"The Chicago School of Economics and (Japanese) Law: Resisting the Invasions by Stigler and Ramseyer"©

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I. Eve of the War of the Worlds in Japanese Law?

> "No one would have believed in the last years of the [20th] century that this world was being watched keenly and closely by intelligences greater than man's and yet as mortal as his own; that as [the Japanese] busied themselves about their various concerns they were scrutinised and studied, perhaps almost as narrowly as a man with a microscope might scrutinise the transient creatures that swarm and multiply in a drop of water."
> *H.G.Wells, "The War of the Worlds" (1898) Book 1, Chapter 1: "The Eve of War"*

Five years ago, an international conference held in Canada examined the differing ways in which the Japanese legal system tends to be studied particularly in the English-speaking world (the world of "Japanese Law"), the German-speaking world ("*Japanisches Recht*"), and within Japan itself ("*Nihonho*"). A clear disjunction seemed to be a more theoretical approach adopted in the sub-world of US scholarship, as compared to more "black-letter law" analysis within the Anglo-Commonwealth sub-world of Japanese Law, and especially the worlds of both *Japanisches Recht* and *Nihonho*. Still, there seemed to be considerable scope for conjunction or convergence among these worlds (Ginsburg et al eds 2001). Subsequently, however, examining Japan's legal system through the lens of economic theory has grown even more pervasive, particularly in US scholarship.

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Most prominent and ambitious is the work of J Mark Ramseyer, especially since gaining a Chair at Chicago Law School in 1995, followed by one at Harvard Law School in 2001. He seeks comprehensively to debunk the conventional wisdom that Japanese law (and socio-economic ordering more generally) does not fit easily within a model of market efficiency based upon narrowly self-interested behaviour. This view may be starting to impact on the alternative approaches to Japanese legal studies (and, indeed, the study of Japan more generally). The likelihood grows along with the burgeoning influence both of economics itself (Ferraro et al 2005: 10-11), especially vis-à-vis broader "area studies" approaches to studying Japan (Patrick 2005), and of American legal scholarship outside the US (Mattei 1994).

Ramseyer and those in his shadow may find themselves largely preaching to the converted at conferences attended mostly by economists, especially within the US, even if their missionary work is still failing to achieve mass conversions at gatherings of Japanese Law scholars – let alone meetings of scholars mainly entrenched in the worlds of *Japanisches Recht* or *Nihonho*. But Ramseyer and his colleagues have more and more potential to influence those congregating outside these venues, for example at conferences on comparative corporate governance held in third countries (like Hong Kong, or Germany: cf Hopt et al eds 2005) where no or few others specialising in Japan's law or economy are present or prepared actively to contest such idiosyncratic views. Eventually, this storm brewing in a rather constrained academic teacup may overflow into the real world. These debates could have a decided impact on policy-making and law reform in Japan and its increasingly interlinked economic partners such as the US, Europe, Australia and Asia-Pacific nations.

Imagine for example if the current feasibility study being undertaken by Japan and Australia results in a Free Trade Agreement (FTA). Such an arrangement should be expected to include a broader business law harmonisation agenda comparable to that now characterising the FTA concluded between Australia and New Zealand in 1982. However, if policy-makers in Japan and Australia are converted to the laissez-faire arguments of Ramseyer (1996) on product liability (PL) and safety regulation, for example, they will "harmonise down" first by rolling back strict-liability PL enacted in both countries (in 1994 and 1992, respectively) based on the European (EU) model. Secondly, following the Ramseyerian line would lead to a reduction in product safety regulation obligations rather than ratcheting them up as has been the case in the EU since 2004 (Nottage 2005 APLR). Likewise, corporate governance in Japan will be abandoned wholly to market forces, supposedly always the optimal way to develop a generally sound corporate sector (Miwa and Ramseyer 2005b). Such an approach rejects imposing even minimal governance requirements across the board (so to speak), although even the US has imposed some comprehensive regulations in the wake of massive corporate

frauds and collapses like the Enron debacle. Japan has continued to retain some restrictions even while loosening many mandatory rules (drawn from the German law tradition) over its "lost decade" of economic stagnation (Fujita 2004; Nottage 2006a).

Even more broadly, entrenching Ramseyer's new perception of – and vision for – law and economics in Japan may seriously influence its "export" of technical legal assistance to developing countries. This "competes" against similar ODA programs offered by countries like the US, but so far in a low-key and pragmatic way drawing mostly on the conventional understanding of Japan's postwar development (Taylor 2005).

Thus, it is important for an increasingly interlinked global community of both scholars and policy-makers (Slaughter 2004) to understand the foundations and goals of Ramseyer's mission to reinterpret Japan as a textbook market economy, and by doing so to broadly reshape the economic analysis of Japanese law. This paper highlights the close parallels between his agenda and that of the Chicago School of economics, which ended up having enormous impact on policy-making first in the US, and ultimately in many other parts of the world – including Australia, New Zealand and the UK. A trinity of inter-related principles characterise this School, which gathered force particularly from the 1960s under the leadership of Milton Friedman and George Stigler. First, the *a priori* knowledge that markets work (and hence the quest to uncover data proving that any ostensible malfunctioning had not actually occurred). Secondly, an unstinting scepticism, particularly about stated intentions or attitudes of socio-economic actors that ran counter to narrow self-interest. Thirdly, an ideological commitment to fight back against the scourge of communism, economic planning and its welfare state offshoots (Part II).

These cardinal principles were extended to the economic analysis of law, beginning with US law (Posner 1972), but gradually then the legal systems of other countries (Ota 1991). Ramseyer, completing his JD at Harvard in 1982, caught the end of the "first wave" of law and economics thinking and has doggedly applied it to Japanese law. He has missed or deliberately dodged subsequent waves (eg Hadfield and Richardson eds 1999), especially the legal academy's belated engagement also with "behavioural economics", which draws particularly on social psychology to question core tenets of the "rationality" underpinning neoclassical economics and hence its faith in markets rooted in narrowly self-interested behaviour.[1] Instead, consistently with postwar Chicago School of economics, the topics and data selected by Ramseyer and his co-authors always show that markets and self-interested

behaviour operate in Japan, no differently than they do (or perhaps must) in other countries (eg Miwa and Ramseyer 2005a). They also blame Marxist sympathisers within Japan (and readily-duped foreign commentators) for thinking otherwise, for example in believing in the concentration of capital via institutions such as "main banks" and vertical or horizontal "*keiretsu"*. Price theorists of the Chicago persuasion find such constructs hopelessly hard to swallow (Part III).

