

DIVORCE AND THE BEST INTEREST OF THE CHILD: DISPUTES OVER VISITATION AND THE JAPANESE FAMILY COURTS

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Translator's Note: The following is a translation of an article written by Professor Takao Tanase for the December 2009 edition of *Jiyū to Seigi*, a Japanese legal periodical. Divorce and familial breakdown has become a major problem in modern Japanese society, yet the law does not provide any meaningful protection for the noncustodial parent. Professor Tanase analyzes this issue from a comparative and theoretical perspective, looking at the current Japanese visitation laws in place today, while contrasting those with the system in the United States. He also looks at how those laws affect actual families, and how the courts have implemented and enforced visitation agreements and orders. This article concludes that not only are the rights of the noncustodial parent insufficient to maintain a meaningful relation with their children following divorce, but that they hardly exist at all.

I. THE SIGNIFICANCE OF VISITATION

A. *Dramatic Increases in Disputes over Visitation*

Disputes over visitation are dramatically increasing in Japan.¹ The number of cases has almost quadrupled over the last ten years, from 1,700 mediated divorce cases and 290 judicial divorce cases in 1998, to 6,260 mediated divorce cases and 1,000 judicial divorce cases in 2008. These disputes are never easy to resolve, and out of a combined 7,100 conciliation and judicial divorce cases that have been resolved, less than 49% resulted in

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¹ This paper is based on a presentation that I made at a symposium sponsored by the Japan Federation of Bar Associations entitled "Family Law Systems Symposium: Divorce and the Child III—Reflections on the Best Interests of the Child," and seeks to emphasize the theoretical and comparative law aspects of the issue. The comparative law aspect of this paper uses only the United States for comparison. However, as countries throughout the world are expanding visitation and encouraging shared parenting, the common practice in Japan is quickly becoming an absurdity throughout the rest of the world. This paper is rooted in this sense of crisis. I want to take this opportunity to cite a piece of Australian literature that skillfully outlines the current changes in the law: Helen Rhoades, *The Changing Face of Contact in Australia*, in PARENTING AFTER PARTNERING 129 (Mavis Maclean ed., 2007).

any kind of visitation award. Only half of these decisions resulted in visitation one or more days every month, and only 15% allowed overnight stays.² Furthermore, it is common for the parties not to honor their agreements even when the parties agree, and issues of visitation remain to the end, even in cases that have reached family court, becoming cases that “cannot be cleanly resolved.”

Behind these statistics is the rising divorce rate in Japan. Over 251,000 married couples separated in 2008, and if this number is divided by the 726,000 marriages in the same year, roughly one out of every 2.9 marriages will end in divorce. Out of all divorcing couples, 144,000 have children, equaling about 245,000 children in all. Seeing as roughly 1.09 million children were born this year, about one out of every 4.5 children will experience divorce before reaching adulthood. Even with the increase in visitation awards, only about 2.6% of the 245,000 children affected by divorce will be allowed visitation.

This raises the question of whether the remaining 97% of children of divorced couples will be able to have smooth visitation with the noncustodial parent. A lack of reliable studies prevents knowing the absolute truth, but considering that judicial cases epitomize the adversarial nature of parties in a divorce, and that their decisions can be seen as legal norms, the most likely result in these types of cases is that noncustodial parents will no longer be able to meet with their children following divorce. Even if they are able to meet, once a month is an abysmal state for visitation rights.

B. *Comparison with Other Countries*

A typical visitation award in most foreign countries is around two nights and three days per week, and people in other countries who are accustomed to this standard hold a widespread view that “in Japan, if you get a divorce you can no longer see your child.”³ According to a well-

² While the term “one or more days every month” is commonly used, in practice it equates to only one day every month. According to a 1996 study by the Yokohama Family Court, 74% of cases had visitation once a month, and less than 3% of cases had visitation twice a month (other cases were less than once every two months). Masayuki Ōtsuka, *Kaji Chōtei ni Okeru Mensetsu Koshō-ken no Jisshōteki Kenkyū*, 98 SHIHŌ KENSHŪJO RONSHŪ 258, 281 (1997). [Translator’s Note: The word “chōtei” has been translated as “conciliation,” “arbitration,” and “mediation” by different authors because it is difficult to find a precise translation for the word in English. The translator chose to use the word “conciliation” because it is the term used in official Supreme Court publications. See, e.g., Supreme Court of Japan, DOMESTIC RELATIONS CASE PROCEEDINGS, available at http://www.courts.go.jp/english/proceedings/pdf/domestic_personal/chart.pdf.]

³ Colin P.A. Jones, *In the Best Interests of the Court: What American Lawyers Need to Know about Child Custody and Visitation in Japan*, 8 ASIAN-PAC. L. & POL’Y J. 166 (2007). While I will soon go into

regarded academic study conducted by Maccoby and Mnookin in 1992 that examined how visitation is conducted overseas, only 21% of cases did not have regular visitation six months after separation, 15% had joint custody divided between staying at “mom’s house” and “dad’s house,” and even among sole custody agreements, 34% had overnight visitation, and 22% had solely daytime visits.⁴ Even three and a half years after separation, the percentage of children who had met with their noncustodial parent in the past month was up to 64% for children under custody of their mothers, and up to 67% for children under custody of their fathers. The percentage of children who had not seen their noncustodial parent in the last two years was only 6% and 3%, respectively.

This data is over twenty-five years old, but since then, recognition that visitation after divorce is indispensable to the healthy development of children has only increased. Legislatures, judiciaries, and administrations have established comprehensive legal protections for visitation rights, and various nonprofit organizations are making efforts in support of visitation. I would like to consider just one of these, the 2008 Indiana “Parenting Time Guidelines,” as an example.⁵

First, the guidelines were written under the assumption that “it is usually in a child’s best interest to have frequent, meaningful, and continuing contact with each parent.”⁶ From there, the guidelines outline various forms

more in depth on the current situation of visitation in the United States, it should be noted that court custody rulings rarely deny visitation to the noncustodial parent. A survey of California cases in 1968 and 1972 shows that visitation was prohibited in less than 1% of cases. Also, 90% of these are deemed to be “reasonable visitation.” LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION*, 228-30 (1985). However, according to interviews, about 25% of these report problems surrounding visitation, with noncustodial fathers feeling dissatisfaction from interference with visitation by custodial mothers and custodial mothers feeling dissatisfaction with fathers who have a bad attitude or carelessness toward visitation. Taking into account the nearly guaranteed “reasonable visitation” and the remaining dissatisfaction, the United States will need to continue developing its doctrine of visitation to allow parents to share in the rearing of their children following divorce in spite of the assertion of rights by the noncustodial parent, the will of the child to have shared parenting, and concerns of the mother for the safety of the child in cases of domestic violence and abuse.

⁴ ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 74, 176 (1992). This study looked at court records dealing with divorce cases involving children under sixteen years of age from two cities in California between September 1984 and April 1985, and tried to conduct interviews with both parents as frequently as possible. The first interview took place three months after divorce (usually six months after separation), and the third was usually conducted three years after divorce. There were 1,124 families involved in the first interview, and 917 families involved in the third. The full details are on page 316 of the book. Additionally, both parents hired a lawyer in 47.1% of cases, just the mother was represented in 24.4%, just the father in 8.8%, and 19.7% of cases went without any representation at all.

