our Working Paper informally, we unfortunately never got around to publishing it in a peer-reviewed journal. We each were involved in other bigger projects, including various books on economic history[37] and Japanese or Asian law.[38]

In addition, after the Global Financial Crisis (2007-08), we thought Ramseyer might back off anyway from his faith in narrow economic rationalism and market-based socio-economic ordering, or that others would see anyway the risks involved in such descriptive and/or normative approaches.[39] After Japan's 2011 "triple disasters,"[40] where the calm and community-minded responses of

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35 *See*, *e.g.*, TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Gunther Teubner et al. eds., 2004); *see* REGULATING LAW (John Braithwaite et al. eds., 2004).

36 *See* Craig Freedman & Luke Nottage, *You Say Tomato, I Say Tomahto, Let's Call the Whole Thing Off: The Chicago School of Law and Economics Comes to Japan*, (Macquarie Univ. Ctr. For Jap. Econ. Stud., Working Paper No. 2006-4), https://www.researchgate.net/publication/228606720_You_Say_Tomato_I_Say_Tomahto_Let%27s_Call_the_Whole_Thing_Off_The_Chicago_School_of_Law_and_Economics_Comes_to_Japan.

37 *See*, *e.g.*, CRAIG F. FREEDMAN, CHICAGO FUNDAMENTALISM: IDEOLOGY AND METHODOLOGY IN ECONOMICS (2008); CRAIG FREEDMAN, IN SEARCH OF THE TWO-HANDED ECONOMIST: IDEOLOGY, METHODOLOGY AND MARKETING IN ECONOMICS (2016); GEORGE STIGLER: ENIGMATIC PRICE THEORIST OF THE TWENTIETH CENTURY (Craig Freedman ed., 2020); COLANDER & FREEDMAN, *supra* note 19; FREEDMAN & TRUUVERT, *supra* note 25.

38 *See*, *e.g.*, Takao Tanase, *Nihonjin No Kenrikan/Keibatsu Ishiki to Jiyushugiteki Hochitsujo [Japanese Conceptions of Rights and Attitudes Towards Punishment, and Liberal Legal Order]*, 157 HOGAKU RONSO 32 (2005) (translated in TANASE TAKAO ET AL., COMMUNITY AND THE LAW: A CRITICAL REASSESSMENT OF AMERICAN LIBERALISM AND JAPANESE MODERNITY (L. Nottage & L. Wolff eds., 2010)); ASIA-PACIFIC DISASTER MANAGEMENT: COMPARATIVE AND SOCIO-LEGAL PERSPECTIVES (Simon Butt et al. eds., 2014); WHO RULES JAPAN? POPULAR PARTICIPATION IN THE JAPANESE LEGAL PROCESS (Leon Wolff et al. eds., 2015); INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan Puchniak et al. eds., 2017) [hereinafter Puchniak]; HIROO SONO et al., CONTRACT LAW IN JAPAN (2019); LUKE NOTTAGE, INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION: AUSTRALIA AND JAPAN IN REGIONAL AND GLOBAL CONTEXTS (2021).

39 This should be characterized as a "ye of little faith" moment. Many at Chicago simply doubled down on their positions. For instance, Fama insisted that the crisis simply proved his famous "efficient markets hypothesis" (that share prices reflect all available information,) originally hypothesized in Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FINANCE, 383 (1970); *see also*, John Cassiday, *Interview with Eugene Fama,* NEW YORKER (Jan. 13, 2010), https://www.newyorker.com/news/john-cassidy/interview-with-eugene-fama.

40 *See generally Disaster Management: Socio-Legal and Asia-Pacific Perspectives,* ASIA-PACIFIC DISASTER MANAGEMENT: COMPARATIVE AND SOCIO-LEGAL PERSPECTIVES

Japanese citizens drew attention and praise, we also thought Ramseyer might reassess his parallel dismissal of any significant role for traditional Japanese cultural norms. When that did not happen,[41] suggesting to us some cognitive dissonance, we decided there was little point in updating our 2006 paper for publication. As well, someone advised one of us (as a then more junior scholar—Nottage) to think carefully about prompting a potentially vigorous and time-consuming debate by publishing the paper for a broader audience. The other (Freedman) retired from full-time university work after 2010. Nonetheless, in light of the controversy around Ramseyer's scholarship that surfaced from 2021, we hope the following updated and expanded analysis helps a wider readership to engage critically with his work, so it can continue to have an appropriate and ongoing place in the comparative study of Japan.

II. CHICAGO'S ECONOMICS, PLUS LAW, EQUALS TRADITION

> "The trouble with most people ain't ignorance; it's what they know that ain't so." (Josh Billings.[42])

(Simon Butt et al. eds., 2014).

41 *Compare, e.g.,* the importance of "social capital" in disaster management, demonstrated empirically by DANIEL P. ALDRICH, BUILDING RESILIENCE SOCIAL CAPITAL IN POST-DISASTER RECOVERY (2012), *and* DANIEL P. ALDRICH, BLACK WAVE: HOW NETWORKS AND GOVERNANCE SHAPED JAPAN'S 3/11 DISASTERS (2019), *with* the persistent emphasis on narrow instrumentalist norms in J. Mark Ramseyer, *Nuclear Reactors in Japan: Who Asks for Them, What Do They Do?* (No. 17-35 Harv. L. Sch. Discussion Paper, Paper No. 909, 2017).

42 ROBERT LEESON, *Patinkin, Johnson, and the Shadow of Friedman*, *in* KEYNES, CHICAGO AND FRIEDMAN 19 (2003). In an earlier draft, Milton Friedman noted in his December 1967 American Economic Association Presidential Address that his own teacher Frank Knight was fond of quoting this comment by Josh Billings (a 19th century American humourist). This efficiently encapsulates Chicago's vision of itself as free-thinking iconoclasts, unwilling to accept commonplace wisdom at face value.

> "But Aaron Director was extremely conservative. Why, I don't know. By the time I knew him he was already like that. And he was an iconoclast. But he didn't develop new data with respect to industrial organization. He didn't develop and articulate new theories. He just said that the conventional belief wasn't so." (Paul Samuelson, conversation with Craig Freedman, October 1997).

In the post-War period, this reflexive position allowed Chicago to set itself up as a counterpoint to the acknowledged source of establishment economic thought, namely Harvard University and MIT. This intentional adoption of an underdog status is reflected by the geographical divide (East Coast versus Mid-West). The schism was undoubtedly amplified by the character of the staff as well (mavericks and outsiders). Such a characterization could not hold up under close examination, though it was true that Harvard maintained an implicit anti-Semitic policy during this time. The contrasting positions (especially the Chicago versus Harvard one) had its roots in the very establishment of the University of Chicago and its very first economics department. What remains essential in understanding the development of this school of thought is the perceived rivalry and the consistently crusading nature of Chicago's approach to economics.

The Japanese like to distinguish surface reality (*tatamae*) from the often-harsh reality (*honne*) lurking just below that agreeable, but misleading, level of perception.[43] This somewhat metaphorical perspective may provide a more useful way to understand the difference between the stated objectives of the Chicago School of economics and those goals that during the post-war period propelled its research program. One way to grasp this point is to think of the methodology, the ramshackle version of positivism that became so closely associated with this school of economists.[44] Though not a field extensively explored, after more than a half century, the most influential essay attempting to analyze economic methodology remains associated with the name of Milton Friedman.[45] This packet of crafted ideology has become notorious for placing no

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[43] The contrast between the comfort provided by accepting the world at face value versus the shock of discovering the reality that lies below has been a constant theme of literature as well as films. The metaphor of Alice going through the Looking Glass has become almost a cliché. In a similar fashion, the film *Blue Velvet* depicts a young man descending from the comforts provided by suburban banality down into the realm of sexual depravity and crime that exists as the dark underside of suburban conformity.

[44] The collective noun for an assorted bunch of economists seems to be a school. Though at Chicago, the adjective "collective" would not discover any fondness for the term.

[45] *See generally* MILTON FRIEDMAN, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 3 (1953). Though credit for this approach has securely rested with Milton Friedman, equal credit has to go to his close friend and associate, George Stigler. Milton Friedman has admitted as much:

> "Craig Freedman: There's an obvious sense that he had been discussing the sort of methodology which you later published. Is that correct, that there had been discussions between the two of you on that topic at the time?
> Milton Friedman: Sure. I had written the methodology paper, which was later formally published. This preceded, by three or four years, the earlier versions. And he refers in one of those lectures [Stigler gave five lectures at the London School of Economics in 1948; see GEORGE J. STIGLER, FIVE LECTURES ON ECONOMIC PROBLEMS (1949)] to the fact that we had been talking about it.
> Craig Freedman: Yes. And how influential were you in each other's thinking on this matter?
> Milton Friedman: We were very influential. I think there's no doubt that my work would have been different if I hadn't been influenced by George and George's work would have been different if he hadn't been influenced by me."
> (Milton Friedman, conversation with Craig Freedman, October 1997).

What is undeniable is that these two close friends (along surreptitiously with Aaron Director) were largely responsible for shaping what became recognized as the Chicago counter-revolution against the Keynesian orthodoxy. Friedman returned to Chicago in 1946 that was originally slated to go to Stigler). Stigler took a joint position in the economics department and business school in 1958. He had previously refused previous attempts to entice him back, perhaps at some level still smarting from his previous rejection. The offer to fill the Chair proved an offer impossible to refuse.

"And his salary was maybe $25,000 in 1958 dollars. That was what I think he was making per year. It was one of the biggest salaries in economics. And he had a grant for a full- time research assistant!" (Claire Friedland, conversation with Craig Freedman, October 1997.)

importance on the reality of its assumptions. Instead, all reliance is placed entirely on how well a theory could account for empirical evidence (the methodological equivalence of curve fitting). The largely unacknowledged reality was that this proclaimed methodology lacked any actual application.[46] As George Stigler's prize student admitted, Friedman's approach fails to describe the way in which economics was practiced at Chicago or anywhere else; the approach is prescriptive in nature rather than descriptive.[47] Sam Peltzman has remarked:[48]

> When I was a graduate student we were taught a paradigm of how you do research. I've got to tell you, it's all wrong. It's not the way we operate. We don't sit up here and develop hypotheses and go out and test them. That's just not what we do. George taught me that. Milton taught me that. They're wrong! And I understand that. I'm older enough now to figure out that's not the way we do work. There's a lot of salesmanship, there's a lot of taking positions, defending them. Right. The facts will win out. I'm not saying that we're not in that sense correct. The facts do win out. But the process by which that happens is not the clean one of scientific method rigorously applied all the time. (Sam Peltzman, conversation with Craig Freedman, October 1997).

The official methodology instead represented a post-hoc justification of a set of Chicago-approved results. If anything, this supposed contribution to the debate on economic methodology during the 1950s was a disguised attempt (intentionally or not) to end a debate that both Friedman and Stigler saw as dangerous to their own more foundational objectives. Questioning the validity of the standard assumptions underlying price theory could result in doubting the conclusions attached to that same approach. As a response, the Chicago strategy reflected a consistent attempt to shift the terms of debate. By seizing the high ground of some more conducive terrain, this Chicago brotherhood became

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[46] There is no evidence that either Friedman or Stigler were particularly interested in methodological issues. This one, quasi-joint attempt flared quickly as Stigler prepared to deliver a lecture exploding Chamberlin's concept of monopolistic competition (GEORGE J. STIGLER, FIVE LECTURES ON ECONOMIC PROBLEMS (1949)). It sputtered and died with Friedman's 1953 essay,*see* Friedman, *supra* note 45. Neither Friedman nor Stigler were tempted to enter any aspect of the debate that followed. Stigler's basic contempt for methodology would later slip out in a much later essay on scientific biography. "I have a singularly low estimate of the scientific value of sermons on methodology" (George J. Stigler, *The Economist and the State* (1965), *reprinted in* THE ECONOMIST AS PREACHER 119 (1982)). Fifty years later at an American Economic Association session celebrating Friedman's methodology, he would disclaim any need to revise his original text. BB R15.5.1

[47] Ronald Coase took exception to Friedman's (and Stigler's) methodology. As he pointed out: "An insistence that the choice of theories be made in accordance with Friedman's criteria would paralyze scientific activity." *See* Ronald Coase, *How Should Economists Choose?*, *in* ESSAYS ON ECONOMICS AND ECONOMISTS 15, 24 (1994).

[48] As mentioned *supra* note 21, these quotes come from interviews of many of the leading lights in and around the Chicago School, conducted by Craig Freedman over late 1997 and recorded and then transcribed (on file with the authors).

capable of more easily shooting down on and decimating opposing arguments.

Thus, by destroying the underlying theory to any policy or recommended action, they sought to bury bothersome discussion, which they deemed to be dangerous. By creating as an alternative, an "as if" world where assumptions were purely heuristic, they undercut potential attacks on Chicago-style price theory (namely the argument that it was built on shaky foundations). From the Friedman-Stigler perspective, price theory stood as a bulwark against government intervention into the workings of a preferred *laissez faire* economy. Both Friedman and Stigler had only recently returned from the first meeting of the Mont Pelerin Society (1947), formed to resist a perceived world-wide tsunami of collectivism.[49] (At least this shared goal shaped the perspective of both the conservatives and the old-style liberals who attended the meeting).

The "as if" world, which formed the convenient plain of analysis Friedman created, would prove foundational for much of the Chicago School approach. This argumentative form was best crystallized by Gary Becker who returned to Chicago in 1970.[50] In a sense they offered, as an argumentative device, what might best be described as a persuasive poison apple strategy. Rational decision making was posited more as an axiom or common notion than some purely heuristic assumption. The challenge was to attempt to slip it past a critical audience.

> It's getting more and more, more and more part of him as he got older actually, this whole view. He insists it's rational. He would tell you, "There is some rational explanation for it. It's just that you haven't looked completely into it and found it."

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[49] This initial meeting played a decisive role in clarifying and shaping these two young economists (both in their thirties). The common thread linking their research programs and the work they did seems to have been forged at this time. It is not coincidental that George Stigler titles the chapter in which he describes his Mont Pelerin experience 'The Apprentice Conservative' (GEORGE J. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 138 (1988)). Perhaps ironically, by the 1970s, Friedman and Stigler were prepared to welcome the termination of the Society. They both felt that its best days were over.

> "I would like to say, however, that you attribute both more unanimity and influence to the Mont Pelerin Society than I do. I should also add, I suppose, that Friedman and I both urged that termination of the Society with the present meeting but were over-ruled by a large proportion of past officers. I have confidence, therefore, that although some of us are surely wrong, some of us are surely not doctrinaire." (Letter from George Stigler to Bertrand de Jouvenal, May 1, 1972).

[50] Chicago made a practice of not immediately hiring its PhD graduates. They first had to prove themselves elsewhere before returning home to Chicago. Thus Becker, like Stigler, traveled back to Chicago from Columbia. Or, Peltzman, like Becker before him, was lured back by Walgreen research dollars that Stigler used to entice those he deemed worthy.

> "I came as a Visitor. I got to know him quite well during that year. Attended the industrial organization workshop regularly, which was very much an eye opener for me. And then, after a lot of hesitation, he and Milton Friedman worked on me a lot, he offered me extra research money if I stayed on. This was Walgreen money and it was a large sum. So he said I could have some research money and I decided to stay. After this, basically, he became my best friend."
>
> (Gary Becker, conversation with Craig Freedman, October 1997.)

> (Sam Peltzman, conversation with Craig Freedman, October 1997).

If a Chicago trained economist could persuade you to swallow what seemed like an innocent assumption, you were almost lashed on an express train leading relentlessly to their preferred conclusion. In this way, what might look like an anomaly or imperfection in a market setting, was clarified to become an instance of market efficiency. In essence, Chicago had shaped a tool that was capable of exploding any consensus or majority-held view. With this strain of analysis, they could create a series of "everything you thought you know, is wrong" moments. In this fashion, the clever minds at Chicago could decimate opponents, while at the same time bolstering their own self-regard.

> George [Stigler] was a puzzle solver. George was definitely that. As far as George was concerned, I would think that the system building had already been completed by Adam Smith and there was not a hell of a lot of room for him or for anybody else to do that. He was interested, I would say primarily, in a particular sort of puzzle and it's a typical Chicago puzzle. And I don't mean that in any bad way, it's the sort of puzzle that the Chicago School's presuppositions require. Show me an apparent anomaly, something that does not seem to be explicable using the Smithian apparatus or the Marshallian apparatus and I will show you that it can be explained that way. That was exactly the sort of thing that George went looking for. And that's not a bad thing. I'd have to say that it can actually be very good.
> (Robert Solow, conversation with Craig Freedman, October 1997.)

In the same way, on the one hand, the Chicago method pushed empirical testing over economics by assertion.[51]

> But he [George Stigler] certainly was a professed believer in quantitative methods. On the other hand, he knew what the answer was going to be in advance. He just regarded it, then, as a way of persuading other people.
> (Ronald Coase, conversation with Craig Freedman, October 1997.)

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[51] The clarion call for a 'back to empiricism' movement came during the address by George J. Stigler, *The Economist and the State*, *supra* note 46, as President of the American Economic Association on 29 December 1964. In this speech he turns prophet attempting to rouse the well-fed ranks of economists. "Our expanding theoretical and empirical studies will inevitably and irresistibly enter into the subject of public policy, and we shall develop a body of knowledge essential to intelligent policy formulation.

> "It was just that he was so enthusiastic about quantitative measures. He thought that he was going to change the world … I was sitting with Aaron Director at the time when he gave his Presidential address and we did look at one another at the time to try to see what each one thought about all of this."
> (Ronald Coase, conversation with Craig Freedman, October 1997.)

Yet the reality was that such testing was simply another form of rhetoric practiced by a set of expert marketers.[52]

> I remember when I was a young person, George Stigler wired and said, "Selling is very important in your research. So write better. Work on writing because that is important. You've got to sell what you are doing." I think he's exactly right. You've got to sell what you are doing. It may be that in the long run good ideas do surface but they surface faster, if written in a persuasive fashion.
> (Gary Becker, conversation with Craig Freedman, October 1997.)

This is a more sophisticated approach than economics by assertion, which seemed to predominate during the pre-War period. But in a sense, it stopped far short of true empirical research where data serves to resolve questions. In the Chicago approach, the answer is known *a priori*.

> It's not that he [George Stigler] ignored all the empirical work in making his decisions. He would come across empirical work which was contradictory to other empirical work. Somehow it always seemed to him that the empirical work which favoured his side was done better than the empirical work which didn't.
> (James Kindahl, conversation with Craig Freedman, October 1997.)

The data is simply dragooned into the argument to provide support for a preconceived result. An approach of this Chicago style approach is fundamental to understanding a good share of the work done in the field of Law and Economics. This essentially evolved out of that Chicago tradition, thanks in part to Aaron Director's lengthy tour within the Chicago Law School:

> The emerging Chicago tradition challenged both of these ruling views. It proceeded from the assumption that modern price theory is a powerful weapon in the understanding of economic behaviour, not simply a set of elegant theoretical exercises suitable for instruction and demonstration of one's mental agility. In particular, primarily under the influence of Aaron Director, we moved away from the assumption that monopoly was almost ubiquitous in modern economies. This Chicago orientation had three main facets. The first was that the goal of efficiency is

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[52] The dependence on empirical testing is a perfect example of the *tatamae/honne* split that underlays much of Chicago economics. Though insisting that all economics must sink or swim on the strength of empirical evidence and testing, the reality was that no one has ever been able to conceive of any evidence that would lead George Stigler (or his closest colleagues) to conclude that markets had performed in a less than efficient fashion.

> "Now, what you have to understand with somebody like Allen Wallis, and so to a degree those people who were in his circle [like George Stigler], is that Allen Wallis had the sharpest priors – I'm using the language of Bayesian probability – of anybody I ever knew. Almost no new data could change his view for this reason."
> (Paul Samuelson, conversation with Craig Freedman, October 1997.)

> pervasive in economic life, where efficiency means producing and selling goods at the lowest possible cost (and therefore the largest possible profit). This goal is sought as vigorously by monopolists as by competitors, and monopoly power is of no value in explaining many phenomena which have efficiency explanations. [53]

A. Standing Economics on its Head: Markets Work, Even When They Don't Seem To

The infiltration of the Chicago method into legal thinking and judgment has a lineage that starts with the brief reign of Henry Simons, and then quickly moves on to Aaron Director (who died on 11 September 2004 at the age of 102). It is Director's mindset rather than his successor, Ronald Coase, which came to dominate the field of Law and Economics.[54] It is true that Coase had a long tenure as editor of its premier journal, the *Journal of Law and Economics*.[55] For many years he also served in the Chicago Law School in the position initiated by Simons and continued by Director.

However, the Coase approach[56] still remains somewhat apart from the method espoused by Chicago market fundamentalists. As Coase legitimately claims, a hard-core Chicago School acolyte like George Stigler never fully understood what Coase was doing. The Coase Theorem[57] reflects Stigler's

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53 GEORGE J. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 162–63 (1988).