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 (eg West 2005). Ramseyer's rhetoric is also a delight, unlike much writing by economists (or lawyers!), although rhetoric is increasingly recognised – or, at least, now more openly promoted – as just another tool in trade for good economists (McCloskey 1994). However, our paper concludes that Ramseyer's iconoclastic "invasion" of Japanese law is likely to encounter increasing resistance (Part III). After all, it was much easier for Stigler and others at Chicago to argue that markets 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, over the 1990s, it becomes harder and harder to push for that last measure of complete market liberalisation. (Similarly, as Tanase (forthcoming) argues – partly from the experience of US law – it becomes harder and harder to achieve a pure liberal or 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.[2]. Lastly, the worlds or disciplines of economics itself, and law as a whole, retain elements of their own logic or ways

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[1] See eg (Sunstein ed 2000), who completed his JD at Harvard in 1978 but has stayed on at Chicago Law School.

[2] See eg {Levitt and Dubner 2005: 177}, by another star of the new generation at Chicago:

> "Levitt thinks he is onto something with a new paper about black names. He wanted to know if someone with a distinctly black name suffers an economic penalty. His answer – contrary to other recent research – is no. But now he has a bigger question: Is black culture a cause of racial inequality or is it a consequence? For an economist, even for Levitt, this is new turf – "quantifying culture", he calls it. As a task, he finds it thorny, messy, perhaps impossible, and deeply tantalizing." (Quoting from *The New York Times Magazine*, 3 August 2003)

More generally, economics may be moving away from the days when answers to statistical tests were foreordained by the orientation of the researcher:

> "They don't see themselves as having political persuasions," said David Colander, an economic historian at Middlebury College … "They see themselves as doing the best analytical-statistical work that can be done, better than in sociology and other social sciences. They are telling you what the options are, but not which option to choose." (Uchitelle 2006:1).

of conceiving things even as they are increasingly perturbed by each other, and both tend to co-evolve with politics and policy-making rather than fully overwhelming them.[3]

Nonetheless, we all must remain vigilant to take the best from the traditional Chicago School of economics, and its foray into (Japanese) law, but be prepared to discard the rest. Our responses, in turn, have broader repercussions for other disciplines, including often parallel methodological battles within political science and Japanese studies more generally (Johnson 2005).

II. Chicago's Economics – then Law – Tradition

> The trouble with most people ain't ignorance; it's what they know that ain't so
> (Josh Billings, quoted in Leeson 2003:19)[4]

The Japanese like to distinguish surface reality (*tatamae*) from the often harsh reality (*honne*) lurking just below that agreeable, but misleading, level of perception.[5] This is the most 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 version of positivism, associated with these economists. The most quoted work of economic methodology is associated with the name of Milton Friedman (1953).[6] This has become notorious for placing

[3] See eg {Joerges et al eds 2004; Braithwaite et al eds 2004; Nottage 2005} OUP.

[4] In an earlier draft, Milton Friedman noted in his December 1967 American Economic Association Presidential Address that his teacher Frank Knight was fond of quoting Josh Billings (a 19th century American humorist) comment. This efficiently encapsulates Chicago's vision of itself as free thinking iconoclasts, unwilling to accept commonplace wisdom at face value. In the post-war period this allowed Chicago to set itself up as a counterpoint to the fount of establishment economic thought, namely Harvard University. This intentional adoption of underdog status is reflected by location (East Coast versus Mid West) and the character of the staff as well (sons of immigrants arriving from provincial hometowns versus patrician stock). Such a characterisation could not hold up under close examination, though it was true that Harvard maintained an implicit anti-Semitic policy during this time. What remains essential in understanding the development of this school of thought is the perceived rivalry and the crusading nature of Chicago's approach to economics.

[5] 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 the descent of a young man from the comforts of suburban banality into the realm of sexual depravity and crime that existed as the dark underside of suburban conformity.

[6] Though credit for this approach has 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 Stigler 1949] to the fact that we had been talking about it.*

no importance on the reality of its assumptions, but instead entirely relying on how well a theory could account for empirical evidence. The reality was that the proclaimed methodology lacked any actual application. As George Stigler's prize student admitted, Friedman's methodology didn't describe the way in which economics was practiced at Chicago or anywhere else:[7]

> "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 an attempt to end a debate that both Friedman and Stigler saw as dangerous to their own objectives. Questioning assumptions underlying standard price theory could result in questioning the results of that same approach.

In the same way, although the Chicago method pushed empirical testing over economics by assertion,[8] the reality was that such testing was simply another form of rhetoric practiced by a set of expert marketers:[9]

> Craig Freedman: Yes. And how influential were you in each others 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 were largely responsible for shaping what became the Chicago counter-revolution against the Keynesian orthodoxy. Friedman returned to Chicago in 1946 (taking a job that was originally slated to go to Stigler). Stigler took a joint position in the economics department and business school in 1958.

[7] Ronald Coase (1994) took exception to Friedman's (and Stigler's) methodology. As he points out: "An insistence that the choice of theories be made in accordance with Friedman's criteria would paralyze scientific activity." (Coase 1994:24)

[8] The clarion call for a 'back to empiricism' movement came during the address by George Stigler (1982) 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

> "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).

It is a more sophisticated approach than economics by assertion, which seemed to be the rule in 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 understanding of this Chicago approach is essential in understanding, at least some of the work, done in the field of Law and Economics. This is because Law and Economics evolved out of that Chicago tradition:

> "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

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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." (Stigler 1982:135).

> "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 on thought about all of this." (Ronald Coase, conversation with Craig Freedman, October 1997).

[9] 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 can conceive of evidence that would lead George Stigler (or his closest colleagues) to conclude that markets had performed in a less than efficient manner:

> "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 –

> 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 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." (Stigler 1988:162-63).

