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**The Sins of Their Fathers: Illegitimacy in Japan and
Surrogate Punishment across Generations**

By J. Mark Ramseyer*

Abstract: In late 2013, the Japanese Supreme Court voided inheritance rules giving non-marital children half the shares of their marital half-siblings. To punish children for the sins of their parents, it explained, violated the equal protection clause of the Constitution. Like the stigma that most traditional societies attached to illegitimacy, the inheritance rules had reflected a simple selection bias: the societies that survive are those where more children live to reproductive age; in harsh environments (the norm until a few centuries ago) whether children survived turned on the level of investment adults made in them; men tend not to invest in children whose paternity they do not know; hence, non-marital children had been substantially less likely to survive; but the stigma attached to illegitimacy and the accompanying legal disabilities had helped minimize the number of such children by channeling sex into stable dyadic relationships.

The pre-2013 inheritance rule had promoted that relational stability by helping women hold men to their promises. In order to induce women to marry them, men routinely promise to invest in the children they bear together. The earlier rule had assured women that if their husbands breached those promises in life, they could at least trust the law to favor their children in his death. After 2013, the courts could no longer offer even that assurance.

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It appears in the Second Commandment. Yahweh announces (Exod. 20:4-6):

Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, nor serve them; for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me

This is not a practice of which we approve. We like to think we punish children for their own sins. For the sins of their fathers, we punish the fathers. To be sure, we realize that children can suffer when we imprison their fathers. We realize that when we fine a 60-year-old investment banker for securities fraud, we may confiscate the money he would have bequeathed to his children. We realize (more abstractly) that when we extract payments from a publicly traded corporation, the shareholders who suffer may have been nowhere near the firm at the time of the misconduct. Surrogate punishment happens.

But we like to think we avoid surrogate punishment when we can. The law of illegitimacy raises the question starkly: should we, must we, do we, punish children for the sins of their fathers? When we distinguish between marital (i.e., legitimate) and non-marital (illegitimate) children in civil disputes and favor the former, do we not do exactly that? Solangel Maldonado and John Witte, Jr., speak for much of the legal professoriate when they insist that we stop the practice. After all, writes Maldonado (2011, 394) children "have no control over the actions of their parents." Reasons Witte (2009, 7), "punishing an innocent child without trial, and giving that child a record of its illegitimacy in order to deter others ... is simply cruel and unjust." The U.S. Supreme Court has already invalidated a range of disabilities on non-marital children.¹ Legal scholars urge judges and legislators forthrightly to abolish the rest.

In 2013, the Japanese Supreme Court took much the same tack. Under the law in place, non-marital children of intestate decedents had taken only half the shares of their marital half-brothers and sisters. When non-marital children had earlier challenged the distinction in court, several times the Supreme Court had upheld it. In 2013, it changed course. Forthrightly, it declared the distinction unconstitutional.

Whether in the U.S. or Japan, in showing such (perfectly understandable) compassion toward non-marital children, reformers threaten to miss (some of) the dynamics of marital contracting. Until a few millennia ago, human communities faced

¹ For court decisions expanding the rights of illegitimate children, see, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

severe resource constraints. Children survived to reproductive age only if parents invested heavily in them. Yet although men tend to invest in their own biological offspring, they seldom invest in anyone else's. They do not invest in other people's sons and daughters, and non-marital children have nothing if not uncertain paternity. Note, of course, that this biological logic to natural selection operates at both the individual and communal level. At the individual level, it selects for males who invest in their own offspring; at the communal level, it selects for groups that maximize the number of surviving offspring -- and groups do so in part by facilitating paternal investments in their offspring by channeling sex into stable dyadic relationships.

During the centuries before the modern "demographic transition" of plummeting birth rates in the wealthy first world, inheritance rules like those in pre-2013 Japan fostered relational stability by helping women hold men to their promises. They helped women enforce the promises that their husbands had made (*ex ante*) to convince them to agree to marriage -- namely, that they would not father children elsewhere, and if they did father such children would not invest their joint assets in them. If and when her husband breached that promise, the pre-2013 rule at least let a woman trust the law (*ex post*) to favor their marital children when her philandering husband died. By abrogating the rule, the Supreme Court increased the difficulty she faced in enforcing the promises he had made when he convinced her to marry him. In the process, it necessarily decreased her incentive to invest in capital (like children) specific to her marriage, and decreased marital stability.

I begin with the 2013 Supreme Court case (Section I.A.). I turn to illegitimacy patterns in Section I.B., and to issues raised by legal disabilities on non-marital children in I.C. I discuss the relation between illegitimacy and natural selection in Section II, and return to the implications of the 2013 opinion in Section III.

I. Illegitimacy and Surrogate Punishment

A. The 2013 Litigation:

1. The law. -- Prior to 2013, Japanese inheritance law had granted non-marital children half the intestate and elective shares of their marital half-siblings. As in the U.S., the statutory drafters apparently expected the intestate rules to approximate what the typical decedent would have wanted had he or she left a will; they provided elective shares (the amount an heir could take "against the will"; also known as "forced shares") to protect dependent family members against a decedent's wrath. Suppose a father died without a will. Until late 2013, his non-marital children took shares half the size of the shares granted his marital children (Civil Code, Sec. 900(d)).² Suppose he devised his entire estate to a third-party. Because the law defined an heir's elective share as the product of his or her intestate share and half the estate (Civil Code, Secs. 1028(b), 1044), non-marital children also took elective shares half as large as his marital children.

Consider an example. X dies with a wife, two marital children A and B, and no other heirs. If he dies intestate, his wife takes half his estate and his children each take one quarter. Suppose he outlives his wife, and dies with marital children A and B and non-marital children C and D. If he dies intestate, A and B each takes 1/3 of his estate, and C and D take 1/6 a piece ($1/3 + 1/3 + 1/6 + 1/6 = 1$). If instead he leaves a will, A

² Minpo [Civil Code], Law No. 89 of 1896, as amended by Law No. 74 of 1947, Law. 222 of 1947.

and B each takes an elective share of 1/6, and C and D take 1/12 ($1/6 + 1/6 + 1/12 + 1/12 = 1/2$).

The scheme dates from the late 19th century. Under the Civil Code of 1896, the oldest male in each generation usually served as the "head" of his "house" (what anthropologists call a "stem family"). On him, it imposed a default regime of primogeniture: should he die intestate, his estate generally went in full to the oldest male in the next generation (1896 Civil Code, Sec. 970; see Ramseyer 1996, ch. 5). Should he leave his property by will, that succeeding "head" could demand half his estate against the will (1896 Civil Code, Sec. 1130).

