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The Tuna Court: Law and Norms in the World's Premier Fish Market

Eric A. Feldman†

Abstract

Legal scholars have long emphasized the corrosive impact of conflict on long-term commercial and interpersonal relationships. To minimize the negative consequences of such conflict, members of close-knit groups who anticipate future interactions create ways to resolve their disputes using internal group norms rather than state-enforced legal rules. From farmers

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in California's Shasta County¹ to jewelers in midtown Manhattan,² the literature describes people who create informal norms of conflict management that are faster and less expensive than formal law and that lessen the harm that conflict causes to their relationships.

This Article tells a different story. It describes a tightly organized group of commercial traders—tuna merchants in Tokyo—who are repeat players in a discrete marketplace where there are regular problems with the quality of auctioned goods. Rather than ignoring those problems or quietly resolving them with reference to informal market norms, Tokyo's tuna merchants make use of a highly specialized court created by the state—the Tuna Court—that follows formal rules and procedures that are contained in a government ordinance. The supposed disadvantages of legal rules are nowhere apparent. The Tuna Court is fast and inexpensive, and the process of articulating and resolving claims serves to strengthen individual relations and the cohesion of the market community. A comparison between Japan and the United States demonstrates that there is more disputing and more legal formality in the Japanese tuna market, and this Article credits a mix of economic and cultural factors for the difference. In short, by presenting a detailed case study of a highly specialized court that operates under government auspices, this Article argues that formal state law can outperform informal group norms by satisfying the business needs of close-knit merchants while simultaneously contributing to the shared values that underlie the success of their future transactions.

INTRODUCTION

A path-breaking examination of California cattle ranchers argues that members of close-knit communities prefer to resolve their conflicts with reference to informal norms³ rather than formal legal rules or procedures.⁴

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1. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

2. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

3. Although the word "norm" is widely used in contemporary legal scholarship, it has no uniformly accepted definition. Eric Posner, for example, writes that "[a] norm can be understood as a rule that distinguishes desirable and undesirable behavior and gives a third party the authority to punish a person who engages in the undesirable behavior," Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996). More recently, Paul Mahoney and Chris Sanchirico have defined "norms" as "rules of conduct that constrain self-interested behavior and that are adopted and enforced in an informal, decentralized setting." Paul G. Mahoney & Chris William Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2030 (2001). Richard McAdams argues that norms are "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both." Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96

Similarly, an influential analysis of the diamond industry concludes that a system of norms prevails among traders because of "its ability to quickly resolve disputes and enforce judgments—results that cannot be obtained through the legal system."⁵ Those studies—both emphasizing that people in close-knit groups rely on informal norms because they value their future relationships and consider formal legal processes destructively adversarial⁶—have inspired an outpouring of scholarly writings.⁷ Yet few

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MICH. L. REV. 338, 340 (1997). In this paper, I emphasize the informal, non-legal nature of norms and norm enforcement.

4. ELLICKSON, *supra* note 1, at 167. The jacket copy of the book makes the point less elegantly but more directly, announcing that "law is far less important than is generally thought" because "people largely govern themselves by means of informal rules—social norms—that develop without the aid of a state or other central coordinator." See also Lewis A. Kornhauser, *Are There Cracks in the Foundation of Spontaneous Order?*, 67 N.Y.U. L. REV. 647, 652 (1992) (reviewing ELLICKSON, *supra* note 1), citing as Ellickson's central hypothesis the claim that members of close-knit groups govern themselves through informal norms "whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another." Edward Rock and Michael Wachter concur, noting that "Ellickson's basic claim is that norms arise in close-knit groups, and that the norms controlling the workaday relationship of such groups will enhance overall welfare." Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1916 (1996).

5. Bernstein, *supra* note 2, at 116. Summarizing the literature, Robert Cooter writes that "[e]mpirical studies of community life and business practice have often concluded that informal sanctions are more important than the law in enforcing norms." Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 223 (1994).

6. As Mahoney and Sanchirico point out, there is a normative undercurrent to this claim: some scholars, they suggest, "express a tentative optimism that socially desirable, or efficient, practices can arise from the interactions of decentralized, utility-maximizing individuals." Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2028 (2001). Although it may on occasion be true that informal norms are normatively superior to legal rules, there is no reason to think that is necessarily, or generally, the case. As Galanter indicates, indigenous (informal) law is not "more virtuous or more efficient than official law. . . . It often reflects narrow and parochial concerns; it is often based on relations of domination; its coerciveness may be harsh and indiscriminate; protections that are available in public forums may be absent." Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 25 (1981).

7. In a steady flow of books and articles, legal scholars have devoted themselves to explicating the meaning of "norms," theorizing about why people abide by norms, and analyzing the efficiency of norms. See, e.g., Mahoney & Sanchirico, *supra* note 3, at 1283 (to demonstrate that "social norms, not legal rules, are the mainstay of social control . . . requires a theory of why individuals would follow norms against their immediate self-interest without threat of formal legal sanction"); McAdams, *supra* note 3 ("[T]here is as yet no consensus about certain basic theoretical propositions, including, most importantly, the meaning of norm. My goal is to remedy some fundamental ambiguities in the term norm."); Posner, *supra* note 3; Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2330 (2004) ("This Essay's primary objective is to begin formulating a positive model that predicts when one should expect to see systems of private law."). Some particularly important contributions to the law and norms literature are ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996); Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000). Although informal social norms are of growing interest among contemporary legal scholars, the issues being addressed are not new. As Rock and Wachter note, "The discussion of the relation between norms or custom and law is, of course, one of the ancient debates of the law.

subsequent empirical investigations have informed the discussion of whether, when, or why informal norms rather than state-created law prevail in certain settings.⁸

Based on a detailed analysis of Japanese traders at the Tokyo Central Wholesale Market's tuna auction (hereinafter Tsukiji, the name of the neighborhood where the market is located), this Article utilizes the case-based method that provided earlier studies with their analytical and rhetorical bite. It interrogates the claim that norms will trump law within particular types of groups by looking at a small, close-knit, specialized merchant community,⁹ trading a product (tuna) with cultural resonance, within a marketplace inscribed by local values, in a nation where recourse to formal legal institutions is often discouraged.¹⁰ Under this set of conditions,

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stretching back centuries." Rock & Wachter, *supra* note 4, at 1914 n.1; see also Steven N.S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 J.L. & ECON. 11 (1973). Law and society scholars have long emphasized how repeat business players avoided formal conflict because it negatively affects the possibility of maintaining a future relationship. See Galanter, *supra* note 6; Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Norms have also played an important role in work of the prominent sociologists. See, e.g., MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1958).

8. Indeed, although the legal scholarship on norms has become increasingly theoretically sophisticated, the most provocative thesis (what I will call the "bold" claim) suggested by the case studies of Ellickson and Bernstein—not simply that people *may* resolve their disputes cooperatively and ignore the law, but that informal norms rather than state-created law *will* order the relationships of members of close-knit groups—has remained largely unexamined, even though it is particularly suited to empirical evaluation. If scholars understood the studies of Ellickson and Bernstein to suggest only that norms can be important, it would be difficult to explain their impact. As Ellickson points out, "[i]n contrast to the law-and-economics scholars, law-and-society scholars have long been aware that norms and self-help play important roles in coordinating human affairs." ELLICKSON, *supra* note 1, at 147. In contrast to the view that *either* law *or* norms may order relationships, therefore, I emphasize the "bold" claim—that is, that in certain settings like close-knit communities, norms *rather than* law will order relationships. In other words, just as Ellickson critiqued legal scholars for their belief in "legal centralism," I am concerned with the "norm centralism" that some have put in its place.

9. According to Ellickson, "[a] group is *close-knit* when informal power is broadly distributed among group members and the information pertinent to informal control circulates easily among them." ELLICKSON, *supra* note 1, at 177-78. He acknowledges that the "vagueness of this definition is unavoidable" due to the wide variety of social environments, so that a group like Shasta County residents are close-knit while those living on a small isolated island are "extremely" close-knit. *Id.* Tokyo's tuna merchants are perhaps closer to California farmers than residents of a remote island. They trade with each other daily; they jointly attend professional education seminars; they work within the same discrete marketplace; they are often members of families that have worked in the tuna trade for generations; they spend their break time and free time socializing in a small number of inner-market cafes and restaurants; their economic well-being is interdependent; and they can punish and reward each other. One element of the trading community is notable for its absence—tuna owners, who are represented by sellers but are themselves not present in the Tsukiji marketplace. For a detailed description of the careers and interactions of tuna traders, see THEODORE C. BESTOR, *TSUKIJI: THE FISH MARKET AT THE CENTER OF THE WORLD* (2004).

10. Although there is a lively debate among scholars of Japanese law about how to explain Japan's low frequency of litigation, there is unanimity about the underlying fact to be explained—the Japanese are far less likely than Americans to resolve their claims through the formal legal system. For publications rejecting the view that the Japanese are unusually averse to conflict, see ERIC A. FELDMAN, *THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY, AND HEALTH POLICY* (2000); JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (1991); J. MARK

existing theories would expect norms to flourish. Through its investigation of conflicts among Tokyo's tuna traders, this Article makes five distinct contributions to the literature on law, norms, and dispute resolution in close-knit business communities.¹¹

First, the Article offers the only analysis in English or Japanese of how merchants at the world's biggest tuna auction handle conflict.¹² Although one must be modest about the reach of findings from any individual case study, comparison across cases is well suited to examining the evolution and resolution of conflict within discrete communities.¹³ By adding a non-U.S. perspective to the debate over law and norms¹⁴ and by making it possible to triangulate the analyses of cattle ranchers and diamond

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RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* (1999); FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987). For a cultural explanation of low litigation rates, see Takeyoshi Kawashima, *Dispute Resolution in Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41 (Arthur Taylor Von Mehren ed., 1963); for an explanation that emphasizes institutional barriers to litigation, see John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359-89 (1978); for an explanation that highlights the predictability of Japanese courts, see J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111 (1988). Nowhere in the literature on the Japanese legal system does one find a claim that for cultural or institutional reasons there is less reliance on norms in Japan than elsewhere. Japan therefore provides an environment in which the reliance on norms is likely to be at least as strong as, and perhaps stronger than, in the United States.

11. In fact, as will be discussed below, there are far more disputes at the Tokyo tuna auction than in the groups studied by Ellickson and Bernstein. Lisa Bernstein's study of disputes in the cotton trade, for example, involves two disputes each year, and her study of diamond dealers involves 150 disputes per year. See Bernstein, *supra* note 2; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001). A potentially interesting element of Bernstein's work on diamond dealers is that the largest and most valuable stones are sold at auction rather than through the exchange that is the focus of her study. Bernstein, *supra* note 2, at 143. It is not clear whether the required arbitration system applies to disputes that arise from those sales.

12. There are books that discuss the operations of Japanese fish markets, some of which focus on Tsukiji, but none discuss the conflicts that arise over auctioned tuna. The most comprehensive history is OROSHIURI SHIJŌ SEIDO GOJYŪNEN-SHI HENSAN JINKAI, OROSHIURI SHIJŌ SEIDO GOJYŪNEN SHI ("A Fifty Year History of the Wholesale Market System," 6 volumes) (Tokyo: Shokuhin Jyukyū Kenkyū Sentā 1979), with volume 5 (*Oroshiuri Shijō Gojyūnen no Ayumi Tōkei* [Fifty Years of Statistics about the Wholesale Market], 1978) being particularly interesting. For two recent additions to the literature, see UEDA TAKESHI, UOGASHI MAGURO KEIZAIGAKU [AN ECONOMIC STUDY OF THE TUNA MARKET] (Tokyo: Shūeisha Shinsho 2003); KOBAYASHI MITSURU, TSUKIJI NO SHIKITARI (THE RITUALS OF TSUKIJI) (Tokyo: NHK 2003). An excellent English language ethnography of Tsukiji is BESTOR, *supra* note 9.

13. Richman observes that the literature on law and norms is "rich for theoretical development" because it is a relatively new area of research, and it "contains genuinely interesting stories." Richman, *supra* note 7, at 2333-34.

14. There have been a number of studies of law and norms outside the United States, but they are not easily compared to the studies by Ellickson and Bernstein. Some are historically distant. See, e.g., Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993). Others focus on nations with "dysfunctional" legal systems. See, e.g., John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421 (2000).

dealers,¹⁵ this study significantly expands the empirical base of the law/norms debate.

Second, and contrary to previous case studies, the Article demonstrates that members of close-knit groups may turn to law rather than norms because legal rules and institutions can be breathtakingly fast and inexpensive. Conflicts over auctioned tuna are brought to Tsukiji's Tuna Court (the more technical term is *Jiko Kensa-sho*, "Accident Inspection Place"), which was created by and is controlled by the government. The Court is located within the state-owned marketplace, so it is easily accessible to the parties. It is quick, dispensing judgments in sessions that last only fifteen minutes. It satisfies the parties by providing buyers with price reductions when judges determine that they purchased a damaged fish, and by allowing sellers¹⁶ to take part in the adjudication process. And it imposes only modest costs on disputants.

Third, the evidence in this Article indicates that the Tsukiji marketplace is rife with disputes between merchants whose work brings them into daily contact. Yet in contrast to the view that frequent face-to-face conflict is likely to undermine future dealings and is thus studiously avoided, market relationships remain strong. Conflicts arise at Tsukiji's tuna auction when buyers purchase a tuna that turns out to be diseased or blemished—or for some other reason is perceived by the buyer to be worth less than expected. Although such problems are frequent and inevitable because the condition of fish is naturally varied, tuna merchants do not rely on *caveat emptor* to eliminate the need to adjudicate individual problems.¹⁷ They instead bring seven thousand claims each year to a specialized

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15. With the exception of studies that analyze the resolution of conflict over automobile accidents, there are few analyses of specific out-of-court dispute-processing systems in Japan, and there are even fewer that focus on the interaction of law and norms. The classic study of automobile accidents is Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651 (1990). An interesting study of dispute resolution is Mark West's study of noise-related complaints involving karaoke clubs. Mark D. West, *The Resolution of Karaoke Disputes: The Calculus of Institutions and Social Capital*, 28 J. JAPANESE STUD. 301 (2002). Frank Upham describes the origins of the Law for the Resolution of Pollution Disputes in UPHAM, *supra* note 10, at 58-59. For a study of law and norms within Japan's sumo wrestling community, see Mark D. West, *Legal Rules and Social Norms in Japan's Secret World of Sumo*, 26 J. LEGAL STUD. 165 (1997), and for an analysis of norms in the context of corporate governance, see Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083 (2001). For a discussion of comparative methodology and triangulation, see HARRY ECKSTEIN, *REGARDING POLITICS: ESSAYS ON POLITICAL THEORY, STABILITY, AND CHANGE* (1992).

16. In this Article, I refer to auctioneers as sellers. In fact, like most auctioneers, they serve as agents or brokers for tuna suppliers, but they do not own the tuna themselves.

17. The maxim *caveat emptor* entered the popular legal lexicon in sixteenth-century England. It refers to the doctrine that purchasers of real property are responsible for evaluating the quality of the land and the soundness of the title. The full phrase is *caveat emptor, quia ignorare non debuit quod jus alienum emit*, or "let a purchaser beware, for he ought not to be ignorant of the nature of the property which he is buying from another party." For a detailed discussion of *caveat emptor* in commercial law, see Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

dispute-resolution body—the Tuna Court—and demand a reduction in the price of their winning auction bid.¹⁸ Their claims do not corrode market relations; to the contrary, they help market participants to assert and refine their expertise, adjust the balance of power between buyers and sellers, and reaffirm a shared notion of fairness by spreading the risks of unknowable quality defects to all parties. Members of the tuna trade continue to buy and sell from each other, and they are able to quickly and profitably move thousands of tuna through the market daily. Like all courts, therefore, the Tuna Court does far more than simply resolve disputes.

Fourth, by comparing conflict over auctioned tuna in the United States and Japan, the Article highlights the superficiality of generalizations about American litigiousness and Japanese aversion to conflict, as well as other myths about transcendent differences between the two legal systems.¹⁹ American tuna traders rarely complain about the quality of their purchases, and U.S. tuna auctions do not provide a formal mechanism for resolving disputes. Japanese buyers, in contrast, formally dispute the price of almost 2% of all auctioned tuna, and there is a formal mechanism to adjudicate their claims. To explain that contrast, the Article uses an analytic middle ground between hard-nosed economism and rootless culturalism.²⁰ It

18. Standard legal treatises on auctions—of which there are few—devote little attention to conflicts over quality, since the formal legal system treats disputes over the quality of auctioned goods as a subset of cases that involve the law of sales and merchantability. See, for example, BRIAN W. HARVEY AND FRANKLIN MEISEL, *AUCTIONS LAW AND PRACTICE* 168-70 (2d ed. 1995), which spends only a page and a half discussing such conflicts. See also SAMUEL LIVERMORE, *TREATISE ON THE LAW, RELATIVE TO PRINCIPALS, AGENTS, FACTORS, AUCTIONEERS, AND BROKERS* (1811); Kurt R. Bachman, *Waiting for the Hammer to Fall: A General Overview of Auction Law* (2002) (unpublished manuscript on file with author). In contrast to the sparse legal literature on auctions is the voluminous economic literature, including PAUL KLEMPERER, *AUCTIONS: THEORY AND PRACTICE* (2004); R. Preston McAfee & John McMillan, *Auctions and Bidding*, 25 J. ECON. LIT. 699 (1987); Paul Milgrom, *Auctions and Bidding: A Primer*, 3 J. ECON. PERSP. 3 (1989); Paul R. Milgrom and Robert J. Weber, *A Theory of Auctions and Competitive Bidding*, 50 ECONOMETRICA 1089 (1982); William Vickrey, *Counterspeculation, Auctions, and Competitive Sealed Tenders*, 16 J. FIN. 8 (1961).