II.A. Standing Economics on its Head: Markets Work, Even If It Doesn't Seem So

The lineage in Chicago starts with Henry Simons and moves on to Aaron Director, who only recently died (11 September 2004 at the age of 102). It is Director's mindset rather than that of someone like Coase (originally from the UK) that dominated[10]. It is true that Coase had a long turn as editor of the premier journal in the field, the *Journal of Law and Economics*. For many years he also served in the Chicago Law School in the position initiated by Simons and continued by Director. However, the Coase[11] approach remains somewhat apart from the method espoused by the Chicago market fundamentalist. As Coase legitimately claims, a hard-core Chicago School acolyte like George Stigler never did understand what Coase was doing. The Coase theorem[12] reflects Stigler's attempt to eliminate one aspect of market failure. The consensus wisdom up to that time assumed that unpriced costs required government intervention. Stigler seized on the work of Coase (1960) as a demonstration that market solutions (almost by definition) had to be the most efficient solution. It is understandable that Stigler titled "Eureka!" the chapter of his autobiography that dealt with the contribution made

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> of anybody I ever knew. Almost no new data could change his view for this reason." (Paul Samuelson, conversation with Craig Freedman, October 1997).

10 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 {Coase 1993}.

[11] The work in question is Coase's *A Theory of Social Cost* (1960).

[12] The Coase theorem, more correctly the Stigler theorem, stipulates that given well defined property rights and zero transaction costs, any assignment of property rights is efficient. Coase himself never accepted 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):

> "He 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." (Ronald Coase, conversation with Craig Freedman, October 1997).

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 version of Coase's work as part of his agenda, but that was hardly Coase's point. 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 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. Although many Chicago types claim his tutelege, the reality would see his 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 mantle.[13] As far as legal theory goes, Coase's key contribution is to dismiss assignment of fault as an unfruitful endeavour. 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 existing transaction costs. To provide a simple example, if drunken drivers are running over small children it might make more sense to assign responsibility to the children's parents to strictly follow road safety than to expend resources trying to reduce drunken behaviour. Coase's method reduces the issue of liability to one of minimising costs.[14] This however is not the focus of the Chicago-trained economist.

The simplest way to think of the Chicago project is to start with its unquestioned and guiding tenet. Markets work. 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[15]. A reader always knows before hand the conclusion

[13] Coase has publicly refuted Posner's interpretations in the past and shows no great respect for the work that Richard Posner has done:

> "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).

[14] See also eg {Calabresi 1970; 1983} and {Mattei 2005}. Professor, later Dean, and now Court of Appeals Judge Guido Calabresi was pivotal in developing the more nuanced Yale approach to law and economics.

[15] 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

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:

> "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 rationalisation that inevitably leads to idealising markets has been best incorporated by a phrase attributed to the UCLA economist, Armen Alchian:[16] *What is, is efficient.* This at first glance seems to be mysticism on the same level as its Hegelian counterpart: *What is real, is ideal*. Given greater 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 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 wouldn't observe it.[17]

> apparent overstatements of the strength of his results." (Harry Johnson, quoted in Leeson 2003b: 261).

[16] Paul Samuelson encapsulates Alchian's approach succinctly, '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).

[17] 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

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 then 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 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 (2002) in his interminable *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 in 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 what is clearly parallel reasoning to a Chicago style of thinking. Calvin instructs the faithful to try and dispose 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.

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

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adulatory remarks in his autobiography about Milton?" (Paul Samuelson,

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'[18]. 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 explains everything is one that ends up explaining nothing.

II.B. Scepticism as an Analytical Approach

We can see this in the work of Aaron Director.[19] 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 publication 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 labour economist Paul Douglas. However, the 1930s did see a complete turnabout under the influence of Knight. Like his mentor and friend, he 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 Friedrich von Hayek's classic polemic *The Road to*

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conversation with Craig Freedman, October 1997).

[18] 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's (1942) *Candide* to justify whatever ghastly event unfolds.

[19] 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 2004). 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 organisation. 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).

Serfdom, found a publisher in the University of Chicago Press. This became something of a bible for the counter-revolution to economic planning initiated by the founding of the Mont Pelerin Society in 1947.[20]

In the same year, 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. The shift to the Law School defused the situation. Despite Simon's untimely suicide, 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[21]. His influence grew even further with the return of George Stigler to Chicago. Director is said to be 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.)[22]

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[20] See <http://www.montpelerin.org/>. As well as Hayek, presidents of this "liberal" Society have included Freedman (1970-2), Stigler (1976-8), and Professor Chiaki Nishiyama (1980-2, awarded a PhD from Chicago in 1960). Japan has hosted meetings of the Society in 1966 and 1988. Director had recruited both Milton Friedman and George Stigler to the cause, as representing the best of the younger generation. Also along was Director's friend and mentor, Frank Knight.

[21] 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 department:

> "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 organisation] 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).

[22] 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 of 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

> "When I moved to Chicago from Columbia University in 1958, I began to see much of my friend Aaron Director. He taught with 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." (Stigler 1988:102).

It was this course in antitrust law that would shape law and economics, Chicago-Style, influencing such luminaries as Bork, Posner, Easterbrook and Landes[23]:

> "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." (University of Chicago News Office 2004).

The stated approach of the course was unarguably commendable. The dogma surrounding anti-trust law was too often unquestioned[24]. The area of monopoly for many economists and

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> his advantage but that's what happened." (Ronald Coase, conversation with Craig Freedman, October 1997).

[23] See Posner (1992) for a useful understanding of what the Chicago approach to antitrust meant.

[24] Stigler in 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 to seeing competition wherever he turned:

> "… 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 behaviour of the steel industry was the traditional one in economics: The industry was "concentrated." (Stigler 1988:99).

His 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 them. And he would have changed them forever if he had stayed on

anti-trust lawyers was a simple question of concentration ratios, how much market share the four or five largest firms controlled. Here, being an iconoclast was not simply refreshing but urgently needed. The profession as a whole had to stop accepting simple assertions at face value. Unfortunately, the Chicago approach seemed to be not so much focused on removing 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 didn't like. This 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 didn't 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 wouldn't exist. If the observed result is efficient, there cannot be cause for government action.

We will let George Stigler explain the Chicago solution in each case. With predatory pricing, the revisionist view starts with a re-examination of the Standard Oil case[25]:

> "Director was sceptical 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." (Stigler 1988:102).

In other words, predatory pricing can't exist because it would be inefficient. Since *what is, is efficient*, it would be impossible to observe (what essentially is) an irrational practice. Predatory pricing isn't anti-competitive because it doesn't, and can't occur. Director persuaded a young economist (John S. McGee 1958) to examine the available evidence. One can easily argue over the selection of evidence he chose to consider. What comes as no

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> 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).

