

MY KEY PHRASE FOR UNDERSTANDING JAPANESE LAW: JAPAN AS A NORMAL COUNTRY...WITH CONTEXT

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Abstract

This essay argues that it is not a good idea to propose keywords to help find the “essence” of Japanese law. In fact, such an approach may well be the problem as we search for a single lens with which to analyze a complex society. Our perceptions of Japan, related to both exaggerated views of early postwar success and subsequent failure and to a preoccupation with cultural explanations, may hinder, rather than aid, careful analysis of Japanese law and its impact on society.

This essay instead proposes that we treat Japan as a “normal” country that has both similarities to and differences with other advanced societies. Those with expertise and experience in Japan can contribute to the understanding of Japan by supplying the Japanese context in which law operates.

Many of the problems of perceptions and stereotypes that involve Japanese law and society are also shared with China and other Asian and non-Western societies. Japanese law scholars should also make greater efforts to collaborate with other Asian law scholars to counter exaggerated cultural perceptions and to increase understanding of their work among general legal comparativists and the general public.

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INTRODUCTION

When presented with the provocative challenge of providing a “keyword” for understanding Japanese law, most participants at a conference on Japanese law at Doshisha University presented papers on some aspect of their main disciplinary field of research. However, having recently taught a broad survey course on Japanese law at both the Tokyo campus of Temple University and at the University of Washington, I took the conference organizer’s charge literally. Rather than make another presentation in my field of corporate governance with a focus on Japan, I gave serious thought to the field of Japanese law as a whole. My conclusion is that it is a terrible idea to provide a keyword for understanding Japanese law.

My thinking was affected by a recent experience in which I gave a lecture in Tokyo to a visiting group of American undergraduate students who were taking an introductory course on Japan. What, they ultimately wanted to know, was a good way to characterize Japan’s “essence?” They had read various articles emphasizing themes such as miniaturization, Confucianism, social relations, and others. Which provided the best “key” for understanding Japanese society?

My response was that maybe we should not be looking for a “grand principle.” Perhaps our search to define some “essence” is, in fact, the problem. We already spend too much time and effort on, and give too much credence to, broad generalizations that often overwhelm, rather than aid, careful analysis. It becomes difficult for the many well-done comparative studies

with a focus on Japan, particularly in the field of law, to have a broad impact due to two old problems involving “grand perceptions” about Japanese society and law that turn out, in fact, to be false dichotomies.

I. TWO “GRAND PERCEPTIONS” ABOUT JAPANESE LAW

A. Perceptions of Success or Failure

The rise and fall of Japan is generally seen as being quite dramatic. We have been fascinated by the economic miracle of the 1960s through 1980s, during which time Japan became the first non-Western country to modernize successfully. We attributed many exaggerated virtues to this economic success, including a well-conceived, consistent economic plan¹ leading to the image of “Japan, Inc.,” brilliant government bureaucrats who utilized “administrative guidance”² to create a new government-led “variety of capitalism;”³ and supposedly unique cultural traits, such as cooperation and consensus, that spurred success.

1. See, e.g., Laura Hein, *Growth Versus Success: Japan's Economic Policy in Historical Perspective*, in *POSTWAR JAPAN AS HISTORY* 99, 105-06 (Andrew Gordon ed., 1993).

2. See, e.g., CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982). Although formulations differ, administrative guidance is generally described as government agencies obtaining informal cooperation from industries, companies or individuals to take or refrain from taking some action. See generally, Mitsuo Matsushita, *The Legal Framework of Trade and Investment in Japan*, 27 *HARV. INT'L L.J.* 361, 376 (1986). There is no clear definition of administrative guidance, as attempts to formulate a legal definition often wind up characterizing it by what it is not--it is not formal administrative action (i.e., “*shobun*” or disposition)--which would be subject to judicial review. See generally John O. Haley, *Japanese Administrative Law*, 19 *LAW IN JAPAN I* (1986).

3. Business school faculty speculated in the “varieties of capitalism” literature whether a Japanese “government-coordinated economy” could transform into a “liberal market economy.” See Richard Deeg & Gregory Jackson, *Toward a More Dynamic Theory of Capitalist Variety*, 5 *SOCIO-ECONOMIC REV.* 149 (2007).

Many Americans also lauded Japan's social successes in its dealings with the problems of modern society. Low crime rates, high literacy rates, lack of corruption, longevity, relatively equal distribution of income, and other social factors led to the thesis of "Japan as Number One," a country that had surpassed the United States.⁴ Holding up a mirror to Japan's successes reflected shortcomings and dissatisfaction with our own society, in which the best and the brightest became lawyers rather than engineers and our overly adversarial legal system resulted in a "litigation explosion."⁵

However, Japan's "unique" success, at least in our minds, was soon followed by an equally unique failure, brought about by the bursting of Japan's economic bubble in the early 1990s and two subsequent decades of low economic growth. Japan's social successes, which largely remained intact during this long period of slow growth, were now ignored.⁶ Holding up our mirror, we now saw a vibrant U.S. postindustrial model that we regarded as a global standard, and a stagnant Japan that talked about reform but seemingly remained unwilling to get "serious" about it despite the proven success of the U.S. model. Ironically, two of the factors previously cited as key to Japan's success—the ability of its government bureaucracy and its "unique" culture—were now seen as important causes of stagnation and failure.