The Code applied a different rule to the men and women who did not serve as head of a house. If one of them died intestate, it spread claims to his or her estate among a variety of heirs (1896 Civil Code, Secs. 994-996). If he or she left a will, it specified the rules by which these heirs could claim against it. Crucially, in both the intestate and the testate rules, it granted non-marital children shares half the size of the shares it left marital children (1896 Civil Code, Sec. 1004).

After the Second World War, the U.S.-run occupation ordered all Code sections relating to a "house" and its "head" repealed. They were, it announced, undemocratic. The Japanese government duly complied, and imposed on everyone -- oldest male or no -- inheritance rules that resembled those it had earlier applied to the non-heads. Non-marital children now took half the shares of their marital half-siblings (Civil Code, Secs. 900(d)).

These mid-century rules did not necessarily leave non-marital Japanese children in a worse position than their peers in the U.S. In Japan, non-marital children took half the intestate shares of their marital half-brothers and sisters. In many American states, for much of the 20th century non-marital children had full rights to inherit from an intestate mother but no rights to inherit from an intestate father (Dukeminier & Sitkoff 2013, 110; Krause 1971, 87-94). In Japan, non-marital children took half the elective shares of their marital half-siblings. In most American states, no children had any elective share, whether marital or no (Dukeminier & Sitkoff 2013, 556-57; Grossman & Friedman 2011, 238, 244).

2. The cases at hand. -- It was this mid-century distinction between marital and non-marital children that the Japanese Supreme Court held unconstitutional in late 2013.³ As is customary in Japanese Supreme Court jurisprudence, the Court gave few facts about the two cases involved. Unnamed parents had died intestate, it wrote. They had left some marital and non-marital children. Those children now quarreled over their respective portions.

The law granting non-marital children intestate shares half as big as the shares of their half-siblings violated the 1947 Constitution,⁴ the Court announced. Article 14(a) of that Constitution provides:

³ [No names given], 2197 Hanrei jiho 10, 2013 WLJPCA 09049001 (Sup. Ct. Sept. 4, 2013) (en banc), rev'g 1425 Kinsho 29 (Tokyo High Ct. June 22, 2012), aff'g 1425 Kinsho 30 (Tokyo Family Ct. Mar. 26, 2012) (dismissing constitutional claim), and [No names given], 2013 WLJPCA 09046001 (Sup. Ct. Sept. 4, 2013).

⁴ Nihon koku Kenpo [Constitution of Japan], Nov. 3, 1946, effective May 3, 1947.

All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

Rather than ban all discrimination, explained the Court, Article 14 bans only unreasonable discrimination. As recently as 1995 and 2009, the Court had declared the marital-non-marital distinction in inheritance reasonable.⁵ Those rules should reflect a country's traditions, it had written, along with its social structure, widely held attitudes, and legal framework. In 1995 and 2009, it had held that they did. The Civil Code structured families around duly recorded marriages. Given that legal context, the Code could reasonably distinguish between children born in and out of marriage.

The social and legal context to that Code has since changed, continued the Supreme Court. When the new inheritance rules took effect in 1947, Japanese citizens still harbored prejudices against non-marital children. Other countries still maintained their own legal biases. Over the course of the intervening decades, however, illegitimacy rates in Japan have risen, said the Court (in fact, see Figure 1, below). Divorce rates have climbed. Family structure has grown more diverse. Reformers have tried several times to repeal the marital-non-marital distinction. Other countries have successfully repealed it. And even when the Court upheld the distinction's constitutionality in 1995, five of the fifteen justices dissented.

Children do not choose to be born to unwed parents, the Court implied. The justices might almost have declared they would not visit the iniquities of the fathers upon the children. They would not place children at a disadvantage simply because their parents had not married. Rather, they would respect children as individuals, and guard their legal rights. The inheritance rules violated the Constitution. Whatever the case in the past, they would not enforce those rules now.

B. Illegitimacy in Japan:

Non-marital births in Japan are rare. As of 2011, 2.2 percent of all children were born to parents unmarried. By contrast, the analogous rate in the U.S. is 40.7 percent (Hamilton, et al. 2013, 2). It is over 30 percent in Australia, Germany, and Spain, over 40 in the U.K., over 50 in Sweden and Mexico, over 60 in Chile and Peru, and over 70 in Colombia (Social 2011).

Non-marital birth rates in Japan have been low for a long time (Figure 1). The rate (non-marital births/all births) was higher during the first half of the 20th century, but nothing like the current rate in the U.S. Even at its peak in 1902, it hit only 9.43. From there, it slid steadily. It had fallen to 5.7 by the time Japan entered war footing in 1935, gone under 4 percent after the war, and by 1965 hit 1 percent.

[Insert Figure 1 about here.]

The illegitimacy rate has risen since 1965, but less because couples bear more non-marital children (the numerator) than because they bear fewer children (the denominator) at all. From 1965 to 2010, the rate more than doubled: from .96 to 2.22 percent. The number of actual non-marital births, however, climbed only 34 percent:

⁵ [No names given], 2064 Hanrei jiho 61 (Sup. Ct. Sept. 30, 2009); Kono v. Otsuno, 1540 Hanrei jiho 3 (Sup. Ct. July 5, 1995) (en banc).

from 17,452 to 22,986. The rate doubled because the number of total births fell 42 percent: from 1,823,697 to 1,050,806.

At least in part, non-marital birth rates declined during the early post-war years because of technology. As the war came to an end, only 6 percent of the women under age 50 used contraceptives. Even in 1950, merely 19.5 percent used them (9.6 percent had used them in the past; Aoki 1970, 12-13). By 1965, 51.9 percent used contraceptives currently and another 15.4 percent had used them earlier (Aoki 1970, 13). Concurrently, physicians began to offer safe abortions. Once the legislature legalized the procedure in 1948, its use soared. As of 1949, the ratio of abortions to live births stood at 3.8 percent. By 1955, it had reached 67.8 percent (Kosei, 1956).

People have migrated massively within Japan over the last century, but the regions where they bear children out of marriage have stayed remarkably stable (Naikaku tokei 1926; Kosei rodo 2010). Non-marital birth rates were highest in Osaka in 1925 (12.7 percent). They were also high in the nearby urban prefectures of Kyoto and Nara. They were high in the neighboring prefectures of Tottori and Shimane on the Japan Sea. And they were high in the southern prefectures of Miyazaki, Nagasaki (both on the island of Kyushu), Kochi, and Kagawa (both on Shikoku). In 2010, non-marital birth rates remained high in Osaka and Kyoto. They were highest on the far-southern island of Okinawa (3.99 percent). And they were still high in Tottori and Kochi, and the Kyushu prefectures of Miyazaki, Fukuoka, and Kagoshima.

