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**Lay Down and Wait for Good News Unless You Are Bowling Alone:
A Comparison of the Identity Crisis Confronting the Japanese
Corporate Warrior and the American Corporate Law Firm
Associate**

Mi Kim¹

I. Introduction

“Always amused” by the references to the at-will employment contract as a “feudal” concept,² Gail Heriot argues that the erosion of the at-will rule will bring about a “neo-feudalism” which will destroy the separation between the private and public spheres by enabling the employer to “invade” and dominate the worker’s privacy.³ According to Heriot, one can readily predict the effects that proposals to eliminate the at-will contract will have on the American worker. One need only to look at the Japanese lifetime employment “tradition,” which according to Heriot is “an extreme example of how feudal vassalage might look if lifted out of the feudal context and put into the modern industrial world.”⁴

Heriot’s argument is composed of two basic assumptions: first, that the American worker currently “enjoys” a balance between public and private spheres and second, that the at-will contract is responsible for this balance.⁵ Doing away with the at-will rule, especially in conjunction with other employment law reforms,⁶ Heriot argues, will not only impair

¹ J.D., University of Miami School of Law (2003).

² Gail L. Heriot, *The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law*, 28 GA. L. REV. 167, 167 (1993), citing *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (for the proposition that the at-will employment tradition is linked to feudalism.) Heriot notes Richard A. Epstein’s “same amusement” at this “error.”

³ Heriot, *id.* at 175. Heriot “will leave it to the reader, however, to determine whether this loss of privacy is a price that should be paid for employment law reform.”

⁴ *Id.* at 204.

⁵ Heriot’s description of the at-will rule is synonymous with Epstein’s, the gist of which is that because the at-will rule is a “default” rule, the parties can “opt out.” Accordingly, the worker does not give up his private world unless he chooses to do so. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

⁶ Heriot, *supra* note 2, at 195. Three other employment law reforms are worker’s compensation, whistleblower protection, and mandatory parental leave.

overall efficiency but will bring about several concrete effects which bring about the "invasion" of the American worker's privacy interests.⁷

While the public-versus-private dichotomy is not a legitimate one, for the purpose of argument, it will be assumed that such a dichotomy exists. Even for the salaried worker, the day is split into two spheres: the "working" hours and the "non-working" or "off" time. The working hours fall into the "public" sphere while the "nonworking" hours fall within the "private" sphere.

When the public-versus-private distinction is viewed in this way, the current identity crisis confronting white-collar professional workers of these two societies is caused by a largely *unregulated* capitalist market's valuation of the worker on the basis of his timesheets, rather than by any erosion of the worker's "privacy" interest. In both systems, the worker depends on his work to validate his identity and worth. And the "others" who control the conditions of work, measure the worker's value largely by the number of hours he is willing to sacrifice from his "private" sphere.

Many workers find themselves trapped in this dilemma, even the highly paid – albeit highly unsympathetic – associates of America's white-shoe law firms, who purportedly possess the greatest degree of bargaining power to "opt out" of the at-will contract. For such employees, the fundamental contradiction has become so acute as to cause, or threaten to cause, the "self" to become wholly extinguished by the "other."

The overall purpose of this note is to examine the identity crisis facing the elite white-collar professionals of two "hyper-industrialized" work societies. This paper will compare the Japanese lifetime employment system from the perspective of the core, male, management worker allegedly afforded the protections of "lifetime employment" and the American at-will employment contract from the perspective of highly-paid associates in large corporate law firms. Despite the wildly different historical and cultural underpinnings of the two employment

⁷ First, due to the increased costs of hiring, the employer will conduct a more thorough investigation into the applicant/worker's background in order to gain assurances about its inherently risky hiring decisions. Second, the employer will attempt to influence and control the employees' private life in order to enhance their productive capacity. And third, the employer will hire less people for the same amount of work. Heriot, *supra* note 1, at 194-97. These effects signal a "feudalization" of the employment relationship in which rigidity and longevity are secured through a "highly ritualized...[and] pervasive bond driven more by objective custom than by the individualized, subjective will of the parties." *Id.* at 215.

models, there are similarities which account for the identity crisis faced by both groups of workers, especially in today's volatile market economy.⁸

Part II describes the lifetime employment system from both a cultural and historical perspective and examines the identity crisis of Japanese "corporate warriors." Part III examines the identity crisis of America's corporate law firm associates and Part IV responds to Heriot's arguments.

II. The Japanese Lifetime Employment Model

For many like Heriot, it is difficult to imagine two employment systems more different from each other than the American and the Japanese. For one thing, the Japanese lifetime employment system is nestled in a communitarian culture while the American at-will system steadfastly maintains the liberal notions of the atomic individual and the freedom of contract. For another, the prototypical Japanese corporate warrior enters into a familial life-long relationship with his employer whereas the American professional worker enjoys a great deal of mobility. It is often noted that Japan is the land of the community while America is the land of individual rights.⁹ It is no mystery then that labor scholars and commentators compare the "bright" and the "dark" sides of these two seemingly contradictory systems and marvel at the outcome—that the same exact features that comprise the "bright side" of one employment system directly accounts for the "dark side" of the other!¹⁰

It seems only logical to conclude that if the Japanese system acknowledged and accounted for individual "rights," then the corporate

⁸ The identity crisis is best described by Duncan Kennedy's "fundamental contradiction" in which the worker's "relation with others are both necessary to and incompatible with [his] freedom." See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 213 (1979).

⁹ Tatsuo Inoue, *The Poverty of Rights-Blind Communitarity: Looking Through the Window of Japan*, 1993 B.Y.U. L. REV. 517, 518-520 (1993).

¹⁰ See generally *id.*; Kyoko Kamio Knapp, *Warriors Betrayed: How the "Unwritten Law" Prevails In Japan*, 6 IND. INT'L & COMP. L. REV. 545 (1996); and Heriot, *supra* note 2. Cf. Makoto Ishida, *Death And Suicide From Overwork: The Japanese Workplace and Labour Law, Labor and Employment in an Era of Globalization*, (Joanne Conaghan, R. Michael Fischl, Karl Klare, eds., 2002) and Kaiulani Eileen Sumi Kidani, *The Japanese Warriors in Pursuit of a Legal Remedy: The Story of Karoshi, or "Death From Overwork" in Japan*, 21 U. HAW. L. REV. 169 (1999).

warriors would not be keeling over from *karoshi*¹¹ or hurling themselves off of Mt. Fuji in order to escape their existential nightmares.¹² Conversely, if the American system acknowledged and cultivated a sense of “community,” then the American worker would not be experiencing the erosion of families and local communities due to moral and social decay and economic insecurity.

Nonetheless, however tidy and convenient in form, these comparisons and conclusions do not paint an accurate picture of the current conditions of the white-collar professional workers in either society. Today, *karoshi* is catching on in the land of rights with the same ferocity that job insecurity and familial/social decay is gripping the land of community.

Although the analysis begins with a description of the unique features of the Japanese lifetime employment system, a strict “individualism vs. communitarianism” approach overlooks functional similarities inherent in both systems that contribute to the identity crisis plaguing the two groups of workers. Emphasizing “polar differences” tends to undermine the fact that both employment systems are social constructs, embodying deliberate political choices and historical experiences. Instead of looking to each other for ideas on employment and labor reform, both the American and Japanese labor systems could perhaps benefit more by independently assessing how market-based mechanisms that anchor both systems have failed to protect the workers in their differing cultural and historical landscapes.