19. Generalizations about “the Japanese” continue to plague the lay literature, despite a large volume of publications that successfully attack such essentializing claims. See, e.g., PETER N. DALE, *THE MYTH OF JAPANESE UNIQUENESS* (1986); SHELDON GARON, *MOLDING JAPANESE MINDS: THE STATE IN EVERYDAY LIFE* (1997); STEVEN R. REED, *MAKING COMMON SENSE OF JAPAN* (1993).

20. As anthropologist Theodore Bestor argues in his recent ethnography of Tsukiji, “[a]uctions in the real world are inseparable from the social institutions and cultural meanings that frame them. Auctions have many characteristics and outcomes, only one of which is to sell products competitively to the highest bidder.” BESTOR, *supra* note 9, at 181. Smith makes a similar point:

When people participate in auctions they act not only as individuals intent on pursuing individual self-interests but, consciously or unconsciously, as part of a community. These auction communities have their own goals, the most important of which is achieving a consensus regarding the values and allocation of the goods bought and sold. The pursuit of this goal requires the production and reproduction of these very same communities. That is, the processes of determining the price and allocating objects are linked to other processes that serve to define and maintain the communities within which these processes occur. . . . As most auctions require a community of some sort for their very existence, so the auction commonly serves as a means for maintaining such communities.

Charles W. Smith, *Auctions: The Social Construction of Value* 51 (1989).

accepts the view that Americans and Japanese will both articulate and pursue grievances when it is in their interest to do so.²¹ But it treats such interests as highly contextual, depending upon individual and social values, the availability of particular dispute-resolution mechanisms, and the existence and power of financial incentives, among other factors. The Article employs carefully tailored analysis rather than broad generalization to unravel the different approaches to tuna defects in the United States and Japan.

Fifth, the success of the Tuna Court indicates that thoughtfully designed and focused courts may outperform the informal norms of close-knit commercial groups. California cattle ranchers, New York diamond dealers, and Tokyo tuna traders all had the option to use formal legal procedures to resolve their disputes, but only the tuna traders invoked law rather than norms to settle their differences. A greater number and variety of case studies is needed to better understand the relative strengths and weaknesses of informal norms and specialized courts and to identify the contexts in which each is likely to succeed. Based upon a comparison of the three cases, however, it appears that one crucial determinant of the choice between law and norms is the design of legal institutions. Formal legal processes that meet the needs of parties will succeed, whereas those that are time-consuming, expensive, cumbersome, and stigmatizing (as appears to have been the case in Shasta County) will lead parties to rely on norms rather than law.

Part I of this Article describes the key parties involved in the buying and selling of tuna at the Tokyo Central Wholesale Market (Tsukiji) and the operation of the tuna auction in the market. Part II provides a history of Tsukiji and a discussion of the evolution of its tuna auction; it uses the scant historical record to speculate on the origin of the Tuna Court. Part III looks in detail at the operation of the Tuna Court. Data on the number, resolution, and appeal of claims shows that it is an extremely busy place, processing approximately twenty-five cases every day and close to seven thousand per year.²² Part IV provides a comparative view by examining how disputes similar to those at Tsukiji are resolved in the biggest tuna auction in the United States.

In Part V, the Article returns to the law and norms literature and its focus on conflict resolution among members of close-knit commercial groups. It reviews the dominant claims of scholars of law and economics and law and society, particularly the view that close-knit commercial transactors will develop extrajudicial, informal approaches to disputing because

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21. J. Mark Ramseyer has convincingly made this point in a series of influential books and articles. See, e.g., J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 290 (1989).

22. The market operates approximately 280 days per year; it is closed on Sundays, some Wednesdays, national holidays, and for 5 days from December 31 through January 4.

Tsukiji Market at 4:30 a.m.: The Start of the Tuna Auction

Pre-auction Inspection of Fresh Tuna

Tsukiji's Tuna Auctioneers

Nakaoroshi Bidding for Tuna

Taking Possession and Sectioning Purchased Tuna

Aerial View of the Tuna Court

Complainants and Judges at the Tuna Court

Announcing Verdicts and Closing Shop

they are more efficient than formal legal rules. In contrast, the Article argues that although Tsukiji's tuna traders rely on a formal, state-centered dispute resolution system, this system efficiently meets the needs of the parties. Part VI more fully explains the success of the Tuna Court. It argues that Tsukiji's tuna dealers have embraced a method of managing conflict that not only succeeds in efficiently resolving conflict but also serves to facilitate the maintenance of order in the marketplace. The process of bringing claims to the Tuna Court fosters rather than damages relationships, thereby supporting a marketplace where thousands of tuna are quickly exchanged²³ and enhancing, rather than destroying, community.²⁴ By providing a venue that helps parties refine their expertise, balances the power of market players, and promotes a shared sense of fairness, the Tuna Court transforms potentially divisive conflict into the glue that binds tuna traders and creates a stable environment for Tsukiji's tuna auction.

I

AUCTIONING TUNA AT THE TOKYO CENTRAL WHOLESALE MARKET

The chain of events that leads to a claim about the quality of auctioned tuna starts in the early morning, when trucks filled with fish unload at the Tsukiji marketplace. Although it is located in central Tokyo just steps from the upscale Ginza district, Tsukiji is built on the water's edge. In the past, boats plying the Pacific entered Tokyo Bay and moored on the market's docks.

These days, almost all tuna that reaches the auction floor is flown to Tokyo and driven from the airport to the market.²⁵ Most of the tuna comes to Japan from overseas—some are farmed in Mexico; others are shipped from suppliers in Indonesia, Sri Lanka, and Taiwan; still others are initially caught in fishing boats off the coast of Spain and elsewhere.²⁶ Most of it arrives frozen, since tuna boats often remain on the water for extended periods and have flash-freezing facilities on board. Some arrive fresh, packed on ice and shipped in large boxes called coffins. Only a small portion of the tuna at Tsukiji comes from Japanese suppliers, but it includes the most highly prized catch—bluefin tuna from Japan's northern coast, many weighing over 500 pounds and arriving at Tsukiji by truck. As shown in

23. For a sophisticated economic analysis of transaction costs, see OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985).

24. For a study of the community-building function of auctions from a sociological perspective, see Phyllis Harrison-Brose, *Community, Business and Play: The Country Sale as Symbolic Interaction* (Aug. 1983) (unpublished Ph.D. dissertation, Indiana University) (on file with author).

25. Tuna that arrive at Narita Airport near Tokyo are subject to an import duty of 3.5%; they are taken through customs within two or three hours of arrival and brought directly to Tsukiji.

26. For a list of the main exporters of tuna to Japan, including the volume and type of tuna exported, see <http://www.globefish.org> (last visited March 2006). Seventy percent of Tsukiji's tuna is imported, and it comes from over seventy different countries. Interview with Officials from the *Ômono Gyôkai*, in Tsukiji Market, Japan (Dec. 2, 2004).

Figures 1 and 2, there is a relatively constant supply of frozen tuna throughout the year, and its price is stable. The supply of fresh tuna, on the other hand, is highly seasonal, and price varies accordingly. Both fresh and frozen tuna are susceptible to the same sorts of problems that lead to disputes over quality, and both are regularly brought to the Tuna Court. In fact, despite the higher price of fresh tuna and the correspondingly higher stakes of disputes over its quality, it appears that fresh and frozen tuna are brought to the Court at a rate proportional to their sales volume. This suggests that money alone may not explain the utilization of the Tuna Court, a theme this Article's final part discusses.

FIGURE 1

Volume and Average Price of Frozen Tuna, 2003

Data provided by the Tokyo Metropolitan Government, Marine and Agricultural Products Division (*suisan nōsan hinka*).

FIGURE 2

Volume and Average Price of Fresh Tuna, 2003

Data provided by the Tokyo Metropolitan Government, Marine and Agricultural Products Division (*suisan nōsan hinka*).

Because of the size and structure of the Japanese tuna market and the internationalization of tuna fishing, auctioning tuna at Tsukiji involves a variety of parties. The market is owned and operated by the Tokyo Metropolitan Government (TMG), and city officials are involved in every aspect of the auction, from the arrival of fish at the marketplace to their display, sale, processing, resale, and shipping.²⁷ Fish suppliers are also essential to the operation of Tsukiji. Although they are not a physical presence in the marketplace, they own and operate fishing vessels worldwide and send their catch to the market. Because few of the suppliers are based in Tokyo, they entrust their products to *oroshi*, or sellers/brokers/wholesalers, who are responsible for getting the tuna onto the auction floor and for operating the auction. *Oroshi* rarely own the tuna that they sell. Instead, they profit by taking a commission on whatever they auction, at a TMG-mandated rate of 5.5% of the sales price.²⁸ Five *oroshi* companies are authorized by the TMG to auction tuna (as well as other products) at Tsukiji—Chūō Gyorui (known as Marunaka), Daito Gyorui,

27. Many aspects of the market are subject to the control of the Ministry of Agriculture, Forestry, and Fisheries (MAFF), but it is the TMG, not MAFF, that is a hands-on presence in the marketplace.

28. Tsukiji's *oroshi* pay their suppliers according to the following general formula: gross sales are determined by multiplying the net auction sales price by 5% (sales tax); from that figure, they subtract a 5.5% commission, a 3.5% import duty, a customs clearance fee, the cost of trucking the tuna from the airport to the market, and whatever the bank charges to remit payment. *Oroshi* are supposed to pay their suppliers within five days of an auction. See <http://www.daiichisuisan.co.jp/> (last visited Mar. 2006).

Tōto Suisan, Tsukiji Uoichiba, and Daiichi Suisan. In terms of the quantity and value of annual tuna sales, there are significant differences in size, with Chūō (the biggest) being approximately three times larger than Daiichi (the smallest), and not surprisingly they compete with each other for market share.²⁹ The auction floor is divided into five sections, and the *oroshi* conduct their auctions simultaneously, with auctioneers working hard to attract bidders through their sales techniques. Buyers, the final parties essential to the auction, must also be authorized by the TMG, and authorization is generally limited to those who own the rights to maintain a wholesale stall in the Tsukiji marketplace. Known as *nakaoroshi* or intermediate wholesalers, buyers (as I will call them in this Article) at Tsukiji purchase tuna at the auction and resell it to sushi chefs, local fish markets, and other purveyors who come to the market every morning for their daily supplies.

The buying and selling of stall rights within Tsukiji is reminiscent of the market for taxi medallions in New York City, with large fluctuations in value depending upon the general state of the economy and the specific conditions of the fishing industry.³⁰ Each stall owner receives a special plastic badge from the TMG, which they must pin on their cap so that auctioneers can recognize them as legitimate bidders. There are approximately 300 specialized tuna dealers at Tsukiji.³¹ In addition, 72 additional badges have been given to companies that do not have stalls at Tsukiji but that the TMG considers to have the requisite tuna expertise to take part in the auction.³² Because a number of Tsukiji-based buyers own the rights to more than one stall and receive a separate badge for each, some companies authorized to buy tuna may be represented by multiple bidders at the daily auction.

Prior to the auction, generally at 3 a.m., sellers (I will refer to the five *oroshi* companies and their employees as sellers, auctioneers, and *oroshi*) arrange their daily “catch” on the cement floor of the auction house. The

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29. Daiichi has 144 employees and had annual sales in both 2002 and 2003 of over \$400 million per year (¥47.6 billion in 2002, ¥46.7 billion in 2003). See *supra* note 28. In contrast, Chūō Gyorui, with more than 250 employees, had gross sales of well over \$1 billion dollars (¥156.1 billion) in 2002. See <http://www.marunaka-net.co.jp/index.htm> (last visited Mar. 2006).

30. See BESTOR, *supra* note 9, at 226-31, for a detailed discussion of Tsukiji's stall licenses. For an analysis of the taxi medallion system in New York, see NEW YORK CITY TAXICAB FACT BOOK 2004, as well as other papers and data, available at <http://www.schallerconsult.com/taxi/> (last visited March 2006).

31. The Tsukiji marketplace has 1648 stalls for *nakaoroshi*, or intermediate wholesalers, but the stalls are quite small, so most *nakaoroshi* rent two or more stalls. The biggest *nakaoroshi* may occupy as many as ten stalls. In total, 837 different *nakaoroshi* operate in the market. Information from the Tsukiji office of the Tokyo Metropolitan Government (on file with author).

32. Outside dealers allowed to participate in the tuna auction include the operators of supermarkets, companies that own chains of sushi restaurants (particularly *kaiten zushi*, which are inexpensive shops where customers sit on stools arranged around a moving conveyor belt, select their desired sushi, and are charged on a per-piece basis), and others. Article 60 of the TMG Ordinance allows goods to be sold only to authorized buyers.

tuna have their bellies gutted, tails cut, major fins removed, and are sometimes displayed with their heads removed. The presentation of the tuna is far from haphazard. Auctioneers need to create a flow and rhythm to the auction, and they group their fish according to whether they are fresh or frozen, and sort them according to size and what they believe to be their overall quality. Once the fish are arranged, generally an hour or two before the start of the 5:30 a.m. auction (5:00 a.m. during the busy end-of-year period), buyers arrive and inspect them. Inspection is specifically authorized by the TMG's ordinance, and it is crucial to buyers because it allows them to evaluate the quality of the tuna and decide which fish they want to buy.³³ Buyers rely on a number of factors to determine their bids. The most obvious are whether the fish is fresh or frozen (fresh are generally more prized), whether it is farmed or wild (wild is preferred), and the species, with bluefin (*kuromaguro*, *honmaguro*, *minami maguro*) the largest and most expensive, bigeye (*mebachi*) the most common, and yellowfin (*kihada*), bonito (*katsuo*), and others evaluated according to season, size, and condition.

Identifying most of these factors requires no special knowledge, since each fish is labeled with its country of origin and the name of the supplier (which makes clear whether it was farmed), and after a few weeks of contact with a large volume of tuna even a novice can differentiate species. What does require expertise is the evaluation of a particular tuna's characteristics, most importantly its color, oil content, texture, and taste. As buyers walk the auction floor, they carry flashlights, gaffs, and towels.³⁴ When they stop for a close look at a tuna they shine the flashlight inside the body cavity, tap its side with the gaff to check for density (like watermelon, every tuna will produce a different type of thud), examine the tail cut for signs of marbling (a fatty tuna is a tasty tuna), check for indications of bruising that may result from a difficult catch or mistreatment, look for disease by examining the color and texture of the flesh, rub a small amount of meat between their fingers to feel the oil content, and smell or even taste some of the meat.³⁵ Both fresh and frozen tuna undergo a similar inspection, although there are a few procedures, like pulling open a tuna belly with a gaff, that are possible only with fresh fish.

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33. Article 70 of the TMG Ordinance authorizes inspection.

34. A gaff has a long wooden handle that terminates in a sharp, curved piece of metal and looks strikingly like the arm of Disney's Captain Hook.

35. There are some differences in how buyers at different tuna auctions inspect the goods. In Hawaii, for example, there is a tradition of "digging," which means that buyers will push their fingers or entire hand into the tuna where the tail has been cut and rip out some flesh, which they will then look at, smell, and rub. As a result, a part of the tuna is ruined, and there are small chunks of meat covering the fish and the floor. The operators of the Hawaii tuna auction have considered prohibiting "digging," but they are concerned that it is such a deeply engrained tradition among buyers that there would be strong resistance. Interview with Management of United Fishing Agency, in Honolulu, Haw. (Feb. 2005) (on file with author).

Because both buyers and sellers at Tsukiji are extremely knowledgeable about tuna, their ability to detect even minor and subtle differences between fish is finely tuned. In fact, interviews with tuna experts in the United States make clear that Japanese tuna buyers are accorded the highest degree of respect. When asked about the Japanese buyers who sometimes show up at his market, for example, a Boston dealer replied that "*us* guys in Boston know how to make a paycheck at the end of the week, but *those* guys [the Japanese buyers] know fish."³⁶ Likewise, the managers of the largest U.S. tuna auction, located in Honolulu, have confidence that the American buyers who frequent their auction are highly knowledgeable and can easily distinguish between the tuna grades that are used to demarcate good from very good or excellent fish.³⁷ But when it comes to making the finest distinctions, they have much more faith in Japanese buyers. "Our guys know the difference between good and very good fish," they state. "But when it comes to the difference between a tuna that is worth \$11.00 a pound and another that might be worth \$11.50? They [Japanese buyers] definitely have the edge."

Armed with their expert knowledge of tuna and the specific information derived from inspection of the fish displayed on the auction-house floor, buyers respond to the 5:30 a.m. bell that signals the start of the daily auction.³⁸ They congregate in one of the five areas where the auction companies begin to hawk their wares. Auctioneers stand on small platforms so that they can easily see all bidders, and their first duty is to call out the number of the fish that is being offered for sale (every tuna is numbered). Each auctioneer has a distinctive style; some are relatively calm and direct, whereas others sway, swing their arms, and turn every transaction into a melodic chant.

Tsukiji's tuna auction uses a distinctive simultaneous bidding system that has been labeled the "Japanese auction" system.³⁹ When the auction

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36. Telephone Interview with Sean Bergen, Globe Fish Company, in Boston, Mass. (Feb. 2005) (on file with author).

37. See, e.g., Seafood Auction Company Grading Sytem, (Apr. 1, 2004), <http://www.bidforfish.com>, which describes a common way of grading tuna. Not surprisingly, A+ is the highest grade, which indicates a "fat fish, thick with pink belly walls and red veins; firm with silver/black exterior, solid nape, still bleeding, Excellent freshness. Bloodline is bright, red and thin," followed by A ("Similar in all ways as A+, but possibly lacking in one quality. Ex: firm but not as firm as an A+ fish. Red veins in belly cavity; thin red bloodline; excellent freshness.") and A- ("Still a near perfect fish with silver/black exterior, excellent belly cavity perfectly intact and bright. Bloodline is red, but may be wider or darker than A grade."). These descriptions should make clear that the distinctions between tuna that are A+ and A- are difficult to put into words, even though they are distinctions that make a concrete difference when it comes to auction and retail price.