⁵ Comm. on Rules of Practice and Procedure, Sup. Ct. of Ind., *Ind. Parenting Time Guidelines* (2008), available at <http://www.in.gov/judiciary/rules/parenting/index.html>.

⁶ This understanding is a fundamental premise behind visitation in the United States. Section 3020 of the California Family Law Code (containing the beginning of the foundational provisions of custody

of visitation, recognizing that in order to promote the child's healthy adjustment and development, the parents need to understand "the basic needs of a child." There are eight such items in the guidelines, each of them significant.

1. Making sure that the child knows that the parents' decision to live apart is not the child's fault.
2. Allowing children to develop and maintain an independent relationship with each parent and to have the continuing care and guidance from each parent [sic].

(The rest are omitted).

In addition, the guidelines use the term "parenting time" instead of the term "visitation" because what is important "is the time a parent spends with a child," and "visits" do not "convey the reality of the continuing parent-child relationship."

There is a concrete duty placed on the custodial parent to exchange information with the noncustodial parent based on the presumption that the noncustodial parent is a partner in raising their child and should be able to communicate freely with the child, be informed of the child's grade reports and school events, and be notified immediately if the child is undergoing medical treatment or has had a medical emergency. In addition, the guidelines contain a detailed model for how to best allocate parenting time based on the age of the child, for example:

- **One to One and a Half Years:** Three non-consecutive days per week, with one day on a non-work day for ten hours, the other days shall be for three hours each day. All scheduled holidays for eight hours, and overnight stays are appropriate when the noncustodial parent is actively involved in rearing the child.
- **Over Three Years of Age:** On alternating weekends from Friday at 6:00 P.M. until Sunday at 6:00 P.M. One evening per week for a period of up to four hours, and all scheduled holidays. In addition, children up to four years of age shall

law) provides in part that "it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern," followed by "it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child . . ." CAL. FAM. CODE § 3020(a), (b) (2008).

have up to four non-consecutive weeks during the year. Children over five years of age shall have one-half of the summer vacation, and time during the school year shall be divided evenly between both parents.

These guidelines are worlds apart from the reality in Japan. While individual parents might create this kind of advanced plan on their own, this kind of custody plan would never come out of the courts or conciliation. Many might say that this kind of plan does not suit Japan, and that Japanese ideas of family are different.

However, even in the United States, it took many years to arrive at this point. During that time people came to recognize the trauma experienced by children caught up in divorce, and have learned ways to try to overcome those difficult challenges through the unified efforts of expert psychologists recommending ways to overcome those difficult experiences, and parents asserting the importance of the “time a parent spends with a child” and protesting being pushed into the role of “the visiting parent.”⁷ Custodial parents and noncustodial parents alike have learned to step outside the bounds of what is commonly thought of as family to form “post-divorce families” as a new societal construct for raising children.⁸

II. REALITIES OF CHILD WELFARE

Compared to the achievements of the United States, even bi-weekly overnight visits are not standard in Japanese family courts. What could be the reason for this? Of course, there is the provision limiting custody to one parent under Article 819 and the lack of a definition of visitation. However, in a sense Article 766 is an extremely comprehensive provision, providing

⁷ JUDITH WALLERSTEIN & JOAN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980) has had a major influence in this area. The study offered free psychiatric services to fifty divorced couples and their children over several years forming a sample group, getting a glimpse of their “inside world” to try to understand how divorce affected people. The authors say that the study led them to more fully understand the importance of visitation to the noncustodial parent. Nearly all children desired to see their fathers soon after separation, and the authors report that many of these children complained of unsatisfying and infrequent visitations, as well as an ambiguous “family structure” that restricted the noncustodial parent, confirming the importance of visitation to enable fathers to continue serving their role and its benefit to the growth of children. This report also served to provide theoretical support to joint custody in its early stages of development. However, Wallerstein later changed her position, becoming pessimistic about the plausibility of shared parenting. *See infra* note 30.

⁸ There is a similar movement in other countries, resulting in family law reform in recent years. *See, e.g.*, RICHARD COLLIER & SALLY SHELDON, *FATHER’S RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE* (2006). This movement has spread to Japan in recent years, and Korea is currently implementing reforms to strengthen the right to visitation. This truly seems to be a movement that is occurring on a global scale.

nothing yet prohibiting nothing. It would even be possible to divide custody rights and create a joint-custody system. Why have the courts not developed the case law in this direction?

If decisions regarding custody are based on the welfare of the child, why does Japan not share in the belief espoused by the Indiana Guidelines that “frequent, meaningful, and continuing contact” is in the best interest of the child? Is there some different concept of “child welfare” that is only accepted in Japan?

The analysis below will look to answer these questions by looking at some of the representative cases denying visitation.⁹

A. *Respect for the Custodial Household*

First, Japanese courts have held that the visitation rights of a noncustodial parent can be limited if the custodial parent is providing a stable home environment. The leading case behind this doctrine is the Ōsaka Family Court decision of May 23, 1968.¹⁰ This decision was made at the time the first visitation disputes were appearing in courts, and, although the case may seem antiquated by today’s standards, it serves as a clear indicator of judicial reasoning.

The husband in this case was having an extra-marital affair, and despite the wife’s initial protests against divorce, the situation soon turned into a fight over divorce conditions. The wife fought for custody but lost, and after several conciliation sessions, the wife finally received twice-a-

⁹ The following three theories of visitation each have slight differences in their conclusions, but are all based on the same fundamental understandings. See, e.g., Mieko Yamada, *Shinken no Kizoku to Mensetsu Kōshō no Kyōhi no Gutaiteki Kijun*, 155 CHŌTEI JIHŌ 72 (2003); Sadahiko Yoshimoto, *Mensetsu Kōshō to Seigen*, 1064 HANREI TAIMUZU, 32 (2001); Yokohama Mensetsu Kōryū Kenkyūkai, *Mensetsu Kōryū Shinpan no Jisshōteki Kenkyū*, 1292 HANREI TAIMUZU 5 (2009). Also, Shūhei Ninomiya in his article *Bekkyo—Rikongo no Oyako no Kōryū to Ko no Ishi (1) ~ (3)*, looks at the same Japanese visitation principles, fully understands the meaning of visitation and selects positive cases that show the current situation, arguing that courts should not deny visitation because of the will of the child, and should instead actively enforce visitation as a parental responsibility against parents who do not recognize it as such. See Shūhei Ninomiya, *Bekkyo—Rikongo no Oyako no Kōryū to Ko no Ishi (1)*, 574 KOSEKI JIHŌ 2, 2-16 (2004); Shūhei Ninomiya, *Bekkyo—Rikongo no Oyako no Kōryū to Ko no Ishi (2)*, 579 KOSEKI JIHŌ 4, 4-14 (2005); Shūhei Ninomiya, *Bekkyo—Rikongo no Oyako no Kōryū to Ko no Ishi (3)*, 581 KOSEKI JIHŌ 2, 2-19 (2005). While I must recognize the efforts of the courts and the active debates amongst scholars, Japanese courts operate under the hard logic of lightly denying visitation, and even when visitation is granted it is minimal in scope. My coverage of the case law below focuses less on analysis and more on trying to clarify this logic.

¹⁰ Ōsaka Katei Saibansho [Ōsaka Fam. Ct.] 1968, 20(10) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 68 (Japan). This case is fully analyzed in, TAKAO TANASE, *RIKONGO NO MENSETSU KŌSHŌ TO OYA NO KENRI*, ch. 3 (1990), my first work that took on the visitation problem, which contains the fundamental thinking on the American views of visitation, the fundamentals of visitation, the post-divorce family, and the right to form a family.

week visitation rights. However, after their divorce was finalized and the former husband and his lover were formally married, he and his new wife adopted his son as their own and started denying his ex-wife access to their child.