Other than Osaka and perhaps Fukuoka, these are mostly prefectures that Tokyo has left behind. For decades now, the brightest and most talented men and women have left these areas for education and jobs in metropolitan Tokyo. Those left in the prefectures tend to be poor. They do not grow the premium rice that the agricultural heartlands in Niigata and Nagano supply. Neither do they house the technology centers and universities that Tokyo and Kanagawa offer. They are simply places that the most talented young people abandon.

Table 1 gives the correlation coefficients among selected variables at the prefectural level. Prefectures with relatively high illegitimacy rates in 1925 have high illegitimacy rates today. They were poor in 1925, and remain poor today. They had high divorce rates in 1925, and continue to divorce. They had a large number of prostitutes. They turn out for elections in low numbers. And they tend to suffer (the correlation is only significant at the 15 percent level) higher crime rates.

[Insert Table 1 about here.]

C. The Problems with Surrogate Punishment:

1. Introduction. -- Among the 21st century legal professoriate, we dislike the idea of subjecting non-marital children to legal disabilities. It resembles surrogate punishment, and we like to think we punish people for what they did. We like to think we punish them only for what they did.

Punishment by proxy bothers us on several dimensions. The economics bother us: we punish because of the incentive structure the penalties create, and surrogate punishment usually imposes only attenuated incentives (Sec. II.C.2, below). The ethics bother us: we try to treat people as moral agents, responsible for what they themselves do, and surrogate punishment ignores that fundamental principle (Sec. 3, below). And the potential constitutional implications bother us: we try not to let the government

enforce the religious preferences of some but not all citizens, and at least the disabilities on non-marital children sometimes seem to do exactly that (Sec. 4, below).

2. The economics of punishment. -- In theory, we punish people (or hold them liable in tort) when they engage in activities that impose negative externalities on others. Occasionally, we inflict criminal penalties. Other times, we limit the punishment to tort sanctions. We punish because the activities harm others, and the punishments reduce the returns to that behavior. We punish because -- to quote Gary Becker (1974, 9) -- "an increase in a person's probability of conviction or punishment" decreases "the number offenses he commits."

Obviously, these sanctions deter only if the people punished find them costly. Suppose, however, that we punish B rather than A for something A does. A will engage in less of the disfavored activity only if he finds B's punishment personally painful. If A despises B, the prospect of B's punishment may not cause him to change his behavior at all. Even if A has never met B, probably he will not change his behavior very much.

Surrogate punishment deters only when the person punished holds genuinely altruistic feelings toward the person punished. Note, however, that if ever surrogate punishment were to deter, it should deter within the family. Most of the time, punishment by proxy will not work. But for hard-wired biological reasons, parents usually do find it painful to learn that their children will suffer.

3. The equities of surrogate punishment. -- On ethical grounds, we object to punishing by proxy. We try to hold people responsible for what they do, and not for what others do. In truth, the Israelites liked surrogate punishment no better. Four chapters after the Decalogue in Deuteronomy, the redactors of the Pentateuch quote Moses for the injunction (Deut. 24: 16):

The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin.

For all the notoriety the passage in the Second Commandment receives, Deuteronomy 24 is easy to reconcile with it. In the Second Commandment, the redactors do not pretend to convey Yahweh's instructions about the proper punishment regime. They do purport to give that in Deuteronomy 24. There, they quote Moses for instructions about how the Israelites should structure their criminal sanctions. They should enforce individual responsibility, the redactors declare. They should hold parents responsible for the actions that they take. They should punish children only for that which the children themselves do.

By contrast, in the second of the Ten Commandments the redactors attribute to Moses a statement from Yahweh about the way he runs the world. Rather than preferred rules of criminal procedure, they describe the actual environment in which they find themselves. And they do not live in a fair world. Instead, they live in one where children routinely suffer for the bad choices their parents make.

A world where non-marital children suffer for the decision their parents made is the world children find themselves today -- in Japan, the United States, and virtually everywhere else. It is that world which American courts have tried to dismantle over the past half century. And it is that world that the Japanese Supreme Court attacked in 2013.

4. The Constitution and religion. -- As if the economic and moral complications were not problematic enough, to some observers the legal disabilities on non-marital children raise constitutional objections to boot. For the most part, U.S. scholars attribute those disabilities to the traditional Christian strictures on premarital sex. To enforce the strictures through the legal system risks -- they imply -- the establishment of religion.

Law professor Courtney Joslin (2015, 807), for example, seems to articulate those scholarly assumptions when she apparently (only apparently) attributes the prejudices against non-marital households to religion: the "[b]ias against nonmarital families continues to be widespread. ... Indeed, close to half of the U.S. population believes that people living in nonmarital cohabiting relationships are immoral." Cynthia Grant Bowman (2010, 12) denounces the laws against extra-marital sex as an attempt "to enforce conformity with the moral standards of the community."

These complaints have a long tradition. Already in 1911, legal scholar Wilfred Hooper (1911, 3) attributed the discrimination in inheritance to "the moral antipathy inculcated by the Church" against "the irregular intercourse of which [the child] was the fruit." Forty years later, Wolfgang Friedmann (1959, 251) blamed the "unfortunate, and often tragic status of the non-marital child" on "the Christian conception of the monogamous marriage." In 1971, Harry Krause (6-7) explained "the traditional status of the non-marital child" by the "ancient prejudice formed by religious and moral taboos." And by 2009, John Witte, Jr. (2009, xii) could write that "sundry medieval Catholics and early modern Protestants" established "something of a caste system of illegitimacy, making the rights of non-marital children a function of the sins of their parents. Consequently, continued Witte (2003), non-marital children "bore the permanent stigma of their sinful and criminal conception, signaled on certificates of baptism, confirmation, marriage, and death."

II. The Biological Logic of Natural Selection

A. Introduction:

In attributing the legal disabilities to religious tradition, scholars tend to miss the biological logic of natural selection -- a logic that applies both to individuals and to the communities in which they lived. At root, the legal disabilities and religious sanctions against non-marital births reflected a common biological imperative: in virtually all societies, non-marital children were substantially less likely to live to reproductive age. As a result, in the radically resource-constrained environment that all communities faced until a few millenia ago, societies that minimized the number of non-marital children were more likely to survive, expand, and thrive than those that did not. The disabilities and sanctions all helped channel sexual activity into stable dyadic relationships -- and the societies that most successfully channeled sex into such stable relationships were most likely to weather that brutal selective mechanism. The legal disabilities did not reflect religious belief. Instead, both the law and the religion reflected a common biological mechanism.