38. Many auctions start similarly; in the early days of the tobacco auction, for example, a bugle was blown to signal the beginning of the auction.

39. RALPH CASSADY, JR., AUCTIONS AND AUCTIONEERING 64 (1967). There are many different auction styles, with the most common being the English (ascending price) and Dutch (descending price). Fish auctions also employ different types of auctions. At the Honolulu Fish Exchange, for

begins and the auctioneer calls out the number of the product being sold, bidders simultaneously raise their hands and use a signal (*teyari*) recognizable only to those "in the know" to indicate the price they are willing to pay.⁴⁰ As a result, two or more bidders will often make the same bid. As bids are made, bidders remain silent and make an effort to look disinterested, as the auctioneer quickly scans the raised arms to identify the highest bid(s).⁴¹ When he identifies the best offer, the auctioneer will call out the price, and bidders can then use hand signals to make a higher bid. When the auctioneer calls out the highest bid price three times and there are no higher bids, the fish is sold.

Depending upon how high the bidding goes, the number of bidders, and the supply of fish, an auctioneer may award a tuna to a bidder and move on to the next item without working terribly hard to increase the bid amount. The volume of tuna sold at the market each morning makes it imperative to keep the auction moving briskly.⁴² In 2004, as indicated in Figure 3, there were between 55,000 and 75,000 tuna auctioned each month, or almost 3000 tuna every day.⁴³

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example, a modified form of the Dutch auction is used, with the auctioneer starting at a high price and then dropping it until a buyer places the first bid. The auctioneer then calls out a higher price with the hope of getting other buyers to start bidding. For a description of the Japanese auction, see SMITH, *supra* note 20.

40. See BESTOR, *supra* note 9, at 191 for a diagram of Tsukiji hand bidding signals.

41. Cassady notes that "more so perhaps than either the English or the Dutch auction, [the Japanese auction] is characterized by a great deal of noise and confusion, much of it stemming from the efforts of scores of bidders to gain the attention of the auctioneer." CASSADY, *supra* note 39, at 64. My experience, in contrast, is that aside from the chants of the auctioneers, the Tsukiji tuna auction is surprisingly quiet and extraordinarily orderly. Perhaps things have changed since Cassady's research four decades ago; his description of the now concrete-and-steel auction hall as "made of roughhewn timber" makes clear that at least some aspects of the marketplace have changed.

42. As Cassady notes, "speed is essential in the sale of fish." CASSADY, *supra* note 39, at 66.

43. This is a rough calculation, assuming an average of 65,000 tuna sold each month and 280 market days per year, which equals an average of 2,786 tuna per day.

FIGURE 3

Tuna Volume by Month and Type, 2004

Data provided by the Tokyo Metropolitan Government, Marine and Agricultural Products Division (*suisan nōsan hinka*).

Because the auction often takes only an hour and rarely lasts longer than two hours (auctioneers can sell approximately 400 individual fish in an hour), it is essential that buyers start the bidding at a reasonable price and sellers move on to the next tuna as soon as they have received an offer they think is close to the highest possible price. Taking another five or ten seconds to coax a few more yen out of buyers is not considered a prudent use of time. It is more important to maintain a rapid pace, since buyers need to take possession of their fish and get to work at their market stalls before retail customers begin their morning shopping.

One important consequence of the type of auctioning and bidding employed at Tsukiji is that it gives auctioneers a great deal of discretion over the buyer to whom they will award a given tuna. An auctioneer is often faced with a number of bidders offering an identical price, and the result is that he has considerable leeway. He may favor a particular buyer who he is trying to win over as a regular client. He may distribute the fish equitably by making sure to accept bids from different buyers at roughly the same rate. Or he may punish particular bidders by ignoring their *teyari*. This last alternative underscores the importance of the relationship between buyers and sellers. Although the core element of that relationship is the economic transaction at the auction in which they agree on a price and exchange a good, there is more to their connection than a discrete economic bargain

that takes the form of a bidding competition between buyers and the sale of a good to the highest bidder. Sellers must create an environment that allows buyers to feel like they will be treated fairly, and buyers must act in such a way as to not jeopardize their chances of being able to purchase fish. It is a delicate balance of power.

II

ORIGINS: THE EVOLUTION OF TSUKIJI'S TUNA COURT

As with many embedded social institutions, it is difficult to unearth the precise origin of Tsukiji's Tuna Court. The historical and cultural importance of seafood in Japan may tempt one to think of the Court as a feature of the Japanese fish trade that has been around for centuries. In fact, it appears to be of relatively recent vintage. Although fish merchants have long plied their wares in the area now known as Tokyo (called Edo until 1868), it was not until the early seventeenth century that a central fish market emerged. It was located in an area called Nihonbashi, close to the Tokugawa Shōgun's Edo Castle in the heart of Tokyo. From its inception, dealers at the market (who initially sold fish they caught from their own boats but later purchased fish for resale) were regulated by the shōgunate; they were permitted to operate their businesses and were granted certain tax exemptions, but they had to supply the castle with fish.⁴⁴ By the end of the nineteenth century, Tokyo's rapidly growing population made the location of the fish market an impediment to urban development, and tensions between fisherman, fish wholesalers, and the government escalated.⁴⁵ Soon after Japan was roiled by the 1918 Rice Riots, in 1923 the Nihonbashi market was destroyed by a massive earthquake and fire. A new era in the Japanese fish trade was about to begin.⁴⁶

In 1923, the national government enacted the Central Wholesale Market Law.⁴⁷ Among its most fundamental goals was the reconfiguration of trading relationships that had resulted in the increasing power of urban fish wholesalers and the exploitation of individual fishermen and small fishing communities. In addition to making *kōhei* (equity, impartiality) and *kōsei* (fairness, justice) the guiding principles of the wholesale market system, the law also changed the mechanism through which fish were bought and sold. For the first time, auctions were made the primary mechanism for

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44. See BESTOR, *supra* note 9, at 97-125, for an informative discussion of the history of Tokyo's fish markets. A good overview is also available at <http://www.tsukiji-market.or.jp/youkoso-konjyaku/origin.htm> (last visited Mar. 2006).

45. Cassidy describes the prewar period as one in which distributors with marketing monopolies granted by feudal leaders were able to exploit local, small-scale fishermen, and for that privilege they paid tribute to the shōgunate. CASSADY, *supra* note 39, at 38.

46. BESTOR, *supra* note 9, at 112-13.

47. Chūō Oroshiuri Shijō Hō.

the exchange of fish.⁴⁸ Construction of a new Tsukiji marketplace was completed in 1935, but not until 1955, after the post-war U.S. Occupation of Japan, did Tsukiji begin its current tenure as a non-military-controlled fish market.⁴⁹

Although tuna were auctioned for a few years in the mid-1930s, there is no evidence that the Tuna Court existed during that time. It is of course possible that prewar buyers who purchased damaged tuna at auction sought relief from sellers, and that buyers and sellers either collectively or individually crafted a system to manage quality problems. But that is only speculation; there are no written histories or other documents that so much as mention disputes over the quality of auctioned tuna during the prewar period. Indeed, the first evidence of a system for resolving disputes over the quality of tuna involves the Osaka Central Wholesale Market, not Tsukiji. Given Osaka's history as a center of trade and commerce, that is not surprising.⁵⁰ The first central fish market in Osaka dates from the building of Osaka Castle in 1583. Pursuant to the 1923 Central Wholesale Market Law, in 1931 the Osaka Municipal Central Wholesale Market was inaugurated, and after a temporary closure during World War II it was reopened in 1950, five years before normal operations were resumed at Tsukiji.⁵¹

Exactly when the Tuna Court began to operate at Tsukiji is unclear. Although there are no written histories of the market that mention the resolution of conflicts over the quality of tuna, evidence from Osaka indicates that the inauguration of the auction system quickly led to a variety of unanticipated problems. Of particular concern was the willingness of some sellers to reduce the price of auctioned goods for certain favored buyers with market power.⁵² Post-auction price reductions threatened the success of the

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48. Prior to auctions, sales of fish were accomplished through negotiated prices. Auctions for vegetables were common earlier. See <http://www.tsukiji-market.or.jp/youkoso/konjyaku/origin.htm> (last visited Mar. 2006). Auctions are defined by Paragraph 7, Article 2, of the TMG Ordinance, and authorized by Paragraph 1 of Article 47.

49. BESTOR, *supra* note 9, at 115-17. For a recent discussion of the Japanese tuna industry, with a particular focus on the interaction of U.S. and Japanese policies regarding the management of fishing resources, see Harry N. Scheiber, *U.S. Policy, the Pacific Tuna Economy, and Ocean Law Innovation: The Post-World War II Era, 1945 to 1970*, in BRINGING NEW LAW TO OCEAN WATERS 29-53 (David D. Caron & Harry N. Scheiber eds., 2004).

50. Seventy percent of Japan's wealth was concentrated in Osaka at the end of the nineteenth century; this made it the nation's trade center. ORIGINS OF THE MODERN JAPANESE STATE: SELECTED WRITINGS OF E.H. NORMAN 156, 164 (John W. Dower ed., 1975). Osaka was also the site of the first futures market. *Id.*; see Ulrike Schaefer, *The Development of Organized Futures Trading: The Osaka Rice Bill Market of 1730*, in JAPANESE FINANCIAL MARKET RESEARCH, 339-66 (William T. Ziemba et al. eds., 1991); see also Mark D. West, *Private Ordering at the World's First Futures Exchange*, 98 MICH. L. REV. 2574 (2000).

51. <http://www.shijou.city.osaka.jp/> (last visited Mar. 2006).

52. Chuo Oroshiuri Shijō—Osakashi Chuo Oroshiuri Shijō no Rekishi to Kōzō [Central Wholesale Market—History and Structure of the Osaka City Wholesale Market], 159 (Miyamoto Mataji and Sakudo Yōtaro eds., Osaka: Chuo Kurabu 1964).

auction system, and market administrations and traders agreed to prohibit such practices in July 1950. But they made one exception by permitting reductions that could be justified by the compromised quality of auctioned products.⁵³ To evaluate the legitimacy of price reductions, they established the *Jiko Shori-kyō*, or Accident Management Place, where a city official would record the facts of a transaction, a representative from the broker selling the allegedly damaged fish would act as a chief judge (*shushin*), and representatives from other wholesalers would serve as assistant judges (*fukushin*) in determining whether a price reduction was warranted.⁵⁴

Interviews at Tsukiji indicate that tuna traders there began to experiment with ways of managing quality problems soon after the 1955 reopening of the market, when the use of auctions to sell tuna became the norm.⁵⁵ Without a regularized system for resolving conflict, buyers who ended up with damaged tuna would sometimes request a discount from the seller. If the seller was reluctant to offer compensation, which was often the case, buyers would sometimes withhold (*horyū*) payment. Not only did that create unwanted tension in an environment where buyers and sellers worked together daily; it also put sellers in a difficult position, since they needed to pay their suppliers. Both sellers and buyers were dissatisfied with this stalemate, so together they went to the Tokyo city officials overseeing the operation of Tsukiji and proposed that the management of conflict be systematized.⁵⁶ An experimental system was piloted in 1958, and again in 1960, first without supervision from city officials and gradually taking on the characteristics of the current system. In 1972, the Tokyo Metropolitan Government issued an ordinance outlining the operation of a dispute-resolution mechanism.⁵⁷ For over three decades, the Tuna Court has operated, unchanged, within the Tsukiji marketplace.

53. Osaka-shi Suisan Kumiai, Osaka-shi Suisanbutsu Oroshi Kyōdō Kumiai, *Suisanbutsu Ryūsū no Henbō to Kumiai no Sanjū-nen* [Thirty Years of Transformations and Associations in Marine Product Distribution] 64 (Tokyo: Sōjinsha, 1985).

54. See *id.*

55. Unfortunately, finding an “old man of the market” with a long institutional memory is difficult, because the taxing nature of work at Tsukiji makes it a job that is far friendlier to youth than age. My speculations about the origin of Tsukiji’s Tuna Court come primarily from conversations with Mr. Nozue Makoto, Director, *Ōmono Gyōkai* [Tuna and Swordfish Buyers Association], who kindly took the time to talk with me about the history of the Tuna Court. They are the most complete observations of the origins of the Tuna Court that I was able to assemble and are presented here as a plausible but not definitive account.

56. According to the Central Wholesale Market Law, wholesalers cannot change the price of a good after a bid is accepted at auction, except in special circumstances. The Tuna Court operates as one of those special circumstances.

57. *Maguro, Kajikirui no Jiko Kensa Yōryō*, June 22, 1972, 47 Chūgyō Gyō Dai 100-Go, in TŌKYŌ-TO CHŪO OROSHIURI SHIJŌ KANKEI HŌREISHU 315 (2000). Local government regulations in Japan are divided into a number of categories, depending upon, for example, whether they include enforcement powers or penalties. The regulation that pertains to the Tuna Court is called a *yōryō*, which is a slightly less robust form of governance than a *kyōrei* because it lacks clear or enforceable sanctions. I have translated both of them as “ordinance.”

III

BRINGING DISPUTES TO THE TUNA COURT

As buyers and sellers work their way through the day's supply of tuna, the auction begins to wind down and activity shifts to the wholesale stalls within the market. With extraordinary speed, thousands of tuna that only an hour earlier densely lined the auction house floor are pulled through the narrow aisles of the market on wooden carts and small, highly maneuverable flatbeds, by which they are taken to the stalls of buyers. Knives as long as skis, requiring two people to hold the blade, are used to fillet the large fresh tuna, and industrial-strength band saws serve to cut the frozen and extremely hard fish. Buyers are determined to quickly split open their "catch" and slice it into sellable pieces because their customers will soon arrive and they want to display their goods in the most attractive manner possible. But they have an additional motivation for immediately carving their catch: they want to look inside the fish to see whether it conforms to their expectations of quality.

As discussed in Part I, Tuna buyers at Tsukiji can assess the quality of tuna with an unusual degree of precision. They can look at a cross-section of the tail and predict the fat content of the highly prized *toro*, or belly. They can rub the exterior skin and have a clear idea of the texture of the interior meat. But there are limits to what they can know beforehand about certain potential problems with a tuna, because at Tsukiji tuna are auctioned whole.⁵⁸ Until a whole tuna is sliced open, there is a risk that the poking and prodding of the pre-auction inspection may have failed to reveal a defect that could diminish the value of even the most highly prized and priced fish. So buyers quickly eviscerate their purchases, because if there is a problem with internal quality they may want to complain. And complaining means that they must bring their fish to the Tuna Court on the same day that it was purchased.⁵⁹

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58. Some have been gutted and have had their heads removed. See text accompanying *supra* note 33.

59. A brief methodological note is in order. Aside from a one-page discussion in Bestor's book, BESTOR, *supra* note 9, at 258, and the general description of the Osaka fish market's dispute resolution system mentioned below, I have found nothing in the Japanese or English-language literature about conflicts over quality at Tsukiji. I have therefore relied primarily on two major sources of information to learn about the Tuna Court. First, once the staff of the TMG's Tsukiji office realized that I was going to show up at the market every morning and keep asking for access to their data, they were good natured enough to allow me to sit in a corner of their office and look at their records. It is from those records that I was able to collect the information contained in the figures below. In addition, the TMG also provided me with the relevant data it had accumulated about market factors like the price of tuna, volume of sales, and so forth. Second, from late November 2004 to early January 2005, I spent almost every market morning watching the workings of the Tuna Court. Whenever possible, I would talk to the judges and the buyers, taking whatever time was available during slow periods to ask questions. These were far from structured interviews; the market is an extremely busy and fast-paced place, where Benjamin Franklin's adage that "time is money" is unusually apt. Rarely did any of my conversations last for more than ten minutes, though I was able to speak with dozens of judges and buyers during my

Since buyers can better judge the quality of a cut-up rather than a whole tuna, thereby minimizing the risk that the fish they purchase will be defective, one might assume that it would be in their interests to demand that sellers auction only cut fish. In fact, there are tuna auctions in Japan where this is the case. But that happens primarily at small, regional markets, where volume is small. In Tokyo, however, even the smallest *nakaoroshi* can sell one or more whole tuna in a day.⁶⁰ Moreover, although buying and selling cut fish would decrease uncertainties about quality, buyers and sellers both prefer to deal in whole fish. Not only would cutting increase the time and trouble it takes sellers to get three thousand large tuna each day to the auction floor, but cut fish are also more difficult for sellers and buyers to handle. Because of the iron in tuna blood, its meat changes color quickly when exposed to air, going from an appealing, rich red to a brown, dark-chocolate color. In some countries, sellers spray the meat with carbon monoxide to prevent discoloration (and to change the color of an oxidized tuna from brown to red). In Japan, however, the use of carbon monoxide is prohibited because it is seen as an inappropriate way of masking possible problems. Moreover, cut tuna can be damaged if it comes into contact with fresh water; the core temperature of a cut fish rapidly increases, requiring constant refrigeration; and the risk of contamination increases when the inside of a tuna is exposed.⁶¹ For those and other reasons, most buyers and sellers want to trade whole tuna, despite the risk of unrecognizable defects at the auction.⁶²

Latent, internal quality defects are not the only types of problems that buyers encounter. After they take possession of a tuna, for example, buyers weigh their purchase and may discover that a fish represented as 125 kilograms weighs only 110 kilograms. Occasionally, they discover that an apparently clean, fresh fish was not iced well and has started to spoil. Once in a while, they may find a problem that a careful inspection would have

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mornings at the market. In addition, I interviewed officials of the *Ōmono Gyōkai* [Tuna and Swordfish Buyers Association] and whoever I found hanging around a room in the market that serves as a general library and lounge [*Ginrinkai*].