Both Japan's unprecedented "success" and "failure" were exaggerated and oversimplified. More importantly, these strong perceptions and assumptions about success and failure made careful analysis of Japan difficult, as it became nearly impossible

4. EZRA K. VOGEL, *JAPAN AS NUMBER ONE: LESSONS FOR AMERICA* (1979).

5. See, e.g., Derek Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983); Russell Baker, *Observer; Lawyers for Cars*, N.Y. TIMES, June 8, 1983, available at <http://www.nytimes.com/1983/06/08/opinion/observer-lawyers-for-cars.html>.

6. See, e.g., John O. Haley, *Why Study Japanese Law?* 58 AM. J. COMP. L. 1, 2 (2010) (arguing that despite the recent trend of declaring Japan a failure, "measured by any standard of well being" Japan remains a great success, and the contribution of law to such success is a worthy object of study).

to argue against the then-prevailing view, at least with a general audience. This pendulum swing from exaggerated views of success to those of failure is obvious in many areas, including my own field of comparative corporate governance. Its birth as a field in the early 1990s began as American scholars sought to study the secrets of Japan's success.⁷

A decade later the overwhelming theme of comparative corporate governance literature was the nearly opposite idea of convergence, i.e., that globalization and competition would result in systems in industrialized countries converging to approximate an American corporate governance system that was now seen as the best system and as the global standard.⁸ Arguably, Japan was correspondingly judged by the extent to which it transformed to something resembling the U.S. model.⁹ Perhaps unsurprisingly, it did not receive high marks.¹⁰

7. See, e.g., Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10 (1991) (developing a theory of path dependence that emphasized how political and historic factors kept corporate governance systems on separate paths, in part to explain why, unlike in Japan or Germany, powerful financial institutions did not play a significant role in U.S. corporate governance); Ronald J. Gilson & Mark J. Roe, *Understanding the Keiretsu: Overlaps Between Governance and Industrial Organization*, 102 YALE L. J. 871 (1993) (attributing Japan's "success" in corporate governance to embedding good governance practices into its industrial structure in the supposed absence of developed legal mechanisms). Curtis Milhaupt described the prevailing view of the role of law in Japanese corporate governance as being "conspicuous by its absence." See Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT'L. L. J. 3, 4 (1996).

8. See, e.g., Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) (advocating convergence).

9. For a discussion of the shortcomings of utilizing an "all-or-nothing" transformational standard see, e.g., Bruce E. Aronson, *Changes in the Role of Lawyers and Corporate Governance in Japan—How Do We Measure Whether Legal Reform Leads to Real Change?*, 8 WASH. U. GLOBAL STUD. L. REV. 223 (2009). In recent years work in comparative corporate governance has moved beyond convergence-based "all-or-nothing" transformational standards for evaluating corporate governance reform in Japan. For the forerunners of this trend, see, e.g., Luke Nottage et al., *Introduction: Japan's Gradual Transformation in Corporate Governance*, in CORPORATE GOVERNANCE IN THE 21ST CENTURY: JAPAN'S GRADUAL TRANSFORMATION 1 (Luke Nottage et al.

One might expect that this image of Japan as a failure would have disappeared following the 2008 financial crisis. Many industrial countries now experience similar problems to those encountered by Japan, including persistent low economic growth and rapidly mounting government debt, and similarly struggle to find effective solutions to these problems.¹¹ Although Japan's misery now has much company and this is generally acknowledged, it nevertheless is surprising to see the extent to which the perception of Japan as a failure lingers. One wonders if Abenomics might make a difference, and whether it is still a question of exaggerated popular images of Japan rather than actual economic and social conditions within the country.

eds., 2008) (arguing that corporate governance reform in Japan, as elsewhere, is typically a process of evolutionary change rather than sudden, transformative change); CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* (2008) (viewing corporate governance systems, including, in chapter 5, that of Japan, with an eye towards law's adaptability rather than on fixed attributes or traditional classifications, and categorizing law based on the organization of legal systems (centralized vs. decentralized) and the functions attributed to law (coordinative vs. protective)).

10. Based partly on an assumption of convergence and partly on holding Japan to its own free market, reformist rhetoric, law specialists looked for a transformation in Japanese corporate governance from a stakeholder-based system to a shareholder-based system. For one of the best studies to measure change based on a criteria of increased emphasis on maximization of shareholder wealth, see Curtis J. Milhaupt, *A Lost Decade for Japanese Corporate Governance Reform?: What's Changed, What Hasn't, and Why*, in *INSTITUTIONAL CHANGE IN JAPAN* 97 (Magnus Blomstrom & Sumner La Croix eds., 2006). The same result was also reached from a broader perspective. See, e.g., John O. Haley, *Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan?*, 19 *J. JAPANESE L.* 5 (2005).

11. For one of the first serious discussions in the United States of the possibility that following the 2008 financial crisis America might repeat Japan's experience of slow growth within a lingering deflationary environment, see James Bullard, *Seven Faces of "The Peril,"* *FED. RES. BANK ST. LOUIS REV.* 1 (Sept.-Oct. 2010).

B. Preoccupation with Cultural Explanations

There are a number of reasons for the longstanding emphasis on cultural explanations in discussions of Japanese society and the corresponding view that “law doesn’t matter.” It is understandable that the first non-Western society to successfully modernize would attract both attention and a search for its “secrets.” Many of these supposed “secrets” involved broad cultural attributions that would have been impossible to utilize outside of Japan. Regardless of whether this cultural emphasis was accurate or useful, it was certainly popular and sold many books and newspapers.

