

Why Has It Been So Difficult to Develop An Internal Legal Culture in Japan?*

Richard Barron Parker**

Introduction

Why has it been so hard for Japan to develop what Lawrence Friedman called an “internal legal culture,” an autonomous group of legal professionals? (For an excellent history and summary of these difficulties see Miyazawa and Feeley 2005.) There is a spectrum of opinions on the answer to this question. At one end of the spectrum (call it the right end) are those such as Takeyoshi Kawashima who see deep-seated Japanese cultural traits as the principal cause of the lack of development of a Japanese internal legal culture (Kawashima 1963, see also Miyazawa 1987). At the other end of the spectrum (the left end) are those such as J. Mark Ramseyer who see conscious and purposeful actions taken over decades by a powerful central bureaucracy as the main cause of the weakness of Japanese “internal legal culture.” (Ramseyer and Nakazato 1999, Ramseyer and Rasmussen 2003).

To see this spectrum more clearly, consider briefly a simpler but related question. Why don't the Japanese file as many lawsuits as Americans? Those on the Ramseyer end of the spectrum see the individual, whether

* © Richard Barron Parker 2008. Parts of this essay are drawn from Parker 1988, 1993, and 1995. Versions of this essay were presented at the XVI International Sociological Association World Congress of Sociology in Durban, South Africa in July of 2006, the Law and Society Association Conference at Humboldt University in Berlin, Germany in July of 2007, and the XXIII World Congress of Philosophy of Law and Social Philosophy held at Jagiellonian University in Cracow, Poland in August of 2007. I am indebted to Lawrence Friedman, Setsuo Miyazawa, Jack Newman, Mayumi Saegusa, Barbara Shore, and Fumiko Yoshikawa for their criticisms and their assistance.

** Haverford College, B. A., 1962; Brown University, M. A. (Philosophy) 1963; University of Chicago, Ph. D. (Philosophy) 1968; Harvard Law School, J. D., 1971. Professor of Law since 1990, Hiroshima Shudo University.

Japanese or American, as a rational chooser who will respond in the same way to the same set of incentives and disincentives. They would say that if the Japanese were situated in the American system of law with the use of the jury in civil cases, the availability of lawyers willing to work for contingent fees, the powerful systems of discovery available in American courts, and the much larger monetary verdicts or settlements obtained, the Japanese would sue as much as the Americans do now. Conversely, if Americans were situated in the Japanese system of law and faced with the obstacles of no juries, much lower awards, fewer lawyers, and weak systems of discovery, they would sue as little as Japanese do now. Those on the Kawashima end of the spectrum would say that the best explanation for why the Japanese sue less than Americans is that they belong to different cultures with different attitudes and values.

For the past thirty-five years, most American scholars of Japanese law have been located on the left half of the spectrum. From Ramseyer on the far left, we move closer to the center with John Haley (1978, 1991, 1998), Frank Upham (1987) and Setsuo Miyazawa (1987, 1992, 2005). Lawrence Friedman himself, if he wrote more about Japan, would likely be a bit right of center, closer to Kawashima, more inclined to give cultural attitudes and values as explanations for why Japanese do not sue as often as Americans, or why Japan has such a weak internal legal culture.

All of these people are sophisticated scholars who realize that both economic incentives and cultural values must be part of a complete explanation of why Japan has a weak internal legal culture. All would agree with Mark West in his study of the interaction between law and cultural norms in several aspects of everyday Japanese life when he says,

“... there is no place now (was there ever?) for a dichotomized view of Japanese law that sees all behavior as either economically motivated or socially encouraged. There is no zero-sum game. Sometimes law-and-economics offers better answers, and sometimes law-and-society does. Some may accuse me of an academic or (worse?) a lawyerly

dodge in an attempt to satisfy both camps. But in fact, I am not proposing a shift to an all-pleasing middle-of-the-road approach as much as I am gently bashing both, encouraging an acknowledgment of the weaknesses of the dichotomy and a discarding of the worst of each school. Answers lie in the interplay, not the extremes.” (West 2005, p. 269.)

Nevertheless, all of these scholars do differ in their sense of where along the spectrum the most illuminating answers lie. Sometimes they differ on methodological grounds.

“We do not use economics because we think everyone (or anyone) always rationally maximizes. We all know no one does. We use economics because we think classic Chicago-school economic intuition (taken alone and simply, without much elaboration) goes far toward explaining much (not all) law-related behavior in Japan. Surely, many readers will protest, Japan is a complex place, a multifaceted universe where every phenomenon results from the subtle interplay of myriad disparate and interconnected causes.... We agree (how could we not?). But unless our critics tell us which of the myriad causes has what relative impact (they rarely do), the complexity is not much of an improvement.”

“The same readers will probably insist that we could explain more if we added culture to our spare model. What we would gain in explanatory breadth, however, we believe we would lose in theoretical parsimony. Consider this book an exercise in parsimony in comparative law. Consider it, in other words, an attempt to show just how far extremely spare economic models go toward explaining the world of law-related behavior.” (Ramseyer and Nakazato 1999, pp. xii–xiii.)

Sometimes the position of a scholar on the spectrum described above is due to the reasons the scholar is writing. If his purpose is to strengthen Japanese internal legal culture, it may be tactically better to focus on spe-

cific policy decisions such as increasing the number of lawyers. If one is defending the status quo, the attraction of cultural explanations is that change is seen as requiring changing the basic cultural values and beliefs of nearly everyone, not just changing some official policies or writing a new set of regulations. (See Miyazawa 1995 at p. 47 where this point is made.)