¹¹ *Karoshi* (or death from overwork) is an extreme manifestation of the identity crisis that workers face in both societies. *Karoshi* will be explored in great detail in the following pages.

¹² See Mark Magnier, “Japan’s Suicide Epidemic in a Nation Where Mental Illness is Shamed and Lifetime Jobs are a Memory, Some Desperate Workers See No Way Out”, L.A. TIMES December 14, 2001, at A1. Magnier’s article describes the large sign at the base of Mt. Fuji that states, “Wait a Minute! The world holds bitterness but also joy. You only have one life to live, so think it over.” At least one taxi company in this area trains its drivers to spot the suicidal worker arriving at Mt. Fuji. A dead giveaway is that the worker arrives to this location by the latest train from Tokyo with little money. See also Heriot, *supra* note 2, at 209 for further explanation of the term “existential nightmare.”

A. Japanese Uniqueness: The Corporate Person and *Kaishashugi* Viewed through a Cultural Lens¹³

The moral world of the Japanese communitarian society relegates the self to the other.¹⁴ Because the Japanese self is thus “situated” rather than “unencumbered,” group loyalty is the supreme value.¹⁵ The unspoken rules connecting the fabric of the Japanese moral world emphasize interdependence (“amae”), connection (“en”), harmony (“wa”) and mutual responsibility for caring (“kikubari”).¹⁶ Two sources of the Japanese cultural view are the Buddhist teachings that embrace submission to fate as the key to happiness¹⁷ and the Confucian teachings which emphasize filial piety, hierarchy, and reciprocal obligations.¹⁸ In the Confucian tradition, duties, not rights, form the basis for human action. Just as the subordinate owes a duty of obedience and loyalty, the superior owes a duty of benevolence. In this cultural context, a successful adult is aware of his position in the various hierarchical relationships he is a part of and submits to the duties inherent in these positions.¹⁹ Two popular sayings, “lie down and await good news”²⁰ and “the nail that sticks out gets hammered down”²¹ capture these Buddhist and Confucian moral norms which emphasize submission to fate, conformity, and obedience.

The center of the Japanese moral world today for the male white-collar professional worker is his company (“kaisha”). As the “public or quasi-public space in his world which overwhelms other public spheres

¹³ *Kaishashugi* is a term coined by Japanese labor scholars combining *kaisha* (company) and *shugi* (ism). This “companyism” is, according to a leading analyst of the *kaishashugi*, “an exquisite combination of the capitalistic competition with the communal or socialistic relations.” See Inoue, *supra* note 8, at 530-31.

¹⁴ *Id.* at 528-39.

¹⁵ *Id.* at 527.

¹⁶ *Id.* at 528; see also Knapp, *supra* note 10, at 569.

¹⁷ Knapp, *supra* note 10, at 581.

¹⁸ See generally Harry G. Hutchison, *The Semiotics of Labor Law, Trade Unions and Work in East Asia: International “Labor Standards” in the Mirror of Culture?*, 14 EMORY INT’L L. REV. 1451 (2000) and Daniel H. Foot, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of – Stability?*, 43 UCLA L. REV. 635, 699-70 (1996).

¹⁹ A *wagamana* (childishly selfish person) is a worker who is too independent. He is considered to be a social liability. Hutchison, *id.* at 1451-52.

²⁰ Knapp, *supra* note 10, at 576.

²¹ Robert Larsen, *Ryousai Kenbo Revisited: The Future of Gender Equality in Japan After the 1997 Equal Employment Opportunity Law*, 24 HASTINGS INT’L & COMP. L. REV. 189, 218 (2001).

in importance,"²² the *kaisa* is the dominant source of the worker's self-identity and loyalty. In exchange for unquestioning loyalty, the *kaisa* furnishes the "corporate warrior" ("kigyo senshi") with social recognition and legitimacy. Because the Japanese employment relationship is not merely contractual but moral, it is said that in Japan's corporation-dominated society ("kigyo-shakai"), the most widespread religion is *kigyo-kyo* (corporate religion).²³ The moral and spiritual aspects of the worker's relationship with the company is exemplified by *messhi hoko*, the practice of sacrificing one's life in service of the common good to the point of self-annihilation.²⁴ While the parallel between the corporate warrior and the kamikaze fighter pilots of WWII may seem extreme, it has long become common knowledge that corporate warriors routinely sacrifice themselves literally the point of annihilation by working themselves to death.²⁵

Viewed through the Confucian lens, the corporation is a family. The bosses are the parents (assuming the duties of benevolence)²⁶ and the subordinate workers are the children (assuming the duties of loyalty). In practical terms, the corporate warrior's "stamina, intestinal fortitude, and dogged loyalty"²⁷ will be rewarded by life-long job security (until the retirement age of 55 to 60) and automatic promotions based on years of service.²⁸ Under this system, the *core* employees of most big corporations and many bureaucratic offices are recruited fresh out of college or high school and furnished with extensive training and

²² Inoue, *supra* note 9, at 528.

²³ Knapp, *supra* note 10, at 569.

²⁴ Inoue, *supra* note 9, at 528.

²⁵ The results of a 1992 poll showed that nearly one out of every two Japanese workers worried about *karoshi*. See Kidani, *supra* note 10, at 174.

²⁶ For a discussion on the Japanese workers' perception that the company will take care of them, see Mara Eleina Conway, *Karoshi: Is It Sweeping America?*, 15 UCLA PAC. BASIN L. J. 352 (1997).

²⁷ Inoue, *supra* note 9, at 571.

²⁸ The three "sacred regalia" of Japanese labor management relations are lifetime employment ("shu-shin koyo"), promotion by seniority ("nenko joretsu"), and in-company labor unions. Inoue, *supra* note 9, at 517. See also Ronald J. Gilson and Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508 (1999); Fred Burmester, *The Team Act - "Employee Participation Plans" Versus "Company Unions": The Irony of Attempting to Reform American Labor Policy Via a Japanese Labor Policy Which is Itself a Reformation (Corruption?) of the American Labor Policy Imposed Upon Japan in the Final Settlement of World War II*, 23 J. CONTEMP. L. 307 (1997); Larsen, *supra* note 21.

professional development which instills corporate loyalty.²⁹ Through a highly ritualized initiation and training process, the corporate warrior-in-training assumes a respectable familial position in his company.³⁰ Having entered the center of Japanese moral life, the corporate warrior's position in his company becomes "a vital source of [his] self-respect, a firm basis for his self-interpretation, and a prime determinant of the social recognition he gains."³¹

B. Political Creation of Lifetime Employment as an Anti-Union Strategy: The Other Face of *Kaishashugi* Viewed Through the Historical Lens

However well the Japanese lifetime employment system may seem to fit the contours of the Japanese communitarian society at large, it is a *practice*³² – rather than a "tradition" – that resulted from an anti-union strategy developed and executed by the United States.³³ Rather than a Confucian cultural construct, the Japanese lifetime employment system is a political construct, tortuously created during the post-World War II years and then thrust upon the Japanese society by appealing to its traditional communitarian values, and arguably by pitting the elite core workers against the non-core workers.

