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3 Law, Culture, and Conflict

Dispute Resolution in Postwar Japan

ERIC A. FELDMAN

I. INTRODUCTION

The 1963 publication of Takeyoshi Kawashima's "Dispute Resolution in Contemporary Japan" has indelibly influenced the study of law and conflict in postwar Japan. A mere nineteen text pages of Arthur Taylor von Mehren's seven hundred-page volume, *Law in Japan: The Legal Order in a Changing Society*,¹ Kawashima's observations about the infrequency of litigation in Japan, and his emphasis on the sociocultural context of conflict, continue to resonate. As a noted scholar of Japanese law has succinctly written, "Virtually every scholarly work [about Japanese law] in the last thirty-five years has been framed in some way or another by the conceptual construct Professor Kawashima offered."²

Kawashima was appointed as a professor of civil law at Japan's preeminent legal academy, the Faculty of Law at the University of Tokyo, before the outbreak of World War II. He held that institution's first chair of legal sociology, and during his career he published scores of books and articles. But "Dispute Resolution in Contemporary Japan" was Kawashima's first article to be translated into English, and it remains the most complete access to his work for English-language readers unable to tackle the vernacular Japanese text.³

It is a matter of speculation as to why "Dispute Resolution in Contemporary Japan" fell on such receptive ears. Perhaps it spoke to concerns about American litigiousness that were on the minds of legal academics and policy makers, who were looking for ways to rein in the use of the courts in the

United States. Maybe it fit well with the stereotypes of Japan developed in the preceding years by English speakers, many of who had been schooled on the work of Ruth Benedict and others who emphasized the uniqueness of Japanese culture.⁴ Possibly it filled a void—there was very little work on Japanese law available in English in 1963, and even less that was well written, interesting, and relatively free of jargon. Surely Kawashima's article and much of his other work articulated a point of view that resonated with Japanese scholars and students, who continue to read and emulate his work. At least in part, Kawashima's appeal to both foreign and Japanese readers was that his article was rich with insight and had identified a challenging puzzle—why was litigation uncommon in Japan?—whatever one may think of the solution he offers.⁵

“Dispute Resolution in Contemporary Japan” has served as a Rorschach test for succeeding generations of Japanese and American legal scholars.⁶ For those seeking a normative statement about the role of law in Japanese society, Kawashima's article appears to supply an answer. His portrayal of the importance of informal mechanisms of dispute resolution, and the sidelining of litigation as a last resort in intractable conflicts involving “pugnacious, litigious fellows,” has been read to imply the desirability, indeed superiority, of solving conflict without resort to the formal mechanisms of law. In contrast to a society in which lawyers and courts depersonalize disputes and destroy the social fabric, Japan is described as a place where a powerful social glue can be stretched, but not snapped, by conflict.

As a theoretical exercise, Kawashima also stimulated debate. Legal theorists interested in the relationship between law and society found food for thought in Kawashima's account of Japan, which seems to present an ideal case for tracing the allegedly powerful links between industrialization, urbanization, and a modern legal system.⁷ Like his contemporary, political theorist Masao Maruyama, Kawashima was deeply interested in the mechanisms through which Japan would modernize, and he was particularly concerned with how new, democratic institutions would arise and develop.⁸ Surely Kawashima's prediction that law and litigation would come to occupy an increasingly important role in Japan *had* to be correct; the very best theories of his day emphasized the increasing similarity between Japan and other economically developed nations, and many were convinced that their “convergence” was inevitable.⁹

Descriptively, “Dispute Resolution in Contemporary Japan” struck a resonant chord. For Japanese readers, Kawashima seemed to have uncovered a deep and compelling truth. Scholars and laypeople alike knew that the Japanese sought ways to manage conflict that kept disputes informal. Kawashima

claimed to have identified the underlying explanation for this behavior: a set of values deeply embedded in Japanese culture that shaped the way individuals handled conflict. Western readers were similarly impressed. They saw in Kawashima an elegant confirmation of exactly what they had always suspected. The Japanese were close-knit, inward looking, inscrutable; they were part of a culture that honored a set of values anathema to Western rationalism.¹⁰

It is tempting to write off Kawashima as being whatever one wants him to be, and no more. But his esteemed position in the pantheon of Japanese legal scholars counsels against a facile dismissal. His writings are still read by many law students in Japan; scholars in and out of Japan continue to cite him, challenge him, reify him, and feel irritated by him; in American classes about Japanese law his writings are generally on the syllabus, and many students find them compelling.

This chapter first identifies the central claims of Kawashima's article and evaluates their strengths and weaknesses. Next, it examines four types of scholarship on Japanese law that owe a significant debt to Kawashima: culturalist views of Japanese law, institutional analyses of the Japanese legal system, law and economics approaches to legal behavior in Japan, and case studies of Japanese law and society. In doing so, it further explores Kawashima's most significant contributions as well as his oversights. The article concludes with a brief discussion of the recent movement to reform the legal system, which seems likely to bring about at least some of the changes to dispute resolution that Kawashima predicted. Both too much and too little have been read into Kawashima's work. Its elegant simplicity hides a complex set of observations. At the same time, those observations can be clearly stated and evaluated.

II. KAWASHIMA'S THEORY OF DISPUTE RESOLUTION

Aside from a requisite citation to Arthur Taylor von Mehren, a distinguished Harvard Law School professor and the editor of *Law in Japan: The Legal Order in a Changing Society*, Kawashima's essay referenced only one non-Japanese scholar's work on Japanese law. That distinction belongs to Dan Fenno Henderson, whose magisterial work on conciliation in the Tokugawa era is one of the most intellectually rich studies of the Japanese legal system in any language.¹¹ Henderson's work detailed the process of extrajudicial dispute resolution in premodern and modern Japan, and in so doing revealed the state's direct involvement in Japanese conflict management. Disputants were often required by government decree to submit to conciliation before bringing their claims to court and found themselves obligated to follow a set of procedures

that made it difficult, often impossible, to file a lawsuit. The power of Henderson's work came from its careful analysis of the mechanism of conciliation, with its attention to the interplay between institutional design and social practice.

Kawashima was familiar with at least some of Henderson's writings; he cites a 1952 article, "Some Aspects of Tokugawa Law," in his discussion of conciliation after the Meiji Restoration.¹² Moreover, nothing in Kawashima's article suggests that he rejects Henderson's emphasis on the involvement of the state in promoting the extrajudicial dispute resolution process. To the contrary, he appears to fully embrace Henderson's perspective. In his discussion of Japanese industrialization and urbanization during World War I, for example, Kawashima notes that the traditional social structure was becoming unhinged. Litigation increased, and "those who had been in an inferior position began to assert their legal rights."¹³ By requiring conciliation, the government was able to "wash away" (*mizu ni nagasu*) disputes. "[T]he emerging individualistic interests of lessees, tenants, and employees," Kawashima writes, "were to be kept from being converted into firmly established vested interests independent of the will of their superiors."¹⁴

Kawashima's embrace of Henderson's perspective would not be particularly notable if it simply reflected the seriousness with which one prominent academic took the work of a peer. What makes it surprising is that Henderson's emphasis on the coercive nature of conciliation flatly contradicts the standard interpretation of Kawashima. According to that interpretation, Kawashima is devoted to monolithic cultural explanations of Japanese legal behavior. In fact, that view finds some support in "Dispute Resolution in Contemporary Japan." Kawashima claims, for example, that of the "several possible explanations for [the] relative lack of litigation [in Japan]," the most important can be "found in the socio-cultural background of the problem," particularly in "the nature of the traditional social groups in Japan."¹⁵ Those groups, he says, "may be epitomized by two characteristics. First, they are hierarchical in the sense that social status is differentiated in terms of deference and authority . . . Second . . . social roles are defined in general and very flexible terms . . . [T]his definition of social roles can be, and commonly is, characterized by the term 'harmony.'"¹⁶

To be sure, these claims are overgeneralized, which makes Kawashima particularly vulnerable to the charge of being too enamored by the influence of culture while neglecting to say what culture means. One need only go back to the beginning of his essay, however, to contextualize his claims about law, culture, and dispute resolution. In the very first paragraph, he states:

There is probably no society in which litigation is the normal means of resolving disputes. Rarely will both parties press their claims so far as to require resort to a court; instead, one of the disputants will probably offer a satisfactory settlement or propose the use of some extrajudicial, informal procedure. Although direct evidence of this tendency is difficult to obtain, the phenomena described below offer indirect support for the existence of these attitudes among the Japanese people.¹⁷

In other words, Kawashima's argument is that the vast majority of Japanese legal attitudes and practices are fundamentally similar to those in other nations. His essay is not explicitly rooted in a view of Japanese uniqueness; to the contrary, Kawashima is pressing for an understanding of dispute resolution in Japan that strongly resembles dispute resolution in every other society. And while he does not overly emphasize the role of the state in forging and framing approaches to dispute resolution, Kawashima's invocation of Henderson makes clear that his devotion to cultural explanations is bounded. Nonetheless, he does see a crucial role for culture: to the extent that nations develop generalizable cultural practices and values, Kawashima suggests that those practices and values can help us to understand how people resolve their disputes.

