

“On the efficacy of lies” (嘘の効用) by Suehiro Izutarō (末弘巖太郎)

Translated by Jason Morgan

Usō no Kōyō: A short introduction to its author and intellectual-historical background

Although far from a household name even in Japan, Suehiro Izutarō (1888–1951) was one of the most important figures in twentieth-century Japan’s intellectual and legal history. In Japan today, Suehiro, when he is mentioned in legal history textbooks or other works by academic specialists, is often remembered as one of the founders of Japan’s labor law.¹ It is true that Suehiro was very much involved in labor law and, more directly (as both partisan and negotiator), labor disputes. He ran into trouble early in his career for his support of sharecroppers in their fight against landlords, for example, and ended his career, under the American Occupation after Japan’s defeat in the Second World War, acting as a broker between Occupation officials and labor leaders in Japan.

But while Suehiro was certainly a founding father of the field of labor law, that work was just one part of the much bigger problem that occupied Suehiro for his entire adult life. Namely, Suehiro was concerned with the gap, as he saw it, between the law in the books and the law on the ground—in Japan’s case, between the Civil Code, which was compiled under the influence of a French scholar named Gustave Émile Boissonade (1825–1910), on the one hand, and on the other hand the “living law” (*ikeru hō*), as Suehiro would later come to call it, borrowing and translating the *Lebendesrecht* concept from Austro-Hungarian legal philosopher Eugen Ehrlich (1862–1922).² Like everyone else in his cohort at the ultra-elite Tokyo Imperial University Faculty of Law, Suehiro was trained to interpret the Civil Code, and was trained mainly in the Code and in German *Pandekten* law (law rooted in Digests, compilations of laws and findings) and *Begriffsjurisprudenz*, a species of positive law highly influential among German jurists and theorist. But various historical circumstances and global intellectual trends—for example, the opportunity to live among the poor, Hull-House style, after a mammoth earthquake and inferno leveled much of Tokyo in early September, 1923—pushed Suehiro into a decidedly non-Idealist direction.³ He didn’t want to see the law as something written in books and pronounced from on high. He rebelled against the very notion of it. Instead, he wanted to see society,

¹ See, e.g., Suehiro (1926), Kawasumi (2022: 316–340) and Ishii (2015).

² On Ehrlich, see Morgan (2019: 47–54).

³ See Morgan (2018).

the people in the streets, as the custodians and progenitors of law, and the law in lawbooks as a lagging approximation of the “living law” in the hearts of women and men. That laborers were facing injustices Suehiro saw as just one symptom of this much greater disease, namely the disconnect between book law and “living law.”

It is in this context that Suehiro wrote what was arguably his most seminal work, *Usō no kōyō*, for the progressive flagship magazine *Kaizō* in 1922.⁴ “On the efficacy of lies,” as I have rendered the title in what I believe is the first-ever complete translation of this important work into English, is a product of Suehiro’s general discontent with the legal framework and social situation, as he sees them, in late-Taishō-era Japan. Suehiro was writing at a time when Japanese society was undergoing enormous changes in political participation and when Japan as a nation was growing strong, rich, and imperially dominant. Whatever the Civil Code said, Suehiro thought, the framers of those laws had no idea of what regular people thought. He wanted to change that, and to use the courts as a means of doing so. Suehiro led a case-law study group at the Tokyo Imperial University hoping to use the gap between law and society as a fulcrum for leveraging social change through judicial activism (or, if need be, through activating judges to be more attentive to the plight of the average citizens who came into their courtrooms).

This grand vision for social change in turbulent, post-World War I Japan (riots over the price of rice had toppled the Japanese government in 1918, just four years before Suehiro wrote “On the efficacy of lies”) helps explain Suehiro’s ambitious, even aggressive posture in his public-facing prose. He opens with a sweeping endorsement of “lies” (*uso*), arguing from a variety of standpoints that without lies societies would not function. In this very broad-brush treatment of lying, we can see Suehiro’s generalized frustration with the gap between law and society—the gap that preoccupied him for his entire career. But we can also see a man on a social mission, writing at a time when society was coming apart at the seams. “On the efficacy of lies” is very much the work of a young, idealistic scholar, a socially-conscious intellectual who has formed a vision of the legal establishment as out of touch and the political establishment as under the control of oligarchs. As a solution, Suehiro recommends leaning into the lies, embracing the gap and using it to effect change in both law and government. As mentioned above, Suehiro developed the “case method” that he learned from legal realists in the United States (such as Roscoe Pound (1870-1964) at Harvard and James Parker Hall (1871-1928) at

⁴ *Usō no kōyō* and accompanying essays by Suehiro were re-released in 2018 as part of the celebrations surrounding the centennial of Nihon Hyōronsha’s founding; see Suehiro (2018). In addition to the English translation here, I know of only one other Western-language translation of *Usō no kōyō*, by Stefan Vogl into German (Vogl 2022).

Chicago), marry it with Ehrlichian ideas about the "living law," and attempt to use the bottom-up pressure of the Japanese masses to bring about institutional change.⁵ These things were very much on his mind as he took pen to paper to write a virtual paean to the skillful use of lies in making the world a better place.

But, even given this context, and even taking into account Suehiro's youthful idealism, there is something ironic in how Suehiro frames his endorsement of "lies." For, in seeing the law as lagging behind social progress, Suehiro is simply transposing (not really even translating) the ideas of legal thinker and historian Sir Henry Sumner Maine (1822-1888) into a twentieth-century Japanese milieu. Suehiro mentions Maine once in "On the efficacy of lies," but even had Suehiro not mentioned Maine, the latter's influence would have been obvious on Suehiro's essay and general patterns of thought. In Chapter II, "Legal Fictions," of his *Ancient Law* (1861), Maine lays out the case for the bifurcation of law between legal codes and social awareness, for example in this opening salvo:

When primitive law has once been embodied in a Code, there is an end to what may be called its spontaneous development. Henceforward the changes effected in it, if effected at all, are effected deliberately and from without (Maine 1917: 13; see also 75-78 for related discourse).

Maine then posits "Legal Fictions" one of three ways—the other two are "Equity" and "Legislation"—that "Law is brought into harmony with society" (Maine 1917: 15). What this means for Suehiro's position—and this is a point which is reinforced by Suehiro's reliance on other Western legal thinkers, such as Rudolf von Jhering (1818-1892), whom Suehiro also brings into "On the efficacy of lies," and Ehrlich and Pound and others—is that there is an inherent tension in what Suehiro is trying to do, a tension which I find to be rooted in the way in which Suehiro understands the gap between law and society. To put a finer point on it, Suehiro takes it as a given that what Maine says is as true about Roman law as it is about law in Japan. Whether the two can be compared at all is an open question, but Suehiro doesn't even ask it. He just jumps in, assuming that what Maine says is transferrable root and branch to the (entirely foreign) soil of an archipelago in the northwestern Pacific.

This is the irony of Suehiro's approach in *Uso no kōyō*. He claims to be reaching back into the Japanese past to recover an older, more humane way of doing courtroom work. But the things he excavates from the supposedly superior past are displayed in, as it were, Western display cases, and

⁵ On Pound and Hall and their influence on Suehiro, see Morgan (2019: 46-47). The *Freirechtsbewegung* which Suehiro mentions in the essay should also be understood broadly along these same lines. For a general overview of the *Freirechtsbewegung*, see Núñez Leiva (2014) and Schmidt (2016). On Suehiro and case law as method, see Kobayashi (2010).

introduced and labeled as almost Western things. In other words, Suehiro applies Maine’s dialectic—a rather Hegelian one, it should be noted—of conservatism and progress to the trials of Ōoka Tadasuke, Echizen-no-kami (1677-1752), whom Suehiro praises in “On the efficacy of lies” (and elsewhere) as having conducted humane trials with full view of the social consequences of jurisprudence (Ishii 1973: 52-56). Suehiro looks to Ōoka, who was a magistrate during the Edo Period, as a paragon of what we might today call social justice. But there is irony in that, in holding Ōoka up as an example of how law and society should interact, Suehiro should at the same time see Ōoka as effecting a kind of legal progressivism which would have been utterly alien to Ōoka, and which is, at any rate, a Western idea which Suehiro has imported to Japan essentially whole-cloth. Suehiro starts and ends with Maine, and presses an Edo-period magistrate into service in the middle act. It makes for an odd performance, if one is willing to read between the lines of Suehiro’s 1922 essay.