Sometimes one's position on the spectrum may be a function of the chronological order in which one learns things. For example, Professor Ramseyer was raised in Japan as the son of missionaries. He does not feel Japan to be as strange a place as someone like myself who did not have any experience of Japan until after the age of forty. For me, cultural differences feel more basic as explanations than they do for someone who has had the experience of both cultures from childhood.

Our position on the spectrum of how best to explain the weakness of Japanese internal legal culture is often influenced by other intellectual paradigms in which we have been trained. Those trained in economics are more attracted to models that posit a universal rational chooser and explain things in terms of incentives and disincentives. Those trained in sociology and anthropology where culture is a more basic category are more comfortable with explanations expressed in cultural terms.

I think that particular economic incentives and disincentives and conscious policy decisions help to explain a lot concerning Japanese legal culture, and I believe that these explanations are often accurate as far as they go and a necessary correction to *nihonjinron* and cultural determinism. Still, I feel that they are incomplete.

A major argument of this paper is that internal legal culture is weak in Japan compared with the West in part because the Japanese did not embrace monotheism and do not share the Western obsession with language. The absence in Japan of monotheism and the Western obsession with language can be no more than one part of the explanation for a weak internal legal culture because these facts are no more than deep back-

ground influences in Japanese society. Cultural explanations seem to me most useful in describing omnipresent background conditions. Can we show a direct causal connection between these omnipresent background influences and some particular law or regulation? Probably not. (That is the thrust of Ramseyer's objections to cultural explanations.) Here I resort to metaphor and simile.

Suppose we think of the voyage of Japanese society to a weak internal legal culture as similar to the course of a sailing ship across an uncharted ocean. The ship reaches a certain point on the far shore in part because of the design of the boat and the choices that the crew makes concerning when to raise the sails and what course to steer. These are the conscious choices highlighted by Ramseyer and those on the left on the spectrum described above. The cultural features I am pointing to in this paper are like constant and steady ocean currents, not noticeable to most of the crew, that push the ship in a certain direction. Exploring the nature of these currents is a necessary part, but only a part, of the explanation for why the ship finally makes landfall at a certain point. Researching the ocean currents complements rather than competes with the Ramseyer sort of explanation. (I am not a determinist in any sense. Sailors are not determined in their course by the force of currents. They can be aware of currents and correct for them in deciding where to steer the ship.)

The purpose of this paper is to point out several omnipresent currents pushing Japanese society towards a relatively weak internal legal culture. The self-conception of individual Japanese and their relationship to one another makes law — the use of written language to coordinate and control the behavior of people in society — less necessary. The extraordinary history of the Japanese, the absence of monotheism, and the absence of the obsession with language that characterizes Western Civilization makes law less attractive to the Japanese. I believe that these facts are a significant yet overlooked part of the reasons why Japan has such a weak internal legal culture compared with the West.

A few final caveats. There is nothing static in human history. There is no element or characteristic of any culture, society, or civilization that is immune from change. Cultures, societies, and civilizations are constantly interacting with one another and with the constantly changing facts of human biology and the physical environment. (Indeed, facts of human biology such as an increase in life expectancy and facts of the physical environment such as a warming climate often change more quickly than cultures change.) Any static or essentialist view of a human culture, society, or civilization is mistaken. It is a mistake to think of cultures, societies, or civilizations as mutually impenetrable spheres. They are more like large pots of paint of different size and viscosity poured onto the floor and running together in unpredictable patterns.

Each actual human being, considered by herself or himself, is a complex mix of influences from a variety of cultures. All assertions about the characteristics of cultures, societies, and civilizations are generalizations about very large groups of actual people. All such assertions are, at best, only statistically true. Thus, it is statistically true that men are taller than women, and that Japanese are more polite than Americans. The statistical truth of these assertions is compatible with billions of women being taller than billions of men, and tens of millions of Japanese being less polite than tens of millions of Americans. Nearly everything I say below is, at best, only statistically true.

Part I

Japan is in fundamental ways different from the other large industrialized countries in the world. More than 97% of the people living in Japan are ethnically Japanese. For more than 1700 years, there has been no significant migration of people to its shores. From the early 1600s until the middle of the 1800s, Japan cut itself off from the rest of the world. Except for the brief American occupation after the Second World War, Japan has not been conquered for at least 1700 years.

If we purge the word “tribe” of any connotation of technological or eco-

conomic backwardness, it is useful to think of the Japanese as a great tribe that has held on to its ancestral lands. A parallel would be if the ancient Britons, or the Biblical Israelites, or the Cherokee had maintained control of their ancestral lands and with no significant inward migration had grown over 1600 years to be one of the largest and most powerful nations on earth.

In such a society, cosmologies, beliefs, symbols, standards of appropriate behavior, and moral and aesthetic values are shared among people to a degree that contemporary Americans can barely comprehend. Europeans must go back 150 or 200 years in their history to find a comparable sense of collectively living together, of sharing a common fate. When I first came to Japan in 1983 at the age of 42, my best strategy for understanding what was happening around me was to imagine myself in a Jane Austen novel. The thickness of the culture, the importance of introductions, the felt imperatives to act always in certain appropriate ways, and the extraordinary psychological intimacy offered a startling contrast with the United States.