Kawashima's claim that Japanese disputants generally resolve their conflicts without going to court is not merely a theoretical formulation. Much of the power of Kawashima's analysis comes from his use of data. The text of Kawashima's article is followed by fourteen tables, documenting the number of civil cases filed from 1925 and 1934, litigation over traffic accidents from 1953 to 1960, the percentage of administrative cases appealed to high courts, the amount of time it took for district courts to resolve cases from 1916 to 1959, and many other issues. Based on these data, he argues that mediation prevailed even when one might predict that the courts would be flooded with claims. An acute housing shortage following World War II, for example, led to conflict over housing, but not much litigation. The economic depression after 1927 caused a large number of bankruptcies, but no surge of lawsuits. In the quotidian world of common public transportation, few cases were brought involving taxi or train accidents. In short, Kawashima argues that despite certain social changes, litigation rates in Japan did not increase.

Culture is neither the first nor the only explanation Kawashima provides to explain the data. First, he notes that litigation takes time and costs money, so many are dissuaded. Second, he observes that those who are willing to

expend time and money are poorly rewarded because litigation results in minimal compensation. Together, these explanations at least to some extent anticipate a rational actor perspective on litigation, as will be discussed below. Third, Kawashima asserts that there is an underlying incompatibility between the universalistic standards of litigation (by which he seems to mean black-letter legal rules applied by an objective judge without regard to the status or characteristics of the parties) and certain sociocultural currents in Japan, such as a tradition of deferring to authority and the contingency of social roles. It is crucial to remember that all three of these responses remain tightly contained. They do not assert that the reluctance to litigate is a particularly Japanese characteristic. Instead, they take as a given that litigation is uncommon everywhere and provide an explanation for the Japanese experience: distinctive perhaps, but not unique.¹⁸

Nonetheless, Kawashima complicates (and ultimately weakens) his argument by focusing on what he considers Japan's most distinctive element of dispute resolution, its low litigation rate, which he thinks is the consequence of a limited number of lawyers and a lack of industrialization. The result, in his view, is that in comparison to the West "demand for lawyers' services is not great" in Japan. Had he remembered Henderson's emphasis on government, Kawashima could have speculated that the lack of lawyers' services resulted from a limited supply, not simply a low demand. By asserting that in contrast to the West the Japanese do not demand the service of lawyers, however, he implies an innate cultural or psychological preference for non-lawyer-driven dispute resolution.¹⁹

Kawashima predicted that as Japan industrialized, entrenched social relationships inhibiting overt forms of conflict would weaken, "traditional" Japanese values such as deference to authority would change, and litigation would increase. In doing so, he is clearly reflecting the academic climate of his times. Of the various intellectual currents that captivated scholars in the 1950s and 1960s, modernization and convergence were perhaps the most compelling. Kawashima did not simply catch the wave; he was at the forefront of Japanese modernization theorists who were consumed by the notion that Japan was "behind" the West and ought to, had to, "catch up." Closing the gap with the West was not a simple matter of exchanging tatami for tile and kimono for khaki. It involved the retooling of a broad array of social and political practices, including law and legal behavior. Some could be transformed, or at least changed, by design; others would change less consciously, a result of fundamental shifts such as industrialization that had an ever-widening circle of influence. In either case, modernization theorists saw a clear relationship

between macro changes in social and economic structure and changes in individual behavior.

True to modernization theory, the contrast Kawashima draws between Japan and the West is neither sharp nor absolute. In his view, litigation is the exception, not the rule, in the resolution of conflicts everywhere. If litigation is more common in the United States than Japan, this phenomenon is as likely to be a consequence of their different political economies, which strongly influence (and, although Kawashima was not explicit about this, are undoubtedly influenced by) cultural preferences and individual behavior. For Kawashima and others, therefore, understanding the relationship between social, economic, and political structure and law became a core area of inquiry; exploring individual attitudes and beliefs about law, what came to be called “legal culture,” was an important part of their effort.²⁰

A stepchild to literature on political culture that sought to correlate political attitudes and beliefs with democratic practices and economic development, analysts of legal culture were particularly interested in the connection between law and modernization.²¹ To better understand legal culture, they relied on opinion polls, questionnaires, and survey research that sought to identify individual attitudes about law and conflict. Kawashima’s writings on legal consciousness influenced many of those who studied Japanese legal culture, who often forgot that sociocultural dispositions were only one aspect of Kawashima’s explanation of the Japanese legal system.

Many studies of legal culture were methodologically unsophisticated, and little consensus emerged about the meaning of legal culture generally or the specifics of legal culture in any particular setting.²² Nonetheless, to specialists and casual observers, often armed with no more than anecdotal data, Japan provided an interesting contrast to their vision of American legal culture. If modern societies required modern legal systems (an assumption of those studying legal culture in the United States),²³ and one quality of a modern legal system is its use by citizens to resolve disputes, then how should one understand Japan? Litigation rates in Japan were far lower than those in the United States; various aspects of Japan’s legal system seemed out of step with the requirements of modernity.²⁴ Yet Japan enjoyed the benefits of modern law—most importantly, industrialization and a vibrant economy. The attraction of studying Japanese legal culture was that it offered a possible solution to a puzzle; by exploring attitudes and beliefs about law in Japan, perhaps it would be possible to better understand how, when, and why people turned to the formal legal system, and which features of that system were critical to

the growth of political and economic institutions. Such high expectations help to explain why the study of Japanese legal culture captured the imagination of so many scholars.

In a recent “hermeneutic, interpretive” essay in which he notes that “it is no exaggeration to say that all Japanese studies have as their starting point a discussion of Japanese culture,” Takao Tanase offers a thoughtful view of the relationship between law, culture, and modernization.²⁵ Taking as his starting point Japan’s reception of foreign legal codes in the late nineteenth century, Tanase accepts neither that such laws were anathema to Japanese culture nor that they faced no cultural barriers. Instead, he claims that Japanese society integrated and accommodated foreign legal codes in its own particular manner. Arguing that “the low mobilization of the law among the general public facilitated rather than hindered modernization in Japan,” Tanase rejects Kawashima’s claims about the necessary connection between law, culture, and modernization. In place of the assumption that Japan would inevitably “progress” toward a modern, rational, Western legal system, Tanase posits that Japan’s historical conditions make Japan unique in its experience of modernity and its development of a legal system.²⁶ Perhaps the different conclusions reached by Kawashima and Tanase are simply a consequence of the decades that divide them. Whatever the explanation, it is a testament to the enduring influence of Kawashima’s work that Tanase, one of contemporary Japan’s most respected legal sociologists, continues to grapple with an issue raised in Kawashima’s 1963 essay.

Before further examining Kawashima’s influence, it may be useful to recap the key features of his essay. Kawashima invoked Japanese culture, particularly values such as deference to authority and harmony, to explain the infrequency with which disputes end up in Japanese courts. His turn to culture takes place within the context of a complex (and sometimes contradictory) argument that the state can exercise its authority by controlling formal conflict, and that disputes in every society are likely to be resolved informally. In Japan (as elsewhere), he indicates that there are many reasons why people keep their distance from courts, including the monetary costs of litigation and the limited compensation awarded by Japanese judges. Looking to the future, he predicts that Japan will change as a consequence of industrialization and urbanization, making courts, lawyers, and litigation a more central part of the system of dispute resolution. But that change will be subtle; litigation will not spiral out of control, and alternative means of resolving disputes will survive, as they do everywhere, and will continue to

offer disputants a faster, less expensive, and more responsive way to handle conflict.