There are other problems with Suehiro’s approach, problems which I hinted at in the opening of this introduction. “On the efficacy of lies” makes sweeping claims about what Suehiro sees as a kind of salvific mendacity, the power of lies to keep society moving, the necessity of hypocrisy to the smooth functioning of legal and social order. But in this panoramic view, Suehiro fails to make distinctions which later and more careful scholars have made for him. To my mind, the best of Suehiro’s critics on this score is Sasakura Hideo, professor emeritus in the Waseda University Law School.⁶ Sasakura distinguishes among a wide variety of things which can be called “fictions,” a definitional yeoman’s work which Suehiro—perhaps for want of page space, or perhaps for want of rigor—neglected entirely. For example, Sasakura draws a clear line between, say, novels and virtual reality, and lies and natural phenomenon such as mirages (Sasakura 2002, 2021). These things are all, roughly, fictions, Sasakura says, but if one is going to be careful about how terms are used, especially when talking about the law, then simply lumping all of these things together into one “fictions” category will not do. Sasakura’s work, read in tandem with Suehiro’s “On the efficacy of lies,” shows the faults of logic and argument in the 1922 essay which many, taken in by Suehiro’s buoyant and playful writing style, may have overlooked the first (and second and third) time through.

This preliminary definitional work allows Sasakura to turn to the main object of his critique, which is not Suehiro but legal scholar Kurusu Saburō’s (1912-1998) 1999 book *Hō to fuikushon* (“Law and fiction”), a foundational text in legal philosophy in Japan (Kurusu 1999). Sasakura finds that Kurusu’s definition of “fiction” is “too broad,” encompassing as it does (Sasakura argues) four strands:

1. voluntary estrangement from reality (*jitsuzai kara no nin’iteki rihan*)

⁶ I took some of Professor Sasakura’s classes in legal and intellectual history while studying at Waseda some ten years ago.

2. positing the existence of something which in reality does not exist (*genjitsu ni sonzai suru mono denai nimokakawarazu sonzai suru to sareru*)
3. saying that some factually existing thing never existed or occurred, or that something which never factually existed or occurred did (*atta 'jijitsu' wo nakatta to ii, nakatta 'jijitsu' wo atta to iu*)
4. means convenient for arriving at some desired conclusion (*nozomashii to kangaeru ketsuron ni tōtatsu suru tame no bengiteki shudan* (Sasakura 2015: 29-30).

These things are, respectively, lies (*uso*), delusions (*mōsō*), semblances (*kashō*), and principles (*gensoku*) or objectives (*mokuhyō*), Sasakura concludes. Kurusu ought to distinguish among them, he says, but doesn't (Sasakura 2021: 30). But what has Sasakura's critique of Kurusu Saburō to do with Suehiro and his encomium to falsehood?

One reason Sasakura's critique of Kurusu's theory of fictions in law is important is that Kurusu's work overlaps conceptually, of course necessarily so, with similar research into Suehiro's theories of legal fictions. For example, Kurusu has done important work on the German theorist Hans Vaihinger (1852-1933), whose theory of *Als ob* ("as if") has been central to much research in Japan on the philosophical problems of fictions (Kurusu 1983). Another, and more important, reason is that Kurusu himself takes up Suehiro's fictions, and Sasakura uses a comparison of the two theorists' treatment of fictions as key points of his own research. Sasakura points out that, for instance, whereas Suehiro saw legal fictions—by which Suehiro meant a kind of socially-conscious, almost freewheeling judicial activism—positively, as something to be encouraged, Kurusu took precisely the opposite view (Sasakura 2015: 62-63). In another example, Kurusu, again with Vaihinger in the background, takes issue with Suehiro's characterization of Ōoka's courtroom work as "lies," preferring instead to see Ōoka's method as "bending the facts" (*jijitsu waikyoku*), or what in English might be called "stretching the truth." (Sasakura 2015: 63-635). Suehiro was playing too fast and loose with language, in other words. Sasakura, towering over both Suehiro and his critic Kurusu, has produced what I think is the best work on Suehiro's legal philosophy, and such conceptual insights are crucial, I believe, to understanding what Suehiro does (and fails to do) in "On the efficacy of lies."

Now, to be fair, Suehiro might argue that all this hair-splitting is exactly what he hates, is exactly what is keeping the man and woman in the street under the thrall of an establishment wholly unresponsive to their needs. And, to be sure, perhaps there is not much difference in outcome, at least in the case of activist judges, between lies and stretching the truth or "bending the facts." Whatever Ōoka did, Suehiro might counter, he saved regular people from the horrors of a codified law inflexibly applied. But, *pace* Suehiro's ghost, conceptually there is a difference, and it should be noted that,

conceptually, Suehiro, like Kurusu and also like Sasakura, is working in an almost completely Western intellectual universe. It is on just this point that I would like readers to review my other essay in this issue, on the *xiezhi* and legal fictions in East Asia prior to the era of widespread Western intellectual influence. For my view is that Sasakura is right as far as his analysis goes, but that there are kinds of legal fictions which predate the advent of ideas such as Maine’s and Vaihinger’s—and, later, Lon Fuller’s (1902-1978), Herbert Lionel Adolphus Hart’s (1907-1992) and Alf Ross’ (1899-1979).⁷ What I would like to do is to put Suehiro in conversation, as best I can, with some figures from the far-distant East Asian past, clearing away the clutter of Western influence as best I can and hearkening back to a time when there were legal fictions—if we can call them that, and maybe we can’t—of an entirely different order. Suehiro was a Japanese legal philosopher, but he was, for all that, very Western in his outlook, at least in his younger years. Readers of the Suehiro translation in this issue of *Kervan* are respectfully requested to read also my essay on the *xiezhi* and decide for themselves whether I have gotten “legal fictions” in East Asia right. Those whose interest is piqued by what they read here are also cordially invited to delve into the world of Japanese legal intellectual history. What I have offered here, vicariously through the great Suehiro Izutarō, is but the smallest of samplings of what is on offer for the intrepid explorer.

Finally, a word about my translation of *Usō no kōyō*. I have benefitted greatly from the help of my friend and mentor J. Mark Ramseyer, who offered many, many comments and suggestions that saved me from grievous error on every page. I am completely responsible for whatever errors remain, and I hope readers who find errors will let me know about it. Now, there will surely be those who will take exception to my translation of certain terms of art which Suehiro uses. For example, I render *jishhitsu-teki kōhei* as “substantive fairness,” and *gutaiteki datōsei* as “actionable universality of

⁷ See e.g., Fuller (1967), Hart (1961: 11-12), Toh (2005: 95-96) and Fernando (2021). The concept of legal fictions is of course much more complex than I have been able to sketch in this brief introduction, and Suehiro’s, and other Japanese thinkers’, engagement with the array of legal-fiction ideas has been rich. For a background to Japanese legal intellectual history with a focus on Suehiro, see Morgan (2019). For some idea of the scope of the problem in Western discourse, see, e.g., “Lecture Two: Legal Fictions” in J.H. Baker, *The Law’s Two Bodies: Some Evidential Problems in English Legal History* (Oxford, UK: Oxford University Press, 2001), 33-57, “‘To Law for Our Children’: Norm and Jurisdiction in Webster, Rowley, and Heywood’s *Cure for a Cuckold*,” in Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of Common Law, 1509-1625* (Chicago, Illinois: University of Chicago Press, 2007), 291-329, “The Restless Spirit of English Law,” in R.H. Graveson, *One Law: On Jurisprudence and the Unification of Law, Selected Essays*, vol. II (Amsterdam, the Netherlands: North-Holland Publishing Company, 1977), 75-95, Aviam Soifer, “Reviewing Legal Fictions,” *Georgia Law Review*, vol. 20 (1986), 871-915, Biquet (2013) and Petroski (2013).

application”.⁸ These are unorthodox translations in the extreme. The first is deadpan-literal, and the second is almost acrobatic, or maybe just vaudevillian. The rub is that there are, to my mind, no better ways to convey, concisely, in English what Suehiro wants to say by using these terms. Other terminology, such as “nominal damages,” is, or should be, much less controversial, but please don’t take my word for it. There are surely other ways to translate virtually any term in the text, and I look forward to learning about good translations that I might have overlooked, or been too ignorant to come up with in the first place.

⁸ See Sasakura (2015: 73) for a critique of Suehiro’s use of the latter phrase, as well as for an explanation of why Sasakura views Suehiro’s linking of the concept to judicial precedent (*hanreihōshugi*) to be mistaken from the perspective of common law legal history.