B. The Welfare of Non-marital Children:

Even within the prosperous modern U.S., non-marital children fare poorly. Observers at all points on the political spectrum make the same point. Political scientist James Q. Wilson (1993, 26-27), for instance, writes:

At every income level save the very highest (over \$50,000 per year), for both sexes and for whites, blacks, and Hispanics alike, children with a never-married or a divorced mother were substantially worse off than those living in two-parent families."

As fellow political scientist Charles Murray (2012, 164) summarizes the evidence, unmarried mothers, simply "provide worse environments for raising children than married mothers."

Law professor Clare Huntington (2015, 170) -- one suspects not a scholar otherwise inclined to agree with Murray -- declares:

Children of unmarried parents fare much worse on a variety of metrics than children growing up with married parents. Poverty and factors such as parental education explain much of this differential, but there is increasing evidence that family structure is an independent causal factor.

Similarly law professor Solangel Maldonado (2011, 391) notes the "social science evidence suggesting that children raised in stable marital homes have better outcomes." And sociologist Sara S. McLanahan and professor of social work Irwin Garfinkel (2012, 149) conclude that "children born to unmarried parents are worse off than children born to married parents in many different domains."

The plight of non-marital children is not peculiar to modern societies. Hallie J. Kintner (1982) finds a correlation between illegitimacy and infant mortality in Germany in the late 19th and early 20th centuries. And Monique Borgerhoff Mulder (1991, 79) notes the importance of paternal care (of which non-marital children receive less) even among Paraguayan hunter-gatherers: "a child's chances of mortality are significantly increased if its father dies before it reaches 15 years [B]oth parents are important to a child's survivorship, and ... a father's contribution becomes increasingly important after the age of 2 years." That non-marital children fare badly is largely a pan-historical, cross-cultural universal.

C. The Biological Mechanism:

1. Paternal investment. -- Non-marital children less often survive to reproductive age for at least two fundamental reasons. Most basically, males invest less in them. Human parents invest heavily in their offspring, and their survival turns on the level of that investment. In the language that biologist E.O. Wilson (2000, 81) pioneered, they are a K-selected rather than r-selected species. In general, the rate at which a species grows over time (t) depends on its current population (N), on the potential rate of increase in the population (given as r), and on the carrying capacity of the environment (given as K): $dN/dt = rN(K-N)/K$. The faster a species can reproduce (the higher its r), the faster the growth rate. The closer its population approaches the maximum capacity of the environment (the smaller the $K-N$), the slower the growth.

Some species (r-selected) survive because they produce many offspring. Each child may have but a low probability of reaching reproductive age, but if the adults bear enough children the species will endure. These r-selected species tend to be small, to

mature quickly, and to have short lives: think oysters and small rodents. They thrive in environments that are unstable and well below their carrying capacity.

Other species (K-selected) produce fewer offspring, but survive because they invest so heavily in the ones they do produce. Each mother bears only a few children, but invests so heavily in each that a high fraction reaches reproductive age. These K-selected species thrive in environments where their population has already approached the limit to what the environment can bear. They tend to be larger, to mature more slowly, and to live longer: horses, elephants, primates.

Adult humans (particularly, adult men) invest less in non-marital children because natural selection favors the genes of those who care for their own biological children -- and non-marital children have but uncertain paternity. Necessarily, the evolutionary process does not select for men who care for genetically unrelated children. It selects only for those who care for their own. Yet where the identity of the father tends to be clear for children born within stable dyadic relationships, it is far more problematic for those born outside of such relationships.

Unfortunately for the non-marital child, a "necessary condition for the evolution of a male strategy which includes parental care" (in the words of psychologists Martin Daly and Margo Wilson)⁶ is "some degree of paternity confidence." After all, "[a]ny behavior which risks misdirecting parental care to unrelated young is maladaptive evolutionarily, promoting the reproductive success not of oneself but of one's rivals." Mulder (1992, 366) makes the same point. "For males paternity ... directly impinges on the benefits of parental care: Why provide parental care to offspring that may not be yours?" Empirically, she finds the predictable consequences: "Between-society comparisons reveal that where men are unsure of their paternity, ... they tend not to invest in their spouses' children"; within-society comparisons reveal that "men who are certain of their paternity are more likely to provide for their offspring than are men who are less certain."

The various communal or religious strictures against extra-marital sex follow -- those societies most likely to survive the evolutionary process are those whose fathers invest heavily in their children; fathers invest most heavily in those children with the highest probability of being their own; and that probability is highest for children born within a stable dyadic relationship. Necessarily, the evolutionary process will select for societies that channel sexual activity toward those stable relationships.

2. The Cinderella effect. -- Not only do non-marital children receive less paternal investment, they also encounter more abuse. Just as the evolutionary process selects for parents who invest in their children, it selects against those who abuse their children. It does not select against those who abuse other people's children. Indeed, to the extent that children in "blended" households compete for finite resources, it selects for adults who favor their own biological children at the expense of children born of others.

The controversial "Cinderella effect" follows. Children face much higher odds of abuse and neglect at the hands of a birth parent's spouse or lover than at the hands of birth

⁶ Wilson (1980, 278)(orig. in ital.). To same effect, see Lightcap, Kurland & Burgess (1982, 62) (parental investment "is selectively advantageous to the parent only in circumstances that will lead to an increase in parental inclusive fitness If relatedness between parent and offspring is low or uncertain, ... parental investment may not necessarily be adaptive.)

parents themselves. According to biologists Alice L. Clarke and Bobbi S. Low (2001, 646):

Children in modern societies with a stepparent are at significantly greater risk of abuse and infanticide than children living with both parents Although [several scholars] have claimed that their studies fail to replicate such a 'Cinderella effect,' [other scholars] have identified glaring methodological failures in each of these studies.

Psychologists Diana Zuckerman and Sarah Pederson (2015) give one estimate of the magnitudes involved:

Compared to children living with married biological parents, those whose single parent had a live-in partner were at least 8 times more likely to be maltreated in one way or another. They were 10 [times] more likely to experience abuse and 8 times more likely to experience neglect.