From the point of view of the Japanese, Americans have the curious habit of viewing themselves and judging themselves from the perspective of an omniscient judgmental God who transcends human history. Even the few Americans who do not believe in such a God usually believe in a universal morality applicable to all human beings in every society at any time in human history. Even those who do not believe in a judgmental God believe in a moral scorecard on which good and bad deeds are recorded wherever one is in the world and whatever the circumstances.

It is only from this point of view outside of history that it makes sense to say that all men are created equal and endowed by that Creator with certain inalienable rights and should therefore be equal before the law. The importance of political and legal equality in American society is due to the American habit of viewing oneself and judging oneself from the point of view of God.

Americans also each see themselves as particular persons of a given sex, race, and social and economic position in a particular community. From this point of view, they have responsibilities and duties as mothers, fathers, sons, daughters, employers, employees, and citizens.

The double perspective that Americans have on themselves opens up the possibility of conflict between the requirements of social roles and what God or universal morality command. The political and legal traditions of the United States result from this double perspective. The American insistence on freedom of conscience embodied in the First Amendment to the Constitution and the value Americans place on personal freedom arise out of the need to follow the commands of God or morality when those commands conflict with social roles since their immortal souls, or at least their moral integrity, depend upon it.

It is this American double perspective that is the cause of what Japanese regard as the extreme individualism of Americans. Americans are “individualistic” because they are both part of and apart from their society. They are able to chose to fulfill or refuse to fulfill the social roles assigned to them and able in alliance with others to evaluate and redefine social roles. Only from this double perspective does it make sense to say that the individual comes before society and that society is nothing but a deal — a social contract — between persons who can conceive of themselves as existing independent of society.

Because of their double perspective, Americans value social and political freedom to a degree that the rest of the world regards as extravagant. The importance of voluntary choice, of keeping one’s options open, and of determining one’s own style of life are taken for granted by Americans. American practices such as serial marriage, changing careers in mid-life, or moving to a different section of the country and beginning all over again are strange phenomena in the eyes of most of mankind.

Among the costs of this degree of freedom is a greater degree of stress

and violence. The weakness of social roles in the United States means that, culturally, Americans live in a partial vacuum. The absence or weakness of the social roles that in other human societies give guidance, comfort, and structure to daily life often produces pathology in Americans, “a world-absorbing egoism; a lethally indifferent privatism; terrible confusion and drifting; a calculated spontaneity; an unconscious guile; a compulsive play-acting; an unappeasable wish to “score”; a merely additive quest for unconnected experience; a search for novelty and sensations; a fickle mobility; and so on.” (Kateb 1984, p. 199.)

The English writer, D. H. Lawrence, observed more than eighty years ago, “The essential American soul is hard, isolate, stoic, and a killer.” (Lawrence 1923, pp. 62–63.)

Given the extraordinary personal freedom that American society allows the individual, the system of reciprocal rights and duties which makes up the American political and legal system is the only barrier to anarchy and chaos. Americans identify law with order and view law as a set of principles (at the Constitutional level, a set of universal moral principles) that control government and the citizen alike. Without the rule of law, the United States could not exist. Americans identify law with order, and regard law as the best alternative to violence. It is no wonder that Americans value law more than do the Japanese.

The Japanese do not share the American conception of the person. They have no tradition of a judging omniscient God or of a universal morality. The Japanese do not constantly judge themselves from a point of view outside of Japanese society. There is no possibility of sinning before an omniscient God, or of feeling guilty for failing to live up to a universal morality. An old Japanese expression is, “Away from home, no shame.”

There is little felt need in Japan for institutions which guarantee personal freedom to act in accord with one’s conscience. A Japanese person cannot depend on God or a universal morality as justification for behavior which is

contrary to prevailing social standards. He neither needs or wants to be different from his fellow Japanese.

The self-identity of the average Japanese, as compared to the average American, is more a function of his or her social roles, and the content of those roles is usually determined by factors beyond his or her control. Even for those in the upper half of the Japanese economy, one's future is determined early in life by one's performance on university entrance examinations and by decisions, often closely controlled by others, concerning whom one should marry and what one's occupation should be.

Quite apart from these institutional restraints on freedom, there are other features of Japanese life that restrict freedom. Tribal standards of appropriate conduct govern the details of daily human relationships. These standards cannot be altered by the individual or legislated in or out of existence by the tribe as a whole. They are simply the "natural" ways a Japanese person should act.

For the Japanese, it is important not only to act in the correct way, but also to have the correct feelings when acting. Japanese expect other Japanese to feel the appropriate emotion which should accompany the appropriate acts in social relationships. Acting in accord with tribal standards with the appropriate feelings is what makes a person Japanese. Being a member of the Japanese tribe is the major ground of self-identity for most Japanese. The failure of Christian missionaries to make new converts in Japan while being very successful in Korea and China is, I think, because being Japanese satisfies many of the same needs as religion. Even Buddhism, which has been in Japan for almost 1500 years, is still seen as a foreign influence when compared to Shintoism, the ancient tribal celebration of the spirits of Japan and of one's identity as Japanese.

There is tremendous positive reinforcement in acting in accord with the tribal standards with the correct feelings, even when one is a foreigner in Japan. I take my dirty shirts to the laundry lady. I am her regular cus-

tomter and she's glad to see me back. We exchange customary greetings. I feel good about giving her my shirts and she is pleased to have me there. I am acting as a customer should and she is acting as a shopkeeper should. A sense of harmony, of participating in a well-choreographed ritual, pervades daily life. When everything is going well, when people are acting and feeling as they should, there is an emotional lift in life's daily routines.

