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## Why Study Japanese Law?

*This essay answers the question “Why Study Japanese Law” pointing to Japan’s success in achieving one of the highest levels of economic and social well-being of any industrial democracy today. Offering a variety of propositions and possible explanations, the author argues that legal scholars in a wide variety of fields should explore more fully the contribution of legal rules and various modes or approaches for their enforcement particularly with respect to Japan’s economic growth, distribution of wealth, healthcare, lack of official corruption, and crime reduction.*

In this *Journal* nearly four decades ago, Charles Stevens, then teaching the first regularly taught course on Japanese law at Columbia Law School, answered the question posed as the title of this essay as follows: “As an ‘instrument of comparison’ Japanese law could be usefully studied for its blend of European, U.S., and native Japanese features as well as a developing legal system in the process of dynamic change.” Underlying both aspects was Stevens’ perception of Japan as a model. Japan, in Stevens’ words, “is the only significant non-Western society which economically and politically is the equal of the West but which culturally and historically is a nation of the East.”<sup>1</sup> Stevens’ argument has been neglected. Preoccupation with debates over law’s limits and a continued focus of Japanese socio-legal exotica have diverted attention from the most significant contributions the study of Japanese law can make. The role that legal rules have played in Japan’s developmental success has been largely ignored. I write this with some trepidation.

Today, Japan is widely perceived in terms of failure. Endless accounts of economic and political stagnation, loss of status as the economic powerhouse of Asia, increases in crime and corruption, suicide rates, not to mention the inadequacy of legal redress for various

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1. Charles R. Stevens, *Modern Japanese Law as an Instrument of Comparison*, 19 AM. J. COMP. L. 665, 669 (1971).

corporate, social and political misdeeds crowd out reports of success.<sup>2</sup> Yet, measured by almost any standard of well being, the untold—or at least underreported—story is actually one of success. The Japanese today enjoy one of the highest standards of living on the globe. Their per capita income, life expectancy, literacy, equal distribution of wealth, and freedom from official corruption and crime in combination surpass all but a few much smaller European states. With a population a third larger than Germany and twice as large as France and the United Kingdom, at over \$31,000 in 2007, Japan's per capita GNP (PPP) was higher than any of the four largest continental European nations.<sup>3</sup> Even more significant, as judged by OECD Gini indices measuring the distribution of household wealth, Japan ranks slightly behind the welfare states of Europe.<sup>4</sup> UN data are even more positive. They rank Japan just behind Denmark and just ahead of Norway and Sweden.<sup>5</sup> At worst, the household distribution of wealth in Japan is on par with Canada and the United Kingdom. To complete the picture, infant mortality is among the lowest and life expectancy for men and women, the highest in the world, as is the literacy rate.<sup>6</sup> Its public officials, particularly career judges and prosecutors, have the world's best record for integrity and enjoy the highest levels of public trust.<sup>7</sup> Equally, if not more significantly, Japan's per capita rates for violent crimes and victimization are not only the lowest in the industrialized world but have decreased dramatically in nearly all categories since the mid-1950s (homicide and robbery) or 1960s (assault and rape).<sup>8</sup>

Anyone concerned with issues of development and economic growth, of distribution of wealth, of health and education, of corrup-

2. For a recent example, see *Confess and Be Done with it*, THE ECONOMIST, Feb. 10, 2007, at 41; CNN: Fri., Mar. 20, 2009: Main Story, *Desperate Japanese Head to "Suicide Forest."* With respect to the latter, what the story did not go on to explain is that, according to World Health Organization data, suicide rates in Japan during three of the past six decades were lower than in France and that currently are less than half the rates in the Baltic states and the Russian Federation. [http://www.who.int/mental\\_health/prevention/suicide\\_rates/en](http://www.who.int/mental_health/prevention/suicide_rates/en) (last visited Apr. 9, 2009).

3. In Europe, only Austria, Belgium, Denmark, Finland, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Switzerland, Sweden, and the United Kingdom had higher per capita incomes. Japan's per capita income is higher than France, Germany, Italy, and Spain. <http://hdrstats.undp.org/indicators/5.html> (last visited Mar. 5, 2009).

