

# JOHN HALEY AND THE AMERICAN DISCOVERY OF JAPANESE LAW

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The exchange takes place in a Moroccan cafe in the year John O. Haley was born, 1942. A Bulgarian bride asks the American saloon-keeper: “Monsieur Rick, what kind of man is Captain Renault?” He replies: “Oh, he’s just like any other man, only more so.”<sup>1</sup>

So too Japanese law, in a way. When Haley entered the field in the mid-1970s, scholars asked, “What kind of legal system is the Japanese legal system?” “Unlike any legal system anywhere in the world,” most replied. Not Haley. “Just like any other legal system,” he insisted. “Maybe even more so.”

As adamant as he was unconventional, within three decades Haley had transformed the field completely.

## I. PROFESSIONALIZATION

Haley entered a field that Takeyoshi Kawashima owned. A professor of Civil Law at the preeminent University of Tokyo, Kawashima had dominated the Japanese legal professoriate for two decades. He had trained a generation of post-war scholars. He had placed them in crucial teaching positions. He had shaped the way Japanese scholars saw contracts, torts, property, and family law.<sup>2</sup> He had introduced “law and society” scholarship.<sup>3</sup>

Through a simple chapter in a 1963 book,<sup>4</sup> Kawashima also dominated the field of U.S. scholarship on Japanese law. Four decades later, his is a chapter many of us still teach. Four decades later, it still captures the stereotypes many students bring to the study of Japanese law. Japanese

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1. CASABLANCA (Warner Bros. Pictures, Inc. 1942).

2. See, e.g., TAKEYOSHI KAWASHIMA, NIHONJIN NO HŌISHIKI [THE LEGAL CONSCIOUSNESS OF THE JAPANESE] (1967).

3. Kawashima has been called “the father of the sociology of law in Japan.” Tom Ginsburg, Takao Tanase, Japanese Litigiousness, and “Taking Kawashima Seriously” 1 (presentation from the 2005 Sho Sato Conference in Honor of Takao Tanase, Feb. 12–13, 2005).

4. Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41, 41 (Arthur Taylor von Mehren ed., 1963). See also YOSHIYUKI NODA, INTRODUCTION TO JAPANESE LAW (Anthony H. Angelo ed. & trans., 1976) (1966).

ignore the law because its rules are un-Japanese, students insist. They avoid the courts because the universalistic legal rules do not fit hierarchical Japan, Kawashima more prolixly explained.<sup>5</sup> They hate lawyers because they hate litigation. And they hate litigation because it threatens the non-confrontational character of the Japanese psyche.<sup>6</sup>

Within Japan, Kawashima soon expanded the chapter into a bestselling paperback.<sup>7</sup> Given his professional position, the book carried a patina of intellectual respectability. And given the 1970s-era fascination with theories about “the Japanese national character,” it found a natural mass audience. It was scholarship-lite, a read-it-standing-in-the-subway paperback for a country that still devoured paperback nonfiction.

It was in *The Myth of the Reluctant Litigant* (“*The Reluctant Litigant*”) that Haley confronted Kawashima directly,<sup>8</sup> of course, but another article of much the same vintage had a possibly-just-as-corrosive effect. *Marketing and Antitrust in Japan*<sup>9</sup> (“*Marketing and Antitrust*”) does not mention Kawashima. It does not discuss sociology. It has less of the intellectual ambition that would soon characterize Haley’s work. As befits a modest piece, it is less cited, less often remembered, and largely not taught. Arguably, however, it weakened Kawashima’s hold on the professorial imagination as fundamentally as anything in *The Reluctant Litigant*.

*Marketing and Antitrust* attacked Kawashima by sheer force of example. The key lies not in what Haley said in the article, but in how he justified what he said. In *Marketing and Antitrust*, he produced an article that in a U.S. legal field might have seemed methodologically conventional. He found dozens of cases. He read them. He cited them. And he wove a story through them about the path of the law.