54 Upon his death the University of Chicago News Office (2004) put out a press release that makes this quite clear. The headline read, "Aaron Director, Founder of the field of Law and Economics" and continues, "Aaron Director, a distinguished University of Chicago economist who greatly influenced the modern course of economics and legal thought through his founding of the field of Law and Economics and his mentoring of generations of scholars, died Saturday, Sept. 11, at his home in Los Altos Hills, Ca., at the age of 102." *See also* Ronald Coase, *Law and Economics at Chicago*, 36 J.L. & ECON. 239 (1993).

55 The promise of editorship (taking over from Aaron Director) exerted a key pulling power in bringing Coase to Chicago from the University of Virginia. He was part of what at the time was known as the Virginia School, perhaps the last outpost of something resembling a Classical Liberal approach to economics. *See generally* COLANDER & FREEDMAN, *supra* note 19.

56 Coase was a faculty member from 1964 until he died in 2013. But in terms of the Chicago School perspective, it is far more accurate to say that while Coase was undoubtedly "at Chicago," he was never "of-Chicago." The Friedman/Stigler approach demanded abstraction and generalization. Coase was a hard-core empiricist in the sense that he was interested in how specific markets worked, rather than some general, idealized one should operate. Theory, from his perspective as a Classical Liberal, could never entirely inform policy. Policy remained time and place specific demanding that the relevant specifics of the case be thoroughly explored.

57 The theorem supposedly derives from *A Theory of Social Cost* from Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). The Coase theorem (more correctly,

attempt to eliminate one aspect of market failure. The consensus wisdom up to that time assumed that unpriced costs (externalities) required government intervention. Stigler seized on the work of Coase[58] as a demonstration that market solutions (almost by definition) had to consistently provide the most efficient solution. It is understandable that Stigler titled "Eureka!" the chapter of his autobiography that dealt with his version of the contribution made by Coase. For Stigler, the overriding importance of this work was its creation of an opportunity to extend the all-encompassing reach of price theory.

This may have allowed Stigler to incorporate his reimagining of Coase's work as part of his agenda, but that was hardly Coase's intention. Since we are never in a world of zero transaction costs, assignment of property rights always will matter. There is also no *a priori* determination of whether or not government intervention will improve outcomes. In Coase's opinion, there could equally be an insufficient amount of governmental intervention as well as, too much.

Coase's influence then can be said to be less than meets the eye, more Chicago lore than Chicago fact. Although many Chicago denizens claim his tutelage, the reality would see these erstwhile disciples as anything but. Coase himself has rejected the attempt by one of Chicago's brightest lights in the field of Law and Economics, Richard Posner, to claim a Coasian-style mantle.[59] As far as legal theory goes, Coase's key contribution is to dismiss assignment of fault as an unproductive endeavor. What is important for Coase is the assignment of property rights in such a way as to allocate risk appropriately. This will yield the most efficient incentives and the best outcomes given the ruling set of transaction costs. To provide a simple example, if drunken drivers are running over small children, it might make more sense to assign

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the Stigler theorem roughly based on Coase's work) stipulates that given well defined property rights and zero transaction costs, any assignment of property rights is efficient. Coase himself never accepted the importance of this particular formulation, nor believed that Stigler and he were on the same wavelength (despite Stigler's intensive lobbying for Coase to be made a Nobel Laureate). Though he had no quarrel with the theory as abstract theory, he perceived that Stigler had largely missed the point of the paper. The assumption of no transaction costs was simply a mechanism employed to counter the standard Pigouvian idea of externalities. Coase's construct attempts to demonstrate that it is the presence of transaction costs, rather than externalities that creates problems. However, since transaction costs are always positive, the abstract and general theory has no specifically useful application.

> "He [Stigler] was always very nice and kind and helpful in many ways. Always. But I often wondered how far he agreed with what I was saying. I think he thought I was all right, but a little odd."
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> (Ronald Coase, conversation with Craig Freedman, October 1997.)

58 Coase, *supra* note 57.

59 Coase has publicly refuted Posner's interpretations in the past and shows no great respect for the work that Richard Posner has completed.

> "And, it's even more so in the work of Richard Posner. Have you read any of that? It seems to me that the plot is always the same, and the characters stay fixed."
>
> (Ronald Coase, conversation with Craig Freedman, October 1997.)

responsibility to the children's parents to strictly follow road safety than to expend resources trying to reduce drunken behavior. Coase's method reduces the issue of liability to one of minimizing costs.[60] This case-by-case perspective, however, is not the standard focus employed by Chicago School economists.

The simplest way to think of their project is to start with its unquestioned and guiding tenet. Markets work. They work because economic agents are rational decision makers. The responsibility of any Chicago economist was to demonstrate that although it might appear that in some particular case the market had malfunctioned, in reality the market had performed in an efficient manner. The cleverness of these economists was in their endless ingenuity, which enabled them to marshal facts in such a way that they always reached this same identical conclusion.[61] A reader always knows beforehand the conclusion these economists will reach. The question, and the incentive to actually read the paper, comes in seeing how they manage to reach this preconceived goal. Following this process can more often than not, be thought provoking.

> It seems to me that when you get to his [Stigler's] later work, say with Becker, you know what the conclusion is going to be before you start the argument. In a sense, you're assembling arguments to support a conclusion. I mean that may be unkind and untrue but it's an impression.
> (Ronald Coase, conversation with Craig Freedman, October 1997.)

The underlying rationalization that inevitably leads to idealizing markets has been best incorporated by a phrase attributed to the UCLA economist, Armen Alchian:[62] *What is, is efficient.* This at first glance seems to be a bit of mysticism on the same level as its Hegelian counterpart: *What is real, is ideal*. Indulging in some additional thought, the two phrases do tend to have much in common given their shared teleological bent. What Alchian means is quite simple in conception. Given competitive markets, there is always an incentive

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60 *See also*, *e.g.,* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); GUIDO CALABRESI, THE NEW ECONOMIC ANALYSIS OF LAW: SCHOLARSHIP, SOPHISTRY, OR SELF-INDULGENCE? (1983); Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi [Symposium: Calabresi's 'the Costs of Accidents': A Generation of Impact on Law and Scholarship]*, 64 MD. L. REV. 220 (2005). Professor, later Dean, and then Court of Appeals Judge Guido Calabresi was pivotal in developing the more nuanced Yale approach to law and economics.

61 Friedman excelled at seizing the high ground and forcing others to debate on his terms.

> "[Friedman] has frequently trapped and sandbagged critics of reputation and integrity by the technique of under-disclosure of analysis and evidence and apparent overstatements of the strength of his results." (Harry Johnson, quoted in Robert Leeson, *Patinkin, Johnson, and the Shadow of Friedman*, *in* KEYNES, CHICAGO AND FRIEDMAN 249, 261 (2003)).

62 Paul Samuelson encapsulates Alchian's approach succinctly by characterizing him as being "more Catholic than the Pope, who never went to University of Chicago but is a real Chicagoan."
(Paul Samuelson, conversation with Craig Freedman, October 1997.)

for one firm to be more efficient than another since by doing so, greater profits can be garnered. If then, a given economic arrangement can be bettered by offering a more efficient alternative, over time it inevitably must happen. Given the test of time, what we observe must be efficient or we would not observe it.[63]

Some economists, like George Stigler, saw no reason not to extend this to the political arena as well. Political markets must also be efficient because otherwise the flow of laws and regulations they produce would change. If sugar subsidies have been in place for so many years, despite the fact that these reward inefficiency from a strictly economics point of view, then voters must find them to be an efficient and desirable way to redistribute income. If not, then over time voters would have exerted themselves to change this outcome.

> He [Stigler] very much believed that the role of economists in formulating or moving policy was overstated. More than I do. It's not something I agree with him on. He would always take this very strong position. We were part of what Marx would call the superstructure. Bought by one side or another and we really didn't have an independent role to play in the evaluation of policy. And yet he had this belief that the world should be a certain way. It's clear. You know, he was a believer in markets. He didn't like the sugar subsidy for sure and I don't know how

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63 Samuelson finds an earlier derivation for the phrase as well as the approach. "You mean, what is, is right. Okay, I imagine that he [George Stigler] got this from Milton Friedman. Because around 1952, at the Paris Colloquium or Conference on Risk, put on by The Econometric Society, Milton Friedman gave a paper which said in effect, life is a constant procession of events that impinge on us with a considerable amount of uncertainty out there. (This is my broad gloss on what he said.) At every stage on the road there are forks in the road, and we are making choices. And, in effect, we end up in the beds that we have made for ourselves. This would have grown, in Milton's mind, out of the Friedman/Savage article of 1948 on gambling. You postulate an epicycle in the form of a non-convex stretch, concave stretch of the utility function so that the people falling in that become inveterate gamblers. And so the inequality is the result of their own *ex-ante* decisions. Now, it's undoubtedly true that if everybody started out exactly alike in genetic composition and environment, (for this they would have to be clones, identical clones) and if for some reason, even though they are clones, they differ in their risk aversion, then, what you will find is that those with the greatest risk tolerance will end up bi-polarly at the extremes more than the people with less risk tolerance. And so what is, is right.

Now, that's in a JPE article. Probably in 1953, I don't know. I would speculate that this would have been an important source. Because George Stigler, who was very critical of people, was almost worshipful of Milton Friedman. And I remember that one of his dicta was that a Milton Friedman theorem was more credible than any other theorem, because everybody picks on Milton. It's an unfair world and so forth which means that he gets a more rigorous testing than anyone else. Doesn't he have genuinely adulatory remarks in his autobiography about Milton?"

(Paul Samuelson, conversation with Craig Freedman, October 1997.)

> you really square it ultimately, with his position that this is the optimal way to redistribute. (Sam Peltzman, conversation with Craig Freedman, October 1997).

Clearly, w*hat is, is efficient* relies heavily on a test of time determination. This is sadly reminiscent of the approach to civil disobedience adopted by John Calvin[64] in his lengthy *Institutes*. Taking predestination as a (God decreed) given, Calvin saw temporal rulers as God's representatives on Earth. However, he conceded the possibility that, for reasons only fathomable to God, an occasional ruler might deviate from the just path (evil of course being inextricably bound up in the working out of God's omnipotent will). In such a case, individuals are under an obligation to refuse to bow down to these false rulers. But how to know which case prevails at any given time? Humans are of course inherently fallible in their judgements. Here, Calvin reflects what can only be labelled as sharing in spirit somewhat parallel reasoning to a Chicago School style of thinking. Calvin instructs the faithful to try and dispose of a perceived unjust (and thus ungodly) ruler. If their revolt is successful, then their action has God's blessing and their original perception was correct. If unsuccessful, they will die and be damned for eternity. After all, the faithful must not defy God's interdictions. Or, *what is, is Godly*. A difference, though, is that what drives the determination of economic efficiency is an implicit or explicit notion that inefficiencies will be driven out of any market.[65]

It is hard to argue with this style of thinking, but it is unsettling. It refuses to lie comfortably as compelling logic because it smacks of the tautological. When stripped of any subsidiary paraphernalia, this reasoning approach seems to be nothing more than a form of posterior rationality. It is a method for always concluding that, to steal the phrase from Voltaire, "we live in the best of all possible worlds."[66] Unfortunately, such a "proof is in the pudding" approach means that the practitioner can never be wrong. Each and every result simply confirms one's starting tenet. An approach or theory that attempts to explain everything is one that ends up explaining nothing.

B. Skepticism as an Analytical Approach

We can see this reflex version of skepticism in the work of Aaron

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64 JOHN CALVIN, CALVIN'S INSTITUTES OF THE CHRISTIAN RELIGION (1536).

65 The underlying yet questionable premise is that economic agents will always spy out opportunities to reallocate resources to more profitable uses, to reap the reward of such actions. The commonplace depiction of this hypothesis is that "no fifty dollar bill will be left on the sidewalk."

66 One way to distinguish an optimist from a pessimist is that while an optimist thinks that we live in the best of all possible worlds, the pessimist is afraid that this is correct. The phrase, "the best of all possible worlds" is continually uttered by Dr. Pangloss in VOLTAIRE, CANDIDE (1947) to justify whatever ghastly event unfolds.

Director.[67] Director remains the key to understanding the direction that Law and Economics took given its Chicago imprimatur. His influence is not sufficiently understood, partially due to his lack of publications during his lengthy career. A student of Frank Knight, he initially came to Chicago with strong socialist leanings and did some initial work with noted labor economist, Paul Douglas.[68] However, the 1930s did see a complete turnabout under the influence of Knight. Like his mentor and friend, Director set himself up as an extreme iconoclast. Unlike Knight, he never seemed to go beyond saying something was not the case, rather than saying what was so. His one unifying principle was to look for an efficiency reason to explain any market phenomenon. In effect, markets are efficient. Given that unarguable starting point, economists are obliged to demonstrate why market results do represent efficient practice.

While largely unpublished, Director's influence within Chicago was strongly felt. He was after all Milton Friedman's brother-in-law (the brother of Friedman's wife, Rose). He was largely responsible for seeing that classic polemic by Friedrich von Hayek (1944), *The Road to Serfdom*, found a publisher in the University of Chicago Press. This work became something of a bible for the counter-revolution to economic planning initiated by the founding of the Mont Pelerin Society in 1947.[69]

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[67] The role and influence of Aaron Director is often overlooked, perhaps because he never bothered to publish much after the early 1930s. "Director's own publications were modest in number, but his contributions to his colleagues' thinking were considerable. University of Chicago colleague and future Nobel laureate, the late George Stigler often said, "most of Aaron's articles have been published under the names of his colleagues." Chicago News Office, *Aaron Director, Founder of the Field of Law and Economics* (Sept. 13, 2004), http://www-news.uchicago.edu/releases/04/040913.director.shtml. However, everywhere you look in the post- war era as far as the conservative intellectual counter-revolution is concerned, the name of Aaron Director repeatedly surfaces.

> "Aaron Director was a scratch tenure appointment at the University of Chicago. He published almost nothing and never took his PhD degree. But Aaron Director was extremely conservative. Why, I don't know. By the time I knew him he was already like that. And he was an iconoclast. But he didn't develop new data with respect to industrial organization. He didn't develop and articulate new theories. He just said that the conventional belief wasn't so."
>
> (Paul Samuelson, conversation with Craig Freedman, October 1997).

[68] The idea of some sort of conversion under the spell of Frank Knight may not completely hold water. That Aaron Director was a pronounced curmudgeon from an early age is not to be doubted. He was consistently contrary even as a student. What is far from clear is whether he sincerely held anything resembling radical or even moderately left-wing views. For an interesting plunge into those formative years, *see* Robert Van Horn and Philip Mirowski, *Neoliberalism and Chicago*, in THE ELGAR COMPANION TO THE CHICAGO SCHOOL OF ECONOMICS 196 (Ross Emmett ed., 2010).

[69] *See About the Mont Pelerin Society*, THE MONT PELERIN SOC'Y, http://www.montpelerin.org/ (last visited Mar. 3, 2022). As well as Hayek, presidents of this "liberal" Society have included Friedman (1970-2), Stigler (1976-8), and Chiaki Nishiyama (1980-2, awarded a PhD from Chicago in 1960). Japan hosted meetings of the Society in

Around the same time, Director succeeded Simons at the Law School. There is a strange parallel here. Simons moved to the Law School as a safe haven. He had had a difficult time winning tenure in the economics department. The battle over Simons had caused a severe rift between his protector, Frank Knight, and Paul Douglas.[70] The shift to the Law School defused the situation. Despite Simon's untimely suicide,[71] it is unlikely that had Simons lived he would have exerted the same sort of influence Director did, either over legal thinking or even among the cadre of legal students or professors at Chicago. At least nothing of his too short career seems to demonstrate this possibility.

Director was quite a different case. In the 1930s, he was a lecturer in the economics department, with a precarious hold on his position. The opening at the Law School became in some sense a silver lining associated with Simons' death. It was at the Law School that his influence grew and that he was able to shape the direction of a new field, namely Law and Economics.[72] His influence grew even further with the return of George Stigler to Chicago. Director is said to have been one of the few people to whom Stigler was willing to listen. (In this case, 'few' means that there were two others beside Director, namely Milton Friedman and Gary Becker.[73]) As observed by Stigler:[74]

> When I moved to Chicago from Columbia University in 1958, I began to see much of my friend Aaron Director. He taught with

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1966 and 1988. Director had recruited both Milton Friedman and George Stigler to the cause, as representing the best of the younger generation. Also present at the Swiss gathering was Director's friend and mentor, Frank Knight.

70 This academic tempest in a teapot (or at least a version of it) is narrated in the autobiography by STIGLER, *supra* note 53.

71 Whether or not Simons did commit suicide is one of those many unresolved questions.

72 It is interesting to build up alternative scenarios of how Law and Economics might have developed had Simons not decided to take his life. Aaron Director's influence certainly gathered steam with his move over to the Law School.

> "Aaron Director and Frank Knight were close and intimate. It was only Frank Knight who got Aaron Director his professorship. Of course, Aaron Director became prominent as a university teacher, and really had an influence, a profound influence upon American IO [industrial organization] policy, when he became a lecturer at the University of Chicago Law School. I think he was just replacing Henry Simons who had been doing that and who committed suicide in one of the early post-World War II years."
>
> (Paul Samuelson, conversation with Craig Freedman, October 1997.)

73 To say that George Stigler was strong-minded and not completely open to counter-argument is an understatement. Curiously enough, he placed an almost unquestioning trust in just a few key colleagues.

> "Aaron was obviously, particularly in recent years, of some influence, but I would be hard put to say exactly what it was. Aaron Director seemed to be certainly one of the people that George Stigler would always listen to very seriously, and in recent times, Gary Becker. He worked closely with him. I don't know always to his advantage but that's what happened."
>
> (Ronald Coase, conversation with Craig Freedman, October 1997).

74 STIGLER, *supra* note 53, at 102.

> Edward Levi … a course in antitrust law, and in the process his luminous mind changed the way in which the Chicago School thought about industrial problems.

It was this course in antitrust law that would shape law and economics, Chicago-style, influencing such luminaries as Bork, Posner, Easterbrook, and Landes.[75]

> But it was his appointment to the faculty of the University of Chicago Law School in 1946 that marked the beginning of his greatest influence. With fellow faculty member Henry Simons, Director first began to apply the principles of economics to legal reasoning, eventually training generations of law students and even his colleagues on the faculty in this then-new way of thinking about the law. His many students and colleagues, including future Federal Judges Richard Posner, Robert Bork and Frank Easterbrook, spread his ideas further, creating what has been called "the greatest innovation in legal thinking since the adoption of the case method."[76]

The stated approach of the course was unarguably commendable. The dogma surrounding antitrust law had been too often unquestioned.[77] The

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[75] *See* Richard A. Posner, *The Chicago School of Antitrust Analysis* (1979), *reprinted in* ANTITRUST AND REGULATION 159, (Giles Burgess ed., 1992) (demonstrating what the Chicago approach to antitrust meant).

[76] *Aaron Director, Founder of the Field of Law and Economics*, UNIV. CHI. NEWS OFF. (Sept. 13, 2004), http://www-news.uchicago.edu/releases/04/040913.director.shtml.

[77] George J. Stiglerin his autobiography describes an "up from slavery" process that allowed him to break free of the unexamined beliefs of his profession and of his most revered teachers. He shifted away from the Simons/Knight anti-bigness approach, instead discovering competition wherever he turned. *See* GEORGE J. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 99 (1988):

> "… in 1950 I believed that monopoly posed a major problem in public policy in the United States, and that it should be dealt with boldly by breaking up dominant firms and severely punishing businesses that engaged in collusion. The justification for my fear of monopolistic behavior of the steel industry was the traditional one in economics: The industry was 'concentrated'."

Stigler's journey encapsulates the Chicago School quest to extend the rule of markets until it could explain any aspect of economics – or indeed any human action.

> "I think he went to a more satisfactory position, absolutely. The earlier view, as you say, he picked up. That was the literature. He hadn't really thought it through. I mean, you know, he hadn't thought through everything at that point, and he hadn't really thought it out. As he thought through more and more, I think he came to a more satisfactory thesis on the issue. I think you're absolutely right, he did. And George was still a young man intellectually when he died at 81. I think he would have changed his views still further, unlike a lot of people who reach that age. They stop thinking. George always said to me, the reason he didn't retire, and stayed around the University of Chicago was he didn't want to become ossified. He wanted to be exposed to new ideas and to changes. And he did. He kept changing

monopoly issue for many economists and antitrust lawyers had degenerated into a simple question of concentration ratios, the extent of the market share controlled by the four or five largest firms. Here, being an iconoclast was not simply refreshing but urgently needed. The profession as a whole would potentially benefit by a refusal to accept simple assertions at face value. Unfortunately, the Chicago approach seemed to be not so much focused on removing regrettable dogma as in substituting its own preferred dogma for the existing brand. Where the then prevailing approach saw the need for government intervention to be widespread, these market fundamentalists failed to find a market result that they did not like.[78]

This perception and acclamation of market-based solutions clearly can be seen in the Chicago approach to two venerable anti-competitive devices: predatory pricing and resale price maintenance, both of which had been labelled traditionally as being *de jure* anti-competitive. The challenge, when viewed with Chicago-tinted lenses, was to demonstrate that such practices either did not

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> them. And he would have changed them forever if he had stayed on with us. He was in pretty good physical shape actually, too. But mentally he was still in very good shape. He was still a very interesting guy to talk to when he retired. He attributed it in part to staying in a tough intellectual environment and he always made that point to me on a number of occasions. But his views did become more consistent. I agree with you on that. Other people may not think so, but I think definitely that was true. He began to re-think some positions he had just inherited. Inherited you know, from his teachers and so on, or from the literature and he put it in a more consistent framework."