4. <http://www.oecd.org/dataoecd/12/2/35445297.xls> (last visited Mar. 5, 2009).

5. <http://hdrstats.undp.org/indicators/147.html> (last visited Mar. 5, 2009).

6. <http://www.literacyonline.org> (last visited Jan. 14, 2007).

7. See John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, in LAW IN JAPAN: A TURNING POINT 99-155 (Daniel H. Foote ed., 2007); John O. Haley, *Japan's Postwar Civil Service: The Legal Framework* (Economic Development Institute of the World Bank, Working Paper No. 93-27, 1993), also in THE CIVIL SERVICE SYSTEM AND ECONOMIC DEVELOPMENT 77-101 (Hyung-Ki Kim et al. eds., 1995).

8. See GORDON BARCLAY & CYNTHIA TAVARES, INTERNATIONAL COMPARISONS OF CRIMINAL JUSTICE STATISTICS 2001 (2004), <http://csdp.org/research/hosp1203.pdf>.

tion and public trust, not to mention concern with crime and personal security, must thus consider Japan and probe the factors that have contributed to its success. Especially for those who seek to ascertain connections between law and human welfare in ordered societies, the study of law and its relationship to Japan's achievements should be a priority. I began to study Japanese law for these reasons. Forty years later, I must confess that I still have more questions and propositions than answers.

Let me take each topic in turn, beginning with economic growth and development. Economists today seem equally uncertain about the determinants and, perhaps more pessimistically, the impediments to economic growth. Led by Douglas North<sup>9</sup> and Hernando de Soto,<sup>10</sup> those who advocate the "new institutional economics" posit a direct linkage between law and development. Arguing that law matters, they have helped to spawn global efforts for "rule of law" reforms. They argue that stable legal regimes that assure protection for property and legal enforcement for contracts are critical to the process of economic exchange and growth. Few indeed dispute that wealth-generating activity requires sufficient political stability and a social environment in which individuals acting with others are willing and able to invest effort and assets in anticipation of economic gain. Political stability is a necessary but insufficient condition. Equally necessary are transactional security and assurance that future returns will not be confiscated, i.e., protection of contract and property. Confidence in legal recognition and protection of property encourages investment in wealth-generating enterprises. Similar assurance of legal enforcement of contracts in turn fosters exchange and transactions among strangers. These features taken together, the argument goes, help to explain why economic activity appears to flourish best in stable political orders in which private law systems function. Japan's experience adds a considerable support for this thesis.

By the mid-nineteenth century, Japan had satisfied all but one of the basic requirements for sustained industrial development and growth. During the previous two and a half centuries, Japan had enjoyed peace and political stability. A thriving commercial economy had developed and expanded with transactional security a well-established norm. A system of legal as well as societal (customary) protection for contracts and property rights had become prominent features of the political-economy. As in Europe, an agricultural revolution had produced surplus wealth that the warrior rulers could

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9. See DOUGLASS NORTH, *UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE* (2005).

10. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

not fully capture. Instead, significant incentives existed for reinvestment and commercial expansion, especially in village Japan. Moreover, Japan had a highly urbanized and literate population. Economic and political conditions were fundamentally similar to those in Western Europe. Japan's political economy at the turn of the nineteenth century had more in common with Western Europe than with any of its Asian neighbors, including China. Missing were only the technological as well as managerial innovations of the industrial revolution already well underway but still not fully complete in western Europe, particularly in England, as well as the conceptual legal framework provided by the European reception of Roman private law. The Meiji legal reforms, it can be said, expanded and solidified preexisting institutions and practices by providing a national legal system with professional judges and the conceptual basis for what Carl Steenstrup describes as "interstitial" recognition of contracts and property rights in early medieval Japan.<sup>11</sup> Indeed, by all accounts, as early as 1890 resort to the newly established system of courts to enforce both contract claims and property was frequent and presumably effective. By 1934, more civil suits per capita were being filed in district courts than at any time in modern Japanese history until the late 1990s.<sup>12</sup>