III. KAWASHIMA'S INFLUENCE ON THE POSTWAR STUDY OF JAPANESE LAW

Kawashima's work has powerfully influenced the entire corpus of scholarship on dispute resolution in Japan. Strong convictions have been developed about its merits and flaws by scholars and students (even those who have not read much or any of Kawashima's writing) who cut their critical teeth by attacking or extolling Kawashima's central claims and proposing alternative (and allegedly more sound) theories of Japanese conflict. A multitude of follow-up studies pursue both his core themes and more tangential issues. He is widely considered one of the most influential minds (often *the* single most influential mind) of Japan's postwar legal academy.²⁷ Why Kawashima has struck such an extraordinarily resonant chord is a question about which one can speculate. That he did so is beyond dispute.²⁸

Four types of research and writing about Japanese law and disputing are particularly identifiable as Kawashima's progeny. First are culturalist approaches, which assert or assume that the study of Japanese dispute resolution is primarily a subset of the study of Japanese culture. Second are analyses that focus on social and political structure as the explanatory engine of Japanese conflict. Third is research in law and economics that applies a set of assumptions about rational behavior to the study of Japanese disputing. Fourth are case studies of law and society in Japan that make use of and extend the insights of cultural, institutional, and law and economics perspectives by examining concrete legal dispute. In what follows, I will highlight what I consider to be the writings that best exemplify each of these approaches to the analysis of Japanese dispute resolution. Together, they constitute a large body of work that emerges from Kawashima's analysis in "Dispute Resolution in Contemporary Japan" but pushes it in new and important directions.

A. CULTURALIST APPROACHES

Kawashima's most fundamental contribution has been to stimulate research and writing on the link between Japanese law and Japanese culture. Indeed, many have read Kawashima narrowly, as if his only insight was that Japanese law is an outgrowth of Japanese culture. One example is the 1979 article by Chin Kim and Craig M. Lawson, "The Law of the Subtle Mind: The Tradi-

tional Japanese Conception of Law.”²⁹ Kim and Lawson argue that, at root, the Japanese simply do not “like” law. As they put it:

The resolution of disputes [in Japan] . . . requires the restoration of harmony and mutual understanding. Lawsuits, on the other hand, pit one party against the other and determine which one shall win, thereby further straining the relationship and further injuring the delicate spirit of *wa*. The spirit of harmony and the social tie (*en*) that binds all relationships act together on the Japanese mind, which therefore tends not to view a dispute in terms of personal rights and duties. The harmonious settlement of disputes through mutual understanding is virtuous; the fight to finish in the courtroom is shameful.³⁰

A more recent example can be found in Yasunobu Sato’s *Commercial Dispute Processing and Japan*, where he writes: “Japan, together with China and other East Asian countries influenced by Confucian philosophy, has a conciliation culture where mediation or conciliation has long been a preferred mechanism for dispute processing. This culture is in sharp contrast to the Western adversarial culture based on individuals, which views conflict and dispute positively.”³¹

In these and many other writings that acknowledge a debt to Kawashima, much of the nuance and complexity that characterize “Dispute Resolution in Contemporary Japan” is lost, replaced by the uninspiring claim that the influence of Japanese culture on Japanese law is unmitigated. To the question of why the Japanese do not sue, Kawashima’s supposed answer is culture. To the question of why Japan has so few lawyers comes his answer, culture. To the question of why informal mechanisms of dispute resolution are well utilized in Japan, again, culture. Never mind that Kawashima makes clear in his writing that culture is only one of many factors that shape legal behavior; forget his insistence that litigation is disfavored everywhere, regardless of culture. The conventional wisdom is simply that Kawashima was a champion of culturalist views of Japanese law.³² For the past four decades, scholars in Japan and the United States who are interested in shedding light on law in Japan have taken that view as their starting point. From their efforts has emerged a set of articles about legal behavior in Japan that generally exaggerate and oversimplify what they assert to be Kawashima’s basic premise.

Summarizing fifty years of comparative scholarship on dispute resolution in the United States and Japan in 1975, for example, Roger Benjamin writes:

[T]he Japanese are held to be group-oriented, structure their individual and collective relationships in vertical combinations for social control purposes,

and emphasize consensus in conflict resolution. By contrast, Americans are thought to be individualistic, stress equality in individual and collective relationships to structure social control, and prefer an adversarial, bargaining style of conflict resolution. Fundamentally, these differences are attributed to value systems in the two societies which emphasize individualistic versus group-oriented decision-making styles. And it is axiomatic that, at the base of these decision-making styles, are very different value systems of conflict resolution and social control.³³

Others have pursued more specific aspects of the nexus between law and culture. Richard Parker, for example, accepts the view that Japanese values of trust, interdependence, and group harmony create a general antipathy to law.³⁴ In his view, one important but overlooked reason for the relatively marginal place of law in Japanese society is that, unlike in the West, Japanese society is not structured around language. Because law, according to Parker, controls behavior through the use of a written language, and written language occupies a less central place in Japan than in the West, law is less vital in Japan. J. C. Smith also reads Kawashima as positing that the Japanese have a unique distaste for law.³⁵ Instead of tracing the source of that distaste to language, he posits that the key difference between the role of law in Japan and the West can best be understood by exploring psychology and ethics, particularly conceptions of self, that lead people in Japan to privilege emotions over reason. Similar claims have been turned into political arguments. Former government official Naohiro Amaya believes that cultural differences between Japan and the United States cause U.S. antimonopoly laws to clash with Japanese values and argues that those laws therefore should not be adopted. Minister Toranosuke Katayama of the Ministry of Public Management, Home Affairs, Posts and Telecommunications, criticizing a lawsuit brought against his ministry by five telecom companies, states: "Resorting to legal action (over this kind of case) has been popular in the United States . . . But such means are not harmonious with Japan's (legal) culture."³⁶

There have been some more serious attempts to examine the relationship between law and culture. Setsuo Miyazawa, in a review essay that discusses the legacy of Kawashima, describes a number of empirical studies of legal culture and legal consciousness.³⁷ One of them, by Kawashima's successor at the University of Tokyo, Kahei Rokumoto, relied on a particularly sophisticated group of empirical and theoretical studies.³⁸ Despite the research of Rokumoto and a few others, however, Miyazawa concludes that "since Kawashima's works appeared, the dominant form of analysis of Japanese legal

consciousness has been anecdotal.” Miyazawa describes as “ambiguous” and “contradictory” several national surveys of law and culture conducted in the 1970s and 1980s by the *Nippon Bunka Kaigi*, *Nihon Bengoshi Rengokai*, and others, and he argues that surveys on Japanese legal culture contain weak questions and obtain unreliable answers.

There are, of course, studies of dispute resolution that acknowledge a debt to Kawashima’s claims about Japanese legal culture but are not overly constrained by them. In an article that examines the role of courts and judges in dispute resolution in Japan, for example, Tetsuya Obuchi challenges Kawashima’s claim that the Japanese regard law like an heirloom samurai sword, something to be treasured but not used.³⁹ Instead, he argues that while people may first seek negotiated settlements to their disputes, they will also resort to litigation. Legal culture, in his view, can accommodate a variety of different approaches to conflict. And, notwithstanding his criticism of the literature on Japanese legal culture, Miyazawa himself did not abandon culture as a variable in understanding differences between legal behavior in the United States and Japan, as his work on international conflict resolution makes clear.⁴⁰ Nonetheless, the study of Japanese legal culture has not gone much beyond the insights contained in Kawashima’s 1963 article. Indeed, many studies have ignored the context in which Kawashima embedded his cultural analysis and have instead argued for a vision of law and dispute resolution in Japan that is entirely shaped by culture. The narrow scope of such views has invited ridicule, and many scholars have turned away from culture and sought other explanations for Japanese legal behavior. One of them, presented as a direct challenge to culture, is a structural analysis that focuses on the configuration of legal institutions.

B. INSTITUTIONAL APPROACHES

Cultural explanations of Japanese disputing behavior owe much to Kawashima’s analysis of why individuals allegedly prefer to resolve conflicts outside of formal legal channels. Individual preferences, however, are neither simple to identify nor easy to generalize, and whether culture or something else is the source of individual law-related behavior is difficult to establish. Not only are individuals members of and participants in cultural practices and rituals; they are also influenced by a variety of political and economic forces that give shape to social practices.