(Gary Becker, conversation with Craig Freedman, October 1997.)

[78] "*What is, is right.* Okay, I imagine that he got this from Milton Friedman. This happened around 1952, at the Paris Colloquium or Conference on Risk, put on by The Econometric Society. Milton Friedman gave a paper which said in effect, life is a constant procession of events that impinge on us with a considerable amount of uncertainty out there. (This is my broad gloss on what he said.) At every stage on the road there are forks in the road, and we are making choices. And, in effect, we end up in the beds that we have made for ourselves.

This would have grown, in Milton's mind, out of the Friedman/Savage article of 1948 on gambling. You postulate an epicycle in the form of a convex stretch, a non-concave stretch of the utility function so that the people falling in that become inveterate gamblers. And so the inequality is the result of their own *ex ante* decisions. Now, it's undoubtedly true that if everybody started out exactly alike in genetic composition and environment, - for this they would have to be clones, identical clones - and if for some reason, even though they are clones, they differ in their risk aversion, then, what you will find is that those with the greatest risk tolerance will end up bi-polarly at the extremes more than the people with less risk tolerance. And so what is, is right. Now, that's in a *JPE* article. Probably in 1953, I don't know.

I would speculate that this would have been an important source. Because George Stigler, who was very critical of people, was almost worshipful of Milton Friedman. And I remember that one of his dicta was that a Milton Friedman theorem was more credible than any other theorem, because everybody picks on Milton. It's an unfair world and so forth, which means that he gets a more rigorous testing than anyone else. Doesn't he have genuinely adulatory remarks in his autobiography about Milton?"

(Paul Samuelson, conversation with Craig Freedman, October 1997).

exist or, if they did, were in fact an efficient solution to a particular market problem. In other words, what we observe is efficient or it would not exist. If the observed result is efficient, then there can be no rational reason underwriting government action.

To best display this antitrust position, we need only allow George Stigler to explain the Chicago perspective in each case. With predatory pricing, the revisionist view starts with a re-examination of the Standard Oil case.[79] Stigler observes:

> Director was skeptical of this tale, and among the reasons were: (1) price wars are costly even, or rather especially, to the victor (whose output and losses exceed those of the smaller rival), and (2) new rivals would appear once the price of oil was raised again to a monopolistic level in that particular town.[80]

In other words, predatory pricing could not exist because it would be inefficient. Since *what is, is efficient*, it would be impossible to observe (what essentially is) an irrational practice. (Or practically, such an attempt could not be long sustained.) Consequently, predatory pricing cannot be considered to be anti-competitive because it does not, and cannot, occur. Director persuaded a young economist John S. McGee[81] to examine the available evidence. One can easily argue over the selection of evidence he chose to consider. What comes as no surprise is that McGee's extensive examination arrives at a predestined conclusion. What is made particularly clear however, in his 1980 follow-up of the original article, is that no evidence could possibly have caused McGee to reach any other conclusion. In a clearly impatient tone, McGee[82] takes the profession to task for not accepting the obvious fact that he had already resolved the issue of predatory pricing some twenty-two years previously. Since predatory pricing *a priori* cannot exist, evidence to the contrary cannot prove its existence. Even a hypothetical letter from John D Rockefeller detailing how he planned to drive another firm out of business by engineering a price war would carry no weight. Anyone can make threats. However, no one can carry out predatory pricing with any degree of success. Stated intentions therefore do not matter. Any contrary pricing data discovered can be similarly dismissed. Starting from this assumed conclusion, it is no surprise that the Chicago style researcher arrives at his or her predestined goal without fail.

Resale price maintenance is the second clear example of the harvesting

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79 The received wisdom was that Standard Oil under John D. Rockefeller had gained enormous success, fortune and power by dominating the oil market through any and all anti-competitive strategies, *supra* note 77, "That last-named technique was employed when Standard Oil cut prices below costs in a particular town until the local producer was bankrupt, and then John D. Rockefeller and associates would buy up the rival for a pittance."

80 STIGLER, *supra* note 53, at 102.

81 John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 138 (1958).

82 John S. McGee, *Predatory Price Cutting Revisited*, 23 J.L. & ECON. 289 (1980).

of Chicago analysis in the anti-trust vineyards. One form of resale price maintenance involves the enforcement of minimum prices on retailers by a manufacturer. The traditional and most obvious response to such a practice is that it is unarguably anti-competitive. Manufacturers are deliberately attempting to prevent discounters from selling a product to the public at a lower price. Consumers are in this case disadvantaged. From a Chicago approach this conclusion must *a priori* be incorrect. The practice must be efficient, or it would not exist. The task therefore allocated to the economist is to show that it would be disadvantageous to in any way limit what must by definition be a beneficial practice. This is once again how Stigler[83] explains the solution:

> The Chicago explanation, developed by Lester Telser, was quite different. Consider a discount house competing with a traditional department store in the sale of household appliances. Without resale price maintenance, consumers could examine the appliances in the department store and then go to a low service, low price discount house to buy them. In the long run, department stores would cease stocking a variety of appliances and providing retail services such as explanation of the properties of the products, and the sales of all appliances would fall. To eliminate this free-rider practice of discount houses, some device such as resale price maintenance was necessary.[84]

In both cases markets are yielding efficient results even though it may seem that these market practices are anti-competitive. In the former, the practice of predatory pricing does not exist. In the latter case, consumers would be made worse off if unchanneled competition eliminated a valuable consumer service, in essence increasing the user cost of those appliances over the long run.[85] Competition therefore may appear to be hindered within a market context. But the buried reality is that an apparent hindrance is only an efficiency improving device. Otherwise, it could not be sustained. However, within a government context, a hindrance must inevitably lead to ineradicable inefficiencies. In the hands of Chicago theorists, the field of law becomes another battleground on

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83 STIGLER, *supra* note 53, at 103.

84 This is a lovely story, but when examined closely does not extend beyond being a fractured fairy tale for well-mannered young economists. The work by Lester Telser, *Why Should Manufacturers Want Free Trade?*, 3 J.L. & ECON. 86 (1960), looks at a particular price rigging case by General Electric. Telser does suggest that the information explanation is a possible justification for the observed practice. However, Telser tests this particular supposition and finds that evidence for it is lacking. It remains for Telser a hypothetical. When in fact questioned about Stigler's claims (Telser, conversation with Craig Freedman, October 1997), Telser responded with surprise and a touch of consternation at such a clear misstatement of his work. This same line of thought extends to all work on resale price maintenance done in this Chicago tradition. The information hypothesis is asserted, but no evidence is ever produced. In a sense, for market fundamentalists, empirical work remains the *tatemae,* not the *honne,* of economic analysis.

85 Prices would be lower, but not low enough to make up for the lack of associated services.

which the superiority of markets could be championed with great success. Any threat to the pre-ordained conclusion of market efficiency was quite naturally savagely attacked and crushed. As noted by Friedland,[86] "[Stigler's] loyalty even extended to abstractions: the Chicago School or neoclassical economics. Much of his work centered around saving the damsel in distress, neoclassicism, from her attackers: hence his work on the economics of information and his enthusiasm for the Coase theorem."

C. Cold War Blues – The Ideological Context of the Chicago Approach

The reason why markets had to triumph, without exception and no matter what the odds, lay in the ideology that shaped Chicago economics—and, indeed, other social sciences particularly in the United States[87] during the Cold War period. As claimed by another Chicago graduate, Don Patinkin,[88] Friedman returned to Chicago in 1946 "to continue the school's fundamental ideological advocacy of free-market economic liberalism." This is exactly what Friedman, Stigler, and their colleagues felt was under threat from the movement toward state planning and the challenge presented by the Soviet Union and its authoritarian allies.

This ideological edge comes out clearly in the title of the powerful polemical work by Friedman, *Capitalism and Freedom*,[89] and especially in its dedication to his two young children "and their contemporaries who must carry the torch of liberty on its next lap."[90] Friedman's concern was palpable:

> As I remember for years after I left the University of Chicago, when they were contemplating influential appointments they would ask me about the person, "Is he really sound?" In fact, Milton once showed his naïveté to me, but it wasn't about appointments. He said, "Tell me the truth, is [neo-Keynesian economist John Kenneth] Galbraith a Commie?"
> (Paul Samuelson, conversation with Craig Freedman, October 1997.)

Seen in the context of the Cold War, there was a clear ideological battle for the proverbial hearts and minds of mankind. It was not only the professed collectivists of the Soviet Union who together posed an imminent danger, but also intellectuals of Western democracies who were too understanding or too accommodating about dangerous alternatives. In this environment, a new Keynesian inspired textbook, like the one produced by Paul Samuelson, and seen

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86 Claire Friedland, *On Stigler and Stiglerisms*, 101 J. POL. ECON. 780, 780 (1993).

87 S.M. AMADAE, RATIONALIZING CAPITALIST DEMOCRACY: THE COLD WAR ORIGINS OF RATIONAL CHOICE LIBERALISM (2003).

88 Quoted in Robert Leeson, *Introduction*, in KEYNES, CHICAGO AND FRIEDMAN 1, 2 (Robert Leeson ed., 2003).

89 MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

90 *Id.;* also quoted in Leeson, *supra* note 88, at 2.

as innocuous today, could generate a firestorm around those institutions that chose to adopt it.[91] Economists like Samuelson and Arrow, in their attempts to formalize large sections of economic theory, seemed determined to find limitations and faults with competitive markets.[92]

The traditional (self-proclaimed) liberals, represented at Mont Pelerin, firmly believed that a free economy was necessary for a democratic society.[93] Given what they uniformly viewed as a dangerous, and almost unrecognized, drift toward collectivism, they, like their socialist opponents, saw no other viable option than embracing the underlying logic of their ideas. They needed to find the courage to be idealistic. The extent of the leap taken, from this position to that of a full-fledged ideologue, is hard to measure. A few steps in this direction need not lead to a deliberate attempt to slant research to achieve a given set of preconceived outcomes.

George Stigler himself was never as crude as that. Nor did he ever consciously try to achieve results that fitted with his deeply held beliefs. But someone who believed so unequivocally in a certain goal would inevitably find evidence to support what he knew (in an almost *a priori* way) to be correct. It is hard to imagine what data, research, or evidence could have moved Stigler to fundamentally change his views about markets. To lose his faith would have fatally undermined the basis of his moral precepts.

For these reasons, Stigler would not surrender his precept that the Trojan horse of beneficial state services ruthlessly advanced collectivist aims at the expense of liberty. But, unlike other clearly confessed ideologues, Stigler refused to rest his case on some simple statement of faith or a claim based on anecdotal evidence. Consistent with his methodology, the assertion of

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[91] Textbook debates within a department or university seem driven by ideology or perhaps theoretical issues that matter to economists more as professionals than as teachers. Thus, the new wave of post-war Keynesian textbooks met resistance from the old guard, as well as from politicians and businessmen, keen on sniffing out anti-free market (communist) influences. Carolyn Shaw Bell, *The Principles of Economics From Now Until Then*, 19 J. ECON. EDUC. 133, 147 (1988):

"I [Carolyn Bell] occasionally met a student who asked if it was true that the book [Samuelson] was communistic and if she would be required to read that radical, Keynes. Like the parents who prompted these questions, many economics faculties condemned the new approach, sometimes in a destructive power struggle. One highly thought of institution was still having difficulty in recruiting in the early sixties because its senior members had for so long adamantly refused to consider appointing anyone using Keynesian analysis."

[92] This assumes that competitive markets eliminated the problem of power from economic analysis. In a Hobbesian type of contract, individuals ceded economic power to the marketplace in order to be "free to choose," to use Milton Friedman's pet phrase. By insuring choice, competitive markets insured individual freedom which formed the bedrock of the classical liberal counter-revolution to state intervention or planning.

[93] Much of this account of that first Mont Pelerin meeting comes from the PBS produced program, *Commanding Heights*. The show interviewed some of the surviving original participants. Milton Friedman remembers it as a meeting of "good eggs." He also recalled a heated debate on distribution where Ludwig von Mises turned on the other participants (including Friedrich von Hayek) by denouncing them as "a bunch of Socialists."

imperilled liberty must be transformed into a testable hypothesis:

> The proof that there are dangers to the liberty and dignity of the individual in the present institutions must be that such liberties have already been impaired. If it can be shown that in important areas of economic life substantial and unnecessary invasions of personal freedom are already operative, the case for caution and restraint in invoking new political controls will acquire content and conviction. [94]

Nonetheless, the ideological drive of the Chicago School remained crucial, and carried over into the establishment of the Law and Economics program in the Law School. As Coase[95] acknowledges from Simons' original proposal around 1945 for a new Institute, it: … should not be mainly concerned with formal economic theory nor should it engage substantially in economic research. It should focus on central, practical problems of American economic policy and governmental structure. It should afford a center to which economic liberals everywhere may look for intellectual leadership and support.

III. PROVING THE NON-EXISTENCE OF JAPAN – RAMSEYER AS A PROFESSIONAL *ENFANT TERRIBLE*

> **"**Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist."[96]

There is also a longstanding Chicago tradition that might be labelled "Épater les bourgeois." The bourgeois they wished to "shock" seemed to be mainstream economists. The conventional wisdom supported by these pillars of the discipline would almost automatically become a target for Chicago's mavericks of the Midwest.[97] As Groucho Marx would sing in the film, *Horsefeather* (1932)

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94 George J. Stigler, *Reflections on Liberty*, *in* THE CITIZEN AND THE STATE: ESSAYS ON REGULATION 14, 18 (1975).

95 Coase, *supra* note 54.

96 JOHN QUIGGIN, ZOMBIE ECONOMICS: HOW DEAD IDEAS STILL WALK AMONG US 1 (rev. ed. 2012) (quoting J.M. KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1936)).

97 The Chicago Department was established almost as a refuge for dissident economists, those that definitely didn't fit in with the Eastern Establishment. Frank Knight undoubtedly honed the departmental edge and made it even more cantankerous.

> "Rose Friedman: I don't think George had much tolerance for stupidity.
> Milton Friedman: I don't think you're getting at anything that is really specifically George Stigler. I think you are getting something that is (a) the atmosphere at Chicago, and (b) intensified by Knight. That an academic is concerned not with being diplomatic, not with trying to avoid hurting people's feelings, but an academic is concerned with saying what's right. Telling the truth, or trying to get at it. And if you disagree with somebody you don't say 'well, now there may be something in what you say'.

"whatever they're for, I'm against it." This would evolve in the post-War period into taking aim at the supposedly collectivist views of the political left. Part of this image Chicago attempted to nurture was an almost natural affinity with controversy. In essence, the idea that these fearless crusaders propagated was one of pursuing the truth and publishing no matter what the consequence. The more mundane consequence of such an approach was that the worset response an academic could receive was simply to be ignored. Accordingly, there was always an element of deliberate stirring in the work of many of Chicago's brightest lights. George Stigler was perhaps the evil genius of this compulsion.[98] As explained by one of his research assistants:

> He was a bit of a provocateur. He liked upsetting people. I told you he wrote that column for *Business Month*. After a year went by, nobody had criticized it. They didn't get any letters to the editor. And you know, he had said so many outrageous things: that insider trading is really okay, that sort of thing. He said things meant to upset people. Well, he gave it up. He wasn't having any fun. He wanted people to criticize his ideas and then he wanted to come back with his rejoinders. You know, he wanted to have a little controversy.
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> [Freedman:] *He liked to stir a little bit.*
>
> Yes. He probably thought the women were being oversensitive. If they had evidence to show him, they were welcome to present it. As far as George was concerned, the free market of ideas was the same as any other free market. [99]

> Rose Friedman: You may be right
> Milton Friedman: You say that's a bunch of nonsense.
> Aaron Director: Exactly. That's not surprising."
> (Milton Friedman, Rose Friedman and Aaron Director, in conversation with Craig Freedman, August 1997.)

[98] Stigler flayed anyone he singled out as an obstruction or opponent. He was an equal opportunity insulter, going after everyone from students to revered figures. He took almost a lifelong pleasure in going after John Kenneth Galbraith, starting with an evisceration of his prize theory at an American Economic Association meeting. George Stigler, *The Economist Plays with Blocs*, 44 AM. ECON. REV. 7, 7 (1954) even entitled his riposte "The Economist Plays at Blocs." Many decades later, reviewing Galbraith's television series, he ended by noting (George Stigler, *A Certain Galbraith in an Uncertain Age*, 29 NAT'L REV. 601, 604 (1977)):

> "How well these artificial pearls display their creator – nice mixtures of what one of Galbraith's favorites, Spiro Agnew, might describe as perspicacity, paradox, and perversity. I do him an injustice, a complimentary injustice to be sure, in being annoyed by this unlearned and opinionated project. Galbraith surely means only to entertain and many others do it less well."

To which Galbraith couldn't help responding in a letter, "[w]hen Bill Buckley told me you were reviewing *The Age of Uncertainty*, I expected the worst and you did not disappoint" (Letter from John Kenneth Galbraith to George Stigler (June 2, 1977).)

[99] Claire Friedland in conversation with Craig Freedman, October 1997. *See also generally* CRAIG FREEDMAN, IN SEARCH OF THE TWO-HANDED ECONOMIST: IDEOLOGY,

Ramseyer's work in Japanese law and economics has long been steeped in this attitude. To an outsider, he would seem to take almost deliberately and seemingly insupportable positions, even to the point of being perversely offensive to other academics and readers. Consequently, someone who claims the *keiretsu* was simply an invention by wild-eyed Japanese Marxists, desiring to prove the existence of monopoly capitalism, will not refrain from claiming that minors can voluntarily and rationally agree to a contract for the provision of sex during wartime. Because of the sensitive nature of this subject matter (as indicated in the "comfort women" controversy outlined in the Introduction to this paper), many more readers will find such claims to be irredeemably offensive, when compared to speculations say about corporate groups in Japan's post-War economy. Yet these recent arguments remain consistent in being as outrageous (and seemingly unsupportable) as many of his earlier, ideologically inspired statements.

As Ramseyer summarized in a paper co-authored almost two decades ago:[100]

> Most of what we collectively think we know about the Japanese economy is urban legend. In fact:
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> - The keiretsu do not exist, and never did. An entrepreneurial research institute in the 1950s created the rosters to sell to Marxist economists looking for the monopoly capital that their theory told them would dominate their bourgeois capitalist world. Western scholars hoping for examples of culture-specific forms of economic organization then brought them back to the U.S.[101]
> - The zaibatsu did not succeed in the pre-war period by buying politicians, exploiting the poor, or manipulating dysfunctional capital markets. They succeeded for all the usual varied reasons that a few firms succeed in any modern economy, namely by outcompeting the rest of the market. They acquired the (pejorative) zaibatsu label because they

METHODOLOGY AND MARKETING IN ECONOMICS (2016).

[100] Yoshiro Miwa & J Mark Ramseyer, *The Fable of the Keiretsu, and Other Tales of Japan We Wish Were True*, 1 (Harvard John M. Olin Ctr. For L., Econ., and Bus., Discussion Paper No. 471, 2004).

[101] Alternatively, for example, we might rephrase this assertion as: "The keiretsu do not exist, and never did. An entrepreneurial [US law professor since] the [1990s] [has proved this] to sell to [US law and] economists looking for the [narrowly self-interested economic actors and perfect markets] that their theory told them would dominate their bourgeois capitalist world. [Foreign] scholars [increasingly questioning] examples of culture- specific forms of economic organization then [may feel obliged to bring this world-view] back [from] the U.S."

happened to be thriving at the same time that muckraking journalists in the 1920s and 30s were desperately looking for someone to blame for the ongoing depression.

- Japanese firms do not have, and never did have, a main bank system. Economists popularized the idea as an anecdote on which to peg their mathematical models, and non-economists use it (like the keiretsu) as yet another putatively culture-bound economic phenomenon.
- Japanese firms are neither short of outside directors nor badly governed. The charges simply represent yet another variant on populist journalism. Like firms in other competitive capitalist countries, Japanese firms survive only if they adopt governance mechanisms appropriate to the markets within which they must compete.
- The Japanese government never seriously guided or intervened in the Japanese economy. The widespread belief in 'administrative guidance' is yet another fairy tale for the gullible. When the economy boomed, politicians and bureaucrats naturally took credit, as politicians do worldwide. It is in their self-interest to claim that they had created the success through their own far-sighted leadership. Marxist scholars dominated Japanese social science departments, and they were not about to suggest instead that market competition might account for the success[102] Finding an example of successful government intervention not only justified the given beliefs of the Japanese academics, but also aligned with many Western scholars of Japan as well.[103]

Starting in the 1990s, Ramseyer had vigorously criticized not only the

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102 Not being psychologists, we will not comment on a seemingly phobic fascination with Marxism and Marxists.