[25] 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.

> 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.

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 takes the profession to task for not accepting the obvious fact that he had already resolved the issue of predatory pricing some 22 years previously. Since predatory pricing *a priori* can't exist, evidence to the contrary can't 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. Stated intentions therefore don't matter. Any contrary pricing data discovered can be similarly dismissed. Starting from this assumed conclusion, it is no surprise that the Chicago style researcher reaches his or her predestined goal without fail.

Resale price maintenance is the second clear example of the harvesting 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 wouldn't exist. Therefore the task 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 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." (Stigler 1988: 163)[26].

Rockefeller and associates would buy up the rival for a pittance (Stigler 1988:102).

[26] This is a lovely story, but when examined closely doesn't extend beyond being a fractured fairy tale for well-mannered young economists. The work by Lester Telser (1960) looks at a particular price rigging case by General Electric. Telser does suggest that the information explanation is a possible

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 doesn't exist. In the latter case, consumers would be made worse off if unchannelled competition eliminated a valuable consumer service, in essence increasing the user cost of appliances over the long run.[27] Competition may be efficiently hindered if done within a market context. However, a government context must inevitably lead to ineradicable inefficiencies. In the hands of Chicago theorists, the field of law becomes another battleground on 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:

> "[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." (Friedland 1993:780).

II.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 US (Amadae 2003) – during the Cold War period. As claimed by another Chicago graduate, Dom Patinkin, Friedman returned to Chicago in 1946 'to continue the school's fundamental ideological advocacy of free-market economic liberalism' (Patinkin, quoted in Leeson 2003:2). 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 Friedman's powerful polemical work, *Capitalism and Freedom* (1962), and especially in its dedication to his two young children 'and their contemporaries who must carry the torch of liberty on its next lap' (Friedman, quoted in Leeson 2003:9):

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justification for the observed practise. 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 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.

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

> "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 to dangerous alternatives. In this environment, a new Keynesian inspired textbook, like the one produced by Paul Samuelson, and seen as innocuous today, could generate a firestorm around those institutions that chose to adopt it.[28] Economists like Samuelson and Arrow, in their attempts to formalise large sections of economic theory, seemed determined to find limitations and faults with competitive markets.[29]

The traditional liberals, represented at Mont Pelerin, firmly believed that a free economy was necessary for a democratic society.[30] Given what they uniformly viewed as a dangerous and almost unrecognised 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

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[28] 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 postwar Keynesian textbooks met resistance from the old guard as well as from politicians and businessmen keen on sniffing out anti-free market (communist) influences:

> "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." (Bell 1988: 147).

[29] This assumes that competitive markets eliminated the problem of power from economic analysis. In a Hobbes-like contract, individuals ceded economic power to the market place 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.

[30] 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'.

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 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." (Stigler 1975: 18).

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 (1993: 244) 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 shoud 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 *Infant Terrible*

> "Most of what we collectively think we know about the Japanese economy is urban legend. In fact:
> - 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.[31]

- The zaibatsu did not succeed pre-war because they bought politicians, exploited the poor, or manipulated disfunctional capital markets. They succeeded for all the usual varied reasons a few firms succeed in any modern economy. They acquired the (pejorative) zaibatsu label because they happened to be thriving when muckraking journalists in the 1920s and 30s came looking for someone to blame for the depression.
- Japanese firms have no main bank system, and never did. 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. When the economy boomed, politicians and bureaucrats did take credit. They had created the success through their own far-sighted leadership, they claimed. Marxist scholars dominated Japanese social science departments, and they were not about to suggest instead that market competition might account for the success. Happy as they were to find an example of successful government intervention, neither were most Western scholars of Japan:"[32] (Yoshiro Miwa and J Mark Ramseyer, "The Fable of the Keiretsu, and Other Tales of Japan We Wish Were True" (April 2004) Harvard Law and Economics Discussion Paper No. 471.

It is in this context that the work of a latter-day Chicagoan starts to make sense. Mark Ramseyer, at first glance, 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. At a recent conference in Germany on transformations in governance regimes in Japan, the US and Europe, for example, Miwa and Ramseyer (2005b) insisted that the entire project was flawed because of the misconceived starting point that postwar Japan had developed a regime contrary to important neoclassical economic principles, with more market-driven approaches only emerging since the 1990s.[33] Ramseyer's approach is

[31] Alternatively, for example: "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 US."

[32] In short, perhaps: "There 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 constraints."

[33] Nottage (2005b), asked at the conference to comment primarily on a paper by the much less dogmatic law and economist from the UK, Anthony Ogus (1994; 2005), anticipated such as response. Nottage hoped its extremism would become obvious to participants (especially those more unfamiliar with Japan) if the diverse assertions made over the years by Ramseyer (such as the "myth" of the main

essentially that 'Everything you know about the Japanese economy is wrong, and you are foolish to continue believing otherwise'. This is certainly one way to get noticed – especially in the US academic world, as the versatile British "law and economist" Anthony Ogus remarked at the conference. Or, as one of the founding fathers of the Chicago School of economics 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" (Knight quoted in Leeson 2003: 15-16). 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 doesn't fully explain what is driving Ramseyer's work. The one consistent feature within his staggeringly voluminous output[34] is the insistence that the Japanese economy is (or ought to be) a liberal market economy much like one finds in the US. Following the tenets of the postwar Chicago School, this should be unarguable if we were simply clever enough to spot the obvious. Going even further, the Japanese legal system would almost by definition be efficient. If the system failed to facilitate such economic efficiency there would be a positive incentive to replace it with a superior approach.

A similar ethnocentricity can be found in his textbook on *Japanese Law: An Economic Approach,* co-authored with University of Tokyo tax law professor Minoru Nakazato and published as the third volume of the "Studies in Law and Economics" series of University of

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bank, the "fable" that Japanese companies disdained shareholders, and so on) were listed up, along with some important counter-evidence, and then if this (almost libertarian) understanding could be counterposed against other alternatives (welfare statist, and "neo-proceduralist" – such as Takao Tanase's neo-communitarianism, or Shigeaki Tanaka's more restrained liberalism). Ramseyer and Miwa (2005b), however, ended up unabashedly providing their own summary of all their arguments that Japan had always remained a classic example of a liberal economy! See also {Ramseyer and Miwa 2004}, the Working Paper version whose abstract is cited at the outset to this Part III.