In his landmark article on Japanese law, “The Myth of the Reluctant Litigant,” John Owen Haley countered what he saw as Kawashima’s overem-

phasis on culture in explaining Japanese dispute resolution.⁴¹ Haley expresses skepticism about claims that the Japanese have a “deeply rooted cultural preference” for informal, mediated settlements; an aversion to formal adjudication; a penchant for compromise; a distrust of all-or-none solutions; and a dislike of public quarrels.⁴² To evaluate what he sees as Kawashima’s overreliance on cultural causes of legal behavior, Haley seeks to answer a decisive question: Are the Japanese so strongly oriented by their culture to informally resolve disputes that they are willing to settle for less than they would be awarded if they litigated?⁴³ If the answer is yes, then Haley will concede that the Japanese are averse to litigation. No concession is necessary; he answers his query in the negative.

At the heart of Haley’s argument is an examination of litigation rates between 1890 and 1974.⁴⁴ Noting that litigation was more frequent before 1937 than in more recent decades, Haley labels as “myth” the view that the Japanese are reluctant to resolve their grievances in court. The reality, he suggests, is that litigation was offensive to “those who wished to maintain a paternalistic order based on a hierarchical submission to authority.”⁴⁵ Because governing elites viewed litigation as destructive of a social order based on personal relationships (which, not coincidentally, is exactly the type of social order that enabled the elites to govern), they sought to limit litigation by creating other avenues for the resolution of disputes.

Japanese elites, in Haley’s view, used a number of mechanisms to suppress litigation. They controlled the number of judges and attorneys by using an examination system that artificially limited entry to the legal profession.⁴⁶ Caseloads were made high and the legal process was crafted to operate slowly, results of a conscious decision to dissuade people from utilizing the formal legal process. Courts were denied contempt powers and possessed few remedies, which made it difficult to enforce judicial decisions. These and other features of the Japanese legal system made going to court expensive, time-consuming, frustrating, and unrewarding and resulted in many people foregoing their day in court. Like Kawashima, therefore, Haley did more than simply assert the importance of his claims. He turned to the data and argued that the Japanese government carefully controlled the process of dispute resolution. By forcing people to use informal mechanisms to resolve disputes and promoting the belief that they do so because they are harmonious and shun overt conflict, the government succeeded in minimizing challenges to its legitimacy and authority.

The brilliance of Haley’s argument was his presentation of a seemingly clear and plausible causal alternative to the idea that traditional values were

the primary shaper of legal behavior. Institutions also have a powerful influence on behavior, he argued; then he demonstrated how institutions themselves were manipulated to keep people from the courts. His dichotomy between culture and institutions was crucial to his project. Without spelling out whether he meant to bring attention to institutions as organizational units or social practices, and never offering a solution to the chicken-and-egg problem of how to disentangle institutions from their cultural context, Haley made it easy for readers to feel that there was now an alternative paradigm to culture as a window on Japanese law.

Haley's emphasis on institutional configuration in the analysis of Japanese conflict has been pursued by a number of other specialists of Japanese law and society. Although he is a keen observer of culture, David Johnson's study of Japanese criminal justice, for example, concentrates on factors such as the training and promotion of prosecutors to explain conviction rates and sentencing.⁴⁷ And Toshiko Takenaka, in her evaluation of Japan's legal regime controlling intellectual property, rejects a cultural approach and instead argues that intellectual property law in Japan is the result of conscious political choices aimed at crafting a particular set of legal doctrines and practices.⁴⁸

Although the arguments presented by Kawashima and Haley may appear to be powerfully contradictory, they can be read as simply differing in emphasis rather than as mutually exclusive formulations. Kawashima is attentive to issues of political and social structure, but they are not his primary interest. His discussion of how the government instituted *chōtei* (mediation) practices suggests an appreciation of the influence of institutional configuration on the behavior of disputants, and his claim that citizens "preferred" mediation to litigation leaves room for an explanation that such preferences are created by institutional design. Similarly, Haley does not explicitly address the question of why (or whether) the particular institutions he highlights are more prominent in Japan than elsewhere. The context and origin of Haley's institutions go largely unexplored, but the individuals who constitute institutions and the time and place in which those institutions arose are connected to a particular society, which suggests a crucial role for culture.⁴⁹ Unfortunately, the subtlety of Kawashima's and Haley's disagreement has been regularly ignored, with the result that much scholarship about law and dispute resolution in Japan asks whether it is best understood through the lens of culture or institutions, as if these were concepts that did not almost always intersect.⁵⁰

The oft-noted tension between Kawashima's emphasis on cultural explanations of Japanese disputing behavior and the primacy Haley gives to institutions, therefore, is far less acute than one might initially suppose. As

already stated, Kawashima is well aware of the power of mutable (and manipulable) institutions, even though he chooses to focus much of his writing on culture. Likewise, there is ample room in Haley's thesis to insert culture; at the very least, it is the context in which the elite create and mutate various institutions, and must therefore exert some influence on both the shapers of institutions and institutions themselves. More fundamental, the issue at stake in the differing interpretations set forth by Kawashima and Haley—whether cultural or institutional factors have a greater influence on legal behavior and therefore on the resolution of disputes—may ultimately resist a compelling conclusion. Disentangling culture from institutions has shown itself to be an extraordinarily difficult, if not impossible, task. Culture is dynamic, shaped and transformed over time by changes in technology, new forms of social organization, and a variety of other factors.⁵¹ Institutions are similarly malleable. Since culture is both a product of and the genesis of institutions, and institutions both create and are created by culture, convincingly demonstrating which one of them is responsible for certain aspects of the legal system is likely to elude even the most able minds.

C. LAW AND ECONOMICS APPROACHES

It should come as no surprise that a third approach to disputing behavior in Japan, most closely identified with Harvard Law School's J. Mark Ramseyer, exhibits both great originality and a deep debt to previous scholarship. Rooted in a view of individual behavior that emphasizes rational decision making, this perspective examines the choices of those engaged in conflict, particularly their decisions about whether and when to settle or sue. Although a rational choice approach to the analysis of disputes does not explicitly reject the potential relevance of cultural or institutional perspectives (indeed, it incorporates elements of both), it takes a somewhat different path in seeking to understand the contours of disputing behavior. At its core is the claim that the measure of a successful legal system is predictability. A predictable system makes it easier for potential litigants to settle their disputes "in the shadow of the law," thereby achieving results that are similar to those that would result from litigation but without the high transaction costs.

Whereas culturalists posit that disputing behavior is primarily a consequence of psychosocial values and influences, and structuralists emphasize the shaping power of institutions, those working within the assumptions of law and economics highlight the intellectual, rational bases of decisions about the resolution of conflict that enable litigants to maximize their wealth in light of

expected litigated outcomes. These different emphases should not obscure important similarities. Litigants may make rational, wealth-maximizing decisions about whether to settle or sue, but they make those decisions within a cultural and institutional context that determines the legal rules, the availability of dispute resolution procedures, the norms that govern relationships between people and groups, and the definition of rationality. As Ramseyer puts it, "Through culture, people make sense of what they experience; through culture, they decide what it is that they most value. As a result, one cannot properly understand the empirical world without a sense of culture."⁵² Ramseyer's emphasis on rational decision making and wealth maximization clearly differs from Kawashima's focus. But Kawashima certainly would have embraced (and did to some extent anticipate) one aspect of the law and economics analysis, arguing that "parties in dispute usually find that resort to a lawsuit is less profitable than resort to other means of settlement."⁵³ Haley's focus on the costs imposed by institutional barriers to litigation also complements Ramseyer's analysis. As Ramseyer approvingly notes, "Haley's first and central proposition [in "The Myth of the Reluctant Litigant" is that] Japanese do not sue because suing does not pay."⁵⁴

The connection between approaches to law and dispute resolution that focus on institutions per Haley and individual rationality per Ramseyer is most apparent with regard to predictability. The predictability of judicial decisions depends on a number of factors. A legal system without rules of stare decisis and dependent on juries, for example, would in most cases be less predictable than one that emphasized the importance of following precedent and gave judges a monopoly on decision making. In Japan, Ramseyer emphasizes, there are no juries; judges can (and do) communicate their leanings to litigants; trials unfold slowly over many months or years; and a highly ordered judicial structure emphasizes the standardization of judgments.⁵⁵ Haley might regard these features of the Japanese legal system as institutional impediments that are manipulated to dissuade people from litigating; Ramseyer emphasizes their economic, communicative function, which enables litigants rationally to decide whether to pursue their disputes in court or to seek a resolution through other means. Ramseyer and Haley may agree about the rationality of disputants, who evaluate the cost of litigation when deciding whether to sue. But where Haley sees institutional barriers that make using the courts prohibitively expensive, Ramseyer sees a legal system that is so transparent that litigants can resolve their differences with reference to their expected litigated outcomes.