103 *See also* YOSHIRO MIWA & J. MARK RAMSEYER, THE FABLE OF THE KEIRETSU: URBAN LEGENDS OF THE JAPANESE ECONOMY (2006). In short, with only minor exaggeration we can sum up the Ramseyer position as: "[t]here are no Japanese people. This is only a conspiracy by left-wing academics trying to convince the discipline that preferences are not the same throughout the world. We reject this relativistic proposition by empirically demonstrating that all choices made by the hypothetical Japanese are no different than the choices made by people in the US once we take into account differences in effective (but not idiosyncratic) constraints."

argument of Stanford economist Masahiko Aoki that firms in post-War Japan had implicit contracts with main banks to take the lead in monitoring and corporate rescue.[104] He also denied that these firms developed implicit contracts with core life-long employees, who received mostly generalist training.[105] Miwa and Ramseyer[106] instead asked rhetorically:

> … do the big firms implicitly promise to pay their employees until … retirement age? Lawyers should recognize the problem: if firms wanted to promise a job long-term, why did they not do so? An "implicit promise" is a promise a firm never made, after all, for had it made it the promise would be "explicit." If a firm wanted to induce its employees to rely on a long-term job and invest in non-transferable skills, why did it not offer them a long-term contract?
>
> If firms and employees did find long-term contracts advantageous, drafting them would be simple. If employees worried that the firm might breach the contract, it could include a liquidated damages clause. If they worried about its ability to pay in a downturn, it could buy an ERISA-style guaranty from an insurance company. And if firms offered the deals routinely, economies of scale would reduce the transactions costs to trivial levels. Notwithstanding, Japanese firms never offered long-term contracts explicitly. Perhaps, however, the right interpretation is not that they promised them implicitly. Perhaps the right interpretation is that they never promised them.

In other words, two decades ago Ramseyer used the lack of written (or explicit) contracts for lifelong employment as proof against the existence of an institution running contrary to Chicago School theory that contracts for labor are just like any other contracts.[107] Yet more recently he is undeterred by historians

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104 *See infra* Part III.A.1; Masahiko Aoki, *Toward an Economic Model of the Japanese Firm*, 28 J. ECON. LITERATURE 1 (1990), had presented a classic analysis of the structure of the "J-firm." Miwa and Ramseyer essentially rejected every section of Aoki's carefully examined and constructed argument. This is despite, ironically, Aoki's work being published just as the appeal and some institutions associated with "Japan Inc." started to crack.

105 Standard economic theory would suggest that training is mostly firm-specific for Western firms, given that general style training is easily transportable to positions in other competing firms. In other words, generalist training is often an investment with shaky future returns for an individual firm. However, in the case of Japan, to jump start industry in the immediate post war period, firms had to invest in general training to bring its work force up to par. (Waiting for the educational system to provide such training involved too long of a lag.) Japanese firms practically eliminated the standard risk attached to general training by simply making it extremely difficult to jump from one job to another comparable position elsewhere. After an initial period, employees of large firms were virtually locked-in.

106 Yoshiro Miwa & J. Mark Ramseyer, *The Myth of the Main Bank: Japan and Comparative Corporate Governance*, 27 L. & SOC. INQUIRY 401, 411 (2002).

107 Making such a contractual argument is easily done if the theorist does not bother investigating the practices of actual firms. Yet, given the belief that economic agents are

criticizing his lack of grounded evidence of any written contracts agreed upon by "comfort women" to provide sexual services during the wartime era. As mentioned *supra* in Part I, Ramseyer instead casually asserts that his economic theory still holds. From his perspective, these women did provide sexual services, which therefore implicitly implies that they voluntarily and efficiently entered into such agreements. Thus, implicit contracts exist when they serve to reach a given conclusion; otherwise, such a construct is merely an empty idea. Having it both ways should be viewed as essentially illogical. Instances when ideology simply triumphs illuminate one of the less commendable aspects of Chicago School market fundamentalism.

Long characterized by iconoclastic claims, therefore, Ramseyer initially seems to be at best cantankerous and at worse perverse. He takes the most commonly-held conclusions about the Japanese economy and denies all of them categorically. In doing so, he is a classic stirrer—someone who likes to provoke his perceived opponents. At a major conference held in Germany on transformations in governance regimes in Japan, the US and Europe, for example, Miwa and Ramseyer[108] insisted that the entire project was simply flawed—depending upon a misconceived starting point. The supposedly erroneous assumption was that post-war Japan had developed a regime contrary to important neoclassical economic principles, with significantly more market-driven approaches within Japan only emerging in the -.[109] Ramseyer's approach then, started—as always—with the principle that "everything you know about the Japanese economy is wrong, and you are foolish to continue believing otherwise."

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merely responding to market price signals, it is understandable that Ramseyer might dismiss such efforts as simply a waste of time. Again, economists are deemed to have insights unavailable to those actually engaged in the economy.

[108] Yoshiro Miwa & J. Mark Ramseyer, *The Multiple Roles of Banks? Convenient Tales from Japan*, *in* CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATE AND MARKETS IN EUROPE, JAPAN, AND THE U.S. 527, (Klaus Hopt et al. eds., 2005).

[109] Nottage anticipated such a reaction when asked at the conference to comment on the presentations by Ramseyer, as well as a less dogmatic law and economics academic from the UK (Anthony Ogus, *Regulatory Paternalism: When Is It Justified?*, *in* CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATE, AND MARKETS IN EUROPE, JAPAN, AND THE U.S. 303 (Klaus Hopt et al. eds., 2005)). Nottage's comment hoped that the extremism of Ramseyer's views would become obvious to participants (especially those more unfamiliar with Japan), by listing diverse assertions made over the years by Ramseyer (such as the "myth" of the main bank, the "fable" that Japanese companies disdained shareholders, and so on), along with some important counter-evidence. A comparison was then made between an almost libertarian understanding of Japan and other alternatives (welfare statist, "neo-proceduralist" – such as Takao Tanase's neo-communitarianism, or even Shigeaki Tanaka's more restrained liberalism). For the published version of that commentary, see Luke Nottage, *Redirecting Japan's Multi-Level Governance*, *in* CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATE, AND MARKETS IN EUROPE, JAPAN, AND THE U.S. 571 (Klaus Hopt et al. eds., 2005). In their own chapter in the subsequent conference volume, however, Miwa and Ramseyer (*supra* note 105) simply provided, unabashedly, their own summary of their standard arguments that Japan had always remained a classic example of a liberal economy. See also Miwa and Ramseyer (*supra* note 100), with part included in their Working Paper (*supra* note 97) whose abstract is cited at the outset to this Part III.

This is certainly one way to get noticed, especially in the US academic world, as the versatile British law and economics scholar Anthony Ogus remarked orally at the Berlin conference.

More broadly, as one of the mainstays of the interwar Chicago Economics Department put it bluntly: "where once it was necessary in writing to pose as merely restating and interpreting doctrine handed down from the Fathers, the surest way to public interest and acclaim now lies through pulling down and overturning everything established or accepted."[110] An ambitious academic knows that the quickest way to get ahead is to create a new path, rather than toil in obscurity adding incrementally to existing knowledge. In this, the academic finds some kinship with the infant given to tantrums. Both are attention seekers.

On closer examination, this does not fully explain what is driving Ramseyer's work. The one consistent feature within his staggeringly voluminous output is the insistence that the Japanese economy is (or ought to be) a liberal market economy much like one finds in the US. (Otherwise it could not, under any imaginable set of circumstances, have succeeded). Following the tenets of the post-war Chicago School, this should be unarguable if we were simply clever enough to spot the obvious. (Ramseyer in this instance might claim a unique ability to separate the *honne* from the *tatemae*). Going even further, the Japanese legal system would almost by definition have to be efficient. If existing jurisprudence failed to facilitate such economic efficiency, there would be a positive incentive to replace it with a superior approach in an evolutionary manner.

A similar ethnocentricity can be found in his textbook on *Japanese Law: An Economic Approach,*[111] co-authored with University of Tokyo tax law professor Minoru Nakazato. This work was published as the third volume of the "Studies in Law and Economics" series of University of Chicago Press that Ramseyer co-edited with Landes. They begin by assembling a comprehensive picture of Japanese law organized, not in accordance with the understandings of Japanese jurists, but instead based deliberately "according to the questions that US scholars and lawyers ask of their own law… to enable readers readily to compare how US and Japanese solve common problems." More specifically, the co-authors use the narrow rational maximiser tenet of economics because they "think classic Chicago-school economic intuition (taken alone and without much elaboration) goes far towards explaining much (not all) law-related behavior in Japan."[112]

Over subsequent years, as indicated *supra*, this agenda has become even more ambitious, with Ramseyer setting about to prove that virtually *all* economic and law-related behavior conforms to this tenet. He remains adamant that markets function well and pervasively in Japan—end of story. The analysis even extends

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110 Robert Leeson, *Introduction*, *in* KEYNES, CHICAGO AND FRIEDMAN Volume 1, 15–16 (Robert Leeson ed., 2003) (quoting Frank Knight).

111 J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH xiii (1999).

112 *Id.* at xii–xiii.

to the world of Japanese professional baseball, long thought to include some distinctive features compared to the US. Instead, detailed econometric analysis from Ramseyer[113] predictably concludes that Japan's professional baseball players receive market value salaries, namely those based on the players' marginal product. As always, the market gets it right. Yet upon unbiased examination, factual problems are evident. Doing so opens the way to developing a better theoretical framework, one that looks not only at market forces, but also legal rules, culture (in baseball, as well as in Japan) and corporate governance regimes.[114]

Indeed, as discussed *infra*, recent collected studies by Ramseyer[115] argue that Japanese civil justice is *more* efficient than US law, implying perhaps that the latter should be reformed to reflect more market-based solutions. The comparison is over-stylized and partial, however, with Ramseyer unaware or uninterested in how Japan's legal system retains often strong affinities with that of Germany and other continental European institutions.[116] However, broadening the comparison to acknowledge that context would presumably mean arguing that those European systems are also optimally efficient. This exercise would only serve to further stretch the credibility of Ramseyer's analysis.

Parallels exist with the projects embarked on by early Chicago School economists like Gary Becker, and Law and Economics specialist Richard Posner (until he had to temper theory to real life following his appointment as a US Federal Court of Appeals judge). Like them, Ramseyer basically adopts a "one size fits all" approach to research and analysis. Accordingly, he starts off by assuming that any alternative claim must be incorrect. The game then becomes

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113 Minoru Nakazato & Mark Ramseyer, *Bonuses and Biases in Japanese Baseball*, 9 (Harvard John M. Olin Ctr. For L., Econ., and Bus., Discussion Paper No. 589, 2007).

114 Factually, for example, the critique by Matt Nichol, *Valuing Professional Japanese Baseball Players and the Role of Statistics, Economics, Culture, and Corporate Governance*, 33 J. JAPANESE L. 120, 132 (2012), notes a 2006 study of the Hanshin Tiger team (cited by Ramseyer but not for this point):

> "Kelly found that there was no correlation between salary and age, experience and performance.
>
> Another limit on Nakazato and Ramseyer's conclusion is that they excluded all players from their dataset with no *ichi-gun* experience, including the lowest paid *ikusei* players. Other factors that indicate some players are not paid their market value are that NPB draftees frequently receive 'under-the-table' payments. Nakazato and Ramseyer included approximate endorsement income in a player's salary. Globalisation presents another challenge in that Nakazato and Ramseyer did not compare the salary of domestic 'free agents' to those of 'posted' players and international 'free agents.'"

For a further fine-grained and theoretically convincing comparison of professional baseball, countering Ramseyer's view of contracts and markets as being all the same, see also MATT NICHOL, GLOBALIZATION, SPORTS LAW AND LABOUR MOBILITY: THE CASE OF PROFESSIONAL BASEBALL IN THE UNITED STATES AND JAPAN (2019).

115 J. MARK RAMSEYER, SECOND-BEST JUSTICE: THE VIRTUES OF JAPANESE PRIVATE LAW (2015).

116 Marc Dernauer, *J. Mark Ramseyer, Second-Best Justice: The Virtues of Japanese Private Law,* 21 J. JAPANESE L. 283, 284 (2016).

to round up evidence that allows him to reach this predestined goal. Any claimed difference must naturally vanish upon examination in the same way that vampires lose their existence in the clear light of day. Ramseyer adopts the typical *a priori* approach that forms the bedrock of post-war Chicago practice. However, given that Ramseyer represents a late practitioner of the original method and one who freely (and perhaps inappropriately) adopts it without any critical change to reflect the intervening decades, the issue becomes whether his version might not itself self-destruct under the probing light of analysis. To gain notice, or even notoriety, he be increasingly pushing the Chicago tradition at least a few steps too far, to the point where its structure collapses due to the lack of both intrinsic economic intuition and even the coherence of the work pioneered by earlier generations.

A. Markets Clear – Consistently (Only?) in Japan

Consider therefore some more specific parallels with the Chicago School approach, extended to the economic, legal and political sectors in Japan. First, Ramseyer and colleagues (notably controversial University of Tokyo economics professor Yoshiro Miwa) have focused much of their energy on proving that "markets cleared" throughout the Japanese economy not only before World War II,[117] but also afterwards. This has meant gainsaying even the careful work by a US economist whom Ramseyer once seemed to hold in high regard, Hugh Patrick,[118] an economist based mainly at Michigan, Yale and Columbia. Like others even today,[119] Patrick had emphasized extensive credit rationing by the Japanese government, including its far-reaching impact for economic regulation and corporate organization generally.[120]

1. Corporate Governance: More of the Same

In particular, for example, it must follow from this revisionist view that main banks also never existed, and that equity finance—and hence shareholders––continued playing the key role in post-war corporate governance.[121] These

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117 *See* J. MARK RAMSEYER, ODD MARKETS IN JAPANESE HISTORY: LAW AND ECONOMIC GROWTH (1996).

118 Hugh Patrick, *Personal Reflections by Hugh Patrick: An Interview with Edward J. Lincoln*, 31 J. JAPANESE STUD. 121, 123 (2005).

119 FREEDMAN & TRUUVERT, *supra* note 25.

120 *But cf.*, Yoshiro Miwa & J Mark Ramseyer, *Directed Credit? The Loan Market in High-Growth Japan*, 13 J. ECON. & MGMT. STRATEGY 171 (2004).

121 On the alleged overwhelming importance of efficient equity markets, stock prices and hence shareholders in Japanese corporate governance, *compare* Steven Kaplan & J. Mark Ramseyer, *Those Japanese with Their Disdain for Shareholders: Another Fable for Academy*, 32 WASH. UNIV. L.Q. 403 (1996) *and* J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 128-135 (1999) *with* the allegedly

arguments are rather like the efficient market joke made about (especially Chicago School) economists: if they spot a 100-dollar bill on the footpath, they ignore it because it cannot exist—someone would have already picked it up.[122] Similarly, main banks cannot exist because they would represent inefficient arrangements. Firms that recognize broader stakeholders like creditors and employees cannot emerge (or will fail) because only those that give primacy to shareholder interests will survive in competitive markets. (Financial resources apparently are easily transferable to a more successful efficient firm.) The game then becomes to marshal data to prove that these deductions hold true, in the tradition of Stigler and the Chicago School (outlined *supra* in Part II).

Unfortunately, there is ample evidence available to demonstrate that the main bank arrangement not only existed,[123] but continued to play important roles especially for small- and medium-sized enterprises in the 1990s, during Japan's "lost decade" of economic stagnation.[124] But Ramseyer cannot recant from his previously published work on main banks. A major starting point was his chapter in a volume on Japanese main banks co-edited by Aoki and Patrick. Ramseyer[125] sets up a series of theoretical reasons why the majority view that they were alive and kicking, playing key roles in Japanese corporate finance and governance, must be wrong. To shove his belief across the line, he must create a construct that essentially represents a theoretical (rather than an actual) Japan. In essence, he must largely ignore how the Japanese economy operates.

One key argument is that main banks' implicit promises to help failing firms ought rationally to be made in terms of express binding contracts, yet they are not (or at least not litigated as such). Consequently, we should conclude that such promises do not exist. To explain then why we seem nonetheless to see actual bailouts by banks, the next step in the argument becomes that Japanese courts have not developed a doctrine analogous to equitable subordination in the US. This doctrine would have voided security interests in order to punish a major secured creditor who intervened. (Failure to do so, would make creditor intervention more common because such action is profitable *ex post*, thus making threats to punish defaulters less credible *ex ante.*)

"wrong" studies by observers such as Ronald Dore, and other such developments assessed in Luke Nottage, *Japanese Corporate Governance at a Crossroads: Variation in Varieties of Capitalism*, 27 N.C.J. INT'L L. 255 (2001); Luke Nottage & Leon Wolff, *Corporate Governance and Law Reform in Japan: From the Lost Decade to the End of History?*, *in* JAPANESE MANAGEMENT: THE SEARCH FOR A NEW BALANCE BETWEEN CONTINUITY AND CHANGE (Rene Haak & Markus Pudelko eds., 2005).

122 DONALD N. MCCLOSKEY, IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE 112–13 (1990).

123 Curtis Milhaupt, *On the (Fleeting) Existence of the Main Bank System and Other Japanese Economic Institutions*, 27 L. & SOC. INQUIRY 425 (2002).

124 Dan W. Puchniak, *A Skeptic's Guide to Miwa and Ramseyer's "The Fable of the Keiretsu"*,12 J. JAPANESE L. 273 (2007).

125 J. Mark Ramseyer, *Explicit Reasons for Implicit Contracts: The Legal Logic to the Japanese Main Bank*, *in* THE JAPANESE MAIN BANK SYSTEM: ITS RELEVANCE FOR DEVELOPING AND TRANSFORMING ECONOMIES (Masahiko Aoki & Hugh T. Patrick eds., 1994).

The first argument is very weak given what we know about the pervasiveness of implicit contracts (the real deals) as opposed to express contracts (the paper deals) in many industrialized democracies. Yet acknowledging this phenomenon means that contracts are made and enforced not just based on a narrow cost-benefit calculus. Rather, contracts operate in a much broader socio-economic context.[126] The second argument—the lack of an analogous equitable doctrine—is very difficult to prove, as Ramseyer himself acknowledges. But in any case, the doctrine would not preclude main banks from committing their support to debtors in other ways. Nor does this preclude being virtually forced to sometimes extend such support by the government, in exchange for a reciprocal agreement linking government backstopping of the banks. Such contracts did occur—largely implicitly—until the late 1990s.[127]

Despite these weaknesses in his theoretical argument, subsequent regression analyses by Ramseyer claim to have duly proven that main banks not only *cannot* exist, but indeed *do not* e.g. Miwa and Ramseyer.[128] However different quantitative analysis continued to show the converse e.g. Lincoln and Gerlach.[129] Ramseyer, as this demonstrates, is given to a twisted Ptolemaic outlook on reality, whereby he piles epicycle on epicycle to destroy the appearances. His use of econometrics then quickly degenerates into simply employing a convenient rhetorical tool.

Secondly, regarding the broader legal environment for corporate governance, Ramseyer and Nakazato[130] also follow the Chicagoan predisposition that "*what is, is efficient*," concluding that:

> Given Japanese economic success, it should come as no surprise that most Japanese corporate [law] rules make reasonably good sense. Only on relatively minor issues are the rules sometimes inefficient. The inefficiency, in turn, probably results from the lack of competitive pressures among incorporating government entities (p.134).

These are remarkable claims, which require extensive mental gymnastics and punchy prose to retain even a glimmer of superficial plausibility. For example, Ramseyer and Nakazato[131] concede that the lack of hostile takeover bids is a "puzzle." It is only a puzzle given the conventional Law and Economics wisdom prevalent in the US during the 1980s and 1990s. Although this is now a

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126 IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL, AND NETWORK CONTRACTS (David Campbell et al. eds., 2003).

127 Curtis J. Milhaupt, *Japan's Experience with Deposit Insurance and Failing Banks: Implications for Financial Regulatory Design?*, 77 WASH. U.L.Q. 399 (1999).

128 Yoshiro Miwa & J. Mark Ramseyer, *The Multiple Roles of Banks? Convenient Tales from Japan*, *in* CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATE, AND MARKETS IN EUROPE, JAPAN, AND THE US (Klaus Hopt et al. eds., 2005).

129 J JAMES R. LINCOLN & MICHAEL L. GERLACH, JAPAN'S NETWORK ECONOMY: STRUCTURE, PERSISTENCE, AND CHANGE (2004).

130 J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH (1999).

131 *Id.*

wisdom dented by the excesses of the post-Enron era. Takeovers (only after observed to be growing in the US, of course) are assumed to provide a necessary and sufficient arm's length market mechanism for controlling incumbent management. Provided legal impediments are limited, these takeover bids primarily benefit shareholders. Accordingly, Ramseyer and Nakazato[132] must reject the conventional wisdom that hostile bids remain rare due to cross-shareholdings. (Curiously, acknowledging this bit of evidence should imply that main banks and *keiretsu* do exist.) Instead, they assert—confessing that they utterly lack data to prove this—that a de facto substitute "perhaps" arises from friendly Merger and Acquisition activity combined with "disguised bribes to the target's senior executives."[133]When in doubt, create an agreeable hypothetical.