Many ironies inherent in the "individualism vs. communitarian" analyses that emphasizes polar differences in the two systems surface when lifetime employment is viewed through a historical lens. At the turn of the century, American and Japanese labor systems practically mirrored each other. Prior to World War II, the Japanese labor model was a feudal³⁴ version of the at-will model under which – depending

²⁹ There remains a rigid division between the core employees who have "lifetime employment" and the non-core employees who are employed at-will. The core employees are male, educated, white-collar professionals. The non-core are female, blue-collar, service, and "non-essential" workers.

³⁰ The recruitment process will be described in some detail in Part III.

³¹ Inoue, *supra* note 9, at 527-28.

³² Lifetime employment is neither law nor a part of any collective bargaining agreement. It is simply a practice that large Japanese companies have more or less adhered to for the core permanent management employees. Moreover, as has been discussed earlier, the benefits of lifetime employment are only afforded to the core employees – male white-collar professionals.

³³ See generally Gilson and Roe, *supra* note 28; see also Burmester, *supra* note 28, at 314.

³⁴ Unlike Gail Heriot's feudalism analysis, which is limited to the relationship between the lords and the vassals, "feudal" as used here brings the workers – the serfs who were wholly dependent on the lords for survival – into the equation.

upon the economic circumstances – the industrial ruling class resorted to mass firings (despite the absence of a public welfare system), or worker poaching in order to curb worker mobility. The Japanese lifetime employment system came about in part because the U.S. wanted to impose something similar to the National Labor Relations Act (“NLRA”) on the Japanese as a part of the post-World War II democratization efforts. Finally, the lifetime employment model reflects the culmination of the American anti-communist strategy. Viewed through a historical lens, it is sublimely ironic that American policy-makers may have contributed more to the creation of the lifetime employment system than Confucius and Buddha could have ever have hoped to.

Prior to World War II, Japan was a feudal industrialized state ruled by the zaibatsu, the industrial ruling class.³⁵ Beginning with the Meiji Restoration of 1868, this pre-World War II industrialization period was characterized by exceedingly high worker turnover rates. During World War I, for instance, the yearly turnover rate of 75% was the norm in most Japanese industries.³⁶ During the 1920’s, a severe economic recession caused labor instability and a corresponding labor surplus.³⁷ During World War II, however, the Japanese faced an acute labor shortage and labor instability resulted from heightened employee mobility due to a healthy external labor market.³⁸

After World War II, the Japanese economy was in ruins. The zaibatsu was restored to power and the companies reverted to mass firings, causing a survival crisis among millions of Japanese workers. In a society which lacked a public welfare system, the “threat of unemployment was literally a threat to survival.”³⁹ During this bleak period people starved and companies dismissed workers at will. In response to this crisis, the Supreme Commander of the Allied Powers (“SCAP”), General Douglas MacArthur, initiated a “democratization” program in order to counterbalance the zaibatsu restoration to power.⁴⁰ At the heart of MacArthur’s democratization efforts was the creation of an independent labor union movement. By 1945, MacArthur’s Trade Union Law (heavily modeled on the NLRA) passed, granting the Japanese workers the ability to form unions and to strike.⁴¹ The Japanese

³⁵ See Burmester, *supra* note 28, at 335.

³⁶ See Gilson and Roe, *supra* note 28, at 519.

³⁷ See *id.*

³⁸ *Id.*

³⁹ Gilson and Roe, *supra* note 28, at 520.

⁴⁰ See Burmester, *supra* note 28, at 337.

⁴¹ See *id.* at 338. The Japanese Constitution (1946) also is reflective of General MacArthur’s early contribution to the development of Japanese labor law.

masses responded by joining the newly formed unions in huge numbers,⁴² striking against their employers, and taking over the plants and running them without the managers.⁴³

The independent labor union movement was intense, effective, and short-lived. By 1947, SCAP decided that worker control over production was a direct threat to the U.S.'s new anticommunist Cold War strategy and abandoned its pro-union democratization policy of 1945.⁴⁴ In 1949, the "Dodge Line" – an "austerity" program developed by Joseph Dodge, a conservative Detroit banker – went into effect, enabling the SCAP to lend its full support to the conservative business interests and their anti-union strategy.⁴⁵ By June 6, 1950, the Japanese government, together with management and the U.S., engaged in the "Red Purge." Over 10,000 union members suspected of being communists were fired and banned from all union activities.⁴⁶ The new U.S. campaign to crush its own creation – the independent labor union movement – hit full throttle within five years of the passage of the Trade Union Law.

When North Korea invaded South Korea two weeks after the beginning of the "Red Purge," the fate of the independent union movement was sealed.⁴⁷ Recognizing the strategic importance of Japan, the U.S. decided that it was necessary to build up the Japanese economy in order to defeat communism. Additionally, the U.S. military presence in the area assured an immediate demand for Japanese products. In practical terms, three anti-union devices were borne by the American anticommunist strategy and the Korean conflict: first, the infusion of

Article 28, still valid today, provides that "[t]he right of workers to organize and to bargain and act collectively is guaranteed." JAPAN CONST. art 28.

⁴² See Gilson and Roe, *supra* note 28, at 521. At the time the Trade Union Law was passed, union membership numbered 381,000. By the end of 1946, union membership was at 5 million.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See Burmester, *supra* note 28, at 341-43. The Dodge Line was designed to "stabilize" the Japanese economy, and involved balancing the national budget, curtailing government spending, and limiting U.S. aid to Japan. As a consequence of this program, severe tensions broke out between labor and management over labor costs because managers were unable to pay more than the "pitiful" wages that they were already paying. When union strikes broke out as a result of this tension, management eventually crushed the strikes and the independent labor movement with the aid of the SCAP.

⁴⁶ See *id.* at 341; see also Gilson and Roe, *supra* note 28, at 521-22, where they estimate over 12,000 workers were "purged."

⁴⁷ See Burmester, *supra* note 28, at 342.

American funds in support of Japanese management interests;⁴⁸ second, the creation of the company union backed by an appeal to the Japanese traditional values; and third, lifetime employment. Through lifetime employment, managers won back their plants from worker occupation firm by firm and crushed worker union support.⁴⁹

By the mid-1950s, the key features of lifetime employment were in place.⁵⁰ Core employees were offered permanent employment (the non-core employees were still at-will) and the external labor market was suppressed by the government and business interests. Government passed anti-poaching legislation and management negotiated “gentlemen’s agreements” not to recruit laterally.⁵¹

This extended historical account is intended not only to point out the many ironies inherent in the Japanese lifetime employment system, but also to illustrate how a new socio-economic hierarchical order was constructed (or reconstructed) within a short time span by the “powers that be.” Traditional communitarian values were important tools that enabled the *zaibatsu*, with full American backing, to create the moral universe of the *kashaihashugi* to safeguard its capitalist interests. The fate of the independent labor union illustrates the strength of Japanese capitalist ideology. Although it was at first viewed as central to the “democratization” of Japan, the unions’ enabling workers to control the means of production eventually threatened capitalism. Thus the *kaishashugi* arose out of the ashes of the doomed independent labor movement.

C. The “Dark” Side: *Karoshi*⁵²

Toshitsugu Yagi, a 43-year-old middle manager who succumbed to a heart attack from *karoshi*, wrote in his diaries:

Let's think about slavery, then and now. In the past, slaves were loaded onto slave ships and carried off to the

⁴⁸ See *id.*

⁴⁹ See generally Gilson and Roe, *supra* note 28.