This cultural emphasis was reinforced by modernization theory, which was popular in the early postwar years.¹² Modernization theory defined a single path to development and encouraged both foreign and Japanese commentators to compare Japan’s development at that time to the “goal” of modernization.¹³ This view is reflected in the work of the most famous Japanese professor of sociology of law, Takeyoshi Kawashima, who in 1963 found that Japanese cultural traditions

12. See, e.g., W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (3d ed. 1990) (positing a single linear path of development consisting of five stages of economic growth for all countries to develop from “the traditional” society” to the ultimate “high mass-consumption” society).

13. Modernization theory’s implication for the importance of law is that as society develops economically and becomes more complex over time, formal “Western-style” legal systems will assume greater importance over the informal dispute resolution mechanisms that are prevalent in “traditional” societies. See TAKEYOSHI KAWASHIMA, *NIHONJIN NO HŌISHIKI* [LEGAL CONSCIOUSNESS OF THE JAPANESE] (1967). In English see Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 *LAW IN JAPAN* 1 (Charles Stevens trans., 1974) (a translation of chapter four of the Japanese book). For a discussion of the importance of modernization theory in Kawashima’s work, see, e.g., ERIC A. FELDMAN, *THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY, AND HEALTH POLICY* 152-53 (2000). At the time of Kawashima’s work there was no example or model for a Non-Western society to develop a modern legal system that significantly deviates from established Western models. Frank K. Upham, *Who Will Find the Defendant if he Stays with his Sheep? Justice in Rural China*, 114 *YALE L. J.* 1675, 1701-02 (2005).

resulted in a lack of “rights consciousness” among Japanese at that time compared to the United States.¹⁴ Such a “lack,” however, presumably should and would disappear once Japan “modernized.”¹⁵

Kawashima’s broad ruminations on the Japanese people’s general conception of law were supported primarily by anecdotes related to contract and property law against a background of low litigation rates.¹⁶ However, his work became wildly popular,

14. See Kawashima, *The Legal Consciousness of Contract in Japan*, *supra* note 13, at 15 (“In Japan...not only are there many instances where written agreements are not drafted, but even when written agreements are drafted their contents are generally very simple...When we compare this situation with the situation in European and American business transactions...we can understand the very conspicuous Japanese peculiarity in this regard.”). For an opposing view by a prominent Japanese law scholar that the supposed historical lack of legal consciousness is a myth, see Frank K. Upham, *Weak Legal Consciousness as Invented Tradition*, in MIRROR OF MODERNITY: INVENTED TRADITIONS IN MODERN JAPAN 48 (Stephen Vlastos ed., 1998).

15. Takeyoshi Kawashima, *The Status of the Individual in the Notion of Law, Right, and Social Order in Japan*, in THE JAPANESE MIND: ESSENTIALS OF JAPANESE PHILOSOPHY (Charles A. Moore ed., 1967) (“...it is clear that the Japanese attitude toward law, right, and social order will continue to undergo changes in the direction of the patterns of Western society...when the traditional social structure becomes disorganized as the process of industrialization proceeds.”), *cited in* FELDMAN, *supra* note 13, at 152.

16. See Kawashima, *The Legal Consciousness of Contract in Japan*, *supra* note 13. An obvious problem is the selection of appropriate anecdotes, and indeed there are claims that even in Japan anecdotes could be cited to reach the opposite conclusion about the strong individuality and rationality of Japanese legal consciousness. See YOSHIO SUGIMOTO & ROSS MOUER, NIHONJIN WA NIHONTEKI KA? [ARE THE JAPANESE JAPANESE?], chapter 11 (1982), *cited in* Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 LAW & SOC. REV. 219 (1987). Miyazawa equates “legal consciousness” in Japan with Lawrence Friedman’s concept of legal culture. He calls for more empirical research, not only on culture at the aggregate or societal level, but especially on individual attitudes with regard to law. *Id.* at 223. In one subsequent empirical study of individual attitudes towards contracts among Japanese law and business students, the authors found that, contrary to their original hypothesis, business students not trained in law took a more “legal” approach to contracts (i.e., favoring strict compliance over flexibility in

both within and outside Japan, in an exaggerated form that portrayed “culture” as an unchanging, dominant force that rendered law irrelevant.

Beginning with the seminal work of John Haley in 1978,¹⁷ Japanese law specialists soon challenged Kawashima’s theory with their own empirical efforts that focused on institutional barriers to litigation, economic analysis, and the role of bureaucratic controls.¹⁸ Although Kawashima’s emphasis on traditional values rather quickly lost influence among specialists

interpretation and execution). See Michael K. Young et al., *Japanese Attitudes Towards Contracts: An Empirical Wrinkle in the Debate*, 34 GEO. WASH. INT’L REV. 789 (2002-2003). But see Salil K. Mehra, *Blaming: Harm Attribution in the United States and Japan*, 75 U. PITT. L. REV. __ (forthcoming 2014) (finding that Japanese and Americans viewed accidents and blame for them in culturally distinct ways).

17. John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

18. Japanese law specialists generally consider Kawashima’s thesis to be superseded by John Haley’s article in 1978 that focused on institutional barriers to litigation. See, e.g., Miyazawa, *supra* note 16, at 222. But see Eric A. Feldman, *Law, Culture, and Conflict: Dispute Resolution in Postwar Japan*, in LAW IN JAPAN: A TURNING POINT 50, 63 (Daniel H. Foote ed., 2007) (noting that Kawashima’s actual research is more complex than its popular characterization and that the seemingly contradictory arguments put forth by Kawashima and Haley can be considered as differences in emphasis rather than as being mutually exclusive).