Daly & Wilson (1985, 197) provide another estimate:

Preschoolers living with one natural and one stepparent were 40 times more likely to become child abuse cases than were like-aged children living with two natural parents.

Necessarily, non-marital children are more likely to live with an adult not their parent.

3. The pressure of natural selection. -- When early humans walked out of Africa some 50,000 years ago, they found a Europe still frozen in the Pleistocene Ice Age. Only 10,000 years ago did their descendants begin to farm, and only a few centuries ago did they start to enjoy more than subsistence resources. Instead, in the brutally inhospitable environments they faced, people routinely starved. The societies that survived the inevitable selective mechanism were those that maintained norms and institutions that most effectively increased the number of members who survived to reproductive age.

Given the lower survival rates of non-marital children, the societies that survived biological selection were those that routed sexual activity into a stable dyadic relationship. They survived the selective process because they maintained rules and norms that led to greater numbers of their offspring reaching reproductive age. Inter alia, those rules and norms often stigmatized illegitimacy. By doing so, they contributed to higher survival rates precisely because (i) they discouraged extra-marital births, and (ii) extra-marital children receive lower levels of parental investment and encounter higher levels of adult abuse.

The logic is straightforward. K-selected species survive harsh environments only if the young receive more parental investment and less abuse. Those environments will not select for fathers who invest in and protect all children. They will select only for fathers who invest in and protect their own biological children. With their less certain paternity, non-marital children receive less male investment and confront more abuse. Necessarily, the societies that survive will be those that route procreation into stable dyadic relationships and minimize the number of such children.

III. Revisiting Japanese Constitutional Jurisprudence

A. The Case:

Return then to the Japanese Supreme Court case of late 2013. Consider the actual facts involved, and the connection between the earlier inheritance rule and marital stability.

Although the Supreme Court said almost nothing specific about the particular two cases, outside sources disclose the facts in at least one of them.⁷ Apparently, the dispute involved a couple who had run a restaurant in the Osaka-adjacent prefecture of Wakayama. The husband had been born in 1929; the wife was probably younger. The couple worked the restaurant together, and had two very young children.

If the couple had followed general Japanese custom, the husband would have held title to the restaurant in his own name. He would not have paid his wife wages for her work, but she would have had access to the restaurant's cash flow for their household expenses. The husband also would have owned their home in his own name. He might have bought it with the restaurant profits, and he certainly would have maintained it with those profits.

In time, the wife became ill. To handle the work that she had been doing, her husband hired an assistant. Eventually, however, he began an affair with the woman he had hired, and then a more serious entanglement. He threw his wife and two children (now ages 11 and 6) out of their house, brought in his lover, and with her bore another two children.

After the marriage collapsed, the wife continued (bizarrely enough) to work at the restaurant. Presumably, she now demanded explicit wages, but for her earlier work in the restaurant she would have received nothing. According to her daughter, she trusted in the law. "My late mother had talked to a lawyer," the daughter explained. "She always promised me that 'the law will protect you.' She lived in hell for more than 40 years, but she counted on the Civil Code to take her revenge on the lover and her children."⁸

This account should leave readers puzzled. After all, the wife could have divorced her faithless husband. Japanese courts generally award divorces to spouses not "at fault," and do aspire to split property acquired during marriage equitably (Soeda, et al. 1997, ch. 4). Perhaps she expected to outlive her husband, and knew he would not write a will. Granted, if so she would have taken half his estate and her children each 1/6th -- leaving his two children by his mistress 1/12th each. But he did not need to die intestate. Suppose instead he willed all his property to his two non-marital children. If his wife survived him, she could have taken 1/4th against the will and her children 1/12th each -- but his non-marital children would still have received a combined 7/12ths. If she died first, her children would have taken 1/6th each and his non-marital children a total of 2/3.

In fact, the husband did not write a will, his wife went first, and he then died intestate in 2001. His marital daughter saw nothing unfair about giving her half-siblings smaller shares in their father's estate. "The family peace was destroyed. We were chased out of our house. We lived with this psychological pain for 40 years. And before my

⁷ Hideji Yagi, *Hichakushutsushi no isan sozoku hanketsu ni okina gimon* [Major Doubts about the Opinion on the Inheritance of Illegitimate Children] (Oct. 15, 2013), available at: <http://seiron-sankei.com/2529>; Fujiko Goto, "Sozoku sabetsu" to iu keredo [It's Called "Inheritance Discrimination," but Still] (July 2013), available at http://www.midori-lo.com/column_lawyer_77.html

⁸ Yagi, *supra* note. As translated in Ramseyer, et al. (2016).

father died, he transferred to his non-marital children huge amounts of assets. Where's the inequality?"⁹

B. The Social Context:

In several crucial ways, the case reflects the different pattern that illegitimacy takes in Japan compared to the U.S. Non-marital American children tend to be born to young, single mothers. About half of those mothers live with the child's father when they give birth, but a majority these relationships then collapse within five years (McLanahan & Garfinkel 2012, 145 fig. 8.2, 147). Figure 2 shows the distribution of non-marital births by the mother's age. Older women bear children outside of marriage too, of course, but disproportionately the mothers are young: for the U.S., the curve skews to the left.

[Insert Figure 2 about here.]

Japanese non-marital children are born to older mothers. In Japan too, young women bear some non-marital children. Yet more than in the U.S., women bear non-marital children during their late 20s and early 30s. Compared to the U.S., the Japanese curve in Figure 2 skews to the right.

Table 2 provides the detail. In Japan, 20-year-old women bear 1,074 non-marital children. Yet 30-year-olds bear almost as many -- 931, and even 35-year-olds bear 820. Only by age 38 does the number of non-marital children fall below 700. Disproportionately, the children born to 20-year-old women are non-marital -- Japanese do not marry that young. From age 30 to 35 to 38, however, the fraction of non-marital births actually increases: from 1.2 percent to 1.3, to 1.8.

[Insert Table 2 about here.]

More than in the U.S., in other words, the Japanese mothers bearing non-marital children are not young women living with boyfriends. Instead, they resemble the lover in the Supreme Court case. They are older. They have taken up with middle-aged, already-married men. And with them, they now bear children.

C. Promissory Commitment:

1. Religion and natural selection. -- The legal disabilities on Japanese non-marital children did not reflect religious tradition. Those traditions (Buddhist, Shinto) do not condemn premarital sex with anything like the vehemence in the Christian West. They do not celebrate premarital sex, to be sure. They simply do not address the issue at much length.