I think that Japanese are so similar to one another and so close psychologically to each other that they are more conscious of both themselves and others. (Americans, because they are so far from each other physically and emotional are often less aware, and often more unthinking, about themselves and others.) This Japanese sense of shared consciousness, of warm intimacy, can be claustrophobic, especially to an American used to being isolated, lonely and free, but there are major advantages. People know what is expected of them and do what is expected of them almost all of the time. Japan is an extraordinarily safe place, not because the State polices people, but because the Japanese people police themselves and each other. The nail that sticks up gets hammered down, but usually the nail doesn't even want to stick up. The average Japanese fears not the judgment of an omniscient God, but the judgment of his or her fellow Japanese.

With the image in mind of a society ordered by tribal standards of correct behavior and feeling, we can begin to understand why the Japanese do not value law as much as Americans do. For the Japanese, resort to law by private citizens presupposes a breakdown in normal social relations, a confession of failure by the parties concerned that they have not been able to act decently. Even the use of law by government is seen, to some extent, as a failure of government. Ideally, government officials should exercise a benevolent and paternal concern for the obedient citizen to which the citizen is entitled by virtue of his deference to authority. The idea of law as something that the citizen can use against the government is still a strange idea in Japan. Rather than seeing law as the best alternative to violence, the Japanese regard a resort to law as virtually the equivalent of

violence. It is no wonder that the Japanese do not feel pressed to increase the number of Japanese judges and lawyers in order to increase the people's access to Japanese courts. Better to leave these matters to the discretion of a wise and benevolent bureaucracy.

Japan and the United States represent the extremes among modern post-industrial nations in terms of using law to structure society. In Japan, where social roles are constitutive of the self, the requirements of those social roles provide social order with much less need for law. In the United States, where the individual can change social roles as easily as he or she changes clothes, the artificial structure of the law is the only alternative to social chaos.

Part II

Law involves the extensive use of language, both written and spoken. An important cultural reason for the Japanese lack of interest in law is that, compared with the Western obsession with language, the Japanese are relatively less interested in language. The structure of the Japanese language reflects and reinforces the Japanese sense of the self as contextual.

“By the age of three, children in the United States have generally mastered the distinction between “I” and “you”, two personal pronouns that will serve them through life in all interactions with others. Furthermore, in the daily speech of the American child, these two terms are heavily favored over all other possible personal referents, such as name, kin term, and the like. The Japanese male child, for his part, by the age of six must master the use of at least six terms of self-reference; girls of that age will employ five. (For persons addressed or referred to, the situation is even more complicated, for both boys and girls regularly use a minimum of fourteen such terms.) Japanese children also use names, kin terms, and place names, but the really striking contrast with the American child's speech habits is that none of the possible options is clearly dominant among Japanese children.

With overwhelming frequency they use no self-referent of any kind.”
(Smith, 1983, pp. 78–79.)

Furthermore, the various words which can be used to refer to oneself and other are often words indicating social or physical place or distance. For example, one polite way to refer to someone standing next to oneself is *kochira*, literally “here.” One generally uses completely different words to describe a given interpersonal situation depending on the age, sex, and status of the listener and/or the person about whom one is speaking. Anything that can be understood from the context of the speaker’s act of speaking, including usually the subject of the sentence, is omitted. In sum, the use of language is so contextually conditioned that the idea of grammar applied to spoken Japanese is often perceived by Japanese people as an importation from the West. To make sense of this idea, consider the contrast with English.

We can ask concerning any written or spoken English sentence whether it is grammatical, independent of any occasion on which the sentence is actually used. There is in English a fairly clear distinction between the grammatical correctness of an English sentence and the appropriateness of uttering that sentence on a particular occasion. This distinction is much less clear in Japanese. The utility of the idea of grammar is limited for the Japanese because speaking “grammatically” in Japanese is a comparatively small part of speaking Japanese well, while for English, speaking “grammatically” is virtually equivalent to speaking English well. A English speaker can be socially oblivious and yet speak English well. For Japanese, where social context determines which of several possible words should be used or omitted altogether, sensitivity to the context in which something is being said is a much larger part of speaking Japanese well.

For the Japanese, acts of speaking are often only component parts of acts of social behavior. For the hundreds of repeated actions in daily life, there is usually some one or a very few verbal formulas which are appropriate to utter on each such occasion. The constant formulaic use of language

strongly reinforces the contextual sense of self and converts many acts of speaking into standard moves in social “games.”

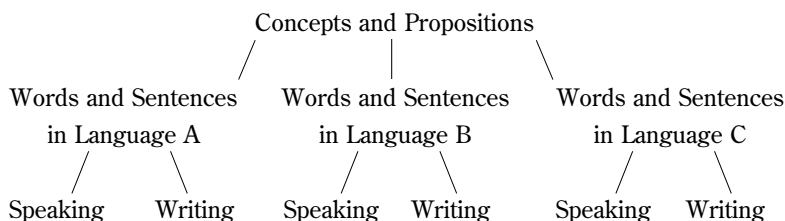
To an extraordinary degree, being Japanese is behaviorally defined. If a child whose parents are Japanese is taken by them out of Japan at age five and does not return to Japan until age fifteen, it is likely that he will always be regarded by many other Japanese as not really Japanese. His physical movements, his tone of voice, and his choice of words will reveal foreign influences. Just his ability to speak another language sets him apart. Although others may admit the usefulness of being able to speak another language, if he does it too well, he becomes potentially more unpredictable in his behavior, less likely to feel and act as a true Japanese should feel and act.