Other analyses by Japanese law specialists emphasized economic analysis and informal bureaucratic controls over the importance of cultural values. For the former See, e.g., J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* (1999) and J. Mark Ramseyer, Opinion and Comment, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111 (1988). For the latter see FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987) and Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC’Y REV. 651 (1991). In addition to disagreeing with Kawashima’s thesis on the merits, Japanese law specialists also had a personal interest in refuting Kawashima’s approach since it denied the importance of the very field that Japanese law scholars were researching. See, e.g., J. Mark Ramseyer, *John Haley and the American Discovery of Japanese Law*, 8 WASH. U. GLOBAL STUD. L. REV. 213, 215 (2009) (stating that “In Kawashima’s crudely reductionist world, American scholars of Japanese law did not need to learn the law. After all, legal rules made no difference.”)

in Japanese law, European-based generalists in comparative law have continued to propound Kawashima's essentialist view of culture for decades. General comparativists continue to compare legal doctrine between the U.S. and Europe, but resort to cultural classifications for Non-Western legal systems.¹⁹ Japan has been variously classified as traditionalist, Far Eastern, Confucian, and "other."²⁰ The divide between generalists in comparative law and specialists in Japanese law with respect to approaches for analyzing Japanese law and society, noted by Frank Upham in 1997, has only grown worse.²¹ Japan specialists have continued to develop their field with a socio-legal approach, while general comparativists seemingly remain stuck with a legal Orientalism from the 1960s and 70s.²²

The purpose here is not to deny the existence of culture, but rather to exercise great caution with respect to *any* essentialist "grand principle" that is difficult to define and even harder to apply to concrete modern phenomena with any consistency. The aspect of Japanese culture that generally receives the most attention relates to the importance of social relationships, which is often portrayed as trumping universalistic principles such as those embodied in law.²³

The best effort to date to define a theory of law in Japan focused on social relations is John Haley's portrayal of Japan's

19. See generally Frank K. Upham, *The Place of Japanese Legal Studies in American Comparative Law*, 1997 UTAH L. REV. 639, 644, 654 (1997).

20. *Id.* at 646-47.

21. *Id.* at 652; Georgio Fabio Colombo, *Japan as a Victim of Comparative Law*, 22 MICH. ST. INT'L L. REV. 731 (2014).

22. "Legal Orientalism" is a phrase used extensively by Teemu Ruskola to describe similar issues of Western stereotypes of a lack of law in China. See TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* (2013).

23. See Kawashima, *The Legal Consciousness of Contract in Japan*, *supra* note 13, at 19-20. For a current example of this traditional approach, see Steven Givens, *The Vagaries of Vagueness: An Essay on "Cultural" vs. "Institutional" Approaches to Japanese Law*, 22 MICH. ST. INT'L L. REV. 839 (2014).

“communitarianism.”²⁴ But does Japan’s supposed social cohesion truly relate back to village relationships during Japan’s medieval Tokugawa period? This claim remains hard to evaluate, and efforts to apply any such general theory to specific modern phenomena encounter serious difficulties.²⁵ In addition, this theory represents only one aspect of Haley’s ongoing sophisticated work on various aspects of change and continuity in Japan. He also, for example, finds it impossible to separate law and culture, with each influencing the other.²⁶

It is worth noting that in the early 1990s this argument about Japanese culture and communitarianism expanded further into a discussion of “Asian values.” This viewpoint, most closely associated with the former leader of Singapore, Lee Kwan Yew, emphasized Asian communitarianism in contrast to Western

24. See JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* (1998). Unlike some of the exaggerated notions of culture discussed herein, Haley, the leading writer on the interaction of law and culture in Japan views law and culture as “inseparable” rather than as competing forces. John Owen Haley, Comment, *Law and Culture in China and Japan: A Framework for Analysis*, MICH. J. INT’L L. 895, 896 (2006). In his view, not only does culture influence law, but “both lawmaking and legal enforcement inexorably influence the continuity and change of culture.” *Id.*

25. Tom Ginsburg, *Studying Japanese Law Because It’s There*, 58 AM. J. COMP. L. 15, 21-22 (2010); Curtis J. Milhaupt, *Bull-Dog Sauce for the Japanese Soul? Courts, Corporations, and Communities—A Comment on Haley’s View of Japanese Law*, 8 WASH. U. GLOBAL STUD. L. REV. 345 (2009). For example, one might expect litigation rates to be higher in Japan’s urban areas as traditional, village-based community bonds are weakened through migration to urban areas; however, this has not proven to be the case. See Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation*, 35 J. LEGAL STUD. 31, 44-45 (2006).

26. See John O. Haley, *Law and Culture in China and Japan: A Framework for Analysis*, *supra* note 24. See also, e.g., Eric A. Feldman, *The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan*, 27 MICH. J. INT’L L. 743 (2006). In addition, Dan Foote has produced a number of interesting articles that highlight how the judiciary and formal legal system are, in fact, harnessed to promote “traditional” values that are often assumed to be cultural and unrelated to law. See, e.g., Daniel Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of – Stability?*, 43 UCLA L. REV. 635 (1996).

individualism.²⁷ In addition to the obvious questions of whether there is a sufficiently uniform Asian culture to support such a thesis and whether that culture played an important role in economic development and modernization, the “Asian values” argument was also attacked by many critics as an excuse to justify authoritarianism.²⁸ In any event, the pendulum soon swung again, and the popularity of the “Asian values” argument declined significantly following the Asian financial crisis of 1997-98.²⁹

The above example illustrates that the tendency to rely on cultural stereotypes in discussions of law is by no means unique to Japan. The rapid rise and “success” of China over the last decade has made that country the new battleground over cultural stereotypes and the role of law in non-Western countries. The corresponding stereotypes of Japan and China have been succinctly summarized thusly: “decisions about law in Japan are guided by norms of harmony” and “Confucian China will/will not respect the rule of law.”³⁰

As a thought experiment, let us consider what would happen if a Japanese (or other foreign) observer attempted to analyze current issues in American society through a similar approach of first identifying an American “essence.” Presumably the American “essence” would relate somehow to individualism: maximization of individual freedom, with perhaps a reference to colonists fleeing to the United States to escape persecution and rugged frontier individualism. There might be a corresponding limited role for government with respect to both individuals and markets.