“On the Efficacy of Lies”
by Suehiro Izutarō

We legal scholars are often in a position to realize that things generally deemed irrational in the world outside the law, once subjected to a value judgment within the legal realm, are immediately rationalized. And, because I think that this phenomenon is often found bearing the particular features of both the law and of the nation-state, I think that collecting and studying such phenomena are, for me as a researcher of the law and of the nation-state, extremely beneficial and necessary. In this sense, for the past several years I have felt a special interest in researching legal fictions (*Rechtsfiktion*), or false pretenses operating within the law.⁹ This essay is, in truth, but a minor by-product born of the happenstances of this course of research. This essay, an expanded version of the text of an address I gave at Keio University, appeared in the July, 1922 (Taishō 11) issue of the magazine *Kaizō*.

1

From the time we are children, we have it drilled into our heads that we must not tell lies. Perhaps we could even say that everyone in the world—without a single exception—believes that lies should not be uttered. Whatever the reasons, everyone, in one way or another, undoubtedly thinks this is so. When we hear the word “lie,” we immediately and quite naturally conjure up images of “The Boy Who Cried Wolf,” the story about the shepherd boy who kept telling lies that there was a wolf around. Eventually he lost the trust of the villagers, so that when a wolf really did appear the boy was eaten. This gives some indication of how very deeply in our brains the lesson that we must not tell lies has penetrated.

However, despite having had this lesson deeply inscribed and drilled into us in this way, our world abounds in lies. Unavoidable lies, avoidable lies that we tell anyway, lies told surreptitiously in the shadows, lies told out in the open, and even, sometimes, lies under the protection of the law, terrifying in that they carry the pain of punishment if denied: all of these lies are told brazenly here under heaven. In this world, then, there are told countless lies of every size and stripe.

Truth be told, our world is arranged such that it would seem to be completely impossible to live for very long were we to refrain absolutely from telling any lies.

⁹ Suehiro uses “legal fiction” and “*Rechtsfiktion*” in the original roman lettering in the text (tr. note).

Therefore, if we want to get along with one another in this world, we will have to solve the extremely important, but also exceptionally difficult, problem of what is to be done about all of the kinds of lies mentioned above. For, you see, while it is true that we must not tell lies, we cannot get through this life without them.

2

I am a practitioner of the law. As such, I have no interest in assuming in public—in informal discussions aside—the expressions of a real pioneering thinker and expert in any matter outside of my own area of expertise, namely the law. A legal practitioner is an expert only when he stays within the law's disciplinary boundaries. The instant he steps outside of those boundaries he becomes a layman. Now, there is no law that says that just because someone is an expert, he mustn't express layman's views. But when an expert leaves his area of expertise, there is nothing to set his layman's views apart from the opinions of any other workaday layman with no particular expertise. No—that's not entirely true. The expert is so given to viewing the world through the colored glasses of his expertise that his opinion on various matters tends to be skewed. We might even say that, because of this, the views of an expert may be of meaner stuff than those of your average layman. And yet, to a surprising degree people show unwarranted deference to an expert's layman's views. People attach tremendous prestige to an expert's layman's opinions, much more than to the layman's opinions of laymen. For example, some Joe Blows and Jill Nobodies, complete unknowns, are born with outstanding critical eyes for the theater. But as soon as some Marquis X or Learned Doctor Y expresses his layman's views on the theater, people rush to exclaim, "My, isn't he knowledgeable about drama!" or "Goodness, what familiarity with plays!" Taken with these odd displays of respect, Marquis X or Learned Doctor Y gets into an expansive mood and discourses publicly in grandiloquent fashion. Maybe the Marquis or the Learned Doctor is the rare type who knows as much as any other man in the street about the shows, despite his exalted status. Apart from these cases, though, I feel altogether uncomfortable when I hear these kinds of people unabashedly put on the airs of honest-to-goodness experts while conveying their layman's views, or when I hear the man in the street showing undue respect for these kinds of people. I think such displays as these are nothing other than a kind of "unjust enrichment." All the same, the experts of the world are prone to getting tripped on just this point. Regular people, too, generally make the same mistake again and again, paying undue regard to the layman's views of experts. I find all of this utterly bizarre.

I am a legal scholar. So, I am qualified to deliver an expert opinion solely and exclusively on the law or on academics. Therefore, when thinking about how to deal with the lies to which I refer in the

title of this essay, “On the Efficacy of Lies,” I shall limit my discussion to the parameters of the law and academics. It is not my remit to deliver myself of opinions on matters touching on general morality and education, as though I were a trained professional in those fields.

For better or for worse, lies play a variety of roles both in law and in academics in general. I think everyone—not just I as a solitary legal practitioner but people of all walks of life—will find it interesting to think about this. Above all else, I feel that it is of utmost importance for me to convey my thoughts “on the efficacy of lies” in order to make clear my position on law and learning. At the very least, conveying my thoughts in this way will go a long way toward making my position on law and learning clearer. This has been the main motivation for me in writing this essay.

3

First, let me give two or three examples of lies which we find in the history of law. I will also consider how those lies have functioned in actual practice.

When I think about law and courts and the like, my mind goes straightaway to Ōoka Tadasuke, Echizen-no-Kami.¹⁰ I think Ōoka was an ideal judge, an eminent justice. Today, whenever we hear carping about trials conducted out in the world having no sense of human emotion or lacking in human sentiment, or about judges being fossilized relics devoid of common sense, I think of Judge Ōoka. I want there to be court trials like his, where the human element is in play.

This is so, but why was Ōoka Tadasuke, Echizen-no-Kami so popular in the past, to the point that he is praised in this way, or if not praised then at least the subject of stories and folklore? Unfortunately, I don’t know of any academically rigorous historical facts that would explain this. I haven’t the least bit of accurate knowledge as to whether any of the facts written in the so-called Ōoka Seidan (“Ōoka administrative tales”) are really and truly the accomplishments of Ōoka Tadasuke, Echizen-no-Kami. But I really don’t care. For the sake of argument, let us say that the entirety of a given tale has nothing to do with what Ōoka Tadasuke, Echizen-no-Kami actually did while in office. Even so, the fact that such a story has been incorporated into the so-called Ōoka Seidan and handed down to the present day shows just how much the people of Ōoka’s time embraced trials such as those described

¹⁰ Ōoka Tadasuke (1677-1752) was a magistrate who lived during the Edo Period of Japanese history (*Echizen-no-kami* is a term of political and social standing, indicating that Ōoka was nominally the lord (*kami*) of the Echizen region, or what is today part of Fukui Prefecture on the Sea of Japan side of Honshū. He is well known in both history and in the folklore that has grown up around him for having been creative in effecting justice for average people within the strict confines of the written Edo Period law (tr. note).

in the tales. Let this be a disclaimer, then, that the Ōoka Tadasuke, Echizen-no-Kami about whom I shall now speak refers to the Ōoka Tadasuke, Echizen-no-Kami who appears in the Ōoka Seidan, and that it is not my intention at all to affirm or deny that any of the Ōoka Seidan tales conform to historical fact.

Why were the trials conducted by Ōoka Tadasuke, Echizen-no-Kami said to be eminent ones with a piercing keenness for the subtleties of human feeling? The answer I would give is this: in one word, it's because Ōoka was adept at telling lies. Put aside, for the moment, the question of whether lies are good or bad. The fact is that Ōoka Tadasuke, Echizen-no-Kami was a masterful liar. And he was praised as someone expert in lying. Read the Ōoka Seidan and see for yourself. The law at the time was top to bottom a fastidious thing. It did not budge. It was unwieldy in the extreme. If one were to try applying the law down to the letter just as it was written on the books, it would have made the masses of people tremble with fear. What's more, judges back then weren't able to creatively bend the rules, as the law was an order issued from on high. The law was not to be moved, and not to be skirted. Such a law as this made it very difficult for anyone to hold a trial adapted to human sentiments, one redolent of the actual flavor of real human life. But this is just what Ōoka Tadasuke, Echizen-no-Kami did. And he wasn't dismissed from his post for it, but was instead praised by those around him for what he was doing.

But how did he get away with it? His method was the lie. The law of the day was rigid, unadaptable. It was impossible to bend the law to bring it closer in line with human feeling. So, Ōoka hit upon the idea of bending the facts instead. If a certain fact was admitted, then, according to the law, a certain punishment would necessarily have to follow. But if that punishment were carried out, then it would deviate from the felt sense of justice which humans share. The only thing that a judge could do in this situation was to make use of lies. There was just one method: to say that a certain fact had, in fact, not happened, or that something that had not occurred had, in fact, taken place. Ōoka Echizen-no-Kami was highly proficient in bending the truth in this way.

