

# BARGAINING IN THE SHADOW OF CHILDREN'S VOICES IN DIVORCE CUSTODY DISPUTES: COMPARATIVE ANALYSIS OF JAPAN AND THE U.S.

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*This paper discusses the social impact of hearing children's wishes in judicial procedures for divorce custody disputes by comparing the different legal systems in Japan and the U.S. In particular, through a plain law and economics approach with the analytical framework of "Bargaining in the Shadow of the Law" suggested by Mnookin and Kornhauser (1979), this paper discusses the backlash to parents' bargaining outside the court by empowering children to be heard in court.*

*There has been a child advocacy movement in Japan to empower children's participation right in the judicial procedures in accordance with the UN Convention on the Rights of the Child, and the act for family court procedure was reformed in 2013 accordingly. However, this paper argues: (i) in general, the more the legal system empowers children's right to be heard in the judicial procedure, the less opportunity children will have to be heard in society (i.e., during the parents' negotiations outside the court); and (ii) particularly under the unique Japanese divorce system, the 2013 reform would hinder the social change to empower children in society—children would rather lose their opportunity to be heard outside the court. In order to really empower children in society, society should not only grant children procedural rights in court but also substantive rights regarding their parents' divorce.*

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## I. INTRODUCTION

Imagine you are a child and your parents decided to separate. Sadly, today is the day your dad is moving out of the house. You really, really wanted to live with your dad, but your parents eventually decided that your mom would take you. Your parents didn't even ask you anything when making this decision. Your mom is super crazy about you, and it seems your dad couldn't convince her although he also desired to have you. How would you feel?

This paper discusses the impact of hearing children's wishes in judicial proceedings for child custody disputes upon divorce, comparing Japan and the U.S. When divorcing parents have minor children, it is necessary for them to determine which parent takes post-divorce custody of their children (more precisely, custodial duties towards and rights with regard to their children). For many parents, children are what matters the most to them, and thus, the issue of child custody frequently turns out to be an important and serious dispute upon divorcing.

However, the main focus of this paper is not the direct effect of children's wishes on judges' decisions in legal procedures. Instead, through a plain law and economics approach, this paper focuses on (i) how divorcing parents' informal bargaining behaviors and negotiations *outside* the court would be affected, and (ii) how those parents' negotiations would differ under each legal system to hear children's wishes. Systematic differences in the legal systems between Japan and the U.S. should have a certain impact on divorcing parents' negotiations. This paper actually intends to highlight potential backlash effects of hearing children's wishes in judicial procedures on society *outside* the court.

The key argument of this paper is that parents might end up giving children less opportunity to express the children's own views during the parents' negotiations *outside* the court even if children's formal rights to express their wishes *inside* the court were more empowered. In particular, the risk of such backlash might be higher under the Japanese divorce system where parents may divorce without any involvement from the court.

A. *Background*

Currently, there is a worldwide consensus that children should be treated as rational human beings, not just as the property or

possession of the parents. As the recently minted word “childism” indicates,<sup>1</sup> some people began to view discrimination against children as serious as discriminations based on race or gender. Also, the worldwide movement of empowering children has been gradually growing. The General Assembly of the United Nation (the “UN”) adopted the Convention on the Rights of the Child (the “UNCRC”) in 1989, which has been widely ratified by every member nation of the UN except for Somalia, South Sudan, and the U.S. Also, in 2006, the UN made a resolution<sup>2</sup> to re-emphasize that the UNCRC “must constitute the standard in the promotion and protection of the rights of the child.”

The UNCRC suggests three different types of children’s rights, often called “three P’s”: (i) Protection from exploitation and abuse/neglect; (ii) Participation in society and the decision-making processes that affect the children’s interests; and (iii) Provision of assistance for survival and development.

Hearing children’s wishes in judicial proceedings, the focus of this paper, is within the scope of the Participation right. Article 12 of the UNCRC provides a specific suggestion on this issue. Children shall have the right to express their views in society (Paragraph 1), and in particular, shall have the opportunity to be heard in the judicial procedures (Paragraph 2).

Article 12 (emphasis added):

1. States Parties shall assure to the child who is capable of forming his or her own views *the right to express those views freely in all matters affecting the child*, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, *the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child*, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Each ratified nation is required to design its own judicial procedures in accordance with this UNCRC suggestion. Thus, designing legal systems to hear children’s wishes is now quite a universal issue. As for divorce custody cases, children’s wishes, preferences,

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<sup>1</sup> ELISABETH YOUNG-BRUEHL, *CHILDISM: CONFRONTING PREJUDICE AGAINST CHILDREN* (2012). Young-Bruehl, a psychologist, first used the word “childism,” and discussed abuse and neglect from the perspective of prejudice against children.

<sup>2</sup> G.A. Res. 61/146, U.N. Doc. A/RES/61/146 (Dec. 19, 2006).

views, and opinions regarding custodial parents should be heard in relevant judicial procedures.

## B. *Scope*

### 1. Children's Right to be Heard

This paper takes a stand that it is essential for our society to empower children's right to be heard, as embodied in the UNCRC.<sup>3</sup> The focus of this paper is on this particular right of children.

On the other hand, detailed discussions about the rights or interests of parents are beyond the scope of this paper. For example, it is said that hearing children's wishes might count against gay and lesbian parents in the custodial disputes.<sup>4</sup> Also, from a paternalistic perspective, some people underline psychologically negative impacts of hearing children's wishes.<sup>5</sup> But I will save those discussions for another occasion.

### 2. Divorce Custody Disputes

Divorce custody cases are an exceptionally good opportunity to discuss children's wishes. Children are required to express their own wishes independently from their parents, since the situations require that a child choose one of two parents. This is different from situations such as school choice, where children and the parents make the choices jointly.

Second, divorce custody cases are a good opportunity to discuss the impact of children's voices to the involving actors' behaviors. As described in Section I-C below, it would be worth analyzing the parents' negotiations *outside* the court in the divorce custody case.

To be precise, this paper analyzes divorcing parents' bargaining in a case where both parents are willing to take custody—the

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<sup>3</sup> This paper does not intend to make a detailed argument in this regard. But, considering children's ability to adapt to a changing environment is higher than that of adults in general, I think we should listen to children in this rapidly changing society. Our next generation should have the right to express its views.

<sup>4</sup> Kirsten Lea Doolittle, Note, *Don't Ask, You May Not Want to Know: Custody Preferences of Children of Gay and Lesbian Parents*, 73 S. CAL. L. REV. 677 (2000).

<sup>5</sup> See, e.g., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 cmt. f. (AM. LAW INST. 2002), which highlights the concern that "children may feel responsible for the outcome of a custody dispute if they believe they have participated in its resolution."

majority case for divorce custody disputes.<sup>6</sup> If only one of the two parents wanted to take custody, no substantial dispute would arise over child custody. If none of the two parents was willing to take custody, child custody arrangements would be of issue, but these kinds of cases are in the minority.

### 3. Japan and the U.S.

This paper focuses on two countries, Japan and the U.S., whose legal systems concerning divorce are systematically different from each other. Thus, hearing children's wishes has differing impacts on these countries' societies. This paper mainly discusses the Japanese context, comparing it to the state of the law in the United States.

#### C. *Significance of Study*

This study is significant in three contexts: (i) the context of children's empowerment; (ii) the context of divorce disputes; and (iii) the context of Japan.

First, in the context of children's empowerment, even though the worldwide movement to empower children and to respect children's participation rights has been growing as described above, there has been a lack of attention to the *outcome* and *social impact* of empowering children's participation rights. How would it affect society and other adults if children were heard; and vice versa, how should children be heard if you consider its impact on society? If children's voices were to be heard in a decision-making or a dispute-resolution procedure, their voices would not only be reflected directly in decisions (i.e., the judge would take into account children's voices when making the judgment), but also might change behaviors and strategies of other actors involved (i.e., the strategies of divorcing parents would change). While advocating for children's conceptual "rights" themselves is important, it is also critically important to discuss the social outcome and impact of hearing children in the legal system. This study offers a discussion from this new perspective.

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<sup>6</sup> For example, in a study conducted in California, 82.2% of mothers wanted to obtain sole physical custody of the children, while a total of 67.9% of fathers wanted to have sole (32.5%) or joint (35.4%) physical custody. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 98–100 (1992).

Second, in the context of divorce disputes, this study offers a new discussion highlighting the relationships between children's wishes and parents' bargaining. In a number of previous studies discussing child custody standards and reforms, a few have cast a spotlight on the role of children's wishes.<sup>7</sup> But none of those studies discussed the effects on parent-bargaining behavior. Considering the fact that parents themselves have broad discretion to determine their post-divorce rights and duties both in Japan and the U.S.,<sup>8</sup> it is necessary to analyze the impact on the parents' negotiations *outside* court when improving the legal system for divorce disputes.

Robert Mnookin and Lewis Kornhauser<sup>9</sup> started the discussion about divorcing parents' bargaining in the shadow of the law. Over the past thirty years, after their article, several studies have discussed divorcing parents' bargaining in the shadow of the law, but none of them really focused on the role of children's wishes.<sup>10</sup> In these thirty years, children's rights have begun to be recognized more explicitly under the UNCRC. Today, it is essential to include the role of children's wishes in the discussion in order to understand divorcing parents' bargaining *outside* the court in a more elaborate way.

Third, this study offers a new discussion emphasizing systemic differences between the legal systems in Japan and the U.S., and how those differences might affect parents' divorcing negotiations. As described in Section II-A below, practices and discussions about how to hear and value children's wishes in the legal system are yet to be developed in Japan. This comparative study would

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<sup>7</sup> E.g., Randi L. Dulaney, *Children Should be Seen and Heard in Florida Custody Determinations*, 25 NOVA L. REV. 815 (2001); Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629 (2003); Rebecca Hinton, Comment, *Giving Children a Right to be Heard: Suggested Reforms to Provide Louisiana Children a Voice in Child Custody Disputes*, 65 LA. L. REV. 1539 (2005); Jacqueline Clarke, *Do I Have a Voice? An Empirical Analysis of Children's Voices in Michigan Custody Litigation*, 47 FAM. L.Q. 457 (2013).

<sup>8</sup> See *infra* Sections II.A.1 and II.B.1.

<sup>9</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>10</sup> E.g., Randy Frances Kandel, *Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation*, 48 S.C. L. REV. 441 (1997); Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, Q.J. ECON. 121, 267 (2006); Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 L. & CONTEMP. PROBS. 177 (2014).

help reveal characteristics of the Japanese legal system and the system's impact on divorcing parents in Japanese society.

I hope this paper will help improve the legal systems for divorce disputes and start discussions about redesigning the legal and social system around children's voices in Japan, the U.S., and other countries.

#### D. *Composition*

First, in Section II, I will overview (a) the legal systems for divorce and (b) the current role of children's wishes in Japan and the U.S. respectively. Then, in Section III, I will suggest two behavioral models for divorce negotiations, and examine them by reviewing both quantitative (a survey report) and qualitative data (biographies) in Japan. Section IV will offer the main argument; it conducts a theoretical analysis of the impact of hearing children in divorce custody disputes based on a concept of bargaining in the shadow of the law. Lastly, in Section V, I will conclude this paper's discussion and offer policy recommendations.

## II. LEGAL SYSTEMS IN JAPAN AND THE U.S.

In this section, I overview the role of children's wishes in the legal systems for divorce in Japan and the U.S.

### A. *Japan*

#### 1. Japanese Legal System for Divorce

Before focusing on children's wishes in the legal system, I would like to briefly summarize the Japanese divorce system in general. Compared to other countries, the Japanese system is unique in two respects: (i) divorce by mutual agreement; and (ii) no joint custody.<sup>11</sup>

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<sup>11</sup> See ATSUSHI OMURA ET AL., *HIKAKU KAZOKU HO KENKYU* [COMPARATIVE STUDY OF FAMILY LAW] (2012); FUMIO TOKOTANI & ATSUSHI MOTOYAMA, *SHINKEN HO NO HIKAKU KENKYU* [COMPARATIVE STUDY OF CUSTODIAL RIGHTS] (2014). For criticism of the Japanese system, see also Matthew J. McCauley, Comment, *Divorce and the Welfare of the Child in Japan*, 20 PAC. RIM L. & POL'Y J. 589 (2011).

i. *Kyogi Rikon* (Divorce by Mutual Agreement)

The most unique quality of divorce law in Japan is that a decree from court is not required to effectuate a divorce. Couples themselves may decide any conditions by mutual agreement, including issues related to their children (i.e., child custody, visitation, and child support) without going to or filing anything with a court. Once divorcing couples agree to a divorce and its conditions, they just go to a municipal office, where they are required to submit a divorce notification form in order to revise their family registration record. This type of divorce, called *kyogi rikon* (divorce by mutual agreement), comprises approximately ninety percent of divorce cases (87.3% in 2013<sup>12</sup>) in Japan.

ii. *Saiban Rikon* (Divorce at Court)

However, if couples cannot agree to the divorce or divorcing conditions, they go to a family court to resolve their disputes. Those cases are called *saiban rikon* (divorce at court—12.7% in 2013<sup>13</sup>). All the cases at the court first go to the conciliation procedure (*chotei*), which is a mandatory procedure,<sup>14</sup> and in which two part-time mediators employed by the court (and sometimes one professional judge) facilitate couples to reach an agreement. Most court cases are successfully resolved at this conciliation stage (ten percent in 2013<sup>15</sup>).