Miwa and Ramseyer[134] were also quick to object to reformers in Japan—following developments in the US, especially after the Enron corporate collapse––who wanted to encourage more non-executive, independent directors onto Japanese corporate boards. This move toward greater accountability was thought to be capable of improving board monitoring capacity on behalf of shareholders. Examining the 1000 largest exchange-listed Japanese firms from 1986-94, they found no statistically significant evidence of better corporate performance in firms with more outside directors, either during the booming 1980s or the 1990s bust. The conclusion is again: *what is, is efficient*. They confirm what they knew they would find. In essence, the "basic economic logic" that:

> what outsiders potentially contribute in independence from managers, they sacrifice in camaraderie and knowledge about the firm. Although in some firms the former may outweigh the latter, in others it will not.
>
> More basically, those firms that survive should disproportionately be those with boards that work well for them.[135]

Curiously, however, they code "outside directors" as those with past or concurrent positions in banks, or other firms (but ignoring any *keiretsu* relationships). They include past bureaucrats, including executive as well as non-executive directors. Yet the theory behind the "monitoring board" is to have at least non-executive directors (and preferably also those who are "independent" in a wider sense), who are less likely to be beholden to the CEO and other managers. Instead, the board members are expected to monitor them on behalf of

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132 *Id.*

133 *Id.* at 121–22.

134 Yoshiro Miwa & J. Mark Ramseyer, *Who Appoints Them, What Do They Do? Evidence on Outside Directors from Japan*, 14 J. ECON. & MGMT. STRATEGY 299 (2005).

135 *Id.* at 303. Incidentally, they go on to suggest that the forced expansion of outside directors on US corporate boards was not to promote monitoring or efficiency but to insulate the firm from extortionate shareholder derivative suits, which only emerged beginning in the 1990s in Japan and still remain at comparatively low levels.

shareholders (and potentially other stakeholders in the firm). Further, Goto et al.[136] point out that anyway:

> they did not determine whether firms have an optimal board composition for monitoring management. This is because the attributes Miwa and Ramseyer focused on as explanatory variables for board composition (e.g. the industrial sector in which the firm is located, whether the firm has a parent company and the firm's level of financial distress) do not reflect the necessity or the cost of monitoring by outsiders.

Noting also that Japanese corporate boards have changed significantly since Japan's "lost decade" of economic stagnation over the 1990s, Goto et al.[137] More recent and careful empirical studies conclude that:

> [T]he board composition of Japanese firms may be suboptimal in some respects. Firms that are likely to benefit from monitoring by outsiders tend to appoint too few outside and/or independent directors, but. . . firms that would benefit from more stringent monitoring by outsiders (such as firms where managerial private benefits are high) are less likely to appoint outside directors.

Goto et al.[138] add that such results provide a basis for corporate law and/or stock exchange rule interventions regarding board composition but explain how this needs to be done carefully to provide maximum net benefit. They go on to explain how Japanese reforms have moved in the direction of encouraging more non-executive and indeed independent directors, albeit more cautiously than even some other major Asian economies.[139]

It is certainly appropriate to query the merits of jumping on the outside directors' bandwagon, as recent detailed comparisons across Asia have shown.[140] Researchers have been prompted by early skeptics to conduct further empirical

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136 Gen Goto et al., *Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017).

137 *Id.* at 157.

138 *Id.*

139 *See also, e.g.*, Curtis. J. Milhaupt, *Evaluating Abe's Third Arrow: How Significant Are Japan's Recent Corporate Governance Reforms?*, (COLUMBIA L. & ECON., Working Paper No.. 561, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925497#; Souichirou Kozuka & Luke Nottage, *Independent Directors in Asia: Theoretical Lessons and Practical Implications*, *in* Puchniak, *supra* note 38, at 468.

140 Puchniak, *supra* note 38; Luke Nottage, *Fledgling Corporate Governance and Independent Directors in Cambodia's Securities Market*, 35 AUSTRALIAN J. CORP. L. 208 (2020); Luke Nottage, *Independent Directors and Corporate Governance in Thailand: A New Frontier*, 31 J. TRANSACTIONAL L. & POL'Y (forthcoming May 2020).

research into their impact on overall corporate performance as well as other useful roles they may play including reducing isolated corporate collapses or even mediating disputes among family shareholders. Inspired by empirical research in the US from the late 1990s, and what we might call "the Chicago question" (if an observed phenomenon is ostensibly so bad, like insider-dominated boards, why hasn't the market efficiently improved it?).[141] Ramseyer was refreshingly quick off the mark to ask the right questions also for Japan—such how to resolve the tension between director experience or expertise and independence. But answers have emerged indicating that market solutions are not always optimal, meaning other institutional and normative forces are in play, and so policy-making for board composition has evolved that he and Chicago School adherents would still find troubling.

The concept of the *keiretsu* seems to be a particular irritant to Ramseyer, who has returned to the subject several times using a number of different variations. To allow any part of common wisdom to stand concerning the *keiretsu* would be to allow an alternative to competitive markets as the sole form of market efficiency. Dangerous heresy needs to be eliminated employing a sort of scorched earth campaign. The solution is to demonstrate that the existence of the *keiretsu* is a myth (as is so much else of the common wisdom concerning Japan). Ramseyer purports to demonstrate this shameful lack of existence empirically. However, his empirics turn out to be more a marketing than a testing tool. His statistical work fails even to meet the following minimum requirements for such analysis.

First, have we devised the correct test? In Ramseyer's case, the test he performs does not necessarily test the hypothesis he states. He looks at main bank shareholding and concludes there is not a preponderance of shares held in a particular group of companies. This ignores the fact that large loans tend to be sold off to several participating banks with the main bank simply taking the lead role as loan originator. In this fashion risk is spread, while participating banks (besides the original main bank) become tied to the fate of a variety of *keiretsu*. In this case, the question arises as to whether Ramseyer is ignorant of basic financing arrangements or if he simply chooses to ignore the obvious.

Second, is the data employed appropriate for the test? Again, often the exact data needed is not available and proxies have to be used. So far, this is standard procedure, but not any proxies will do. Ramseyer's proxies can be found wanting, but Ramseyer simply glosses over any difficulty when necessary. Curiously, he can criticize existing definitions of a *keiretsu,* but then use those rejected definitions as the source for his data. In this way, it becomes difficult to know if the problem lies with the concept of the *keiretsu* or simply the data employed.

Third, are the results of the test being evaluated fairly? Ramseyer here adopts what is one of the more dubious approaches of the Chicago School. The tactic is to push claims to their limit and wait for others to try to knock them down.

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[141] As pressed by Miwa and Ramseyer (*supra* note 133 at 332): "Provided boards matter, by standard economic theory market competition should drive firms toward their firm-specifically optimal board structure."

This is a method that grabs attention but can lack integrity. Notice it depends on a narrow, and largely unproven concept of the marketplace for ideas. Namely that out of the furnace of heated competition, the correct conclusion will inevitably arise. Besides lacking any solid evidence in the field of economics, this belief seems a bit ingenuous, more will of the wisp than anything anchored by hard facts and data.[142]

> It's a sort of a 'Marines' approach to Economics. Stigler was certainly one of the leaders of the Chicago School. I think that's what distinguished the Chicago approach. We take what we do very seriously. And we take it as far as you can."
> (Craig Freedman, conversation with Sherwin Rosen, November 1997.)

Ramseyer also employs a statistical strategy that might be called the 'MEGO' approach to statistics, namely "My Eyes Glaze Over" when I attempt to work my way through the volume of statistical tests presented within one paper. The sheer volume of data and statistical tests cause any but the most determined reader to relinquish concerted attempts to examine the empirical work closely. A rational critic might easily conclude that the potential reward from meticulously plowing through all the econometric work presented simply was not worth the cost. Whether this is somehow a deliberate ruse employed by Ramseyer is, of course, fundamentally unknowable.

This approach extends generally throughout Ramseyer's work. Problems in the performance of Japanese markets tend to be attributed to unwarranted government intervention. More generally, the "minor" inefficient rules on the law books actually add up to be many (p. 123). For years these laws have prompted US interests (such as the United States Trade Representative and the American Chamber of Commerce in Japan) to insist on the liberalization of many of these mandatory rules (e.g. as to share types, transfers, buybacks, minimum capitalization, decisions by shareholder consent, and choice of directors and/or statutory auditors to monitor management). Starting in the early 1990s, many of these regulations have been completely or substantially relaxed as a result of sweeping reforms to Japanese corporate law.[143] Even domestic

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142 If anything, economists have proven to be the great recyclers in terms of ideas and theories. It is difficult to pinpoint any economic theory, however dubious, that has been buried once and for all. Given time, such seemingly buried theories are resurrected, albeit dressed and packaged more fashionably than before. This is as true of theories appealing to those on the political left, as to those on the right. *See, e.g.* Marian Tupy, *Anti-Colonialism's Bad History*, QUILLETTE (Apr. 13, 2021), https://quillette.com/2021/04/13/anti-colonialisms-bad-history/.

143 Tomotaka Fujita, *Modernising Japanese Corporate Law: Ongoing Corporate Law Reform in Japan*, 16 SINGAPORE ACAD. L.J. 321, 322 (2004); Curtis. J. Milhaupt, *Evaluating Abe's Third Arrow: How Significant Are Japan's Recent Corporate Governance Reforms?* (Columbia L. & Econ. Working Paper No. 561, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925497# From the Chicago School perspective, so-called reform or liberalization of an existing regulatory structure simply signifies a redistribution of benefits from one vested interest to another. When the rents

interests have sought more flexibility within corporate organizations to facilitate the goal of revitalizing the Japanese economy (albeit, perhaps with the underlying objective of benefiting managers rather than shareholders).[144]

2. Product Safety and Consumer Law

This monomaniacal focus on market efficiency is applied to all other areas of law subjected to Ramseyer's brand of economic analysis. His conclusions are consistently dominated by an undiminished faith that "*what is, is efficient.*" In those rare cases where the evidence seems to point in a contrary direction, such anomalies can be readily remedied by further market-driven solutions. For example, he has long remained skeptical about strict liability obligations. In Japan, such accountability is imposed on manufacturers for

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gained through regulation begin to diminish (perhaps due to technological change,) support for the status quo weakens. Rents then are simply shifted rather than abolished.

> "My students will tell you that in the mid-seventies, before any of this began, when I talked about banking, for example, I said, '[t]here is no way this industry can remain regulated. There is no way.' Even airlines, this is true even in airlines where the first response to the dissipation of the rents was to try to make them operate better. I said, '[l]ook, there is something very funny going on here.' This is the mid-seventies. I can remember very clearly telling my class, that there is something very funny going on. This is something never seen before. A regulatory agency is saying that what we need is more efficiency. I said, '[t]his is a signal that either one of two things can happen. Either the regulators are going to be replaced by other regulators who get off this efficiency kick, or regulation is dying.' Because a view that what they are trying to do is to use exactly what in textbook welfare economics are efficient price signals, efficient resource allocation, cannot be correct. That's the view that I came to believe was the wrong view of what regulation is trying to do. Regulation only survives if it has rents to spread around. In the past it used price and entry in the traditional mode. Today it's more complicated. But in the airline case, it had price and entry as its delegated mechanisms. So it's got to create inefficient prices if it's going to do its job. If it's focusing on efficiency, something's wrong. So I knew it then. I had this view already back in the seventies that regulation can put itself out of business."

(Sam Peltzman in conversation with Craig Freedman, October 1997.)

144 Curtis J. Milhaupt, *A Lost Decade for Japanese Corporate Governance Reform?: What's Changed, What Hasn't, and Why*, *in* INSTITUTIONAL CHANGE IN JAPAN 97, 98 (2006). It is unclear what J. RAMSEYER & NAKAZATO,, *supra* note 111, at 134 mean by "the lack of competitive pressures among incorporating government entities" as one possible cause of "minor" inefficient rules in Japanese corporate law. Perhaps it refers to the contrast with competition among states in the US, a battle largely won by Delaware, to offer the most flexible (or favorable) corporate law regime in order to attract "business" from corporations. Mark D. West, in writing *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 UNIV. PA. L.R. 527 (2001) picks up on this point as an explanation of why Japanese corporate law reform has mostly been driven by external shocks, not internal development. But that explanation does not square well with reforms especially since the 1990s (Luke Nottage, *Nothing New in the (North) East? The Rhetoric and Reality of Corporate Governance in Japan*, 10 COMPAR. RSCH. L. & POL. ECON., Research Paper No. 01-1,2006).

defective products by Japan's Product Liability (PL) Law of 1994, as well as under the 1898 Civil Code for negligence in supplying goods. In fact, the subject of his Coase lecture at Chicago Law School[145] proved true to his "public choice" style cynicism when focused on legal or regulatory interventions.[146] He felt confident in singularly emphasizing a rent seeking aspect. The gist of his argument relegated consumer regulation as a lobbying effort being pushed along by manufacturers of safer products seeking to raise compliance costs and hence keep ahead of their competitors. As stated, this assumption runs contrary to a much more fine-grained analysis of the Law's genesis, emphasizing the rebirth of consumer power, international developments, and so on.[147]

Yet, at the same time, Ramseyer[148] felt compelled to argue that some of these manufacturers had already developed a private ordering scheme as a more efficient substitute for strict-liability obligations imposed on all manufacturers.[149] Specifically, he objected to such PL (public liability laws) because "it forces sellers to bundle insurance contracts with the goods they sell. Basic theory, however, suggests that if some buyers want bundled insurance contracts, then in unregulated markets some sellers will offer them."[150] The theory behind this is clear. Universal schemes lead to an inefficient allocation of risk between buyers and sellers as well as creating a potential moral hazard

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145 J. Mark Ramseyer, *Public Choice*, (COASE-SANDOR INST. FOR L. & ECON. Working Paper No. 34,1995), https://chicagounbound.uchicago.edu/law_and_economics/394/.

146 Like most of the Chicago School, he failed to understand Coase's methodological approach. Coase basically rejected the compulsion to simply abstract in order to generalize. He also refused to jump from theory to policy, staying true to more classical liberal economist. Instead, Coase advocated getting one's hands dirty in nitty gritty details, as well as not being ruled by a priori assumptions.

> "George [Stigler] didn't like my piece that I wrote on Economics and The Contiguous Disciplines.
> *Yes, I've read it. It's a good work.*
> He didn't think so.
> *What was his problem?*
> Well, I didn't actually ask him. He indicated his displeasure by saying - you know, it had been written for originally, and then given at, a conference in Germany. He said it would have been better if it had been written in German.
> *I suppose he didn't care for it.*
> He didn't care for it. This must mean, I think, and this may be of interest to you, that he didn't understand it."
> (Ronald Coase in conversation with Craig Freedman, October 1997.)

147 LUKE NOTTAGE, PRODUCT SAFETY AND LIABILITY LAW IN JAPAN: FROM MINAMATA TO MAD COWS 23–69 (2004).

148 J. Mark Ramseyer, *Products Liability through Private Ordering: Notes on a Japanese Experiment*, 144 UNIV. PA. L. REV. 1823 (1996).

149 A private scheme must in the Ramseyer world inevitably be more efficient since anything that governments can do, the private sector can do better. We can almost hear Ramseyer doing a take on the famous, "Annie Get Your Gun" duet: "Anything you can do, I can do better."

150 RAMSEYER &NAKAZATO, *supra* note 111, at 99–100.

problem.

When Ramseyer and Nakazato examined the Japanese situation they find, lo and behold, that this is exactly what Japanese manufacturers did before the PL Law pursuant to the "Safety Goods" or SG scheme (and others) from the mid-1970s. Some firms helped develop safety certification standards set by their industry association, got specific product types certified, then were able to take out insurance against claims for product defects. (Allegedly, the small "insurance premium" was built into the sale price). This insurance was then paid out (voluntarily) on a strict-liability basis if consumers were able to prove to the association that a product was manufactured defectively (as opposed to negligently).

Unfortunately, there are all sorts of problems with this analysis. In particular, although the theory sounds plausible, the empirical foundations are weak in many respects. For example, once again a "puzzle" is acknowledged. (This reflects a standard Chicago approach). Namely, over nearly two decades, only 339 out of 727 claims (averaging 460,000 yen each) were paid out. The successful claims represent over 100 types of products registered under the scheme.[151] Yet the main reason given for this limited result is that "probably" the scheme, by design, disproportionately covers only the safest products. Consequently, the voluntary system generates few injuries, and few claims.[152] If this happens to be the case, then, why do such manufacturers spend time and money to have their products certified and insured? Moreover, if the scheme were such an efficient solution to the stated problem, why have so few products been certified, compared to the thousands of purely voluntary standards developed and published by Japanese and international bodies?

Equally or even more plausible is that the SG manufacturers, and the industry more generally, supported the scheme as a convenient way to pre-empt the government responding more broadly to widespread safety failures in the late 1960s and early 1970s. In essence, these firms feared that the government would impose strict-liability requirements in tort or stricter government safety standards. The former was delayed until the PL Law of 1994, and the latter have also remained rare. Only six mandatory standards were imposed under the Consumer Product Safety Law of 1974 as of 2005.[153] Despite a subsequent succession of high-profile issues that further heightened community concerns about product safety,[154] there are currently only 10 mandatory safety standards set under the

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151 *Id.* at 104–06.

152 The text also "suspects (the SG system itself provides no data on point) that the SG firms (like the more reputable American firms) handle the most serious product defects outside of the official claims procedures through straightforward product recalls." *Id.* at 263 n.92. The year after publication, however, was when Japanese firms belatedly began recalling unsafe products. These ranged from foodstuffs, consumer electronics and automobiles, causing the public (and the government) to realize that Japan's recall system was not functioning effectively either.

153 Luke Nottage, *Reviewing Product Safety Regulation in Australia - and Japan?*, 16 AUSTRALIAN PROD. LIAB. REP. 100 (2005).

154 Luke Nottage, *The ABCs of Product Safety Re-Regulation in Japan: Asbestos,*

Consumer Product Safety Law, compared to 44, for example, under the Australian Consumer Law.[155]

> This success for Japanese manufacturers has come at a small cost, given the limited payouts under the SG scheme. Likely explanations for such payouts, in turn, are that a strict-liability standard was *not* voluntarily applied, especially for the common cases of warning and design defects.[156] Clearly, manufacturers made little effort to publicize their scheme among consumers. In Ramseyer's own terms, doing so would contradict those firm's self-interest. However, Ramseyer and Nakazato either fail to mention or simply downplay longstanding concerns about such evident lapses.[157] This response is predictable because the purported efficiency of the scheme and therefore its normative appeal must turn on it having broad coverage, and being accepted by consumers on the basis of informed consent. No matter: investigators like Ramseyer never let contrary data (or a search in good faith for missing data) ruin a nice theory consistent with the Chicago School ideology that markets always work efficiently, rendering government intervention unnecessary.[158]

More recent research by Ramseyer[159] into product safety law and practice in Japan displays further flaws in both logic and evidence. The latest attempt comes from his book entitled *Second-Best Justice: The Virtues of Japanese Private Law*.[160] Overall, the book praises the Japanese legal system for resolving private law disputes more efficiently through highly standardized and therefore more predictable decisions, when compared to the higher level of litigation in the US. For Ramseyer the cause is linked arguably to an over-emphasis on "individualized justice," compounded by venal lawyers who (thanks to juries and elected juries) find it lucrative to extort outrageous payouts.[161] Accordingly, in

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Buildings, Consumer Electrical Goods, and Schindler's Lifts, 15 GRIFFITH L. REV. 242, 242 (2006).

155 *Compare PSC Mark: Mandatory Consumer Safety Approval*, JAPAN QUALITY ASSURANCE ORG., https://www.jqa.jp/english/safety/service/mandatory/psc, *with Mandatory Standards,* AUSTRALIAN COMPETITION & CONSUMER COMM'N, https://www.productsafety.gov.au/product-safety-laws/safety-standards-bans/mandatory-standards.

156 RAMSEYER & NAKAZATO, *supra* note 111. Again, in a footnote (n 263), they concede: "The limitation to defectively *manufactured* goods (as opposed to claims overr warning or design defects) is only our inference. Because the council's deliberations are not public, we do not know how broadly it interprets the concept of *defect*.

157 *See, e.g.,* Hiroshi Sarumida, *Comparative Institutional Analysis of Product Safety Systems in the United States and Japan: Alternative Approaches to Create Incentives for Product Safety*, 29 CORNELL INT'L L.J. 79 (1996).

158 Ramseyer, channelling the spirit of the Chicago School sometimes utilizes an approach to data that might be described as: "When my facts disagree with what I know to be true, I ignore the facts or find a better set."

159 J. Mark Ramseyer, *Liability for Defective Products: Comparative Hypotheses and Evidence from Japan*, 61 AM. J. COMPAR. L. 617 (2013).

160 RAMSEYER, *supra* note 115.

161 It is hardly surprising that Republican politicians, supported by Chicago-style reasoning, generally push to cap such payouts through legislative efforts.