[34] As of January 2006, his Harvard webpages list 158 publications (via http://www.law.harvard.edu/faculty/directory/facdir.php?id=54), beginning with "Thrift and Diligence: House Codes of Tokugawa Merchant Families" published in *Monumenta Nipponica* in 1979. 26 papers had been uploaded from around 2001 on the widely accessed SSRN database (www.ssrn.com), giving Ramseyer an "all time" ranking of 23rd equal (out of over 55,000 authors). Total downloads were 4281 (ranked 88th). The pace of downloads is accelerating, with 785 being downloaded over 2005, but this represents a ranking only of 161, so more downloads may be due primarily to more people now using SSRN.

An inspiration may be Richard Posner and Takeyoshi Kawashima, the doyen of postwar legal sociology in Japan whose "culturalist" theory (divorced from its nuances) was caricatured and crucified by Ramseyer (1988) at an important early juncture in his career. Certainly he has written about their prodigious output, and their undoubted influence in the US and Japan respectively.

Chicago Press that Ramseyer co-edits with Landes.[35] They begin assembling a comprehensive picture of Japanese law organised, not in accordance with the understandings of Japanese jurists, but instead 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" (Ramseyer & Nakazoto 1999: viii). Over subsequent years, 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, and hence of course that markets function well and pervasively in Japan.

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 Court of Appeals judge). Like them, Ramseyer basically adopts a 'one size fits all' approach to research and analysis. Therefore he starts off by assuming that any alternative claim must be incorrect. The game then becomes 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 under the clear light of day. Ramseyer adopts the typical *a priori* approach that forms the bedrock of postwar 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 doesn't itself self-destruct under the probing light of analysis. To gain notice, or even notoriety, he may be pushing the Chicago tradition at least a few steps too far, to the point where its structure collapses due to the lack of intrinsic economic intuition and perhaps even the coherence of the work pioneered by earlier generations.

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

Consider some more specific parallels with the Chicago School approach, extended to the economy, law and politics in Japan. First, Ramseyer and colleagues (notably controversial University of Tokyo economics professor Yoshiro Miwa) have focused much energy recently

[35] Indeed, in his review essay, Michigan economist Gary Saxonhouse (2001: 377) faults them for not finding that the Japanese and US legal systems may be even more similar (eg by taking US state court rather than federal data to show even closer percentages of de facto plea bargaining in criminal cases). Overall, however, he praises their "attempt to show that the Japanese legal system is consistent with conditions that facilitate efficient economic growth …[finding] that in many significant ways the Japanese legal system resembles at a functional level the seemingly very different American system".

on proving that "markets cleared" throughout the Japanese economy not only before World War II (see also Ramseyer 1996a), 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 (2005: 123) – albeit based mainly at Michigan, Yale and Columbia – that had emphasised extensive credit rationing by the Japanese government and its far-reaching consequences for economic regulation and corporate organization generally (cf now eg {Miwa and Ramseyer 2004}).

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 postwar corporate governance.[36] These arguments are rather like the bad joke made about (especially Chicago School) economists: if they spot a 100-dollar bill on the footpath, they ignore it because it cannot exist – it must have been efficient for someone already to have picked it up (McCloskey 1990: 112-3). Similarly, main banks can't exist because they must represent inefficient arrangements, and firms that recognise broader stakeholders like creditors and employees can't exist (or will fail) because really only those that give primacy to shareholder interests will survive in competitive markets. The game then becomes to marshal data to prove that these deductions hold true.[37]

[36] On main banks, compare {Miwa and Ramseyer 2005b} with eg {Milhaupt 2002}. On the importance of equity markets, stock prices and hence shareholders in Japanese corporate governance, compare {Kaplan and Ramseyer 1996} and {Ramseyer & Nakazoto 1999: 128-135} with the allegedly "wrong" studies by observers such as Ronald Dore, and other developments assessed in {Nottage 2001; Nottage and Wolff 2005}.

[37] This progression is clear, for example, in Ramseyer's research on main banks. In a chapter in a volume on Japanese main banks co-edited by Aoki and Patrick, {Ramseyer 1994} sets up a series of theoretical reasons why the majority view that they are alive and kicking, playing key roles in Japanese corporate finance and governance, must be wrong. One key argument is that main banks' implicit promises to help failing firms ought rationally to be made express binding contracts, yet they are not (or at least not litigated as such), so we should conclude that they make no such promises at all. To explain then why we seem nonetheless to see more bailouts by banks, another argument becomes that that Japanese courts have not developed a doctrine analogous to equitable subordination in the US, voiding security interests to punish a major secured creditor who intervened (thus making creditor intervention more common because profitable *ex post*, and hence threats to punish defaulters less credible *ex ante*). 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 industrialised democracies, but this phenomenon means acknowledging that contracts are made and enforced not just based on a narrow cost-benefit calculus but rather in a much broader socio-economic context (see Campbell et al 2003). The second – the lack of an analogous equitable doctrine – is very difficult to prove, as Ramseyer himself acknowledges; but anyway it would not preclude main banks committing to supporting debtors in other ways (or even being virtually forced to sometimes by the government, in exchange for it agreeing to back the banks, which it did – largely implicitly – until the late 1990s: Milhaupt 1999). Despite these weaknesses in the theoretical argument, subsequent regression analyses by Ramseyer claim to have duly proven that main banks not only *cannot* exist, but indeed *do not* (eg Miwa and Ramseyer 2005b), despite different quantitative analysis continuing to show the converse (eg Lincoln and Gerlach 2004).

Secondly, regarding the broader legal environment for corporate governance, Ramseyer and Nakazoto (1999: 134) 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."

These are remarkable claims, and require extensive mental gymnastics and punchy prose to retain even superficial plausibility. For example, they 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 over the 1980s and 1990s, although a wisdom now dented by the excesses of the Enron era. Takeovers (although only after observed to be growing there, of course) are assumed to provide a necessary and sufficient arm's length market mechanism for controlling incumbent management to the benefit primarily of shareholders, provided legal impediments are limited. Therefore, Ramseyer and Nakazoto must reject the conventional wisdom that hostile bids remain rare due to cross-shareholdings (which would 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" (pp 121-2).

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. 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 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 share holding 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.