Like approaches to disputing grounded in culture and institutions, a

rational choice perspective offers an explanation of Japanese dispute-resolving behavior that cannot stand alone. If rationality means that individuals will refuse to settle for an amount less than a court is likely to award—that is, that people in Japan will “avoid” a judicial determination only if they think that the determination is no more lucrative than an out-of-court settlement—then data become essential. What do people and/or their legal representatives know, and think they know, about how courts will resolve particular disputes? Are they similarly well (or poorly) informed about extrajudicial processes? Can potential litigants and their counsel obtain sufficient information about how a particular conflict is likely to be handled by different dispute resolvers when they are actually facing a dispute? As Ramseyer acknowledges, his thesis and the issues it raises “don’t lend themselves to testable hypotheses.”⁵⁶

Consequently, one can use the basic framework he proposes while reshaping the theory in various ways. Rather than associate rational behavior with actions that are exclusively influenced by financial incentives, for example, the definition of rationality can be broadened. Research on courts and litigation reveals a mix of incentives for why people go to court; winning is one of them, but so too is the opportunity to have one’s day in court, to be heard by a neutral third party, to exercise one’s rights.⁵⁷ There may be equally strong reasons why people choose not to litigate; it takes time, can exact a reputational cost, and can conclusively sever a relationship, among others.⁵⁸ In addition, people may have a particular self-image—as strong-willed and assertive, or perhaps harmonious and consensual—and make decisions about which method of dispute resolution to utilize that are not primarily motivated by an assessment of their likelihood of victory. This does not mean that such litigants are irrational, but that different people in similar circumstances may take into consideration different conditions in their rational calculations. Understanding those differences may lead one back to a consideration of cultural and institutional variation.⁵⁹

The economic perspective on dispute resolution in Japan includes a normative claim that conflicts with Haley’s emphasis on institutional design. In Ramseyer’s view, Japan’s system of dispute resolution (indeed, *any* system of dispute resolution) is laudable if it is highly predictable and thereby encourages disputants to settle their claims informally. As he puts it, “Litigation is scarce in Japan not because the system is bankrupt. It is scarce because the system works.”⁶⁰ That conclusion clashes with a normative implication of Haley’s work—that Japan’s scarcity of litigation is an indication that people are being inappropriately kept from the courts and are unable to seek justice.

Ramseyer may be correct in arguing that it is desirable for a legal system to minimize transaction costs and maximize individual advantage by finding ways for disputants to resolve conflicts without the time and expense associated with litigation. But his position takes as a given the content of legal rules, and it therefore has little to say about the degree to which the resolution of conflict “in the shadow of the law” achieves a normatively desirable result in a given case. Similarly, his approach does not address the role that litigation may play in changing legal rules. Judicial decisions often reshape or at least adjust particular rules as a consequence of new cases that challenge existing legal interpretations and practices. In simple and highly standardized areas of law the rules may be relatively impermeable. But in many situations new cases bring novel issues, and if they are not litigated then legal rules will fossilize and the “shadow” of the law will cease to shift.

D. CASE STUDIES

Studies that focus on the evolution and resolution of particular legal conflicts also owe a debt to Kawashima. In “Dispute Resolution in Contemporary Japan” and many of his later writings, Kawashima made elegant use of particular legal conflicts to illustrate his theoretical concerns. In fact, many of Kawashima’s generalizations about Japanese law and culture appear to have emerged from his study of specific types of conflicts, particularly disputes between contracting parties.⁶¹ Some have followed a similar path and sought to examine concrete legal conflicts in order to develop and test theories of Japanese dispute resolution. Such studies tend to be conceptually rooted in one of the approaches discussed above—cultural, institutional, and law and economics. But they differ from the writings highlighted under those headings because they ground their analyses in detailed case studies of discrete conflicts and are therefore more inductive than many (but not all) of the previously discussed works.

The resolution of disputes over traffic accidents, for example, has attracted the attention of a number of scholars. It was Kawashima who first used traffic accidents to generalize about dispute resolution. He noticed that although there were numerous railroad and taxi accidents in 1960, very few were brought to court.⁶² His explanation for this, like his explanation for low levels of litigation more generally, highlighted what he called “the social-cultural background.”⁶³ By using traffic accident data as a window on Japanese dispute resolution, Kawashima triggered an ongoing debate.

In both an article and a book chapter, Ramseyer argues that the behavior

of heirs of victims of fatal traffic accidents calls into question claims that the Japanese do not assert their legal rights because of cultural barriers and also contradicts the assumptions of institutional approaches. Instead, he argues, heirs settle their claims for amounts that are close to what a court would award, which strongly suggests that legal rules structure out-of-court settlements.⁶⁴ Tanase offers a somewhat different analysis, proposing a “management model” for Japanese non-litigiousness.⁶⁵ Using data about compensation for automobile accidents (a broader category than the fatal accidents that Ramseyer examines), he claims that the Japanese government creates a non-litigious society by successfully managing both the supply of judicial resources and the demand for litigation. It does so by providing free consultation to accident victims, creating a standard system of compensation, and offering extrajudicial methods of dispute resolution. Tanase’s model borrows aspects of the cultural, institutional, and economic approaches, but combines them in a novel way. Other studies of traffic accident disputes, like those of Shozo Ota and Daniel Foote, add further nuance to the interpretation of how best to understand the disposition of such conflicts.⁶⁶ These studies provide valuable insight into how a certain type of conflict—one that is routine, addresses harms that range from minor to fatal, and brings together random parties—is handled. But there are many other forms of conflict that do not fit such a pattern; since the mid-1980s, a number of studies have focused on disputes that bring to the table a variety of other issues.

A case-based approach—and one that also investigates quotidian conflicts—animates Mark West’s work on karaoke, lost objects, love hotels, and other issues. In “The Resolution of Karaoke Disputes: The Calculus of Institutions and Social Capital,” for example, West frames his work with references to Kawashima, Haley, and Ramseyer.⁶⁷ Like them, he is interested in explaining the cause of Japanese non-litigiousness; to do so, he highlights the interplay of individual decision making, economics, and culture. Picking up on Frank Upham’s work on environmental pollution (discussed below) but narrowing the focus to private disputes over noisy karaoke bars, West argues that the decision to pursue complaints over karaoke noise through litigation, extralegal dispute resolution mechanisms, or settlement reflects a mix of pressures—financial, institutional, and cultural. Which factor is most relevant will depend largely on the type and context of the dispute and on the available dispute resolution options. Rather than offer support for a single approach to dispute resolution, West suggests that the best explanation is likely to be eclectic.

In *Law and Social Change in Postwar Japan*, the most well-known example

of a case-based approach to Japanese dispute resolution, Frank Upham tackles issues far more complex than traffic accidents.⁶⁸ Upham roots his book in the study of four legal conflicts that involve the state: environmental pollution, minority rights, gender discrimination, and industrial policy. Each section of the book unravels a complex dispute, which enables the reader to gain an understanding of the personalities, politics, and particularities of the specific issue being presented. But the conflicts are not simply described; they are couched in the context of a more general argument about the operation of Japanese law.

Upham's chapter on environmental pollution illustrates his argument. It tells the tragic story of mercury poisoning caused by industrial effluents released by the Chisso company and the response of those who suffered as a consequence of the pollution. We learn that some of those affected by the mercury were reluctant to sue, in part because they worried about being known as people who would use the legal system to vindicate their rights.⁶⁹ Ultimately, the victims were split into three groups; those who asked the government's Ministry of Health and Welfare to mediate their dispute with Chisso, those who directly negotiated with Chisso, and those who sued. It is here that Upham turns his lens to the interests of the government and makes his most original contribution. He argues that the state's primary concern is with the process through which the conflict between Chisso and the victims of mercury contamination is resolved, not the content of the resolution. The government worried that the victims and their growing political movement would seize control of the dispute resolution process, and it therefore moved to placate those who sought justice. It did so in three ways: by working to solve the underlying problem of industrial pollution, discrediting the antipollution movement by creating an extrajudicial process through which disputes over pollution could be resolved, and "settling the moral accounts" resulting from government and business involvement in industrial pollution by compensating victims.⁷⁰ Upham's argument does not champion a particular version of Japanese culture, but it does locate the victims of Chisso's pollution in a social context, in which their actions are embedded in values that reflect Japanese village life. Likewise, he emphasizes the institutions that facilitate and/or inhibit the resolution of conflict.