Instead, the disabilities tracked very widely held (but not religious) norms: children should grow up within stable dyadic relationships. Rather than religion, the norms captured directly the biology of natural selection. The disabilities at stake channeled sex toward stable relationships by facilitating the promises necessary to form those relationships and to invest heavily in them.

Japan is a fundamentally monogamous world. Emperors and plutocrats may have "kept" one or more concubines through the early 20th century. Sei Shonagon may have entertained her serial lovers in the 11th. But modern middle- and professional-class Japanese limit their sexual activity to one partner, and expect their spouses to reciprocate

⁹ Goto, *supra* note.

monogamously. They have their affairs -- but men and women alike, they consider them dishonorable even as they indulge.¹⁰

2. Promissory credibility. -- In this monogamous world, the pre-2013 inheritance rules had (however tenuously) helped women enforce (at least some of) the promises that their husbands had made, and to invest in their relationship on the strength of those promises. Young unmarried women (and their parents) will search for a mate who will invest in their children. Given resource constraints (few men have the wealth to support two households), they will search for a mate who will not invest in other women's children. Young unmarried men (and their parents) will try to attract such women. Necessarily, they will look for a way credibly to promise women that they will invest exclusively in their mutual offspring.

In other words, the earlier rules had helped women hold men to their commitments. On the one hand, before agreeing to marry a man, women routinely demanded (often explicitly, at least implicitly) that he promise to invest in their children. Because most men lacked the resources to do this at the level she wanted and invest in children he bore with other women besides, she demanded that he not invest in children he bore with other women. Usually, she demanded that he not father children elsewhere at all.

On the other hand, in order to induce a woman to marry him, men routinely promised (often explicitly, at least implicitly) to invest in the children they would bear together. Given their resource constraints, they routinely promised not to father children with other women. Women demanded, men promised -- but breach happens. If and when it did, the pre-2013 Civil Code rule gave women the right to demand at least part of the terms of the original bargain.

When a husband broke the promise he made to his wife, the pre-2013 rule gave his wife and her children some -- nothing close to full, but at least some -- protection. If he died intestate (as most Japanese are said to do), her children received preferential shares. If he wrote a will that left more to the children by his lover, they could renounce it and demand preferential elective shares.¹¹ To induce women to marry them, men had promised to invest their energies and earnings in the children that the two of them bore together, and not to invest in children that they bore with someone else. When they breached that promise, the inheritance rules had given the women who had relied on those promises at least part of the terms of their bargain.

3. Marriage-specific investments. By helping women enforce at least part of the promises that their husbands had made, the pre-2013 inheritance rules had eased the risks that women took in making investments specific to their marriage (i.e., investments that have the highest value if the relationship continues). Couples agree to "divorce if, and only if, they both expect," as Becker (1991, 331) put it, "to be better off divorced."

¹⁰ See generally Henrich, Boyd & Richerson (2012).

¹¹ Note that he could not circumvent these rules by acknowledging his extra-marital children. Although he could indeed acknowledge them unilaterally (Civil Code, Secs. 779, 781), that act did not make them legitimate. They became legitimate only if he then married their mother (Civil Code, Sec. 789). Given the restrictive Japanese rules on contested divorces, this effectively gave his wife a veto.

Whether they expect to be better off turns in part on the level of "marital-specific" (Becker 1991, 329) investments they make. If they invest heavily in marital-specific capital, they earn high returns in marriage that they sacrifice if they divorce. If they do not invest heavily, they suffer a more modest loss from any divorce. Necessarily, the level at which men and women invest in marital-specific capital affects the stability of marriages one observes.

Whether women (or men) invest in marriage-specific capital depends, however, on their vulnerability in divorce. "The accumulation of marital-specific capital is," writes Becker (1991, 329), "discouraged by the prospect of divorce because, by definition, such capital is less valuable after a divorce." Women realize that their husbands may have affairs. They realize that their husbands may father children by other women. If their husbands can freely divert their assets and income to these competing households, women will invest less in their relationship -- they will bear fewer children, and invest less in the children they do bear -- and marriages themselves will become less stable. The pre-2013 inheritance rules had helped protect wives against a husband's choice to raise and invest in a competing household. The rules did not grant women full protection -- or even anything close. But under those rules, a wife could at least know that her children would take precedence over the later competing household upon his death.

4. Divorce and promissory credibility. -- Even during the purportedly patriarchal years before the war, Japanese judges showed a concern about holding husbands to their promises. The 1896 Code itself had let husbands divorce adulterous wives, but given no reciprocal right to women. In fact, however, judges routinely let wives divorce husbands who tried to raise and invest in competing families. Granted, they did not give women divorces for every one-night stand. But if a husband maintained a mistress or tried simultaneously to raise children by other women, they routinely granted his wife a divorce. In 1908, for example, the Tokyo District Court awarded a wife a divorce when her husband fathered two children with a lover.¹² In 1912, the Osaka Court of Appeals granted a divorce to a wife whose husband had redeemed an indentured prostitute and moved in with her. In 1910 it granted a divorce where a husband maintained a competing household. It explained:¹³

After marrying the appellee, the appellant continued to have sexual relations with his former wife Mine Fujiwara. After May 1909, he redeemed the indentured geisha Yasu Yamamoto and currently lives with her. These circumstances constitute a grievous insult to the appellee under Civil Code Sec. 813(e), and entitle her to the divorce she claims.

¹² Koganezawa v. Koganezawa, 492 Horitsu shimbun 16 (Tokyo D. Ct. N.D. journal issue of Apr. 20, 1908).

¹³ Fukumori v. Fukumori, 687 Horitsu Shimbun 24, 25 (Osaka Ct. App. Oct. 19, 1910); see also Ueno v. Ueno, 892 Horitsu shimbun 21 (Tokyo D. Ct. July 14, 1913) (divorce granted where husband decides to live with mistress); Okamoto v. Okamoto, 774 Horitsu shimbun 22 (Osaka Ct. App. Feb. 9, 1912) (same); Moriyama v. Moriyama, 2651 Horitsu shimbun 9 (Oita D. Ct. Nov. 29, 1926) (same); Hayashida v. Hayashida, 2042 Horitsu shimbun 26 (Tokyo Ct. App. July 3, 1922) (same); Tanshi v. Tanshi, 24 Daihan minroku 2364 (Daishin'in Dec. 19, 1918) (same); Iida v. Iida, 2976 Horitsu shimbun 14 (Sup. Ct. Mar. 1, 1929) (same); Shinozuka v. Shinozuka, 1550 Horitsu shimbun 20 (Tokyo Ct. App. Apr. 2, 1919) (divorce granted where husband installed mistress in marital house).