Second, is the data employed appropriate for the test? Again, often the exact data needed is not available and proxies have to be used. Ramseyer's proxies can be wanting, but Ramseyer often glosses over any difficulty. Curiously, he can criticise existing definitions of a *keiretsu* but then use those faulty definitions as the source for his data. In this way it is 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. This is a method that grabs attention but can lack integrity.

> 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 (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 any attempt to examine the empirical work closely.

This approach extends generally to all of 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 liberalisation of many of these mandatory rules (eg as to share types, transfers, buybacks, minimum capitalisation, decisions by shareholder consent, and choice of directors and/or statutory auditors to monitor management)[38]. Many have been completely or substantially relaxed as a result of sweeping reforms to Japanese corporate law over the last 15 years (Fujita 2004). Even domestic interests have sought more flexibility within corporate

[38] Perhaps economists of Ramseyer's persuasion would dismiss these US efforts as pure rent seeking – American interests seeking additional and unjustified benefits. Yet, because the reforms loosen mandatory rules to allow firms to govern themselves more flexibly, they should welcome them as generally offering efficiency gains. A dilemma arises because Japanese corporate law (and everything else in Japan) is perceived as already largely efficient.

organizations in order to facilitate the goal of revitalising the Japanese economy (albeit, perhaps, to the main benefit of managers rather than shareholders: Milhaupt 2003).[39]

And so it goes on, for other areas of law subjected to economic analysis by Ramseyer, dominated by the precept that "*what is, is efficient*" – and perhaps, in the rare cases where it may not be, can be readily remedied by further market-driven solutions. For example, he remains sceptical about strict liability obligations imposed on manufacturers for defective products by the Product Liability (PL) Law of 1994, in addition to liability under the 1898 Civil Code for negligence in supplying goods. True to his cynicism about legal or regulatory interventions derived from "public choice" theory, the subject of his Coase lecture during his first year at Chicago Law School (Ramseyer 1995), he asserts – again contrary to a much more fine-grained analysis of the Law's genesis, emphasising the rebirth of consumer power, international developments, and so on (Nottage 2004: chapter 2) – that it was pushed along by manufacturers of safer products seeking to raise compliance costs for and hence keep ahead of their competitors. Yet, at the same time, Ramseyer (1996) argues that some such manufacturers had already developed a private ordering scheme as a more efficient substitute for strict-liability obligations imposed on all manufacturers[40]. Specifically, he objects to such PL 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" (Ramseyer and Nakazoto 1999: 99-101). 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 problem.

When Ramseyer and Nakazoto examine 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 (the small "premium" for which is allegedly built into the sale price). This insurance was then paid out (voluntarily)

[39] It is unclear what Nakazoto and Ramseyer (1999: 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 corporate law regime in order to attract "business" from corporations. {West 2001} picks up on this point as a reason 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 over the last 5-10 years {Nottage 2006}.

[40] A private scheme must in the Ramseyer world inevitably be more efficient since anything that governments can do, the private sector can do better.

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, the theory sounds plausible, but the empirical foundations are weak in many respects. For example, once again a "puzzle" is acknowledged: over nearly two decades, only 339 claims (averaging 460,000 yen each) were paid out of 727, for over 100 types of products registered under the scheme (Ramseyer and Nakazoto 1999: 104-6). Yet the main reason given for this is that "probably" the scheme, by design, disproportionately covers only the safest products – hence generating few injuries, and few claims.[41] If so, then, why do such manufacturers spend time and money to have their products certified and insured? And if the scheme was such an efficient solution, 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 more plausible is that the SG manufacturers and the industry more generally supported the scheme as one way to pre-empt the government responding more broadly to widespread safety failures in the late 1960s and early 1970s, by imposing strict-liability 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 6 mandatory standards ever imposed under the Consumer Product Safety Law of 1974: Nottage 2005 APLR).

This success for 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,[42] and also that manufacturers made little effort to publicise their scheme among consumers. Ramseyer and Nakazoto fail to mention or downplay longstanding concerns expressed in such respects (eg Sarumida 1996). This response is predictable because the efficiency of the scheme must turn on it having broad coverage, and being engaged by consumers on the basis of informed consent. Never mind, however: don't let contrary data (or a search in good faith

[41] 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" (p 263 n 92). The year after publication, however, was when Japanese firms belatedly began recalling unsafe products – ranging from foodstuffs, consumer electronics and automobiles – and the public (and the government) realised that Japan's recall system was not functioning effectively either.

[42] Again, in a footnote (n 263), they concede: "The limitation to defectively *manufactured* goods (as opposed to claims over 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*.

for missing data) ruin a nice theory consistent with the Chicago School belief that markets always work, rendering government intervention unnecessary[43].

Thirdly, Ramseyer has had no compunction in extending this belief to explain politics, in its broadest sense, in Japan. (In this way he helps economics live up to the cliché of being the imperialistic science.) Working with a political scientist now at Yale, but who worked at UCLA in the early 1990s when Ramseyer was there before Chicago, he has applied "rational choice" theory to ridicule the conventional wisdom that bureaucrats primarily governed postwar Japan. Not content with the growing counter-argument that governance had in fact been or become more diffuse (Abe 1991), Ramseyer and Rosenbluth (1993) argued that it was the conservative LDP politicians – driven solely by the narrow incentive of maximising votes and power – who were firmly in control, with bureaucrats doing their bidding.

That early work also hypothesised that Japanese judges would comply with the policy preferences of LDP politicians, since their longstanding tenure undermined any incentive to have a truly independent judiciary. With a colleague from UCLA days (now at 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 (2003) 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 favour of the government but quite independently of the LDP, as a means of maintaining broader public confidence in the judiciary, pointing out also that Ramseyer and Rasmussen have never even tried to find direct evidence of politicians leaning on certain judges (Haley 2006). Other specific criticism is now being directed at various conclusions they draw from their data (Upham 2005: 428-439). Even if they are largely correct, it doesn't much help legal advisors or commentators addressing a particular case (even "politically charged") as regression analysis always deals in aggregates. Nor did the original studies continue much beyond 1993 so we can test or guess what might happen next.[44]. More generally, it is hard to know what other implications to draw

[43] Ramseyer channelling the spirit of the Chicago school sometimes utilises an approach to data that might be described as 'When my facts disagree with what I know to be true, I ignore the facts'.