The court found that “the child [was] living under the custody of his father and adoptive mother, and he seem[ed] to be content and satisfied with his lifestyle, desiring no change. In addition, although his mother came for a visit after he started attending elementary school, he must have been emotionally shaken and adversely affected by that experience, and even the school staff were clearly opposed to his mother’s visits.” The court ruled that, “for the time being,” it would be best for the “welfare of the child” to no longer allow the mother to visit.

While modern courts have started to recognize the necessity of visitation, there is still the negative decision of the Ōsaka High Court of February 3, 2003,¹¹ which also involved a remarried parent formally adopting children from a prior marriage. The court in this case asserted that “in light of the fact that a father and step-mother are trying to form a new family relationship under a joint custody agreement, there is no denying that exposing the child to different lifestyles and methods of discipline can have adverse effects on the feelings and emotional stability of the child,” agreeing with the decision to prohibit overnight visitation with the mother twice a year, and changing the order of the lower court to allow daytime visits with the mother only once a month.

A search of the case law including the terms adoption, remarriage, adoptive mother, joint custody, and visitation yields a host of cases that have similarly denied visitation based on some combination of conflict between the parents and the will of the child, and none that protect the bond between a child and both biological parents by actively recognizing visitation in spite of adoption by the new spouse of one of the child’s parents.¹² Even though there is no doctrine of law stating that visitation shall be automatically denied after the remarriage of the custodial parent, there is clearly a hesitation by the courts to allow visitation between the noncustodial mother

¹¹ Ōsaka Kōtō Saibansho [Ōsaka High Ct.] Feb. 3, 2006, 58(11) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 47 (Japan).

¹² Yoshimoto, *supra* note 9. Out of six published cases, there are only two exceptions that recognize visitation, leading the author to conclude “[t]hese types of cases, as a general rule, do not recognize visitation.” One of the exceptions (case 3 in the original text) allowed visitation only with one of two children, who was in junior high school, and was permitted only once a year (the other exception was an international marriage case). However, adoption after remarriage does not even require approval by the court, and if that effectively prohibits visitation then the parent-child bond with the noncustodial parent can be severed at the sole discretion of the custodial parent.

and her child when there are tensions arising from the adoptive mother trying to keep the birth mother away, or from issues regarding the formation of the new family and the loyalty of the child.

In court, this aversion to custodial parent visitation is recast as benefitting “the welfare of the child.” The first case referenced above used language such as “the child is satisfied with his current established lifestyle” and “after the visitation the child was emotionally shaken,” while the second case looked at things such as “different lifestyles and methods of discipline” having “adverse effects on the feelings and emotional stability of the child,” attempting to show that the mother’s visitation was against the welfare of the child.

But is that really true? Do children really not want to see their mothers once they are settled into their current lifestyle? Is the child’s emotional stability really threatened when meeting with his or her mother when that mother has a different lifestyle? Or, it is possible that the children were emotionally shaken because they really wanted to see their parents, but knew they could not because the father and adoptive mother were opposed?

I know that if I were standing in that child’s shoes, I would think that I should be allowed to see both my parents without protest from either side. This is something that is common to both Japanese and American children, and very well researched American studies have shown that children, most particularly very small children, eagerly look forward to meeting with the noncustodial parent.¹³ The difference is that in Japan the adults often do not allow children under their custody to meet with the other parent, openly proclaiming these feelings, and the courts acknowledge understanding of the “feelings of the custodial parent.”

Another factor might be the Japanese notion of family, where parents control their children and the family is closed off to the rest of the world. Being inside such a family is seen as good for the welfare of the child, and noncustodial parents are seen as coming from the outside, bringing with them different lifestyles and different ways of disciplining children; they are seen as something to be guarded against. In Japan, the custody rights of a parent with sole custody are very strong. This not only denies noncustodial parents their parental rights, but also suppresses the will of the child, trapping it inside and denying their rights.

While I argue as a practical matter that the Japanese views of the family and concepts of parental rights must change alongside the negativity

¹³ WALLERSTEIN & KELLY, *supra* note 7. Even three and a half years after separation, three quarters of children under the age of eight, and 60-70% of children under the age of fourteen were “looking forward to visitation”; less than 10% were negative toward visitation. MACCOBY & MNOOKIN, *supra* note 4, at 190.

toward visitation, I would like to look at two other principles relating to visitation before moving on to the conclusion.

B. Avoidance of Major Conflicts

The first of these principles states that visitation should be denied because it places a burden on the child when visitations are not going smoothly due to deep tensions between the mother and the father.

An April 30, 1996 decision of the Yokohama Family Court found, “in the absence of special considerations, it is proper to avoid visitation in situations where there is strong antagonism between the parents, and the custodial parent is strongly opposed to visitation.”¹⁴ The court reasoned that, “it is impossible as a practical matter to engage in harmonious visitation without the cooperation of the custodial parent,” and “going against the will of the custodial parent and forcing visitation would be very detrimental.”

This line of reasoning is common in court decisions, including a recent decision by the Tōkyō Family Court on July 31, 2006, where the court reasoned, “a cooperative and trusting relationship between the parents is necessary to have smooth and stable visitation that truly contributes to the welfare of the child.” Because the degree of the conflict was strong in that case, the court ordered that visitation be limited to once every one-and-a-half months at a specialized support center.¹⁵

The decision does acknowledge the positive value of visitation, stating, “it is necessary for the development of well adjusted and healthy children to have loving contact with the noncustodial parent through visitation, even after the divorce of their parents.” However, the court expressed reservation, saying “visitation is intended to help the healthy development and character-building of the child, and must be appropriately limited in scope and manner to meet those ends.” The court concluded, “there is no mutual trust or cooperation” between the parents, and ordered only monitored and limited visitation.

While no one would deny that it is ideal to conduct visitation smoothly with the understanding of the custodial parent, this ideal does not lead to the conclusion that visitation should be restricted when it cannot be conducted smoothly. There is value in the act of a parent and child meeting and interacting, even if the conditions are not ideal. If antagonism between

¹⁴ Yokohama Katei Saibansho [Yokohama Fam. Ct.] Apr. 30, 1996, 49(3) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 75 (Japan).

¹⁵ Tōkyō Katei Saibansho [Tōkyō Fam. Ct.] July 31, 2006, 59(3) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 73 (Japan).

the parents is an issue, it is possible to order the custodial parent to exercise self-restraint and not show that antagonism in front of the child, with an understanding of the importance of interacting with the noncustodial parent.

However, the courts are going the opposite direction by placing the burden of loss that comes from a lack of mutual trust and cooperation between the parents on the shoulders of the noncustodial parent seeking visitation. This is especially true in situations where the noncustodial parent was at fault in the divorce due to violence or unfaithfulness. The court does not say that the reason is past infidelity, rather that there is strong distrust toward the noncustodial parent, a feeling the court can sympathize with, and therefore visitation cannot now be allowed.

In the end, this reasoning does nothing more than inject problems between the parents into the visitation between a parent and child. Divorce is fundamentally a dispute between the husband and wife, and regardless of the reasons for their separation, the bond between parent and child remains. This view is currently the global consensus, and has also been recognized in Japan.