And when a husband fathered a son with one mistress and bore a daughter with another, the Tokyo Court of Appeals in 1922 took much the same tack.¹⁴

The pre-war courts did not just let wives jettison husbands who maintained mistresses; they also let them sue those ex-husbands for damages. Declared the Supreme Court in 1926, adultery was not only grounds for a divorce. It could also constitute a tort, and a wife might claim compensation.¹⁵

Should one spouse act immorally and damage the peace, safety, or prosperity of the family, he or she violates the terms of the marriage contract and the rights of the other spouse. Just as a wife owes a duty of chastity to her husband, therefore, a husband owes the same duty of chastity to his wife.

The Japanese concern for protecting wives against philandering husbands is not new. It reaches back at least a full century.

IV. Conclusions

The societies we observe are the societies that survived the pressures of natural selection. Necessarily, they are the societies that maximized the number of children reaching reproductive age. Given the K-selected nature of the human species, they are among the societies where fathers invested most heavily in their biological children. After all, the evolutionary process does not select for men who invest in their rivals' children. It selects for men who invest in their own. Given the more uncertain paternity of non-marital children, it selects for societies that reduce the number of such children by channeling sexual activity into stable dyadic relationships.

This evolutionary logic is not religious or even deliberate. It is biological. And it is this logic that led to the inheritance rules the Japanese Supreme Court held unconstitutional in 2013. After its decision, non-marital children would no longer take half the portions of their marital half-siblings. They would now receive the same.

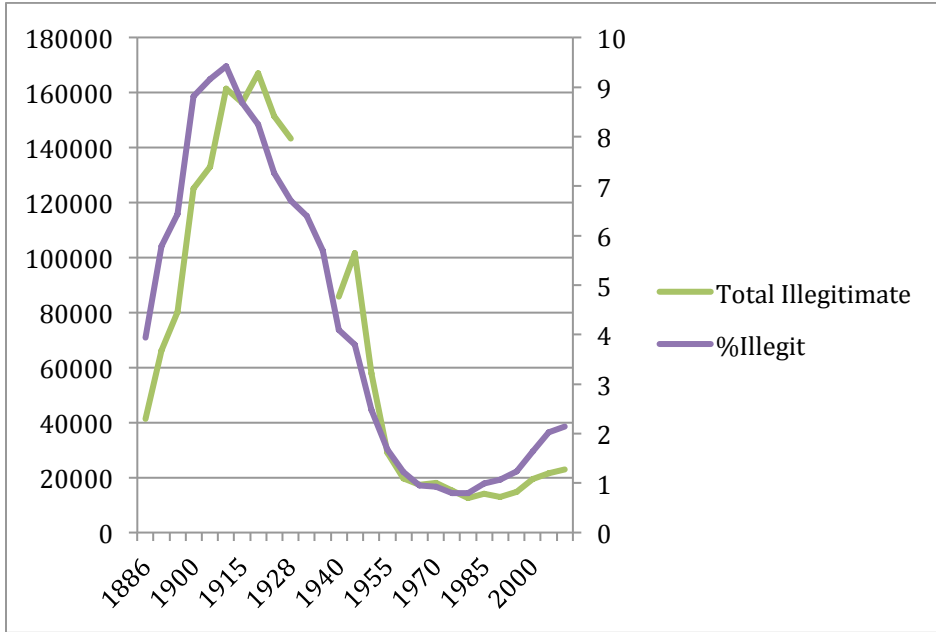
In holding the inheritance rules unconstitutional, the Court voided a rule that at least partially had held men to the promises they made upon marriage. To convince their wives to marry them, they had promised -- perhaps explicitly, certainly implicitly -- to invest their time and resources in the children they bore together. Given real-world resource constraints, they concomitantly promised not to invest in children they bore with anyone else.

The Civil Code had offered women the assurance that any children they bore with the man who made this promise took some priority upon death over children he bore elsewhere. At least by the terms governing intestate succession and elective shares, the Supreme Court now freed men from this constraint.

¹⁴ *Iijima v. Iijima*, 2330 *Horitsu shimbun* 17 (Tokyo Ct. App. July 3, 1922). See also *Saito v. Saito*, 659 *Horitsu shimbun* 12 (Osaka D. Ct. N.D., journal issue of Aug. 15, 1910)(divorce granted where husband was raising children born of other women); *Kashiwagi v. Kashiwagi*, 557 *Horitsu shimbun* 9 (Osaka D. Ct. N.D. journal issue of Mar. 15, 1909) (divorce granted where husband lives with mistress and son by mistress).

¹⁵ *Japan v. [Unnamed]*, 5 *Daihan keishu*, 318, 325-26 (Sup. Ct. July 20, 1926) (as translated in Ramseyer 1996, 104. See also *Ueno v. Ueno*, 892 *Horitsu shimbun* 21 (Tokyo D. Ct. July 14, 1913)(wife may sue for damages where husband brings in another woman while she is away); *Tsujimoto v. Hirai*, 2889 *Horitsu shimbun* 13, 15 (Osaka D. Ct. July 25, 1928)(ex-wife may sue for damages where husband maintained a mistress).

Figure 1: Numbers and Rates of Non-marital Children in Japan, 1886-2011



Notes: Numbers on the left; rates (in %) on the right.

Sources: Kazuhiro Murakami, *Meiji Taisho ki no shiseishi ninchi seikyu* [The Demand for Recognition of Illegitimate Children During the Meiji and Taisho Periods], 35 *Shakai kagaku kiyo* 79 (1996); *Kosei rodo sho, Jinko dotai tokei* [Vital Statistics of Japan, 2011] (Tokyo: Kosei rodo sho, 2013); Shirley Foster Harley, *The Decline of Illegitimacy in Japan*, *Social Probs.*, 18: 78 (1970).