27. Fareed Zakaria, *Culture is Destiny: A Conversation with Lee Kwan Yew*, 73 FOREIGN AFF. 109, 113 (1994).

28. For a review of this debate, see, e.g., Karen Engle, *Culture And Human Rights: The Asian Values Debate In Context*, 32 N.Y.U. J. INT'L L. & POL. 291 (2000).

29. See Mark R. Thompson, *Whatever Happened to Asian Values?*, 12 J. DEMOCRACY 154, (2001).

30. See Nicholas C. Howson & Mark D. West, *Law, Norms, and Legal Change: Global and Local in China and Japan*, 27 MICH. J. INT'L L. 687, 692 (2005).

Could such an “essence” of individualism be used as the main framework for analyzing current issues such as gun control, health care, fiscal policy, bank regulation, or immigration? Any such approach would immediately encounter the inconvenient fact that the concept of individualism is broad and amorphous, and that beliefs and attitudes can be affected by many factors and can change relatively rapidly. For example, the most controversial issue in the United States in the early fall of 2013 is arguments over the budget, debt ceiling, and defunding the Affordable Care Act (“Obamacare”). Unsurprisingly, both sides to this debate regularly cite works of the nation’s Founding Fathers to show that the bedrock principles of the American republic support their own respective positions.³¹ Individualism and opportunity might be thought to lead to a relatively open immigration policy, but there are periodic backlashes against such a position with changing economic and other conditions and some attitudes may have changed as recently as the Republican party’s defeat in the 2012 presidential election.³²

In sum, not only is society constantly changing, but so are views of history and interpretation of broad principles, as they both reflect current issues and changing needs. It is therefore exceedingly difficult to find an unchanging, broad social or cultural principle to utilize for analysis of specific contemporary issues.

31. See, e.g., David A. Fahrenthold, *Founding Fathers weigh in on Obamacare (with the help of today’s statesmen)*, WASH. POST, Oct. 1, 2013, available at <http://www.washingtonpost.com> (noting that it was “a busy week for the Founding Fathers. In the debate that led up to the shutdown, legislators name-checked at least . . . 28 of the 56 signers of the Declaration of Independence.”).

32. And may have subsequently changed back again, as rising Republican prospects in the 2014 mid-term elections may have cooled ardor for immigration reform. See, e.g., John Dickerson, *Back From the Dead: A Year Ago Immigration Reform was Crucial for Many Republicans; That was Before They Felt Confident about 2014*, SLATE, March 18, 2014, available at http://www.slate.com/articles/news_and_politics/politics/2014/03/reince_priebus_immigration_reform_and_gop_autopsy_why_republicans_are_ignoring.htm 1.

II. THE ROLE AND IMPORTANCE OF LAW IN JAPAN

Perceptions about the role of law in Japan have been significantly affected by our preoccupation with cultural explanations of Japanese society, resulting in a longstanding view that “law doesn’t matter” in Japan. This view has persisted throughout the pendulum swing in our perception of Japan’s success and failure.

During the 1980s the purported lack of law was cited positively as a reason for Japan’s success. The Japanese focus on business, engineering, informal cooperative relationships, and an active role for government bureaucrats, were all seen as being superior to America’s preoccupation with rules, lawyers, legal formalities, and litigation.

It is interesting to observe how perceptions of a lack of law in Japan managed to persist through Japan’s period of “failure.” Like bureaucracy and cultural “uniqueness,” a supposed lack of law that had previously been cited as a key to Japan’s impressive “success” was now deemed to be a cause of failure. The persistence of our image that “law doesn’t matter” in Japan may again have colored our evaluation of Japan’s efforts to institute major reforms in the 1990s. For example, there is little disagreement that “law on the books” did change substantially in areas such as financial deregulation under Japan’s “Big Bang” program. However, it was presumed that changes in the law did not matter; actual practices in the area of financial regulation did not change because of government bureaucrats’ unwillingness to give up control of financial institutions. Japan’s continuing low economic growth was cited as proof of this proposition. The notion that law doesn’t matter in Japan survived intact despite substantially changed circumstances.³³

33. See Bruce E Aronson, *Reassessing Japan’s Big Bang: Twenty Years of Financial Regulatory Reform*, in *JAPAN SINCE 1945: FROM POSTWAR TO POST-BUBBLE* 165, 170, 172 (Christopher Gerteis & Timothy S. George eds., 2013) (arguing that Japan’s Big Bang financial deregulation program and accompanying administrative reform were a real, if partial success, contrary to popular views of failure).