The core cases discussed in *Law and Social Change in Postwar Japan* revolve around conflicts between groups of the aggrieved and the state. Moreover, the victims in all three cases are relatively powerless and traditionally disadvantaged; that may explain, at least in part, their willingness to litigate. It is therefore difficult to generalize from these cases to more individually focused

resolution of conflict, as well as to disputes that arise between those of relatively equal social status. Nonetheless, Upham has extended Kawashima's emphasis on specific, individual conflicts to a consideration of disputes that are political, moral, and socially disruptive. More than disputes over barking dogs and bad brakes, such conflicts may reveal the fundamental values and workings of a society.

Others have also examined broad-based social conflict as a means of better understanding dispute resolution in Japan. In *The Ritual of Rights in Japan: Law, Society, and Health Policy*, for example, I highlight two disputes that involve both legislation and litigation—brain death / organ transplantation, and HIV/AIDS—to draw attention to how the explicit assertion of legal rights has become a common feature of Japanese dispute resolution.⁷¹ Rather than seek to explain *why* there is so little litigation in Japan, my concern is to better understand the many dimensions of Japanese conflict—cultural, economic, and political—and how it is resolved. The disputes I investigate are not the everyday conflicts between neighbors; they involve broad issues of policy, large groups of people, and highly politicized struggles.

Contentious public disputes over policy are not the only, or necessarily the last, vantage point from which to understand the role of law in the resolution of disputes, as I discuss in my study of the tuna auction at Tokyo's Tsukiya wholesale market.⁷² At Tsukiya, dealers make use of an ingenious government-operated tuna court to manage conflicts over the quality of auctional fish. In contrast to studies in the United States that highlight the efficiency of informal norms for resolving disputes among close-knit actors, and the corrosive impact of formal legal conflict on continuing relationships, I argue that Japan's tuna merchants are heavily dependent on formal legal rules to resolve their conflicts. In the Tokyo tuna auction, the invocation of law and the embrace of formal methods to resolve conflict bind tuna traders, strengthen their relationships, and are extremely fast and effective. Setsuo Miyazawa, Robert Kidder, David Apter, Susan Pharr, John Campbell, Chalmers Johnson, Mark Levin, Robert Leflar, and other scholars of law and politics have also moved beyond Kawashima's focus on individual conflict resolution and examined aggregated claims and politicized disputes.⁷³ Many of their studies examine issues that emerged in late twentieth-century Japan, such as gender equality, industrial pollution, and patients' rights, among others. Because such conflicts are less likely to be shaped by interpersonal pressures or community norms than those highlighted by Kawashima, they may more frequently end up in court.⁷⁴ Indeed, certain factors that Kawashima identified as affecting the future of dispute resolution—urbanization, industrialization,

greater equality of citizens, more universalistic standards, and greater assertion of legal rights—appear to have had an impact on the types of disputes that arise and the process through which they are resolved. Were he alive today, Kawashima might counsel legal scholars to develop a taxonomy of conflict, from the mundane to the far-reaching, from those involving exclusively private disputes to group-oriented policy controversies, and seek to disentangle the relative influences of culture, costs, institutions, and political power that have an impact on how they are managed, both in Japan and comparatively. Without such guidance, scholars may continue to examine discrete areas of conflict without the benefit of a general framework that distinguishes different types of conflicts and links them to a particular approach to dispute resolution.

IV. CONCLUSION: THE FUTURE OF DISPUTE RESOLUTION IN JAPAN

Looking back at the forty years of scholarship on Japanese law and conflict inspired by Kawashima's "Dispute Resolution in Contemporary Japan," it is extraordinary that one paper (followed, of course, by his many other publications) has played such a central role in delineating the questions that continue to animate the study of Japanese law and society. Even today, almost every important contribution to the literature on disputing in Japan, and most general writings on the Japanese legal system, pay homage to Kawashima. Whether intended as a direct rebuttal of Kawashima's thesis, a modification of his claims, or a reaffirmation of his argument, Kawashima's work is the reference point from which all others—young and not so young, Japanese and non-Japanese, lawyers, sociologists, and political scientists—begin.

Kawashima's predictions about the future of law and dispute resolution in Japan are also regularly revisited. For every article that claims Kawashima's expectations have proved true, one can find contrary assertions that history has exposed his errors.⁷⁵ It is therefore particularly interesting that the movement to reform the Japanese legal system that began in the mid-1990s may be poised to bring about, by conscious institutional manipulation, a variety of the changes that Kawashima thought would inevitably arise from modernization.⁷⁶ Organizations and institutions such as Keidanren, the Japan Federation of Bar Associations, the Supreme Court, the Ministry of Justice, the Liberal Democratic Party, and others have at least superficially embraced the "rule of law" as an essential component of Japan's future success.⁷⁷ For a variety of often conflicting reasons, these groups have agreed (with varying

degrees of enthusiasm) to expand the population of legal professionals in Japan, speed up the workings of the civil courts, introduce lay opinion into determinations of criminal wrongdoing, decrease the financial costs imposed on those who want to sue, make legal expertise more readily available to those who previously could not afford it, change the system of legal education, and allow law firms more flexibility to operate in a competitive domestic and international environment, among other things.

The overall impact of these changes is unclear, at least for now, but it is possible that they will push the system in the direction that Kawashima predicted—a greater reliance on universalistic rules, more individual rights assertion, more litigation, and less reliance on social norms as the glue that orders social relations. Ironically—but perhaps not surprisingly, given that many reformers graduated from the University of Tokyo’s Faculty of Law when Kawashima’s influence was at its peak—the reformers retain a strong allegiance to a culturalist view of Japanese law, despite their conscious manipulation of institutions to facilitate change. The June 2001 report of the Justice System Reform Council, for example, the government’s key legal reform body, states:

—Bad break or
loose line?
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[T]he Council has determined that the fundamental task for reform of the justice system is to define clearly “what we must do to transform both the spirit of the law and the rule of law into the flesh and blood of this country, so that they become “the shape of our country” . . . In other words, how should those mechanisms [of the justice system] and the legal profession be reformed so as to make the law (order), which serves as the core of freedom and fairness on which “our country” should be based, broadly penetrate the entire state and all of society and become alive in the people’s daily life?⁷⁸

It is impossible to know whether or to what extent such efforts to revamp Japan’s legal culture will succeed, or how the changes that are now occurring will ultimately affect the process of dispute resolution or the substantive outcome of particular conflicts. Significant political differences have surfaced among those involved in the conceptualization and implementation of judicial reform, and some parties would like to create an expanded role for alternative methods of dispute resolution that could limit the number of cases that end up in the courts. Regardless of whose interests prevail in the current legal reform debate, it is clear that the framework Kawashima provided for examining the interweaving of law and culture in Japan will continue to shape the analysis and discussion of dispute resolution for decades to come.

NOTES

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1. Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan," in Arthur Taylor von Mehren, ed., *Law in Japan: The Legal Order in a Changing Society* (Cambridge, MA: Harvard University Press, 1963), 41.

2. Michael K. Young, Masanobu Kato, and Akira Fujimoto, "Japanese Attitudes towards Contracts: An Empirical Wrinkle in the Debate," *George Washington International Law Review* 34 (2003): 789, 790.

3. Kawashima published a book that further explored many of the issues raised in the article. See Takeyoshi Kawashima, *Nihonjin no hō ishiki* [The Legal Consciousness of the Japanese] (Tokyo: Iwanami, 1967).

4. Ruth Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Boston: Houghton Mifflin, 1946). It is a sign of changed times in the legal academy that in 1997 Frank Upham argued that American scholars of Japanese law find cultural explanations "anathema." See Frank K. Upham, "The Place of Japanese Legal Studies in American Comparative Law," *Utah Law Review* 1997 (1997): 639.