⁵⁰ See *id.* at 526-28.

⁵¹ Gilson and Roe argue that the “deliberate” closing of the external labor market, not lifetime employment, is responsible for the employer’s investment in worker training and lack of worker mobility. See Gilson & Roe, *supra* note 28, at 527-32. For a discussion on the unwritten gentlemen’s agreements, see also Foot, *supra* note 18, at 699-70.

⁵² This comment does not address the symbolic aspects of *karoshi*. For an excellent discussion of this topic as well as Emile Durkheim’s studies of suicides, See generally Inoue, *supra* note 9; Ishida, *supra* note 10.

new world. But in some way, aren't our daily commuter trains packed to overflowing even more inhumane? And, can't it be said that today's armies of corporate workers are in fact slaves in almost every sense of the word? Their worth is measured in working hours.⁵³

Yagi concluded that the corporate warriors' lives are even more miserable than the slaves of the past because the slaves were not denied the simplest of life's pleasures, such as the right to sit down to dinner with their families.⁵⁴ Those who bristle at the comparison of the Japanese corporate warriors to the slaves of the past may find the description of *karoshi* as "ritualistic suicide" a little less uncomfortable.⁵⁵ Whether this crisis is one of "slavery" or "ritualistic suicide," what is inescapable is that the lives of the 10,000 workers that fall victim to *karoshi* (death from overwork) or *karojisatsu* (suicide from overwork) every year signal an existential nightmare.⁵⁶

Today's medical consensus in Japan would soundly disagree with the American cliché that "hard work never killed anybody."⁵⁷ According to the National Institute of Public Health, five work patterns do in fact kill: working extremely long hours or night hours, working without reasonable breaks, high-pressure work, extremely hard physical labor, and continuously stressful work.⁵⁸ With the possible exception of hard physical labor, the other four work patterns apply, in varying degrees, to corporate warriors.⁵⁹ One shared characteristic of all *karoshi* victims, whether young or old, white or blue collar, is that every single victim worked in excess of 3,000 hours each year (3,000 hours is

⁵³ Knapp, *supra* note 10, at 550.

⁵⁴ See Inoue, *supra* note 9, at 533-34.

⁵⁵ For the discussion of *karoshi* as "ritualistic suicide on behalf of one's company," see Foot, *supra* note 18.

⁵⁶ For the definitions of *karoshi* and *karojisatsu*, see generally Ishida, *supra* note 10. The 10,000 per year figure comes from Knapp, *supra* note 10 at 551. 10,000 deaths is comparable to the number of deaths resulting from motor vehicle accidents each year in Japan. Kidani, *supra* note 10, at 175.

⁵⁷ That the cliché is seriously outdated or just flat-out wrong is evidenced by the fact that United Nations has formally adopted *karoshi* as part of its agenda. See Knapp, *supra* note 10, at 552.

⁵⁸ See Kidani, *supra* note 10, at 172-73.

⁵⁹ A recent survey found that corporate warriors accounted for 62.5% of all *karoshi* victims. See Knapp, *supra* note, 10 at footnote 35.

equivalent to working twelve hour days for 250 days of the year).⁶⁰ By comparison, the internationally subscribed maximum working hour limit is set at 1,800 hours per year.⁶¹ Despite the widely known health risks of overworking, it is estimated that one out of every six Japanese worker still puts in 3,000 hours each year.⁶²

Japanese law has played a heavy hand in legitimizing *karoshi* because it has failed to restrict the capital-driven managerial prerogatives in the areas of overtime regulation and worker's compensation. Worker overtime in Japan is governed by the Labor Standards Law ("LSL") which prescribes that "[w]orking conditions shall be those which should meet the needs of workers who live lives worthy of human lives" (article 1) and restricts working hours to a maximum of 40 hours per week (article 32).⁶³ Two additional articles in this same statute, however, give teeth to employer demands for worker overtime and prove that articles 1 and 32 are a pretext if not a flat-out sham. Article 36 provides that employers may force employees to work overtime as long as the union (or a majority of the workers if no union exists) has agreed to work overtime. Since the Japanese unions are company unions, nearly all Japanese companies have these so-called "three six agreements."⁶⁴ Additionally, article 37 prescribes a 25% premium for overtime pay. Because the costs of hiring additional employees would far surpass the 25% premium pay, overtime is the only choice for employers in the unregulated market economy.⁶⁵

⁶⁰ See *id.* at 552-53. See also, Ishida *supra* note 10, at 224.

⁶¹ See Kidani, *supra* note 10, at 174.

⁶² See Ishida, *supra* note 10, at 223; Knapp, *supra* note 10, at 552-53. According to Knapp, one out of five office workers in Tokyo are afraid to fall victim to *karoshi*.

⁶³ See Kidani, *supra* note 10, at 186.

⁶⁴ See Ishida, *supra* note 10, at 226-27; see generally Inoue, *supra* note 9. According to the Secretary of Japan Federation of Newspaper Worker's Unions, "it is no exaggeration to say the unions act as if life can be exchanged for money." Knapp, *supra* note 10, at 555.

⁶⁵ See Kidani, *supra* note 10, at 186-87. It is estimated that unless overtime premium were raised to 62.5%, companies would prefer overtime pay to the cost of hiring new employees. This figure does not account for the fact that workers do not declare a majority of their "service" overtime hours. The direct connection between overtime and profitability is shown by the fact that unpaid compensation for overtime accounted for 20% of the profits at the Fuji Bank and more than 10% at the Sanwa Bank in 1990. A customary practice in the banking industry is the "Seven-Eleven," where the bank employees put in 16-hour days by working from 7:00 a.m. to 11:00 p.m. See Knapp, *supra* note 10, at 381.

The courts have also assumed an active role in validating managerial prerogatives even in the most extreme cases of worker abuse in these two areas. With regard to overtime, the Japanese Supreme Court has held that a worker can be fired for refusing to work overtime on just one occasion. In the 1991 *Hitachi* case, the Japanese Supreme Court held that “an individual worker has no right to refuse an employer’s request for overtime if the time does not exceed the limit agreed upon by the employer and the union.”⁶⁶ The *Hitachi* court upheld the firing of a worker for refusing to work overtime on just one occasion despite the fact that the Hitachi “three six agreement” mandated overtime work for wildly broad and ambiguous reasons like “attain[ing] production targets.”⁶⁷

With regard to worker’s compensation benefits, the courts have held that *karoshi* victim’s families can be denied worker’s compensation benefits even if the worker died after working almost 5,700 hours/year. In 1990, Koichi Fujiwara’s widow was denied worker’s compensation benefits. The appellate courts affirmed this decision despite the fact that the forty-two year old truck driver⁶⁸ died after working 5,700 hours that year.⁶⁹ Although Fujiwara routinely put in more than 200 hours per month in overtime, the worker’s compensation office found that no causal relationship existed between Fujiwara’s death and his work simply because none of the company’s other drivers who put in the same kinds of hours had suffered serious illness or death.⁷⁰ The callousness inherent in the rationale of this decision⁷¹ is not only reflective of the hostility that confronts workers’ compensation claimants in Japan but it also reflects the inescapable irony that no worker could attribute his death to *karoshi* – regardless of the number of hours he worked – unless others like him also died.

⁶⁶ Knapp, *supra* note 10, at 554-55.