Chapter 3 ("A System with Few Claims: Products Liability"), Ramseyer[162] seeks to explain why Japan has far less PL litigation than the US:

> Most modern products are safe—for the simple reason that most modern Japanese and American consumers are rich; that most rich people willingly pay for safe products; and that manufacturers do best in competitive markets when they offer consumers what they want. Japanese judges with a second-best approach apparently understand this. They apparently realize they cannot reliably distinguish the rare defective product from the putative defective product advanced by the fraudulent attorney. Rather than try more than half-heartedly, they treat all product liability claims with skepticism.
>
> By contrast, Americans have built a legal system around a first-best obsession with giving every claimant a plausible shot at recovery.

In addition, Ramseyer[163] blames two distinctive features of the US legal system, lay juries and elected judges, for allowing prolific and venal American lawyers to "extort" judgments and settlements for products that are not actually harmful. To bolster this conclusion, he pooh-poohs arguments highlighting various "institutional barriers" that have long been identified as making it more difficult generally to bring civil suits in Japan. Ramseyer[164] presents some (but limited and debatable), evidence querying whether Japan in fact has: lower damage awards (despite the US allowing for punitive damages), higher lawyer costs (or less contingency fees), less extensive pre-hearing discovery of evidence, and less effective means to aggregate plaintiffs (through class actions).[165]

Essentially, Ramseyer argues first that both countries consume the same products, which competitive markets then helpfully ensure are safe.[166]

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162 RAMSEYER, *supra* note 115, at 36.

163 *Id.* at 66–69.

164 *Id.* at 59–65.

165 It is beyond the scope of this already long paper to address such arguments. However, taking for example pre-trial discovery, a recent detailed study does show that the sharp contrast often drawn with the U.S. system is overblown, at least since Japan's Code of Civil Procedure reforms in force since 1998. *See* Andrew Pardieck, Discovery in Japan (Mar. 6, 2020) (unpublished manuscript) (on file with author). Yet that careful research still reveals that very significant differences remain that relatively disadvantage plaintiffs. These include the lack of depositions or a general duty on litigants to pro-actively disclose all relevant documentary evidence. Moreover, the more limited doctrines available to Japanese judges rely overwhelmingly on voluntary disclosures by litigants. The latter feature can also be seen as yet another example of "authority without power," emphasized by John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, *in* LAW IN JAPAN: A TURNING POINT 99 (Daniel J. Foote ed., 2007), as a persistent feature of Japanese legal history and related socio-economic ordering. Sadly, this approach contradicts the standard economic rationalist paradigm.

166 A classic Chicago style paper by Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981),

Empirically, this is a remarkable assertion given that the Consumer Product Safety Commission in 2018 estimated that unsafe products still cost the US economy $1 trillion annually.[167] Theoretically, even Ramseyer[168] later concedes: "[t]o be sure, markets are never perfect. Informational asymmetries, negotiation costs, and commitment difficulties can sometimes prevent consumers and manufacturers from contracting for mutually favored levels of product safety."

Secondly, he argues that substantive Japanese PL law is basically the same as in the US. Furthermore, he claims that the strict-liability PL Law of 1994 is basically the same as the old Civil Code negligence-based regime. This vastly over-generalizes. Starting from the 1990s, the voluminous US case law began to reinstate negligence-style reasoning (and focused on what reasonable alternatives were available for suppliers) for design or warning defect claims. Doing so left a pure strict liability regime only for one-off manufacturing defects, as evidenced in the American Law Institute's *Restatement 3rd (Product Liability)* [169] and ensuing case law.

By contrast, the 1985 European PL Directive that inspired Japan's 1994 Law (and starting from the 1990s, similar regimes later added in Australia and around the Asia-Pacific region) maintain the earlier strict liability standard for establishing a product defect. Notably, this approach maintained the perspective of consumer safety expectations. There is a large conceptual and practical difference between assessing a lack of sufficient safety from that perspective, rather than from the perspective of whether the manufacturer was negligent (including by reference to industry standards). This distinction holds, even if the usual Civil Code burden of proof can be reversed so lack of negligence needs to be proven by the manufacturer. The latter approach was indeed arguably adopted by the Osaka District Court in a judgment involving a Panasonic TV that caught

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constructs a model that purports to demonstrate that in competitive markets firms cannot get away with (not profitable) cutting corners or offering inferior products. However, the conclusion depends on assuming a high degree of consumer rationality exists. In essence, accurate and sufficient information is quickly relayed to consumers. Moreover, consumers' memories and attention spans are deemed to be approximately infinite. Like elephants, they never forget. The type of bounded rationality offered by Herbert Simon, never gets a look-in, at least in this proposed environment. Unfortunately, there is no evidence, for instance, that consumers do remember corporate scandals over time. Given the current overload of information, it is possible to assume that just as celebrity may last for only a requisite fifteen minutes, memory is also about fifteen minutes long. At least, that is what many politicians hope.

167 *See U.N. Conference on Trade and Development, Unsafe consumer products cost the US economy $1 trillion each year* (July 11, 2020), https://unctad.org/news/unsafe-consumer-products-cost-us-economy-1-trillion-each-year. A more recent conservative estimate from the government in Australia is $4.5 billion annually: *see* Australian Government, Treasury Consultation Regulatory Impact Statement (2019) linked via Luke Nottage, *Rather than Recalling Unsafe Products Why Not Ensure They Are Safe in The First Place?*, THE CONVERSATION (2021), https://theconversation.com/rather-than-recalling-unsafe-products-why-not-ensure-theyre-safe-in-the-first-place-146988.

168 RAMSEYER, *supra* note 115, at 50–51.

169 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § (AM. L. INST. 1998).

fire. Yet that was a rare and unusual judgment rendered just before the 1994 Act was legislated, and in the shadow of protracted public debate over how PL law should develop in Japan.

In turn, the significant doctrinal shift in Japan's liability regime explains evidence of a step-up in PL lawsuits filed, settled, or resolved through published court judgments from the mid-1990s.[170] Regarding the PL judgments annually, the step-up (and high proportion of pro-plaintiff outcomes) can be seen even in Table 3.2 presented by Ramseyer.[171] Admittedly, this is off a very low base and annual reported PL judgments—and even unreported ones, which Ramseyer guesses are extensive—remain very low compared to the US, but not to other countries with similar liability regimes such as Australia.[172]

Thirdly, building on the above two (questionable) premises, Ramseyer argues that there has been no practical impact from the 1994 PL Law. He asserts that Japan, for example, displays the same low and declining levels of non-traffic accidental deaths as in the US. (As for the increase acknowledged in Japan from the 1990s, Ramseyer argues that these come from Japan's comparatively aging population being more prone to accidents.) However, even if we can assume that such hospital data in each country are similarly good proxies for the undefined subset of product-related deaths (and indeed can be generalized to other non-lethal accidents), there is an unexplained phenomenon in Table 3.1.[173] What is the explanation for Japan's increase in accidental deaths reported from the early 1990s, before the rate drops back in the late 1990s, for both the elderly and "below 65" population cohorts? This pattern could, in fact be consistent with the evidence from many independent sources.[174] Japanese manufacturers significantly ramped up their product safety activities (through product redesign and especially better warnings, PL insurance and dispute resolution systems etc) as debate re-emerged from the early 1990s, strongly pushing for strict liability PL legislation. More public discussion about safety issues could well have generated more reporting of product-related accidents. Concerted improvements by Japanese firms, and the emergence of largely pro-plaintiff court judgments, arguably then generated safety improvements that would explain the decline in accidental deaths resuming from the late 1990s.

Ramseyer[175] instead argues later that there was no impact from the PL Law of 1994. He does so because he hypothesizes that the government-funded Consumer Lifestyle Centre should have seen a decline in product-related health and

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170 NOTTAGE, *supra* note 146, at 171; Luke Nottage, *Comparing Product Safety and Liability Law in Japan: Path-Dependant Globalization*, *in* EMERGING RIGHTS IN JAPANESE LAW 159 (N. Schreiber Harry & Mayali Laurent eds., 2007).

171 RAMSEYER, *supra* note 115, at 52.

172 Jocelyn Kellam & Luke Nottage, *Happy 15th Birthday, TPA Part VA! Australia's Product Liability Morass*, 15 COMPETITION & CONSUMER L.J. 26 (2007); Luke Nottage & Jocelyn Kellam, *Product Liability and Safety Regulation*, *in* CONSUMER LAW AND POLICY IN AUSTRALIA AND NEW Zealand 187 (Malbon Justin & Nottage Luke eds., 2013).

173 RAMSEYER, *supra* note 115, at 48.

174 NOTTAGE, *supra* note 146, at 191–98.

175 RAMSEYER, *supra* note 115, at 50.

safety inquiries from consumers compared to inquiries related to services (not covered by the Act). He observes that numbers for both categories "remained stable until the mid-1990s, and then both began to climb steadily (probably because of increased reporting practices)." Yet Figure 3.1 shows a sharper increase for product-related inquiries from the mid-1990s than would be consistent with "increased reporting." Greater notification would relate to efforts by the government and the media to publicize the new PL Act, which was quite effective according to several surveys.[176] The further step-up in inquiries from around 2005 could be related to a succession of high-profile safety failures.[177] The overall increases for both categories should also be assessed against the ageing of Japan's population, which Ramseyer curiously does not discuss in this context.

In sum, Ramseyer argues unpersuasively that the Japanese and US consumer product markets, as well as their substantive and even civil justice systems relevant to PL, are basically the same. The only significant exceptions he allows for are the presence of juries and elected judges in the US. This situation apparently allows lawyers there to generate many more and unjustified PL lawsuits. Empirically, there is no investigation into whether Japan may generate fewer suits and claims, say because of better ex ante regulation by public authorities—not just through direct pre- or post-market controls, but also more active or effective negotiations with firms in the shadow of public law combined with the increasingly attentive media. Nor is there any mention of Japan's universal public health system or other welfare mechanisms, which would make legal recourse less important for victims compared to the US.[178] This absence occurs even though later chapters of Ramseyer's book discuss the public health system when analyzing (similarly limited) medical malpractice lawsuits. Normatively, Ramseyer's main implication also seems to be consistent with the Chicago School: *what is, is efficient* at least in Japan, thanks to markets not law reform. Such optimal circumstances would also be obtained in the US, for example, by simply getting rid of juries or elected judges.

In his book, however, Ramseyer[179] has to acknowledge at least three fields where instead apparently *what is*, *is inefficient*—by Chicago School standards. Yet he argues that these aspects of private law are at least "predictably wrong," so parties can (efficiently) contract around the bright-line but bad rules (and economic consequences), established by Japanese courts:

> In labor law, judges stop firms from dismissing workers during recessions; in the process, they raise the odds that firms will avoid hiring new employees. Necessarily, they increase the overtime firms demand during peak demand and make it harder for the unemployed to find jobs …. In landlord-tenant disputes, judges stop landlords from evicting tenants; in the process, they raise the

176 NOTTAGE, *supra* note 146, at 154–201.

177 Nottage, *supra* note 153, at 242.

178 Colin Jones, *Second-Best Justice: The Virtues of Japanese Private Law*, 72 MONUMENTA NIPPONICA 356, 360–61 (2017) (reviewing J. MARK RAMSEYER, SECOND-BEST JUSTICE: THE VIRTUES OF JAPANESE PRIVATE LAW (2015)).

179 RAMSEYER, *supra* note 115, at 165.

> odds that owners will avoid renting empty units. Necessarily, they shrink the size of units landlords do rent and make it harder for people without housing to find apartments ... In consumer finance, judges ban firms from lending to high-risk borrowers at market rates; in the process, they increase the odds that lenders will shun poorer applicants. Necessarily, they make it harder for the cash constrained to borrow funds anywhere …

Yet Pardieck shows convincingly that in disputes involving leases, and to a lesser extent perhaps individual labor law disputes, the Japanese courts engage in a very fact-specific analysis of the equities or fairness involved in each case.[180] This is far from setting a predictable rule, although as a broad generalization courts and sometimes related legislation do tend to favor the perceived weaker party. The way disputes are resolved becomes even murkier given that the vast majority of disputes never get through formal court processes (the second layer). Instead, they are resolved in the shadow of increasingly detailed terms inserted nowadays into contractual documentation in these two fields (the first layer). Furthermore, these "layers of the law" in Japan run precisely contrary to what is predicted by Ramseyer through game theory (and seemingly established in some specific markets in the US, as cited from Lisa Bernstein). They posit instead that business deals are usually characterized by loose reference to contract terms, but strict application of the law after the relationship breaks down.

As for consumer finance, a new bright-line rule was indeed established by a Supreme Court judgment in 2006 and then legislative reform, which abolished "grey zone" extra interest payable by borrowers.[181] Yet this shift was preceded by complex case law developments with different lines of reasoning and results percolating up from lower courts. Even where the Supreme Court ruled to the benefit of consumers, it sometimes used literalist interpretations and other times used purposive interpretations. This protracted state of flux did not generate much predictability. Further, even from 2006 onwards, there was a dramatic increase in cases filed to reclaim the "grey zone" interest that the Supreme Court found to have been overpaid. As Dernauer[182] points out:

> If one follows Ramseyer's argument [developed to explain comparatively few traffic accident lawsuits in Japan (as mentioned *infra*)], one would expect that the high predictability of the outcome of a lawsuit in those cases would also lead the parties to settle the case without filing a lawsuit. However, in the years after 2004, the number of lawsuits in Japan dealing with a claim for the return of overpaid interest grew extraordinarily.

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180 Andrew Pardieck, *Layers of the Law: A Look at the Role of Law in Japan Today*, 22 PACIFIC RIM L. & POL'Y J. 599 (2013).

181 Souichirou Kozuka & Luke Nottage, *Re-Regulating Unsecured Consumer Credit in Japan: Over-Indebted Borrowers, the Supreme Court and New Legislation, in* YEARBOOK OF CONSUMER LAW (Annette Nordhausen, Geraint Howells & Deborah Parry eds., 2008).

182 Dernauer, *supra* note 116, at 287.

> From 2007 to 2011, the number of such first instance lawsuits in the Japanese district courts in Japan exceeded the number of all other first instance district court cases combined (e.g. in 2008: 144,468 of 235,508 cases). One wonders why Ramseyer does not himself addresses this contradiction to his own theory …

Dernauer [183] also questions Ramseyer's theoretical assumption that consumers (or employees) should not be treated as more vulnerable, with courts or legislatures, therefore, intervening in their contracts to redress imbalances. He points out that this is a widespread view not just in Japan, but also across the European Union. Similarly, in Australia, even economists in the Productivity Commission (2008) emphasized pervasive information asymmetries (briefly acknowledged by Ramseyer in the product safety context) as well as behavioral errors in consumer markets as grounds for further consumer law reforms. A large empirical and theoretical literature shows how these market failures are exploited by consumer finance companies, in particular, across many developed countries, including Japan.[184]

Ramseyer seemingly ignores these realities because they fail to fit in with the standard puzzle pieces of the Chicago School narrative. By definition, contracts are perceived to be mutually beneficial to both parties. The underlying assumption is that no one intentionally desires to make themselves worse off. But the key word here is "perceived." Asymmetric information is unfortunately common in contractual arrangements, allowing parties to be deluded or even deliberately misled.[185] The Chicago approach to contracting often seems to minimize these difficulties. In their way of thinking, a misled or deluded person could simply exit from these undesirable contractual constraints at any time. An implicit assumption underlying this idea of contractual responsibilities treats both parties to the agreement as equals, since both have the freedom to enter and exit these contracts. For those at Chicago, this equals an absence of any one-sided power attached to

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183 *Id.* at 289.

184 SOUICHIROU KOZUKA & LUKE NOTTAGE, THE MYTH OF THE CAUTIOUS CONSUMER: LAW, CULTURE, ECONOMIC AND POLITICS IN THE RISE AND PARTIAL FALL OF UNSECURED LENDING IN JAPAN (2009). Indeed, this analysis (and that by Kozuka and Nottage, *supra* note 180) shows how the option of charging extra "grey zone" interest – as long as borrowers agreed to repay it "voluntarily" – was introduced by the Japanese legislature in the 1980s in the hope that the "good" lenders would come into the market and drive out the "bad" loan sharks. Yet the new, often larger, lenders (some with foreign investment) also exploited informational asymmetries and behavioral biases. Doing so allowed them to market inappropriate consumer loans, especially as new technology became available, and eventually even sometimes indulged in the harsh debt collection tactics that of the loan sharks. Eventually the courts started ruling against the lenders, and the legislature also had to admit its deregulatory initiative had failed.

185 Nobel Prize winning economist, Oliver Williamson, is sometimes cited by Ramseyer. But Williamson, in his transaction cost analysis of markets and firms, has often stressed the idea of opportunism, namely that economic agents will intentionally attempt to deceive others if it is in their self-interest. People lie and cheat, even in contractual relationships, which is one reason why firms vertically integrate.

these mutually agreed-upon contracts.[186] Ramseyer's corresponding assumption of contractual efficiency, evident in his analysis of consumer finance and product safety, also arguably explains his recent views on the Korean "comfort women."[187]

3. Politicians > Bureaucrats > Judges

Lastly, Ramseyer has had no compunction in extending his belief in optimal market-based ordering to explain Japanese politics, in its broadest sense. (By doing so, he helps economics identify with the unfortunate cliché of being the imperialistic science.) Working now with a political scientist (Frances Rosenbluth, currently at Yale but stationed at UCLA in the early 1990s during Ramseyer's years there), the duo applied "rational choice" theory to ridicule the conventional wisdom that bureaucrats primarily governed post-war Japan. They were not content with the growing counter-argument that governance had, in fact been or had become more diffuse.[188] Instead, Ramseyer and Rosenbluth[189] argued that it was the conservative Liberal Democratic Party (LDP) politicians, driven solely by the narrow incentive of maximizing votes and power, who were firmly in control (as principals). This implied that bureaucrats were doing their bidding (as agents). As observed in a scathing review by Chalmers Johnson and E.B. Keehn,[190] this book got off to a rocky start. Invoking the "rational choice" made by Chinese coolies pulling barges through the Yangtze River gorges, Ramseyer and Rosenbluth:

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186 A much-cited paper defending capitalist markets written by Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972), makes this stance explicit. They equate the labor contract between employee and employer with that between a customer and a grocer. The customer can buy a tin of tuna fish from the grocer or exit the contract by going elsewhere. The grocer maintains the same entry and exit freedom. In the same way, employees and employers have the right to enter and exit a contract at will. Consequently, in their view, there is a complete absence of a one-side power relationship. Of course, the hidden assumption is that each side to a labor contract shares exactly the same opportunity cost attached to the exit option.

187 See *supra* Part I; *see infra* Part IV. Comfort women were involved in a contractual relationship with the Imperial Army. Accordingly, they were willing participants in this arrangement. Thus, in Ramseyer's view, everything you think you know about the comfort women situation is wrong and the controversy is overblown. Like any good Chicago acolyte, Ramseyer then hunts for evidence that will lead him to this logical conclusion, even if it means banging square pegs into round holes. He may not necessarily deny that there had been individual instances of abuse of power, cases where even atrocities had been committed. Such acts are not infrequent during war time. But his self-appointed brief was to examine charges concerning an official policy of the Japanese government and that was a different story.

188 Masaaki Abe, *The Internal Control of a Bureaucratic Judiciary: The Case of Japan*, 23 INT'L J. SOCIO. L. 303 (1995).

189 *See* J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE (1993).

190 Chalmers Johnson & E. B. Keehn, *A Disaster in the Making: Rational Choice and Asian Studies*, 36 NAT'L INT. 14, 14 (1994).

> offer the explanation that "Acting collectively as principals, the coolies hired supervisors with whips to prevent each other from free riding." It evidently never crossed the minds of these savants of coolie motivation that their conclusion is so preposterous that it could be established (if at all) only empirically—by some on-the-spot discovery of a hitherto unknown guild of Chinese masochists.[191]

Ramseyer and Rosenbluth further hypothesized that Japanese judges (as further agents) would comply with the policy preferences of LDP politicians. This complaisance was allegedly due to the fact that the LDP's long standing tenure undermined any incentive to countenance a truly independent judiciary. With a colleague from UCLA days (who subsequently moved to Indiana University), helping on the econometrics, he has since engaged in endless regression analyses to prove that this is true. The collected works of Ramseyer and Rasmusen[192] purportedly show that judges who ruled against LDP preferences in selected "politically charged cases," at least until its fall from power in 1993, suffered poorer careers.

Again, there are many difficulties with this analysis. One consistent criticism has been that the courts may indeed have developed a bias in favor of the government, but quite independently of the LDP, as a means of maintaining broader public confidence in the judiciary. These critics point out also that Ramseyer and Rasmusen have never even tried to find direct evidence of politicians leaning on certain judges.[193] Other specific criticism is now being directed at various conclusions they draw from their data.[194]

Even if they are largely correct, it doesn't much help legal advisors or commentators addressing a particular case (even one that is "politically charged") as regression analysis always deals in aggregates. Nor did those original studies continue much beyond 1993, allowing others to test or guess what might happen

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191 *See* RAMSEYER & ROSENBLUTH, *supra* note 188.