Even in the previously cited case from the Tōkyō Family Court, both sides accused the other of violence, and the court recognized that there were violent fights where both parties were equally at fault. Rather, the issue in this case was the almost daily recurring fights for a period of two years after the divorce, usually conducted through their lawyers, over the timing and manner in which visitations were conducted. There were countless reasons for opposing visitation, including the emotional effect on the child, bad-mouthing the other parent to the child, demanding visitation over the phone, or abusive language. The very act of seeking visitation became its own point of contention, or at least making it look that way became very easy.

Consequently, requiring trust and cooperation provides motivation for parents who do not want to allow visitation to remain uncooperative. If the noncustodial parent tries to obtain visitation through legal avenues, all the custodial parent needs to do is not respond to the arbitrator's efforts to reach an agreement and keep the talks in deadlock. If custodial parents hold out in their refusal in court, they are sure to get a denial of visitation, or at most a "minimal visitation" of once every two or three months.

Is this really an appropriate result? While these cases restrict visitation to avoid placing an emotional burden on the child, in reality is this not missing the basic premise that it is best for the welfare of the child to have the love and support of both parents?

III. THE WILL OF THE CHILD

Another failing of the Japanese visitation system can be said to be the principle of “the will of the child,” which, while proclaiming the welfare of the child is held captive to the parents’ conflict, leads to results against the child’s welfare. Let us start by looking at a concrete example. My fifth example case can be found in the October 23, 1998 edition of *Kēsu Kenkyū*, and is an actual example of a divorce by conciliation.¹⁶ This is a case where the husband often did not come home until morning for days at a time and spent household money on personal pleasures, and one day the wife left a note and returned to her hometown to teach him a lesson. She thought that he would come apologize and pick her up, but he never came and instead demanded a divorce. At the time that they started living separately, the older child was five years old and the younger child was two-and-a-half. Their father took both of the children, and the mother was seeking custody.

What became relevant was the will of the child, as found in investigator’s reports. Two investigations were made, the first after a year and a half of separation (of only the older child). The report states:

[t]he child responded willingly to questions about daily life, and seemed to be friendly and talkative. However, when the child and I were the only ones left in the room and we started to talk about the petitioner (the child’s mother), the child’s voice suddenly grew quiet and became less talkative, saying things like “when mom comes by it makes me throw up” and “all she does is yell at me from the moment she wakes up to the moment that she goes to sleep.” The child also told me that “I can’t sleep the night before she comes, and I hate how she drags me around to all sorts of different places.”

This report was used unfavorably toward the petitioner during conciliation sessions to decide custody and visitation, but an honest reading of it almost painfully shows evidence of an attachment to the mother that has been suppressed by his custodial family.

The next report was taken two years later, when the child was in the second grade. After first summarizing the current condition of custody by stating “the child is happy at school, the child’s grade reports are good, and the child is in good health,” the report states that “[the child] calls the

¹⁶ Rikon, *Mensetsu Kōshō Chōtei Jiken—Shinken to Mensetsu Kōshō wo Megutte 4-nen Arasotta Jirei*, 259 *KĒSU KENKYŪ* 95-146 (1999). [Translator’s Note: The author’s name was omitted in the original.]

petitioner ‘that woman’ and ‘idiot’ at home. The child has a strong sense of distrust of the mother because she wrote things in court documents that the child never said.” The examiner also wrote, “when the respondent [the child’s father] talked to the child about the issue, saying ‘if you want to see her, you can,’ the child stubbornly refused.”

The report further states:

[R]egarding the petitioner, the child frowned and said, “she came to my school field day the other day, and she had gotten fat. I couldn’t stand how she would follow me around. I hate it when she comes. She stands out, waving her hands and wandering around making a fool of herself. Even my friends tell me ‘there’s your mom.’”

In the end, the investigator concludes:

[U]nder the current circumstances, with the child firmly asserting that he does not want to see the petitioner, conducting visitation would be extremely difficult. So long as the respondent expresses no desire to accept visitation, it is unlikely the will of the child will change, and even if visitations were forced it would do nothing but place a substantial emotional burden on the child.

Here, the will of the child is transformed into an avoidance that borders on being a crime of conscience. However, it is only a seven-year-old child that is calling his mother “fat and disgraceful” with disdain. It is hard to imagine any child hating his or her own mother in this way.

The child may have called the petitioner “that woman” and “idiot” at home, but after all, a former wife is no longer related to the former husband and his mother, and they see no wrong in completely hating and despising his ex-wife. However, this child is half the flesh and blood of his mother, and this denial of the mother as a person becomes a denial of the child as a person. Of course, at such a young age, children are still developing their self-identity, but there is no doubt that as this child reaches puberty and starts to become independent and develop his own sense of self, the denial of his mother by his father and grandmother will weigh heavily on his heart. This is the true emotional burden that must be considered when looking at the welfare of the child.

It is also likely that he was greatly pained by hearing his mother badmouthed around the house leading up to this point. At five years old, the child surely had a bond with his mother when they separated. It is

commonly accepted in the United States that most children, especially younger children, look forward to visitation sessions, and in Japan studies indicate that, even as children are hurt during divorce, they still hold loyalty to their parents, and rejection by a parent can leave a scar that never heals.¹⁷ I would even go as far as to say that a parent who cannot understand these feelings was never qualified to have custody to begin with.

In reaching the conclusion prohibiting visitation, the examiner emphasizes the firmness of the child's avoidance of visitation, stating "so long as the respondent expresses no desire to accept visitation" the will of the child will not change. However, this "will of the child" is, in reality, not the will of the child, but in fact that of "the respondent refusing interaction," in other words, "the will of the custodial parent." In essence, this denial of the ex-wife that constitutes the will of the custodial parent becomes the will of the child through the control of the child in the custodial household. The child then avoids his own mother on his own, severing the parent-child relationship. Even told "you can meet your mother," he will not.

While divorce brings about the end of a spousal relationship, it should never be able to sever the parent-child bond. However, this tenet of visitation is compromised by the principle of protecting the will of the child. This principle remains uncertain due to the inability of Japanese law to effectively intervene in the process of the parent's will becoming the child's will, and to the acceptance of this constructed child's will "because forcing visitation would only put a burden on the child."¹⁸

¹⁷ KAZUYO TANASE, RIKON TO KODOMO—SHINRI RINSHŌKA NO SHITEN KARA, Ch. 2 (2007). Also, in a column called "*Oyaji no Senaka*" [*My Father's Back*], the "Night Watch Teacher" Osamu Mizutani writes, "My parents divorced when I was three, and because my mother destroyed all pictures of him, I did not know his face or his name until he died twenty years ago. My mother won't tell me what kind of father he was. However, I always hated him for abandoning me. When I saw fathers and their children holding hands outside, I wanted to tear them apart from each other." ASAHI SHINBUN, Sept. 13, 2009. Perhaps those difficult experiences made Mr. Mizutani who he is today, but the tragedy of a child hating a parent due to losing that parent to divorce must be ended. [Translator's Note: Osamu Mizutani is a childcare and development specialist who is known for dealing with troubled youth. He patrols his neighborhood streets at night, giving him his nickname.]