Ōoka Tadasuke, Echizen-no-Kami was not the only one who brought the full flavor of human life into trials using this approach, however. It is likely that judges everywhere—although of course there will be variations in degree depending on the time and place—can be understood to have adopted similar methods. In Rome, for instance, it is said that judges would often apply the legal principle of the “*monstrum*” in order to allow mothers who had killed their deformed children to escape the legal responsibility for murder.¹¹

¹¹ Suehiro uses the word *monstrum* in Roman letters in the original text (tr. note).

In Rome, if a deformed child, though born of a human womb, was deemed not sufficiently human in appearance, then he or she was called a *monstrum* (“demon spawn,” or, colloquially in Japanese, a child who does not bear resemblance to his or her parents) at law and was not imbued with legal personhood. It seems that this way of thinking goes back deep into the Roman past. It was later set down in the Code of Justinian by the legal practitioner [Julius] Paulus, whose opinion on the *monstrum* can be found in *Digestorum Lib. I. Tit. V. de statu hominum L. 14.*¹² The practice of disposing of the *monstrum*, if logic is followed without splitting hairs, was undeniably a species of murder. What happened was that a mother who gave birth to an unsightly child, or a child whose features did not resemble those of his or her parents, would quietly kill the infant, on the belief that letting such a child live would bring shame on the household and be a misfortune for the child him- or herself. But indicting such a mother for the crime of murder was absolutely intolerable for a judge as a human being, and was also a foolishness from the standpoint of society. Therefore the judge in such a case, wishing to do something to save the mother from the murder charge, hit on the solution of the legal principle of the *monstrum*. A mother had killed her child. But it had actually been a *monstrum*'s, not a human being's, life that was taken. Therefore, there had been no crime. In this way, the judge had strained logic to take pity on the poor mother.

Seen through the eyes of modern medicine, nothing other than a person can be born of the womb of another person. Even if we grant this, however, it would be thoughtless of us to laugh at the Romans for having been ignorant or stupid. Yes, the concept of the *monstrum* does not hold up under the modern medical gaze. But by this same concept a human life was saved. In his own day a judge was surely praised for deploying this illogical logic.

We hear in Japan of the patrolmen during the Tokugawa Period who took to heart the important principle of seeing but pretending not to have seen. If we are pedantic about it, we can argue that the authorities should have prosecuted whenever and wherever the patrolmen discovered a crime. But if the authorities were to bring each and every crime to trial, they would conversely lose legitimacy in the eyes of the people. So, it was considered a virtue (?) of the patrolmen to see but to pretend not to have seen, in other words for patrolmen to lie.¹³ But this was not limited to the old Tokugawa, but has also been practiced during the Meiji and Taishō periods, as well. The Code of Criminal Procedure was

¹² From my research, it would seem that Suehiro may have meant Book VI, Title 29. Also, the use of *monstrum* in the *Digestorum* appears to be somewhat different from the way Suehiro has presented it. More research is needed to confirm these points (tr. note).

¹³ There is a question mark in parentheses in the original text exactly where indicated in the translation (tr. note).

revised this year. Despite the lack of any clear prescription prior to this, many scholars in the past have used the term “opportunism” (*Opportunitätsprinzip*) to describe placing the decision whether to prosecute a crime or not entirely at the discretion of the prosecutor, with the officers of the court following the prosecutor’s lead.¹⁴ Applying the term “opportunism” makes the practice sound very dignified, but in fact it amounts to the same thing as a patrolman’s having seen something but then pretended not to have seen it. However this has now been codified in the text of the law, appearing in Article 279 of the new Code of Criminal Procedure as follows: “[P]rosecution need not be instituted if it appears unnecessary because of the character, age, and environment of the offender, the circumstances of the offense, or the circumstances following the offense.”¹⁵ Instead of officially sanctioning so-called lies, a standard has been established for liars. The result is that we are able to obtain truth from lies. Readers are invited to try opening the judicial statistics to the “infanticide” section and see for themselves. Doing so will reveal just how often, on this point, today’s prosecutors are “seeing, but pretending not to have seen.”

4

There is a system of nominal damages in the laws of England and the United States.¹⁶ If you read the Japanese translation of “nominal damages” [*songai baishō*] literally it manifestly means a system which aims to compel payment for [*baishō*] damages which have actually been incurred [*songai*]. If there has been an infringement of rights but no damage has arisen, then there is therefore no obligation to make any restitution for damages. Let us say, speaking now of Japan, that A enters B’s privately owned land without permission, and B sues for damages. If B has not suffered any loss because of A’s having entered B’s property, then the requirements for establishing that an illegal act has been committed have not been met and B is bound to lose his case. Speaking strictly from the standpoint of logic, because B has suffered no loss, it stands to reason that he has no right to seek any damages. However, it is also certain that, strictly speaking, A has infringed on B’s rights. In this sense, A is definitely in the wrong. Therefore, B will find it an extraordinarily unsatisfying conclusion if, having lost the case on nominal grounds because no damage was suffered (even though B’s rights were infringed), he were compelled

¹⁴ Suehiro uses the term *Opportunitätsprinzip* in Roman letters in the original text (tr. note).

¹⁵ See Dango (1970: 518; tr. note).

¹⁶ Suehiro uses the term *nominal damages* in Roman letters in the original text, following the term *meigijō no songai baishō*, for which I believe “nominal damages” is an adequate and accurate gloss.

to pay court costs for his failed suit. B will think to himself, “I don’t mind receiving no damages, but I don’t want to lose in court.” If B were to be deemed the winner on purely formal grounds in this situation, he would surely be very pleased.

In English and American law, “nominal damages” comes to B’s rescue in situations such as this. Strictly speaking there has been an infringement of rights, so there must be some kind of compensation made in return. As a symbolic gesture recognizing damages, the court might impose a fine of, say, one shilling to be paid by A to B. When things are arranged in this way, the aggrieved party can say that he has won his case, even if it’s a financial victory of a single shilling. Nominally speaking, and from a practical standpoint as well, there is a real benefit in having avoided paying court costs. In actual fact, no damage has been proven. But the court deems that insofar as rights have been infringed there has been damage incurred. The beauty of this system is that damage is given concrete form in the symbolic payment of a shilling. This is a prominent example of the efficacy of lies.

At the present time the general run of legal scholars in Japan is in the thrall of a narrow-minded rationalism which absolutizes the principle of “no damages, no compensation”. These scholars hold that the irrational and unique system of nominal damages should never be transplanted from England and America to Japan. However, I hope fervently for the day when it is, for I believe that if the nominal damages system were to come into practice in our country it would lead to an untold increase in the trust that average people, ignorant of the law, have in courts, as well as to a much greater commerce between tort law and morality. However, in order for that day to come, narrow-minded rationalism must first be driven from the brains of the average legal scholar [in Japan], and in its place planted a much deeper and broader way of thinking which emerges by means of what is rational, and resting upon what is rational.

5

Next, let us consider that the current law of most European countries and in America does not recognize uncontested divorce. Because divorce is permitted only in the event of certain causes stipulated in the law, absent any of those causes a divorce cannot be obtained, even if both the husband and the wife mutually consent to it. In this, the divorce laws of Europe and America are rigid and narrow, entirely different from the laws in Japan. However, in the West, too, a husband and wife who have decided to part ways do not just accept their lot and go on living together in a civil fashion. Even though in the Bible it is written, “What therefore God hath joined together, let not man put asunder,” when two people want to part ways, they want to part ways, and that is simply that. So, when a husband and wife have decided to say goodbye to one another, they convey their intentions each to each and

the wife sues the husband for divorce. The judge will ask her on what grounds she brings her suit. The wife will reply, “My husband has mistreated me, he has beaten me three times.” The judge will then turn to the defendant, the husband, and ask, “Do you admit that what the plaintiff, your wife, says is true?” “Yes,” the husband will answer. Thus the judge is deceived and the divorce is granted. Even if he harbors some reservations about the veracity of the facts presented to him, the judge still hands down the judgment of divorce. In point of fact, then, in the West, too, there is also divorce by consent, with both parties agreeing to the deal. The tool used in this case is a species of lie, a kind of performance.