The story, however, is more complex. Japan also teaches other, more cautious, lessons about property and contracts. Trust and private ordering were equally if not more significant. Cooperative behavior is a fundamental feature of Japanese social and economic life. The *mura* (village), I have argued,<sup>13</sup> is Japan's dominant social and political paradigm. I am persuaded that this is a principal consequence of over a millennium of wet paddy rice production by relatively small communities throughout the archipelago as the primary source of wealth. Rice production requires coordinated cooperative efforts to create, manage, and maintain complex systems of irrigation as well as to plant, cultivate, and harvest the end-product. As Francesca Bray points out,<sup>14</sup> individual or cooperating cultivators and households could dig for themselves the necessary ponds, ditches, and channels to provide sufficient irrigation for the needs. Arguably at least, the patterns of agricultural production produced shared habits of cooperation and interdependence that significantly influenced prevailing modes of social organization. To

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11. CARL STEENSTRUP, *A HISTORY OF LAW IN JAPAN*, esp. 71-159 (1991); also, JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 51-65, and sources cited therein (1991).

12. See John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WILAMETTE JOURNAL OF INTERNATIONAL LAW AND DISPUTE RESOLUTION 121, 126 (2002).

13. HALEY, *supra* note 11, at 58, 175. See also JOHN O. HALEY, *SPIRIT OF JAPANESE LAW* (1998).

14. FRANCESCA BRAY, *AGRICULTURE* 109-10 [Joseph Needham, *SCIENCE AND CIVILISATION IN CHINA*, VOL. 6, *BIOLOGY AND BIOLOGICAL TECHNOLOGY*, PART II] (1984).

the extent that imperial or warrior rulers also sought to maximize the wealth they could extract, they were forced to make some accommodation to local autonomy and the preservation of their rice-cultivation communities.

Moreover, unlike imperial China, where by the middle of the thirteenth century the examination system was open to all adult males allowing access at least by wealthy households to the ruling elite, at no time prior to the nineteenth century could Japanese cultivators acquire such status except by deserting their villages to become warriors. Even that option ended in the sixteenth century. In the process through centuries of institutional change, these rural hamlets and villages rather than kinship groups preserved and perfected the patterns of interdependence, cooperative interaction, and community ordering necessary for optimal production of wet-paddy rice.<sup>15</sup> The consequences included deeply embedded patterns of cooperative behavior, consensus, and collective controls that aligned individual self-interest with the welfare of the community.

Such patterns are manifest in a sense of communitarian identity and connectedness that has been at least as important as law and legal controls. Thus, as a breach of trust an unexcused breach of contract has been more apt to lead to refusals to deal and boycott than to a lawsuit. In turn, a lawsuit may function more as a public signal of untrustworthiness than as a legal remedy. Its threat may be more meaningful than any ostensibly claimed legal remedy. Two prototypical commercial transactions stand out—one universal, the other peculiarly Japanese. The first is the letter of credit. Although viewed legally as a series of contracts between buyers, their banks, correspondent banks, and finally sellers, such arrangements may be held together more by trust between repeating players than by legal rules enabling dealings among putative strangers. Each stage of the typical letter of credit arrangement involves a series of individual transactions between parties with established relations—between the buyer and its bank, that bank and its correspondent bank, and finally the seller and its bank. The benefits of future dealings and the necessity for continued trust seems as compelling an explanation for its long-lived global success as a standard commercial transaction than the law. More telling, however, is the exceptional Japanese reliance on promissory notes more as collateral than as legally enforceable debt instruments. Clearing house rules that require all member banks to terminate all customer relationships with default-

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15. See FRANCESCA BRAY, *THE RICE ECONOMIES: TECHNOLOGY AND DEVELOPMENT IN ASIAN SOCIETIES* 170-82 (1986); Richard A. O'Conner, *Agricultural Change and Ethnic Succession in Southeast Asian States: A Case for Regional Anthropology*, 54 *THE JOURNAL OF ASIAN STUDIES*, 968-96 (1995). For a recently popularized view, see MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 236-37 (2008).

ing promissors are the glue that holds the system together.<sup>16</sup> Little if any law may seem in play here.