60. No data is available on the quantity or value of the daily purchases of buyers. But a casual walk through the market makes clear that even the smallest stalls buy at least one whole fish each day, and the larger stalls may buy a dozen or more.

61. Cutting tuna prior to auction may also lead to an increase in prices because it would decrease risk; it could reduce the comparative advantage of tuna expertise by making clearly visible some of the internal factors that only the most well-trained experts can judge before a tuna is cut; it may require a recalibration of the size of market stalls because buyers would need more refrigeration; and the entire marketplace might have to be enclosed to create a more temperature-controlled environment.

62. The preference of buyers and sellers for dealing in whole tuna was reaffirmed by interviews with tuna merchants in Hawaii, where the tuna auction is also limited to whole fish. Telephone Interview with Staff of United Fishing Agency and Fish Wholesale Companies (Feb. 2005) (on file with author). BESTOR, *supra* note 9, at 258, correctly points out that the whole-tuna rule disadvantages buyers because it limits their ability to fully evaluate quality, but he underplays the degree to which both buyers and sellers benefit from the sale of whole fish.

revealed but that they overlooked in the cold, dark, and rushed pre-auction hours. On many occasions, the defect they discover would have eluded even the most thorough and expert tuna bidder. In such cases, Tsukiji's expert buyers have an opportunity for recourse. If after taking possession of a tuna and opening it up they are dissatisfied with its quality and believe they have overpaid, buyers can assert a right to compensation. They do so at an institution that is unique to Japanese fish markets and which finds its most distinctive expression at Tsukiji's Tuna Court.⁶³

From 7:30 to 7:45 every morning, and for three additional sessions lasting fifteen minutes at 8:15 a.m., 9:15 a.m., and 10:30 a.m., the Tuna Court convenes to adjudicate the claims of unhappy tuna buyers. Located on a barren rectangle of outdoor cement adjacent to the tuna auction house, the Court is clearly demarcated by a metal fence on two sides, a cinder-block wall on one, and three plastic cones linked by a yellow pole that serve as its entrance. On an A4-sized piece of paper taped to the wall is a sign posted by the Tokyo Metropolitan Government (TMG) that officially designates the area as the *Jiko Kensa-sho*, or Accident Inspection Place. A small cardboard box attached to one wall contains forms for judges to fill out when making their decisions, and in a corner is a pile of square pieces of plywood that the judges can place on top of an I-beam and use as their "bench" between cases.

The operation and jurisdiction of the Tuna Court is spelled out by a TMG ordinance, passed in 1972 under authority delegated to the TMG by the Ministry of Agriculture, Forestry and Fisheries.⁶⁴ It provides for the resolution of conflicts over the quality of auctioned tuna, but it makes clear that buyers cannot simply throw caution to the wind and recklessly bid for poor-quality fish with the expectation that they will later be compensated. Instead, it requires that sellers allow pre-auction inspection and makes buyers responsible for whatever problems have been discovered through it. The Court's focus, therefore, is on problems that are akin to what one might think of as no-fault complaints, since they involve a gap between a buyer's expectations and the actual quality of a purchase resulting from defects that even the most conscientious and highly skilled tuna expert would not have discovered. The buyers who bring claims to the Tuna Court will prevail only if they can show that the seller is at fault for a particular problem (like misrepresenting the weight of a fish) or if the problem with the quality of their tuna could not have been known without bringing it back to their stall and opening it up.

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63. Institutions similar to Tsukiji's Tuna Court appear to operate at other Japanese tuna auctions where the fish are sold whole, like in Osaka, but the volume of tuna sold at Tsukiji dwarfs that of other markets, and the Tuna Court is similarly more vibrant in Tokyo than elsewhere. Unfortunately, I have no formal comparative data; I spent weeks hanging around Tsukiji before gaining access to TMG's records, and I did not have a similar opportunity elsewhere.

64. See *supra* note 58.

Although the Court has jurisdiction over different types of claims, the vast majority involve no-fault complaints. Figures 4, 5, and 6, disaggregate the complaints brought to the Tuna Court each month into four categories: no fault, spoilage, weight, and appeals.

FIGURE 4
Complaints By Category, 2002*

Data provided by the Tokyo Metropolitan Government, Marine and Agricultural Products Division (*suisan nōsan hinka*).

FIGURE 5

Complaints By Category, 2003*

Data provided by the Tokyo Metropolitan Government, Marine and Agricultural Products Division (*suisan nōsan hinka*).

FIGURE 6

Complaints By Category, 2004*

Data provided by the Tokyo Metropolitan Government, Marine and Agricultural Products Division (*suisan nōsan hinka*).

No-fault claims clearly make up the bulk of the Tuna Court's docket, with other categories constituting an almost insignificant number of cases. Most no-fault problems involve parasites (*sashi*), which are easily

recognized once a tuna is filleted; in the early stages they look like small grains of rice implanted in the meat, and later they become marble-sized or golf ball-sized areas with an unattractive, gooey texture. Some tuna suffer from a disease that turns part of the meat a hazy white color (*yamai*) and changes its texture. Too much internal blood is also a common no-fault problem, and it causes large dark patches or thin dark veins to run throughout the meat. Some no-fault problems make a tuna inedible, but more commonly they decrease the value of a fish by altering its color and presentation, factors critical to Japanese cuisine and thus to the price consumers are willing to pay for a given cut of tuna.

Despite the fact that buyers and sellers at Tsukiji have high levels of expertise, and despite the pre-auction inspection that enables buyers to carefully calibrate their bidding, the rate of cases brought to the Tuna Court would alarm most product manufacturers. As Figure 7 shows, in 2004 buyers brought between fifteen and twenty disputes for every 1000 auctioned tuna—a complaint frequency of 1.5% to 2%, or twenty-five to thirty complaints each day.⁶⁵ Tuna sellers and TMG officials report that buyers are more likely to complain when the volume of tuna sales is low, because they have extra time and are particularly concerned with their profits in a slow market.⁶⁶ Yet as Figure 8 shows, tuna volume and claims volume move roughly in unison.⁶⁷

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65. From March through November 2004, there was an average of twenty-seven complaints per day. Calculations based upon data provided by the Tsukiji office of the TMG.

66. Interviews with Oroshi, TMG Officials, in Tsukiji Market, Japan (Nov. 2004-Jan. 2005).

67. The only time when disputing increased in a slow market was between May and June. At all other times, disputing increased when tuna volume increased (Aug.-Oct.), disputing decreased when tuna volume decreased (Apr.-May, July-Aug.), or disputing decreased when tuna volume increased (Mar.-Apr., June-July, Oct.-Nov.). The latter relationship suggests that a busy market may cause a decrease in disputing, even though a slow market does not lead to an upswing.

FIGURE 7

of Disputes per 1000 Auctioned Tuna, 2004

Data provided by the Tokyo Metropolitan Government, Marine and Agricultural Products Division (*suisan nōsan hinka*).

FIGURE 8

Tuna Volume vs. Dispute Volume, 2004

Data provided by the Tokyo Metropolitan Government, Marine and Agricultural Products Division (*suisan nōsan hinka*).

To initiate a claim at the Tuna Court, buyers must attend an adjudication session on the same day as their purchase and bring at least one quarter of the allegedly damaged fish, for which they must have paid at least ¥120

per kilo.⁶⁸ In most cases they bring the entire tuna. As they enter the “place” where disputes are processed, they are met by a representative of the TMG, to whom they provide a sales slip containing information about the price, weight, and seller of their tuna, and from whom they receive a sheet of paper with a case number. In addition to an official from the TMG, who is required to supervise every meeting of the Court, there are five judges charged with examining each tuna and determining the degree of damage. Not surprisingly, judges are not members of the national judiciary, nor do they have any legal training. Instead, they are registered tuna auctioneers who work for the Tsukiji tuna brokers (*oroshi*) in the specialized tuna and swordfish division.⁶⁹ To become auctioneers, they must take a difficult series of TMG-administered exams, and to enhance their expertise they attend various seminars on tuna offered by the *Ōmono Gyōkai*. Once they believe that they have sufficient expertise and work experience, they submit their credentials to the TMG for certification as judges. Each company supplies a judge for every adjudication session.⁷⁰ Like the staff of the TMG, who are easily recognizable by their beige clothing and official caps, *oroshi* (like the English-language word ‘wholesaler,’ *oroshi* can refer both to the corporate entity and an employee of that entity) are clearly identifiable by their dark navy coats, all of which carry the corporate logo of the employer.

As in any court, the flow of cases to the Tuna Court differs by day and by session.⁷¹ On some mornings only one or two buyers will attend the 7:30 a.m. session but ten or fifteen will show up at 8:15 a.m.. On others, the first session may be busy but the next sessions less so. More often than not, the majority of claims are brought to the two middle sessions (8:15 a.m. and 9:15 a.m.), and the early and late sessions are relatively quiet. The flow of cases determines how long judges can deliberate about any specific problem. But the time available for deliberation makes less of a difference than one might imagine. Like buyers and perhaps more so, judges know their tuna, and a quick glance is often all they need to evaluate the type and severity of a problem. As they move from tuna to tuna, they may touch the

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68. See *supra* note 58.

69. Although the ordinance allows buyers to serve as judges, it seems that the time commitment makes this unattractive, and no buyers are currently involved in adjudicating cases.

70. The adjudicators supplied by the companies receive no special payment for their services, and the companies are not compensated by the TMG or the buyers for the staff time that is devoted to the resolution of disputes. That at least in part explains why no buyers have jumped at the chance to be judges, even though the TMG ordinance permits them to serve.

71. It appears that there are certain buyers who are more likely to bring fish to the Tuna Court: they are referred to by the same term that one uses to describe a customer who is a “regular” at a restaurant (*iyōren*). It is not clear whether “regulars” are just particularly unlucky individuals when it comes to buying tuna or if they are more willing to take the time to dispute their purchases. One possibility is that those who have their market stalls in a section of the market that is close to the Tuna Court are more likely to be regulars than those who must traverse the entire floor of the market to get to Court.

interior meat, ask the buyer a question, and talk amongst themselves. There is no formal hearing and buyers are not asked to explain the reason for their claims. But they often try to draw the attention of the judges to what they think is a particularly problematic part of the fish, and many argue their cases by trying to convince the judges that the condition of their fish is highly problematic. In some cases, judges spend only fifteen seconds evaluating the condition of a tuna and deciding on what they think is a reasonable resolution. In no case did I witness a judge spending more than two minutes on a given case.

To enable the five judges to reach a verdict, they are given a form on which to record their individual judgments. At each disputing session, one judge serves as chairperson and collects the judgment forms from the other judges. By the terms of the TMG ordinance, the judges' options are limited. Buyers dissatisfied with a purchase cannot ask for the sale to be rescinded. Nor can they demand a price reduction equal to the total cost of the damage. Instead, the Tuna Court offers only one possible remedy: the final price that was bid by the buyer and accepted by the seller can be adjusted by a percentage that reflects what the judges believe is the value of fifty percent of the damage. Under the ordinance, the judges' scores are averaged to determine the price adjustment. But in almost all cases the chair looks at the five scores and guesses at a numerical average, rather than computing the true average of the five scores.⁷² For the price of a tuna to be reduced, the ordinance stipulates that the judges must assign it a percentage of at least 11%; scores of 10% and under are insufficient for a price reduction. In addition to a floor of 11%, there is a 50% maximum amount by which a bid price can be lowered. The 11% floor makes clear that the Tuna Court will only respond to nontrivial damage and the 50% maximum ensures that buyers and sellers will each suffer a loss equal to half the value of the damage.

Once the chairperson has looked at the price-reduction scores of the other judges and recorded the "average" score on a form supplied by the TMG, he gets ready to announce the final verdict. Other judges gather around him, the representative of the TMG stands by his side, and complainants mingle on the periphery so they can hear the judgments. In a voice that attests to his training as an auctioneer, the chair shouts out the case number, name of the seller, and the percent of the price reduction. The TMG official records the verdicts, and as he does so, he shouts the vital information to ensure that there has been no miscommunication.⁷³

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72. In fact, judges have different approaches to determining the average, with some dropping the highest and lowest of the five scores and averaging the remaining three and others looking at all five scores in determining the final price reduction.

73. Enforcement of judgments is relatively simple. The new, adjusted price is communicated by the TMG to the buyer and seller, and in almost every case buyers pay. If they do not, sellers can simply

Most of the time, the shouting of the verdict is met with silence from buyers, who take hold of their carts and rush back to their stalls. Sometimes, a judge will pat the shoulder of a buyer and smile, or a buyer will utter a casual remark to a seller, like "See you later" or "So it goes." Rarely does a buyer look or act surprised when he hears the verdict, and for good reason. Of the 5504 cases brought to the Tuna Court from March through November 2004 (see Figure 9), all but 208 of them received a reduction in price.⁷⁴ A significant plurality of the total, 2480 or about 45%, led to an identical result—the minimum 11% reduction in price.⁷⁵

FIGURE 9

Data provided by the Tokyo Metropolitan Government, Marine and Agricultural Products Division (*suisan nōsan hinka*).

The next most common resolution was the maximum 50% price reduction, which was awarded in 638, or 11.6%, of cases. In short, almost

stop selling to the buyer until payment is made, and in extreme cases the TMG can suspend the buyer's bidding privileges.

74. As Figure 9 indicates, price reductions cluster in certain amounts, whereas some numbers are never used. Sixty-five of the 5504 complaints received a 9% price reduction, for example, but only 3 received 10%, and 103 got 18%. But, none were awarded 17% or 19%. When I asked the tuna traders why some numbers were so common and others were so rare, they responded that there are some numbers that just sound unappealing in Japanese, and others that have a good "ring."

75. There is no publicly available data on the Tuna Court. The forms on which verdicts are recorded are collected on a fiscal-year basis by the TMG, some general figures are tallied, and then the detailed sheets are thrown away. Thanks to the kindness of several officials in the Tsukiji office of the TMG, I was given access to the data being collected for 2004. Because the Japanese fiscal year runs from April 1 to March 31, the only detailed data in the TMG office started in March 2004.

everyone who brings a complaint to the Tuna Court ends up paying less for their tuna than they bid at the auction, and the majority of complainants—57%—receive either the lowest or the highest possible reduction.⁷⁶ These results are important in understanding the role of conflict and its resolution at Tsukiji, and I will return to them in my conclusion.

Notably missing from the auction and the Tuna Court proceedings are the actual tuna owners. Because of the internationalization of the tuna trade, most owners have no physical or corporate presence in Japan. But even fishing companies working within Japan do not attend. As a result, the owners of the disputed tuna depend upon their agents—the *oroshi* companies that provide the judges—to protect their interests. To some extent, the interests of the suppliers and the *oroshi* to whom they entrust their catch are similar. Just as the owners profit more if their tuna are sold at the highest possible price and disputes result in small reductions, so too does the 5.5% commission of the *oroshi* increase with a higher price at auction and decrease as auction prices fall and as the Court reduces prices.⁷⁷

In many cases, however, the difference in the commission is minimal, and the potential for good will and increased future dealings created by awarding a price reduction may outweigh the financial loss brought on by a lower price. At the low end of the tuna price scale, for example, are farmed, frozen bigeye tuna, which could sell for as little as \$6.00 per kilo and weigh only 60 kilos. An 11% price reduction would cut the *oroshi*'s commission from \$19.80 to \$17.60 and drop the sales price by only \$39.60; a 50% price reduction would decrease the sales price by \$180.00 and cut the commission by \$9.90. The five-judge panel, with representatives from each *oroshi* company, prevents an individual judge from giving more generous price reductions to those who regularly buy tuna from his company, a strategy that might be used to lure buyers from their relationships with other companies. Still, the willingness to be generous may extend only so far; there are bluefin tuna at Tsukiji that weigh over 250 kilograms and sell for upwards of \$40 per kilo. When confronted with a \$10,000 fish, a 50% price reduction becomes far more than a low-cost way of cementing relationships between buyers and sellers.⁷⁸

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76. One unusual finding from the 2004 data is that the number of claims brought during a week remains relatively stable, with no discernable increase or decrease in the number of claims brought early or late in the week, aside from a drop-off on Saturday. Yet there appears to be a pattern in how cases are resolved, with a steady rise in the generosity of price reductions from Tuesday through Saturday; the reductions average 17.7% on Tuesday and climb to 18.8% on Saturday.

77. None of Tsukiji's *oroshi* so much as suggested that their commission should be based on the original sales price, rather than be reduced in step with whatever price reduction is offered to buyers. In contrast, whenever I discussed the Tuna Court with American auctioneers, they assumed that auctioneers' commissions would not be reduced, since the auctioneer had done his job by pairing a buyer with a seller and should not be penalized by the existence of a defect in the product.

78. Technology provides owners with a certain degree of instant oversight. When a dispute results in a substantial price reduction for an expensive fish, the judge from the company that auctioned

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The high rate of claims suggests that buyers do not feel particularly constrained about using the Court, but they do seem to worry about pressing their cases too far. Not only are buyers notably reticent to make comments when the verdict is announced, they are also reluctant to appeal (*saishin*), even though the TMG ordinance gives them a right to do so.⁷⁹ Appeals are supposed to be brought on the same day as the original judgment but are sometimes made the following day. No new paperwork is needed, nor are there special judges or a different venue. Buyers simply return to the Tuna Court at one of the designated session hours and indicate that they want a rehearing. As in the initial claim, they must bring their damaged tuna, but they must also bring “new” evidence, which means the tuna has to be cut in at least one more location to enable judges to have a different view of the alleged problem. There is almost always some turnover of judges between court sessions (so that of the five judges at the 7:30 a.m. court session, for example, three may return at 8:15 a.m. and be joined by two others). This provides continuity between the initial determination and the appeal but also allows for a fresh perspective. Judges hearing an appeal are informed of the original verdict, so they know if the appellant’s tuna received a score of 8% (and thus no price reduction was offered) or if the first determination was to offer a 25% reduction, which the buyer believes was insufficient.