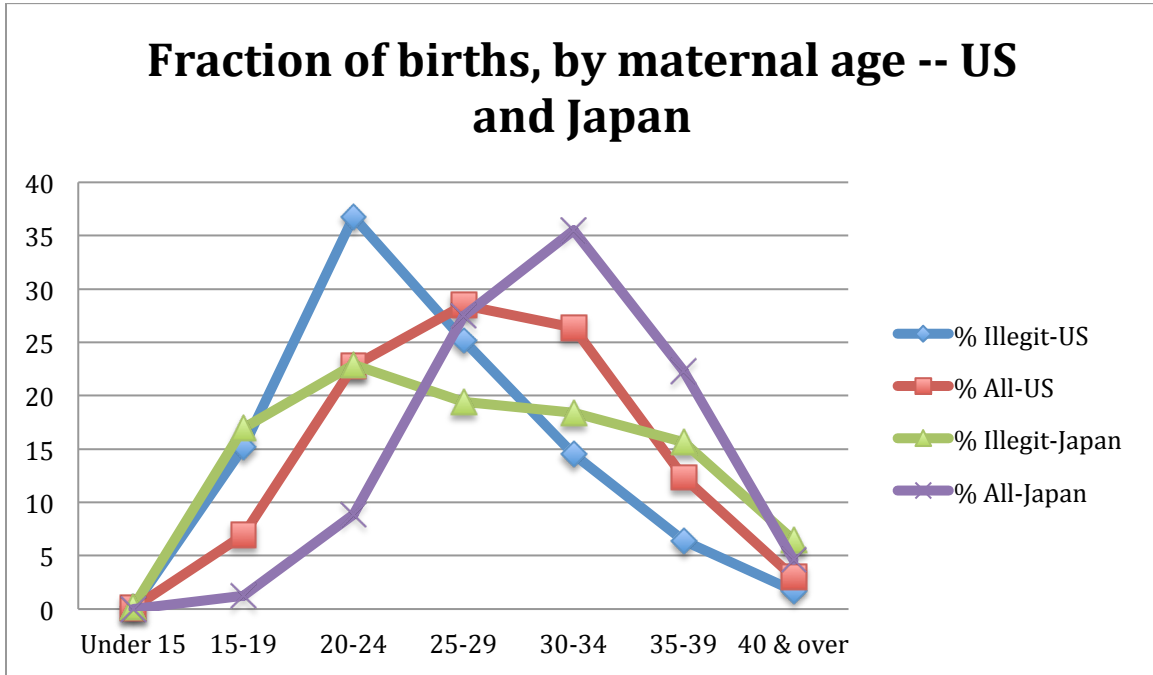
Table 1: Selected Correlation Coefficients

	Illeg 2010	Illeg 1925	Divor 2010	Divor 1925	Prost PC 1924	Adv univ	Income 2004	Voter TO	Crime rate
Illegitimacy rate, 2010	1.00								
Illegitimacy rate, 1925	.542***	1.00							
Divorce rate, 2010	.681***	.298**	1.00						
Divorce rate, 1925	.426***	.244*	.210	1.00					
Prostitutes PC, 1924	.271*	.361**	-.137	.141	1.00				
Advance to university, 2002	-.447***	.059	-.518***	-.412***	.258*	1.00			
Income, PC 2004	-.751***	-.382***	-.736***	-.477***	-.090	.586***	1.00		
Voter turnout rate, 2003	-.485***	-.273*	-.125	-.170	-.370**	-.063	.309**	1.00	
Crime rate 2010	.109	.215	-.178	-.362**	.324**	.511***	.254*	-.433***	1.00

Notes: ***, **, *, significantly different from 0 at the 1, 5, and 10 percent levels, respectively. n = 47, prefecture-level data.

Sources: Somu sho, Senkyo kanren shiryō [Materials Related to Elections] (Tokyo: Somu sho, 2003), available at: http://www.soumu.go.jp/senkyo/senkyo_s/data/shugiin44/index.html; Homu sho, Hanzai hakusho [Crimes White Paper] (Tokyo: Homu sho, 2011); Kosei rodo sho, Jinko dotai tokei [Vital Statistics of Japan] (Tokyo: Kosei rodo sho, 2010); available at: http://www.e-stat.go.jp/SG1/estat/GL08020103.do?_toGL08020103_&listID=000001071104; Naikaku tokei kyoku, Jinko dotai tokei, showa 1 nen [Vital Statistics, 1926] (Tokyo: Tokyo tokei kyokai, 1926); Takao Fukumi, Teito ni okeru baiin no kenkyu [Study of Prostitution in the Capital] (Tokyo: Hakubun kan, 1928); Ken Toba, Nihonjin no heikinchi [Average Values for Japanese] (Tokyo: Seikatsu joho sentaa, 2005).

Figure 2: Fraction of Births, by Mother's Age -- U.S. and Japan, 2013



Sources: Kosei rodo sho, Jinko dotai tokei [Vital Statistics of Japan] (Tokyo: Kosei rodo sho, 2013); available at: http://www.e-stat.go.jp/SG1/estat/GL08020103.do?_toGL08020103_&listID=000001071104Jinko dotai tokei, 2013; Brady E. Hamilton, Joyce A. Martin, Michelle J.K. Osterman & Sally C. Curtin, 2014. Births: Preliminary Data for 2013, 63 (2) National Vital Stat. Rep. 1, at tab. 6.

**Table 2: Number of Births,
by Marital Status and Mother's Age, 2013**

	All births	Marital	Non-marital
Total	1,029,816	1,007,026	22,790
14&under	51	0	51
15	184	6	178
16	759	211	548
17	1,862	892	970
18	3,540	2,486	1,054
19	6,568	5,451	1,117
20	9,763	8,689	1,074
21	13,791	12,631	1,160
22	17,204	16,182	1,022
23	22,062	21,079	983
24	28,430	27,447	983
25	36,376	35,496	880
26	46,709	45,858	851
27	57,195	56,315	880
28	67,213	66,286	927
29	75,301	74,413	888
30	76,932	76,001	931
31	75,965	75,090	875
32	73,262	72,441	821
33	71,603	70,806	797
34	67,642	66,872	770
35	62,762	61,942	820
36	54,592	53,883	709
37	45,583	44,824	759
38	37,267	36,602	665
39	29,537	28,930	607
40	20,680	20,168	512
41	12,896	12,515	381
42	7,459	7,195	264
43	3,761	3,606	155
44	1,750	1,671	79
45	667	621	46
46	241	224	17

Table continued on next page

Table 2 (Continued)

47	87	81	6
48	50	47	3
49	24	24	-
50	15	14	1
51	22	20	2
52	4	2	2
53	4	4	0
54	0	0	0
55&over	2	1	1
Unknown	1	0	1

Sources: Kosei rodo sho, Jinko dotai tokei [Vital Statistics of Japan] (Tokyo: Kosei rodo sho, 2013); available at: http://www.e-stat.go.jp/SG1/estat/GL08020103.do?_toGL08020103_&listID=000001071104Jinko dotai tokei, 2013;

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