On closer examination, the legal framework—the conceptual understandings, the norms and particular rules within which such transactions take place—is significant. Legal concepts and rules determine form and define the parameters of acceptable behavior. They have a didactic function and consensus-creating capacity that establish the rules of the game and create normative standards the parties are expected to satisfy. Trust, reputation, and the possibility of boycott may provide effective substitutes for formal means of legal enforcement but the rules of contract and property still define the breach. Law and extralegal community controls—the mechanisms of private ordering, if you will—function in tandem to create a dynamic system in which wealth-producing activity, investment and commercial transactions, can flourish and expand.

But what of the consequences? How has Japan avoided the social dislocations, the atomization, the economic inequalities that seem to follow as the night the day in other industrializing or rapidly growing societies? How has Japan managed to maintain social and political stability and, if we are to believe statistical measures, its extraordinary equality of wealth? I can only suggest a few tentative explanations. We know that community consensus and responsibility have been deeply embedded social and political values throughout the process of growth. The introduction of Western conceptions of private law rights thus challenged deeply rooted and widely shared habits, beliefs and values—in other words, the prevailing ideology—of the Japanese community in general and of political elites in particular. At the end of the nineteenth century the holders of private rights articulated in the provisions of the new codes—particularly household heads and landlords—acted as one would expect, seeking judicial recognition of their newly acquired legal rights. In so doing in the midst of social and economic changes produced by emerging entrepreneurs, they further disrupted established relationships and patterns of community life.<sup>17</sup> Political elites also reacted as might be expected. Within two decades, political demand increased to redefine by law landlord rights, to mitigate the decisional authority of household heads, and to provide alternative judicial mechanisms with emphasis on conflict-avoiding resolution of civil disputes instead of the enforcement of legally recognized claims. Yet, rather perversely,

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16. See Marc Ryser, *Sanctions without Law: the Japanese Clearinghouse Guillotine and its Effect on Default Rates*, in REPUTATION: STUDIES IN THE VOLUNTARY ELICITATION OF GOOD BEHAVIOR 225-40 (Daniel Klein ed., 1997); Toshiro Matsumura & Marc Ryser, *Revelation of Private Information about Unpaid Notes in the Trade Credit Bill System in Japan*, 24 J.LEGAL STUD. 165-87 (1995).

17. On community disruption from absentee landlords and their defense of rights, see ANN WASWO, *JAPANESE LANDLORDS: THE DECLINE OF A RURAL ELITE* (1977).

as new measures were enacted first to enable and then to require formal conciliation for more and more categories of civil disputes, the number of ordinary lawsuits as well as conciliation proceedings increased.<sup>18</sup> We do not know what would have happened but for the collectivist transformation that occurred in the 1930s. With the rise of “revisionists” within the civilian and military bureaucracies, condemnation of party politics, of the emerging “money cliques” (*zaibatsu*), and of individualism (*kojishugi*) became even more pronounced. During this period collectivist ideals prevailed grounded, in the words of Ronald Dore and Tsutomu Ôuchi, in “a transcendent moral authority . . . not matched in any other industrial country.”<sup>19</sup> After a decade of war, defeat, and military occupation, Japan emerged in a continuing collectivist mode with economic recovery an overriding aim. Personal security may have been a fundamental concern, but individual security could only be achieved through collective action. Hence by the end of the pacific War, if not before, nearly all Japanese organizations, public and private, recruited entry-level applicants. Lateral hiring was or at least became an exception limited to marginal employees who, like the foreign experts of the early Meiji era, possessed needed skills that could not be replicated at least until new employees could be trained. Since few, if any, opportunities for lateral hiring existed, the result was an equally extraordinary degree of immobility. For Japanese in public agencies as well as private firms, there was simply no exit. A newly hired twenty-two-year-old assistant judge, newly recruited Ministry of Finance official, Mitsubishi bank employee or Fuji Motors manager knew then that thirty-five years hence at age fifty-seven his (women were not included) and his family’s welfare depended fundamentally on the political presence or prosperity of the organization they had joined. Lacking the possibility of exit, individual Japanese had (and I believe still have) little choice but to pursue the collective interest of the public agency, the firm or family business to which they had tied their future. This single factor, I submit, produced a dynamic, another spiral of cause and effect, that helps again to explain Japan’s success as well as, I should add, some of its failures. Again law plays a role.