[44] Cf {Nottage 2005 OUP; Abe and Nottage 2006}. Now we have an inkling, of sorts. {Ramseyer and Rasmusen forthcoming} conduct extensive quantitative data examine 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 deeply disturbing for their original theory. One "immunising strategy" (as economists call it) to preserve the theory might be to argue that nothing has changed in Japanese politics. In private

from their book besides the obvious. Judges – widely considered to embark on a lower paid and lower profile career out of a true sense of public service – should be treated as being self-interested and even as venal as politicians, bureaucrats, and other socio-economic actors as conceptualised by the Chicago School.

Never mind, however. The Chicago-style approach has achieved a growing influence on political science in US circles, and Ramseyer's theory in this field is too comforting for Chicago adherents to reject despite concerns about the data and their implications. Never mind, moreover, the more circumspect acknowledgement by Coase himself that it may not necessarily be true that:

> "an approach developed to explain behaviour 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 behaviour need not be the same and, in particular, the institutional framework within which the choices are made are quite different." (Coase 1978: 208)

III.B. Believe Nothing Said

The second set of parallels with harder-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 behaviour[45]. 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

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conversation, Ramseyer had previously suggested that. To his credit, this untenable view is not now pursued. The only real alternative is to switch tack completely, and advance a new proposition: to "obviously speculate" (p 27) about "issues beyond the scope of our data", that "the key to the success of the Japanese judiciary probably lies instead in uniformity – particularly, in the uniformity rather the judicial output", not just their hard work. They concede they lack data on dock clearance rates to gauge the latter, and simply assert for the former that judicial careers are monitored for consistency with precedent, which allows them to reach a broader conclusion: Japanese courts produce predictable judgments economising on litigation costs by facilitating out-of-court settlements. But this strategy raises its own problems. If both factors are 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 approach to legal reasoning shared by both Japan and the US (Nottage 2002) – then this new conclusions from this latest study cannot be maintained, and the original *theory* therefore loses credibility.

[45] In standard economic models, individuals respond to market forces. They don't 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).

other more diffuse characteristics. Nor would he give weight to managers who say they care for their employees more than shareholders. Even industry associations who might concede that they never really voluntarily moved from a negligence to a strict-liability standard in operating their insurance schemes for defective products. Or, albeit less likely, those who might even confess that they never really wanted to publicise their scheme to ensure consumers' informed consent to the schemes would also be dismissed.

Nor would Ramseyer give credence to judges who might insist that they tend to rule in accordance with LDP preferences in narrow categories of cases only, 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. And that they 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 (cf eg Hagiya ed 2004). 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 (Schwartz and Pharr eds 2003). All and any such utterings can be dismissed as "anecdotes", swamped by quantitative data (especially regression analyses) that prove the contrary at the aggregate level, or simply a reflection of mass delusion.[46]

Likewise, all that counts in explaining civil or criminal litigation patterns are statistics uncovered from the courts and elsewhere, along with the theory that rational litigants settle rather than sue primarily 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 (Ramseyer and Nakazoto 1989). Yet this has not prevented the argument being generalised – in a subtle manner – to explain much litigation behaviour in Japan (Ramseyer and Nakazoto 1999: 99, 180). To be sure, Ramseyer acknowledges some limits in his study of traffic accidents, but basically puts the burden on others to adopt his precise methodology and uncover contrary "hard data"[47] – even though

[46] By backing himself into this methodological corner, Ramseyer cannot really seek out "anecdotal evidence" (eg 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, or (more importantly) the Supreme Court General Secretariat in their process of assigning judges 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.

[47] 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 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.

that may be impossible, where there are far fewer tort cases and (partly relatedly) 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 Nakazoto 1999: 95 [and 99])

Subsequently, however, Tanase (2001) has isolated steadily more litigious behaviour in traffic accident dispute resolution over recent decades, and added quantitative analysis linking tort litigation partly to socio-cultural milieu in different parts of Japan, forming one basis for his broader neo-communitarian understanding of Japanese law and society (Tanase forthcoming). Quite similarly, to understand disputing behaviour over noisy *karaoke*, West (2002) 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 behaviour). These more nuanced explanations of Japanese dispute resolution practice also resonate with recent large-scale survey evidence. For example, Tanase (2005: 24-5) found that three-quarters of respondents asked even about traffic accidents – where disputants are usually strangers and ought 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 agreed more with the idea that monetary compensation was enough. This is quantitative evidence suggesting that apology plays an important role in settling traffic accident disputes – consistent with much earlier "anecdotal evidence" (eg Wagatsuma and Rosett 1984) – but it does not fit in Ramseyer's model.

It probably cannot, either, because "apology" is a partly socio-cultural phenomenon that is hard to define and record; and because this survey evidence is only about "attitudes", which the Chicago School is utterly sceptical about. Likewise, Ramseyer's model and methodological approach cannot readily incorporate strong quantitative evidence (Ohbuchi et at 2005) 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). 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 money value and singled out in observed behaviour, in contrast even to many other contemporary economists.[48]

III.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. To put this in even broader context, it is important to realise that Ramseyer grew up in darkest Kyushu as the son of a Mennonite missionary. This may help explain his own proselytising urge, albeit to convert all students (and perhaps practitioners) of Japanese law to the Chicago faith.[49] Anyway, soon after Mark Ramseyer completed his MA in Japanese studies at the University of Michigan – with a strong Jesuit history, and later famous for its Japanese studies – he published a study noting some parallels between certain "House Codes" (internal rules) of Tokugawa merchant families and the early Protestant view discerned by Max Weber, linking religious virtue to maximising wealth (Ramseyer 1979: 218).

That perspective may have been reinforced by the combination of political conservatism and free-market liberalism propounded by Ronald Reagan, 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)[50]. Reagan's reign revived and reinforced the Chicago School's concern both with Communism abroad and their welfare-state sympathisers in the US. It also fed through to significant retrenchment in regulating markets, and even access to the courts in civil litigation (eg Haltom and McCann 2004).

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[48] Cf eg {Akerlof and Kranton 2005}, on how preferences or happiness can change in institutional settings (discussed by Ross Gittins, "People Capital: Workers Retooled as Insiders", SMH 11-12 June 2005). Even Saxonhouse (2001: 384) chides Ramseyer and Nakazoto for not adding the more realistic assumption of risk-averseness to their simple model, in which case more information about outcomes will more probably generate trials – yielding "results entirely consistent with observed Japanese behaviour" as revealed by them for major criminal cases. If that assumption is extended to civil litigation too, however, this undercuts their conclusions from traffic accident disputes.