If couples still fail to reach an agreement through the conciliation procedure, they file a lawsuit for divorce with the family court (*sosho*). This is officially a separate legal procedure from the conciliation procedure (*chotei*), but there is *de facto* continuity in practice: the judge usually handles the court proceedings based on the judicial record of the conciliation procedure.<sup>16</sup> These cases are approximately three percent of all divorce cases. Once they file a lawsuit, half of the cases are resolved by a court's adjudication (1.2% in 2013<sup>17</sup>) while another half are resolved by a settlement (1.5% in 2013<sup>18</sup>).

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<sup>12</sup> KOSEI RODO SHO [MINISTRY OF HEALTH, LABOR, AND WELFARE], JINKO DOTAI TOKEI [DEMOGRAPHIC REPORT] (2014).

<sup>13</sup> *Id.*

<sup>14</sup> Kaji Jiken Tetsuzuki Ho [The Domestic Relations Case Procedure Act], Law No. 52 of 2011, art. 257 (Japan).

<sup>15</sup> SHO, *supra* note 12.

<sup>16</sup> In small courts in rural areas, even the judge in charge would be the same person as the one in charge of the conciliation procedure.

<sup>17</sup> SHO, *supra* note 12.

<sup>18</sup> *Id.*



### iii. Sole Custody

Another unique quality in Japan is joint custody of the child after divorce is not permitted. A parent with a sole legal custodial right (*shinken*) must be identified for each child, regardless of whether parents divorce by *kyogi rikon* or *saiban rikon*.<sup>19</sup> This is grounded in the traditional idea that divorced parents cannot jointly and amicably take care of their children.<sup>20</sup> Ordinarily, the parent who takes the legal custody (*shinken*) would also take the physical custody (*kangoken*) of the children.<sup>21</sup>

## 2. Children's Wishes in Japanese Legal System

### i. Rights to Express Wishes

In accordance with the UNCRC (see Section I-A above), there is a movement in Japan to empower children's participation rights in the judicial procedures. A new Japanese act (Kaji Jiken Tetsuzuki Ho [The Domestic Relations Case Procedure Act], hereinafter the "Act"), which reformed family court procedures significantly, was enacted in 2011 and took effect in 2013. In order to be consistent with the UNCRC, children's participation rights in family court are stipulated in four ways under the Act: (A) through (D) below.<sup>22</sup>

(A) Regarding the child at the age of fifteen and older, "the family court must hear statements from the child" when the court makes an adjudication.<sup>23</sup> This provision was actually not new to divorce custody cases; the same provision existed before the new Act took effect in 2013.<sup>24</sup> Specific ways to hear the child are not clarified in the Act, and it is considered that a variety of ways would be acceptable, such as: (i) direct hearing by the judge; (ii) hearing or examination by a family court research official (*katei*

<sup>19</sup> MINPO [Civ. C.] art. 819, paras. 1–2 (Japan).

<sup>20</sup> YUKO MIZUNO, RIKON CHOTEI / RIKON SOSHO [DIVORCE CONCILIATION & DIVORCE LITIGATION] 142 (Kenichi Akitake & Kentaro Oka eds., rev. ed. 2013).

<sup>21</sup> It is not prohibited to divide legal custody and physical custody between two parents, but such an arrangement is unusual in practice. See MINPO [Civ. C.] art. 766, paras. 1–2 (Japan).

<sup>22</sup> OSAMU KANEKO, ICHIMON ITTO KAJIJKEN TETSUZUKI HO [Q&A: THE DOMESTIC RELATIONS CASE PROCEDURE ACT] 34 (2012).

<sup>23</sup> Kaji Jiken Tetsuzuki Ho [The Domestic Relations Case Procedure Act], Law No. 52 of 2011, art. 152, para. 2 (Japan).

<sup>24</sup> But, the Act newly expanded the scope of this provision to the cases of termination of parental rights. To be specific, the family court was not obliged to hear children's wishes in termination of parental rights before 2013, but now the family court must hear children's wishes.

*saibansho chosakan*);<sup>25</sup> (iii) written statement submitted from the child; and (iv) inquiry in writing.<sup>26</sup>

(B) Even regarding children not reaching the age of fifteen, the family court “shall endeavor to understand the intentions of the child . . . , and to take the child’s intentions into consideration in adjudicating the case, according to the child’s age or degree of development.”<sup>27</sup> Even though this was not a significant change in practice, it was the Act that first stipulated this clearly in the law.

(C) As long as the child is considered to have basic mental capacity (usually at the age of ten), the child may participate in the child custody case as an “Interested Party,” independent from the parents, and the child him or herself may perform procedural acts without having any legal representative, such as his or her parent, guardian, attorney, and guardian *ad litem*.<sup>28</sup> By participating as an “Interested Party,” the child can state his or her own views before the court. This was new to Japanese family courts.

(D) As for the child’s participation as an “Interested Party,” the family court may appoint an attorney as counsel for the participating child, upon the request of the child or at the discretion of the court.<sup>29</sup> This was also very new to the Japanese legal system. Before 2013, there was no formal system for children to be directly represented by attorneys in the judicial procedures except for juvenile delinquent or criminal cases.

While (A) applies only to *sosho* (the adjudication procedure) and does not apply to *chotei* (the conciliation procedure), (B), (C), and (D) apply to *chotei* as well as *sosho*.<sup>30</sup>

## ii. Role of Children’s Wishes

Now, the family court system in Japan secures children’s procedural right to express their own wishes and views in child custody cases. However, the Act did not stipulate how the court should value expressed children’s wishes, and this is still left open. Two

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<sup>25</sup> Family court research officials (*katei saibansho chosakan*) are experts in child psychology, development, and education, who conduct research and examinations for judges. Normally, each case at the family court is assigned to one judge and one (sometimes two) research official(s).

<sup>26</sup> OSAMU KANEKO, CHIKUJO KAISETSU KAJI JIKEN TETSUZUKI HO [COMMENTARY ON THE DOMESTIC RELATIONS CASE PROCEDURE ACT] 492–93 (2013).

<sup>27</sup> Kaji Jiken Tetsuzuki Ho [Domestic Relations Case Procedure Act], Law No. 52 of 2011, art. 65 (Japan).

<sup>28</sup> *Id.* at arts. 151 & 42.

<sup>29</sup> *Id.* at art. 23.

<sup>30</sup> *Id.* at art. 258, para. 1.

opposing positions were discussed upon the enactment of the Act, but the discussion has been inconclusive.<sup>31</sup>

One position was to treat children's wishes as one of numerous factors to help the court determine the best interests of the children when deciding the custodial parent. It is said that court practices have primarily taken this position before and after the enactment of the Act.<sup>32</sup> To be specific, the court exercises discretion to determine the best interests of the child through a holistic review of all factors such as: (i) factors of parents, including parents' capacity for custody, mental and economic environment, living environment, educational environment, parents' attachment to the child, previous custodial circumstances, assets, and support from other relatives; and (ii) factors of child, including age, sex, physical and mental maturity, adoption to environment, adoptability to new environment, *child's wish*, attachment to parents and relatives.<sup>33</sup>

The weight of a child's wish depends on the child's age. Because children around the age of ten are considered to have the basic mental capacity to declare their own intent in Japan, it is said that courts tend to respect the wishes of children at the age of ten or older when those wishes are clearly expressed. On the other hand, the court would not always respect the wishes of children below the age of ten.<sup>34</sup>

Another approach, promulgated mainly by child-advocate attorneys, was to give children the rights to make a decision, and to support children in the exercise of such rights. In other words, children's wishes and choices are considered to be a controlling and decisive factor in deciding the custodial parent.

<sup>31</sup> Homusho, [Ministry of Justice], Hosei Shingi Kai—Hishojiken Tetsuzuki Ho / Kaji shinpan Ho Bukai Kaigi Gijiroku [Legislative Council—Working Group for Act of Procedure in Non-Contentious Matters / the Domestic Relations Case Procedure Act: Mins. (2009–10) at the 9th and 27th meetings]; HIROSHIGE TAKATA, KAJIJIKEN Tetsuzuki Ho: Riron Kaishaku Unyo [the Domestic Relations Case Procedure Act: Theory, Interpretation and Practice] 242–54 (2014) (Japan).

<sup>32</sup> Family court's adjudications are rarely publicized. Consequently, it is difficult to grasp the family court practice and ruling in Japan. A common way to learn the family court practice is to review commentaries written by judges. See *infra* note 33.

<sup>33</sup> MIZUNO, *supra* note 20, at 143–45; MASAOKI MATSUBARA, KASAI NI OKERU KO NO SHINKENSHA / KANGOKENSHA WO SADAMERU KIJUN [CRITERIA FOR DETERMINING CHILD CUSTODY AT FAMILY COURT], FUFU / OYAKO 215 DAI [215 QUESTIONS FOR MARRIED COUPLES / PARENTS AND CHILDREN] (Aiko Noda & Yasuko Hitomi eds., 1991).

<sup>34</sup> MIZUNO, *supra* note 20, at 145; SHUHEI NINOMIYA & FUJIKO SAKAKIBARA, RIKON HANREI GAIDO [DIVORCE CASES GUIDE] 201–02 (2d ed. 2005).

Even though current court practice in Japan has adopted the first position (a non-controlling factor to determine the best interests of the child), this practice may shift in the near future to the second position (a controlling factor based on the child's right to choose), given the general movement in Japan to empower children's rights.

## B. *U.S.*

### 1. U.S. Legal System for Divorce

Divorce and child custody are intrinsically state law issues. Legal systems vary from state to state. However, generally, parents in the U.S. are required to obtain a decree from court when divorcing. In other words, courts reserve the legal authority to determine all the conditions of divorce, including child custody, visitation, and child support. Having said that, in practice, the court usually acknowledges the conditions agreed upon by the parties. In most divorce cases, once parents file a form with the court specifying the divorce conditions agreed, the court would issue a decree in accordance with the form submitted. To be specific, Section 306 of the Uniform Marriage & Divorce Act of 1970 (amended in 1971 and 1973) (the "UDMA") has suggested the "unconscionable" standard: the court shall issue a divorce decree unless the court finds the agreement "unconscionable."<sup>35</sup> Parties also may choose to merge the provisions of divorce agreement into the decree or not.<sup>36</sup> Therefore, divorcing parents themselves have a certain *de facto* discretion to determine the divorce conditions.<sup>37</sup>

Also, joint custody is widely adopted in the U.S. Some states have introduced a system to divide child custody into legal custody and physical custody.

### 2. Children's Wishes in U.S. Legal System

Despite the fact that the U.S. has not ratified the UNCRC, children's wishes are indeed playing an important role in the U.S.

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<sup>35</sup> This "unconscionable" standard has been actually adopted in several states such as Colorado (COLO. REV. STAT. § 14-10-112 (2015)), Kentucky (KY. REV. STAT. ANN. § 403.180 (West 2015)) and Missouri (MO. REV. STAT. § 452.325 (2015)). Other standards are such as the "unfair" standard adopted in Arizona (ARIZ. REV. STAT. ANN. § 25-317 (2015)).

<sup>36</sup> As for the practice and the effects, see, for example, JAMES DWYER, *FAMILY LAW: THEORETICAL, COMPARATIVE, AND SOCIAL SCIENCE PERSPECTIVES* 686 (2012).

<sup>37</sup> This is so called "private ordering." See Mnookin & Kornhauser, *supra* note 9.

legal system for divorce custody.<sup>38</sup> First, I will overview the relevant cases of the Supreme Court of the United States. Then, I will summarize how the roles of children's wishes have been considered in state court cases.

### i. Supreme Court of the United States

There has been no Supreme Court case directly addressing the role of children's wishes in divorce custody. However, children's voices in broader contexts have been discussed in some cases. Although the issue of children has mostly appeared as conflicts between parents (i.e., parents' rights to control their children's upbringing) and state intervention (i.e., *parens patriae*),<sup>39</sup> children's voices were mentioned in the three cases below.