One success, I suggest, results from the paradox of equalitarian emphasis within hierarchical Japanese organizations. For me at least, the most likely explanation for lower executive salaries in Japan than in other industrial states are the internal dynamics that ensure that those who rise to positions of authority at the apex cannot claim significantly larger shares of the collective wealth than

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18. John O. Haley, *The Politics of Informal Justice: The Japanese Experience, 1922-1942*, in 2 *THE POLITICS OF INFORMAL JUSTICE* 125-47 (Richard Abel ed., 1982).

19. Ronald P. Dore & Tsutomu Ôuchi, *Rural Origins of Japanese Fascism*, in *DILEMMAS OF GROWTH IN PREWAR JAPAN* 181, 201-02 (James W. Morley ed., 1971).

those below them. Be that as it may, the more significant consequence is the effect of new entry and competition.

Economic theories on the dynamics of growth often leave two basic assumptions unstated. In addition to political stability, competition and diversification have proven to be equally fundamental prerequisites. Without conditions of competition, economies stagnate. Without the incentives to innovate and to expand that competitive markets ensure, economic actors tend not to perform at their potential peak and to avoid the risks intrinsic to new, potentially greater wealth-creating activity. Legal rules can play an important role in this context. As noted, legal rules that encourage investment stimulate new entry and thus prevent the effective exercise of market power to determine prices and restrict output by any single firm or by several firms acting in concert. Legal rules that restrict entry, however, have the opposite effect. Such rules reinforce risk avoidance, invite stagnation, and ultimately stifle economic activity and growth. Once again the Japanese experience is exemplary.

Few periods of Japanese history have witnessed as expansive a proliferation of economic activity and innovation as the late nineteenth-century. This proliferation was largely a result of the removal of status and other restrictions on commercial activity and entrepreneurship. Only legislation, such as the Banking Law of 1876 (replacing the more restrictive 1872 regulation) that provided new security and incentives for investors fostered further expansion. Under the new law the number of chartered banks increased from 6 to 153 in three years.<sup>20</sup> Little evidence links competitiveness with law at least since the 1930s. More commonly, officials attempted, but failed, to limit entry, reduce "excessive competition," and force greater concentration. Notwithstanding these efforts, new entry and fierce firm rivalry have in fact remained constant features of Japan's commercial life throughout its modern history.<sup>21</sup>

Assessing the contribution of law to the distribution of the wealth generated by Japan's phenomenal economic growth is an even more elusive quest. Demographics, education, and decreases in both the availability and the demand of low paid unskilled labor, as well as the variety of factors restricting the percentage of households with both spouses engaged in high income producing careers, seem more likely causes. I would at least tentatively posit that legal rules fostering community cohesion and encouraging private, inter-generation

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20. See KOZO YAMAMURA, *A STUDY OF SAMURAI INCOME AND ENTREPRENEURSHIP* 166 (1974).

21. See JOHN O. HALEY, *ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY YEARS, 1948-1998* 14 (2001); see also John O. Haley, *Administrative Guidance versus Formal Regulation: Resolving the Paradox of Industrial Policy*, in *LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES* 107-28 (G. Saxonhouse & K. Yamamura, eds., 1986).