¹⁸ Even recent cases continue to use this theory. See Tōkyō Kōtō Saibansho [Tōkyō High Ct.] Aug. 22, 2007, 60(2) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 137 (Japan). When the will of the child is formed under the strong influence of the custodial parent, it is important to raise questions of parental alienation, and to force visitation while trying to break the strong influence. The very fact that the child would avoid a parent is itself unfortunate, and if it is something that arose only out of the parental tensions of divorce, it is vital that visitation continue at a frequency and in a manner that allows the natural parent-child relationship to be restored, which I believe will lead to true happiness for the child. Other countries have long debated and carried out this kind of visitation, showing just how far behind Japan has fallen. See JOHNSON, *infra* note 19.

IV. MAKEUP OF THE POST-DIVORCE HOUSEHOLD

A. *The Curse of Sole Custody*

The above has detailed how conflicts between parents during divorce, through the legal principles of respect for the custodial household, avoidance of major conflicts, and following the will of the child, affect whether visitation is awarded, and how it is difficult to realize visitation against the will of the custodial parent. These legal principles shape how the courts decide cases, resulting in visitation standards that are lower than almost anywhere else in the world.¹⁹ The following will look at why divorce disputes between parents in Japan often result in severing the parent-child bond, and how these legal principles came to dominate the practicalities of visitation today.

Judicial decisions can be seen as a reflection of the society in which they operate, and there may remain some influence from the time in Japanese society when divorce was viewed as *engiri*, or the severing of a relationship, or as feminist history teaches, perhaps the concept of the “modern family,” which came about during the period of rapid economic growth, has created a new oppression inside the family, with closeness inside the family and exclusion of those outside. This is the oppression of women by men through gender roles or, in this context, oppression coming from the unification of mothers and children under the guise of custody. At the root of Japanese judicial principles of visitation is the fundamental idea that if you do something the custodial parent dislikes, it will result in a negative effect on that parent’s custody of the child, thereby going against the welfare of that child.

This combination of the old idea of *engiri* following divorce and the new idea of the closed nature of the modern family has been used to sustain the Japanese system of sole custody. Going beyond just Article 819, it penetrates the entire Japanese custody system, including the tacit encouragement of formally adopting children after remarriage, a tolerance of taking away one’s children when beginning to live apart, and the restricted use of visitation.

¹⁹ In the United States, even cases like this would have schedules (mandated by the court) of three day, two night visitations every other week, or in cases with smaller children, twice a week visitations starting in the late afternoon and ending at bedtime with one overnight stay a week, accomplished with the mediation and support of specialists. A thorough and knowledgeable analysis of these problem visitation cases, and methods for overcoming these difficulties, can be found in JANET JOHNSTON, ET. AL., *IN THE NATURE OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE* (2009).

Of course, it goes without saying that the environment in which modern families operate has changed greatly since the era of the household system, and marriages out of romantic love are quickly supplanting the arranged marriages of old. Women are increasing their presence in the workplace, the average age of marriage is increasing, and birth rates are decreasing. At the same time, men are starting to take a more active role in raising children, and disputes over custody are becoming fiercer. In addition, the principle that the law should not enter the household is no longer absolute, as symbolized by domestic violence and child abuse laws. Our society has come to accept the intervention of the law to protect our rights when those rights are violated.

On top of this, as stated in the introduction, the divorce rate is rising, and it is estimated that one in four children will experience the divorce of their parents. The fact that a child's relationship with the noncustodial parent is severed for the convenience of the custodial parent is a violation of that child's rights that must not be ignored. Even the Japanese courts have recognized that it is theoretically best for a child to receive continued love and support from both parents following divorce. The problem is that this ideal cannot be realized when the custodial parent strongly protests. The law is weak.

During the era of *engiri* when divorce was considered to sever all ties, the law rarely intervened. All our society needed to do was place an emphasis on seriously discussing whether to separate, and plan accordingly based on that decision. However, people now expect the courts to ensure the right of the child to meet the noncustodial parent after divorce, and to provide regular and continuous visitation, not just isolated visits. Moreover, resistant custodial parents are increasingly asserting their rights. The weakness of the law seen here is that it just allows parents who happened to get custody over their children to have their own way.

The "post-divorce family" needs not only upbringing by the custodial parent, but also interaction between the child and the noncustodial parent and sufficiently smooth cooperation between the custodial and noncustodial parents in order to function. Without a tailored legal framework to facilitate these elements, visitation cannot continue.

There are three fundamental principles that arise when considering laws for the post-divorce family from the perspective that visitation is necessary. While each of these proposals references American law, Japan now sees divorce rates that rival those of the West, and in order for children to be brought up receiving the love of both parents even after divorce, it is necessary to learn from their advanced legal institutions.

B. *The Principle of Visitation*

The first perspective necessary for establishing visitation is the “principle of visitation.” A positive expression of this principle is found in California Family Code §3100(a), “. . . the court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child.” A similar view is expressed in Article 2 Paragraph 3 of the Convention on the Rights of the Child, of which Japan is a signatory, “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the best interest[s] of the child.” Both provisions recognize and protect the right of a parent and child to visitation (as a duty of the state) as long as it does not infringe on the best interest of that child.

If one were to just look at these two provisions, it would appear that the law in Japan is no different from the law in California. Even if it is not explicitly stipulated, visitation is a part of custody in Article 766, as has been established as a subject of adjudication in court decisions since the Tōkyō Family Court decision of December 14, 1964,²⁰ and the Supreme Court decision of July 6, 1984.²¹ In addition, it is widely accepted in everyday practice that well implemented visitation is beneficial for the healthy development and growth of a child. It is also established that visitation should only be restricted when it infringes on either the “best interest of the child” standard used abroad, or the “welfare of the child” system used here in Japan.

However, the difference is that in the United States, visitation is called a “right” and treated as such, with clearly defined rules and exceptions²²

It cannot be said that American jurisprudence does not contain any of the traits common to the Japanese system discussed above, such as respect for the custodial household and the avoidance of conflict, which cater to the

²⁰ Tōkyō Katei Saibansho [Tōkyō Fam. Ct.] Dec. 14, 1964, 17(4) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 55 (Japan).

²¹ Saikō Saibansho [Sup. Ct.] Jul 6, 1984, 37(5) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 35 (Japan).

²² [Translator’s Note] The author gives three examples of how the law has been applied in the United States that have been omitted from this translation. These cases are: *Devine v. Devine*, 213 Cal. App. 2d 549 (1963) (a noncustodial father has a right, subservient only to the child’s best interests, to reasonable visitation with his child, and this right should not be denied without cause.); *Radford v. Matczuk*, 223 Md. 483 (1960) (neither the adultery nor the arrest of the father for theft of government property were grounds for striking from divorce decree the previously granted right of father to visit his son who was now in his teens and who had been in custody of mother since birth); and *Shapiro v. Shapiro*, 54 Md. App. 477 (1983) (order denying former husband visitation with his child until psychotherapist should recommend otherwise was an indefinite suspension of visitation and an improper delegation of judicial responsibility, and was therefore improper). This discussion is omitted from the translation for brevity.

feelings of the custodial parent and consider the convenience of custody. But those that do exist only consider to what extent visitation directly harms the child.²³ Courts do not consider the will of the parent disguised as the will of the child, and bring the parties together to try to restore the family relationship even in the most difficult of cases.

The American system clearly defines the principle of visitation and what constitutes an exception to this principle by limiting such exceptions to situations that would directly harm the child. This direct harm is not the short-term “emotional burden of the child” as in Japan, but instead a limitation of visitation when it would truly negatively affect the long-term growth and development of the child to such a degree that it would overcome the importance of visitation. This is the principle of visitation.