[49] Several other leading US scholars of Japanese law have instead spread the Christian Word in Japan: John Haley, Michael Young, and Mark West.

[50] 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 (eg on corporate governance).

The 1980s and even the early 1990s 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 on 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 sympathisers from the US during the post-War Occupation of Japan (Miwa and Ramseyer 2004), as well as those perceiving and acclaiming subsequent government-led industrial policy in Japan (Johnson 1982, 1984). Ideology becomes even more obvious when blaming "Marxists" for inventing – as a "monopoly capital" analogue predicted by their own theory – the myth of main banks and the *keiretsu* (Miwa and Ramseyer 2005a).

Since the late 1990s, however, the ideological and normative nature of Ramseyer's mission has become more apparent, despite his continued insistence – at least in writing – 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 that these represent failures of the macro-economy, not micro-economics. However, there is much evidence to the contrary (eg Lincoln 2003), which explains why there has been so much deregulation and legislative reform.

An alternative, more realistic response might be for Ramseyer, like most commentators nowadays (eg in corporate governance: surveyed in Nottage 2006a), 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 postwar Japan had been characterised by many 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 complete *laissez faire*. Yet pursuing this alternative strategy risks more directly exposing his normative agenda. Further, studies along those lines might even yet uncover "inefficiencies" or features objectionable to a Chicago devotee (like main banks, long-term concern for employees, or a broader social egalitarianism) that are and remain quite distinctive to Japan, and which may be justifiable under – and thus support – other schools of economic thought, or justifiable simply on other grounds (like support for state capacity, even in a deregulating world: Fukuyama 2004). These risks are not worth taking, for Ramseyer, so instead we are subjected

to an increasingly comprehensive and total application of Chicago School precepts to the still quite open field of Japanese studies.[51]

More generally, if you choose 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 true understanding of what drives the approach. The program then can degenerate into a pure marketing exercise in which form dominates whatever substance remains.

In short, therefore, we must remain not only conscious and critical of ideological underpinnings within the American milieu. In addition, looking more closely too into the *honne* in Japan, as the Princeton historian concluded in trenchantly reviewing what he called Ramseyer's rational-choice "polemic" on law and economic behaviour in Tokugawa and early modern Japan:

> "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." (Howell 1997: 406).

IV. Invasion and Resistance

> "At any rate, whether we expect another invasion or not, our views of the hu man [& Japanese] future must be greatly modified by these events. … it has robbed us of that serene confidence in the future which is the most fruitful source of decadence, the gifts to human science it has brought are enormous, and it has done much to promote the conception of the commonweal of mankind. … [But] I must confess the stress and danger of the time have left an abiding sense of doubt and insecurity in my mind." H.G.Wells, "The War of the Worlds" (1898) Book 2: "The Epilogue"

This paper has identified the close parallels between three key characteristics of much of the Chicago School of Economics, and their fervid application to the analysis of Japanese law through the avalanche of work by J Mark Ramseyer. Given our own training in economics, we can hardly dismiss outright the notion of economic approaches to studying law-related phenomena. We even welcome certain significant strands within the Chicago School itself, notably the "transaction cost economics" founded by Ronald Coase.[52] The problem this paper has tried to highlight is when devotees to more extreme theorists within the School, notably

[51] More cynically, the need to continually draw attention to his work leads Ramseyer to making 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.
[52] See eg (Nottage 1998) Onati.

Stigler and Friedman, develop consistent fore-ordained conclusions and then the "evidence" that always conveniently supports them. Ramseyer simply extends this approach religiously to an increasingly broad swath of Japanese law.

One response is that even others with a bent for economics lose interest in contesting such studies. Some have found that alternative evidence already undercuts the arguments in certain areas, as with that marshalled by Curtis Milhaupt (2002) regarding main banks. Others see more outright lacunae in Ramseyer's evidence, which cannot be perfectly filled either way, as with the assertion that voluntary industry association-bsed insurance schemes against product defects paid out on a strict liability basis before the PL Law came into effect in 1995 (above, Part III.A). Non-economists object to having their research agendas dictated by a certain view of social science. Some will find their worst fears confirmed, namely methodology tainted by ideology while pointing the finger at other approaches. Those of a hermeneutical persuasion (such as Tanase: Nottage 2006b) 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.

More broadly, taking any approach to an extreme risks making debate and mutual learning quite futile. Extending mainstream Chicago School economics to law in Japan can also rub off on trajectories in other social sciences, such as political science, applied to Japanese phenomena. It can also skew proper assessments of Japan's current regulatory milieu, essential for effective policy-making. For example, recent reactions to product safety problems (asbestos, defective buildings, and electrical goods) demonstrate a still comparatively strong role for various forms of engagement involving public authorities, rather than leaving matters to private ordering. That is also consistent with considerable "re-regulation" to ratchet up safety, labour and environmental standards in many other countries world-wide.[53] But this tendency is unlikely to be appreciated, normatively or even empirically, by those of a strong Chicagoan persuasion.

Ramseyer's direct influence on policy-making in Japan appears so far to have remained minimal, despite his laudable efforts to reach out to the *nihon-ho* world by publishing some works in Japanese. By contrast, his work certainly served as a major catalyst to revitalising the field of Japanese Law in English since the late 1980s, and *Japanisches Recht* more recently and to a far lesser extent. Simple "culturalist" approaches are no longer academically

[53] (Nottage manuscript, 31 July 2006, submitted to Griffith L Rev); cf generally (Braithwaite and Drahos 2000).

credible, and increasingly rare even among non-academic commentaries on Japanese law. New syntheses of historical, sociological, political *and* economic approaches are emerging.[54] As those studying Japanese law are forced to engage with more disciplines, greater scope is created for truly interdisciplinary work. Even those working predominantly as economists need to keep sharpening their methodological tools, and digging up new mines of data, to engage with Ramseyer's increasingly provocative work. And perhaps one of his most enduring legacies, as it was with several Chicago economists, is the improvement in prose style expected of all those now active in the field of Japanese law. Hopefully, after almost two decades of reassessments and discussions at various levels, life will go on and a War of the Worlds may yet be averted. As the Romans put it, though: *Si vis pacem, para bellum* – if you want peace, prepare for war!

[54] See generally (Abe and Nottage 2006); and more recently eg (Feldman 2006a and b) [Tuna; also Tobacco].

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