*Yoder*<sup>40</sup> was a case where three Amish parents were convicted, under the state compulsory school attendance statute, for not sending their children to school. The majority opinion delivered by Chief Justice Burger took the position of not considering children's wishes because (i) it was the conflict between the State and the parents and (ii) the children were not parties to the litigation. However, in his dissenting in part opinion, Justice Douglas insisted the importance of hearing their children's wishes on whether or not they prefer to attend school:

[A]s the child has no other effective forum, it is in this litigation that his rights should be considered. And if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections . . . . [O]n this important and vital matter of education, I think the children should be entitled to be heard.<sup>41</sup>

Another case was *Prince*,<sup>42</sup> a case where the custodian of a nine-year-old girl was convicted under state child labor laws for

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<sup>38</sup> Historically, the legal standards for divorce custody in the U.S. have changed largely. The custody rule was simple in the early nineteenth century: the father was entitled to child custody (the paternal-preference standard). Later, the rule shifted to the maternal-preference standard in the twentieth century. Then, up to the present, the gender-neutral "best interests of the child" standard spread in the U.S., under which children's wishes began to be taken into account. For the history, see Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 232–37 (1975).

<sup>39</sup> See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>40</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>41</sup> *Id.* at 242–44.

<sup>42</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

letting a girl sell religious magazines on the street. The majority opinion delivered by Justice Rutledge admitted the broad authority of the state to regulate children's activities and sustained the state laws, reducing this case "to the question whether the presence of the child's guardian puts a limit to the state's power."<sup>43</sup> But Justice Murphy, in his dissenting opinion, attached weight to the girl's wishes and religious freedom after examining the result of the girl's testimony, and insisted that the state laws cannot be sustained. Murphy stated, "it is undisputed, furthermore, that she did this of her own desire and with appellant's consent. She testified that she was motivated by her love of the Lord and that He commanded her to distribute this literature; this was, she declared, her way of worshipping God."<sup>44</sup>

The third case was *Michael H.*,<sup>45</sup> which featured a dispute over the visitation rights between a man who was the putative natural father (ninety-eight percent probability according to a blood test) of the child and a man who was the husband of the mother. The plurality opinion delivered by Justice Scalia highlighted the importance of the family unit established by marriage, denied dual fatherhood, and denied visitation rights of the putative natural father. In this case, the child herself (through her attorney and guardian *ad litem*) was also a party to the litigation, and claimed that she had a due process right to maintain full filial relationship with both of the two men. However, no Justice really focused on the role of the child's wish. The plurality opinion just stated the child's due process challenge was "if anything, weaker than" the putative natural father's, and rejected the argument of dual fatherhood.<sup>46</sup>

To sum up, the Supreme Court has been very reluctant to discuss the role of the children's wishes. *Yoder* avoided considering children's wishes by strictly limiting the scope of the case to parents' rights. *Prince* switched the focus to whether the presence of the child's guardian puts a limit to the state's power. Also, *Michael H.* primarily focused on the rights of the putative natural father even though the child herself was a litigating party as well.

On the other hand, the Supreme Court has still left a huge room for discussion over the role of the children's wishes in the

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<sup>43</sup> *Id.* at 169.

<sup>44</sup> *Id.* at 172.

<sup>45</sup> *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>46</sup> *Id.* at 130.

judicial procedures.<sup>47</sup> Considering there have been some Justices like Douglas (in *Yoder*) and Murphy (in *Prince*) who insisted the importance of children's wishes, the Supreme Court might decide to give significant weight to the role of children's wishes in the future if a suitable case was presented.

## ii. State Courts

There have been abundant court cases addressing custody in each state, and state courts usually do consider children's wishes in some way. State court cases can be roughly categorized into two different groups: (a) those that view children's wishes as a non-controlling factor and (b) those that view children's voices as a controlling factor. The view of children's voices as non-controlling factor can be further classified into: (a-1) a non-controlling factor having great weight; (a-2) one of numerous non-controlling factors; and (a-3) the last factor to be considered.<sup>48</sup>

### a. Non-controlling factor

The prevailing position of state courts is to treat children's wishes as one of the factors to be considered, but not as the controlling factor, as long as the children are of sufficient age and capacity of exercising rational judgment. This view is adopted by the UDMA as well. Section 402 of the UDMA explicitly stipulates that child custody shall be determined in accordance with the best interests of the child. Then, it further suggests "[t]he wishes of the child as to his custodian" as one of the five major factors to be considered by the court.<sup>49</sup> Section 2.08 of ALI's Principles of the Law of Family Dissolution takes a more cautious view<sup>50</sup> toward children's wishes, but it still recognizes matured children's "firm and reasonable preference" as a factor to be considered.

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<sup>47</sup> Please note that *Michael H.* shall not be construed to limit the role of children's wishes on the divorce custody issue. *Michael H.* was not a case where the child's choice between two persons/parents was the issue. It was a case where the child insisted on having both of the two persons as fathers rather than choosing one of them.

<sup>48</sup> D. W. O'Neill, *Child's wishes as factor in awarding custody*, 4 A.L.R. 3d 1396 (1965).

<sup>49</sup> Other factors listed by the UDMA are: (1) the wishes of the child's parent or parents as to his custody; (2) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (3) the child's adjustment to his home, school, and community; and (4) the mental and physical health of all individuals involved. But, it should also be noted that the court shall consider "all the relevant factors," not limited to these five factors, under the UDMA.

<sup>50</sup> See *supra* note 5.

At least the courts in the following states have explicitly taken this position: Alabama, Alaska, Arkansas, California, Florida, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming.<sup>51</sup>

However, the weight given to children's wishes as a non-controlling factor varies by court. Some courts give children's wishes significant weight (heavier than other factors) and others do not.

One view, (a-1), is that children's wishes are entitled to great weight even though they, standing alone, are not a controlling factor. For example, in New York, the Supreme Court of Orange County stated, "while the express wishes of the children are not controlling in determining whether to modify custody, *they are entitled to great weight*, after consideration of the age and maturity of the children and the potential for influence having been exerted on the children" (emphasis added).<sup>52</sup> Some states, including California and Hawaii, have a statute giving children's wishes "due weight."<sup>53</sup>

Another view, (a-2), is that the trial courts have broad discretion in determining children's custody in the best interests of the children, and the children's wishes are a factor, just like many other factors, to be considered under such a broad discretion. For instance, in Alabama, the State Supreme Court has established a list of factors trial court may consider:

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<sup>51</sup> From the state court cases listed in O'Neill, *supra* note 48. *E.g.*, Heyat v. Rahnamaei, 127 So. 3d 1209, 1223 (Ala. Civ. App. 2013); Helen S.K. v. Samuel M.K., 288 P.3d 463 (Alaska 2012); Mathews v. Schumacher, 375 S.W.3d 31 (Ark. Ct. App. 2010); *In re* Patrick S. III, 160 Cal. Rptr. 3d 832 (Cal. Ct. App. 4th Dist. 2013); Schweinberg v. Click, 627 So. 2d 548 (Fla. Dist. Ct. App. 5th Dist. 1993); *In re* Marriage of Balzell, 566 N.E.2d 20 (Ill. App. Ct. 3d Dist. 1991); Baxendale v. Raich, 878 N.E.2d 1252 (Ind. 2008); McKee v. Dicus, 785 N.W.2d 733 (Iowa Ct. App. 2010); Penn v. Penn, 28 So. 3d 304 (La. Ct. App. 2009); Karanikas v. Cartwright, 61 A.3d 69 (Md. 2013); J.F. v. J.F., 894 N.E.2d 617 (Mass. App. Ct. 2008); Fletcher v. Fletcher, 504 N.W.2d 684 (Mich. Ct. App. 1993); Lundell v. Lundell, 387 N.W.2d 654 (Minn. Ct. App. 1986); Phillips v. Phillips, 45 So. 3d 684 (Miss. Ct. App. 2010); Farley v. Farley, 51 S.W.3d 159 (Mo. Ct. App. 2001); *In re* N.S., 253 P.3d 863 (Mont. 2011); Colling v. Colling, 818 N.W.2d 637 (Neb. Ct. App. 2012); Ivory B. v. Shameccka D.B., 993 N.Y.S.2d 173 (N.Y. App. Div. 2014); Hammeren v. Hammeren, 823 N.W.2d 482 (N.D. 2012); Ketterer v. Seifert, 902 A.2d 533 (Pa. Super. Ct. 2006); Waters v. Magee, 877 A.2d 658 (R.I. 2005); Payne v. Payne, 674 S.E.2d 515 (S.C. Ct. App. 2009); Watson v. Watson, 196 S.W.3d 695 (Tenn. Ct. App. 2005); *In re* S.N., 272 S.W.3d 45 (Tex. App. 2008); Paryzek v. Paryzek, 776 P.2d 78 (Utah Ct. App. 1989); Holiday v. Holiday, 247 P.3d 29 (Wyo. 2011).

<sup>52</sup> Margaret M.C. v. William J.C., 972 N.Y.S.2d 396, 399 (N.Y. Sup. Ct. 2012).

<sup>53</sup> CAL. FAM. CODE § 3042(a) (2011); HAW. REV. STAT. § 571-46(3) (2013).



The sex and age of the children . . . [;] the characteristics and needs of each child, including their emotional, social, moral, material and educational needs; the respective home environments offered by the parties; the characteristics of those seeking custody, including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the children; the interpersonal relationship between each child and each parent; the interpersonal relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; *the preference of each child, if the child is of sufficient age and maturity*; the report and recommendation of any expert witnesses or other independent investigator; available alternatives; and any other relevant matter the evidence may disclose [(emphasis added)].<sup>54</sup>

In this list, children's wishes are treated as one of the many factors, and the Court of Appeals of Alabama has taken the position that "although the stated preference of a child regarding custody is to be considered by a trial court, the child's desires are not controlling."<sup>55</sup>

Also, some courts have taken the position, (a-3), to treat children's wishes as the last factor to be considered. These courts consider children's wishes only in doubtful cases where the courts are having difficulties in determining the custodial parent because all the other factors are in a state of equipoise.

For instance, the Supreme Court of Rhode Island in 1975 held that the trial court did not abuse its discretion in giving substantial weight to the child's preference, in a case where circumstances were so nearly "in state of equipoise" as to make it extremely difficult for the court to decide the custody of the child.<sup>56</sup> Also, more recently in a 1993 Michigan Court of Appeals case, the custody of children was awarded to the mother in a case where both parents were equal with regard to all custody factors except for reasonable preference of the children, which was in favor of the mother.<sup>57</sup> Another example is a Pennsylvania case in 1995: the Superior Court took the position that children's preference would have to "tip the evidentiary scale" in favor of the father in a case where record showed each parent equally suitable to have custody.<sup>58</sup>

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<sup>54</sup> *Ex parte Devine*, 398 So.2d 686, 696-97 (Ala.1981).

<sup>55</sup> *Heyat*, 127 So. 3d at 1223.

<sup>56</sup> *Goldstein v. Goldstein*, 341 A.2d 51, 53 (R.I. 1975).

<sup>57</sup> *Fletcher v. Fletcher*, 504 N.W.2d 684 (Mich. Ct. App. 1993).

<sup>58</sup> *Myers v. DiDomenico*, 657 A.2d 956, 958 (Pa. Super. Ct. 1995).

## b. Controlling factor

Some courts have treated children's wishes as the controlling and decisive factor for the courts to consider when determining custody. As of 2001, twelve states had a statute considering children's preference as the key and controlling determining factor.<sup>59</sup> But currently, Georgia seems to be the only state that has such a statute. Georgia has established a specific statute that stipulates children reaching a certain age (fourteen years) must be allowed to choose the post-divorce custodial parent by themselves.

In Georgia, the Supreme Court has taken the position that it was mandatory for the courts to follow children's choices of the custodial parent as long as the chosen parent is not unfit to have the custody of the children<sup>60</sup> under the statute, which stipulates at the time the following:

In all such cases and in cases where a change in custody is sought, where the child has reached the age of fourteen years, such child shall have the right to select the parent with whom such child desires to live and such selection shall be controlling *unless the parent so selected is determined not to be a fit and proper person to have the custody of said child* [(emphasis added)].<sup>61</sup>

The language of the statute has been slightly revised to be the following:

In all custody cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live. The child's selection for purposes of custody shall be presumptive *unless the parent so selected is determined not to be in the best interests of the child* [(emphasis added)].<sup>62</sup>

But, the fundamental concept of the statute has been maintained, which explicitly states "the child shall have the right to select the parent" and under which the exercise of court discretion against children's choice is considered as an exception.