The idea that language was no more than social behavior revolutionized twentieth century western philosophy but has always been taken for granted in Japan. The theories of knowledge, meaning, reference, and truth which made the idea of language as social behavior seem so revolutionary in the West never got started in Japan. For an account of the probable eventual demise of these theories within western philosophy see Rorty (1979, 1982, 2007).

Native English speakers tend to regard the English language as something out there to be learned by anyone, similar to geometry (the grammar) and skiing (the skill it takes to be able to speak fluently). Because speaking Japanese is so inseparable from Japanese social behavior, the Japanese tend to regard speaking Japanese as Japanese-style behavior similar to wearing a kimono. Foreigners who learn to speak Japanese fluently are seen by Japanese as imitating Japanese behavior. Usually the imitation is not a good one. A perfect imitation requires the speaker to have internalized Japanese attitudes, to have developed a contextual sense of self.

The English language is seen by native English speakers as made up of words which can be put together into sentences. The same English sen-

tence can be expressed in speech or in writing. The words and sentences of English, which can be expressed in speech or in writing, refer to concepts and propositions which are the meanings of those English words and sentences. Concepts and propositions can be expressed in English words and sentences or in the words and sentences of another language. Different languages are seen by native English speakers as different systems of words and sentences for the expression of the same concepts and propositions. In sum, we have the following hierarchy.



For Americans and most Westerners, the French sentence, “Toutes les hommes sont mortels,” and the English sentence, “All men are mortal,” express the same proposition. These sentences “mean the same thing,” that is, express the same proposition, whether they are written or spoken. The major purpose of speaking or writing is thought to be the expression of concepts and propositions. In the West, propositions were the inventions of Greek philosophers who wrote the first systematic treatises on logic. Logic was thought to be the study of the relationships between propositions, that is, the relationships between the meanings of sentences abstracted away from the sentences of any actual language. Logic seemed to the ancient Greeks, and to Westerners until the twentieth century, a kind of knowledge superior to all other kinds of knowledge, prior to all experience, and true in all possible worlds. The notion that the study of language abstracted away from the behavior of speakers and writers and from any actual language provided answers to the most fundamental questions reached its zenith in Kant and in philosophical idealism.

Kant’s philosophical idealism suggested that language in the abstracted

form of concepts of time, space, and causation, actually determined the shape of the world of everyday experience. In this sense, Westerners saw themselves living within language instead of simply using it as a tool for communication. The history of twentieth-century Western philosophy has been a history of the abandonment of these abstractions of the acts of speaking and writing. Logic is no longer thought of as “the laws of thought.” Instead, various interesting logics are invented and used for a wide variety of purposes. Large scale theories of knowledge, meaning, reference, and truth are slowly being abandoned as uninteresting topics of discussion in the same way that many scholars in the eighteenth century turned their attention from theology to physics. (Rorty 1979, 1982, 2007.)

From the Japanese point of view, the Western philosophical tradition which put a person “inside” of his acts of speaking and writing is strange indeed. Why didn’t the Japanese take the same path? (The path of the West is so strange that a better question is: why did the West go the way it did?) One of the reasons may be that, for the Japanese, speaking and writing are very different activities. Thus the first move up the hierarchy illustrated above, in which speaking and writing are seen as two ways of expressing the same “sentence,” was never plausible to the Japanese, and so the subsequent move from “sentences” to “concepts and propositions” was never made.

Speaking Japanese is primarily face-to-face behavior. Writing Japanese is more like painting. The separation between writing and speaking is further accentuated by the fact that many common words in spoken colloquial Japanese are seldom used in written Japanese and vice versa. Spoken colloquial Japanese is also very different from place to place in Japan (similar to dialects in various parts of England one hundred years ago). The written language is so different from colloquial spoken Japanese that it lacks the power to freeze the form of the spoken language, which changes rapidly from decade to decade.

In sum, the Japanese tend to regard speaking and writing not as two dif-

ferent ways of expressing the same “words and sentences,” but as two very different ways of communicating. The Western merging of these two activities into the activity of “expressing thoughts in a language” and then the merging of “expressing thoughts in language A” and “expressing thoughts in language B” into the idea of “expressing concepts and propositions” seems to the Japanese a strange way of looking at ordinary acts of speaking and writing.

The central place of theory in the West seems, from the Japanese perspective, to be a consequence of this odd custom of abstracting away from ordinary acts of speaking and writing. To assert a theory is to assert the truth of a set of propositions, to rise above any actual language and to “say” something about “reality” in every language at once, to abstract oneself away from any social or cultural context. The Western idea that the world is a certain way, independent of any human observer, is dependent on the Western idea of an omniscient God. “Reality” is the world from God’s point of view. Western scientists and philosophers aspire to assert “objectively true theories,” that is, they aspire to “speak” as God would speak, in every language at once from a point of view outside of any human context. Without the idea of an omniscient God and, thus, without a point of view from which to assert theories true of “reality,” the Japanese have been comparatively uninterested in large-scale theorizing.