192 J. MARK RAMSEYER & ERIC RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003).

193 John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, *in* LAW IN JAPAN: A TURNING POINT 99 (Daniel J. Foote ed., 2006). An almost compulsion seems to exist at Chicago that a theory has to explain everything. If that evidence doesn't seem to appear, harder scrabbling must inevitably unclose the truth.

> "He [George Stigler] would often criticize, I know he would often criticize people for trying to explain every observation and not accepting the fact that there was a certain degree of error. But when in the middle of a lunch time conversation, if you confronted him with something like that, with some anomaly, he could have just said, 'Look, that's the error. Let's just go on and talk about the substance'. But he would in fact say, 'No. You're going to find that some interest was in there on the political front. You'll find it if you look hard enough.' You wouldn't find it."
> (Sam Peltzman in conversation with Craig Freedman, October 1997).

194 Frank Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 L. & SOC. INQUIRY 421, 428–39 (2005).

next. Subsequently, however, Ramseyer and Rasmusen[195] did consider extensive quantitative data which examined how appointments to the Supreme Court, as well as lower courts, have changed in the wake of the LDP's loss of power in 1993 and subsequent slow return to coalition government. They find little change to past practices, which in fact is deeply disturbing for their original theory that the LDP indirectly influences the Japanese judiciary. To preserve the theory, one "immunizing strategy" (as economists call it) might be to argue that nothing has changed in Japanese politics, but at least this implausible view is not pursued.

The only real alternative then is to switch tack completely and advance a new proposition—to "obviously speculate" about "issues beyond the scope of our data." In an article published in 2006, Ramseyer and Rasmusen suggested that "the key to the Japanese judiciary's success probably lies instead in uniformity—particularly, in the uniformity of the judicial output," not just their hard work.[196] They conceded data was missing on dock clearance rates to gauge the latter and simply asserted in support of the former that judicial careers are monitored for consistency with precedent. This allowed them to reach a broader conclusion: asserting that Japanese courts produce predictable judgments economizing on litigation costs by facilitating out-of-court settlements. Similar arguments were re-stated in the selected works assembled a decade later by Ramseyer.[197] But this strategy raises its own problems. If this was so important, then not properly accounting for them *empirically* in earlier studies surely undermines the conclusions reached. If they are not determinative—and this is certainly arguable given the more substantive rather than formal elements in legal reasoning shared in both Japan and the U.S.[198] —then these new conclusions from the subsequent study cannot be maintained. This means that the original *theory* loses credibility.

More generally, it is hard to know what other implications to draw from the studies by Ramseyer and Rasmussen, besides the obvious. Judges, for instance, are widely considered to embark on a lower-paid and lower-profile career out of a true sense of public service, and because they want to think and act independently (instead of being beholden to clients as lawyers or the government as public prosecutors). Yet, as conceptualized by the Chicago School, these officials should be treated as no more than self-interested individuals who are as venal as politicians, bureaucrats, and other socio-economic actors.

Despite such inconsistencies and speculative leaps, the Chicago-style approach has achieved a growing influence on political science in US circles.

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195 J. Mark Ramseyer & Eric Rasmusen, *The Case for Managed Judges: Learning from Japan after the Political Upheaval of 1993*, 154 UNIV. PA. L. REV. 1879 (2006).

196 *Id.* at 1927.

197 *See* RAMSEYER, *supra* note 115.

198 Luke Nottage, *Form, Substance and Neo-Proceduralism in Comparative Contract Law: The Law in Books and the Law in Action in England, New Zealand, Japan and the U.S.* (Oct. 2001) (Ph.D. in Law thesis, Victoria University of Wellington) http://researcharchive.vuw.ac.nz/handle/10063/778.

Consequently, Ramseyer's theory in this field is too comforting for Chicago adherents to reject, despite concerns about the data, logical arguments and their implications. Never mind, moreover, the more circumspect acknowledgement by Coase himself that it may not necessarily be true that:[199]

> … an approach developed to explain behavior in the economic system will be equally successful in the other social sciences. In these different fields, the purposes which men seek to achieve will not be the same, the degree of consistency in their behavior need not be the same and, in particular, the institutional framework within which the choices ar e made are quite different.[200]

B. Believe Nothing Said

The second set of parallels with hard-core early Chicago School economics lies in Ramseyer's disinterest in people's attitudes or stated intentions, as opposed to "hard data" on their actual behavior.[201] Thus, he would not believe bankers or debtors even if they state categorically that they have main bank relationships involving implicit promises of bailouts or other more diffuse characteristics. Nor would he give weight to managers who say they care for their employees more than shareholders. Even industry associations that might concede that they never really voluntarily moved from a negligence to a strict-liability standard in operating their insurance schemes for defective

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199 GEORGE STIGLER: ENIGMATIC PRICE THEORIST OF THE TWENTIETH CENTURY, (Craig Freedman ed., 2020) has made the clear the distinction that while Ronald Coase was at Chicago, he was not of Chicago. He did in fact spend 49 of his 102 years at Chicago, but his methodological approach to economics sharply differed from such luminaries as Stigler, Friedman or Becker. *See* Thomas Hazlett, *Looking for Results: An Interview with Ronald Coase*, REASON: FREE MINDS AND FREE MARKETS (January 1997), https://reason.com/1997/01/01/looking-for-results/:

> "When you say it is un-Chicago, you mean that it is an unmodern Chicago View. Because Frank Knight was at Chicago, and I was brought up more on Knight than I was on any of the others. And my views were quite consistent with what he says. They're not consistent with what George Stigler, Gary Becker and Richard Posner say. Posner condemns me because I don't think people maximize utility."

200 Ronald Coase, *Economics and Contiguous Disciplines*, 7 J. LEGAL STUD. 201, 208 (1978).

201 In standard economic models, individuals respond to market forces; they do not shape them. Stated intentions are apt to be misleading due to the limited comprehension of the actor. The same approach holds within political and legal marketplaces. This approach is made clear by Gary Becker in his evaluation of what constitutes evidence.

> "I don't think you can talk with restaurant managers, in fact, about such things. You know they are not trained, they know in a certain deep sense, but they are not trained to articulate why things are happening."
> (Conversation with Gary Becker, November 1997).

products would receive short shrift from Ramseyer. Or, albeit less likely to emerge, he would also dismiss those who might even confess that they never really wanted to publicize their scheme to ensure consumers' informed consent to the schemes.

Nor would Ramseyer give credence to judges who might insist that they tend to rule in accordance with LDP preferences in only narrow categories of cases, or mainly due to their view that the proper role of the judiciary in their democratic polity is to retain public trust on such points. Nor would he give weight to the assumption that these judges can retain such trust only by heeding the voice of a clear majority of citizens, subject to such decisions being justifiable within the rules and broad principles set out in the relevant legislation.[202] Also banished would be any contention that to comply directly with politicians' preferences would risk having the persistently high levels of trust in the judiciary undermined by the much lower and declining public trust in politicians—and indeed, the bureaucracy—in contemporary Japan.[203] All and any such utterings would be dismissed as "anecdotal evidence," swamped by much more reliable quantitative data (analyzed statistically using econometric methods) that prove the contrary at the aggregate level, or that remain simply as an intrinsic reflection of mass delusion.[204]

Likewise, all that counts in explaining civil or criminal litigation patterns are selected statistics uncovered from the courts and elsewhere. Left unsaid is that such statistics must be accompanied by an *a priori* theory assuming rational litigants primarily settle rather than sue if the substantive (monetary) outcome is relatively predictable. Unfortunately, such statistics only seem to be readily available and the outcomes so predictable in the field of traffic accidents.[205] Yet this has not prevented the argument from being generalized—in a subtle manner—to explain much other litigation behavior in Japan.[206]

Admittedly, Ramseyer acknowledges some limits in his study of traffic accidents. Yet he basically puts the burden on others to adopt his precise

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202 *Cf., e.g, NIHON NO SAIBANSHO - SHIHO GYOSEI NO REKISHITEKI NA KENKYU* [JAPAN'S COURTS: HISTORICAL STUDIES OF JUDICIAL ADMINISTRATION] (Masashi Hagiya, ed., Koyo Shobo, 2004); Haley, *supra* note 164.

203 THE STATE OF CIVIL SOCIETY IN JAPAN (Frank J. Schwartz & Susan J. Pharr eds., 2003).

204 By backing himself into this methodological corner, Ramseyer cannot really seek out "anecdotal evidence" (e.g. from a long-retired senior judge) to counter Haley's point that there appears to be no documented instance of an LDP politician leaning on individual judges in politically charged cases. Equally, or perhaps more importantly, no influence exerted on the Supreme Court General Secretariat when it assigns judges so as to better or worsen their subsequent careers. Instead, he can only assert that conservative politicians achieve these outcomes – "proven" by the regression analyses of career paths – by the Japanese judiciary fearing and anticipating (like good English butlers!) this potential on the part of the LDP.

205 *See* J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 264 (1989).

206 MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 99, 180 (1999).

methodology and uncover contrary "hard data."[207] This remains a somewhat spurious challenge since such data may be impossible to uncover in a country where there are far fewer tort cases and (partially because of that) less heavy involvement of insurers keeping such data:

> First, typical or no, automobile accidents are a large part of the court docket in any industrialised society. Typical or no, they are important in their own right. Second, as of the mid-1990s, we know of no one who has collected any systematic data that contradict the conclusions we reach on the basis of these traffic accident data [namely that, notwithstanding the allegedly consensual and harmonious nature of Japanese society, those injured do *not* ignore the law]. If other disputes settle differently, *no one* has yet collected systematic data to prove it. (Ramseyer and Nakazato 1999: 95 [and 99])

Subsequently, however, Tanase isolated increasingly more litigious behavior in traffic accident dispute resolution over recent decades and added quantitative analysis linking tort litigation partly to the socio-cultural milieu in different parts of Japan. This behavior forms one basis for his broader neo-communitarian understanding of Japanese law and society.[208] Quite similarly, to understand disputatious behavior over noisy *karaoke*, West[209] turns not only to monetary factors (to explain especially why claimants seek free-intermediation by local government officials, rather than lawsuits), but also "social capital" indices and case analysis (to explain settlement behavior).

These more nuanced explanations of Japanese dispute resolution practice also resonate with recent large-scale survey evidence. For example, Tanase[210] found that three-quarters of respondents asked about traffic accidents––where disputants are usually strangers and ought to therefore have less incentive to build a broader social relationship—still felt more affinity to the idea of the injured party connecting with the tortfeasor by requiring an apology. Only one-quarter surveyed agreed more with the idea that monetary compensation was sufficient. This is quantitative evidence suggesting that apology plays an important role in settling traffic accident disputes—consistent

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[207] Put more simply in marketing terms: the Chicago approach is to push a theory to its limit, until it verges on self-implosion. The challenge thrown down to doubters is to prove the theory wrong, but by using the tests and the terms devised by the theory's originator. The trick, discovered early on at Chicago, is to be in the position of dictating the terms of debate. This ensures that any subsequent battle will be staged within a conducive environment.

[208] TANASE TAKAO, COMMUNITY AND THE LAW: A CRITICAL REASSESSMENT OF AMERICAN LIBERALISM AND JAPANESE MODERNITY 177 (L. Nottage & L. Wolff trans., 2010).

[209] Mark D. West, *The Resolution of Karaoke Disputes: The Calculus of Institutions and Social Capital*, 29 J. JAPANESE STUD. 301 (2002).

[210] Takao Tanase, *Nihonjin No Kenrikan/Keibatsu Ishiki to Jiyushugiteki Hochitsujo [Japanese Conceptions of Rights and Attitudes Towards Punishment, and Liberal Legal Order]*, 157 HOGAKU RONSO 24 (2005).

with much earlier "anecdotal evidence"[211]—but unfortunately does not fit Ramseyer's model.

It probably cannot intrinsically, because "apology" is a partly socio-cultural phenomenon that is hard to define, measure, or record. In addition, this survey evidence is only about "attitudes," which the Chicago School is utterly skeptical about. Likewise, Ramseyer's model and methodological approach cannot readily incorporate strong quantitative evidence that contemporary Japanese disputants in civil matters more generally reported greater satisfaction from the trial processes they experienced not only as a result of substantive legal outcomes. Greater satisfaction also came from more diffuse "procedural justice" elements such as parties' sense of the control they retained over the trial process, or "relational factors" such as the neutrality, trustworthiness and respectful attitude of the judge.[212] Acolytes of the original Chicago School are sublimely uninterested in exploring what we mean by "satisfaction," or more diffuse determinants that cannot readily be assigned a monetary value and singled out in observed behavior. This narrow approach manages to contrast even with many other contemporary economists.[213]

C. Ideology Rules

Ramseyer's cynicism about attitudes or intentions, and the optimistic belief that markets consistently work well, are linked to the third feature of the Chicago approach: an ideological commitment to laissez-faire methodological individualism. Soon after Mark Ramseyer completed his MA in Japanese studies at the University of Michigan (an institution with a strong Jesuit history, and later famous for its Japanese studies,) he published an article noting some parallels between certain "House Codes" (internal rules) of Tokugawa merchant families and the early Protestant view discerned by Max Weber. These linked religious virtue to wealth maximization.[214]

That perspective may have been reinforced by the combination of political conservatism and free-market liberalism propounded by Ronald Reagan,

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211 *See, e.g.*, Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461 (1986).

212 Ken-ichi Ohbuchi et al., *Procedural Justice and the Assessment of Civil Justice in Japan*, 39 L. & SOC'Y REV. 875, 879 (2005).

213 *Cf., e.g.*, George Akerlof & Rachel Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSPECTIVES 9, 12 (2005) (discussing how preferences or happiness can change in institutional settings). Even Gary R. Saxonhouse, *How to Explain Japan's Legal System*, 3 AM. L. & ECON. REV. 376, 384 (2001) chides Ramseyer and Nakazato for not adding the more realistic assumption of risk-averseness to their simple model. Doing so would recognize that more information about outcomes will probably generate additional trials – yielding "results entirely consistent with observed Japanese behavior" as revealed by them for major criminal cases. If that assumption is extended to civil litigation as well, this undercuts their conclusions derived from traffic accident disputes.

214 J. Mark Ramseyer, *Thrift and Diligence: House Codes of Tokugawa Merchant Families*, 34 MONUMENTA NIPPONICA 209, 218 (1979).

US president from 1981 to 1989. During this period, Ramseyer completed his JD at Harvard (in 1982) and began his academic career at UCLA Law School (from 1986, until his move to Chicago in 1992).[215] The Reagan Administration validated the Chicago School antipathy to both Communism abroad and its welfare-state sympathizers in the US. It also fed through to a significant retrenchment in efforts to regulate markets, and to significantly reduced access to the courts in civil litigation.[216]

The 1980s also witnessed strong growth in the Japanese economy, especially compared to the US. For a Chicago School adherent like Ramseyer, this success could only be explained if Japan operated according to efficient market principles. By debunking conventional views to the contrary, Ramseyer was able to transform Japan into an unlikely ally of Chicago-style economics. The ideological backdrop to this stance becomes even more apparent when we see his attacks on New Deal sympathizers during the post-war Occupation of Japan.[217] This animus extends as well to those perceiving and acclaiming subsequent government-led industrial policy in Japan, such as Chalmers Johnson.[218] Ideology becomes even more obvious when blaming "Marxists" for inventing—as a "monopoly capital" analogue inherently predicted by their own theory—the myth of main banks and the *keiretsu*.[219]

Since the late 1990s, however, the ideological and normative nature of Ramseyer's mission has become more apparent despite his continued insistence that he is undertaking purely positive or descriptive analyses. The increasingly strident and ambitious assertions may be related to the deepening decline of the economy and ever-more comprehensive legal reforms in Japan over this period. If the system was so efficient, why has it faltered? One predictable response would be to represent these as failures of the macro-economic policy rather than market micro-economics. However, there is much evidence to the contrary,[220] which explains why there has been so much deregulation and legislative reform.

An alternative, more realistic response might be for Ramseyer, like most

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215 Interestingly, in earlier days the economics department at UCLA was viewed as a sort of western annex of Chicago. Two stalwarts of the UCLA department, Harold Demsetz and Armen Alchian, significantly influenced the law and economics movement, and Ramseyer's own work (e.g. on corporate governance).

216 *See, e.g.*, WILLIAM HALTOM & MICHAEL J. MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004).

217 Yoshiro Miwa & J. Mark Ramseyer, *The Good Occupation? Law in the Allied Occupation of Japan*, 8 WASH. U. GLOBAL STUD. L. REV. 363, 363 (2009).

218 CHALMERS A. JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925–75, 3 (1982); CHALMERS A. JOHNSON, THE INDUSTRIAL POLICY DEBATE (1984).

219 Yoshiro Miwa & J. Mark Ramseyer, *Asking the Wrong Question? Changes of Governance in Historical Perspective?*, *in* CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATE, AND MARKETS IN EUROPE, JAPAN, AND THE US 73 (Klaus Hopt et al. eds., 2005).

220 *See, e.g.*, JAMES R. LINCOLN & MICHAEL L. GERLACH, JAPAN'S NETWORK ECONOMY: STRUCTURE, PERSISTENCE, AND CHANGE 1–3 (2004).

commentators nowadays (e.g., in corporate governance: surveyed in Nottage),[221] to acknowledge that Japanese law and the economy in fact had developed many inefficiencies. Then he could urge even more market reforms. Ramseyer might still argue that post-war Japan had been characterized by more free markets and corresponding efficiencies than non-Chicago Schoolers had believed. After all, his insistence that free markets were enormously pervasive seems to be underpinned by some hope that this will make it easier to maintain or establish a *laissez faire* environment.

However, by pursuing such an alternative strategy, he would risk directly exposing the normative features of his agenda. Further, studies along these lines might even yet uncover "inefficiencies" or other aspects objectionable to a Chicago devotee (like main banks, long-term concern for employees, or a broader social egalitarianism). These institutions are and remain quite distinctive to Japan. The danger posed to Ramseyer's approach is that they may be justifiable under, and thus support other schools of economic thought, or be justifiable simply on alternative grounds—providing support for state capacity, even in a deregulating world.[222] These risks are not worth taking, for Ramseyer. Instead, we are subjected to an increasingly comprehensive and total application of very constrained Chicago School precepts to the still quite open field of Japanese studies.[223]

More generally, if one chooses to push any theoretical tool or approach too far, it tends to slide into parody, farce, or even slapstick. By taking an approach that—even in the hands of the most talented practitioners—has a tendency toward self-parody, the potential for serious absurdity comes when an ambitious academic retains the method and the ostensible objective but lacks a full understanding of what drives the approach. The program then can degenerate into a pure marketing exercise in which form dominates whatever substance remains.

Recently, a Singapore-based professor of East Asian history (and Columbia University Ph.D. graduate) has suggested that Ramseyer may have a further implicit partly normative motivation. Sayaka Chatani considers it would have become difficult nowadays for him to query directly in the US whether its disadvantaged (racial or other) minorities might be significantly responsible for their circumstances. This may encourage Ramseyer recently to study and write about other minorities connected instead with or in Japan, less well known to reviewers of non-Japanese journals, such as the comfort women, Koreans in

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221 Luke Nottage, *Nothing New in the (North) East? The Rhetoric and Reality of Corporate Governance in Japan*, 10 COMP. RSCH. L. POL. ECON. 1, 5–8 (2006).

222 FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY (2004).

223 More cynically, the need to continually draw attention to his work leads Ramseyer to make ever more extreme claims. He, in effect, is compelled to top his last effort if the repetitive nature of his program is to avoid causing ennui among his readers. In essence, he needs to keep finding ways to offend his opponents. Stirrers that lose their ability to stir, fundamentally lose their *raison d'etre*.

Japan, and "burakumin."[224]

> In short, therefore, we must remain conscious and critical of the evolving ideological underpinnings within the American milieu. We must also look more closely into the *honne* in Japan, as a Princeton historian concluded in trenchantly reviewing what he called the rational-choice "polemic" by Ramseyer[225] on law and economic behavior in Tokugawa and early modern Japan:[226]

Critics of Ramseyer's approach cannot afford to dismiss it out of hand or invoke culturalist arguments against it, but must rather demonstrate with empirical evidence that however rationally markets operate, they are necessarily constrained by political institutions and their ideological supports.

IV. CONCLUSIONS

> ... highly-educated or intelligent people tend to be far *more* ideological than the general public. They are *more* likely to be partisan, to be obsessed with some moral-political cause, or to use some intellectual framework or idealized model to interpret the world.[227]

This paper has identified the close parallels between three key characteristics of much of the Chicago School of Law and Economics and their blinkered application to the analysis of Japanese law through the avalanche of work by J Mark Ramseyer. These are essentially that markets work pervasively, observable outcomes are meaningful (so we can ignore expressed views), and individual choices should be prioritized.