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<sup>59</sup> Dulaney, *supra* note 7, at 819–20. States other than Georgia listed therein currently do not seem to have such a statute anymore; it seems these states shifted to a non-controlling factor system under the best interests standard.

<sup>60</sup> Froug v. Harper, 140 S.E.2d 844 (Ga. 1965).

<sup>61</sup> *Id.* at 846.

<sup>62</sup> GA. CODE ANN. § 19-9-3 (2011).

### C. *Comparison of Legal Systems in Japan and the U.S.*

Major differences between legal systems in Japan and the U.S. are:

First, regarding divorce law in general, parents have broad discretion to determine divorce conditions both in Japan and the U.S. However, there is a critical difference in the legal systems between the two countries: parents may divorce without any involvement of the court in Japan, while divorcing parents always have to obtain a decree from the court in the U.S.

Second, concerning children's wishes, courts in both Japan and the U.S. ordinarily hear children's wishes in a certain way, particularly if the children are mature enough to express their own views. There are similarly opposing positions regarding the role of children's wishes in both Japan and the U.S. One position is that the court takes children's wishes into account as one of the non-controlling factors to determine the best interests of the child. But, the weight given to children's wishes is not always the same. The court would consider it heavier as the age of the children becomes older, and as the court is more inclined to consider "the best interests of the child" in a psychological way to maximize the subjective welfare of the child.<sup>63</sup> Another position is that the court considers children's wishes as a controlling factor based on the idea that children at a certain age should have the right to choose the custodial parent. Japanese courts and the majority of the U.S. state courts adopt the first position, but a few U.S. state courts, such as those in Georgia, employ the second position.

Third, joint custody is not permitted in Japan while it is allowed or even recommended in the U.S.<sup>64</sup>

## III. BEHAVIORAL MODELS FOR DIVORCE NEGOTIATIONS

### A. *Two Models*

This Section III offers an outline of parents' behavioral principles, before conducting the five-factor bargaining analyses in Sec-

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<sup>63</sup> As for the idea of the "psychological best interests test," see ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE* 474–75 (6th ed. 2009).

<sup>64</sup> See MACCOBY, *supra* note 6 at 284–85. For the argument against the tendency in the U.S. of presumption in favor of joint custody, see Robert H. Mnookin & Eleanor E. Maccoby, *Facing the Dilemmas of Child Custody*, 10 VA. J. SOC. POL'Y & L. 54, 74–75 (2002).

tion IV.<sup>65</sup> In this section, I introduce and examine two models from the area of law and economics, which would facilitate the analysis of parents' behaviors in custodial negotiations. The two models are (i) the self-interested person model and (ii) the altruistic person model.

### 1. Self-Interested Person Model

Conventional studies of law and economics borrow the idea of *homo economicus* from neoclassical economics. They assume people behave rationally to maximize their own interests through a cost-benefit analysis (rational choice theory).<sup>66</sup> It would be true that people do care about self-interests. I call this behavioral model the self-interested person model.

Based on this model, a parent would behave in a way to maximize his or her self-interests when negotiating in divorce custody disputes. Namely, a parent would seek child custody as long as his or her own financial and emotional interest of obtaining child custody exceeds his or her own financial and emotional costs for seeking it. If both parents wanted to continue living with the child, they would fight for the custodial right in order to satisfy their self-interests.

### 2. Altruistic Person Model

On the other hand, studies of behavioral economics emphasize that real people are different from *homo economicus*. They consider people's self-interest to be bounded, and that people often behave in a way to achieve fairness and other people's interest as well.<sup>67</sup> Actually, one well-known behavior of an animal or a human being in the area of ethology is parents' behavior to protect children (so called, "parental investment").<sup>68</sup> It would be true that parents often do care about their children's interest.

To simplify, I define a person who behaves in a way to maximize a third party's interest as an altruistic person. In other words, under this altruistic person model, a parent would behave in a way to maximize children's interests when negotiating in divorce cus-

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<sup>65</sup> Mnookin, *supra* note 9. It seems Mnookin and Kornhauser's analysis was mostly based on the model of a self-interested person.

<sup>66</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3–4 (8th ed. 2011); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 10–11 (4th ed. 2011).

<sup>67</sup> See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1479 (1998).

<sup>68</sup> See Robert Trivers, *Parental Investment and Sexual Selection*, in *SEXUAL SELECTION AND THE DESCENT OF MAN* 136–79 (Bernard Campbell ed., 1972).

today disputes. However, even if the parent were an altruistic person, the parent's specific behaviors in bargaining would vary based on each parent's thoughts on how "to maximize the children's interests."

## B. *Japanese Parents' Behaviors: Analysis of Report and Biographies*

### 1. Questions and Methodology

The first question is to what extent the two behavioral models above (i.e., self-interested person or altruistic person) would fit into the reality of the parents' custodial negotiations. I assume this is not a black-and-white question. Each negotiating party would exhibit some aspects of both models. Some would have stronger self-interested person characteristics, and others would be more like the altruistic person. Actually, social science studies, which compared the negotiation culture of Japan and the U.S., have found that Japanese negotiators are generally more altruistic and less self-interested than American negotiators.<sup>69</sup>

However, the next question is how parents actually behave based on the altruistic person model. In order to examine this question and the reality of parents' negotiations in Japan, this paper analyzes two different kinds of materials.

The first material is a report of a survey conducted by Family Problems Information Center ("FPIC").<sup>70</sup> There have been several psychological studies related to post-divorce children's developments, but this FPIC's report is the only empirical study in Japan that covers the communications between parents and children at the time of divorce. FPIC conducted surveys by way of questionnaires and interviews with people who experienced divorce in the past either as a parent or a child. I mainly review quantitative data in the FPIC report in order to find out tendencies of parents' behaviors upon divorce.

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<sup>69</sup> Wendi Adair et al., *Starting Out on the Right Foot: Negotiation Schemas When Cultures Collide*, 2 NEGOT. & CONFLICT MGMT. RES. 138 (2009); Jeanne Brett & Tetsushi Okumura, *Inter- and Intracultural Negotiation: U.S. and Japanese Negotiators*, 41 ACAD. MGMT. J. 495 (1998).

<sup>70</sup> SHADAN HOJIN KATEI MONDAI JOHO SENTA [FAMILY PROBLEMS INFORMATION CENTER ("FPIC")], RIKON SHITA OYA TO KODOMO NO KOE WO KIKU [HEARING VOICES OF DIVORCED PARENTS' AND CHILDREN'S] (2005).

Second, from a qualitative perspective, I analyze biographies of Japanese people who experienced (i) parents' divorce when they were children; or (ii) their own divorce after having children. I collected biographies commercially published in Japan recently of people such as celebrities, actors, entertainers, artists and athletes—these biographies were found on online search engines by using the keywords “biography [*jijoden* or *jiden*]” and “divorce [*riikon*].” Out of the total twenty-six biographies collected, seven biographies contained relevant descriptions of communication between parents and children upon divorce (see Section VI. Annex for the list of biographies reviewed).

Considering feasibility,<sup>71</sup> I believe the use of biographies is a fairly good qualitative methodology to look at parents' behaviors upon divorce. The main strength of using biographies is that the authors' own vivid descriptions remain unaffected by survey questions or interviewers' focuses. The weakness of this methodology should also be noted. The primary weakness is the potential inaccuracy of the descriptions; the authors' memories at the time of writing might not be precise. In addition, particularly in commercial biographies, authors might intentionally distort facts to make themselves look good in the public. Sample bias might be an issue as well; stories of celebrities might not represent the behaviors of Japanese parents.

## 2. Analysis

### i. FPIC's Report

By reviewing the quantitative data of the FPIC's Report, I consider parents' behavior in the divorce negotiations can be classified roughly into two categories: (a) behavior to avoid children's involvement; and (b) behavior to encourage children's involvement.

#### a. Parents' Behavior to Avoid Children's Involvement

The first type of parent behavior is to exclude children from the divorce process. According to the FPIC's report, only fifty-seven percent of divorced parents in Japan discussed their divorce

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<sup>71</sup> Even though FPIC succeeded in conducting interviews and surveys, their study was supported by two major nation-wide newspapers (The Asahi Shimbun and The Nikkei). It is hard to conduct large-scale interviews on private family-related issues (especially, divorce-related issues) in Japan. In addition, the conciliation procedure (*chotei*) at the family court is completely private, and the family court's adjudications in the adjudication procedure (*sosho*) are rarely publicized.

with the children before or upon divorce.<sup>72</sup> It means the rest (i.e., forty-three percent) do not. Twenty-eight percent of parents have never explained divorce to children even after the divorce.<sup>73</sup> The major reasons for not explaining divorce to children, listed in the report, were reasons such as “I thought the child would not be able to understand because the child was little,” “I’m worried how much the child understands it,” and “I have no idea how much the child can understand it and whether I should explain it to him or not.”<sup>74</sup> The majority of these reasons are based on the parents’ concern about the children’s capacity to understand divorce. Also, another reason listed is “I couldn’t stand telling it because I felt so sorry for the child.”

It may seem that these parents exclude their children from the divorce process. But, when you see their reasons, it is not because they do not care about their children’s interests, but because they do not want the children to be confused by an incomprehensible issue and to be hurt emotionally.

#### b. Parents’ Behavior to Encourage Children’s Participation

The second type of parents encourages children to become involved in the divorce process. As mentioned above, it is true that more than half (fifty-seven percent) of divorced parents in Japan explained about their divorce to the children before or upon the divorce. Their reasons, as listed in the report,<sup>75</sup> can be classified into types, such as: (i) to mitigate children’s discomfort and anxiety upon divorce (i.e., “I felt the explanation based on the fact was necessary in order for the children not to feel anxious by their groundless assumptions”); (ii) to respect children’s right to know (i.e., “I thought even little children could understand about divorce if I explained it in a proper way. And I thought children had the right to hear it because they would be impacted by the divorce”); and (iii) to respect children’s right to self-determination (i.e., “Divorce is a big issue for children. If I were a child, I would not want the parents to decide about me in my absence”).

Some parents not only explain their divorce, but also ask children for their opinions. According to FPIC’s report, upon the par-

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<sup>72</sup> FPIC, *supra* note 70, at 10. Out of ninety-nine parents (valid respondents), thirty-one explained “well in advance” and twenty-five explained “just before” the divorce.

<sup>73</sup> *Id.* Out of ninety-five parents (valid respondents), twenty-eight “did not explain” it to the children.

<sup>74</sup> *Id.* at 11.

<sup>75</sup> *Id.* at 12–13.

ents' divorce, (i) thirty-four percent of the children were asked their opinion on the divorce;<sup>76</sup> and (ii) forty-four percent of the children were asked their opinion regarding which parent to live with after the divorce.<sup>77</sup>

These parents encourage their children to participate in the divorce process or at least inform their children about the divorce.

ii. Biographies

Parents' behaviors and the communications between parents and children described in the biographies<sup>78</sup> can be classified into the same two types as above: (a) to avoid children's involvement; and (b) to encourage children's participation.

a. Parents' Behavior to Avoid Children's Involvement

In three cases, parents did not explain their divorce to children at all, let alone hear the children's wishes.

In Kanji's case, he divorced his wife when his daughter was thirteen or fourteen years old. Before the divorce, he tried to explain it to his daughter, Hiroko, but failed to do so. It is described as follows:<sup>79</sup>

*We talked and came to the conclusion that we would separate, but one issue was our daughter. At least, I wanted to tell Hiroko about our separation properly. Hiroko was on summer vacation at the time, and she was in a place called Herman in northern Massachusetts to participate in a summer camp. I went to the U.S. by myself.*

*. . . .  
 Daughter brought a friend with her. . . . We entered an Italian restaurant. When I tried to start talking about divorce while we were eating, Daughter digressed. She kept talking about the camp happily. I could not find a moment to talk, and could not tell her in the end. Maybe, Hiroko knew about it, but it was difficult for her to hear the conclusion that she was the most afraid of.*

In DAI's case, where the parents divorced when he was around the age of three, he did not receive any explanations upon the parents' divorce. The description goes as follows:<sup>80</sup>

<sup>76</sup> *Id.* at 19. Out of eighty-nine children (valid respondents), thirty were asked their opinions.

<sup>77</sup> *Id.* at 20. Out of ninety-one children (valid respondents), forty were asked their opinions.

<sup>78</sup> The original languages of the biographies are Japanese. All of the excerpts herein from the biographies are my translations.

<sup>79</sup> KANJI INOKI, ANTONIO INOKI JIDEN 254–58 (1998).