In fact, the legal system was one of the major areas of reform in Japan's ambitious plans to undertake deregulation and administrative reform initiated toward the end of the 1990s.³⁴ Traditional cultural stereotypes of harmony and consensus were further challenged by one of the overarching goals of reform: to transform Japan from a system of *ex ante* procedures (decided in advance by government bureaucrats through administrative guidance) to an *ex post* system (decided after the fact through interpretation and enforcement of legal rules). Although it is difficult to measure success in any such broad endeavor, the reforms had a substantial impact. The unexpected rise of large corporate law firms in Japan and the expanded role of corporate lawyers suggest that more Japanese businessmen who wished to know whether a new product or service was permissible began consulting lawyers for interpretation of legal rules rather than visiting bureaucrats for advance approval.³⁵

Law remains an important tool today to implement policies designed to revitalize Japan. Every element of the Abe administration's growth policy will require substantial legal implementation. These include expanding the workforce to combat an aging society by increasing the role of women, providing incentives to stimulate the growth of emerging

34. *Id.* at 167. For the substance of the legal reform proposal, see JUSTICE SYSTEM REFORM COUNCIL, *Recommendations of the Justice System Reform Council*, ch. III, pt. 1-1 (2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> (report of a special legal reform council created by the Japanese Cabinet). For an overview of the legal reform process, see, e.g., Setsuo Miyazawa, *Law Reform, Lawyers, and Access to Justice*, in JAPANESE BUSINESS LAW (Gerald Paul McAlinn ed., 2007) (illustrating an overview of the legal reform process).

35. See, e.g., Bruce E. Aronson, *The Brave New World of Lawyers in Japan: Proceedings of a Panel Discussion on the Growth of Corporate Law Firms and the Role of Lawyers in Japan*, 21 COLUM. J. ASIAN L. 45, 75, 78 (2007). See also Toshimitsu Kitagawa & Luke Nottage, *Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects*, in RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 201, 246 (William P. Alford ed., 2007).

companies, and entering into the Trans-Pacific Partnership to increase trade and investment.³⁶

It is difficult to prove my sense that law plays an important role in Japanese society, although perhaps not as large a role as in the United States. As with research on litigation rates, it may prove to be the case that the legalistic U.S. is, in fact, the outlier and that Japan, on the basis of a broader comparison of industrialized societies, is actually a “normal” country. The continuing development of Asia and substantial increases in intraregional economic, academic, and cultural interactions provide new and important opportunities for collaborative comparative research between Japan and other Asian countries that share some historical, institutional, and cultural features. This may also clear the way for comparisons that do not necessarily utilize the U.S. or other Western countries, with their strong cultural stereotypes of Asia, as an explicit or implicit standard for comparison.³⁷

36. HEADQUARTERS FOR JAPAN’S ECONOMIC REVITALIZATION, JAPAN REVITALIZATION STRATEGY: JAPAN IS BACK (June 14, 2013), *available at* http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en_saikou_jpn_hon.pdf.

37. The economic rise and modernization of Asia presents a new opportunity (and challenge) for the Academy to undertake comparative studies of legal systems in Asia, rather than comparing a single system in Asia to the United States or other Western country. The important potential benefits of such comparisons include providing both greater context and understanding of legal systems in each country and suggesting alternative approaches to dealing with common problems. For a few examples of this approach in my area of corporate law and corporate governance, *see, e.g.*, Hideki Kanda, *What Shapes Corporate Law in Japan*, in TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA (Hideki Kanda et al., 2008); Harald Baum & Dan W. Puchniak, *The Derivative Action: An Economic, Historical and Practice-oriented Approach*, in THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH (Dan Puchniak et al., 2012). For my own modest contribution to this collaborative effort, *see* Bruce E. Aronson, *Corporate Governance Models and Practices in Japan and East Asia: Proceedings of a Panel Discussion* (27 COLUM. J. ASIAN L., forthcoming 2014), *available at* <http://ssrn.com/abstract=2395059>.

III. APPROACH TO THE STUDY OF JAPANESE LAW AND SOCIETY

A. Treating Japan as a Normal Country

If, as argued above, analysis of Japanese law is hindered by broad and oversimplified perceptions, what approach should researchers take? The first principle is to treat Japan as a “normal” country, i.e., use the same research methodologies that would be used for any country. This would include an effort to cut through the pendulum swings in perceptions about Japan’s success and failure³⁸ and disregard the tendency to provide broad cultural explanations.

One of the best examples of this approach is John Haley’s seminal work, *The Myth of the Reluctant Litigant*, which early on used modern, well-accepted methodological approaches to deal effectively with a culturally laden issue.³⁹ It looks at the available evidence and shows no particular assumption about Japanese “culture.”⁴⁰ Through the 1980s, differing approaches to

38. Or, in the words of Japan historian Stephen Vlastos, to “strike the mean: to see through the trends of the day to ways in which Japan is really quite ordinary.” Stephen Vlastos, *Bookending Postwar Japan: Seeing a Whole Greater than the Sum of its Parts*, in *JAPAN SINCE 1945: FROM POSTWAR TO POST-BUBBLE*, *supra* note 37, at 257, 258.

39. Haley, *supra* note 18. See also Ramseyer, *John Haley and the American Discovery of Japanese Law*, *supra* note 18. For specific examples, see *infra* note 44.

40. Haley’s article remains the gold standard for comparative studies due to its integration of three highly useful approaches. First, Haley used empirical data to challenge conventional wisdom. His data indicated that it was a lack of legal infrastructure rather than a cultural predisposition against the use of litigation that accounted for relatively low litigation rates in Japan. Haley, *supra* note 18 at 378-89. Second, he employed a historical perspective, arguing, for example, that if conciliation procedures were made mandatory in the interwar years for the purpose of suppressing litigation and societal upheaval dating from the 1920s, it was unlikely that a cultural reluctance to litigate was the cause of a decline in litigation in the postwar years. *Id.* at 368-78. Third, he looked beyond a bilateral comparison between the United States and Japan to examine available data on litigation from a variety of countries, concluding that while Japanese litigation rates were low, they were not extraordinarily so; if

the study of Japanese law by scholars such as Mark Ramseyer and Frank Upham shared the common characteristic of utilizing standard research methodologies to analyze Japan without reliance on any essentialist cultural explanation.⁴¹ Thus, for several decades scholars in Japanese law have treated Japan as a “normal” country.