⁶⁷ *Id.* at 555.

⁶⁸ Although the scope of this article is limited to white collar professional employees, the holding of the Fujiwara case presumably applies to white collar workers as well. *See id.* at 560-61.

⁶⁹ *See id.* at 560, n. 92. Knapp notes that Fujiwara was paid only \$500 per month. One day, he worked 22 hours and 15 minutes.

⁷⁰ *See id.* at 560-61.

⁷¹ The callousness is especially severe when one considers that the corporate warriors are absentee fathers and absentee husbands. After devoting everything to the *kaisha*, he has nothing left for his own family. One corporate warrior submitted this poem to a contest hosted by a life insurance firm: “Spent the weekend with/Perfect strangers, or were they/My wife and kids?” Knapp, *supra* note 10, at 550.

Some corporate warriors like Ichiro Oshima cannot wait for *karoshi* to consume their lives. He committed suicide after working for one full year with only ½ day of vacation.⁷² Frequently working until 6:30 a.m., Oshima told his boss, “I cannot function as a human being. I wake up after only two hours of sleep.”⁷³ Oshima was 24 years old when he gave in to *karojisatsu*.

There are two signs that the Japanese government has at least acknowledged the *karoshi* and *karojisatsu* crises. In December 2001, the Ministry of Health, Labour and Welfare adopted a new criterion for establishing causation in worker’s compensation claims.⁷⁴ If the worker puts in more than 80 hours of overtime each month for six months preceding his death, courts are required to provide worker’s compensation benefits to his family.⁷⁵ Before the adoption of this new criterion, the claimant had to prove that the worker was under an excessively heavy burden prior to his death (attributable to “an unusual circumstance” or “excessively onerous work”), and that this excessive condition arose within one week prior to death.⁷⁶ Also, in February 2002, the Ministry ordered employers to send workers for full medical checks by *company* doctors if they worked more than 80 hours of overtime per month.⁷⁷

Even if these new measures seem to be little more than “gestures,” any impact that they may have on curbing employer abuse directed against corporate warriors is severely undermined by the erosion of lifetime employment. As of December 2001, Japan’s unemployment rate was soaring at a record high of 5.4% (3.5 million unemployed workers).⁷⁸ Since worker layoffs and dismissals do not equate to reduced work burdens on the remaining workforce,⁷⁹ and because the threat of unemployment is very real, it is highly probable that workers will be too afraid to complain about their miserable working conditions. The employers’ abandonment of the life-long commitment to their workers in

⁷² See Kidani, *supra* note 10, at 188.

⁷³ *Id.*

⁷⁴ See Kwan Weng Kin, *Death From Overwork - Tokyo Government Acts*, SING. STRAITS TIMES Feb. 18, 2002.

⁷⁵ See *id.*

⁷⁶ See Ishida, *supra* note 10, at 227. This criterion excludes coverage to most cases of *karoshi* – which result from gradual development of fatigue over an extended period of time. See Knapp, *supra* note 10, at 552.

⁷⁷ See Kin, *supra* note 74.

⁷⁸ For the proposition that corporate warriors are now being laid off en masse, see Magnier, *supra* note 12.

⁷⁹ See *id.*

the throes of a volatile economic market has ensured that the *karoshi* problem will continue.

D. The Identity Crisis and Explanations

Socio-cultural pressures cannot account for why Japanese workers continue to expose themselves to death by *karoshi*, especially in an era when lifetime employment is a fast-fading memory for the hundreds of thousands, if not millions, of corporate warriors standing on unemployment lines. The Confucian cultural lens explained lifetime employment through the notion of reciprocal duties. The corporate warriors assume their privileged roles within the *kaisha* hierarchy and furnish “stamina, intestinal fortitude, and dogged loyalty” in exchange for a life-long commitment and benevolence. Today, however, despite the fact that the company has failed to live up to its end of the bargain, workers still engage *messhi hoko*. Capitalist economics and politics offer a more cogent explanation.

History reveals that lifetime employment was a political construct arising from a calculated anti-union strategy, which was then thrust upon the Japanese worker through an appeal to his communitarian values and the Confucian promise of reciprocity. The independent labor union was crushed precisely because its central role in the democratization efforts threatened the capitalist ideology. Even under the auspices of lifetime employment, key players in the *karoshi* rat race were the products of unrestrained capitalism rather than the duty-driven Confucian norms. Just as the company unions were created by capitalist clout, a closed external market was also a capitalist creation, glued together by the “gentlemen’s agreements” not to recruit laterally. And all along the way, law played a decisive role, legitimizing each of these creations and enabling management to secure its interests. Law was not a mere “heirloom sword,” as many scholars have suggested,⁸⁰ but an effective weapon wielded by the management.

Irrespective of economics and politics, if lifetime employment was ever an adequate explanation for the employer’s domination (and annihilation) of the worker’s private sphere, as some have suggested, it can no longer explain the continuing employer appetite for *messhi hoko*. The only difference today from one decade ago when Heriot wrote her defense of the at-will contract is that the Japanese corporations have abandoned the lifetime employment relationship and have once again have reverted to mass dismissals. By all indications, the Japanese

⁸⁰ See generally Inoue, *supra* note 9; Knapp, *supra* note 10.

lifetime employment “tradition” barely lasted the working lifespan of just one generation of Japanese corporate warriors.

Many scholars of the *karoshi* crisis have embraced Emile Durkheim’s thesis that the “way people die sometimes discloses the dilemma or contradictions inherent in their form of social life.”⁸¹ Professors Baba, Inoue, and Ishida accordingly describe *karoshi* as a symbolic death that embodies the dilemma of a society experiencing “an exquisite combination of capitalistic competition with communal or socialistic relations.”⁸² However well this captures the dilemma of the *karoshi* victims, it is perhaps even more exaggerated among the living—the newly unemployed corporate warriors. The majority of the unemployed today are the former breadwinners in their forties and fifties who sacrificed everything for the sake of the *kaisha*. And they did so with the expectation that the *kaisha*, the benevolent “parents,” would repay their loyalty with life-long security and commitment. In a society where the moral universe centers around the *kaisha*, the *kaisha*’s betrayal has emptied the corporate worker of his self-respect and his social recognition. Without the *kaisha*, and without an income, these former warriors have nothing on which to base their identity—they cannot fulfill the moral duties inherent in their overlapping roles as fathers, husbands, and workers. Today, thousands of former corporate warriors are joining the ranks of the 10,000 *karoshi* victims each year. Suicides directly attributable to unemployment and personal debt now number 8,500 annually.⁸³ As long as companies continue to hand out pink slips, the *kaisha* will continue to devour both the corporate warriors of today and yesterday.

III. The American Corporate Law Firm Associate

It appears either exceedingly unfair or callously superficial to compare the plight of the Japanese corporate warrior to the highly-paid associates of the large and elite corporate law firms in America. Although corporate law firm associates work a great deal more than average American workers, they are well-compensated for their *choice* to do so. Thus the corporate associate’s plight is far less sympathetic than the plight of the corporate warrior. However, the experiences of the American corporate lawyer are nonetheless valid indicators of worker alienation and commodification caused by market-based valuations of worth, irrespective of the choices that may otherwise be available to the

⁸¹ *Id.*; see also Ishida, *supra* note 10.

⁸² Inoue, *supra* note 10, at 538.