<sup>80</sup> DAI, BREAK POINT: JINSEI GA KAWARU SHUNKAN 20–24 (2013).



*Before I entered into kindergarten, my parents got divorced.*

. . . .

*In a darkish room of a housing development apartment with little sunlight, Mother was crying and Father was shouting. My mind went blank, and I could not do anything. I was opening my eyes and standing still.*

*Dim memories. I found myself leaving home led by Mother by hand,*

*Mother and I, and Brother and Father, our family was split into two.*

*I still do not know now the meaning of the words Father shouted at the time (“Why are you still talking about such a thing!”) or the reasons why they got divorced. I have never tried to find out about it.*

Similarly, in Akane’s case, where the parents divorced when she was around the age of two, she did not receive any explanations upon the parents’ divorce. The description goes as follows:<sup>81</sup>

*“Father hasn’t come back after he went to a bathhouse,” Mother told me quite disinterestedly. It was the winter when my age was two.*

*The first memory of my life began on the previous night.*

*In a small bathroom of the public housing, my parents were quarreling very hard. They were almost punching each other, or maybe they were actually punching or kicking each other . . . .*

*Mother: “What are you doing? Until when, that kind of things! Aren’t you ashamed of yourself?”*

*Father: “Shut up! It is useless to say such a thing now!”*

*My parents’ shouts could be heard outside the bathroom. I, a little kid, was terrified of the loud sounds, the bang and slam made by their fight. And I covered my ears in bed.*

. . . .

*I never saw Father after the next morning of the severe marital quarrel. Father has been at a bathhouse for more than twenty years now.*

*Of course, I did not know the word divorce until very later, and I was thinking again and again as a kid, “Where did Father actually go?”*

In these three cases, the parents did not explain their divorce to the children. They decided to divorce by themselves and determined child custody without any involvement from the children.

It is not clear why the parents behaved in this in the latter two cases, because they are described from the little children’s view-

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<sup>81</sup> AKANE OSAWA, HAHU HITORI KO HITORI 6–8 (2009).

point. But, the description of Kanji's case has an interesting implication. It seems that Kanji, the father, did not think it was important to involve his daughter in the divorce process, even though he cared much about the daughter's welfare. He even went to the U.S. from Japan in order to see the daughter. However, he did not want her to participate in the divorce discussions, but simply wanted to inform her about the parents' decisions (and he eventually failed to do so).

b. Parents' Behavior to Encourage Children's Participation

In four cases, children's wishes were respected and children themselves decided the post-divorce custodial parent.

In Taichi's case, whose parents divorced when he was at the age thirteen or fourteen, his mother asked him about the custodial preferences and he himself decided to live with the mother. The description goes as follows:<sup>82</sup>

*When I was in my second year of junior high school, Father and Mother got divorced at last.*

*Mother: "Which of us do you want to accompany, Taichi?"*

*Me: "Mom, of course."*

*I decided to accompany Mother without hesitation, and after that, I met Father much less frequently. I still think Father is a great guy, but I could not respect his behaviors toward Mother. He sometimes spoke in an autocratic manner, and there was no reason for me to dare to choose Father instead of Mother.*

In Mariko's case, whose parents divorced when she was at the age of thirteen, she herself chose to live with her father. Her feeling at the time is described as follows:<sup>83</sup>

*After the divorce of my parents, I lived with Father and my elder sister. . . . Because I did not have a good relationship with Father, I actually wanted to accompany Mother. But, I decided in the end to live with, not Mother, but Father because I wanted to stay together with my sister who I liked very much. My sister, who was three years older than me, did not choose Mother, but chose Father.*

The third one, Hikaru's case is a unique one. Her parents divorced when she was seventeen, and she chose to live by herself after the parents' divorce.<sup>84</sup> Probably, this choice was possible for

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<sup>82</sup> TAICHI ISHIMOTO, FURYO ROKU: KANTO RENGO MOTO RIDA NO KOKUHAKU 37 (2012).

<sup>83</sup> MARIKO ISHIHARA, FUZOROINA HIMITSU 23-24 (2006).

<sup>84</sup> Technically, the legal custodial parent should have been determined upon the divorce, but it is not mentioned in the biography.

her because she was already working as a well-known successful singer at the time. Her choice is described as follows:<sup>85</sup>

*I was seventeen, and I was old enough to choose which parent to support. Father and Mother told me their arguments respectively. Their stories were totally different from each other, and I was confused about what was true and what was a lie. I was distracted.*

*I tried to be in a neutral position. . . . Honestly, I wanted to be involved with this issue as little as possible. Most importantly, I hated that they were bringing a dispute into my workplace. It was annoying.*

*Soon after Mother left our house, I also left home and started to live in a hotel.*

Aya's case is also similar to Hikaru's case. Her parents divorced when she was fifteen, and she chose to live by herself:<sup>86</sup>

*"Which of us do you want to accompany if Dad and Mom got separated?"*

*Mother often asked us this question whenever she quarreled with Father . . . .*

*My answer to her insensitive question was always the same: "I will accompany Father."*

*Father looked like a weak person, and as a child, I thought that someone would need to be with him to support . . . .*

*My answer to "accompany Father" became a lie as a result. I did not accompany Father, Mother or Grandmother, but decided to live by myself. I was fifteen at the time. I quit high school to work to survive; I began to work seriously as a model and earned living expenses.*

In these four cases, parents involved the children in their divorce processes. Unfortunately, the reasons why the parents behaved in this way were not very clear from the descriptions because they were written from the children's viewpoint. But, at least, it seems that parents treated children as autonomous persons: (i) parents asked children for their preferences of the custodial parent; (ii) children clarified their preferences; (iii) parents respected children; and (iv) parents allowed children to follow the children's preferences.

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<sup>85</sup> HIKARU UTADA, TEN 17 (2009).

<sup>86</sup> AYA SUGIMOTO, RIBERARU RAIFU, LIBERAL LIFE 34-35 (2010).

## iii. Altruistic Person Model: Paternalistic and Autonomic

Based on the above analysis of the FPIC's report and biographies, the specific behaviors of an altruistic person would vary primarily based on parents' thoughts concerning children's autonomy and protection. Some parents would value children's protection paternalistically and think that children's involvement in divorce negotiations would be useless and harmful to the children. Others would value children's autonomy and think that children's participation in determining child custody would serve the best interests of the children.

Therefore, the altruistic person model could be further subdivided into (i) *paternalistic* altruistic person model and (ii) *autonomic* altruistic person model.

## IV. BARGAINING IN THE SHADOW OF CHILDREN'S VOICES

A. *Five-Factors Framework*

## 1. Overview

In this section, I attempt to analyze the divorcing parents' informal bargaining and negotiations *outside* the court under each legal system, focusing on how children's wishes are valued in judicial procedure. This paper aims to predict the reality of divorcing parents' behaviors through a basic law and economics approach by employing the five-factor analytical framework of Mnookin and Kornhauser.<sup>87</sup>

To be specific, this paper applies the five-factor framework to each of the behavioral models discussed in Section III. The five-factor framework was suggested for divorcing parents' bargaining in the shadow of the law: (1) preferences of the divorcing parents; (2) bargaining endowments created by legal rules; (3) degree of uncertainty concerning the legal outcome; (4) transaction costs; and (5) strategic behavior.

## 2. Review of Five Factors

These five factors are the elements suggested for the analysis of divorcing negotiations in general. I will first review each factor

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<sup>87</sup> Mnookin & Kornhauser, *supra* note 9.

and examine the utility of each factor when focusing on the parents' custodial negotiations and children's wishes.

i. Preferences of the Divorcing Parents

In simplified terms, there are two elements to be settled upon divorce: money and custody. Monetary issues include property division, child support and alimony.<sup>88</sup> The other major issues are child custody and visitation. The first factor is parental personal preferences in regard to these issues.

Regarding child custody, most parents would be willing to maintain some relationship with their children, but the degree of such desire would vary with each parent. Some would prefer to maintain the custodial rights of the children at any cost. But others would be satisfied with visitation rights or would prefer to trade custodial rights for money to some extent: for instance, (i) a husband might want to give up child custody and be satisfied with some visitation rights, considering that he could spend his time with the children only on the weekend anyway due to his work situation, or (ii) a wife might want to give a husband more frequent visitation rights in order for him to provide her with more generous child support or alimony.<sup>89</sup>

However, these parental preferences are basically just personal preferences. Therefore, the preferences concerning child custody would not be affected by the legal systems to hear children's wishes in the judicial procedures.<sup>90</sup>

ii. Bargaining Endowments Created by Legal Rules

The second factor is the bargaining endowment created by legal systems. Divorcing parents always negotiate in the shadow of the law; each side makes plausible claims based on the expected legal outcome if the case were to go to court. At the bargaining table, each parent has an alternative option to go to court if they cannot reach an agreement. Therefore, neither parent would agree to a divorce arrangement (concerning both monetary and custody issues) that is worse than the expected legal outcome at the court. Even for the informal negotiations outside the court, legal rules

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<sup>88</sup> There is no such legal concept of alimony payment to the divorcing partner in Japan, while there is in the U.S.

<sup>89</sup> Mnookin & Kornhauser, *supra* note 9, at 966–68.

<sup>90</sup> Having said that, the law regarding monetary issues such as child support might affect parental preferences; parents might prefer the custodial rights more if the legal standard for child support is set high.

and systems provide bargaining endowments, power, and chips to each party.<sup>91</sup>

Basically, where the legal system tries to hear children's wishes regarding child custody, the preferred parent is more likely to be awarded child custody if the case goes to court. Thus, generally speaking, the parent preferred by the child would have stronger bargaining endowments for child custody.

### iii. Degree of Uncertainty Concerning the Legal Outcome

The third factor is the degree of uncertainty if the case went to court. If the court had disclosed simple, clear, and straightforward rules or guidelines related to the case, it would be easier for parties to predict the legal outcome of the court. However, there is always a certain uncertainty concerning the court decisions because no precedent would be exactly the same as the current case.<sup>92</sup>

If the uncertainty were lower, negotiating parties would have a stronger tendency not to go to court. In a case where the legal outcome can be clearly predicted by each party, there is no point for the parties to bear the additional transaction costs mentioned in the fourth factor below to pursue a lawsuit.<sup>93</sup>

Under the legal system in which the court takes into account the children's wishes as just one of the non-controlling factors to determine the "best interests of the child," the uncertainty of the child custody would be high. But, the uncertainty would decrease as the court gives greater weight to children's wishes when deciding the custodial parents.

### iv. Transaction Costs

Each party is required to bear all the transaction costs (including both financial and emotional costs) incurred for the case. In general, the longer the negotiations or disputes take, the higher transaction costs become. In particular, the transaction costs would increase if the case went to court.<sup>94</sup> With regard to financial costs, parties would need to pay the attorneys' fee largely increased for the litigation, as well as the filing fee and other fees. As for emotional costs, fighting in litigation for a long time would be certainly a heavy emotional burden on the parties. Also, emotional costs would usually be higher in the divorce case than in other

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<sup>91</sup> Mnookin & Kornhauser, *supra* note 9, at 968–69.

<sup>92</sup> *Id.* at 969–71.

<sup>93</sup> See, e.g., POLINSKY, *supra* note 66, at 135–46.

<sup>94</sup> Mnookin, *supra* note 9, at 971–72.

types of disputes because they relate to a party's attachment to the children and to the anger and reprobation to the other party.

The degree of estimated transaction costs for litigation would affect the informal negotiations outside the court. First, a party who can afford more transaction costs would have an advantage in the bargaining because he would have alternative options to continue the negotiations for a longer period or to bring the lawsuit, while the other party would lose such options at some point. Second, if the transaction costs for litigation were much higher than continuing informal negotiations, parties would tend to avoid going to court.

Hearing and valuing children's wishes in the judicial process would certainly affect the degree of parties' transaction costs of litigation.

#### v. Strategic Behavior

The last and most critical factor for this paper's analysis is the strategic behavior of parents during negotiations. During informal negotiations outside the court, parties try to influence and convince the counterparty not only by claiming rules and norms but also by using a variety of tactics including bluffing and threatening.<sup>95</sup>

Under the legal systems to hear children's wishes, how to "use" the children might be the key of the negotiation tactics to maximize or exaggerate the parents' bargaining endowments. But, the strategic behavior of parents would differ depending on the parents' characteristics.

#### B. Analysis

By using this framework and the three behavioral models of parents' characteristics (self-interested person, paternalistic altruistic person, or autonomic altruistic person) described in Section III, this paper predicts how each design of the legal system to hear children's wishes would affect divorcing parents' bargaining behaviors. As for the five-factor framework, I omit the first factor, the parental preferences, which would not have an impact on this analysis.