What the Japanese have cared about is the appropriateness of the behavior of particular people in particular contexts. Sometimes the behavior involves speaking, but the Japanese do not attach as much importance to saying things as Westerners do to saying things. They believe that men and women think and feel many things that cannot be expressed in words. Westerners, especially educated English speakers, tend to feel that their language is so rich and powerful that if they cannot adequately express their thoughts and feelings, it is their fault. With the examples of Shakespeare and Milton before them, English speakers tend to believe that the English language is adequate to express any thoughts or emotions they might have.

In contrast, the Japanese regard themselves as larger than their language. A Japanese person believes that his or her deepest thoughts and most powerful emotions are beyond the power of either speaking or writing to express.

Westerners tend to believe that language determines thought. If the meaning of something cannot be put into words, then it has no meaning or sense. It is literally nonsensical. Westerners seem to believe themselves trapped inside their language.

“Language is the silent police of the mind. Moreover, we have only language to rely on to escape language.” (Hutchinson, 1984, at p. 236.)

For the Japanese, this seems an odd thing to say. A language is not a set of goggles locked around one’s head through which he or she must look at things; it is more similar to a musical instrument ready at hand that a person can choose to play or not to play. The language we choose to play (English or Japanese or Language N) will place its own limitations on the sounds we can make and the thoughts and emotions we can express. Some languages are better than others at expressing certain sorts of thoughts and emotions. Some thoughts and emotions cannot be expressed in any language.

For the Japanese point of view, it is obvious that human beings experience much more than they understand and understand much more than they can articulate in speech or in writing. Both speaking and writing are no different from running or eating. “The meaning” (in the Western sense) of what is said or written is only part of the act of speaking or writing and often not the most important part.

The Japanese do not especially value the speaking of truth for its own sake. There is no tendency as there is in the West for valuing the speaker or writer because he might speak or write the truth. Japanese children are not trained in public speaking. There is no tradition of political rhetoric in

Japan. In Japanese history, there is no Abraham Lincoln or Churchill — no great man who used language as a tool to inspire and lead. Generals did not address the troops before battle. The articulate verbal person is thought of by most Japanese as probably a bit shallow because the deepest emotions cannot be expressed in mere words. Words, speaking, and language itself are simply not glorified the way they are in the West. Three Japanese proverbs are, “Silence is golden,” “All trouble comes from the mouth,” and “Words are the root of all evil.”

From the Japanese point of view, the Western obsession with language and with truth and true theory often get in the way of beauty, harmony, and even human decency. My Japanese students cannot understand why people would kill others over religious arguments where the questions at issue are what an omniscient God requires of human beings. One Japanese friend of mine, a philosophy professor, observed that Japanese have little interest in abstract theory because theories are most useful to people who like to argue. People who do not like to argue have no use for theory.

Part III

If the use of language is highly contextual in Japan, then we should expect the law in Japan to also be contextual and it is.

Americans think of law as an independent set of rules or principles derived from authoritative texts which are interpreted and applied by judges whose authority is based on the authority of those texts and on the regularity and impartiality of the process of interpretation and application. For Americans, the virtue of law is its impersonality and its independence from the particular problematic situation or social conflict it is called upon to structure or decide. Americans trust law to the degree that it is not contextual. Legal rules and principles, legal textual authorities, and judges and legal procedure are not supposed to be affected by the wishes and desires of the parties in a particular case.

In Japan, the wants and desires of the people in the immediate situation

are much more important. The harmonization of those wants and desires into a coherent pattern of interpersonal behavior is always the primary goal. The constant use in daily conversation of the dichotomy between *tatema* and *honne*, the formal surface of human relations and the reality of real human beings in a real situation, indicates the willingness of the Japanese to set aside general rules or principles (including law) whenever the immediate needs and wants of the people in the immediate situation require it. In Japanese society, the sheer fact that someone wants something is a sufficient reason to give it to him or her. And why not? What better reason could there be?

Americans, in contrast, are generally reluctant to regard their wants as good reasons for getting something. Americans must first have their wants approved by God, or a moral theory, or some other entitlement such as a legal right before those wants can serve as justification for getting something. Americans, much more than Japanese, regard the sheer following of a rule as a good in itself, regardless of the actual consequences involved in following the rule in a given situation. The American is apt to claim that what the immediate situation calls for cannot be known without an examination of what principles or rules should govern the situation. Americans tend to characterize both morality and law as primarily a matter of following rules.

From the Japanese point of view, one needs no rule or principle to justify helping oneself or others to enjoy life or to avoid obvious difficulties. For the Japanese, both morality and law are concerned less with rule following and more with people's attitudes. The Japanese are, from the point of view of Americans, remarkably uncaring about whether their actions are "principled" or "justified." They are much more concerned about what action is called for by the immediate situation.

"There can be no doubt that the Japanese on the whole do think less in terms of abstract ethical principles than do Westerners and more in terms of concrete situations and complex human feelings. To the

Westerner the Japanese may seem weak or even lacking in principles; to the Japanese the Westerner may seem harsh and self-righteous in his judgments and lacking in human feelings.” (Reischauer 1977, p. 140.)

From the Japanese point of view, law is an extraordinarily inefficient means for coordinating human behavior. First, established authorities must lay down general rules for everyone to follow. Certain minimum standards of internal coherence must be met. The rules must be published and then enforced. These necessarily general rules must be interpreted and applied to individual cases with results often less than maximally beneficial to the parties and sometimes patently unjust. The extraordinary complexity of the law, especially American law, and the social resources its processes consume, also count against law as a means for organizing a society.