⁸³ See Magnier, *supra* note 12.

corporate lawyer. Both the corporate warrior and the corporate law firm associate are members of the elite in their respective societies, and both groups of workers are confronting an acute identity crisis. A discussion of the corporate lawyer's dilemma does not trivialize the corporate warriors' existential nightmare. Instead, the assumption that worker alienation in the two hyper-industrialized societies are caused by diametrically opposing forces can only oversimplify and trivialize the experiences of *both* groups of workers.

**A. Heavenly and Earthly Riches or Eternal Damnation:
the Role of Work**

Like Japan, work dominates the American cultural and moral landscape. The historic roots of the "Protestant work ethic" trace back to the Puritan colonists' Calvinist belief that material success was a sign of God's blessings on the select few that were "saved" from eternal damnation.⁸⁴ Thus, hard work, thrift, and business acumen were "qualities to be cultivated by those who hoped to enter Heaven."⁸⁵ The Puritanical zeal for work is exemplified by their "holy crusade against [medieval] holidays, demanding that only one day a week be set aside for rest."⁸⁶

In *The Protestant Work Ethic and the Spirit of Capitalism*, Max Weber described the moral and religious dimensions of American labor:

Labor is not merely an economic means: it is a spiritual end. Covetousness, if a danger to the soul, is less formidable menace than sloth. So far from there being an inevitable conflict between money-making and piety, they are natural allies, for the virtues incumbent on the elect – diligence, thrift, sobriety, prudence – are the most reliable passport to commercial prosperity. Thus, the pursuit of riches, which once had been feared as the enemy of religion, was now welcomed as its ally.⁸⁷

Given this historical and religious background, American workers have just as much at stake in their jobs as Japanese corporate warriors. Their jobs determine their wages and economic prosperity. Economic prosperity in turn determines the workers' standing in the

⁸⁴ See Conway, *supra* note 16, at 364.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 365.

community and signals their allotted spot in heaven. Poverty and unemployment, on the other hand, signal eternal damnation and moral depravity. Viewed through this historical and religious lens, it is not surprising that the “pursuit of riches” is the American obsession and that poverty and unemployment are abhorred. Among those who most possess the capacity to fulfill the desire for riches is the American corporate lawyer.

B. The Marxist Critique and the American Corporate Law Firm in the Age of the Gargantuan Billable Hour and the Greedy Associate

It is difficult to imagine a class of workers who least fit the category of the “exploited” worker than the highly-paid associates in beautifully-furnished elite corporate law firms. By all measures they ooze success. And yet, it is the associates (or former associates) themselves that hurl Marxist epithets and embrace the “exploited” categorization.⁸⁸ The almighty billable hour, they claim, has reduced them to the “most wretched of all commodities.”⁸⁹ mechanized hourly wage-slaves. One associate claims that the “large law firm is one of the only institutions in contemporary America that fits Marx’s theory of exploitation with no fudging required.”⁹⁰ Two other former associates (and now law professors) shamelessly assert that this is so because to the

⁸⁸ Along with the sources cited in this article, the numerous anonymous messages posted on the message boards and chat rooms on the internet provide ready support for this proposition. My favorite is at GreedyAssociates.com. The proliferation of these websites not only evidences the associates’ ability to voice their dissatisfaction with their working conditions but also provides a means of worker solidarity. Somewhat like “identity-based network organizations,” see Alan Hyde, *A Closer Look at the Emerging Employment Law of Silicon Valley’s High-Velocity Labour Market*, in LABOR AND EMPLOYMENT IN AN ERA OF GLOBALIZATION, (Joanne Conaghan, R. Michael Fischl, Karl Klare, eds., 2002), these message boards provide informal advice and networking opportunities for associates to counter the “bowling alone phenomenon.”

⁸⁹ Karl Marx, *The Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER (Robert C. Tucker ed., Samuel Moore & Edward Aveling trans., 2d ed., W.W. Norton & Co. 1978) at 70.

⁹⁰ S. Elizabeth Wilborn and Ronald J. Krotoszynski, Jr., *Views from the Front: A Dialog about the Corporate Law Firm*, 1996 UTAH L. REV. 1293, 1295 (1996), citing David, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 735 (1988).

big law firms, associates are disposable like “Doritos.”⁹¹ According to these critics, the corporate law firm structure embodies the capitalist ideal. The partners who own equity stake in the firm and have a client base (capital source) are the bourgeoisie. Each partner’s salary is supported by the labor of two or three associates, the disposable at-will members of the proletariat.⁹² Despite the illusions of attaining the “holy grail” of the equity partnership, the law firm leverage structure ensures the associates’ disposability.⁹³

That associates’ Marxist ramblings have an objective basis in fact is supported by numerous studies revealing how miserable and dangerously unhealthy associates really are.⁹⁴ One out of three suffers from depression, drug abuse, or alcoholism.⁹⁵ It should be noted that lawyers *generally* suffer from a major depressive disorder at a rate 3.6 times higher than non-lawyers with similar socio-economic profiles,⁹⁶ and suffer alcoholism and drug abuse at twice the rate of non-lawyer adults.⁹⁷ Not surprisingly, lawyers commit suicide more often than non-

⁹¹ See Wilborn & Krotoszynski, *id.*, at 1303-04 (when associates leave the firm, the attitude is, “don’t worry, we’ll make more”).

⁹² Wilborn and Krotoszynski describe the law firm structure as a “ponzi scheme.” *Id.* at 1312. In support, they cite the Merriam Webster’s Dictionary’s definition of ponzi scheme: “an investment scam where early investors are paid off with funds put up by later investors. Later participants are therefore subject to increasing risks.”

⁹³ This is because firms must “regularly shed themselves of large numbers of senior associates who are too expensive to do document reviews and other grunt work and, moreover, are often fully capable of doing the partner’s job.” *Id.* at 1334.

⁹⁴ See Keith Cunningham, *Father Time: Flexible Work Arrangements and the Law Firm’s Failure of the Family*, 53 STAN. L. REV. 967, 969-70 (2001) (lawyers have the highest job dissatisfaction among all professional groups; see generally Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 RUT. L. J. 143 (1998); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN’S. L. REV. 85 (1994); David A. Kessler, *Professional Asphyxiation: Why the Legal Profession is Gasping for Breath*, 10 GEO. J. LEGAL. ETHICS. 455 (1997).

⁹⁵ See Patrick Schiltz, *Those Unhappy, Unhealthy Lawyers*, NOTRE DAME MAG., Autumn 1999, at <http://www.nd.edu/~ndmag/legl2f99.htm>; see also Schutt, *id.*, at 150.

⁹⁶ See Schiltz, *id.*

⁹⁷ See *id.*

lawyers.⁹⁸ These figures are especially significant in a society that spends \$200 billion dollars a year dealing with job-related stress.⁹⁹

The primary reason for the intense dissatisfaction and stress levels among American corporate lawyers is that, like the Japanese corporate warriors, they work too much. It is common knowledge that associates in large corporate law firms routinely bill a minimum of 2,000 hours per year.¹⁰⁰ Many bill 2,500 hours or more.¹⁰¹ As a general rule, since only two-thirds of the time actually spent working translates into billable hours, attorneys must work 3,000 hours per year in order to bill 2,000 and 3,750 hours in order to bill 2,500.¹⁰² Any claim that the associates' work schedules allow for a "balancing" of work and family or other private interests must first meet this mathematical challenge. Family or personal time, much like the associates themselves, are "ever diminishing commodit[ies]."¹⁰³

Like the Japanese law, American law provides no protection against overwork. The Fair Labor Standards Act exempts white-collar workers entirely from overtime regulation.¹⁰⁴ Just as in Japan, the law

⁹⁸ See *id.*

⁹⁹ See Conway, *supra* note 16, at 367. This figure comes from the International Labor Office, which has concluded that stress is "one of the most serious health issues of the twentieth century."