Although the announcement of the initial verdict is generally met with silence, occasionally a buyer will emit a loud groan or rhetorically say, “Are you kidding?” “What, only 15% for this kind of serious problem?” or “Unbelievable.” On rare occasions, perhaps once or twice a year, a buyer is so dissatisfied with the initial determination and the resolution of the appeal that he decides to press his case even further. The provisions of the TMG ordinance are murky in terms of how they apply to such situations because they do not distinguish between the first and subsequent appeals. Nonetheless, when a case boils over and a buyer is deeply dissatisfied with the actions of the Tuna Court, other parties get involved and help broker a solution. Despite the infrequency of such problems and the absence of written records, the comments of tuna traders suggest that in contentious cases the judges, buyer, representatives from the Tuna and Swordfish Buyers Association (*Ōmono Gyōkai*), and sometimes another experienced and respected tuna buyer will meet, examine the fish, and try to find a solution that involves increasing the price reduction offered to the buyer by a mutually agreeable amount.⁸⁰

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the fish may use his mobile phone to take a digital photo of the damage and instantly email the picture (using the phone) to the supplier.

79. See *supra* note 57.

80. Interviews with TMG Staff and Judges, in Tsukiji Market, Japan (2005) (on file with author).

Perhaps the most notable aspect of the appeals process is how infrequently it is utilized. Overall, only 182 of the 5504 claims in 2004 were appealed—approximately 3% of all cases. The appeals rate increases dramatically among cases in which no price reduction was initially awarded; more than 25% of those (55 out of 208) were appealed. For those who choose to appeal, their decision almost always pays. Eighty-five percent of the 55 appealed cases that were initially denied price reductions received a bump up to a level that triggered a price reduction. In many cases, judges bumped the insufficient award—7%, for example—exactly the amount needed to enable the buyer to receive the minimum 11% price reduction (4%).⁸¹ In the 127 appealed cases where the initial judgment involved a price reduction but the buyer was dissatisfied with the awarded amount, the success rate was almost 98%. In only three of those cases did buyers fail to improve on their original award. The average pre-appeal price reduction of all 182 appeals brought in 2004 was 14%, and the average increase in the awarded price reduction was 9%, resulting in an average overall price reduction for post-appeal cases of 23%, compared to less than 19% for all pre-appeal cases.

With the success rate of appeals so high, one might wonder why appeals are so infrequent. The answer is straightforward. Buyers freely use the Tuna Court to resolve quality disputes, and judges express no resentment that they are being asked to reduce the price of some fish. But there is a delicate balance between what is considered a legitimate claim for a price reduction when one's fish is damaged and an inappropriate demand that judges provide a more substantial remedy to a problem that they may not think is particularly severe. If buyers cross the invisible line that demarcates reasonable claiming from inappropriate whining, they risk a damaged reputation and the possibility of retribution on the auction floor. So buyers generally contain their desire to question the judgment of judges, because too strongly expressing themselves can result in sellers denying them a winning bid. As one seller put it, "Why would I, as the auctioneer, sell a fish to someone who I know might loudly complain if I could sell it to someone else? It's only natural."⁸²

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81. When judges at the Tuna Court hear an appeal, they reexamine the fish and on their judgment sheet write a decision that is relative to the initial determination. If they agree with the original determination they write "0"; if they think that the initial determination was too low, they write a plus-sign and then the percent by which they think the initial judgment should be increased, abiding by the maximum 50% ceiling on price reductions.

82. The possibility of economic retribution against an unpopular buyer is not limited to Tsukiji. Smith has described how tensions between buyers and sellers have erupted into physical violence at the New Bedford Fish Exchange. See SMITH, *supra* note 20, at 134-35.

IV

AUCTIONS, QUALITY, AND CONFLICT: A COMPARATIVE VIEW

This Article asks a seemingly simple question: why do Tokyo's tuna merchants rely on the Tuna Court? In an environment where buyers and sellers are regular and frequent transactors, how should we understand their willingness to engage in repeated conflict? And with a range of options from which to choose, occupying a spectrum from *caveat emptor* to litigation, why do parties at Tsukiji rely on a system that is so heavily imbued with formal legal rules? The law-and-economics literature on informal norms among close-knit groups, with its emphasis on the efficiency of norms, does not predict or explain the existence of an efficient, law-bound Tuna Court. Nor does law-and-society scholarship hold the explanatory key; the classic works on conflict among repeat players predict that informality will trump formality because of a disinclination to engage in face-to-face disputing. If the most widely accepted theories of disputing fail to explain the experience at Tsukiji, perhaps it is because there is something distinctive about the auction of perishable products, or more specifically the auction of tuna, that leads to a particularly unusual form of conflict resolution. Rather than focusing exclusively on Tsukiji, therefore, some comparative perspective may be useful in unraveling the workings of the Tuna Court.⁸³

Although fish and shellfish are a more significant part of the diet in Japan than in most other nations, tuna fishing has a long history in the United States, and tuna auctions can be found from Boston to Hawaii.⁸⁴ Many U.S. tuna auctions are relatively small, regional affairs dwarfed by the tonnage sold at Tsukiji. But there is an exception: the Honolulu Fish Exchange. Unlike Tsukiji, the auction in Honolulu is privately owned and operated. On an average day in February 2005, almost 750 tuna passed through the auction, about 25% of the amount sold at Tsukiji on a

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83. Bernstein argues that if norms in a particular industry are constant across borders, despite variations in the legal systems of different countries, it "suggests that the traditional rules and institutions are likely to be efficient from the perspective of market insiders." Bernstein, *supra* note 2, at 157. So if one finds that buyers and sellers at tuna auctions outside of Japan rely on a system of dispute resolution similar to that at Tsukiji, it might be reasonable to conclude that such a system is particularly well suited to the interests of the parties. As this Part will show, there is no such similarity.

84. Average per-capita consumption of fish and shellfish in Japan from 1999 to 2001 was 145.7 pounds, compared to 62.3 pounds in the United States, according to the U.S. National Marine Fisheries Service. See http://www.st.nmfs.gov/st1/fus/fus03/08_perita2003.pdf (last visited Mar. 2006). The gap is even larger for the consumption of fresh (as opposed to canned) tuna, and greater still for comparisons of high-quality, sushi-grade tuna. For a history of albacore tuna fishing in California, see R. Michael Laurs & Ronald C. Dotson, *Albacore*, in CALIFORNIA'S LIVING MARINE RESOURCES AND THEIR UTILIZATION, Sea Grant Extension Publication, Department of Wildlife and Fisheries Biology, University of California, Davis, 136-38 (William S. Leet et al. eds., 1992). Among the tuna auctions in the United States are the Portland Fish Exchange, the New England Fish Exchange, and the Gloucester Seafood Display Auction.

comparable day.⁸⁵ In price and weight the numbers in Hawaii are somewhat less robust, since individual tuna at Tsukiji are generally larger and more expensive than those in Honolulu. Still, the Honolulu tuna auction is a good-sized market that supplies not only Hawaii but also sends fish to the U.S. mainland and overseas, including Japan.

The various links between Hawaii and Japan—historical, economic, and cultural—suggest that if any U.S. tuna auction were to resemble Tsukiji, it would be the Honolulu Fish Exchange.⁸⁶ An economic analyst at the National Marine Fisheries Service, for example, describes the fishing industry and fish traders in Japan and Hawaii as highly similar, with both being small, tightly organized communities that stress personal relationships.⁸⁷ The two most senior administrators of the Hawaii auction are both of Japanese descent, and the founder has worked closely with Japanese fishing companies for over four decades and regularly travels to Japan. The newly built auction house in Honolulu was explicitly modeled on Tsukiji, from the 5:30 a.m. ringing of a bell (imported from Japan so that the auctioneers could replicate the timbre of Tsukiji's bell) to the method of arranging whole tuna on the auction-house floor. As in Tokyo, there is a pre-auction inspection that allows buyers to judge the quality of the tuna.⁸⁸ If the Tuna Court is an institution that emerges from the logic of tuna auctions, then there is reason to expect a similar arrangement in Honolulu.⁸⁹

Despite the many similarities between the Tokyo and Honolulu tuna auctions, however, the Honolulu Fish Exchange has nothing that resembles the Tsukiji Tuna Court. In fact, disputes are extremely rare in Hawaii, totaling only a couple of complaints each month.⁹⁰ With approximately one complaint for every 7500 auctioned tuna in Honolulu (15 out of 112,500), compared to the 113-150 disputes for every 7500 tuna auctioned at Tsukiji (15-20 out of 1000), disputing in Honolulu is 100 times less common than

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85. Data provided by United Fishing Agency (on file with author). The average price of the 734 tuna sold on that day was \$1.96 per pound.

86. Just as tuna is not the only fish auctioned at Tsukiji, there is more to the Honolulu Fish Exchange (more accurately called United Fishing Agency, the company that owns and operates the auction house) than tuna. Many other local species, like mahi mahi, opah, opakapaka, and ono are also auctioned there.

87. Telephone Interview with Rita Curtis, Economist, NOAA Fisheries (Jan. 2005) (on file with author).

88. Buyers in Hawaii are able to inspect tuna by "digging," which means that they pull small amounts of meat from the tail cut with their fingers. Because this practice can degrade the quality of some portion of the fish but does not reveal much more about a tuna than a less invasive inspection, the auction owners may prohibit it sometime in the future.

89. In fact, when discussing tuna auctions and conflicts with a manager of the Globe Fish Company in Boston, he said that he assumed Tsukiji and Honolulu had very similar systems for resolving conflict. Interview with Sean Bergen, *supra* note 36.

90. Interview with Assistant Manager, United Fishing Agency, in Honolulu Fish Exchange, Honolulu, Haw. (Feb. 2005) (on file with author).

in Tokyo.⁹¹ Nothing about the underlying biology of tuna determines this result; tuna auctioned in Hawaii are just as likely to suffer the ills of parasites and disease as those in Tokyo, and the Hawaiian tuna dealers are familiar with (and use Japanese words to describe) such problems. Nor are buyers finding other ways to resolve conflict; as at Tsukiji, buyers in Honolulu do not sue, even though contract law provides various possible remedies for products with latent defects. The difference in the frequency of disputing is therefore a social phenomenon, not a result of fish biology or legal doctrine.⁹²

That buyers in Honolulu don't complain is closely linked to two other critical facts: the Honolulu Fish Exchange does not provide a mechanism for handling disputes, and those who do complain are rarely compensated. Owners of the Hawaii auction house could potentially use their leverage with owners, suppliers, and buyers to broker a resolution to a conflict over the quality of auctioned tuna. But they choose not to do so, in part because they consider such claims illegitimate. Conversations with owners and employees of the Honolulu Fish Exchange always led to the same rhetorical claim: why, they asked, should the price of a defective tuna be reduced, when buyers never offer to pay a supplement when they are lucky enough to purchase a top-grade fish at a bargain price?⁹³ A similar sentiment was expressed by buyers, only a few of whom expressed unhappiness about the impossibility of receiving a price reduction for damaged fish. Most described the tuna auction as a gamble that they sometimes win and sometimes lose.

In addition to the view that *caveat emptor* is a fair principle for the allocation of risk, the Honolulu Fish Exchange has certain characteristics that help to explain the absence of a forum like the Tuna Court. First, there is only one tuna auction in Hawaii, and it is privately operated. The auction house thus enjoys a monopoly, and it exercises that power in a variety of

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91. This figure is a rough but conservative estimate, assuming 750 tuna auctioned per day for twenty market days each month, or 15,000 tuna per month; two disputes each month amounts to a dispute rate of .0133%, compared to fifteen disputes per 1000 auctioned tuna at Tsukiji, or 1.5%.

92. The fact that there are fewer disputes in Hawaii is not in itself evidence that it is a normatively better system than one where conflicts regularly arise and are resolved. I take no position on whether it is "better" to rely on *caveat emptor* or to create an institution like the Tuna Court. My point is that institutions like the Tuna Court can perform extraordinarily well, not that they are the only way to successfully manage conflict.

93. Interviews with employees of United Fishing Agency/Honolulu Fish Exchange (Feb. 2005) (on file with author). According to the owner of the Hawaii tuna auction, he used to be somewhat more willing to "work with" buyers who inadvertently purchased a damaged tuna by negotiating with the supplier or finding other ways to reduce the sting of a bad purchase, like giving them a break of some sort when they next came to the auction. But he found that one good deed invited a rash of claims and that lazy or unskilled buyers were the first to demand a price reduction. So he let it be known to all buyers that claims would no longer be considered. Still, there are occasions when a buyer may come and complain about a tuna that is nearly worthless, and if it is a buyer who has earned respect and is not a whiner, he may try to "work something out." *Id.*

ways. In contrast to the 5.5% commission established by the Tokyo Metropolitan Government for Tsukiji auction houses, in Honolulu the commission is 10%, and neither suppliers nor buyers who are unhappy with that arrangement can do much about it. Second, the size and price of tuna in Honolulu are modest, at least compared to those in Tsukiji. Rarely does a tuna there exceed two hundred pounds, and most are less than one hundred, in contrast to the five-hundred-plus-pound tuna in Tokyo, where one hundred pounds is considered a small fish. Because many of the tuna in Hawaii sell for just a few dollars per pound, if prices were reduced as in Tsukiji—with 11% being the most common adjustment—it would involve too little money to justify the trouble of bringing a claim. Third, buyers in Hawaii, like those at Tsukiji, are repeat players, but in contrast to the several hundred Tsukiji tuna buyers who assemble in a vast marketplace, there are only a few dozen buyers in Hawaii who gather in a relatively cozy one-room auction hall. To the extent that theories emphasizing the aversion to formal conflict among members of close-knit groups have some explanatory power, this may be an illustration of those claims.

Fourth, whereas buyers at Tsukiji tend to represent relatively small, family-owned enterprises that resell their tuna within the Tsukiji market, those in Hawaii are mostly employees of marine-product wholesale companies that buy at the Honolulu wholesale market and resell to distant buyers. Buyers in Honolulu may therefore care less than those in Tsukiji about price because they are buying on behalf of a company, not for their own enterprise. In addition, in most cases a whole tuna will be resold to and filleted by a downstream buyer, not the wholesale company that bought it at the auction. This removes the product in time and space from the auction company and eliminates the possibility of bringing the cut tuna to an adjudication session.

At any rate, in the biggest U.S. tuna auction, buyers rarely make claims for damaged tuna, there is no written or organized system for processing claims, and price reductions are rare. Japanese buyers, in contrast, frequently assert their right to a price reduction, a local ordinance clearly spells out a dispute-resolution system, and it is almost guaranteed that disputes will trigger a price reduction. These differences may appear incompatible with commonly held generalizations about dispute resolution in the United States and Japan, but they make more sense when viewed in the social context of the tuna auction. That is, different business structures (family-owned vs. impersonal, private vs. public), different valuations of the product, a different degree of sensitivity to short-term losses, and different presumptions about risk (*caveat emptor* vs. risk spreading) explain at least in part the fundamentally different approaches to handling problems with the quality of auctioned tuna in Tokyo and Honolulu.

In other U.S. auction communities distant from Hawaii, one finds practices similar to those in Honolulu. There are other fish auctions, notably those in New England, where whole tuna are sometimes sold, but none have anything that resembles the Tsukiji Tuna Court. At the Globe Fish Company in Boston, for example, if a tuna is found to be diseased, a price reduction or refund is unlikely to be provided unless the entire fish is unusable.⁹⁴ An unusual system for auctioning tuna has recently been created by the Seafood Auction Company in New Bedford, Massachusetts, which has started what may be the world's first online tuna auction.⁹⁵ Buyers can log onto the site and see photos of the tuna that will be auctioned, and each fish is graded according to quality. They then join a live online auction, and their purchase is shipped to them on the same day as the sale. Unhappy buyers have twenty-four hours to contact the seller, and in some cases they are permitted to return the fish or are offered a price reduction. But only problems that involve at least 25% of the value of the fish will be considered, few complaints are made, there is not a group of judges with independence from the seller, and there is no assurance that one's complaints will be heard.

In fact, there does not appear to be a single fish or tuna auction in the United States that has adopted an approach to the resolution of conflicts over quality that in any way resembles the Tuna Court.⁹⁶ Instead, those involved in American auctions emphasize the inherent risks of their trade and the appropriateness of buyers bearing the risk of defects, since it is buyers who benefit when they buy a top-quality product for an average price.⁹⁷ In other U.S. auctions, where pre-auction inspection does not eliminate the possibility of latent defects, one finds Honolulu-like norms. Cattle auctions are perhaps the best example. An auctioned cow may appear healthy, but when it is brought to the slaughterhouse its meat may in fact be damaged.

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94. Interview with Sean Bergen, *supra* note 36.

95. Telephone Interview with Jim Levy, Seafood Auction Company, in New Bedford, Mass. (Feb. 2005) (on file with author); see also <http://www.bidforfish.com>.

96. Cassady's work suggests that even without inspection, the principle of *caveat emptor* pervades U.S. fish auctions. CASSADY, *supra* note 39, at 144. He writes: "In some auctions (for example, the sale of halibut in Seattle and of tuna in San Diego) the goods are purchased sight unseen, and preauction examination of the property is impossible. However, the buyer knows the reputation of the fishing boat's master as well as the general nature of the cargo, and he may base his judgment of how high to go in his bidding on such information. Moreover, as he usually exercises some control over the grading of the fish at the time they are unloaded, his bidding is not entirely blind. Yet not all risks are eliminated. I know of one purchaser who bought what was supposed to be medium-sized and large-sized skipjack who found that he had purchased mostly small fish; he incurred considerable loss because of the lower meat yield and the added labor costs of processing smaller fish. In this instance the vendor may have misrepresented his wares, but the buyer may have been equally culpable in not being alert to the possibility of misrepresentation." *Id.* at 144.