Some of the other constituent elements of American law such as authoritative texts and politically powerful judges who have extraordinary authority to interpret those texts are also not present in Japan. Japan has no tradition of an omnipotent God who sends messages concerning eternal salvation or damnation via written texts such as the Bible and via messengers such as Jesus and the Biblical prophets. Such a religious tradition makes the interpretation of texts and controversial readings of those texts a natural way of talking about pressing social problems. America’s religious traditions are a necessary condition of the extraordinary authority of the United States Supreme Court to work major changes in American society based on its role as interpreter of the sacred text of the Constitution of the United States.

The Japanese Constitution was written by the Americans in 1946 and has not been amended since, a sign that it is not taken very seriously by the Japanese. Although the Japanese Constitution explicitly provides for judicial review, Japanese judges have not and could not challenge the ruling governmental bureaucracy in Japan in any significant way. Japanese soci-

ety does not use law and politics as a central organizing principle in the way that the Americans do. In this respect, the Japanese are more like the rest of the world than are the Americans.

As was pointed out at the beginning of this paper, the bureaucracy's resistance to the loss of prestige and power which a legitimization of law's role would bring about is also a force working against the authority of law in Japan. (Haley 1978 and 1991 and Upham 1987 are the classic texts on this subject.) In addition, most Japanese see the Japanese legal system as a foreign and not completely welcome influence in Japan. It is an eclectic collection of laws from a variety of Western countries. The basic Japanese civil and criminal codes are close copies of German civil and criminal codes. The political system is parliamentary yet the Japanese Constitution was written by the Americans in 1946 and embodies the US Constitution's political philosophy of strong individual rights against the government, a philosophy not shared by most Japanese. Other areas of law such as anti-trust and labor law are governed by statutes modeled on American federal statutes or, more recently, as in the law of products liability, on European Union statutes, but the reality of anti-trust enforcement, labor relations, or products liability litigation is radically different from the United States or Europe (See, for example, Ramseyer 1985.)

Most Japanese see the Japanese legal system as not reflective of basic Japanese values. Social order is achieved by the dense web of social expectations that Japanese have of one another. The society is governed by the discretionary administration of a powerful bureaucracy. (But see West 2005 for interesting examples of the interaction of formal law and culture in ordinary Japanese life.)

Given all of the above, it is not surprising that the Japanese have failed to develop a strong "internal legal culture." The Japanese do not embrace the elaborate traditions of textual analysis and the complicated structures of Western law as their primary means for ordering Japanese society. The things that legal professionals do well are not what the Japanese want

done. Law and politics in Japan are still largely *tatema*, the formal surface of things, not *honno*, the actual realities of power and social control.

A Postscript on Method

How can one establish a causal connection between the absence of monotheism in Japan and the absence of a strong internal legal culture? Is Ramseyer right that we should confine ourselves to a parsimonious economic model?

I remember thinking years ago when reading the first edition of Richard A. Posner's *Economic Analysis of Law* (Posner 1973) that such an analysis worked well when applied to antitrust law but that it was absurd when applied to civil rights as Posner tried to do.

The absence of a strong legal culture in Japan cannot be explained by reference to economics alone. Generally, social institutions and particular rules and regulations are explained primarily by human intentions and motivations. The motivation of doing something because it pays off economically has the advantage of being a more universal and more measurable motivation than other sorts of motivations. But if one restricts the analysis to economic motivations only, one may produce not just an incomplete picture of why things are the way they are, but a deeply misleading picture. A major example of the parsimony that misleads can be found in current explanations for the problems of ghetto poverty in the United States.

Orlando Patterson, an African-American professor of sociology at Harvard University, recently castigated American social scientists for neglecting cultural causes in their explanations and prescriptions for the twenty percent of American blacks still left in ghetto poverty,

“Several recent studies have garnered wide attention for reconfirming the tragic disconnect of millions of black youth from the American mainstream. But they also highlighted another crisis: the failure of social scientists to adequately explain the problem, and their inability to

come up with any effective strategy to deal with it.”

“The main cause for this shortcoming is a deep-seated dogma that has prevailed in social science and policy circles since the mid-1960s: the rejection of any explanation that invokes a group’s cultural attributes — its distinctive attitudes, values and predispositions, and the resulting behavior of its members — and the relentless preference for relying on structural factors like low incomes, joblessness, poor schools and bad housing.”...

“Nor have studies explained why, if someone cannot get a job, he turns to crime and drug abuse. One does not imply the other. Joblessness is rampant in Latin America and India, but the mass of the population does not run to crime.”

“And why do so many young unemployed black men have children — several of them — which they have no resources or intention to support? And why, finally, do they murder each other at nine times the rate of white youths?”

“What’s most interesting about the recent spate of studies is that analysts seem at least to be recognizing what has long be obvious to anyone who takes culture seriously: socioeconomic factors are of limited explanatory power. Thus it’s double depressing that the conclusions they draw and the prescriptions they recommend remain mired in traditional socioeconomic thinking.” (Patterson 2006)

Another example of misleading parsimony producing disastrous results is the current American misadventure in Iraq. A necessary condition of the inability of the Americans to predict what would happen in Iraq was that virtually all predictions of the problems likely to occur as a result of invasion were socioeconomic in content. Religion and tribalism, the major ingredients in any plausible cultural analysis, were left out.