I analyze the specific legal systems in a following order: (i) the Japanese system after the 2013 reform (compared to the previous system); (ii) the Japanese system compared to the U.S. system (in-

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<sup>95</sup> *Id.* at 972-73.

cluding comparison of attorneys' role); and (iii) the controlling factor system compared to the non-controlling factor system.

### 1. Japanese System after 2013

As described in Section II-A, the family court system in Japan was reformed in 2013. Under the new system, children's procedural rights to be heard in the divorce custody cases are guaranteed: (i) children at the age of fifteen and older are entitled to be heard by the family court; (ii) the family court shall endeavor to take the children's intentions into consideration even if they are below the age of fifteen; (iii) children around the age of ten are allowed to participate in the case as an independent "Interested Party;" and (iv) children may have an attorney when participating in the case.

With regard to the role of children's wishes, the court considers children's wishes as one of the factors to determine the best interests of the child and to decide the custodial parents. However, it is said that the older the children are, the heavier weight the court gives to the children's wishes; in particular, the court respects the wishes of children at the age of ten and older.

How would parents negotiate the child custody under this new Japanese system?

#### i. Bargaining Endowments Created by Legal Rules

Under the Japanese system, the court certainly takes into account the child's wish as one of the factors to determine the best interests of the child. Therefore, obviously, a parent preferred by the child more than the other parent would at least have an advantage in this one factor, and would more likely be awarded child custody if the case went to court.

Thus, the parent preferred by the child would have stronger bargaining endowments for child custody. The older the children are, the stronger endowments the parent obtains; in particular, a parent preferred by the child at the age of ten and older would have relatively strong endowments.

#### ii. Degree of Uncertainty Concerning the Legal Outcome

Because the Japanese system uses the "best interests of the child" standard, in which the court has broad discretion to determine the best interests of the child from numerous factors, the uncertainty of child custody would basically be high.

Having said that, the uncertainty would decrease as the court gives greater weight to children's wishes than to other factors.



Therefore, the older the children are, the less uncertain the court decision becomes; to be specific, it would be highly probable for the court to adjudicate to give child custody to the preferred parent when the child at the age of ten clearly expressed his or her preference.

### iii. Transaction Costs

#### a. Self-Interested Person Model: Costs for Parents

The transaction costs of divorce litigation for parents would be higher under the Japanese system after 2013 than those before 2013. Therefore, based on the self-interested person model, parents would be more reluctant to go to court under the 2013 system than under the previous system.

First, the transaction costs for parents would be higher. Under the 2013 system, the child may participate in the procedure as an independent party, and the court may appoint a representative attorney for the child. If the child (and the attorney) participated in the case, the structure of the dispute would change from two-party negotiations to three-party negotiations. Multiparty negotiations are usually more difficult to settle and resolve due to their complexity. Consequently, parents would be required to bear more fees to their own attorneys, and to spend more time and energy for the litigation.

Second, because of the system's preference for children's wishes, the emotional costs of parents at the court would be high under the 2013 system. The new system guarantees children of all ages to be heard, under which children's preferences would be more prone to be revealed to the parents. For instance, the parent not chosen by children would be hurt emotionally, especially if children's wishes became the focal point of the arguments and children stated their wishes explicitly in the procedures. Particularly, the emotional cost of parents would be high if the child were at the age of fifteen, the age for the mandatory hearing by the family court.

#### b. Altruistic Person Model: Costs for Children

The transaction costs for children would also be higher. Under the 2013 system, children would be required to bear the emotional burden of expressing their views in judicial procedures. Children at the age of fifteen must bear this emotional burden. In particular, when children decided to explicitly express their preference of the custodial parent, their emotional burden would be

quite high. In addition, if the child were involved in the case as an independent party, he or she would be exposed to the transaction costs of time and energy to participate in the litigation.

Thus, based on the paternalistic altruistic person model, parents would be reluctant to go to court under the 2013 system.

But, at the same time, from the perspective of children's autonomy, the benefits for children to go to court would be higher under the 2013 system because they are guaranteed to express their wishes if the case went to court. Therefore, based on the automatic altruistic person model, parents would balance the costs and benefits for children to go to court.

#### iv. Strategic Behavior

##### a. Self-Interested Person Model: Parent's Interests

Assuming a parent, as a self-interested person, is eager to obtain custody of the child for his or her own interests, that parent would employ strategic behaviors to maximize his or her odds of getting child custody. Under the Japanese system, where the court hears children's wishes as one of the non-controlling factors, that parent would try to "use" the child's voice to increase his or her odds.

For example, one parent might try to bluff the other parent about the children's wishes or control the children's voices.<sup>96</sup> In this regard, the parent living with the children would have a great advantage compared to the other non-resident parent. First, some resident parents might bluff the non-resident parents about the children's views and wishes (i.e., the parent can say to the other parent, "Ken (child) is saying he wants to continue living with me," even if Ken has never actually said so). Some might force or ask the children to say the word on the parent's behalf (i.e., the mother can ask the child, "Ken, tell your Dad that you want to live with Mom," even if Ken does not have a specific preference between the two parents). Second, some parents might even try to control or brainwash the children's wishes (i.e., the mother can say to the child, "You have no choice but to live with me. Your Dad is such an irresponsible man, and he just abandoned us," even if it is not based on the fact).<sup>97</sup> Furthermore, considering these advantages of

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<sup>96</sup> Also, a parent might provide the child with gifts and pleasant times to win child custody. This is the so-called "lollipop" syndrome. See MNOOKIN, *supra* note 63, at 589.

<sup>97</sup> One parent might, deliberately or unconsciously, behave in a way hostile to the other parent, and alienate the child from the other parent. Then, the child would grow up to reject the targeted parent. This kind of parental behavior is the so-called "parental alienating behavior,"

physically having children under their control, some parents might take children away from the other parents by using physical forces before starting the divorce negotiations.

On the other hand, children's age would play an important role in determining parents' behaviors. Parents' strategic behavior might be stronger if the children were at the age of ten or older because the older children's wishes would be more respected if the case went to court. However, at the same time, younger children would be easier to be controlled by the resident parent because of their higher dependence on the parent emotionally, financially, and socially. But, older children would still be somehow controlled by the resident parent even though they might not be as highly dependent as younger children (i.e., it would be difficult for the resident parent to shut down all the communication between a fifteen-year-old child and the other non-resident parent. The child could use the phone or email on his or her own).

#### b. Altruistic Person Model: Children's Interests

Assuming a parent thinks, as a paternalistic altruistic person, that he himself or she herself having custody would serve the best interests of the child, that parent would employ strategic behaviors to maximize his or her odds of getting child custody. In that case, the parent's strategic behaviors would be basically the same as the self-interested person model. Having said that, a paternalistic parent might be more reluctant than a self-interested parent to have the children involved in the divorcing process and to "use" children's voices in a tactical way because the paternalistic parent would care about children's interests.

On the other hand, if a parent thinks, as an autonomic altruistic person, that children themselves should choose the custodial parent in order to maximize the children's interests, that parent would behave in a different way (i) to reveal real and honest wishes of the children, and (ii) to follow the children's wishes.

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and the child's symptom is the so-called "parental alienation syndrome ("PAS")." See, e.g., RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME* (2d ed. 1998); Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249 (2001). Parental alienation is usually a post-divorce issue, such as one related to visitation, but it could be an issue for custodial negotiations upon divorce if the negotiation took a long time.

## v. Holistic Discussion

## a. Self-Interested Person Model &amp; Paternalistic Altruistic Person Model

To sum up, based on the self-interested person model or the paternalistic altruistic person model, Japanese legal systems after 2013 would have two major influences on divorcing parents' behaviors.

First, divorcing parents would be reluctant to go to court to settle child custody disputes. From the viewpoint of transaction costs, the transaction costs for parents before the court would increase both emotionally and financially under the 2013 system, which guarantees children's right to be heard and the right of participation. Also, the transaction costs for children would increase if the case went to court. Thus, parents would be reluctant to go to court either under the self-interested person model or the paternalistic altruistic person model. In addition, from the viewpoint of the degree of uncertainty concerning the legal outcome, parents would be particularly reluctant to go to court if the children are older because the court would be more respectful of the older children's wishes.

Second, under the 2013 systems in Japan, children would lose their opportunities to express their real wishes. From the analysis of strategic behavior of parents, parents would make an attempt to control children's voices. The parents who successfully have a certain level of control over their children would avoid going to court, where children's honest views might be revealed or where children might change their views. At the same time, the non-resident parents who do not have direct contact with the children would also avoid going to court because there would often be a significant risk for them to go to court without having communication with the children. Imagine a simplified situation where the mother (resident) is bluffing the father (non-resident): "Ken (child) is saying he wants to continue living with me." The mother would certainly avoid going to court in order to maintain her bargaining endowment created by her bluff. The issue here is that the parents would not only avoid going to court, but also would try to control children's voices and to curtail the children's opportunities to express their real wishes during the informal negotiations outside the court.

## b. Autonomic Altruistic Person Model

On the contrary, the Japanese legal system after 2013 would have a different impact under the autonomic altruistic person

model. If parents were eager to respect children's autonomy and children's own preferences, they would try to reveal children's honest wishes during the informal negotiations outside the court regardless of the design of the legal system. As for the strategic behavior, parents would occasionally be willing to go to court under the 2013 system, which guarantees children to be heard in the judicial procedures. For instance, if a parent is concerned that the child's honest wishes are unclear or that the counterparty denies to respect the child's wish in the informal negotiations, that parent might choose to go to court in order to settle the case pursuant to the child's honest wishes. From the viewpoint of transaction costs, the parent would balance the costs and benefits for the child to go to court.

#### vi. Combination of Parents' Characteristics

In the analysis above, I examined *each* parent's behavior. Under the Japanese legal system after 2013, if a parent has strong characteristics of a self-interested person or a paternalistic altruistic person, that parent would be reluctant to go to court, and children might lose their opportunities to express their wishes.

On the other hand, if a parent has rather strong characteristics of an autonomic altruistic person, that parent would be positive to go to court in order to respect the real wishes of the children.

However, divorce custody negotiations are actually between *two* parents. Thus, to make the analysis more precise, combinations of *two* parents' characteristics should be further examined.

a. Resident Parent v. Resident Parent

*Table 1: Combinations of Two Resident Parents and Children’s Opportunities to be Heard*

	<b>SI</b>	<b>PA</b>	<b>AA</b>
<b>SI</b>	Negative		
<b>PA</b>	Negative	Negative	
<b>AA</b>	Somewhat Positive	Somewhat Positive	Positive

In cases where both parents live together with their children (i.e., where both parents have an easy access to their children), there are six possible combinations of parents’ characteristics as shown in Table 1: SI-SI, PA-SI, PA-PA, AA-SI, AA-PA and AA-AA<sup>98</sup> (SI, PA and AA respectively represent Self-Interested person, Paternalistic Altruistic person and Autonomic Altruistic person). Each cell in Table 1 indicates, by the scale of four (Negative, Somewhat Negative, Somewhat Positive and Positive), whether the children have opportunities to be heard—(i) whether the case would likely be brought to court and (ii) whether the children have opportunities to express their real wishes during the parents’ negotiations.

The analysis is simple if both parents have similar characteristics. Under the combinations of SI-SI, PA-SI and PA-PA, both of the parents would be reluctant to go to court and would not be respectful to the children’s own wishes. Consequently, the case would not likely go to court and children would lose their opportunities to express their real wishes during the parents’ negotiations. Conversely, under the combination of AA-AA, both parents would be respectful to the children’s own wishes, and they would not hesitate to go to court if necessary. For instance, parents would choose to go to court to settle the case if the children’s real wishes

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<sup>98</sup> The two characteristics tied with hyphen simply indicate the combinations, and the order before and after the hyphen does not have a particular meaning.

were not clear or if each parent has a different view on the children’s wishes (for instance, both parents might consider that himself or herself is more preferred by the children). Therefore, children would have their opportunities to express their wishes during the negotiations, and the case would be positive to go to court.