transfers of wealth—private, family-centered safety nets if you will—are contributing factors. Inadequate state-provided welfare for the aged and retirees also has consequences. When state provided welfare diminishes, aging parents are more often apt to negotiate with their children for long-term care in return for better housing. Similar consequences follow from rules that allow or require mandatory retirement at an early age. Such rules produce demand for systemic post-retirement placement for senior employees (including law professors), allowing in turn expanded entry level employment and continuing work for retiring seniors. We also need to reexamine assertions about prewar wealth distribution. We need to question whether the problems of rural poverty and inequality were ever as great as historians, mostly Marxist, have depicted. We need to know more about the effect of prewar judicial decisions and legislation, including legal reforms to reduce or ameliorate landlord exercise of property rights, such a mandatory conciliation of landlord-tenant disputes,<sup>22</sup> and the 1921 Land Lease and House Lease laws, as well as the postwar land reform. I would add judicial decisions invoking what judges viewed as “the sense of society” (*shakai gainen*) in denying the firms, spouses, and parties to long-term tenancy and other contractual relationships the legal right to terminate unilaterally an otherwise on-going relationship.<sup>23</sup> Dan Foote describes as an example of judicial “activism”<sup>24</sup> the cases invalidating unilateral employment termination without cause. These cases contrast starkly with the dearth of decisions in which the court has similarly protected the individual exercise of rights within the relationship or the community against the collective interest or consensus.<sup>25</sup> By reinforcing community, the courts may have contributed to community controls and cohesion that in turn produces intra-community wealth transfers. One possible consequence is the reinforcement of private mechanisms and practices that reduce dependency on the state and public resources. The community—from family to the firm—thus becomes a substitute source of social welfare. The absence of state welfare thereby increases the advantages of community to the individual and thus in turn contributes to the sort of cohesion that enables the community to provide the substitute source.

A closer examination of health care might also be a priority. Japan’s enviable record for low infant mortality and long life expectancy may have little to do with law and healthcare policy. Yet the question should be explored. The study of Japanese health policy by John

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22. See HALEY, *supra* note 17.

23. See HALEY, *supra* note 13, at ch. 7.

24. Daniel H. Foote, *Judicial Creation o Norms in Japanese Labor Law: Activism in the Service of—Stability*, 43 UCLA L. REV. 635-709 (1996).

25. HALEY, *supra* note 13, at ch. 8.

Campbell and Naoki Ikegami<sup>26</sup> is an exemplary effort. One might also ask to what extent are price controls necessary and might they at least in in Japan have created incentives for hospitals to spread the costs of up-to-date medical equipment by making it more available for relatively routine preventative care, or are there other cost-spreading consequences?

Both prosecutors and judges enjoy the highest levels of public trust<sup>27</sup>—and deservedly so. Japanese judges and prosecutors have an unsurpassed record of integrity. Judicial bribery and the sort of administrative corruption that is endemic in much of Asia do not exist in Japan, however serious the evidence of political corruption may be. The only case involving a conflict of interest causing a judge to be removed from the bench that has occurred in the past six decades involved the appointment of an attorney as trustee in bankruptcy some weeks after the attorney had hosted the judge to a game of golf. Exclude political funding and government procurement, and Japanese officialdom generally beats nearly all of its peers in other industrial states of honesty and competence. Even where corrupt practices are an issue, particularly in public works contracts, Japan ranks just behind Canada and Germany but well above the United States.<sup>28</sup> I doubt that law plays a direct role in this context. More significant are the organizational features described above that enable and create incentives for peer monitoring of individual behavior. That said, however, a closer look at the history of the establishment of Japan's contemporary bureaucracies—including the judiciary—would be useful. If corruption had ever been a problem, it would be worth knowing what steps or institutional reforms may have changed the internal—culture as well as the incentive structure.

Even the judiciary, however exemplary its success, is today more often denigrated than praised. For a decade and a half, in a series of studies that include numerous articles and even a book, J. Mark Ramseyer, an extraordinarily talented legal scholar, indicts the judiciary as an institutional pawn of political actors.<sup>29</sup> Yet, in the end

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26. JOHN CAMPBELL & NAOKI IKEGAMI, *THE ART OF BALANCE IN HEALTH POLICY: MAINTAINING JAPAN'S LOW-COST, EGALITARIAN SYSTEM* (1998).

27. Yomiuri Newspaper Poll, National Perceptions, April/May 1995, *World Surveys* 651, 1995, cited in John O. Haley, *Litigation in Japan: A new Look at Old Problems*, 10 WILLAMETTE JOURNAL OF INTERNATIONAL LAW AND DISPUTE RESOLUTION 121 (2002).

28. [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi2006](http://www.transparency.org/policy_research/surveys_indices/cpi2006) (last visited Feb. 13, 2007).