The law exists for the sake of human beings. Law is first truly practiced only when it is grounded in human ways of thinking, in the requirements of human society and economies. A law may have conformed to social thinking and economic conditions in the past, but as social circumstances change so the practice of the law changes *de facto* alongside them. Legislators may try to force a law on society without having investigated the actual conditions prevailing in that society, but such a law will hardly, in fact, be followed. To the extent that people believe that divorce is wrong, the law prohibiting uncontested divorce will be solemnly upheld. However, once that belief has given way, then the people in that society, pressed by demand, will chip away at the law with the weapon of the lie, no matter how stern are the prescriptions written down in the lawbooks. At the extreme, the result will be that it will not make any difference whether there is any law at all.

The same thing happens in the case of hardline calls for government officials to be held responsible for things. Even bureaucrats must eat. They, too, have wives and children to feed. If a bureaucrat is thoughtless and ends up fired, he and his family will be thrown out onto the streets. Some low-ranking official may be assigned by chance to keep watch over a certain area. Let's say that some lawless fellow plants a bomb in his own pocket and leaps out while the official is on watch, detonating the bomb and killing himself in the process. While it may be warranted to criticize the official for not having discerned the lawless nature of the scene in advance, even so there is no call to make the bureaucrat assigned to guard that area bear absolute responsibility for what happened there. Whether to hold the bureaucrat responsible ought to depend on whether, in a real and demonstrable way, he has been derelict in his guard duties in actual fact. Judgment cannot be passed absolutely based solely on the official's having been assigned to a certain place by chance. But in Japan today the question of official responsibility is treated with tremendously rigid formality. When a crowd throngs a railway station, then no matter how careful the stationmaster is there could be someone who gets shoved onto the tracks. In this case, unless the stationmaster has somehow failed to exercise the utmost care, he bears no responsibility for the accident. The responsibility lies with the person who did the pushing,

as well as with the people who caused the crowding. And yet, as things stand today, in such a case a responsible party will have to be found, and that party will come from among the stationmaster and the station staff.

Responsibility requires the freedom to act. When regulations deprive someone of his freedom, then responsibility no longer attaches. Even so, government offices and big corporations, which try to control everything with a barrage of regulations, also attempt the formal regulation of their employees' responsibility. The result is that responsibility is sclerotic and stylized, and loses all grounding in morality.

But the bureaucrat must go on living. He must take care of his family. If the bureaucrat is not given the freedom to act, will he really just grit his teeth and accept final responsibility when this is pressed on him as a matter of formality? No. In such a situation, the bureaucrat will without fail doctor the facts which are held to give rise to his formal responsibility, will conceal those facts, will pull the entire complex of his responsibility up by the root. In other words, he will lie.

In relating the above, I am in no way passing judgment in any particular way on any specific incident that has happened recently in Japan. What is true, however, is that we now often hear about government officials' telling lies. If this is true, if government officials really are lying, then we must think about the fundamental causes of this serious problem. I maintain that the cause of it all is taking a hard line when it comes to assigning responsibility.

If a parent pays absolutely no attention to the wants of his child and raises the child up sternly according solely to how the parent thinks, then that child will, without fail, become a liar.

6

It should be clear from the above two or three examples just how big a role lies play in the law.

First, the Ōoka trials example and the discussion about the *monstrum* make us realize how powerful lies are to save people from overly-strict legal systems.¹⁷ Even those of the most ramrod-straight uprightness will surely have understood that the lie is not to be despised. In particular, when legal codes are not able to keep pace with vicissitudes in social sentiment because conservative elements in a certain society hold sway, a rift forms between society and the law, and law conforms to social expectations. This is a kind of lie. The people often say that judges have fossilized, that they have no common sense. But no matter how fossilized a judge, how lacking in common sense, he is still a

¹⁷ The word *monstrum* appears again in the original in Roman letters (tr. note).

human being, after all. He is a human being who sees beauty and knows it is beautiful, who tastes sweetness and knows it is sweet. This is why when a judge sees a defendant before him in court, listens to what he has to say, and comes to know the circumstances behind the case, it is only natural that the judge will think—as a human being, and regardless of what is written in the law—that this way of punishment or of handling the matter is best, or that this is the kind of trial that ought to be conducted. And when a judge thinks along these lines, then, if the law has some elasticity then he will make use of that and stretch the law, but if the law is stern and inflexible then the judge will, without fail, appeal to the lie for aid. The judge will skirt the law by saying that something that happened didn't, or that something that didn't happen, did. In this way, the judge will satisfy the requirements of humanity. This is not, at all, a question of good or evil. This is a fact. And it will go on being a fact forever, for as long as court trials are conducted by human beings.

Further, those who have heard the example above of the government bureaucrat or read the tale previously related of Western divorces will surely have come to the full realization that the law, contrary to what many people today, and in particular many judicial authorities, hold, is not omnipotent. Government administrators are particularly prone to the belief that anything can be ordered under the color of law, that the law enables one to reform any manner of morals or mores. But human beings are not as meek and submissive as government administrators think. There are limits, more or less, to what human beings can do. If a law lacks rational basis but still demands what goes beyond the bounds of reason, then human beings are not going to bow and scrape and go along with such a law. It isn't going to happen. If someone is a serious type with a firm will, then he will even risk death to fight the law. But if someone is the type who goes along to get along—as the majority of people are—then he will seek refuge in lies. In doing this, he will slip out of the net of the law. The more excessively severe the law is, the more the people will become liars. They will lose their moral polish. “Tyrants make a mockery of us,” they will cry. But tyrants who go on making a mockery of the people will not find that mockery, or the meanness and mendacity of the people, funny. The reason is that the tyrants will have brought all of this about themselves, because the people, just like the tyrants, value their lives above all else.

The bottom line is that lies will be efficacious once the law has stopped meeting the needs of society. We shall discuss later whether this is a good or bad thing. But, good or bad, it is a fact which cannot be denied.

Human beings are, for the most part, conservative creatures. At the same time, human beings love rules and regulations. They hate exceptions, to the point of absurdity.

Let us say, for example, that we have a certain law. But then, let us say, the world changes bit by bit, until eventually new facts come into existence which don't fit within the parameters of the pre-existing law. The most rational step to take when that happens is to set up an exception for those new facts. The logic of this is eminently reasonable. However, in most cases people do not choose to go down the road of rationality. They strive to stuff the new facts into the old law. They don't refrain from bending the facts—that is, at lying—in order to make them fit.

It is for this reason that, when we look at the history of legal development, we find that lies play the role of mediators in the actual evolution of the law. This fact is pointed out by Henry James Sumner Maine, the founder of the English Historical School, in his esteemed volume *Ancient Law*, and by Rudolf von Jhering, the founder of the German Sociological School, in his enduring masterpiece *The Spirit of the Roman Law*.¹⁸ These scholars seek examples in the changes in the ancient law. However, the phenomenon of change is hardly confined to unenlightened antiquity. Examples of it abound even among modern, civilized men, who flatter themselves that their civilization has progressed and that they themselves think and act in an eminently reasonable way.

For example, the principle of “no fault, no strict liability” developed gradually from the time of the Roman law, and came to full form especially toward the end of the eighteenth century. This principle is manifestly at work in the current Japanese civil code, as well as in the laws of Europe and the United States. However, with the progress recently in material civilization and the development of major industry, there have been many inventions which are very convenient for the person using them, but very obnoxious and dangerous for everyone else. There have also been many inventions which are now indispensable in general cultural facilities, or at least very convenient to use, but which are also prone to inflict damage on other people. What I mean are things like automobiles, steam trains, big factories, reservoirs, and gas tanks.¹⁹ These things are very convenient. They are also very dangerous. Under the prevailing “no fault, no strict liability” principle, in the majority of cases it is practically impossible for people who have been injured due to the use of these things to seek damages, because of the impossibility of proving that the owner or operator of the car or train or factory has

¹⁸ Suehiro uses the names “Henry James Sumner Maine” and “Jhering” in roman letters in the original text (tr. note).

¹⁹ For the “reservoirs” reference, Suehiro probably has in mind the famous case of *Rylands v. Fletcher* (1868).

been negligent. For instance, the other day a gas tank exploded in Fukagawa. The company pleaded force majeure, but the victims lay the blame at the feet of the company. Under the prevailing legal principle, if the victims want to seek damages they will have to prove negligence on the part of the company. But the tank has already exploded and all the debris has been cleared away, so that not a trace of the original tank remains. What will the victims use as proof? The victims are without remedy, or without, at least, any apparent one. It's exactly the same when someone is run over by a car and killed, or when someone is killed or has his property destroyed due to the collapse of a reservoir. So, in recent years society has come to call for a "liability for compensation even in the absence of negligence" principle, over and against the former "no negligence, no liability" rule.