Deeper examinations are necessary for the two remaining combinations: AA-SI and AA-PA. Under these combinations, one parent would be reluctant to go to court and unrespectful to the children’s wishes while the other parent would be positive to go to court and respectful to the children’s wishes. But actually, one party can bring a lawsuit—a mutual agreement between two parents is not required to go to court. Thus, as long as one AA parent is involved in the case, the case would be somewhat positive to go to court. Also, as long as one AA parent is involved in the case and he or she has a sufficient access to the children, that parent would surely ask the children’s own wishes. Thus, although the other parent (SI or PA) would try to control children’s voices or to prevent children from involving the divorce process, the children’s real wishes would probably appear on the bargaining table during the negotiations.

b. Resident Parent v. Nonresident Parent

*Table 2: Combinations of a Resident Parent and a Nonresident Parent and Children’s Opportunities to be Heard*

		<b>Nonresident</b>		
		<b>SI</b>	<b>PA</b>	<b>AA</b>
<b>Resident</b>	<b>SI</b>	Negative	Negative	Somewhat Negative
	<b>PA</b>	Negative	Negative	Somewhat Negative
	<b>AA</b>	Positive	Positive	Positive

In cases where one parent is a resident parent and the other parent is a nonresident parent (i.e., one of the parent has limited access to the children), combinations of parents' characteristics are more complicated. In those cases, as discussed in iv-a above, the resident parent would have a great advantage regarding strategic behavior. There are nine possible combinations as shown in Table 2: [SI, SI], [SI, PA], [SI, AA], [PA, SI], [PA, PA], [PA, AA], [AA, SI], [AA, PA] and [AA, AA].<sup>99</sup> As the same as Table 1, each cell indicates, by the scale of four (Negative, Somewhat Negative, Somewhat Positive and Positive), (i) whether the case would likely be brought to court and (ii) whether the children have opportunities to express their real wishes during the parents' negotiations.

As discussed in the case of two resident parents, the analysis is simple if both parents have similar characteristics. Under the situations of [SI, SI], [SI, PA], [PA, SI] and [PA, PA], the case would not likely go to court and children would lose their opportunities to express their real wishes during the parents' negotiations. On the contrary, under the combination of [AA, AA], children would certainly have their opportunities to express their wishes, and the case would be positive to go to court.

Under the combinations of [SI, AA] and [PA, AA], the case would somewhat unlikely go to court and children would somewhat lose their opportunities to express their real wishes during the negotiations. Despite an involvement of one AA parent to the case, effects of the AA parent would be limited due to the limited access from the nonresident parent (AA) to the children. Influence of resident parent (SI or PA) would be much stronger. For instance, imagine the same situation described in iv-a above where the SI or PA mother (resident) is bluffing the father (non-resident), "Ken (child) is saying he wants to continue living with me." As already discussed, the mother in this situation would avoid going to court so that she could maintain her bargaining endowment created by her bluff. What I would like to highlight here is that the AA father (non-resident) would also not dare to go to court. He would think—he would just lose the case before the court and the lawsuit would cause unnecessary transaction costs for Ken (and the himself) if the alleged Ken's wish were actually true. Therefore, unless the father was very skeptical about Ken's real wish, the AA father would end up respecting the "Ken's wish" alleged by the resident mother, which might be different from Ken's real wish.

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<sup>99</sup> The first of the two characteristics in parentheses indicates the characteristic of a resident parent. The second one is the characteristic of a nonresident parent.



Lastly, under the combinations of [AA, SI] and [AA, PA], children would have their opportunities to express their real wishes, and the case would likely go to court if necessary. As long as an AA resident parent is involved, that parent would surely ask the children's own wishes. At the same time, the access of the non-resident parent (SI or PA) to the children is limited. Thus, attempts of the nonresident parent to control children's voices or to prevent children from involving the divorce process would fail. Also, in order to settle the case in accordance with the children's own wishes, the AA resident parent would not hesitate to bring the case before the court if he or she had difficulty negotiating with the other parent.

### c. Conclusion

The purpose of the Japanese system reform in 2013 was to empower children's rights to be heard. As long as at least one autonomous altruistic person is involved as a resident parent (i.e., AA-SI, AA-PA, AA-AA combinations of resident parent v. resident parent, and [AA, SI], [AA, PA], [AA, AA] combinations of resident parent v. nonresident parent), wishes of the children would be respected during the negotiations and the case would be positive to go to court if necessary. This consequence would be consistent with the purpose of the 2013 reform.

On the other hand, in the rest of situations where (i) both of two parents are either self-interested persons or paternalistic altruistic persons (i.e., SI-SI, PA-SI, PA-PA of resident parent v. resident parent, and [SI, SI], [SI, PA], [PA, SI], [PA, PA] of resident parent v. nonresident parent) or (ii) autonomous altruistic person is involved only as a nonresident parent (i.e., [SI, AA], [PA, AA] of resident parent v. nonresident parent), the case would not likely go to court, and children might lose their opportunities to express their wishes during the parents' negotiations. This seems to be opposite to the purpose of the Japanese system reform in 2013.

## 2. Japanese System Compared to U.S. System

### i. General Differences

If you compare the Japanese system after 2013 to the U.S. majority system, the fundamental structure to hear and to value children's wishes in the judicial procedures is similar. The court hears children's wishes and takes them into account as one of the non-controlling factors to determine the best interests of the children.

However, as described in Section II, the Japanese divorce system has some outstanding qualities when compared to the U.S. system. Under the Japanese legal system for divorce, (i) parents may divorce by mutual agreement without any involvement from the court, (ii) ninety percent of divorce is actually completed this way, and (iii) joint custody after divorce is not permitted. I think this unique difference would affect parents' custodial negotiations if parents were self-interested persons or paternalistic altruistic persons.

First, because joint custody is not permitted in Japan, one parent should be selected as the custodial parent. Thus, the disputes over child custody would be harsher in general in Japan than in the U.S. Second, parents would be more aggressive in Japan in controlling and hiding children's wishes from the other parents during negotiations because there would be no involvement from the court at all as long as parents could reach an agreement. On the contrary, the parents would be less aggressive under the U.S. system where the court always has the final authority to issue a divorce decree.

To conclude, children would be exposed to greater risk of losing their opportunities to be heard under the Japanese system than under the U.S. system.

## ii. Attorneys' Role Under Ethical Rules

I also would like to discuss the role of attorneys in informal negotiations by comparing ethical rules for attorneys in Japan and the U.S.

In the U.S., the American Bar Association ("ABA") has established the Model Rules of Professional Conduct in 1983, which serves as an ethical rule for attorneys in most states. Rule 4.1 thereof stipulates truthfulness in statements to others upon transactions.

Rule 4.1 [(emphasis and note added)]:

In the course of representing a client a lawyer shall not knowingly:

a) *make a false statement of material fact* or law to a third person; or.

b) *fail to disclose a material fact* to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [(note: Rule 1.6 covers confidentiality of information)].

Under the U.S. majority system, where the court takes into account children's wishes as one of the factors to decide child custody, it is likely that children's wishes in the divorce custody negotiations fall under a "material fact." Especially if children were older and their wishes were given heavier weight by the court, attorneys should certainly consider children's wishes as a "material fact." Thus, under the ABA's rule in the U.S., attorneys cannot bluff or hide the children's wishes in the divorce custodial negotiations. Even if the client (resident parent) wanted to bluff or hide the child's real wish, the attorney would still be required to deliver the child's real wish to the counterparty (non-resident parent) in the negotiations. Namely, in the U.S., attorneys of parents would play the role of a safety net for children to express and reflect their wishes in divorce negotiations outside the court.

On the other hand, in Japan, the Japan Federation of Bar Associations (*nichibenren*) ("JFBA") established the Fundamental Rules of Attorneys' Professional Conduct (*bengoshi shokumu kihon kitei*) in 2004, which all the attorneys in Japan are required to follow. In the JFBA's rule, the only clause relevant to handling children's wishes is Article 14 regarding contribution to unlawful behavior.

Article 14 [(emphasis added)]:

Attorneys shall not assist or use *fraudulent transactions*, violence, and other unlawful or unjust behaviors.

Bluffing or hiding children's real wishes in the divorce custody negotiations might in theory fall under "fraudulent transactions" of Article 14. However, unlike ABA's Rule 4.1, the vague language of JFBA's Article 14 focuses on unlawful behaviors, and does not specifically mention truthfulness or a statement of "material fact." Therefore, Japanese attorneys might not consider children's wishes as an issue of Article 14. Attorneys might not dare avoid bluffing or hiding children's wishes in the divorce custody negotiations when being requested to bluff or hide by the client. In that sense, in Japan, attorneys for parents might not be playing the role of a safety net for children to reflect their wishes in the divorce negotiations.

### 3. Non-controlling Factor v. Controlling Factor

As described in Section II-B above, in the U.S., a few states, such as Georgia, have adapted the legal system to hear children's wishes as a controlling factor, while the courts in the majority of the states consider children's wishes to be a non-controlling factor.

Also in Japan, some child-advocate attorneys have insisted on introducing such a controlling factor regime (see Section II-A).

How would the parents' negotiations differ under the legal system of non-controlling factor and that of controlling factor?

i. Bargaining Endowments Created by Legal Rules

The parent preferred by the child would have stronger bargaining endowments for child custody. And the heavier weight the court gives to children's wishes, the stronger endowments the parent obtains. More specifically, the bargaining endowments of the preferred parent would be conclusively strong under the legal system that considers children's wishes as a controlling factor. Under the system of controlling factor, the court would give child custody to a parent as long as the child preferred that parent despite any other factors. On the other hand, the endowments would be weaker under the legal system that considers children's wishes as just one of the non-controlling factors, although still positively enhanced by the children's preferences.

ii. Degree of Uncertainty Concerning the Legal Outcome

The uncertainty would be much lower under the controlling factor regime, in which children have the right to choose the custodial parent, than under the non-controlling factor regime. This is because the court under the former system would simply give child custody to the parent preferred by the children while the court under the latter system has a broad discretion to determine the best interests of the child.

Having said that, in reality, a room for uncertainty would still remain even under the legal system of controlling factor. For example, the uncertainty under the legal system of controlling factor would still be higher than the maternal-preference standard,<sup>100</sup> under which the mother basically takes the child custody. There are two reasons for this from a practical perspective.

First, it would not be easy for parents to find out the children's honest views and wishes before going to court, while "who the mother is" would always be clear under the maternal-preference standard. Particularly, there would be a psychological barrier for children to inform their wishes to the parent not chosen by them.

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<sup>100</sup> The same discussion applies to the paternal-preference standard, which is not common around the world at the present day, but was for example adopted in Taiwan until 1996. See Hung-En Liu, *Mother or Father: Who Received Custody? The Best Interests of the Child Standard and Judges Custody Decisions in Taiwan*, 15 INT'L J. L. POL'Y & FAM. 185 (2001).

Second, the children's views and wishes might change before the court, while "who the mother is" would almost never change under the maternal-preference standard. The children's initial views and wishes might change after being interviewed by a neutral third person and/or being advised by their attorney or guardian *ad litem*. For instance, even if a child said to the father, "I would like to stay with you, Dad," at the early stage of the divorce negotiations, there is no guarantee that this word from the child was honest and that this view would not change before the court.

### iii. Transaction Costs

#### a. Self-Interested Person Model: Costs for Parents

The transaction costs of divorce litigation for parents would be higher under the legal system of controlling factor than that of non-controlling factor.

Under the system of controlling factor, it would be more likely that children's wishes become the focal point of the arguments and that children state their wishes explicitly in the procedures. Consequently, the parent not chosen by children would be emotionally hurt more.

#### b. Altruistic Person Model: Costs for Children

The transaction costs for children would also be higher under the system of controlling factor than the system of non-controlling factor. Children would feel an emotional burden more because they themselves have to choose the one custodial parent from the two parents and their choices would be the final call.

But, at the same time, from the perspective of children's autonomy, the benefits for children to go to court would be higher under the system of controlling factor because the court would always decide the custodial parent in accordance with the children's wishes. Therefore, based on the autonomic altruistic person model, parents would balance the costs and benefits for children to go to court.

### iv. Strategic Behavior

#### a. Self-interested Person Model: Parent's Interests

If a parent who is a self-interested person were eager to obtain custody of the child for his or her own interests, that parent would employ strategic behaviors to maximize his or her odds of getting the child custody. Under the controlling factor system, it would be

very critical for parents to “use” the child’s voices to increase his or her odds because the child’s wish would be the decisive factor if they went to court.

Therefore, under the system of controlling factor, parents would be more aggressive in bluffing, controlling, and hiding their children’s voices from the other parents in order to maximize his or her bargaining power in the negotiations.

#### b. Altruistic Person Model: Children’s Interests

Assuming a parent thinks, as a paternalistic altruistic person, that he himself or she herself having a child’s custody would serve the best interests of the child, that parent would employ strategic behaviors to maximize his or her odds of getting child custody. Thus, the analysis would be basically similar to the self-interested person model, but a paternalistic parent would be more reluctant to have children involved in the process.