29. See, e.g., J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003); J. Mark Ramseyer & Eric B. Rasmussen, *The Case for Managed Judges: Learning from Japan after the Political Upheaval of 1993*, 154 U. PA. L. REV. 1879 (2006); J. Mark Ramseyer & Eric Rasmussen, *Why are Japanese Judges so Conservative in Politically Charged Cases?*, 95 AMERICAN POLITICAL SCIENCE REVIEW 331 (2001); J. Mark Ramseyer & Eric B. Rasmussen, *Why the Japanese Taxpayer Always Loses*, 72 SOUTHERN CALIFORNIA LAW

even he finds that Japan's judicial system "has attracted some of the best and brightest of university graduates . . . . After all, the system clearly and predictably rewards meritorious judges willing to put aside their personal political preferences and such rewards attract many bright young minds."<sup>30</sup> Judges who "decide like cases alike" gain better assignments and promotion.<sup>31</sup> Those who do not are penalized. The consequence, as Ramseyer has also shown,<sup>32</sup> is consistency, greater certainty of outcome, as well as a predictability that facilitates the efficient enforcement of the law through bargaining and settlement in its "shadow." Competence determines who gains, and competence as Ramseyer also now shows, is measured by effective case management.<sup>33</sup> The effect as graphically depicted in Figure 1 has been a remarkable reduction of delay the disposition of cases with a concomitant increase in the number of cases filed. One possible explanation for the correlation between reductions in delay and increasing caseloads is that potential litigants in Japan are extremely sensitive to delay and thus more cases are filed as the delay diminishes. At some point, however, the increasing caseloads cannot be managed so well and the reductions in delay must cease. At such a point, some early empirical evidence suggests, case filings in turn decrease.<sup>34</sup>

At least equally deserving of close attention is Japan's phenomenal reduction of violent crime and victimization during the past six decades. Japan must be doing something right. One may be able to avoid serious inquiry, as nearly all observers both within and without Japan tend to do, into the factors that account for Japan's relative low crime rates overall by invoking the endurance of traditional values and social controls. But surely such constant features of Japanese society do not adequately explain the dramatic postwar reduction of violent crime and victimization. Low crime rates do enable law enforcement authorities to clear more cases and clearance rates constitute, in a mutually reinforcing manner, a significant factor in crime prevention. I believe that other factors are equally significant. The first is the persistence of official emphasis in the criminal justice system for what is commonly referred to today as "restorative jus-

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JOURNAL 571 (1999); J. Mark Ramseyer & Eric B. Rasmussen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 259 (1997); J. Mark Ramseyer, *The Puzzling (In) dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 271 (1994).

30. J. Mark Ramseyer & Eric B. Rasmussen, *The Case for Managed Judges: Learning from Japan after the Political Upheaval of 1993* 154 U. PA L. REV. 1879, 1929 (2006).

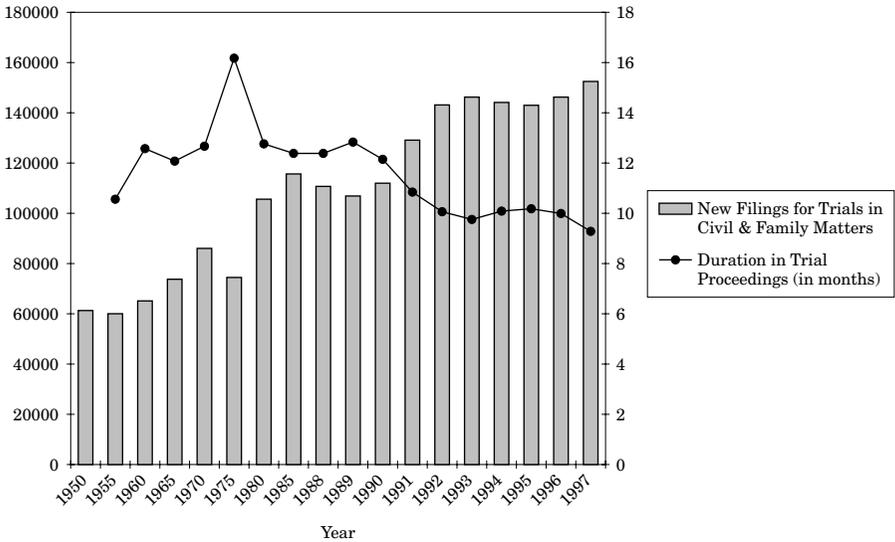
31. *Id.* at 1927.