5. Kawashima does not, however, explain how one can determine what counts as "frequent," "infrequent," or "normal" amounts of litigation. He uses little comparative data, does not defend his various comparative references to the United States, and does not present criteria for evaluating the relative frequency of litigation in one or a number of locales. Still, many scholars who have followed Kawashima share his assumption that litigation is uncommon in Japan, and their research is aimed at finding an explanation for that phenomenon.

6. Young, for example, says that he "remains a bit mystified about Professor Kawashima's precise point in his many writings" and goes on to offer one partial version of Kawashima's thesis. Young, Kato, and Fujimoto, "Japanese Attitudes towards Contracts," 790–91.

7. Marc Galanter, "The Modernization of Law," in Lawrence M. Friedman and Stewart Macaulay, eds., *Law and the Behavioral Sciences* (Indianapolis: Bobbs-Merrill, 1977), 1046–55.

8. Some of Maruyama's work has been collected in Masao Maruyama, *Thought and Behavior in Modern Japanese Politics*, ed. Ivan Morris (New York: Oxford University Press, 1963).

9. See, e.g., Reinhard Bendix, *Nation-Building and Citizenship: Studies in Our Changing Social Order* (Berkeley: University of California Press, 1964).

10. For a variety of perspectives on Japanese culture, see Benedict, *The Chrysanthemum and the Sword*; Peter Dale, *The Myth of Japanese Uniqueness* (New York: St. Martin's Press, 1986); and Ross Mouer and Yoshio Sugimoto, *Images of Japanese Society* (New York: Kegan Paul International, 1990).

11. Dan Fenno Henderson, *Conciliation and Japanese Law: Tokugawa and Modern*, 2 vols. (Seattle: Association for Asian Studies / University of Washington Press, 1965).

12. Dan Fenno Henderson, "Some Aspects of Tokugawa Law," *Washington Law Review* 27(1) (1952): 85.

13. Kawashima, "Dispute Resolution in Contemporary Japan," 53.

14. *Ibid.*, 54.

15. *Ibid.*, 43.

16. *Ibid.*, 45.

17. *Ibid.*, 41.

18. Christian Wollschläger, who examined civil case filings in Japan between 1875 and 1994, claims that his "findings confirm the traditionalist explanation of the avoidance of litigation as it was laid down in Kawashima's historical studies . . . Social attitudes towards law which continue from an agrarian feudal state are indeed the only basis for explaining the stable secular development of litigation in Japan as well as the wide distance from Western nations. The low demand for civil justice is a genuine element of legal culture insofar as it distinguishes the practical operation of law from Western nations. It is the Japanese aspect of Japanese law which otherwise comprises many foreign imports." Christian Wollschläger, "Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics," in Harald Baum, ed., *Japan: Economic Success and Legal System* (New York: Walter de Gruyter, 1997), 89—142, 134. Wollschläger qualifies these findings by notifying readers that he is unable to make use of Japanese-language materials. In addition, he too quickly discounts other possible explanations for litigation rates in Japan; see the discussion in this chapter, below.

19. See, e.g., Kawashima, *Nihonjin no hō ishiki*, 166—78, where he relies on cultural preferences rather than political or institutional factors to explain Japanese legal behavior.

20. For a more complete discussion of research on Japanese legal culture, see Eric A. Feldman, *The Ritual of Rights in Japan: Law, Society, and Health Policy* (New York: Cambridge University Press, 2000), chap. 7, 141—65.

21. Galanter, "The Modernization of Law," 1046—55.

22. See generally David Nelkin, ed., *Comparing Legal Cultures* (Brookfield, VT: Dartmouth Publishing Company, 1997).

23. Galanter, "The Modernization of Law," 1046–55.

24. See *ibid.*

25. Takao Tanase, "The Empty Space of the Modern in Japanese Law Discourse," in David Nelken and Johannes Feest, eds., *Adapting Legal Cultures* (Portland, OR: Hart Publishing, 2001): 187, 188.

26. An analysis of the rule of law, and its relationship to economic development, can be found in Frank Upham, "Mythmaking in the Rule of Law Orthodoxy," Carnegie Endowment for International Peace, September 2002, downloaded from (<http://www.ceip.org/files/pdf/wp30.pdf>).

27. See, e.g., Young, Kato, and Fujimoto, "Japanese Attitudes towards Contracts," 789.

28. Yoshiyuki Matsumura, "The Works of Takeyoshi Kawashima," *Law and Society Review* 22 (1988): 1037 ("all subsequent scholarship dealing with Japanese attitudes toward law and the legal system have had to take into account Kawashima's hypothesis").

29. Chin Kim and Craig M. Lawson, "The Law of the Subtle Mind: The Traditional Japanese Conception of Law," *International and Comparative Law Quarterly* 28 (July 1979): 491.

30. *Ibid.*, 491, 502.

31. Yasunobu Sato, *Commercial Dispute Processing and Japan* (New York: Kluwer Law International, 2001), 330.

32. Kawashima himself was clearly intrigued with the part of his explanation that focused on culture. He followed "Dispute Resolution in Contemporary Japan" with a book, *Nihonjin no hō ishiki* [The Legal Consciousness of the Japanese], which introduced the concept of legal consciousness into the study of Japanese law, and much of his writing was particularly aimed at exploring the relationship between law and culture.

33. Roger W. Benjamin, "Images of Conflict Resolution and Social Control: American and Japanese Attitudes toward the Adversary System," *Journal of Conflict Resolution* 19(1) (March 1975): 123–37.

34. Richard B. Parker, "Law and Language in Japan and the United States," *Osaka University Law Review* 34 (1987): 47.

35. Joseph Carman Smith, "Ajase and Oedipus: Ideas of the Self in Japanese and Western Legal Consciousness," *Osaka University Law Review* 34 (1987): 1. Another psychological approach to Kawashima is Yoshiyuki Matsumura, "Procedural Justice in Dispute Resolution—Japan and the West" (paper presented at the Annual Meeting of the Law and Society Association, University of Amster-

dam, June 26–29, 1991), on file with author. Matsumura was Kawashima's last student (*joshu*), and his focus on American social psychology reflects Kawashima's interest in that field.

36. Naohiro Amaya, "Harmony and the Antimonopoly Law," *Japan Echo* 8 (1981): 85; "Gov't to Maintain Competition Policy on Connection Fees," *Kyodo News Online*, July 18, 2003, at (http://www.findarticles.com/p/articles/mi_g01973/is_200307/ai_n9007646).

37. Setsuo Miyazawa, "Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior," *Law and Society Review* 21(2) (1987): 219–41.

38. Kahei Rokumoto, "Nihonjin no hō ishiki no chōsa" [A Survey of the Legal Consciousness of the Japanese], in *Hōgaku kyōshitsu* 109 (October 1989): 94–100, 97; Rokumoto, *Hōshakaigaku* [Sociology of Law] (Tokyo: Yūhikaku, 1986), chap. 5, 189–232.

39. Tetsuya Obuchi, "Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects, with Special Emphasis on In-Court Compromise," *Law in Japan: An Annual* 20 (1987): 74, 81.

40. Setsuo Miyazawa, "How Does Culture Count? A Discussion on International Conflicts as Conflicts of Legal Cultures" (paper from 13th World Congress on Philosophy of Law and Social Philosophy, Kobe, Japan, August 25, 1987); published in Japanese as "Bunka wa ikanaru imi ni oite jūyō ka? Bunka-teki setsumei to kōriteki setsumei," in Kōichirō Fujikura and Ryūichi Nagao, *Kokusai masatsu: sono hōbunka-teki haikai* [International Friction: Its Background in Legal Culture] (Tokyo: Nihon Hyōronsha, 1989), 274–97.

41. John O. Haley, "The Myth of the Reluctant Litigant," *Journal of Japanese Studies* 4(2) (1978): 359–89.

42. *Ibid.*, 359.

43. *Ibid.*, 365.

44. *Ibid.*, 368. Haley measures litigation rates by calculating the number of filed/disposed civil suits per capita. On that basis, he concludes that there is less litigation in Japan than in Australia, Denmark, and the United Kingdom, for example, but more than in Norway, Sweden, and Finland (364).

45. *Ibid.*, 371.

46. *Ibid.*, 385.