However, if a parent thinks, as an autonomic altruistic person, that children themselves should choose the custodial parent in order to maximize the children’s interests, that parent would behave in a way to be respectful of children’s wishes. Therefore, in that case, parents would be more likely to choose to go to court under the legal system of controlling factor, where it is guaranteed that the court hears and follows children’s wishes.

### v. Holistic Discussion

#### a. Self-Interested Person Model & Paternalistic Altruistic Person Model

Based on the self-interested person model or the paternalistic altruistic person model, the legal system of controlling factor would have two stronger influences on divorcing parents’ behaviors than the system of non-controlling factor.

First, divorcing parents would be more reluctant to go to court to settle child custody disputes. From the viewpoint of transaction costs, the transaction costs for parents before the court would increase under the system of controlling factor. Also, the transaction costs for children would be higher under the system of controlling factor if the case went to court. Thus, parents would be more reluctant to go to court either under the self-interested person model or the paternalistic altruistic person model. In addition, from the viewpoint of the degree of uncertainty concerning the legal outcome, parents would be more reluctant to go to court because it

would be easier for them to predict the outcome of the court under the system of controlling factor.

Second, under the system of controlling factor, children would have less opportunity to express their wishes. From the analysis of strategic behavior of parents, parents would make an attempt to control children's voices more under the system of controlling factor. Consequently, parents would be more prone to avoid going to court, and also to curtail the children's opportunities to express their real wishes during the informal negotiations outside the court.

#### b. Autonomic Altruistic Person Model

On the contrary, as for strategic behavior under the autonomic altruistic person model, parents would be more willing to go to court in some cases under the legal system of controlling factor, where it is guaranteed that the custodial parent is determined in accordance with the children's wishes. For instance, if a parent is concerned that the child's honest wishes are not reflected in the informal negotiations, the parent might choose to go to court in order to settle the case pursuant to the child's honest wishes. More specifically, from the viewpoint of the transaction costs, that parent would balance the costs and benefits for the child to go to the court.

#### c. Conclusion

In conclusion, under the legal system of controlling factor, compared to the legal system of non-controlling factor, parents would be more reluctant to go to court and children would be more likely to lose their opportunities to express their wishes if the parents have strong characteristics either of a self-interested person or a paternalistic altruistic person. Namely, when the children's right to be heard is more empowered under the legal system, children would actually have less opportunity to be heard in the negotiations outside the court.

On the other hand, if a parent has rather strong characteristics of an autonomic altruistic person, the parent would be more positive to go to court in order to reveal and to reflect the wishes of the children under the legal system of controlling factor than that of non-controlling factor.

To be more precise, similar discussions to 1-vi above would apply with regard to combinations of parents' characteristics. If at least one autonomic altruistic person is involved in the case as a resident parent, wishes of the children would be more respected

during the negotiations and the case would be more positive to go to court under the legal system of controlling factor. However, for the rest of parents' combinations, the case would less likely go to court and children would have less opportunity to express their wishes during the parents' negotiations under the controlling factor system.

## V. CONCLUSION

### A. *Discussion*

In this paper, I first compared how legal systems hear children's wishes in divorce custody disputes in Japan and the U.S. Second, by reviewing a quantitative survey report and biographies in Japan, I suggested three behavioral models (the self-interested person model, the paternalistic altruistic person model, and the autonomic altruistic person model) to analyze parents' negotiations for divorce custody in Japan. Lastly, I analyzed parents' custodial negotiations in Japan by using the five-factor framework of bargaining in the shadow of the law.

As a general result, empowering children's rights to participation in the legal procedures would actually work well to empower children in society if the parents have strong characteristics of an autonomic altruistic person. However, children whose parents' characteristics are of a self-interested person or a paternalistic person would have less opportunity to be heard in the parents' negotiations outside the court if children's participation rights in the legal procedures were empowered. This general principle would apply not only to the Japanese legal systems, but also to the U.S. systems.

More specifically, based on a self-interested person or a paternalistic person model, children would rather lose their opportunity to be heard in the parents' negotiations outside the court under the current Japanese legal system after 2013, which guarantees children's participation rights in the court. Compared to the U.S. system, Japanese children would have less opportunity to be heard outside the court if you consider the uniqueness of Japanese divorce system (*kyogi rikon*) and the ethical rules for attorneys. In addition, under the legal systems that value children's wishes as a controlling factor rather than a non-controlling factor, children would have less opportunity to be heard.



The purpose of the 2013 reform of family court systems in Japan was to empower children's rights to participate and to express their own views. However, this reform might end up curtailing these children's rights in the shadow of the law. In particular, the majority (nearly ninety percent) of the divorce custody disputes in Japan are settled outside the court. The main concern is that the introduction of systems to empower children's wishes in the judicial procedure targeting a minority of the divorce disputes might have a de facto adverse effect of preventing children from raising their wishes in the majority of divorce disputes outside the court in society.

Furthermore, as I summarized in II-A above, there is a discussion still going on in Japan about how a court should value children's wishes. However, if the court practices were to move to the direction to consider children's wishes as a controlling factor in the current Japanese system, children might further lose their opportunity to be heard.

Children's rights advocates often focus narrowly on the formal legal rights of children before the court, but we should not ignore the actual impact and backlash on the whole society in the shadow of the law.

### B. *Policy Recommendations*

Though further empirical studies would be needed to identify the best legal system for child empowerment, I would like to tentatively explore two possible reforms to mitigate the concerns above in Japan.

One possible approach would be to secure the court's involvement in each case. The first policy recommendation, based on this approach, is to abolish the *kyogi rikon* (divorce by mutual agreement) system in Japan, at least for couples with a child. Ideally, the court should be involved and hear children's wishes in every divorce custody case. In this way, children's right to express their wishes would be guaranteed in all the divorce custody cases. Even though it might not be feasible for the court to directly hear children's wishes in every case, it would be feasible to employ a system like that of the U.S. under which the court has the final authority to review parents' agreement and to issue a divorce decree.

Another possible approach would be to secure children's rights outside the court. Thus, the second policy recommendation

is to give children a substantive right regarding their parents' divorce. Under the current Japanese system, children have the procedural right to participate in the legal procedures and to express their wishes there, but they do not have any substantive right outside the court. I think this is the main problem that would cause the above concerns outside the court. To be specific, my recommendation is to grant children, at least at a certain age, the right of veto on their parents' divorce and on the divorce conditions (i.e., parent would be required to obtain children's written consent upon divorce). In this way, parents would no longer be able to ignore children's wishes in the divorce negotiations. Some might feel this idea radical, but I think it is rather natural for children, as members of the family, to have a substantive right for divorce if you consider the fact that divorce is dissolution of the family and not just separation of the couple. This second recommendation would apply to the U.S. system as well as the Japanese system.

Of course, various other factors (i.e., psychological effects on children, parents' interests, and judicial economy) and any other possible options should be examined carefully before actually implementing these policies. But still, I believe it is worth suggesting the policies recommendable from the perspective of empowering children's participation right.

### C. *Future Tasks*

This paper employed three models to identify parents' characteristics and theoretically discussed divorcing parents' bargaining behaviors through a five-factor framework from a law and economics approach. Considering the difficulties of conducting empirical studies on divorce disputes in Japan,<sup>101</sup> this theoretical analysis provides meaningful insight. Having said that, divorce custody disputes are perhaps more complicated in reality. This paper's analysis might not be applicable as-is to some exceptional cases.

For instance, while this paper focused on parents' behaviors, the changes of legal system might also affect children's behaviors in some cases. Technically, empowering children's participation right in the judicial procedures can provide bargaining endowments with the children. Although it would be difficult for children to be aware of such bargaining endowments in most cases, some older

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<sup>101</sup> See *supra* note 71.

children might be able to utilize their own bargaining power during the divorce custody negotiations outside the court.

In another instance, with regard to the degree of uncertainty concerning the legal outcome, this paper discussed that divorcing parents would become reluctant to go to court if the court's decisions were predictable (i.e., under the controlling factor regime). But, parents' motivations to "go to court" might be more diverse. In particular, under the Japanese legal system, the lawsuits (*sosho*) have de facto continuity from the pre-litigation conciliation procedures (*chotei*) at the court. Therefore, some parents might choose to enter the court system initially not for seeking the court's adjudications but solely for the purpose of facilitating their negotiations through the conciliation procedures (*chotei*).

Also, regarding the transaction costs, increase of the costs caused by children's participation in the judicial procedures might not have so much impact on parents' behaviors in some cases. For parents who have already paid enormous costs for the divorce negotiations (imagine severe cases where parents are exhausted after fighting over the years in a highly hostile way), the costs caused by children's participation in the judicial procedures might be a minor issue.

These examples mentioned above are potential exceptions, and they would not ruin the importance of this paper's arguments. However, empirical studies would be eventually needed to reveal details of the reality—how parents actually behave in the custodial negotiations in each legal system. I hope this paper's models and theoretical analysis will help design the empirical studies in the future.

## VI. ANNEX

The list of 26 biographies reviewed (\*contains relevant descriptions):

- DAI, BREAK POINT: JINSEI GA KAWARU SHUNKAN (2013).\*
- KANJI INOKI, ANTONIO INOKI JIDEN (1998).\*
- MARIKO ISHIHARA, FUZOROINA HIMITSU (2006).\*
- TAICHI ISHIMOTO, FURYO ROKU: KANTO RENGU MOTO RIDA NO KOKUHAKU (2012).\*
- AKANE OSAWA, HAHA HITORI KO HITORI (2009).\*

- AYA SUGIMOTO, RIBERARU RAIFU [LIBERAL LIFE] (2010).\*
- HIKARU UTADA, TEN (2009).\*
- RURIKO ASAOKA, SAKITSUZUKERU (2013)
- SHINICHI CHIBA, CHIBA SHINICHI ARATEME WACHINAGARINDO (2008)
- NORIAKI ENDO, THE STORY (2013)
- HITOMI FUJIMOTO, RIKON MADE (2001)
- HIROMI GO, DADHI [DADDY] 1998
- KENICHI HAGIWARA, SHOKEN (2008)
- RIE HASEGAWA, GANRIKI (2012)
- TAKAFUMI HORIE, WAGA TOSO (2015)
- KAZUMA IEIRI, KONNA BOKU DEMO SHACHO NI NARETA (2007)
- MERO IMAI, NAITE, YANDE, WARATTE (2012)
- YUKI KOKUBO, ISSHUNNI IKIRU (2013)
- JUNKO MIHARA, IKITAI (2010)
- MEGUMI OKUNA, AKAI TOGE (2008)
- SHINOBU OTAKE, WATASHI HITORI (2006)
- NORIKO SAKAI, SHOKUZAI (2010)
- AI TOMINAGA, AI NANTE DAIKKIRAI (2014)
- MASANOBU TAKASHIMA, NANNO INGA DE (1996)
- KAZUYA YOSHII, USHINAWARETA AI WO MOTOMETE (2007)
- ZEEBRA, ZEEBRA JIDEN HIP HOP LOVE (2009)

## Correction by the Author

November 2, 2016  
Hiroharu Saito

The author would like to correct lines 24-26 (and note 30) on page 946 as follows.

### Original sentence

While (A) applies only to *sosho* (the adjudication procedure) and does not apply to *chotei* (the conciliation procedure), (B), (C) and (D) apply to *chotei* as well as *sosho*.

↓

### Revised sentence (see underlined parts)

While (A) applies only to *shinpan* (the adjudication procedure) and does not apply to *chotei* (the conciliation procedure), (B), (C) and (D) apply to *chotei* as well as *shinpan*. (A) also applies to *sosho* (the litigation procedure).

### Add one more source to note 30 (see underlined parts)

30 *Id.* at art. 258, para. 1. Jinji Sosho Ho [Personal Status Litigation Act], Law No.109 of 2003, art. 32, para. 4 (Japan).

### A supplemental note:

The author omitted an explanation of *shinpan* in the original article. The author's intention was to simplify explanations of the complicated family court system in Japan, but it might have been misleading.

If *chotei* (the conciliation procedure) fails, the case will go to either *sosho* or *shinpan* in accordance with the nature of the case. Parties must file a lawsuit to start *sosho* (the litigation procedure) in cases where divorce itself is an issue in dispute. *Shinpan* (the adjudication procedure) is the adjudication procedure used for cases where custody of the child or visitation is disputed without disputing divorce itself. These cases automatically move to *shinpan* once *chotei* fails. The judge adjudicate issues in dispute such as designation of the custodial parent or surrender of the child custody. Kaji Jiken Tetsuzuki Ho [The Domestic Relations Case Procedure Act], Law No. 52 of 2011 applies to *chotei* and *shinpan*. Jinji Sosho Ho [Personal Status Litigation Act], Law No.109 of 2003 applies to *sosho*.