Thirteen years ago, Professor Samuel Huntington published an influential article entitled, “The Clash of Civilizations?” (Huntington 1993), later expanded into a book. (Huntington 1996.) His definition of civilizations was largely in terms of religion. What was radical about the article and book was that a major scholar of international relations was taking serious account of religious motivations, the heart of any cultural analysis. Shocking thirteen years ago, cultural explanations of American foreign policy and international relations are now mainstream. (See, for example, Mead 2001 and Gaddis 2004.)

An adequate explanation for why Japan has such a weak internal legal culture requires an historically informed cultural analysis as a major component. Tocqueville is needed in addition to Ramseyer.

References

- Gaddis, John Lewis (2004) *Surprise, Security, and the American Experience* Cambridge: Harvard University Press.
- Haley, John O. (1978) “The Myth of the Reluctant Litigant,” 4 *J. of Japanese Studies* 359–390.
- Haley, John O. (1991) *Authority Without Power: Law and the Japanese Paradox*. New York and Oxford: Oxford University Press.
- Haley, John O. (1998) *The Spirit of Japanese Law*. Athens: U. of Georgia Press.
- Hutchinson, Allan C. (1984) “From Cultural Construction to Historical Deconstruction,” 94 *Yale Law Journal* 209.
- Huntington, Samuel (1973) “The Clash of Civilizations?,” *Foreign Affairs*, Summer 1973.
- Huntington, Samuel (1976) *The Clash of Civilizations and the Remaking of World Order*. New York: Simon and Schuster.
- Kateb, George (1984) “On the ‘Legitimation Crisis’,” in William Connolly (ed.), *Legitimacy and the State*. New York: New York U. Press.
- Kawashima, Takeyoshi (1963) “Dispute Resolution in Contemporary Japan,” in Arthur Taylor von Mehren (ed.) *Law in Japan: The Legal Order in a Changing Society*. Cambridge: Harvard U. Press 41–72.
- Lawrence, D. H. (1923) “Fenimore Cooper’s Leatherstocking Novels,” in *Studies in Classic American Literature*. London: Penguin Classics (1990).
- Mead, Walter Russell (2001) *Special Providence: American Foreign Policy and How It Changed the World*. New York: Alfred A. Knopf.
- Miyazawa, Setsuo and Malcolm M Feeley (2005) “The Relationship between the State and the Legal Complex in Modern Japan: Continuity and Change,” <http://>

- www.law.stanford.edu/events/friedman/papers/Miyasawa-Feeley.pdf (unpublished draft). This paper is no longer available at the Stanford website. It will be published in Terry Halliday, Lucian Karpik, Malcolm Feeley, *Struggles For Political Freedom*. Oxford: Hart Publishing, Onati International Series in Law and Society (In Press).
- Miyazawa, Setsuo (1995) "For the Liberal Transformation of Japanese Legal Culture: A Review of the Recent Scholarship and Practice," 29 *Kobe University Law Review* 45–64.
- Miyazawa, Setsuo (1992) *Policing in Japan*. Albany: State U. of New York Press.
- Miyazawa, Setsuo (1987) "Taking Kawashima seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behaviour," 21 *Law and Society Review*, 219.
- Parker, Richard B. (1986) "The Authority of Law in the United States and in Japan," 33 *Osaka University Law Review* 1–15.
- Parker, Richard B. (1988) "Law, Language and the Individual in Japan and the United States," *Wisconsin International Law Journal* 179–203. Reprinted in *Japanese Law and Legal Theory* (ed. Koichiro Fujikura). Aldershot: Dartmouth Publishing 1996.
- Parker, Richard B. (1993) "Fairness and Corrective Justice in the United States and Japan," 15 No. 2 *Hiroshima Shudo University Law Review (Shudo Hogaku)* 1–25.
- Parker, Richard B. (1995) "Economic and Racial Equality in the United States and Japan," 17 *Hiroshima Shudo University Law Review (Shudo Hogaku)* 15–48.
- Patterson, Orlando (2006) "A Poverty of Mind," *The New York Times*, Op-Ed, March 26, 2006.
- Posner, Richard A. (1973) *Economic Analysis of Law*. Boston: Little, Brown.
- Ramseyer, J. Mark and Eric B. Rasmusen (2003) *Measuring Judicial Independence: The Political Economy of Judging in Japan*. Chicago: U. of Chicago Press.
- Ramseyer, J. Mark and Minoru Nakazato (1999) *Japanese Law: An Economic Approach*. Chicago: U. of Chicago Press.
- Ramseyer, J. Mark (1985) "The Costs of the Consensual Myth: Anti-Trust Enforcement and Institutional Barriers to Litigation in Japan," 94 *Yale Law Journal* 604.
- Reischauer, Edwin O. (1977) *The Japanese*. Rutland, Vermont: Charles Tuttle.
- Rorty, Richard (1979) *Philosophy and the Mirror of Nature*. Princeton: Princeton University Press.
- Rorty, Richard (1982) *Consequences of Pragmatism*. Minneapolis: Minnesota University Press.
- Rorty, Richard (2007) *Philosophy As Cultural Politics*. Cambridge: Cambridge University Press.
- Smith, Robert J. (1984) *Japanese Society: Tradition, Self, and the Social Order*. Cambridge: Cambridge University Press.
- Upham, Frank K. (1987) *Law and Social Change in Postwar Japan*. Cambridge: Harvard U. Press.
- West, Mark D. (2005) *Law In Everyday Japan: Sex, Sumo, Suicide, and Statutes*. Chicago: U. of Chicago Press.