B. Providing Context for Understanding Japanese Law and Society

Researchers on Japanese law and society can utilize their expertise and experience to contribute to the understanding of Japan by providing context. In comparative studies the two extremes are generally not very useful. An emphasis on cultural uniqueness means that any findings cannot be utilized in other societies. Conversely, an emphasis on a universal principle such as economic rationality tends to make all societies look alike. In either case, the value of comparative research is called into question.⁴²

For meaningful comparisons, scholars can aim for the middle ground between these two extremes, examining both similarities and differences and providing useful context that both deepens understanding and suggests potential alternative approaches to formulating policies and solving problems. Under this view, people are “rational” but only in the sense of a bounded

anything, the United States was the outlier due to its unusually high rate of litigation. *Id.* at 362-64.

41. See *supra* note 18 for citations.

42. The logical result is an ongoing “crisis” in general comparative law which includes the view that comparisons are essentially useless. See, e.g., Pierre Legrand, *The Same and the Different*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 240, 245 (Pierre Legrand and Roderick Munday eds., 2004) (arguing that “...as he engages with his (impossible) object of study, ‘the comparati[st] presumes similarities in different jurisdictions in the very act of searching for them’ and assumes differentiating features to be largely indifferent. The desire for sameness breeds the expectation of sameness which, in turn, begets the finding of sameness.” (emphasis in original)); Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 *HARV. INT’L L.J.* 411-55 (1985); Upham, *supra* note 19, at 650.

rationality that is largely defined by their societal context. In defining this societal context, the trend in the literature on Japanese law has been to look first at the effect of institutions and to be wary of “culture” due to its overemphasis and abuse in the past.⁴³ However, the persistence of institutions is itself an indication of shared values or “culture,” and “institutions” and “culture” can be viewed as complementary components of societal context rather than as opposing or competing explanations.⁴⁴

It is easy to find significant issues in contemporary Japan where defining and explaining the context is essential. For example, take the important issue of constitutional revision. In the abstract, it does not sound particularly controversial for Japan to recognize a right of collective self-defense in its constitution, as permitted by the UN charter and as claimed by virtually all nations. However, the Japanese context involves historical aggression against other countries in Asia that is still denied by Japanese nationalists and remains an issue today, as well as domestic political issues involving past militarism and the nature of a democratic society.⁴⁵ Providing such context does not automatically mean that constitutional revision is unwise. However, fully understanding the Japanese context permits fuller

43. Some argue that a number of Japanese law specialists may have gone too far in the opposite direction in an attempt to avoid overly broad use of the term “culture”—i.e., by expanding the concept of “institutions” so broadly as to make its use equally problematic. David T. Johnson, *Law in Everyday Japan: Sex, Sumo, Suicide, and Statutes by Mark D. West Review*, 32 J. JAPANESE STUD. 444, 445 (stating that the use of the concept of “institution” by Mark West in his book *LAW IN EVERYDAY JAPAN: SEX, SUMO, SUICIDE, AND STATUTES* “is so broad that it is difficult to discern anything important that is excluded from its confines”).

44. See, e.g., Carl J. Green, *Japan: “The Rule of Law Without Lawyers” Reconsidered*, reprinted in *THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY* (Curtis J. Milhaupt et al. eds., 2nd ed. 2012) 179, 181. See also Haley, *supra* note 24, at 896.

45. For a general introduction to the history and role of Japan’s modern constitutions, see LAWRENCE W. BEER & JOHN M. MAKI, *FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN’S TWO CONSTITUTIONS, 1889-2002* (2002).

comprehension of the implications and consequences, both domestic and international, of such choices.⁴⁶

C. Continuing Development of the Field of Japanese Law

By the late 1980s the field of Japanese law had moved well beyond essentialist cultural stereotypes, and for several decades Japanese law specialists have regarded any discussion of essentialist culture as both fruitless and anachronistic.⁴⁷ The field has continued to develop in two ways. First, a number of Japan

46. The ruling Liberal Democratic Party (LDP) created a draft of a substantially amended constitution in 2012 that goes far beyond amendment of the pacifist provision in Article 9 to seemingly “turn back the clock” to a “controlled society.” See Japan’s Constitution: Back to the Future, *ECONOMIST*, June 1, 2013, available at <http://www.economist.com/news/asia/21578712-shinzo-abes-plan-rewrite-japans-constitution-running-trouble-back-future>. For a discussion of the most controversial proposed amendments see, for example, Lawrence Repeta, *Japan’s Democracy at Risk – The LDP’s Ten Most Dangerous Proposals for Constitutional Change*, 11 *ASIA-PAC. J.: JAPAN FOCUS*, Issue 28, No. 3, available at <http://japanfocus.org/-Lawrence-Repeta/3969#>. For the international implications of such constitutional amendments, see, for example, Yuka Hayashi, *Japan Leader Charts Path for Military’s Rise: Abe Seeks to Leverage Legislative Strength to Remake Pacifist, World War II-Era Constitution, a Proposal Riling Tokyo’s Neighbors*, *WALL ST. J.*, April 24, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323551004578438253084917008?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887323551004578438253084917008.html#printMode?KEYWORDS=YUKA+HAYASHI>. A likely alternative to a constitutional amendment is a new “official” government interpretation of Article 9 to permit Japan to engage in collective self-defense. However, even this scenario is controversial. See, e.g., Craig Martin, *The Case Against “Revising Interpretations” of the Japanese Constitution*, *ASIA-PAC. J.: JAPAN FOCUS* (Jan. 31, 2014, 7:02 AM), <http://japanfocus.org/-craig-martin/2434> (arguing that the courts, not the government, have the constitutional authority in Japan to interpret constitutional provisions).