The time has come for legislators to enact new laws which incorporate such new requirements as appropriate. Negligence is not the only factor giving rise to liability. There are other examples which should rationally suffice to give rise to liability for damages. New laws must be established based upon this sound foundation. Scholars are on the case, and so are some legislators. One example is the automobile liability laws enacted in Germany and other countries. But as legislators in those countries hemmed and hawed, and as German scholars carried out a paper-and-ink war over the theory of no-negligence liability, the courts in one country—France—managed to make a giant leap forward.

The French courts have attempted to make objective the originally subjective concept of negligence. The courts have objectively decided that in such and such cases there is obvious negligence, and have stopped allowing the old subjective meaning of negligence at trial. Of course, the language has not changed—the word is still pronounced "negligence". But the same word now means something only very slightly different from "unlawful". While the German scholars were busy grappling with the problem of no-negligence liability in their research and debates, the French courts arrived at the same destination of no-negligence liability without coming out and saying that that's what they were going to do. The weapon in this fight? Lies. The French court used lies to establish new law.

The courts in Japan today also often try the same thing. The most visible example was in a *Daishin'in* [Great Court of Cassation] decision of September 1, 1920. The summary is as follows. Someone left his wife and children behind in their home village and went to America, but as he did not send sufficient money back home to them, the wife borrowed twenty or thirty yen in order to make ends meet. When the lender demanded repayment, however, the wife cancelled the loan contract and refused to pay back the money on the ground that "Under Article 14 of the Civil Code a wife may not take out loans without her husband's permission." In this situation, if any of the circumstances enumerated in Article 17 of the Civil Code had applied then the wife would not have had to seek her husband's permission in order to take out a loan. As such, the wife would not have been able to cancel

the loan contract as described above. Unfortunately, there were no such circumstances in this case, so it would seem that, technically, there was no choice but to go along with what the wife said. However, the court held that, “In cases such as this one, in which a husband, seeking to earn money, leaves his wife and children in their home village and crosses over to a faraway land, but then fails to send money to his wife and children for several years, then, absent special circumstances such as there being wealth in the home in which the wife and children are residing sufficient to cover living expenses, in order for the wife to maintain the household and to educate and care for the children, it is reasonable and equitable to acknowledge that she has obtained the husband’s permission in advance to see after the maintenance of the household by taking out a certain amount of loans, as necessary. Understanding the matter in this way, this court finds it fitting to temper compassion with justice to the fullest extent.”²⁰ The wife thus lost her case. In this example, it is a fact that the wife did not obtain the permission of her husband to take out loans. But the case would have turned out the wrong way had it ended there. The lender would have been told, sorry, but you must eat your losses. So, the court invented the fiction of permission. In point of fact, no permission had been granted. However, the court proceeded as though it had, and rounded out the fiction with phrases like “reasonable and equitable” and “temper compassion with justice to the fullest extent”. Dr. Makino [Eiichi] the most zealous of the Freirechtsbewegung adherents in Japan, said of this decision that “The courts have used expanded exceptions to Article 17 of the Civil Code.” Conversely, Dr. Tomii [Masaaki], an esteemed veteran of the French legal school, finds Makino’s logic difficult to accept, and argues instead that “The exceptions in Article 17 have not been expanded, rather, the courts say that permission was, in fact, granted.” As a third-party observer to this minor debate, I have been greatly interested in seeing the way both scholars’ minds were working, apart from the way their thoughts were manifested verbally. In the thought patterns of Drs. Makino and Tomii we have been able to see the contrast between the French way of thinking, which amounts to “see, but pretend not to have seen,” and the Freirechtsbewegung style, which attempts to use cases in a rational way, like the rungs of a ladder, to effect [legal] evolution.

8

As can be seen from the above, historically, lies have displayed great social efficacy. We can continue this line of reasoning to see the same efficacy manifested in our own time. We know that lies are being

²⁰ In the original, the quoted passage is in old-style Japanese, in keeping with the Daishin’in case being quoted, with *katakana* used where *hiragana* would be used today (tr. note).

used today because human beings feel themselves to be eminently reasonable, although this conceit is punctured by their being unexpectedly unreasonable in actual practice.

Thinking along purely rational lines, it is a given that lying is wrong. It is simply not *comme il faut* to say that something that happened didn't happen, or that something that didn't happen, did. The revolutionaries who want to do away with all falsehoods, compromise, and tradition are almost always opponents of the lie. These revolutionaries also want to rid the legal system of every last trace of fiction. As an example, consider the laws following the recent workers revolution in Russia. For instance, a September 16, 1918 law in Russia prescribed the total abolishment of the adoption system. In a statement providing the rationale behind this law, we apparently find that "The first code of the [Bolshevik Family Law?] does away with all fictions and presents the bare facts as they are, bringing them straightaway to the surface, namely the facts of relations between parents and children. This is done not merely by means of words, but as a way to inculcate in the people the habit of speaking the truth and so free them from all manner of superstition."²¹

Now, it is true that, on grounds of reason, it is not a felicitous phenomenon that so many fictions are used in the law. Rather, such thinking goes, there being lies in the law indicates the need for legal reform. But because human beings are unexpectedly unreasonable, it is urgent that the objective of practical legal reform be achieved by means of these fictions. Jhering, in the aforementioned *The Spirit of the Roman Law*, brings forth this principle in the following way: "Throwing away fictions before laying the grounds for having methods for achieving actual solutions is the same as telling a limping person to throw away his crutches."²² Jhering further states that "Were there no fictions in the world, then many aspects of the Roman law, which exerted a profound influence on later generations even over the course of its vicissitudes, would surely have been applicable even farther into the future than it already was."²³

However, at the same time Jhering recognizes that fictions are not a perfect method for revising the law. Recognizing that the occurrence of fictions in the law indicates that the law is in need of reform—no, that that law has already, in practice, been revised—I would like to use these instances as rungs along the evolutionary ladder. There is no underlying principle to lies. So, if lies are the only method that courts use to bring the law into harmony with social changes, then regular people will feel

²¹ I have not been able to find the original. The quotation is my translation from Suehiro's Japanese (tr. note).

²² Quote is from Jhering (1865: 288).

²³ Quote is from Jhering (1865: 288). Suehiro's translation into Japanese expands on the German original without changing Jhering's overall meaning.

uneasy, unless the courts somehow express some grandiloquent and truly believable ideal. But even if courts do possess such a grandiloquent and truly believable ideal, and tell the people to trust in the ideal and be at ease, then it is conceptually no different from putting one's faith in a benevolent monarch and giving a free pass to despotism. We moderns, baptized in the French Revolution, are not likely to accept this. Moderns seek some reliable standard other than human beings. We want a guarantee.

Furthermore, if the law is fixed and the judges are inflexible, then as I wrote earlier it will be the people themselves, who are in a position of having to accept the law as applied, who will resort to lying. It is clear that this would be no cause for celebration in the slightest. A child who tells many lies betrays a parent with a pigheaded disposition. A people which tells many lies betrays a national law maladapted to social circumstances. In these situations, the attitude which both the parent and the state must adopt is one of reflection and repentance. And as for judges in this situation, theirs is to let lies be lies, to awaken to the fact that the time for legal reform has come, and to “see but pretend not to have seen” until comes the imminent completion of that reform.

9

Human beings have a fondness for what is fair. Moderns in particular, who have suffered through long years of iniquity, love fairness above all else. Modern man's universal and fundamental expectation of national society is that all must be equal under the law. The rule of law is a system born of this expectation.

The rule of law is a way of thinking according to which laws are laid out once and for all, after which the world is managed in accordance with those laws. In effect, it's a way of thinking involving the creation, ahead of time, of a measuring stick which is known as “the law”. However, the basic quality which a measuring stick must have is rigidity, fixedness. A measuring stick which can be stretched or crimped at will is a contradiction in terms. If, for example, there were a clothier who sold bolts of fabric which he had measured using a stretchy rubber measuring tape, there would surely be few who would trust him and do business with him. Likewise, if a nation's laws are able to be stretched or shrunk down with abandon, then it is a certainty that the people will have no refuge in the law, and will give voice to their discontent.