C. *The Principle of Shared Parenting*

The second necessary element for effective visitation is the principle of shared parenting.

Statutes and case law in the United States often uses the term “reasonable visitation” when granting visitation rights. This is a type of open standard that depends on what is “reasonable” in that society at that point in time. However, when the parties are unable to agree on visitation, two nights and three days every other week is generally granted as a matter of right. Except in situations where the noncustodial parent has given voluntary consent, anything lower than this is impossible without some showing by the custodial parent that visitation would directly harm the child.

This reasonable visitation is in stark contrast to the standard in Japan of once a month or once every two months, sold by arbitrators as “common sense” and seen even in cases awarding visitation. Even these isolated visits are often no longer than two or three hours, and in particularly contentious

²³ *Larroquette v. Larroquette*, 293 So. 2d 628 (4th Cir. 1974) and *Marlow v. Marlow*, 702 N.E. 2d 733 (Indiana 1998) are cases that are commonly cited as examples of the court placing restrictions on visitation because of potential harm to the child. *Larroquette* dealt with a petition by the mother to restrict visitation with her eight-year-old daughter to one day a week from morning to ten o'clock at night because her daughter came home complaining that her father was making her sleep in the same bed as him and his “concubine” during visitations that lasted from Friday until Sunday. *Marlow* was a case where the father had his eight year old and five year old sons for overnight homestays, but the father was a homosexual, would often have his male partners stay over during visitation time, and took the children to homosexual events. Because of concerns that this would confuse the children, who had been given a conservative Christian education, the mother petitioned the court to place conditions on visitation so that the father would not be able to have his male partner stay at his home or take the children to homosexual functions. While both courts decided for the petitioner, they are controversial in the United States because the judge in *Larroquette* hid his moral views behind “the best interests of the child” and the *Marlow* decision was decided based on bias against homosexuals. However, neither decision completely prohibited visitation nor restricted it to two hours a month, but instead created conditions appropriate for the child's age and needs.

cases this visit must occur at a designated family center where only a formal meeting can take place. A noncustodial parent once told me jokingly, “all we did was walk the dog. We met at the park and it was over.” Why does Japan allow such meager visitation?

A parent cannot expect to enjoy lively interaction with a child, help raise the child, or have any impact on the child’s growth or character development through this “minimalist visitation.” Unless visitation is made to allow parents to form essential bonds with their children and provide them emotional support, the 250,000 children a year who lose contact with one of their parents will continue to live with the scar of their parents’ divorce their whole lives.

A half-century has passed since two-night, three-day visitation became commonplace in the United States. Japan must first catch up to this standard, but the United States is already continuing to move ahead. The State of California enacted the first joint custody law in 1980, and similar laws quickly spread across the whole country. While each state has enacted slightly different systems, California Family Code Article 3080 provides, “there is a presumption...that joint custody is in the best interest of a minor child...where the parents have agreed to joint custody,”²⁴ and Article 3081 provides that “on application of either parent, joint custody may be ordered in the discretion of the court.”²⁵

The current California statute refrains from creating a general presumption for joint custody, but grants courts discretion, including the decision to allow sole custody.²⁶ However, as stated above, the State proclaims that it is public policy to “assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing.”²⁷ Within the statutory definition of the best interest of the child, the court is required to take into account “[t]he nature and amount of contact with both parents,”²⁸ and in cases of sole custody, “which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent.”²⁹ It is clear that even in situations without full joint custody, the State has taken a

²⁴ CAL. FAM. CODE §3080 (2008).

²⁵ *Id.* §3081.

²⁶ *Id.* §3040(b).

²⁷ *Id.* §3020(b).

²⁸ *Id.* §3011(c).

²⁹ *Id.* §3040(a)(1).

position of having courts strongly support visitation under the belief that visitation resembling joint custody is in the best interest of the child.

This newly created view of the family is far removed from the traditional Japanese notion that divorce equals a total severance from the family and the modern notion that those on the inside of the family should be closed to those on the outside. Supporting this is the established practice in the courts for “reasonable visitation,” and a society that has been carrying out those post-divorce visitations. At the same time, even in the United States, societal changes such as the overwhelming increase in the divorce rate, the growing participation by fathers in the lives of their children, and the growing interest of society in the welfare and healthy development of children are also relevant. At the very least, it is no longer acceptable to consider it beneficial to sever a child’s relationship with the noncustodial parent in order to maintain the closed-off nature of the custodial family.

By this time, the work of Dr. Bowlby and his highly influential attachment theory have made it clear that the creation of a strong attachment to one’s parents, especially by small children, is decisively important for forming basic trusting relationships throughout one’s entire life. If that relationship is somehow severed, it will be a traumatic experience and the child will feel a strong sense of unease. In addition, this attachment is formed first with a child’s primary caregiver, but is also formed between a child and his or her father as the child develops. In most healthy families, a child has such an attachment to both parents.³⁰

If the father participates in rearing the child through activities like changing diapers, giving the child baths, and putting the child to bed, the father will soon form an attachment as a primary caregiver identical to the one formed between mother and child. Even without this level of participation, an attachment can form with only playing and spending time together. In particular, through the natural process of slowly growing

³⁰ Dr. Bowlby emphasized the importance of the primary attachment figure (the mother) in his original work, but subsequent research has shown that an attachment bond is formed between father and child in the early stages of development. Richard Warshak, *Social Science and Children’s Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L. Q. 83 (2000) is a criticism of Dr. Wallerstein’s report that looks at cases seeking to block the custodial parent from moving far enough away to make visitation difficult, where the author argues that this is the current consensus amongst psychologists regarding the attachment bond with the father.

Yet it is also true that a father’s bond is formed stronger and sooner through active participation in child-rearing. This issue arises in debates over whether it is appropriate for children to have overnight stays with their fathers, particularly between the ages of zero and two (or three). Fundamentally, overnight visitation is extremely beneficial for both parents and children in forming attachment bonds, however it is understood that it is necessary to have experience feeding the child and putting the child to bed while living together to make this possible. The Indiana guidelines that I introduced earlier were also created with this purpose.

independent from the mother and forming connections to the wider world, if the mother encourages the child's relationship with the father through words like "see, daddy's home," and "get a hug from daddy," then a healthy bond will form with both parents.³¹ Interacting with different people promotes the child's character development.

This textbook knowledge, based on the research and discoveries of countless American psychologists and psychiatrists, has changed societal attitudes and judicial practice, resulting in modern U.S. joint custody laws. However, this research has exerted no effect on the Japanese judiciary which still has few qualms about severing this valuable attachment relationship.

For a child, divorce severs these important attachment relationships, and our society must consider how to reduce the worries of the child and prevent divorce from becoming a traumatic experience. This is how we can best care for our children. Dr. Wallerstein's work, referenced above, also accurately captures with a psychiatrist's eye the unease and confusion experienced by a child before and after one parent leaves the home. A whole host of emotions emerge, such as fear, powerlessness, sadness, fantasies of reconciliation, worry for the parents, feelings of abandonment, comfort and sympathy from the parents, conflicts of loyalty when one parent seeks agreement in attacks on the other, anger toward their parents and, for younger children, guilt over blaming themselves for their parent's divorce. Children can also experience various forms of regression and psychological maladjustment.