97. Here and elsewhere, I focus on auction houses that deal in goods that share some essential characteristics—external inspection may not reveal internal defects, and a single good is of sufficient value to make a claim regarding that good a real possibility. Vegetables don't fit this paradigm, nor do paintings or jewelry.

The most common condition is "cutting black," meaning that the meat along the upper back will be bloody and dark, akin to what humans experience as a black-and-blue mark.⁹⁸ Even though large sections of meat may be unusable, auction houses insist upon the responsibilities of buyers and are unwilling to offer compensation.⁹⁹ Horse auctions are similar. As one breeder puts it:

If I sold them [buyers] a horse directly, I'd never see the end of them. If the horse got lame or turned out to have no heart, they'd be back at me, expecting me to make it up to them somehow. If the horse turns out to be a winner they won't share their purse with me, but if there is trouble, I'll know. I'd never be free of that horse. . . . This way [an auction], once it is sold it is sold. I've sat next to a friend while he was actually bidding on one of my horses. He got her. I said congratulations and good luck with her. Turned out she couldn't run worth a damn, but he never said a word to me about her.¹⁰⁰

Those involved in automobile auctions in the United States express a similar sentiment. As one seller noted, "when I sell a car [at auction], no matter to whom I sell it, best friend or enemy, it's sold. I'm not going to get a call the next morning that he's changed his mind or he wants something in addition."¹⁰¹ Yet the refusal of U.S. auction houses to reduce the prices of goods with latent defects has not occasioned a wave of litigation. No buyer at the Honolulu Fish Exchange has ever sued over tuna quality, and buyers at other fish auctions have been equally nonlitigious.¹⁰² Nor has the attitude of the auction houses brought about the downfall of auctions as mechanisms for the sale of goods. Instead, without any apparent coordination between auction houses in different locales or dealing in different

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98. Telephone Interview with Kevin Lambright, Shipshewana Auction, in Shipshewana, Ind. (Feb. 2005) (on file with author). The most common cause of "cutting black" is that a heifer was bruised when mating with a bull; it can also be caused by rough treatment by the seller, stress, and other factors. *Id.*

99. Most livestock auction houses have signs on the walls indicating that all animals are sold "as is." *Id.* If a cattle buyer calls to complain about a cow "cutting black," Kevin Lambright of the Shipshewana Auction in Indiana asks the buyer the date of his birthday, and then tells the buyer that he is over twenty-one and is an adult who needs to take responsibility for his own decisions, like buying products at auction.

100. SMITH, *supra* note 20, at 74. In Japan, the purchaser of a racehorse at auction may rescind the sale within ten days if he discovers certain types of undisclosed defects. See ¶ 2, art. 19, Operating Rules of the *Nihon Kyōsōba Kyōkai* [Japan Racehorse Association].

101. SMITH, *supra* note 20, at 74.

102. A search of all cases available via Westlaw, both federal and state, as well as searches of legal newspaper databases, did not uncover a single case of litigation over the quality of fish purchased at auction. The only provision of the U.C.C. that specifically applies to auction sales is Section 2-328, which indicates that such sales are subject to the same rules of contract law as all other sales. U.C.C. § 2-328 (2004).

products, the norm of “buyer beware” has come to define the response of sellers to those who buy defective goods at American auctions.¹⁰³

It is important not to overgeneralize about the differences between the United States and Japan when it comes to compensating those who purchase defective merchandise at auctions. In Japan, like in the United States, auction houses generally disclaim responsibility for the quality of auctioned merchandise and remove themselves from conflicts that arise between buyers and sellers.¹⁰⁴ In at least one auction setting, however, the difference between the United States and Japan is vivid: Tsukiji’s Tuna Court has no equal in the United States.¹⁰⁵ Tuna auctions in the United States embrace *caveat emptor*, not a Tuna Court, and U.S. cattle auctions also put buyers at risk when it comes to latent defects. (Cattle auctions in the United States are similar to Japanese tuna auctions. Like tuna, an external inspection cannot fully reveal the inner characteristics of a cow; cows are living creatures subject to a wide range of possible problems; each individual animal commands a significant market value; and beef is an essential component of the U.S. food supply and has cultural salience.)

In comparison to the management of disputes at other auctions in both the United States and Japan, therefore, the Tuna Court is distinctive. It cannot be described as “typically Japanese,” because it does not represent the usual way in which auction-related conflicts in Japan are resolved. Nor is it a system that arises inevitably from tuna auctions, as the evidence from Hawaii makes clear. Instead, like many institutions, the Tuna Court emerged from a particular configuration of historical, economic, and social factors, and it represents a response to those factors. Like New York’s orthodox Jewish diamond dealers and California’s rural cattle ranchers, Tokyo’s tuna traders have taken a particular approach to resolving conflict;

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103. According to Cassady’s authoritative work on auctions, “The maxim *caveat emptor* is generally applicable to the sale of goods at auction, unless an express warranty is made.” CASSADY, *supra* note 39, at 132. Cassady’s research on auctions started with his study of the fish industry and the trade in marine products, for which he visited fish auctions throughout the world in the 1950s. But he does not mention disputes over the quality of auctioned fish, despite his discussion of other types of conflicts; this suggests that he did not observe a Tsukiji-like Tuna Court during his research. *Id.* at 133-34.

104. Online auction websites in both the United States and Japan, for example, offer advice to buyers and sellers who have a dispute, but they do not directly participate in adjudicating conflicts. *See, e.g.*, <http://www.ebay.com> (U.S.) and <http://www.bidders.co.jp> (Japan).

105. Though some might perceive similarities between the Tuna Court and an inspection system regulating North American tobacco sales during the seventeenth century, the two are not truly comparable. Tobacco sellers would “nest” low-quality tobacco within higher quality merchandise to deceive buyers, which triggered a system of inspection by English government officials. Eventually, inspectors had taken so many bribes that they were no longer credible, so buyers and sellers turned to neighbors to adjudicate disputes. But that was before tobacco auctions had started in the nineteenth century; there is no evidence that such a system extended to disputes over the quality of auctioned tobacco. *See* Wilbur Wright Yeargin, Jr., *The History of the Tobacco Auction System and The Tobacco Auctioneer* 6-15 (1989) (unpublished M.A. thesis, Duke University) (on file with author).

unlike those groups, theirs is an approach that is heavily dependent upon a formal, statutorily created institution, rather than informal norms.

V

NORMS, LAW, AND THE TUNA COURT

The tuna market at Tsukiji provides an opportunity to evaluate the claim that members of close-knit merchant communities will rely on efficient, informal norms rather than on legal rules to order their relationships and manage conflict.¹⁰⁶ Applied to Tsukiji's tuna traders, that claim suggests that merchants are likely to reject formal legal rules because informal norms will offer a faster, cheaper, and simpler way of handling disputes.

In fact, there is unambiguous evidence that Tokyo's tuna dealers shun the government's conventional legal apparatus. As John Haley demonstrated in the 1970s, structural factors like Japan's scarcity of attorneys, prolonged civil trials, and the expense of filing a case play a key role in limiting litigation among all (not only close-knit) parties in Japan, and culture may also play a role in inhibiting legal conflict.¹⁰⁷ Factors specific to the tuna trade, like the complexity of scheduling meetings with an attorney and making court appearances when one works fish-market hours, in addition to the perishable nature of fish, are further disincentives to litigate.¹⁰⁸ A search of Japanese legal databases does not turn up a single recorded judicial opinion (at least since 1900, as far back as the Japanese legal databases go) that involves a conflict over the quality of auctioned tuna,¹⁰⁹ despite the availability of legal rules on which to base a claim. Purchasers of damaged tuna could bring a cause of action under Article 570 of the Civil Code and Article 526 of the Commercial Code, which since the late 1890s have allowed buyers of goods with latent defects either to rescind the sale

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106. As Ellickson notes, "to govern their workaday interactions, members of a close-knit group tend to develop informal norms whose content serves to maximize the objective welfare of group members." ELLICKSON, *supra* note 1, at 283. Bernstein suggests that the benefits of private norms over formal legal rules are that they reduce the cost and delay of obtaining a court judgment, provide a streamlined process for disputing, and facilitate contracting. Bernstein, *supra* note 11, at 1740-42. For additional insight on New York's diamond dealers, see Daniel Lang, *Pelikaanstraat Midtown*, NEW YORKER, July 10, 1943, at 42-55.

107. Haley, *supra* note 10; see also KAWASHIMA TAKEYOSHI, *NIHONJIN NO HÔ ISHIKI*, (Tokyo: Iwanami, 1967).

108. The processing of claims at Tsukiji may appear to support the oft-made claim that extrajudicial systems for managing conflict in Japan are one way that the state keeps disputes out of the courts and limits the power of the judicial branch. Yet the trigger that often leads the state to create conflict resolution systems outside the courts—lawsuits that begin percolating through the system—is missing at Tsukiji, where the Tuna Inspection System evolved without regard to concern about an increase in litigation.

109. The searches were conducted using the CD-based Hanrei Taikei system compiled by the Daiichi Hōki Company, <http://www.daiichihoki.co.jp>.

or to obtain a price reduction commensurate with the degree of damage.¹¹⁰ Both of those potential remedies are more generous than the resolution provided by the Tuna Court.¹¹¹ Yet the possibility of receiving a full refund for a damaged tuna has not brought buyers to the courts. Indeed, none of the dealers I interviewed at Tsukiji had heard of the relevant Articles of the Civil or Commercial Codes, much less how either might be relevant to their transactions, and they evidenced deep skepticism about litigating cases of tuna quality.

But the reluctance of Tokyo's tuna dealers to pull their fish carts through the streets of Tokyo in order to assert their claims at the Summary Court or District Court does not represent a rejection of state-sponsored law. Like all wholesale markets in Tokyo, Tsukiji is built on land owned by the TMG, and its overall operations are regulated by the Ministry of Agriculture, Forestry and Fisheries, which has jurisdiction over all Japanese fish, vegetable, and livestock markets.¹¹² National legislation is far too blunt to take into account the many differences in locales and products that are germane to such locally embedded institutions. Consequently, the detailed regulation of regional markets is left to local government, and in the case of Tsukiji that means the TMG. Among the TMG's many ordinances that set standards for the operation of Tsukiji is the one from 1972 outlining a process for compensating buyers who purchase a damaged tuna.¹¹³ Tuna traders have therefore turned their backs on the government's centrally administered system of courts, but in its place they have embraced another form of government involvement in their relations—a TMG-created dispute-resolution mechanism that I call the Tuna Court.

Of course, one's willingness to conceptualize the system at Tsukiji as a court depends at least in part upon how "court" is defined. Clearly, the Tuna Court does not conform with what Martin Shapiro calls the "prototype" of courts—institutions where independent judges apply

110. Civil Code of Japan, art. 570; Commercial Code of Japan, art. 526 (originally Article 288) ("In the case of a sale between merchants, the buyer shall, upon taking delivery of the subject matter, examine it without delay, and if he discovers any defects therein or any deficiency in quantity he shall immediately dispatch notice thereof to the seller; otherwise he has no right to cancel the contract, to demand a reduction in the price or to claim damages."). Commercial Code of Japan (Eibun Hōrei-sha trans., Tokyo, Japan, 2004). On the general duty of inspection, see EGASHIRA KENJIRŌ, SHŌTORIHIKIHO 26-33 (Tokyo: Kōbundō, 2002).

111. The Tuna Court does not allow buyers at Tsukiji to rescind the sale, and it provides compensation for only 50% of the value of the damage.

112. The *Chūō Oroshiuri Shijō Hō* [Central Wholesale Market Law], first passed in 1923 and revised in 1971, authorizes the Ministry of Agriculture, Forestry and Fisheries to set standards for the operation and licensure of wholesale markets, and it authorizes the use of auctions to sell fish. But it does not go into great detail about the operation of particular markets; that is left to local governments. The Tokyo Metropolitan Government's ordinance that outlines the operation of all wholesale markets in the city is *Tokyo-to Chūō Oroshiuri Shijō Hōrei* [Tokyo's Central Wholesale Market Ordinance]. See http://www.reiki.metro.tokyo.jp/reiki_honbun/ag10111481.html.

113. The ordinance also covers swordfish, but the volume of swordfish is dwarfed by that of tuna.

preexisting legal norms after hearing adversary proceedings, with the goal of making a dichotomous decision that one party is legally in the right and the other is legally in the wrong.¹¹⁴ But as Shapiro argues, the prototype fails to describe the vast majority of institutions that we call "courts."¹¹⁵ Instead, courts exist on a spectrum; beyond a common dispute-resolution logic that entails the use of third parties to resolve conflicts, they take many forms and incorporate a variety of features.¹¹⁶ Marc Galanter and John Lande have pointed to an array of features that make courts more or less "public" or "private," with "public" resembling the prototype critiqued by Shapiro. To distinguish between the publicness and privateness of courts, they offer criteria that include access to and location of the proceedings, as well as personnel, funding, review, substantive norms, and procedures.¹¹⁷

Using these definitions and criteria as a matrix, what is the best way to classify Tsukiji's dispute-resolution institution? On the one hand, the TMG ordinance is quite specific in detailing the operation of the Tuna Court. It prohibits buyers from bringing claims that involve fish that cost less than ¥120/kilo, and requires that when buyers make claims they must cut their fish into at least four pieces before presenting it to the judges. It prescribes a system for selecting judges and outlines the supervisory authority of the TMG. It provides the substantive rules that control the proceedings, limiting price reductions to between 11% and 50%. It offers a system of appeal. Like most courts, it occupies a specific location on government land, and precedent matters. The rules for handling disputes at Tsukiji are thus state law, which is interpreted and imposed by a specialized public court.

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114. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981). Robert Summers raises a number of concerns about H.L.A. Hart's view of courts that echo Shapiro's rejection of the prototype of courts. See Robert S. Summers, *Legal Institutions in Professor H.L.A. Hart's Concept of Law*, 75 NOTRE DAME L. REV. 1807 *passim* (2000).

115. In Shapiro's view, the most important quality of a court is that it involves a conflict structured as a triad, in which two parties appeal to a third party to help them resolve their differences. SHAPIRO, *supra* note 114, at 1.

116. *Id.*

117. Although Galanter and Lande emphasize the many dimensions along which courts may vary, they nonetheless provide a tentative definition of a public court, which they say is "an institution constituted and operated by public (governmental) authority that determines rights or entitlements and resolves claims according to publicly authorized norms, in judicial form, whose decisions are backed up by public force." Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 *STUD. IN L., POL. & SOC'Y* 393, 298-99 (1992). Richman offers a somewhat simpler distinction between public and private ordering: "public ordering employs the coercive power of the state, to which all actors are subject and relies on standard contract law and litigation rules. In contrast, private ordering relies on reputation mechanisms, which can induce only members of a merchant community to comply, and exhibits separately created law and selected judges." Richman, *supra* note 7, at 2340. Galanter and Lande's more complex matrix better captures the many dimensions along which dispute-resolution institutions vary, and it is therefore more helpful in thinking about the attributes of the Tuna Court. See Galanter & Lande, *supra* at 399.

On the other hand, the Tuna Court incorporates a number of features that are more typical of private courts: only certain types of parties have access to the Tuna Court, the proceedings are not open to the public, the industry-supplied judges are paid by private parties, and there are no public records. If one's definition of a court is limited to the prototype described and rejected by Shapiro, then the Tuna Court is a different kettle of fish. There are obvious differences between Tsukiji's dispute-resolution forum and courts like the United States or Japanese Supreme Court, just as there are between the Tuna Court and standard trial courts.¹¹⁸ But if one accepts that there are many different types of courts that manifest a variety of features, including public courts like supreme courts, housing courts, and small-claims courts, as well as the range of institutions that Galanter and Lande call "private courts" (court-annexed arbitration, rent-a-judge systems, "embedded tribunals" like the NCAA's Committee on Investigations, and others), then the question is not *whether* the Tuna Court is a court but rather what kind of court it is.¹¹⁹

One way to analyze the Tuna Court's "courtiness" is by analogy to the merchant law of the Middle Ages, the so-called *lex mercatoria*. Over the past several decades, scholars have been drawn to the study of merchant law, which they have seen as a possible model for the management of contemporary transnational trade disputes.¹²⁰ Similar to Tsukiji's Tuna Court, the *lex mercatoria* handled conflicts between merchants in bodies that were presided over by merchant-judges. Where *lex mercatoria* and the Tuna Court differ is with regard to jurisdiction; unlike the Tuna Court, which controls a relatively narrow band of cases in the Tokyo fish market, the *lex mercatoria* is most often treated as a trans-industry and transnational set of norms not targeted at a particular type of business. In addition, and perhaps more importantly, the merchant law of the Middle Ages is generally seen as having been largely autonomous from the state, and its decisions were enforced by industry boycotts and expulsion.¹²¹ The Tuna Court owes its existence to a governmental ordinance; its decisions are enforced by the

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118. Some scholars have treated the creation of common-law precedent as a critical function of courts. The Tuna Court clearly falls short of that goal. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

119. Galanter & Lande, *supra* note 117, at 400-07. For an analysis of small-claims courts, see Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323 (1995). For an examination of one type of specialized court, see Susan Eley, *Changing Practices: The Specialised Domestic Violence Court Process*, 44 HOWARD J. CRIM. JUST. 113 (2005).

120. See, e.g., Symposium, *The Empirical and Theoretical Underpinnings of the Law Merchant*, 5 CHI. J. INT'L L. 1 (2004); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1995); Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990).