However, if the measuring stick of the law is completely inflexible and cannot be stretched or trimmed by even the slightest degree, then those greatly enamored of fairness will also, without fail, air their grievances in public. People want fairness, but they hate hidebound rules. At first blush, it must be admitted that these two things constitute an altogether contradictory and petulant demand.

But what is to be done? Humans are contradictory. They are petulant. That's just who they are. The law that must prevail among humans, these contradictory and petulant humans just as we find them, is a law that can satisfy these contradictory and petulant demands. The reason is that we must think, not of laws for a utopian Cockaigne, but of laws for the real world of human beings.

It would seem that most of those who debate the law have no understanding of the contradictions and petulance which beset human beings. As a result, some of them argue that if people want equality before the law, then there must be no demanding elasticity in the law. When the existing law is applied to some specific circumstance and the common run of people see this as unfair, then the scholars who insist on equality before the law offer a curt reply, saying, "It is the law. It must be applied." And they apply the law reflexively. This is certainly gallant of them. But is there not somewhere in the hearts of these gallant men of iron, hard and level-headed and given to bold and decisive action, a certain soupçon of unease? They are people too, after all. They are human beings who see beauty and know it as beautiful, and who hear of sadnesses and feel sad. If they were to cut a man down, then in their hearts they would undoubtedly shed the tears of a man. If not, then they could not be called human beings. To make a trial turn by activating the law is no different than feeding meat into a grinder. It should give us no joy to have raised to an exalted station a machine for the judging of human beings.

And yet, why shouldn't there be those who cut men down resolutely, even while shedding manly tears on the inside? I admire the high-minded will of those people. But at the same, I cannot help but calling such high-mindedness stupidity. For, if the law is a completely fixed and inelastic thing, and if those who apply the law do so inflexibly, then the contradictory and petulant people in the real world will doubt the law—will they not?—and will wonder what, exactly, the law is for. And those among the people who are serious and courageous will try to destroy the law, while those who go along to get along and who love just being alive will duck and flout the law in secret. The reason is that people must go on living, even if it means privately treating the law with scorn.

Among the people, those who are of serious and courageous disposition have no tolerance for lying. They are willing to risk their lives to destroy the law if the law means telling lies. Because these people strive to live without lying, and because they teach their children and grandchildren to live without lying, too, they will seek the ruin of the law. People who view the law as unbending and who seek to use it in that way, fear revolutionaries above all else. But, in fact, revolutionaries come precisely from the midst of these very serious and courageous types of men.

Then you have those, the majority, who go along to get along, and who are neither so serious nor so courageous. These people cop to the lie and sidestep the law. If the law is fixed, and if it is applied absolutely without question in certain cases, then the only way to avoid applying the law is to say that

what is, isn't. It goes without saying, is in fact plain to see, that those who passionately love life will seek refuge in this method of lying. Would those who see the law as unbending and who seek to apply it as such relish what comes of such ideas and practice? No. These people would hate what they have wrought, hate it like nothing else. But however much those who see the law as fixity hate when the law is skirted, it is, in practice, impossible that those with a passionate love for life will ever do other than lie. What else can we call, other than stupid, the fact that the legalists are oblivious to this towering fact of human nature?

A big river rolls boundless on. Men, seeking to narrow the river's breadth, build an iron wall along its right bank. The river flows against the iron wall, trying to wash it away. But, noticing that this can't be done, the water changes course and pours against the left bank instead. The river runs rampant against this soft bank and swallows it up, carrying it away downstream. In this example, if we imagine someone asleep atop the iron wall along the right riverbank, content with pleasant dreams, then surely anyone would say that such a man was a fool. There are those who advocate *Freirechtsbewegung*. Then there are those who reject *Freirechtsbewegung*, advocating a position dead-set against it. These anti-*Freirechtsbewegung* people dream atop the bulwark they've built holding the river back, and think themselves sublime. However, these same people do not realize that the left bank is steadily eroding away. These people ought to leave their studies, get out of their red-brick government buildings, and use the eyes they were born with to see reality as reality, to take a long, hard look at the world as it really is. It shouldn't be that hard. They would understand immediately that the opposite bank was being washed away. However, there are also the go-along-to-get-along types among them. These types pay lip service to the law's being inflexible, but when it comes down to it they lack the bravery, and know only the sublime way it feels to put the inflexible law into practice. They are captive to prevailing tradition and dogma and mouth the words “the law is fixed”. But they cannot realize their ideals in practice. What do they do, then, when this contradiction comes to a bitter head? How do they extract themselves from the crisis they have made? The weapon they use at such moments is always the same: lying.

Of course, judges—and in particular judges in societies where conservative elements are in power, or in countries under the rule of law—must assume a judicious demeanor. The reason is that they are in the difficult position of having to bring into accord, by lying, the law and the world of men. However, we can find no reason at all that those—namely, scholars—who both legally and socially speaking are not in the least constrained, should tell lies out in the open, whether consciously or unconsciously, in order to make the varying threads of tradition and dogma and human necessity align, finding themselves to be tangled up in these threads. The position they must adopt in these cases is, on the one

hand, one of legal reform, and on the other hand one of affirming and also engendering the law's elasticity. But when they who seek to harmonize the law and human nature with lies also defend and conserve their own dogmas and traditions with lies, then this entire arrangement amounts to one gigantic self-delusion.

10

Ultimately, the path we must follow is to pursue fairness while forging a law sufficient truly to satisfy human beings, who detest being persnickety about rules.

In Europe in recent years, surely the one who first began calling for such a path to be followed was the French jurisprudence scholar [François] Gén^y.²⁴ Gén^y was able to theorize new legal concepts because he attempted logically to conceptualize the fact that French judges in the past used lies to make the various elements of a trial line up. The result was that *Freirechtsbewegung*, which arose from Gén^y's insights, began influencing legal circles in Japan a dozen years or so ago. However, at first this influence did nothing beyond provoke abstract debates among legal scholars. *Freirechtsbewegung* was almost completely divorced from reality. Nevertheless, after the Great War, *Freirechtsbewegung* theories gave rise to tremendous changes in the general economic situation and social thought patterns in Japan. Because of this, suddenly a vast gulf opened between the law and human beings, providing another opportunity for *Freirechts* thinking to come to the fore. It did so, in the event, under the rubric of the socialization of the law.

This should no doubt be celebrated. But what we must remember here is that no matter how much people detest overly fastidious rules and crave trials with a human element, these same people also absolutely never discard their desire for fairness and an assurance, a guarantee. Even though we moderns, baptized in the French Revolution, may be fully aware that the desire for vain freedom itself caused the social calamities of the nineteenth century and thereafter to unfold, it doesn't mean that we want to get rid of freedom. And, while people know full well that the rule of law principle is liable to bring about over-fastidiousness for the rules, they also do not give up on seeking assurances of fairness. So, while we advocate for *Freirechtsbewegung* and argue for the socialization of the law, what we must never forget, even for a moment, is that we must secure for the people what they seek: freedom, fairness, and the assurance thereof.

²⁴ Suehiro uses the name Gén^y in Roman letters in the original (tr. note).

Apart from those scholars of recent years who explicate *Freirechts* and argue for the socialization of the law, or those who speak of the law’s ideal, or of the law’s purpose, or public order and salutary customs, there is no one who advances actionable ideas that would satisfy the real social need for guarantees of fairness. To be sure, one can certainly join the noble fight for a “new organization” to encourage young people highly prone to become entangled in tradition and tripped up by fine-filamented logic and grow dejected. It is also a powerful thing to break through long-entrenched *Begriffsjurisprudenz*, bureaucratism, and formalism. However, if this is all that scholars achieve, then the good fruits of their labors will last but a moment. Such efforts are transitional. This work merely destroys what is old—apart from that, it constructs nothing new for the sake of human culture. No sooner will the dawn break on such scholars’ throwing a busted-up *Begriffsjurisprudenz* out by the front gate than a clamoring for fairness and freedom will rush in by the back gate to assail them. If this is true, then it is surely no different than riding the crest of a wave one has happened to catch and laughing down at the lowness of those in the same wave’s trough. Before long, those scholars, too, will fall into a wave trough and invite the scorn of whoever comes along on the next wave’s crest. I have heartfelt doubts about whether there is any cultural value to what these scholars are trying to do.