Given our own training in economics, we can hardly dismiss outright the notion of extending economic approaches to the analysis of law-related phenomena. We even welcome certain significant strands within or on the borderlands of the Chicago School itself, notably the "transaction cost economics" founded by Ronald Coase.[228] The problem this paper has tried to highlight occurs

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224 *See* Sakaya Chatani, *Ramseyer Ronbun wa Naze 'Jiken' to Natta ka? [Why did Ramseyer's Article Become an 'Issue'?]*, [2021/5] SEKAI 119, at 123–24 (Japan). We are grateful to Ruth Effinowicz for bringing this analysis to our attention.

225 J. MARK RAMSEYER, ODD MARKETS IN JAPANESE HISTORY: LAW AND ECONOMIC GROWTH 81 (1996).

226 David Howell, *[Review] Odd Markets in Japanese History: Law and Economic Growth*, 52 MONUMENTA NIPPONICA 404, 406 (1997).

227 Musa al-Gharbi, *Three Strategies for Navigating Moral Disagreements*, HETERODOX: THE BLOG (Feb. 16, 2018), https://heterodoxacademy.org/blog/three-strategies-moral-disagreements/.

228 As applied to long-term contracts involving Japanese firms, *see, e.g.*, Luke Nottage, *Bargaining in the Shadow of the Law and the Law in the Light of Bargaining:*

when ideologically driven theorists within that School, notably Director, Stigler, and Friedman, developed consistently pre-ordained conclusions to which they inevitably match suitably supportive evidence (Part II). Ramseyer simply extends this approach religiously to an ever-increasingly broad swath of Japanese law and socio-economic phenomena (Part III).

However, the urge to simply condemn or dismiss Ramseyer's work appears badly misguided. Calling Ramseyer a racist for his recent work on Koreans, for instance, simply shifts the terms of debate to a less productive region.[229] (Ironically, however, engineering such shifts was long a strategic device deployed by such Chicago luminaries as George Stigler. He relished in constructing strawman versions of opposing theories which he could eviscerate with ease.) Refuting a racist label remains almost impossible. However, in Ramseyer's case, the possibility exists to eliminate this as a compelling factor behind his work. As we have tried extensively to demonstrate, his work on the comfort women issue may be more offensive to a wider audience, but it is perfectly consistent with his approach to scholarship in a variety of areas over many decades. Moreover, this approach is identifiably the same over his very long career. This particular application may make people uncomfortable, but it is not without at least a dollop of negative merit, by forcing us to take a closer look even at a politically charged issue.

Ramseyer's efforts, no matter what one's evaluation of them, do help us all to examine what we know and why we know it. Being completely adamant about any subject is often all too comfortable and all too lazy. Doing so can create a different ideological trap—one of assuming that an issue is too obvious to question. At the very least, Ramseyer, therefore, forces his serious opponents to re-examine their fundamental thinking and beliefs.[230] He also has an eye for digging up interesting sources of data, especially in some of his earlier work,[231]

Contract Planning and Renegotiation in the Us, New Zealand, and Japan, *in* CHANGING LEGAL CULTURES II: INTERACTION OF LEGAL CULTURES 113 (Johannes Feest & Volkmar Gessner eds., 1998). Coase focused on the best way to achieve a given outcome. Doing so, moved the discussion away from simply focusing on what party was the victim and who was responsible. The assumption was that both sides to a given dispute, if reasonable would prefer a mutually advantageous result.

229 For example, the African National Congress, the governing party of South Africa, has long responded to charges of corruption by labelling both the charges and those who make them as racist. In South Africa, this has become known as "playing the race card." The clear attempt is one of trying to distract attention away from the actual issue. Practically, the motivation of opponents is hardly as important as whether the charged politicians are actually corrupt. Nor will a focus on racism, in this instance, help root out corruption, which equally harms the public.

230 GORDON MENZIES, WESTERN FUNDAMENTALISM: DEMOCRACY, SEX AND THE LIBERATION OF MANKIND 17 (2020) (pointing out, we are all "fundamentalists," in the sense of holding (often unarticulated) a priori assumptions and worldviews.).

231 However, his more recent work on the legal and medical professions – with the implicit normative criticism say of a public health care system – is persuasively criticized by Colin Jones, *Second-Best Justice: The Virtues of Japanese Private Law*, 72 MONUMENTA NIPPONICA 356, 359 (2007) on both logical and factual grounds:

and he writes beautifully.

Accordingly, the more productive way to challenge Ramseyer's conclusions is not by labelling or dismissing him. Instead, such work needs to be taken seriously by putting it through the equivalent of a forensic autopsy. This involves demonstrating how Ramseyer constructs his argument, especially the fundamental assumptions and logic on which it is built. Only then is it appropriate to examine, factually, whether the edifice he has erected is built on a foundation of granite or of sand. Simply disliking a conclusion is never sufficient. Even an odious conclusion is not prima facie wrong.

However, his views on the "comfort women" (recently restated in Ramseyer) [232] remain unpersuasive in both logical arguments and factual foundations. Echoes of Chicago School methodological tenets abound. The starting point is again: "Everything you thought you knew is wrong." Why is it wrong this time? Allegedly because a cabal of actors finds it in their self-interest to fabricate the story. So, we have writers who made this up. Predictably, we have communist groups exploiting the opportunity—namely, in this case, North Korea and its sympathizers. We have old women claiming falsely that they were prostitutes when they were just out to collect a payout. We also have the South Korean government politicizing the issue, while the Japanese government is honorable, although that seems irrelevant to the question of historicity.

Then Ramseyer cherry-picks the facts. The few writers who agree with him are brave and had to fight attempts to suppress them. He simply tends to ignore contrary writing as hardly worth considering. Ramseyer presents a short, very compacted overview of prostitution in pre-war Korea and Japan. He wants to use this for his claim that pre-war brothels and the comfort women stations were the same. The basis for this seems to be the argument that they were regulated by the Japanese government before and during World War II. Yet how well regulated is surely another and central issue and was strict regulatory enforcement really a focus for the authorities?[233] As for the comfort women themselves, Ramseyer finds

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> "Doctors who consciously choose to forego income opportunities in order to help people with life-threatening conditions are assumed by this analysis to be less talented in their ability to practice medicine. However, most doctors, and perhaps many patients as well, would find the idea of evaluating technical skill from income tax information horrifying and alien.
>
> Leaving aside the subjective conclusions they invite, Ramseyer's reliance on high-taxpayer records (which he and his colleagues have also used to try to analyze the distribution of talented lawyers) seems deeply flawed for other reasons as well. The Japanese tax system treats salaried professionals very differently from business owners, and many doctors and lawyers run their practices as businesses. Those who do so have far greater ability to lower their tax liability through deductions and the mixing of private and business expenses."

We are reminded of the joke about economists searching for lost keys under the lamp post because that is only where the light falls.

[232] J. Mark Ramseyer, *Social Capital and the Problem of Opportunistic Leadership: The Example of Koreans in Japan*, 51 EUR. J.L. & ECON. 1, 3 (2021).

[233] After all, even in developed contemporary economies like Australia with strong labour laws, for example, contracts for sexual services and work conditions are not as

testimony that all was well. Alternatively, he shows that they have changed their story. But he simply ignores all those who might have narratives that run counter to what he wants to claim, namely that this was a market like any other.

Nonetheless, comfort stations were unlikely to be like Tokyo brothels in pre-war Japan. Ramseyer himself acknowledges that in those brothels, the prostitutes saw 2–3 customers daily. Also, they had to attract customers to earn more. Yet comfort stations were more an assembly line. The women there worked long hours and saw maybe a dozen men daily. Also, it seems doubtful that soldiers actually got to choose.

Ramseyer further assumes that very young, uneducated farm girls reasoned like Chicago economics professors. Or perhaps they acted as if they were economists because they responded to the relevant price signals, despite the increasingly militarized and directed economy. Yet it would seem that it was the parents who received any initial payment and so could easily force daughters into this arrangement. Also, if some young Korean was in a Shanghai comfort station or one in Singapore, how easy would it be to run off home? The likelihood is that they would be raped or killed trying to return. The idea that the opportunity cost of breaking the contract was equal on both sides seems wildly implausible. Nor is it conceivable how these comfort women could "shirk." They did not have to charm the soldiers since they did not have to entice repeat customers. Ramseyer also puts great store on the fact that large numbers of women did not renew their contracts, as indicating that they were not forcibly kept in the brothels. No consideration is given to the possibility that brothel-keepers preferred younger women in their employ and so did not want to renew contracts once expired.

Thus, Ramseyer creates a sort of rational comfort station world where actors behave in the preferred Chicago School manner. Contracts simply benefit both sides and, although cheating may happen, it is rare and it occurs on both sides. All evidence is marshalled for this unlikely conclusion. There is little or no acknowledgement of logical counter-arguments or factual gaps. His latest paper on this topic simply restates the purported economic logic behind these contracts, without reference to the specific objections mentioned above or the wider critique we and others have presented of Chicago School methodology. Ramseyer instead maintains that has not made any factual mistakes that significantly affect his argument.[234]

The problem with this one-sided approach to research by Ramseyer, which we have shown goes back consistently over decades, is that even others with a bent for economics can lose interest in engaging with such studies.[235]

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advantageous in fact compared to those for other workers. See, e.g., Alice Orhiston, *Precarious or Protected? Evaluating Work Quality in the Legal Sex Industry*, 21 SOCIO. RSCH. ONLINE 173 (2016).

234 J. Mark Ramseyer, *Contracting for Sex in the Pacific War: A Response to My Critics* (Jan. 4, 2022), https://ssrn.com/abstract=4000145.

235 Not providing even a sliver of attention to his work is a fate worse than death for Ramseyer. Given a possible motivation to seek controversy by offending, silence is of course crushing. Perhaps the comfort women article would have simply faded had it not been championed by right wing groups in Japan, prompting reactions by those more on the

Some have found that alternative evidence already undercuts the arguments in core areas of market regulation, such as corporate governance, as with that marshalled early on in the response by Milhaupt[236] regarding main banks (*supra* Part III.A.1). Others see more outright lacunae in Ramseyer's evidence, which cannot be filled either way. An example is his assertion that voluntary industry association-based insurance schemes against product defects paid out on a strict liability basis before the PL Law came into effect from 1995.[237]

As for those unversed or uninterested in economics, they can understandably object to having their research agendas narrowly dictated anyway by a specific view of social science, and what constitutes "evidence" that becomes open to meaningful debate. Ramseyer's methodology seems superficially scientific, in marshalling data to prove unconventional hypotheses, leaving others to rebut the logic or data with a better explanation.[238] Yet this risks mutual "confirmation bias."[239] Indeed, some of the best and most influential scientists have instead invited their own co-researchers to disprove their hypotheses in the first place.[240] Recent studies and controversies have

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political left. This problem is an unfortunate offshoot of producing controversial material.

[236] Curtis Milhaupt, *On the (Fleeting) Existence of the Main Bank System and Other Japanese Economic Institutions*, 27 L. & SOC. INQUIRY 425, 427 (2002).

[237] Freedman & Nottage *supra* Part III.A.2.

[238] One core belief subscribed by many at Chicago is the validity of a marketplace for ideas. Given competition, the end result should be truth. Flawed theories and assumption should be unable to be sustained over the long run. The classic vindication of this position is related by George Stigler in his account of the famous dinner when Ronald Coase convinced a gathering of Chicago luminaries to change their minds concerning what Stigler would later formulate as Coase's Theorem, *supra* note 77:

> "We strongly objected to this heresy. Milton Friedman did most of the talking, as usual. He also did much of the thinking, as usual. In the course of two hours of argument the vote went from twenty against and one for Coase to twenty-one for Coase. What an exhilarating event!"

This description fits rather snugly with Stigler's almost sweet, but nearly ingenuous belief in Edwin Canaan's dictum that in the long run truth wins out: "However lucky Error may be for a time, Truth keeps the bank and wins in the long run": *see* EDWIN CANNAN, A HISTORY OF THE THEORIES OF PRODUCTION AND DISTRIBUTION 392 (1903). However, this fable largely ignores their own formulation of consumer's choice. In this perspective, sellers must try to convince potential buyers that the flow of benefits derived from the attached services outweighs the opportunity cost of purchase. Thus, marketing plays a key role. The end result in this market for ideas then may not necessarily be the truth, but rather what academics find most acceptable.

> "I do think that marketing is very important when undertaking an intellectual activity. It's probably more important now than it was before."
>
> (Sherwin Rosen in conversation with Craig Freedman, October 1997).

[239] This bias is well-documented in psychology. Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175 (1998); and in the increasingly influential field of behavioral economics . BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000).

[240] *See* Ameet Ranadive, *Why It's Important to 'Dare to Disagree'*, MEDIUM (June 3, 2017), https://medium.com/@ameet/why-its-important-to-dare-to-disagree-a200e00af069 (summarizing a TED talk by Professor Margaret Heffernan (*Dare to Disagree*, at

anyway highlighted problems of bias, negligence, hype, and even outright fraud across both social and natural sciences.[241] Other critics of Ramseyer will find their worst fears confirmed, namely a methodology too tainted by ideology to teach us much, while displaying no reluctance to point the finger at other approaches and traditions.[242] Those of a hermeneutical persuasion, such as Tanase,[243] for example, will see an extreme Chicagoan approach as instead highlighting the permeability of "norms" and "facts," while insisting ironically on a strict distinction between the two.

Some of Ramseyer's work (and his conclusions) seems so perversely contrarian that the overwhelming temptation is to dismiss him as just another case of an academic on the make. Unfortunately, such work can create potentially practical problems since it does provide a rationale for politicians and bureaucrats to carry out unjustified ideologically based programs. For Ramseyer, this is a conservative policy approach where the private sector is automatically privileged, with legal decisions, regulations, and enforcement mechanisms reflecting his particular bias.

However, the potential problems would be equally onerous were the suggested policy slanted ideologically and consistently more towards government intervention and regulation. Academia, for instance, is viewed as having shifted left, particularly within the US and in such fields as the social sciences. This change has provided postmodern critical theory with the basis to "reify" its approaches, extending recently beyond the universities into wider Western society.[244] Ramseyer's ideological and methodological preferences are likely to attract growing pushback given the growing partisan divide that results in ever more Western countries. Consequently, it is disingenuous to expect Ramseyer not to generate heightened outrage when broaching politically charged topics such as gender or race relations.

More broadly, taking any approach to an extreme position risk making debate and mutual learning quite futile. Opponents at that point tend to talk past

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https://www.youtube.com/watch?v=PY_kd46RfVE&list=PLhIvxQgFYvUmK5lhlv80EB3A7-a4qRglK&index=1, discussing Oxford scientist Dr Alice Stewart and her longstanding co-researcher George Kneale)).

241 STUART RITCHIE, SCIENCE FICTIONS: HOW FRAUD, BIAS, NEGLIGENCE AND HYPE UNDERMINE THE SEARCH FOR TRUTH (2020).

242 Often attached to the Chicago lack of etiquette is an unjustified sense of self-confidence. At the extreme, there is an absence of doubt that feeds into their ideological beliefs. Basically, there is a sense of knowing how the economy and even the world fundamentally operate. As one of George Stigler's co-authors succinctly pointed out:

> "He [Stigler] was absolutely sure the economy was on his side and if research was properly done it would show this. He really believed that he understood how the world works. And the way the world works had been shown to him by the theory of price."
>
> (James Kindahl in conversation with Craig Freedman, October 1997).

243 Luke Nottage, *Translating Tanase*: *Challenging Paradigms of Japanese Law and Society*, SHO SATO CONFERENCE PROCEEDINGS at 3 (2005), https://www.law.berkeley.edu/wp-content/uploads/2015/07/nottage-translatingtanase.pdf.

244 *See* Pluckrose & Lindsay, *supra* note 15.

one another, eager simply to score points. Extending mainstream Chicago School economics to law in Japan can also rub off on trajectories in other social sciences, such as political science, when applied to Japanese phenomena. These studies can skew proper assessments of Japan's current regulatory milieu, undercutting a balanced perspective essential for effective policy-making. For example, reactions to product safety problems in the mid-2000s (asbestos, defective buildings, and electrical goods) demonstrated a still comparatively strong role for various forms of engagement involving public authorities rather than leaving matters to private ordering.[245] That is also consistent with considerable "re-regulation" to ratchet up consumer law, safety, labor, and environmental standards in many other countries world-wide.[246] Yet this tendency is unlikely to be appreciated, normatively or even empirically, by those of a strong Chicago School persuasion.

Such analysts focus on the *individual*, as channels for narrow economic rationality. However, to understand complex contemporary social problems and then develop policies and laws to address them, requires exploring psychological dimensions to human behavior[247] that can develop very differently across cultures.[248] In addition, policy-makers and law reformers need to examine *interactional* factors, including how individuals interact with peers, neighbors, and the wider culture. They should also integrate (political and socio-economic) *structural* factors, which nowadays are attracting much more emphasis particularly in the West.[249] The latter tendency rubs up strongly against the approach of Chicago School economics, including latter-day adherents like Ramseyer, and this tension helps explain the controversy he has recently engendered.

Ramseyer's direct influence on policy-making in Japan appears so far to have remained minimal, despite the emergence of law and economics as an academic sub-field in Japan.[250] Nonetheless, it is possible that some residual

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245 Chicago demonstrates a lazy tendency toward one sided skepticism. While rightfully critical of government overreach, markets tend to be given a free pass. However, both government and markets are no more than alternative governance systems invented by the human race. Markets wasn't an addendum provided by God to Moses on Mount Sinai. Humans are inherently flawed as is what they produce. Meaning that it is wise to see the inherent flaws attached to both government and market operations.

246 Nottage, *supra* note 153, at 242; *see also* JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000); LUKE NOTTAGE ET AL., ASEAN CONSUMER LAW HARMONISATION AND COOPERATION: ACHIEVEMENTS AND CHALLENGES (2019).

247 EYAL, *supra* note 23.

248 JOSEPH PATRICK HENRICH, THE WEIRDEST PEOPLE IN THE WORLD: HOW THE WEST BECAME PSYCHOLOGICALLY PECULIAR AND PARTICULARLY PROSPEROUS (1st ed. 2020).

249 Michael Jindra, *Academe's Other Diversity Problem*, INSIDE HIGHER ED (Mar. 25, 2021), https://www.insidehighered.com/views/2021/03/25/scholars-should-take-more-comprehensive-approaches-social-programs-order-address (referring for example to recent economic analysis that takes culture seriously); Melissa Kearney & Ron Haskins, *How Cultural Factors Shape Economic Outcomes* (2020), https://www.brookings.edu/product/how-cultural-factors-shape-economic-outcomes/.

250 Shozo Ota, *Law and Economics in Japan: Hatching Stage*, 11 INT'L REV. L. &

influence has flowed, for example, from his early doubts about outside directors in corporate governance (*supra* Part III.A.1). In addition, his work has served as a major catalyst in some degree of stimulating debate and innovative research in the field of Japanese law pursued, especially in the English-speaking world.[251] This result particularly holds outside Japan, starting in the late 1980s. Since the "comfort women" controversy from 2021, Ramseyer's impact has spread into some of the popular press, although the latter is notoriously fickle, so this influence may be fleeting.

The controversy, and this paper digging into his methodological precepts shared with the Chicago School, should leave the lesson that economics does offer a valuable form of analysis for policy-making and for any field of legal studies. Yet it is no more than an investigative tool. Economic analysis can become counter-productive if it brings along with it an *a priori* solution to any and all legal or regulatory problems. In this case, the use of economics deteriorates into just another rhetorical strategy to win ideological arguments. Even this aspect still provides some unintended consequences attached to Ramseyer's work. His efforts provide readers with a valuable lesson, namely that economic analysis can be wrongly used to achieve pre-conceived results. In such cases, economics ceases to be a tool of discovery but instead, as previously noted, degenerates into an adjunct of ideological imperatives. In response to such over-reach, legal scholars would be misguided if tempted to dismiss economics as a useful tool for analyzing aspects of the law. But these same scholars would be wise to recognize and deliberately downplay economic analysis that is in reality promoting a pre-ordained ideological objective. At this point, purported research becomes the sport of conspiracy theorists and others with a questionable political agenda.

The Chicago approach to Law and Economics has always retained a remarkable ability to formulate revealing questions, even if their subsequent answers have sometimes seemed overly contrived and preconceived, and Ramseyer is demonstrably very much in the same tradition. Uni-dimensional "culturalist" approaches are no longer academically credible and increasingly rare even among non-academic commentaries on Japanese law. Yet new syntheses of historical, sociological, political, *and* economic approaches have been emerging especially over the last 20 years.[252] Those studying Japanese law are being forced to engage with more disciplines, creating a growing scope for truly interdisciplinary work. Even those working predominantly as economists are forced to keep sharpening their methodological tools, and digging up new mines of data, to engage with Ramseyer's deliberately provocative work.

ECON. 301, 302 (1991).

[251] Tom Gisnburg et al., *The Worlds, Vicissitudes and Futures of Japan's Law*, *in* THE MULTIPLE WORLDS OF JAPANESE LAW 1 (Tom Ginsburg et al. eds., 2001).

[252] *See generally* Luke Nottage, *The Cultural (Re)Turn in Japanese Law Studies*, 39 VICTORIA UNIV. WELLINGTON L. REV. 755 (2009).