121. One such analysis is Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523 (2005).

state; and in a variety of other ways (discussed above) it is a creature of the state.¹²² Yet in spite of their comparatively weak link to government, the scholarly literature uniformly refers to the merchant tribunals of the Middle Ages as courts.¹²³

Another set of institutions that can be usefully compared to the Tuna Court are problem-solving courts.¹²⁴ Partly as a result of studies by the U.S. Department of Justice, New York and other states have in recent years created problem-solving courts targeted at social issues like drug abuse, domestic violence, mental illness, and homelessness.¹²⁵ Those coming before such courts are called “clients” rather than defendants, and judges who are trained in the subject matter of the court get deeply involved in the details of their clients’ lives.¹²⁶ Yet the encounters occur in traditional courthouses, and judges are attired in their usual judicial robes.¹²⁷ Like merchant courts, problem-solving courts are, along a variety of dimensions, less “public” than the Tuna Court; they are thus elongating the spectrum of what counts as a court, and they point to the fluid and dynamic nature of dispute-resolution institutions.

Related to the continuum of publicness and privateness that characterizes courts, dispute-resolution mechanisms are also arrayed along a spectrum of formality.¹²⁸ The contemporary literature on law and norms tends to treat formality and informality dichotomously, designating state-created law and state-supervised courts as “formal” while calling the norms of

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122. Recently, however, a number of articles have argued for a stronger link between merchant norms and state law than had previously been acknowledged. See, e.g., Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT'L L. 39 (2004); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval “Law Merchant”*, Yale Law School Student Scholarship Series, Paper 5, 2005, at <http://lsr.nellco.org/yale/student/papers/5>.

123. Cooter writes, “The merchants in the medieval trade fairs of England developed their own courts and practices to regulate trade.” Cooter, *supra* note 3, at 1647.

124. See, e.g., Timothy Casey, *When Good Intentions are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 S.M.U. L. REV. 1459 (2004); Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003); Symposium, *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence*, 29 FORDHAM URB. L.J. 1755 (2002).

125. See Leslie Eaton & Leslie Kaufman, *Judges Turn Therapist in Problem-Solving Court*, N.Y. TIMES, Apr. 26, 2005, at A1. In New York, for example, there are 138 drug-treatment courts, 37 dedicated to domestic violence, 5 for mental health, and 1 for homelessness, and in the near future 3 problem-solving courts will be created to manage sex offenders. *Id.*

126. *Id.*

127. *Id.*

128. For a similar approach to the continuum between formality and informality, see Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U. L. REV. 1217 (2004), describing lending transactions as existing on a spectrum from formal to informal and arguing that the selection of a more or less formal type of transaction has a cultural basis. For the best analysis of Japanese legal “informality,” see UPHAM, *supra* note 10.

close-knit groups “informal.”¹²⁹ But there is no bright line separating those types of interactions. On one side of the continuum, one might imagine state-sponsored rules, perhaps those promulgated by national assemblies or supreme courts, followed by the rules created by local governments, regional and specialized courts, and village councils. The other side of the continuum may start with the norms of the family, alongside of which are institutional norms of various types (like school and workplace norms), community norms, regional norms, and even national norms.¹³⁰ But from one end of the spectrum to the other, one finds a mix of the formal and the informal, the normative and the positive. The interactions between and among legislators and judges, for example, are powerfully shaped by “informal social regularities” that they feel obligated to follow, and which affect their formal rulemaking by defining the acceptable limits of their behavior.¹³¹ Likewise, the norm-laden rules that shape family interactions have elements of formality, sometimes articulated by the head of the family himself or herself (negotiated curfews, prohibited acts, prescribed punishments) and sometimes pronounced by the state (surrogate decision making, inheritance). Somewhere along the spectrum, one may seek to justify a demarcation between formal and informal; indeed, it is difficult to conceptualize the relationship between different types of social ordering without such a demarcation. Nonetheless, it is critical to recognize that “formal” and “informal” do not exist as mutually exclusive categories; each contains elements of the other. Like the definition of a court, the designation of “formal” or “informal” depends upon the answer to the question, “Compared to what?”

The intertwining of the formal and the informal is well illustrated by Tsukiji’s dispute-resolution mechanism. Just as the avoidance of national courts does not signify the rejection of public law, the embrace of the TMG’s Tuna Court does not mean that informal norms are unimportant in the resolution of conflict between tuna merchants. One can identify a variety of norms that affect the operation of the Tuna Court. Buyers, for example, are invariably polite to each other. They never try to make a case for a

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129. For two recent contributions to that literature, see Elizabeth A. Hoffmann, *Dispute Resolution in a Worker Cooperative: Formal Procedures and Procedural Justice*, 39 *LAW & SOC’Y REV.* 51 (2005); Susan M. Olson & Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 *LAW & SOC’Y REV.* 139 (2004).

130. Galanter usefully explains the relationship between “official law” and “indigenous law,” as requiring “[o]ne [to] imagine a scale with pure types at either end. At the official ‘exogenous’ end might be formal written rules remote from everyday understandings, enunciated by trained specialists, enforced by governmental coercion. At the indigenous end would be simple (?) rules, close to everyday perceptions, applied by non-specialists internalized by the participants and enforced by diffuse social pressure.” Galanter, *supra* note 6, at 18 n.25.

131. I am quoting from McAdams’s definition of norms as “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.” McAdams, *supra* note 3, at 340.

high price reduction by comparing their (worthy) claim with another buyer's (frivolous) claim. They avoid bringing tuna with marginal problems. They defer to the initial decisions of judges, which greatly limits the frequency of appeals. Numerous norms also shape the behavior of judges and administrators. Although the TMG ordinance does not specify how Court decisions are to be communicated, for example, a norm of openness has developed, and judges shout each verdict so that all who are present can hear the decision. Norms are also important to the determination of price reductions. The chief judge is given wide latitude in reaching a final judgment so that he can try to find a number that "feels right" rather than strictly following the ordinance and averaging the judges' scores.

Moreover, the Tuna Court's very existence likely depends on social norms. Although it is difficult to verify, for instance, the principle that the risk of latent defects should be borne by both buyers and sellers may have started as a market norm and been formalized as a legal rule in the TMG ordinance. And norms that bear on trust and reputation help to keep buyers and their disputes within the market's dispute-resolution mechanism.¹³²

Along a number of important dimensions, therefore, the government-controlled dispute-resolution process at Tsukiji resembles a public, formal court; however, like many courts, it is interwoven with community norms. Contrary to the view that informal norms and formal rules are mutually exclusive, Tsukiji's Tuna Court is an expression of both. The Tuna Court thus defies predictions that members of close-knit merchant groups will reject formal, public courts and laws in favor of informal group norms. Instead, formal law-bound procedures play a central role in the interactions of tuna traders and govern their management of disputes; compared to ranchers and diamond dealers, tuna traders have opted for a high degree of legal formality. Yet the presence of formal legal rules is compatible with many norms that inevitably shape their behavior.

There is an additional way that the Tuna Court challenges past scholarship on close-knit merchant communities. Although there is considerable disagreement among scholars of the Japanese legal system about how best to explain Japan's low litigation rate, one rare area of consensus is that the assertion of rights and the resort to formal means of resolving disputes is particularly infrequent among repeat players with regular future interactions.¹³³ In fact, that claim is commonplace among American law-and-

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132. It is difficult to know which if any of these norms predate the Tuna Court, since they may have emerged as a consequence of the Court. But it appears that the creation of the Court by the TMG was at least in part a response to a request from tuna traders, so the Tuna Court is itself an expression of their norms.

133. For accounts of Japan's low litigation rates, see Haley, *supra* note 10; Kawashima, *supra* note 10; Ramseyer, *supra* note 10. For an overview and critique of the U.S. literature on disputing and ongoing relationships, see Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735 (1996).

society scholars. Stewart Macaulay's widely cited work on Wisconsin businessmen argues that their desire to maintain a future relationship leads them to rely on informal methods of resolving disputes, and Marc Galanter's study of U.S. litigation patterns emphasizes that parties with continued dealings avoid using formal legal rules to resolve disputes because it risks severing their relationship.¹³⁴ Such views have been repeated and amplified by other socio-legal scholars, particularly anthropologists and sociologists who have studied conflict in discrete American communities.¹³⁵

Such well-considered analyses are contradicted by the fact that Tsukiji's tuna traders have adopted a system that encourages buyers to assert a right to compensation in the approximately seven thousand claims they bring each year. It is crucial to note that tuna traders are not required to bring their complaints to the Tuna Court. If they desired, buyers and sellers could resolve their conflicts privately. They could agree, under the auspices of their trade associations, to avoid the market's Tuna Court by imposing the cost of poor-quality fish on buyers. Or they could make sellers wholly responsible for quality problems. If they considered informality critical to positive future business dealings, they could avoid the TMG's formal court proceedings and opt for a different approach to dispute resolution. Yet tuna traders have come to depend upon a system that is more formal and rule oriented than many alternatives, and which involves clear, persistent, and direct disputing. They do so, I claim, for two reasons. First and most apparently, the Tuna Court is an efficient way of handling problems with the quality of auctioned tuna. Second, it plays a critical role in creating and preserving order in the marketplace. The following Part explores these two advantages.

VI

WHY A TUNA COURT? EFFICIENCY AND THE CREATION OF COMMUNITY

As Part V noted, studies of business dealings within close-knit commercial groups emphasize the efficiency of resolving conflict by means of informal norms. Such claims do a poor job of explaining the dispute-resolution process at Tsukiji. The most distinctive characteristic of the Tuna Court is its legal formality. Although the Tuna Court in part owes its

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134. Macaulay, *supra* note 7; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

135. See, e.g., CAROL J. GREENHOUSE, BARBARA YNGVESSON & DAVID M. ENGEL, *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* (1994); David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984); Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOC'Y REV. 891 (1979).

existence to the norms of tuna traders at Tsukiji, traders did not choose to rely only on the unwritten practices and values of their profession that had been created and reshaped over generations. Tuna traders' informal norms undoubtedly influenced their approach to dispute resolution—even the shared acknowledgement that there was a problem in need of a solution reflects the influence of trade norms. But when it really mattered, they turned to the government for rules and structures that could facilitate the resolution of conflict. In effect, they turned their backs on informal norms (perhaps because they were inadequate, or contested, or for some other reason; the historical record is insufficient to say), and moved away from what some scholars suggest is a particularly efficient way of handling conflict. Instead, they dragged the state into their conflicts, just as they drag their tuna to the Tuna Court.¹³⁶

The government-administered Tuna Court imposes certain costs on the parties. To make a complaint, buyers—generally the owners of small, family-operated companies—must take thirty to forty-five minutes away from their wholesale stalls during peak market hours to bring their fish to the Tuna Court and await a decision. Sellers, namely the five Tsukiji tuna auction houses, adjudicate the cases, so they must provide personnel who might otherwise spend more time on more obviously profitable activities. Market administrators oversee every claim, record the decisions, and inform all parties of the adjusted price; this requires extensive paperwork and consumes staff hours.

Nonetheless, such costs are modest when compared to what the Court provides. Buyers who bring their damaged fish to the Tuna Court obtain a rapid and almost automatic price reduction of between 11% and 50%. The entire process takes much less time than the average Tokyo commute. No lawyers or representatives are needed, there are no case-filing fees, and the only relevant evidence is a single fish (and the price that the buyer paid for it). Fact finding involves nothing more than five judges who inspect the disputed tuna, and their skill at doing so enables buyers to feel confident that they are being treated fairly. In short, Tsukiji's tuna traders appear to be engaged in a highly efficient system for resolving conflict, even though it is dominated by formal legal rules and procedures. They use the Tuna Court because they believe that the rewards considerably outweigh the costs.¹³⁷

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136. It is also possible (but unlikely) that the Tuna Court was imposed by the government without any bottom-up demand from tuna merchants. Based on the thin historical record and my conversations with merchants, it seems that there was some sentiment among tuna buyers and sellers that government involvement was desirable, but it is possible that the Court was more a consequence of government initiative than of merchant demand.

137. These claims are consistent with Cary Coglianese's "disturbance theory" of disputing. See Coglianese, *supra* note 133, at 758-62.

The finding that Japanese disputants will turn to the legal system when they think that they have something to gain confirms the claims of others who have studied conflict in Japan. Whether relying explicitly on a rational-choice perspective or taking a broader political or sociological approach, recent scholarship consistently emphasizes that individuals in Japan have no inherent hesitation about bringing their claims to court.¹³⁸ Indeed, the Tuna Court is exactly the type of court that one would expect litigants to favor. Its ability to resolve disputes quickly and efficiently makes it more attractive than alternative dispute-resolution techniques, so that even the predictability of its decisions (almost half of all cases reach the same 11% result) has not led tuna merchants to resolve their claims in the shadow of Tuna Court law.

But the promise of a fast and inexpensive solution to the problem of overpaying for a poor-quality fish is not the only reason for the frequent use of the Tuna Court. Tanase Takao, an influential legal academic, echoes the views of some American legal analysts in expressing skepticism about the social consequences of rights assertion and conflict.¹³⁹ As he puts it, "appeals to rights interrupt the flow of everyday social interaction and create tensions in social relationships [in Japan] . . . rights talk inevitably constructs subjects into abstracted identities lacking a communitarian ethos."¹⁴⁰ By focusing on the corrosive effect of formal disputing on the bonds of community, however, Tanase underemphasizes an alternative understanding of rights, conflict, and community. The Tuna Court at Tsukiji is an example of the centrality of rights and conflict in the *creation* of social order. By facilitating buyers' assertions of rights and airing of disputes; providing mild, community-preserving remedies rather than all-or-nothing, punitive, existence-threatening judgments; and downplaying the potentially divisive consequences of too much "rights talk," the Tuna Court serves to strengthen the ties between tuna traders that are essential to the successful operation of the market.¹⁴¹ Rather than splintering relationships

138. John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 121, 128 (2002); Ramseyer & Nakazato, *supra* note 21.

139. Tanase is best known to the English-reading world for his work on automobile accident disputes. Tanase, *supra* note 15. A selection of his voluminous Japanese-language writings has recently been translated and will be published in 2006. For a general discussion of his work, see Veronica Taylor, *The Scholarship of Takao Tanase*, Presentation at the 2005 Sho Sato Conference on Japanese Law, Boalt Hall, University of California, Berkeley (Feb. 11-13, 2005) (on file with author). His view of rights and community is influenced by MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

140. Takao Tanase, *Rights and Community* (forthcoming 2006) (untitled manuscript on the Japanese legal system, on file with author).

141. A study of the lobster industry in Maine, which relies on the literature on relational contracting, similarly emphasizes the importance to those working in the industry of reducing friction between actors to facilitate the operation of the market. Social and cultural factors, at least in some cases, trump market rationality. See JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988). For an overview of relational contracting, see *THE RELATIONAL THEORY OF CONTRACT: SELECTED*

and incurring unjustifiable costs, the process at Tsukiji neutralizes the negative feelings that often accompany litigation in the United States, and instead is essential to the maintenance of an ordered marketplace.¹⁴² Stated differently, the formal rules for resolving conflict over defective goods at Tsukiji, embodied by the Tuna Court, succeed in diffusing a variety of tensions that would otherwise inhibit the operation of the tuna auction. Tsukiji's Tuna Court thus fulfills a number of functions. Not only does it serve to resolve discrete disputes, but it also fosters positive relationships between tuna traders and enables goods to rapidly flow through the marketplace.¹⁴³

The effectiveness of Tsukiji's Tuna Court in creating and maintaining order does not suggest the absence of personal animosity or the suppression of competition among tuna traders. Those are inevitable and enduring features of any complex marketplace. Instead, "order" refers to a set of qualities that enable the auction to operate in a way that best serves the interests of all parties. Among the qualities that constitute order, trust is notable.¹⁴⁴ Without trust, buyers would be less willing to rely on the seller's pre-auction grading of tuna; they would be suspicious of how auctioneers conducted the auction; and sellers would lack confidence in the behavior of buyers engaged in tuna inspection and in other circumstances. Such concerns would affect the overall atmosphere of the market, and they would also slow its operation.¹⁴⁵ And in a business where the freshness of the product is crucial to its value, getting tuna quickly from the auction floor to the table is of the utmost concern.

WORKS OF IAN MACNEIL (David Campbell ed., 2001). An excellent Japanese compilation on relational contracting is KEIYAKU HÖRI TO KEIYAKU KANKŌ [PRINCIPLES OF CONTRACT AND PRACTICES OF CONTRACT] (Tanase Takao ed., Kōbundo 1999).

142. Many buyers start and end their professional lives at Tsukiji, as do some of the sellers. A relatively small, insular group of individuals run the tuna auction, and they are proud of what they do and extremely good at it. For them, the atmosphere of the market and the interactions between buyers and sellers is a central part of their lives. So they care about maximizing order and minimizing tension for the same reason that most people prefer a congenial workplace to one that is poisoned with mistrust and hostility. For a discussion of the legal consequences of hostile relations, see Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211 (2002).

143. One can also think of the tuna auction at Tsukiji as a place where buyers are essentially paying for a tuna that comes with an insurance policy that covers some of the loss from latent defects, which is more effective than private insurance because it involves a group of arbitrators and thus limits the risk of moral hazard (which might lead buyers to be less careful when inspecting and bidding for tuna). I am grateful to Robert Kagan and Chris Sanchirico for raising this issue.

144. The importance of trust is not limited to Tsukiji, but is an important feature of most auctions and other commercial interactions. In U.S. livestock auctions, "spotters" point out defects in animals about to be auctioned, and buyers expect that defects will be revealed. Robert E. Clark, *On the Block: An Ethnography of Auctions* 41-76 (Aug. 1973) (unpublished Ph.D. dissertation, University of Montana) (on file with author) (discussing the role of trust in U.S. livestock auctions).