47. David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press, 2002).

48. Toshiko Takenaka, "Does a Cultural Barrier to Intellectual Property Trade Exist? The Japanese Example," *NYU Journal of International Law and Politics* 29 (Fall 1996–Winter 1997): 153.

49. On the difficulty of decoupling culture and institutions, see Michael Thompson, Richard Ellis, and Aaron Wildavsky, *Cultural Theory* (Boulder, CO: Westview Press, 1990); and Mary Douglas, *How Institutions Think* (Syracuse, NY: Syracuse University Press, 1986).

50. In fact, Haley appears to have gradually revised what was arguably the most radical implication of “The Myth of the Reluctant Litigant”—that elites consciously manipulated institutions to keep people from resolving their disputes in court. In his later work, Haley appears to be suggesting something less than the conscious, intentional shaping of institutions. He also makes more room for sociocultural variables in his explanation of Japanese dispute resolution. See generally John O. Haley, *Authority without Power: Law and the Japanese Paradox* (New York: Oxford University Press, 1991); David T. Johnson, “Authority with Power: John Haley on Japan’s Law and Politics,” *Law and Society Review* 27 (1993): 619; and John O. Haley, “Litigation in Japan: A New Look at Old Problems,” *Willamette Journal of International Law and Dispute Resolution* 10 (2002): 7.

51. See, e.g., Stephen Vlastos, ed., *Mirror of Modernity: Invented Traditions of Modern Japan* (Berkeley: University of California Press, 1998).

52. J. Mark Ramseyer and Minoru Nakazato, “The Rational Litigant: Settlement Amounts and Verdict Rates in Japan,” *Journal of Legal Studies* 18 (June 1989): 263, 290.

53. Kawashima, “Dispute Resolution in Contemporary Japan,” 49.

54. J. Mark Ramseyer, “Reluctant Litigant Revisited: Rationality and Disputes in Japan,” *Journal of Japanese Studies* 14(2) (1988): III, 112.

55. *Ibid.*, III, 113.

56. *Ibid.*, III, 120.

57. See, e.g., Tom R. Tyler, *Why People Obey the Law* (New Haven, CT: Yale University Press, 1990); and E. Alan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988).

58. For an insightful discussion of the “costs” of litigation in an American community, see David Engel, “The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community,” *Law and Society Review* 18 (1984): 551.

59. At some point, the definition of rationality becomes so broad as to be meaningless. If an individual’s actions are deemed rational because the individual did what he or she intends and wants to do, then rationality becomes tautological, and it no longer provides a useful explanation of particular behavioral choices.

60. Ramseyer and Nakazato, “The Rational Litigant,” 263, 290.

61. I will not discuss Kawashima’s work on contracts, although it does represent another important part of his influence. See Takeyoshi Kawashima, “The Legal Consciousness of Contract in Japan,” *Law in Japan: An Annual* 7 (1974): 1 (a

translation of chapter 4 of *Nihonjin no hō ishiki*). See also Young, Kato, and Fujimoto, "Japanese Attitudes towards Contracts," 789; Willem M. Visser 't Hooft, *Japanese Contract and Anti-trust Law: A Sociological and Comparative Study* (New York: RoutledgeCurzon, 2002); and Curtis J. Milhaupt, "A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law," *Harvard International Law Journal* 37 (Winter 1996): 3–64.

62. An unusual aspect of tort law in Japan is that railroad companies can often be plaintiffs in train accidents because trains are forced to run on tracks according to fixed schedules. Those who are hit by trains because they are on the tracks are legally liable for the train delay and other damages. In fact, railroad companies rarely (if ever) bring such claims. I am indebted to Setsuo Miyazawa for this point.

63. Kawashima, "Dispute Resolution in Contemporary Japan," 43. After the publication of Kawashima's paper, the Traffic Department of the Tokyo District Court established guidelines for the resolution of traffic disputes in order to prevent an increase in traffic accident cases. Police, insurance companies, and lawyers have been using those standards, which has served to limit traffic accident litigation.

64. J. Mark Ramseyer and Minoru Nakazato, *Japanese Law: An Economic Approach* (Chicago: University of Chicago Press, 1999), 99.

65. Takao Tanase, "The Management of Disputes: Automobile Accident Compensation in Japan," *Law and Society Review* 24 (1990): 651.

66. Shozo Ota, "Traffic Accidents in Japan: Law and Civil Dispute Resolution," in E. Hondius, ed., *Modern Trends in Tort Law* (Netherlands: Kluwer Law International, 1999), 79–93; Daniel Foote, "Resolution of Traffic Accident Disputes and Judicial Activism in Japan," *Law in Japan: An Annual* 25 (1995): 19.

67. Mark D. West, "The Resolution of Karaoke Disputes: The Calculus of Institutions and Social Capital," *Journal of Japanese Studies* 28 (2002): 301–37.

68. Frank Upham, *Law and Social Change in Postwar Japan* (Cambridge, MA: Harvard University Press, 1987).

69. *Ibid.*, 37.

70. *Ibid.*, 56.

71. Feldman, *The Ritual of Rights in Japan*. I also make use of a case-based approach in two international, comparative studies of conflict. See Eric A. Feldman and Ronald Bayer, eds., *Blood Feuds: AIDS, Blood, and the Politics of Medical Disaster* (New York: Oxford University Press, 1999); and Eric A. Feldman and Ronald Bayer, eds., *Unfiltered: Conflicts over Tobacco Policy and Public Health* (Cambridge, MA: Harvard University Press, 2004).

72. Eric A. Feldman, "The Tuna Court: Law and Norms in the World's Premier Fish Auction," *California Law Review* 94(2) (March 2006).

73. See, e.g., Robert L. Kidder and Setsuo Miyazawa, "Long-Term Strategies

in Japanese Environmental Litigation,” *Law and Social Inquiry* 18 (1993): 605; Susan Pharr, *Losing Face: Status Politics in Japan* (Berkeley: University of California Press, 1990); David Apter and Nagayo Sawa, *Against the State: Politics and Social Protest in Japan* (Cambridge, MA: Harvard University Press, 1984); Mark Levin, “Smoke around the Rising Sun: An American Look at Tobacco Regulation in Japan,” *Stanford Journal of Law and Policy* 8 (1997): 99; Robert Leflar, “Informed Consent and Patients’ Rights in Japan,” *Houston Law Review* 33 (1996): 1; John Creighton Campbell, *How Policies Change: The Japanese Government and the Aging Society* (Princeton, NJ: Princeton University Press, 1992); and Chalmers Johnson, *Conspiracy at Matsukawa* (Berkeley: University of California Press, 1972).

74. In “Dispute Resolution in Contemporary Japan,” Kawashima mentioned disputes between different social groups as not triggering the sociocultural concerns about hierarchy and harmony that inhibited much individual litigation. But he believed that the preference for conciliation would spill over from individual to group disputes and would therefore limit litigation in such areas as well.

75. See Wollschläger, “Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany,” 89. Basing his claim on evidence that litigation rates, both civil and administrative, remain lower in Japan than in other places Wollschläger rejects Kawashima’s prediction that as Japanese law modernized people would become more conscious of their rights and use the courts more frequently. See also Takao Tanase, “Soshō riyō to kindaika kasetu” [Litigation Utilization and the Modernization Thesis], *Minji soshōhō riron no arata na kōchiku: Shindō Kōji Sensei koki shukuga* [A New Construction of Civil Procedure Theory: A Tribute to Professor Kōji Shindō on His Seventieth Birthday] (Tokyo: Yūhikaku, 2001), 288; and Seigo Hirowatari, “Post-war Japan and the Law: Mapping Discourses of Legalization and Modernization,” *Social Science Japan Journal* 3 (2000): 155.

76. An interesting discussion of recent legal changes and cultural change is Kahei Rokumoto, “Law and Culture in Transition” (paper presented at symposium “Legal Reform and Socio-Legal Change in Japan,” Boalt Hall School of Law, University of California, Berkeley, November 4–5, 1999), on file with author.

77. For a detailed account of the debate over legal reform in Japan, see Setsuo Miyazawa, “The Politics of Judicial Reform in Japan: The Rule of Law at Last?” in “Reform in Japanese Legal Education,” special issue, *Asian Pacific Law and Policy Journal*, 2001 (online); 2003 updated version on file with author.

78. Justice System Reform Council, Final Report, June 12, 2001, at (<http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>).