The most helpful thing during this period of confusion is a guarantee that both parents will continue to serve as loving figures of attachment. Because of this, it is essential that visitation starts immediately following separation. This is the exact opposite of the common practice in Japan, where one parent will often strictly deny visitation, especially in situations where that parent took the child out of the home, because of a fear that the other parent will take the child back during visitation. Even after divorce conciliation has started, visitation is postponed, using the excuse that they cannot have visitation until the conciliation is finished, and then not until all the paperwork is finalized. Parents and children must be able to see each

³¹ Although in a slightly different context (same-sex marriage), courts generally evaluate whether the biological parent considers the other person to be the other parent, rather than a person who just helped to raise the child, in relation to the issue of whether to grant parental-like rights (visitation rights) to a de-facto parent. *Holtzman v. Knott (In re Custody of H.S.H-K)*, 533 N.W. 2d 419 (Wis. 1995). This shows that the formation of a parent-child attachment bond is being encouraged, especially within the structure of shared parenting. William B. Turner, *The Lesbian De Facto Parent Standard in Holtzman v. Knott*, 22 BERKLEY J. GENDER L. & JUST. 135 (2007).

other following separation as much as before, and to share quality time together. Only after this should conciliation start.

Together with the need to keep children from experiencing trauma associated with being cut off from a figure of attachment, it is necessary for children to continue to be raised and cared for by both parents, with whom they have an attachment relationship, until adulthood, in the same manner as normal households. Dr. Wallerstein analyzed the difficulties in raising children from the limited role of visitation, even if that visitation was continuous, and found that roughly 30% of fathers had maintained visitation that was meaningful for both parent and child five years after separation. Common among those 30% was a commitment to actively carry out their parenting responsibilities even in the role of visiting parent, and the parenting abilities to understand the needs of their children as they grew and to skillfully carry out their fatherly roles.

This is shared parenting with the participation of the noncustodial parent after divorce. While this cannot be expected from all post-divorce families, if we truly consider the welfare of the child, this must be the ideal goal. It has been pointed out that shared parenting, when carried out between divorced couples with a high level of conflict, can distress the children, especially older girls, because they are loyal to and sympathize with both parents, internalizing the conflict.³² However, most research as a whole shows that children adjust well when the relationship with the noncustodial parent is good, and that parent is actively involved in the children's schooling and daily life.³³

What is most important is for the noncustodial parent to have frequent and varied interactions with the child, with overnight stays being especially valuable psychologically for younger children. Cuddling, putting to bed,

³² Janet R. Johnson, et al., *Ongoing Post-Divorce Conflict in Families Contesting Custody*, in *JOINT CUSTODY & SHARED PARENTING* 183 (Jay Folberg eds., 2nd ed., 1991). Dr. Johnston conducted research with Judith Wallerstein, and is a professor of psychology at Stanford University. Since then she has worked as a clinical psychologist, making research on visitation and shared parenting in high conflict families her life's work. Here she analyzes hardship, and argues for using that hardship not as a reason to minimize visitation, but to mediate and lead toward shared parenting for the most benefit to the child through overcoming that hardship. Her book, *IN THE NAME OF THE CHILD*, was born out of this analysis. See JOHNSTON, ET. AL., *supra* note 19.

³³ While there is expansive research on this subject, the following are works that give an overview of many studies: Robert Bauserman, *Child Adjustment in Joint-Custody versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 *J. FAM. PSYCHOL.* 91 (2002); Christy M. Buchanan & Parissa L. Jahoromi, *The Best Interests of the Child: A Philological Perspective on Shared Custody Arrangements*, 43 *WAKE FOREST L. REV.* 419 (2008).

and comforting the child in the middle of the night are all important in building attachment relationships.³⁴

Some might think that this is nothing more than armchair speculation, and that a Japanese custodial parent would never allow this kind of relationship with the noncustodial parent. However, if we were to try it, like the story of Columbus and his egg,³⁵ the custodial parent could shoulder less of the parenting responsibilities, and the child may respect the custodial parent more, as has been seen in the United States. It has further been argued that, in shared parenting, communication between the parents is essential, and the noncustodial parent must also respect the custodial parent in order for positive interaction with the child to continue.³⁶ By putting the child first, shared parenting works to suppress the realization of animosity between the parents.

This is the principle of shared parenting that considers visitation after divorce.

D. *The Right to Form a Family*

The third and final principle for successful visitation is the “right to form a family.” This is somewhat controversial, even in the United States, where the right of parents to care for their children is considered to be a constitutionally-protected “right of the parent,” and all issues concerning the custody of the child are decided under the judicial standard of the “best interest of the child” in place of the “rights of the child.” In addition, there is the strong assertion centered in Europe that the Convention on the Rights of the Child must be interpreted as establishing visitation as a fundamental right of the child, and that signatories to the convention are obliged to protect this right.

The dispute over whether this is a right of the parent or a right of the child is a remnant from the period when parents exercised strong control over their children in the name of parental rights, with some arguing that such a viewpoint is unsuitable for the modern idea of the best interest of the child, and others, particularly in the United States, arguing against the

³⁴ Michael E. Lamb, *Improving the Quality of Parent-child Contact in Separating Families*, in PARENTING AFTER PARTNERING 11, 16-18 (M. Maclean ed., 2007).

³⁵ [Translator's Note] “Columbus’s egg” is an expression common in Japan used to describe a brilliant discovery that seems obvious to everyone after the fact. It comes from a story largely unknown in the United States, where Christopher Columbus made a wager that he would be able to make an egg stand on end. He won the bet by tapping the egg on the table, flattening one top so that it would stand upright. See JAMES BALDWIN, THIRTY MORE FAMOUS STORIES RETOLD (1905).

³⁶ Wayne Parker, *Making Joint Custody Work: Five Keys to Succeeding at Joint Custody*, <http://fatherhood.about.com/od/managingcustody/a/jointcustody.htm> (last visited July 26, 2009).

socialist notion that children were raised by the society as a whole. This comes from the era of the fights against Nazism and socialism, when there was a strong liberal ideological dislike of interference by the government in the family. This can be seen in cases like *Meyer v. Nebraska*,³⁷ which established the view that parental rights are constitutionally protected.³⁸

While I agree with those who advocate for the rights of the child, the legal approach toward visitation in Japan, which frames all matters of visitation following divorce as an issue of custody and refuses to grant parents a concrete right to seek visitation of their children has lost its sense of balance.³⁹ This has resulted in a system that claims to put the welfare of the child before everything else, and that society as a whole will raise the child. But as we have seen, the parental rights of the custodial parent are strangely strong, and with the law's weakness, in the end the reality in Japan works against the best interest of the child.

Rather, parents raising their children is fundamental in our society, and on account of the ideas that "the natural bond between parent and child is formed through parents doing whatever it takes to further the interests of their children" and that "it is necessary to protect these loving bonds from governmental interference," the right of parents to raise their children is provided constitutional protection. Deprivation of this right directly takes away from the parent the joy of parenting and depriving a child of their important attachment figure.⁴⁰ In terms of the Japanese Constitution, there is the right to the pursuit of happiness, but in the United States this is also

³⁷ 262 U.S. 390 (1923).

³⁸ Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights*, 33 FAM. L. Q. 815 (1999). This article argues that constitutional law cases regarding how much influence parents can have on state-mandated education concerning things such as education in an immigrant family's native language or in the Amish religion, under a liberal ideology, afford too much protection of a parent's independence in determining how they raise their children, making it difficult to always consider the best interest of child first.