Those who babble uselessly about vain ideals and strive by word and deed to realize public order and good morals must, in the end, also be those who allow for the despotism of judges.²⁵ At the light of dawn, when the *Freirechts* for which we have indiscriminately been arguing has finally been achieved, what will have been the point? For yet again will come then the calls for guarantees of freedom and fairness. What I seek is to preserve guarantees of freedom and fairness while also avoiding the trap of over-fastidiousness for the rules. In other words, I want guaranteed, substantive fairness.

Typically, those who have tried to bring substantive fairness or actionable universality of application into the courtroom have chosen from among two main methods. The first method is reliance upon enlightened magistrates, the second is the jury system. Given an enlightened magistrate fully in control of the conduct of a trial, it may indeed be possible that those trials will be actionable universality of the law’s application for each individual case brought before that magistrate. However, given the disgust with political corruption today, calling for reliance on enlightened magistrates is the same as singing the praises of enlightened despotism. I am of the firm belief that culturation is the means by which that which is now reserved for a certain class of people may be made easily accessible by all, and that education is the means of achieving this. It must amount to a repudiation of

²⁵ On “public order and good morals,” see Section 90 of the Civil Code: 「公の秩序又は善良の風俗に反する法律行為は、無効とする」 (tr. note).

jurisprudence to say that enlightened trials would be impossible without enlightened magistrates. It is virtually equivalent to arguing that, so long as there is a famous craftsman who has made a famous blade, it matters not whether Honda Kōtarō is around to wield it. We must still create laws which will allow for enlightened trials even when there are no enlightened magistrates. In other words, we need laws which will preserve substantive fairness and actionable universality of application in all particular cases, in the face of all of their concrete details. Failing this, then the moment we gain *Freirechts*, we will begin longing for freedom and fairness.

The second method is the jury system, which preserves the law while allowing for adaptations to human needs. This method, while diametrically opposite to enlightened magistrate despotism, nevertheless aims at exactly the same outcome. Judges are prone to being constrained by demands for fairness, that is, consistency of application. Fairness, after all, is the original point of law. As a result of this tendency, trials are liable to lose their human element. One way to rescue judges from this tendency is the jury system, which involves bringing several laymen into the courtroom, lining them up, and having them certify the fundamentals of guilt or innocence. This method has the merits of allowing for trials to be infinitely rejiggered as the world changes, and also of introducing a standard of elasticity to the law. However, as this elasticity can sometimes be taken entirely too far, it becomes difficult for trials to be conducted governed by the concrete facts of each situation, which in turn makes it easy for trials to lack both reasonableness and fairness.

In this sense, enlightened magistrate despotism and the jury system have opposite good and bad points between them. At the same time, both methods share in their failure to satisfy modern man, who hopes to have guarantees of freedom and fairness but who also hates sticklers for the rules.

11

We seek a standard by which to measure. And yet, we seek a flexible standard at the same time. This is, yes, a contradictory desire. But because human beings are as we have described them above, law must satisfy this desire in all its contradiction.

I therefore believe that the law which must henceforth be created must be a flexible standard which adapts to each concrete case in a regular way, and that jurisprudence must seek out just this universal standard of elasticity. As long as *Freirechtsbewegung* looks for nothing other than a standard which will flex just like rubber, then it will have the effect solely of destroying the past.

But how does one make a standard which flexes in a regular way? This standard is the only one for which jurisprudence must henceforth aim. However, it also belongs to the group of problems which are nearly impossible to solve.

As I see it, the perennial and fundamental problem with law and jurisprudence is that both have neglected to take as their subject of study human beings. Not only that, but law and jurisprudence have also recklessly hypothesized human beings as a kind of background object. In other words, law and jurisprudence have not sufficiently inquired into the ever-present unknown variable [i.e., the human person]. Instead, they have cavalierly repositioned the unknown variable as a known variable. Of course, hypotheses are the premises of all learning. The reason for this is that unless all the figures given in a certain question are posited as known variables, even if in a hypothetical way, then it becomes impossible to come up with any scientifically accurate answers. However, hypotheses to be used in finding answers to scientific questions must be arrived at only after having done adequate experimentation beforehand, and only with a full view of probabilities. And yet, your typical legal scholar or economist will think nothing of taking human beings, which should be understood as fundamentally X, and changing them out for A, or B, or what have you, hypothesizing that human beings are rational, that they are self-interested, and so forth.²⁶ Can scholars who work in this way expect easily to arrive at any formal, let alone accurate answers?²⁷ Human beings are rational, but also have extremely irrational aspects. They are also simultaneously self-serving but with non-self-serving aspects. So, no actionable universality of application is bound to present itself in each individual case as the result of a logical process casually predicated upon hypothesized human beings.

I think, therefore, that, within the bounds of jurisprudence, at least, human beings, as they are—in other words as the unknown X factor—must be added into the equation without any manipulation. Of course we must assiduously pursue the known elements within that variable X, based upon the fundamental and empirical knowledge gained by the human race over long years of struggle. How regrettable, though, that the known-factor elements under the X rubric, which have been gleaned from the knowledge which humans have come to understand thus far, are so pitifully few. In the final analysis, we must accept that a great many unknown elements will remain. This is why it is a rash plan, badly lacking in humility, to willy-nilly change out X for A or B. Even so, leaving X as X does not a science make. X must be made into a known variable. So, the first thing to do, as far as is possible, is to find known variables within X: a, b, c, d, and so on. In doing so, however, we must also steel ourselves to accept that there will remain, even after this process, a big unknown variable. Let us call that big unknown variable x. Then, instead of following the standard jurisprudential practice of cavalierly substituting X for A or B or the like, we can lay out the information like so: $a + b + c + d + x$. Of course, in

²⁶ Here and in the following paragraphs, Suehiro uses “X”, “A”, “B,” and so forth (tr. note).

²⁷ There is a question mark in parentheses in the original exactly where I have placed the same in the translation (tr. note).

this case we will have to leave the determination of the value of x entirely at the discretion of the judge or the juror. It goes without saying, therefore, that the thinking of the judge or the juror will exert a profound effect on the form which the answer ultimately takes. Even so, the method I have just described will vastly improve the actionable universality of application of trials in each concrete situation when compared with the cavalier transposition of X for A or B or the like. The method I advocate will also guarantee much more fairness than were we to entrust entirely to judges or jurors the determination of X when used as X . In this way, in the itemized list $a + b + c + d + x$, each letter may be expressed as a' , b' , c' , and so on, or as a'' , b'' , c'' , and so forth, thus maintaining a relational correspondence which will sway the final result. I think it must be the goal which jurisprudence should pursue henceforth to find just this sliding scale.

We must put to maximum use all the spoils of science. At the same time, however, we must not overemphasize the gains that science has made. We must accept the fact that x will remain within X forever. Furthermore, it must be added that it is extraordinarily self-delusional to think that accurate answers can be obtained by cavalierly swapping out X for A or B . We should dissect X to the fullest extent that science allows. Then we must determine the value of the x that remains based on an ideal foundation. Accuracy in jurisprudence must be exactly as I have herein described.

12

I am a legal scholar. So, my argument, concretely and finally, comes down to case law. By seeking $a + b + c + d + x$ via a dissection of the actual details of each individual case as found in a multitude of judicial decisions, and then by finding the relational correspondence between these details and the answers [found in those decisions], I hope to gain material for deliberating upon what actionable universality of application should look like in cases which arise in the future. These will be, I believe, invaluable materials allowing us to move away from individual decisions' being a matter of applying a fixed law to each case, and also to think about what law is in its kaleidoscopic and ever-changing pursuit of actionable universality of application.

I am convinced, on this score, that legal education henceforth must be conducted using the case method.²⁸ Jurisprudence heretofore, which proceeded with great faith that correct conclusions could be drawn by swapping out X with, say, A or B or the like, has not taught students the pith and marrow

²⁸ Suehiro uses the words "case method" in Roman letters in the original.

of the law.²⁹ Traditional jurisprudence involves little more than acquiring logic and a wily dexterity in applying it. But it must be admitted that the law obtained hereby is far removed from the real law.

I began conducting jurisprudential education at [Tokyo Imperial] University using the case method from the spring of this year. This has been problematic for many. What I am doing is decidedly not in the spirit of the traditional practicum with which law students have long been familiar.³⁰ I consider that the case method is the only way to teach the real living law, the law which is a flexible standard bending in accordance with a fixed rule.

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²⁹ There is a question mark in parentheses in the original exactly where I have placed the same in the translation (tr. note).

³⁰ Suehiro uses the German word “Praktikum” in the original (tr. note).

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