32. J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, J.LEGAL STUD. 263 (1989).

33. Ramseyer & Rasmussen, *supra* note 28, at 1927.

34. John O. Haley, *The Myth of the Reluctant Litigant*, 2 JOURNAL OF JAPANESE STUDIES 359, 381-84 (Spring 1978).

## NEW CIVIL CASES AND DURATION OF PROCEEDINGS: DISTRICT COURTS



“I have described the attitudes and approach of police, prosecutors and judges on numerous occasions.<sup>35</sup> At each stage in the formal criminal process, from the identification of the offender, and the decision to prosecute to final sentencing, confessions with an apology, expression of remorse, and willingness to compensate the victim for harm done by the offender is generally greeted by the authorities with a willingness to be as lenient as the law allows. In response to offender contrition, however, officials also routinely encourage victims to pardon. Similar attitudes favoring lenient treatment for confessing offenders are not necessarily shared by the general Japanese public. Empirical evidence suggests that Japanese harbor sentiments as retributive as their counterparts in the United States, at least with respect to strangers.<sup>36</sup> I believe that the process itself—especially the need for offenders to negotiate, through go-betweens and other means, for victim pardon—reduces victim de-

35. John O. Haley, *Comment on Using Criminal Punishment to Serve Both Victim and Social Needs*, 72 LAW AND CONTEMPORARY PROBLEMS 219-25 (2009); John O. Haley, *Apology and Pardon: Learning from Japan*, in CIVIC REPENTANCE 97-120 (Amitai Etzioni ed., 1999) also in 41 AMERICAN BEHAVIORAL SCIENTIST 842-67 (Mar. 1998); John O. Haley, *Crime Prevention Through Restorative Justice: Lessons from Japan*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 349-71 (Burt Galaway & Joe Hudson eds., 1996); John O. Haley, *Victim-Offender Mediation: Japanese and American Comparisons* (assisted by Ann Marie Neugebauer), in RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH, 105-30 (Heinz Messmer & Hans-Uwe Otto eds., 1992); John O. Haley, *Confession, Repentance and Absolution*, in MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITIES 195-211 (M. Wright & B. Galaway eds., 1989).

36. V. LEE HAMILTON & JOSEPH SANDERS, EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES, at ch. 7 (1992).

mand for retribution. The process creates personal connections between victims and offenders through mutual friends and community acquaintances in other words, linkages that tend to reduce the sense of estrangement and to reinforce community. On the basis of such observations of the Japanese experience, the Australian criminologist John Braithwaite constructed a seminal argument for restorative justice.<sup>37</sup>

Whatever its broader merits, restorative justice exemplifies an essentially communitarian approach to criminal justice. It enables victims and offenders alike to favor offender reintegration and restoration of community cohesion. What is most significant about the Japanese experience is the degree to which restorative approaches to criminal justice reflect official rather than popular attitudes. David Johnson's exhaustive study<sup>38</sup> of Japanese prosecutors, their work and attitudes, is particularly revealing. He found that they consider offender remorse and victim offender reconciliation to be among their highest professional priorities.<sup>39</sup> Presented with a similar list of possibilities, King County, Washington prosecutors placed both at the bottom.<sup>40</sup> Had the questionnaire used for the King County prosecutors not listed both, I doubt that they would have even considered either as aims.

In the end my answer to the question "Why Study Japanese Law?" is this: whatever the field—economic growth, distribution of wealth, health care, corruption, or crime—by understanding Japan's successes and their relationship to law, we may well find better ways to solve our own problems.

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37. See JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989); JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (2002).

38. DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN*, at ch. 3 (2002).

39. *Id.* at 97-98.

40. *Id.*



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