³⁹ Even recently, an article entitled *Summary of Family Court Cases* arrives at the conclusion that "the Supreme Court has yet to clearly affirm whether a right to visitation exists." 60(1) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 62 (2008) (JAPAN). Even before determining whether it is a right of the parent or the child, the fact that the realization of visitation depends on the arbitrariness of the obligated custodial parent, who can avoid the noncustodial parent and treat the child like a piece of property, and if the custodial parent stubbornly refuses to engage in visitation, the parent can use reasoning such as "the stability of the custodial household," "a lack of trust," or "the will of the child" to accomplish this goal, goes to show visitation is "not a right" in Japan.

⁴⁰ *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1317 (1980). A representative case on this subject is *Stanley v. Illinois*, 405 U.S. 645 (1972). This is a case looking at the constitutionality of an Illinois decision ruling that an unmarried father had no custody rights over his child, and that the child would become a ward of the state following the death of the mother unless the father petitioned for custody and it was found to be in the best interest of the child. The Supreme Court overturned the decision, ruling that a father has an inherent right to raise his child that can only be overcome by an explicit showing by the state that the father is unfit to serve as a parent.

viewed as a privacy right (right of self-determination). This right to form a family has been given strong expression in constitutional jurisprudence, and stands alongside the right to interracial marriage, the right to abortion, and the right to same-sex marriage. While there is some conflict when looking at child rearing in the context of the family unit, modern families are becoming increasingly diverse, and it is becoming necessary to look at the issue of parental rights in the context of individuals rather than the family unit, creating this fusion with constitutional rights.

However, even as we espouse to respect the right to raise one's child, in circumstances concerning a dispute or loss of parental rights, with either a party seeking intervention into the family by the State, or the State intervening when it acknowledges illegal activity within a family, they cannot be swept away as just a liberty interest. Visitation is somewhere in between. While this can be seen as the parents asking for government intervention following a divorce, unlike the designation of custody, the right to raise one's child can be seen as simply acknowledging a parent's natural right. If this is true, then there is no need for government intervention.

In reality, even if there is conflict over custody, it is usually a one-sided attempt to prevent visitation; the true conflict comes down to the noncustodial parent asserting a parental right to raise the child against the custodial parent. As the court framed it in *Radford v. Matczuk*,⁴¹ the only issue was the parent's right to see the child, in short, exercising a right that existed from the beginning. This recognition forms the basis for the right of visitation in the United States.

While the right to visitation has been deemed a constitutionally-protected right, it is important to remember that the right may be restricted by other superior rights, and no one disputes that the state is able to restrict the exercise of those rights to protect the interests of the child.⁴² Also, agreements such as the Convention on the Rights of the Child, which recognize the right of a child to have regular contact and interaction with a noncustodial parent, are making progress throughout the modern world, subordinating the rights of the custodial household to the rights of the child. In this light, on the one hand, the right of a parent to have "reasonable visitation" is coming to be considered a parental right, and on the other hand, the child's "right to have frequent and continuous contact" with the

⁴¹ 223 Md. 483 (1960).

⁴² While the right to visitation has been afforded constitutional protection as a right to raise one's children, most states already have special protections for the noncustodial parent that allow visitation unless there are special circumstances that would pose some sort of threat to the child, making debate about the constitutionality of this right very uncommon. *Developments in the Law, supra* note 40, at 1332.

noncustodial parent is becoming more protected. Through this, the principle of visitation has grown alongside the principle of joint custody, becoming an institution in its own right.

At the same time, the right to raise one's child has gone from having the character of a freedom right to sharing an affinity with the principle of shared parenting. The parenting done by the noncustodial parent after divorce is no longer within the framework of the household. In order to view this as child-rearing too, it is necessary for us as a society to rearrange our notions of family and household. The individualistic nature of this freedom right makes this transformation possible.

Saying that family law is constitutional in nature is actually recognizing that it is not a law relating to the family as a whole, but to the familial relationships between individuals.⁴³ The family is nothing more than a collection of individuals bound together by familial relationships, and there is no reason why the family could not extend beyond the limits of the household.

This view of family is an important part of American visitation law. If the law were to categorize a family practicing shared parenting after divorce as a household, that category would need to exclude everything that fell outside, placing the important relationship between the noncustodial parent and child outside the protection of the law. From the viewpoint of the child, it would expose the important attachment relationship between the child and the noncustodial parent to potential interference by the custodial parent. The law counters this danger by protecting the right to form and maintain a relationship between the noncustodial parent and the child under the Constitution, the highest law in the land.⁴⁴

⁴³ *Id.* at 1160.

⁴⁴ The United States Supreme Court has recently decided a case where the father died and the grandparents petitioned for visitation, ruling that a Washington statute permitting "[a]ny person" to petition a superior court for visitation rights "at any time," . . . whenever "visitation may serve the best interest of the child" was too broad in scope and unconstitutionally restricted the right of a parent to rear his or her children. *Troxel v. Granville*, 530 U.S. 57 (2000). While familial relationships continue to expand beyond the household (the right of visitation for grandparents is now widely accepted), parents, including noncustodial parents, are given special weight in rearing their children. It has become a principle of constitutional law following *Stanley* that, when considering the concept of parental rights and "the best interest of the child," the state is excessively infringing on the right of the parents to rear their children when it gives an order that it believes to be good for the child regardless of the will of the parents.

While it is difficult to draw clear lines (even in this case the court did not completely deny visitation, instead ruling that the constitution required the will of the parent to be reflected in the frequency, method, and procedures of visitation), it has become necessary to consider new issues of regulating parental rights through a constitutional dimension, while addressing fundamental questions about the nature of families and dealing with the continued expansion of familial relationships beyond the household.

Recently, domestic violence claims by the custodial parent have been used to deny visitation, which is becoming a reason in itself to think of visitation as a right. While modern family law is sensitive to oppression within the family and must protect women who have been abused, the parent-child relationship must be maintained to the greatest extent possible. In order to delineate between these contradictory interests, while giving each the greatest amount of consideration possible, constitutional considerations cannot be overlooked. Sensitivity towards human rights is necessary, as in the least restrictive alternative principle in constitutional cases when deciding matters of human rights, and due process must be satisfied.⁴⁵ Simply denying visitation due to allegations of domestic violence without investigating the nature of that violence or the potential effect that it would have on visitation is too crude of a method for modern family law.⁴⁶

The right to form a family is the individual right to form familial relationships, existing within the framework of the household, while at the same time expanding beyond that framework. This idea has long existed in the United States, but has since come to the fore with constitutional protections as the freedom to choose one's lifestyle is respected and families become more diverse. As divorce becomes commonplace in our society, this legal framework can make possible the formation of post-divorce families that are not restrained to the bounds of the household, making it possible for children to maintain the love of both parents and overcome the difficulties of divorce.

⁴⁵ The California Family Code allows courts to mandate supervised visitation, a temporary suspension of visitation, or the prohibition of visitation when a protective order has been issued due to abuse or domestic violence and it is necessary to protect the best interest of the child. CAL. FAM. CODE §3100(b). In addition, in cases where domestic violence is alleged and an emergency protective order has been issued, conditions can be placed on the manner of transfer of the child so as to limit the child's exposure to potential domestic conflict or violence. *Id.* §3100(c). Finally, the court can only issue an order not only when there was violence in the past, but also when there is fear of future physical or emotional damage. *Id.* §6321(b).

⁴⁶ Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAMILY COURT REVIEW 500 (2008) (a recent psychological study looking at different categories of domestic violence and its relation to visitation).