¹⁰⁰ See Schiltz, *supra* note 95; see also Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 240, 246-48, (Winter, 2000)(citing Chief Justice William Rehnquist's condemnation of the billable hour requirement as "treating the associate very much as a manufacturer would treat a purchaser of one hundred tons of scrap metal").

¹⁰¹ See Schiltz, *supra* note 95.

¹⁰² See *id.*; see also James Regan, *How About a Firm Where People Actually Want to Work?: A "Professional" Law Firm for the Twenty-First Century*, 59 FORD. L. REV. 2693, 2705 (2001)(working 3,000 hours is equivalent to working putting in 60 hours every week and taking two weeks of vacation every year).

¹⁰³ Cunningham, *supra* note 94, at 978-980. A recent ABA survey shows that the top two reasons that associates are dissatisfied with their jobs are: "not much time for self" and "not much time for family." Cunningham also notes that 63% of 1,500 CEOs and HR Directors of large corporations said that "none" is the reasonable amount of time for a father to take off from work upon birth or adoption of a child. *Id.* at 975.

¹⁰⁴ Section 13 of the FLSA exempts workers "employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman." In 1990, only 67% of wage and salaried workers were covered under FLSA's provisions regulating overtime. This is not surprising since the

legitimizes the big firm culture's instigation and maintenance of the billable hour rat race by refusing to regulate it.¹⁰⁵ The elite firms value an associate's contribution to the firm primarily, if not solely, on the basis of his billable hours.¹⁰⁶ Where hefty timesheets equal "success, promotion, and prestige,"¹⁰⁷ the firm culture's message to the associate is that if he can out-bill his cohorts, he will reach the "pinnacle" of the corporate law firm – the equity partnership and *job security*.¹⁰⁸

The Protestant work ethic that values material success and abhors poverty is exemplified in the "age of the gargantuan billable hour"¹⁰⁹ and the greedy associate.¹¹⁰ Despite evidence that overworked associates suffer serious health problems as well as an evisceration of their personal lives, the gargantuan billable hour translates into worker success and profitability, and explains why associates are unwilling to stop running in the rat race. According to the 1998 National Association for Law Placement report, only 2.9% of associates worked part-time schedules even though 94% of law firms allow associates to do so. Associates do not work part time because they fear "reduced compensation, decreased advancement opportunities, and diminished workplace reputation."¹¹¹

goal of FLSA was not to reduce overtime but to create work. See Conway, *supra* note 16, at 366.

¹⁰⁵ Lawyers, like the Japanese corporate warriors, do not have ability to form independent labor unions. They are not "employees" for the purposes of the NLRA.

¹⁰⁶ At least 100 law firms listed on the National Law Journal's top 250 List provide a "merit" based or "discretionary" bonus as measured by the associate's billable hour. See www.ilrg.com.

¹⁰⁷ *Id.*

¹⁰⁸ See *Cunningham*, *supra* note 94, at 983, (quoting a managing partner as saying that in order to reach the pinnacle of the law firm pyramid, a lawyer must be "fully committed and fully involved" and that a part-time lawyer can be neither of these things).

¹⁰⁹ *Id.* at 979. One insider notes that "if you're in a law firm and all the powerful people are working 100 hours a week, then that's communicating something back about what's valued." *Id.* at 981.

¹¹⁰ Regarding the term "greedy associate": empirical studies show that many law students come from an elite socioeconomic background. According to Susan Daicoff, this explains why law students are attracted by the money and prestige associated with the legal profession. See Susan Daicoff, *Articles Lawyer, Know Thyself: a Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1353-54 (1997).

¹¹¹ *Cunningham*, *supra* note 94, at 980-81.

The quasi-religious pursuit of riches also furnishes a partial explanation for sky-high attrition rates. Generally, in large corporate law firms, 44% of new associates leave within three years and 73% percent within six years of employment.¹¹² The “associate attrition clock” estimated that in 1999, an associate left the firm every 15 billable minutes.¹¹³ In 1999, only 18.5% of these associates left the firm for other work.¹¹⁴

In the “high velocity labour market”¹¹⁵ of the 1990’s, the economy was seemingly healthy, the external labor market was strong, and the greedy American corporate associate was bowling alone¹¹⁶ and scoring high.¹¹⁷ If there was ever any time to romanticize or glorify the American at-will contract, the late 1990’s were it.

C. The Marxist Critique & the American Corporate Law Firm in the Age of the Gargantuan Billable Hour and the Hungry Associate

The Protestant work ethic that values material success and abhors poverty exemplifies the *current* “age of the gargantuan billable hour” and the *hungry* associate. Just as the Japanese employers abandoned lifetime employment and resorted to mass-layoffs of the corporate warriors in the 1990s, the American law firms are currently undergoing a firing frenzy. The New York Law Journal website’s column entitled “Layoffs & Other Economic Problems” features over 100 articles detailing associate dismissals.¹¹⁸ Articles like “The Life of a Laid-Off Associate,” “Highest-Billing Associate Gets the Boot,” “Valley Firm Tells Associates: Take Pay Cut or Hit Highway,” and “Firms

¹¹² See Regan, *supra* note 102, at 2707; see also Cunningham, *supra* note 94, at 970-71. The large law firm turnover rate is 20%. Within eight years, less than 1/3rd of the original associate class remains at the law firm.

¹¹³ Michael D. Goldhaber, *Waging a War of Attrition*, NAT’L L. J., December 13, 1999, at <http://www.law.com/cgi-in/gx.cgi>.

¹¹⁴ See *id.*

¹¹⁵ For further explanation of the term “high velocity labour market,” see generally Hyde, *supra* note 88.

¹¹⁶ The “bowling alone” phenomena is described by Hyde, *id.*, at 348.

¹¹⁷ Most large firms increased starting salaries to \$125,000 during the salary wars of the 1990’s. Some New York and Silicon Valley firms even went as high as \$145,000. See Kevin Wack, *The Tide Turns: Remember when Associates Ruled? Well...*, BUS. L. TODAY December 11, 2001 at 41, 41-3, as well as websites devoted to associate pay monitoring and associate salary surveys. See www.ilrg.com; www.nylawyer.com/pay/index.html.

¹¹⁸ As of March 8, 2002 available at <http://www.nylawyer.com/pay/index.html>.