47. In the mid-1990s, Frank Upham called the approach of European-oriented comparativists that relied on cultural explanations to categorize non-Western legal systems as “anathema” and “bizarre” to scholars of Japanese law. See Upham, *supra* note 19, at 656 Writing nearly a decade ago, Kent Anderson called the relevance of law in Japan a “hackneyed” question. See Kent Anderson, *Review Essay, The Next Generation: Milhaupt and West on Japanese Economic Law*, 27 *MICH. J. INT’L. L.* 985, 1000 (2006).

experts in sociology of law have developed more complex and sophisticated arguments about the relationship of law and culture. These include, for example, emphasis on the fact that culture is not unchanging, but rather is constantly being reimagined, being both fluid and negotiable, and is utilized selectively and strategically;⁴⁸ and characterizations of culture as not being determinative, but rather as acting as an important filter in determining both which Western laws to adapt and how to adapt Western legal concepts to local circumstances.⁴⁹

A second, and perhaps more significant development, is research in fields other than sociology of law that ignores cultural stereotypes, assumes that law matters in Japan, and proceeds to examine how law influences economic and other actors in Japan. This work is exemplified by Curtis Milhaupt and Mark West, who also pay heed to the influence of social norms, which could be regarded as a non-essentialist form of “culture.”⁵⁰ In fact, such a “hybrid” approach, which combines social norms, institutional structures and law to analyze the role of law in Japan is now the dominant methodology employed by Japanese law scholars.⁵¹

Despite this ongoing, sophisticated research, cultural stereotypes continue to dominate the thinking of general legal comparativists, let alone the general public. Certainly, Japanese law specialists should continue their current methodological

48. See Setsuo Miyazawa, *How Does Culture Count in Legal Change?: A Review with a Proposal from a Social Movement Perspective*, 27 MICH. J. INT'L. L. 917 (2006).

49. See Takao Tanase, *Global Markets and the Evolution of Law in China and Japan*, MICH. J. INT'L. L. 873 (2006); Miyazawa, *supra* note 48, at 917.

50. See, e.g., Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083 (2001); MARK D. WEST, *SECRETS, SEX, AND SPECTACLE: THE RULES OF SCANDAL IN JAPAN AND THE UNITED STATES* (2006). See also Anderson, *supra* note 47.

51. For a few examples out of many, see, e.g., Feldman, *supra* note 26; Luke Nottage, *Japan's New Arbitration Law: Domestic Reinforcing Internationalisation?*, 2 INT'L. ARB. L. REV. 54 (2004) (considering a variety of possible explanations for the relative failure of domestic arbitration in Japan).

approach to research on Japanese law, having already largely overcome the problems cited in this essay. However, the greater and more significant challenge at this stage is what scholars in the field of Japanese law (as well as legal specialists in other non-Western countries such as China) should do to try and exert some meaningful influence on generalists' (mis)perceptions of the role of law in Japan.

It is both too great a burden and completely unrealistic to expect that generalists in comparative law, let alone the general public, will take the initiative to become familiar with the work of Japanese (and other) legal specialists in order to move beyond outdated and unhelpful cultural stereotypes. The only practical method for making progress in closing the gap between specialists and generalists is for scholars in Japanese (and Asian) law to take the initiative. It is therefore difficult to argue with the recommendations of Setsuo Miyazawa, leader of the East Asian Law and Society collaborative research network, who advises that researchers in East Asia should help generalists understand the value of their work and contribute to general theory-building by presenting work that is not bound conceptually by national or regional boundaries, and should also seek to present to, and collaborate with, generalists as much as possible.⁵²

CONCLUSION

Understanding of Japanese law has been hindered by lingering perceptions in other academic disciplines and in broader society that overemphasize cultural explanations and exaggerate Japan's "success" or "failure" as explanations for the role of law in Japan. Japanese law scholars have challenged these assumptions and have gone on to develop an interesting and valuable literature in their field, but this work has had only limited impact on broader academic disciplines and society.

52. Setsuo Miyazawa, *Where are We Now and Where Should We Head for? A Reflection on the Place of East Asia on the Map of Socio-legal Studies*, 22 PAC. RIM L. & POL'Y J. 113 (2013).

Going forward, we should continue to resist the notion of finding one “grand principle” that defines the “essence” of Japan. Rather we should continue to use accepted academic methodologies and treat Japan as a “normal” country, while explaining the Japanese context within which socio-legal comparisons must take place. The issues and possible solutions discussed herein are by no means unique to Japan; they apply equally to other Asian and non-Western countries. However, Japan was the first to develop and, as a result, the role of law in Japan was arguably the first field of legal studies in modern times to deal with these issues. Hopefully, we can continue to develop the field and provide an example to, and increase collaboration with, specialists on other Asian and non-Western countries, and also encourage and collaborate more closely with our general comparativist colleagues in their ongoing struggle to make fruitful comparisons of law and society.