145. Time is of the essence in all auctions, in part because auctioneers try to create a rapid pace that enables them to maximize the number and price of auctioned goods. *Id.* at 77.

The existence and operation of Tsukiji's Tuna Court promotes order and contributes to the successful functioning of the tuna trade in at least five ways. First, the very fact that there is an outlet for the resolution of disputes plays a role in the creation of a stable market environment.¹⁴⁶ Like studies of procedural justice in the United States that highlight the importance to litigants of having their day in court, dispute resolution at Tsukiji gives those who are unlucky a chance to air their concerns.¹⁴⁷ They can take their fish to Court, complain to the sellers, and commiserate with other dissatisfied buyers. In that way, the Tuna Court is like a corner café where merchants blow off steam about the lousy fish they bought in front of a captive audience of other buyers and judges who not only listen but also provide financial relief. The high rate of claiming at Tsukiji (1.5% to 2% of all tuna sales) and the similar frequency with which claims are brought for the most and least valuable fish point to the Tuna Court's function as a *venue* for conflict, not simply a mechanism that provides financial relief. Without such an outlet, frustration over defective fish would simmer, and it could manifest itself in ways that might diminish the good will on which the auction depends.

Second, the system for resolving conflict at Tsukiji privileges the value of expertise, the most important currency of the tuna market. If there were no opportunity to assert and resolve claims about allegedly hidden defects in tuna, there would be ambiguity as to whether those who purchased damaged goods were unlucky or were unskilled evaluators of tuna quality, and such ambiguity would be corrosive to market relationships.¹⁴⁸ The vital bond that links the community of tuna traders is their finely tuned knowledge of tuna; it is what limits entry to the trade, breeds and defines respect, enables conversations, determines grading and price, and ultimately determines which buyers will flourish and which will fail.¹⁴⁹ As a forum for resolving disputes, the Tuna Court brings together dozens of people daily—at least twenty-five buyers, several TMG officials, perhaps a dozen or more representatives from the five auction houses—who for sixty minutes (four sessions of fifteen minutes each) engage in a series of

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146. This provides at least a partial explanation for why so many cases are brought to the Tuna Court. One might assume that the predictability of the Tuna Court's judgments would lead merchants to resolve their claims "in the shadow" of the Tuna Court's substantive rules. But the low cost (in terms of time and trouble) of using the Court, along with its other benefits, discussed *infra*, lead buyers and sellers to utilize the court itself rather than attempting to replicate its outcomes through informal means.

147. On the importance to disputants of having their "day in court," see E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

148. There is some overlap here with what Bernstein and others call "reputation." Bernstein, *supra* note 2.

149. At Tsukiji, for example, there are not generic eel dealers, but some who specialize in freshwater eel and others in saltwater eel; there are not shellfish sellers, but sellers of shrimp and sellers of oysters. Business and social relations, financial as well as familial ties, are shaped by what one does, and how well one does it.

conversations about tuna diseases, handling, and storage.¹⁵⁰ Everyone in attendance can look at the fish that have been brought to court, and the judges' verdicts are loudly and publicly announced, a form of shaming for those who bring spurious claims and a reward for those who do not. In a sense, each dispute-resolution session serves as a mini-seminar, where experts trade knowledge about an issue that is at the core of their livelihood and provide each other with the equivalent of "CTE"—continuing tuna education. The reward for participation is that so long as there is some merit to the claim, a price reduction will be offered, though it is likely to be only 11% unless the fish is virtually unusable, in which case the buyer will save 50% of the bid price.

The premium placed on expertise explains why the Tuna Court entertains no-fault claims and why almost every claim is compensated. The unstated norm of disputes about quality at Tsukiji is that if one is in doubt about whether a tuna is defective, it is better to refrain than to complain. During the time that I observed the resolution of conflicts at Tsukiji, there was only one occasion when a buyer brought a tuna before the judges and was greeted with raised eyebrows. It was a large fresh fish—over 500 lbs—and one of the most expensive purchases of the day. The buyer was concerned that it was diseased, but within seconds of examining it all five judges concluded that it was fine. The buyer was embarrassed; he had complained about what everyone thought was a perfectly good product, and in the process had raised questions about his judgment and expertise. As the judges made a few sarcastic remarks, the buyer talked with the TMG's supervisor and withdrew his complaint, saying that he would look in more detail at the fish and would return if he saw further evidence of a problem.¹⁵¹

Bringing meritless claims does not suggest dishonesty, but it suggests something equally undesirable: it raises the possibility that the complainant lacks the degree of expertise needed to be a player in the tuna trade. Appeals are also closely linked to expertise, with their infrequency in part explained by the reluctance of buyers to challenge the expertise of sellers, and their high success rate reflecting the willingness of sellers to acknowledge the expertise of buyers by ratcheting up the price reduction in cases about which buyers feel strongly enough to appeal. Beyond a system for resolving disputes, therefore, Tsukiji's Tuna Court offers buyers and sellers

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150. As noted in Part II, *supra*, judges must have several years of experience working in the specialized tuna division of an auction house, and they often attend seminars about tuna held by the Tuna and Swordfish Buyers Association. Most judges are relatively young (between their early 30s and mid-40s), because the auction houses see judging as an opportunity for them to finely tune their knowledge of tuna, get to know experts from other companies, and interact with buyers and TMG staff.

151. Such withdrawn cases are not included in the data presented in this paper. But they are sufficiently rare—probably fewer than a dozen cases a year—that they would not affect my conclusions.

a venue for displaying and refining their expertise, and it allows buyers to absolve themselves of any blame for the misfortune of having purchased a damaged fish. As a consequence, good market relations are maintained and order is preserved among those who participate daily in Tsukiji's tuna exchange.

Third, the Tuna Court reaffirms the relationships that are crucial to the maintenance of a well-ordered marketplace by reducing the potential for exploitation among buyers and sellers. Because the supply of and demand for auctioned tuna fluctuates for a variety of reasons—fishing conditions, economic conditions, the popularity of particular types and cuts of fish, health warnings such as concern over mercury levels, and other factors—the relative power of buyers and sellers also varies.¹⁵² Without a generally accepted method for handling disputes over quality, one can easily imagine that buyers would exert pressure on sellers for compensation during times of high supply or low demand, and vice versa. If the settlement of disputes changed in step with market conditions, so that whichever party had more market power at a given moment could dictate the principles of compensation, conflict resolution would become little more than extortion, and the emphasis placed on expert evaluation of damaged tuna would diminish. The substitution of power for cooperation and expertise would damage the atmosphere that enables the tuna auction to function successfully. Tsukiji's conflict-resolution system regularizes the principles of disputing and contributes to constancy in the balance of power between buyers and sellers, which is crucial to the stability and harmony of their interactions.

Fourth, the Tuna Court responds to and reaffirms a conception of fairness that is shared by market participants, and in doing so it establishes a way of managing conflict that traders have come to see as a natural and desirable condition of the marketplace. Investigating and evaluating notions of fairness is inevitably a difficult task, and so the data presented in support of this claim is speculative. But in conversations with market participants about dispute resolution at Tsukiji, a clear pattern emerged. When interviewing tuna traders about the Tuna Court, I asked why they didn't save the time and trouble engendered by the current system by creating an *ex ante* way of handling conflict, such as putting all the risk on buyers. Buyers and sellers alike, as well as representatives from the TMG, invariably responded that they had a Tuna Court because it was the fair (*kōsei*)

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152. When it comes to tuna, the laws of supply and demand must also take into account the public's "taste" for particular parts of the tuna. The fatty underbelly (*toro*), for example, is now the most expensive part of the tuna, with a single sushi-sized bite sometimes costing upwards of \$20. But it has not always been highly prized. During the Edo Period, it was considered too oily for those with discriminating taste and was left for those who could not afford the "better" parts of the fish. UEDA, *supra* note 12, at 179. For an analysis of the formation and change of "taste" and its sociological significance, see PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* (1984).

way to handle the problem of defective fish. Further questioning revealed a trio of concerns thought to be at the core of a fair system. Fairness, in the view of those involved in Tsukiji's tuna trade, has several characteristics: (1) it requires a system of dispute resolution to handle the problem of defective tuna, (2) it dictates that the financial loss caused by defective fish be shared by buyers and sellers, and (3) it demands that similar problems should lead to similar price reductions. The existence of the Tuna Court itself is part of what constitutes fairness. So too is the allocative principle that underlies the adjudication of disputes—the principle that allows a buyer's cost to be reduced by no more than half the value of the total damage. The fact that the likelihood of receiving the minimum or maximum price reduction (recall that 57% of buyers received the 11% minimum or 50% maximum) is much higher than any other resolution also speaks to the shared view of fairness, since the problems that lead to complaints are often subjective—how “off” is the color, how “bad” is the disease, how “tough” is the meat—which leads judges to make binary decisions that a tuna's defect is either minor or catastrophic.¹⁵³ By creating and using a system of dispute resolution that complies with, and continually reasserts, the view of fairness shared by market participants, market relations remain positive, order is maintained, and tuna can be traded quickly and efficiently.

Ultimately, dispute resolution at Tsukiji reflects as much the importance of local reason as that of universal rationality. The rules and procedures of Tsukiji's Tuna Court are influenced by the logic of the market, but they also bear the imprint of the needs, interests, and values of those who participate in the tuna auction. Because buyers and sellers meet each other daily and share an interest in quickly and profitably moving tuna from the auction floor to the sushi counter, they want a working relationship that maintains market order and minimizes tension. The Tuna Court is critical to meeting that goal. When buyers wheel their tuna carts to the Tuna Court and assert their right to compensation, and when representatives from the five tuna auction houses examine their allegedly damaged goods, they are engaged in an ongoing process of fine-tuning the market relationships on which the success of the tuna trade depends.

Still, there are limits to the utility of frequent and intense disputing. At some point, conflict can morph from a builder of community to a threat to the very values it so effectively bolsters. Although Tsukiji's “Accident Inspection Place” manifests many of the attributes of public courts, therefore, those whose lives are rooted in the market are conscious of the

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153. The 11%-50% range is a relatively mild, community-preserving remedy, unlike an “all or nothing” resolution that might reduce the effectiveness of the Tuna Court as a builder of market relations. Email from Robert Kagan, Professor, University of California, Berkeley (Feb. 2005) (on file with author).

potential threat legal conflict poses to the marketplace. As a result, they deemphasize the formal nature of their disputes and the commonalities between their tuna “inspection place” and a courthouse. My research at Tsukiji was punctuated by a recurring question from those I interviewed: what could an American law professor possibly find interesting enough about the tuna trade to lead him to hang around a cold, wet corner of the marketplace during the pre-dawn hours? When I responded to one of my questioners, a Tuna Court judge, by saying that I was interested in the legal nature of Tsukiji’s dispute process, he immediately disagreed. “This doesn’t have any legal significance” (*hōritsuteki imi ga nai*) he shot back. “We are just five guys talking” (*go-nin no aida no hanashi dake da yo*).¹⁵⁴ Likewise, in one of my first discussions about the Court with the Director of the *Ōmono Gyōkai* (Tuna and Swordfish Buyers Association), I used a Japanized version of the English word “claim” to describe the bringing of a dispute to Court. He quickly corrected me. When a buyer appeals a case, he explained, the buyer is making a “claim” (he used the word *kuremu*); initially, buyers are only asking that “accidents” (*jiko*) be evaluated.

Those conversations point to a fifth way the Tuna Court serves to create and preserve order among tuna traders. While it provides an official, state-sponsored outlet for blowing off steam, reaffirming expertise, balancing power among traders, and articulating a shared view of fairness, the nature of the Tuna Court allows buyers and sellers to think of themselves as engaged in a purely informal, in-house process. Although in general people in Japan will go to court when it is in their interest to do so, the calculation of the costs and benefits of formal disputing is not simply an actuarial exercise. Among tuna traders (and many others), going to court has a strongly negative connotation. As in Thailand, where a colloquial expression holds that it is better “to eat dogshit than to go to court,”¹⁵⁵ courts in Japan are often said to be acrimonious, relationship-ending, time-consuming places. That view is at least in part a legacy of a long-standing government policy to delegitimize the courts, which it saw as contributing to social disintegration. In an effort to ensure that “Japanese morals rather than law” shaped the resolution of disputes, for example, the government enacted a variety of prewar laws that required many types of conflicts to be handled by extrajudicial conciliation.¹⁵⁶

154. Interview with Mr. Matsuzaki Hidehiko, Tuna Section, Dai-ichi Suisan Co. Ltd., in Tsukiji Market, Japan (Dec. 6, 2004) (on file with author).

155. DAVID ENGEL, CODE AND CUSTOM IN A THAI PROVINCIAL COURT: THE INTERACTION OF FORMAL AND INFORMAL SYSTEMS OF JUSTICE 98 (1978), discussed in Marc Galanter, *Adjudication, Litigation, and Related Phenomena*, in LAW AND THE SOCIAL SCIENCES 151 (Leon Lipson & Stanton Wheeler eds., 1986).

156. John Owen Haley, *The Politics of Informal Justice: The Japanese Experience, 1922-1942*, in THE POLITICS OF INFORMAL JUSTICE, VOL. 2, at 125-47 (Richard L. Abel ed., 1982). Recent survey data suggests that the public no longer has strongly negative feelings about litigation; but that data fails to interrogate members of close-knit commercial groups, or any other close-knit groups, about their

Moreover, the most common Japanese word for court, *saibansho*, has a decidedly official, judicial meaning. Unlike the liberal use of the word "court" in English to refer to a variety of different types of dispute-resolution mechanisms, *saibansho* clearly references one of the hierarchically organized bodies administered by the Supreme Court Secretariat. The TMG ordinance that established the Tuna Court does not use the word for court, and Tsukiji's tuna traders disclaim the association between the Tuna Court and a "real" court, at least in part because it would be misleading in Japanese to call Tsukiji's dispute-resolution body a *saibansho*, since it clearly exists outside of the Secretariat's administrative domain. Consequently, the tuna traders have the best of both worlds—they can legitimately deny that their dispute-resolution institution is a court but at the same time enjoy the benefit of an efficient government-run, conflict-resolving body, which saves them from the potential complications of private bargaining.

In that way, the Tuna Court provides traders with an elegant solution to their conflicts. By offering an in-house system for adjudicating claims, it eliminates the time and trouble of bringing their cases to the official courts, and at the same time obviates the potential discomfort of having to find more personal, private solutions to their disputes.¹⁵⁷ By keeping their claims local, tuna traders can defang the existence of face-to-face conflict and instead define their disputes as simply routine discussions of technical "accidents" that are necessary to arrive at the appropriate price adjustment. Likewise, the pursuit of a price reduction is not articulated as the assertion of a right to compensation but rather as a mutual quest for consistent results. In essence, the Tuna Court enables tuna traders to deny the existence of frequent disputing in their workplace and instead allows them to emphasize their membership in a cohesive trading community, where the inherent nature of the product brings about certain problems with quality that are nobody's fault and that can be quickly and consensually resolved. Packaged in non-disputatious terms, the Court poses a minimal threat to the social order of the tuna traders and instead highlights the informal, consensual, and personal nature of market relationships. This further stabilizes the tuna marketplace.

"The Shasta County evidence," writes Ellickson, "indicates that people are aware that the legal system is a relatively costly system of dispute resolution and therefore often choose to turn a deaf ear to it."¹⁵⁸ In

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attitudes toward bringing their co-members to courts. See *Shihō Seido Kaikaku Shingikai* [Justice System Reform Council], *Minji Soshō Riyōsha Chōsa: Hōkusho* [Report of a Survey of Civil Litigation Use] (Dec. 2000), some results of which are discussed in Haley, *supra* note 138, at 128. An account of the government's continuing effort to delegitimize the courts can be found in UPHAM, *supra* note 10.

157. In essence, the choice between law and norms is therefore in part a function of culture, since it will reflect the degree to which different groups are more or less comfortable with private bargaining.

158. ELICKSON, *supra* note 1, at 281.

contrast, the Tuna Court is in almost perfect harmony with the needs of market participants. The Court's durability and vitality cuts against the grain of theories predicting that overt conflict between closely linked parties shatters relationships.¹⁵⁹ At Tsukiji, the airing and resolving of disputes is critical to the connections binding tuna merchants. Moreover, in contrast to the received wisdom that members of close-knit merchant communities generally find informal norms of managing conflict more efficient than formal legal rules,¹⁶⁰ Tokyo's tuna traders use formal rules and institutions to resolve their disputes. The heavy reliance on the formal, state-created Tuna Court neither obliterates the possibility of long-term cooperation nor inhibits the flow of tuna through the marketplace. To the contrary, it provides evidence that in Japan and perhaps elsewhere, carefully designed, highly specialized, government-operated courts may be an effective way of handling conflict that arises in distinct merchant communities. As the operation of the Tuna Court makes clear, such courts can quickly and inexpensively handle a high volume of cases, and at the same time contribute to the maintenance of an ordered marketplace.

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159. Yngvesson offers a useful summary of that literature: "Conventional wisdom and much social science research tell us that people who are involved in continuing relations will handle conflict through procedures which emphasize reconciliation and mutually agreed upon decisions. More formal procedures—typically official government or other public tribunals—are avoided, since their use may escalate conflict and endanger the relationship." Barbara Yngvesson, *Re-Examining Continuing Relations and the Law*, 1985 WIS. L. REV. 623, 624 (1985). For additional insights on continuing relationships and the law, see MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955); Marc Galanter, *Vision and Revision: A Comment on Yngvesson*, 1985 WIS. L. REV. 647 (1985); Merry, *supra* note 135.

160. For a discussion of norms, law, and efficiency, see Mahoney & Sanchirico, *supra* note 6.