Muzzle Fired Associates,” signal the full-fledged return of the “dark” side of the employment at-will contract for corporate law firm associates.¹¹⁹ Internet message boards now warn of the “cloak and dagger approach to firing”¹²⁰ and law firm “backstabbing.”¹²¹

Downsizing does not mean less work for the remaining corporate associates. Rather, it threatens their very self-worth and in some cases their redemptive potential.¹²² Thus, exceedingly high numbers of at-will dismissals ensure that the corporate law firm associates, just like their Japanese counterparts, will continue to sacrifice their public *and* private lives to the “gargantuan billable hour,” even to the point of personal extinction.¹²³

IV. Conclusion

The rat race continues in the land of community and the land of rights where work dominates the cultural, social, and quasi-religious landscapes. For the corporate warrior, as long as his “stamina, intestinal fortitude, and dogged loyalty” translates solely into the almighty working hour, he will continue to sacrifice his “personal” self to annihilation. In the land of community, Darwinistic market forces, encouraged by ready pink slips, continue to gobble up the worker, the family, and the civic community. The death of the Japanese lifetime employment system

¹¹⁹ *Id.*

¹²⁰ The “cloak-and-dagger” approach to firing is when the partners tell the soon-to-be canned associates, “keep up the good work,” two days before firing them. One firm used this approach when firing 10% of its associates. To add insult to injury, associates were pressured to sign forms stating that they were leaving “voluntarily.” Wack, *supra* note 116, at 41-43.

¹²¹ One anonymous posting dated March 2001 warned: “In today’s market, these firms give the term ‘backstabbing’ a new meaning. Word to the wise – if you hear people talking about ‘Survivor’ a lot, watch your back. I repeat, watch your back. You’re next.” *Id.*

¹²² Conway argues that the problem of *karoshi*, in America, is “getting worse as companies struggle to save themselves on the bottom line by trying to produce more with fewer workers.” Conway, *supra* note 15, at 352. See also Sanford M. Jacoby, *Melting Into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHI.-KENT L. REV. 1195 (2000) (arguing that the recent downsizing disproportionately affects all educated professional and managerial employees).

¹²³ Professor Duncan Kennedy has argued that some evils of the corporate law firms could be successfully remedied if progressive attorneys in those firms asserted themselves. See *Rebels from Principle: Changing the Corporate Law Firm from Within*, HARV. L. SCH. BULL. Fall 1981, at 36, 36-39. However, in today’s market, associates may feel even less comfortable voicing dissenting opinions.

perhaps best symbolizes the market's appetite for *karoshi*. Once upon a time, at least a few members of the privileged ranks of society toiled under their belief that their value as workers and members of the *kaisha* deserved reciprocal obligations. The corporate warriors of today, disposable at will, no longer enjoy and suffer from that delusion.

The market's appetite has not overlooked the land of rights. The almighty billable hour has transformed even the most elite of the white-collar work force into self-described "Doritos," and the current economic downturn has assured that these "rugged" individuals will readily submit to its demands. In many ways, the plight of the corporate law firm associates is far less sympathetic. The greedy associate of the 1990's gleefully entered the rat race running full speed. No matter what the outcome, it can be conceded that the corporate lawyer cannot claim that he was ever deluded into thinking that he had a "right" to any job.

In the era of globalization and the "high velocity capital market," unrestrained market incentives will likely have steroidal effects on the rat race. The ushering in of the uber-rat race will likely pit the elites of the two leading hyper-industrialized economies against each other. Where the finish line is is no one's guess, but so long as the promise of riches and the threat of the pink slip litter the working landscape, the contestants are unlikely to step off of the track.

Given this background, then, today's corporate warrior and corporate law firm associate pose some interesting challenges to Heriot's at-will and "privacy" arguments. Heriot's first argument was that due to the increased costs of hiring, the employer will conduct a more thorough investigation into the applicant's background under the lifetime employment model. For support, she pointed to the hiring practices of Japanese corporations. Even assuming that the lifetime employment "tradition" continues today, the first premise of this argument is flawed because it is still doubtful that the costs of hiring a corporate warrior ever exceeded the \$100,000 that the large corporate law firm still spends on recruiting and training a newly graduated law student.¹²⁴ The second premise is also questionable given that the big law firms use multi-tiered screening processes and have state bar-backed investigations into the applicants' backgrounds. In a typical large law firm, the forces that be screen resumes, conduct multiple personal interviews and reference checks, and try-out the candidate through a summer during which the firm can gain further assurances of the candidate's fitness *prior* to extending a "permanent" offer. Moreover, since the offers of employment are contingent upon the ability to practice law, the state bar

¹²⁴ See Cunningham, *supra* note 94, at 1003.

associations ensure a thorough background check in areas like *personal finance*¹²⁵ and mental health history.

Heriot's second argument is that without the at-will contract, the employer will attempt to influence and control the employee's private life in order to enhance his productive capacity. Heriot contends that the Japanese "cradle-to-grave, morning, noon and night image of a company town never had a great level of appeal here."¹²⁶ Even if the factual description of the Japanese lifetime employment model is outdated (or worse, inaccurate), Heriot's second argument still does have merit. It has been explained that the very disposability of the corporate law firm associates under the at-will model provides disincentives for partners to familiarize themselves with the associates and learn about their lives outside the firm. For the partners, "getting to know an associate is akin to adopting a Thanksgiving turkey as a pet: it's just going to cause you more guilt at the end."¹²⁷

In this sense, Heriot's thesis that the at-will contract protects the workers' "privacy" interests is readily supportable. The critical question here is whether the protection of "privacy" interests should be held in such high regard, especially given the context: the at-will protection only serves to dissipate employer guilt when eating its kill. The associates' perception that they are viewed as "Doritos" by the firm's partners evidences the profitability of the billing mill. Despite the prevalence of studies that show the costs of associate attrition,¹²⁸ the law firm turnover rate was exceedingly high in the late 1990's.

Heriot's final argument is that there will be less demand for workers under a lifetime employment system. Presumably because it costs more to hire employees, the employer simply will hire less people for the same amount of work. Two clarifications need to be made in responding to this argument given the extreme working hour demands made on the American at-will employee. First, the central issue is not whether the employer will hire less but whether the newly hired workers will have any protection against at-will dismissals. Under the at-will system, no worker has any protection against dismissals, for any reason, period. Under the short-lived Japanese lifetime employment system, the core management workers enjoyed protection against dismissals without

¹²⁵ In Florida, bar applicants required to disclose every check that the applicant "bounced" within so many years.

¹²⁶ Heriot, *supra* note 2, at 213.

¹²⁷ Wilborn and Krotoszynski, *supra* note 90, at 1303.

¹²⁸ One study says that it costs 150% of the associates' salary to replace them. See Cunningham, *supra* note 94, at 1004.

cause while the non-core workers did not. And second, both the American and the Japanese companies are currently downsizing. The practical effect of worker layoffs for the remaining workers is to work more – so that they may hope to save their jobs, their worth, and in America, one may even say their “souls.”

After speculating that the “neo-feudalism” of the Japanese lifetime employment system was “no historical accident . . . given the fact that Japan’s industrialization followed quickly on the heels of the collapse of its quasi-feudal system,”¹²⁹ Heriot asks whether the Japanese lifetime employment tradition is “all bad.”¹³⁰ Her answer, in its entirety is:

Of course not. In many ways, it is the answer to the existential nightmare. Modern man may be falling into the immeasurable abyss, without firm footing as to law or morality, but at least (under the Japanese system of lifetime employment) he has some company. He has his employer and his colleagues. Much more so than his American counterpart, the Japanese employee has the security, both economic and personal, that comes from devoting oneself to a community.¹³¹

¹²⁹ Heriot, *supra* note 2, at 204.

¹³⁰ *Id.* at 209.

¹³¹ *Id.*