In other words, Haley used court cases to locate legal rules, and then treated those rules as important. By his very research method, he claimed that law mattered. Contrary to everything in Kawashima’s work, Haley implied that law shaped the way people behaved, and that court opinions disclosed the scope of the law. The Japanese legal system, he declared by example, was just like any other legal system.

5. Kawashima, *supra* note 4, at 43.

6. *Id.* at 44.

7. See generally KAWASHIMA, *supra* note 2.

8. John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 361–62 (1978).

9. John O. Haley, *Marketing and Antitrust in Japan*, 2 HASTINGS INT’L & COMP. L. REV. 51 (1979).

Times change. Three decades later, it is hard to explain how revolutionary—how profoundly liberating—so straightforwardly doctrinal an article as *Marketing and Antitrust* could have been in 1979. Yet we owe the change to Haley himself. Even if we do “law and” work, we now recognize that we cannot say much that is intelligent without knowing the underlying legal doctrine.

That was not always so. In Kawashima’s crudely reductionist world, American scholars of Japanese law did not need to learn the law. After all, legal rules made no difference. Unintentionally (we can only hope), Kawashima had created a field that celebrated the amateur. We did not need to be able to read court opinions. After all, litigation and courts did not matter. We did not even need to be able to read the Civil Code. After all, statutes did not matter either.

In the field Kawashima had created, American scholars needed only to think great thoughts. It helped to have an eloquent but tipsy Tokyo dinner partner. It helped to have a garrulous taxi driver and an eager-to-please interpreter. But find an “informant” or two, and any speculation about law in Japan was fair game. The only expertise required—as Chalmers Johnson is said to have said in another context—was to have flown over the country in daylight.

Haley changed all this. Before he began his career, no Western scholar wrote articles that took Japanese case law seriously. Certainly Dan Henderson did not write in that vein. Michael Young had not yet published his article on land-use regulation.<sup>10</sup> Contemporaneously with Haley, Frank Upham did indeed examine Japanese case law. His careful and thoughtful study of Japanese environmental case law is a tour de force.<sup>11</sup> Crucially, however, we owe the professionalism that characterizes our field today to Haley and Upham—and no others.

## II. THE HALEY OEUVRE

### A. Introduction

The best scholars are like roofers, Richard Epstein once explained over lunch. They start laying shingles on one part of the roof. They lay each shingle so that it overlaps another. And by the time they break for coffee,

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10. Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984).

11. Frank K. Upham, *After Minamata: Current Prospects and Problems in Japanese Environmental Litigation*, 8 ECOLOGY L.Q. 213 (1979).

they have moved to an entirely different part of the roof from where they started.

Haley's work has spanned nearly the entire range of Japanese law. He did so much as the Epsteinian roofer did. He started in antitrust. And for those of us with an abiding interest in antitrust law, he has continued to offer insight and provoke thought. As editor of the field journal, *Law in Japan*, he organized a symposium on the field in the early 1980s.<sup>12</sup> He published additional careful studies in 1978, 1984, 1991, 1995, and 1998.<sup>13</sup> In 2001, he published a pathbreaking antitrust book with the University of Washington Press.<sup>14</sup> But he did not let the book stop him. By 2002 and 2004, he had resumed his antitrust articles.<sup>15</sup>

This corpus alone would constitute a respectable output, and had Haley done nothing else, he would still be the leading Western interpreter of Japanese antitrust. And yet for him, it was just the start. From this beginning in antitrust, he developed ideas that would form the basis for crucially important contributions in a variety of areas of Japanese law.

### *B. Litigation and Settlement*

Of Haley's many forays, consider three: litigation and settlement, bureaucrats, and victim-offender reconciliation efforts. This tribute is personal; no doubt others would pick different areas of the law. But return first to antitrust. Antitrust litigation is expensive. Only rarely did Japanese file private antitrust suits, and the reasons were straightforward: it would cost them a fortune, it would take years, and they would probably lose anyway. "Might not a similar logic explain a broader class of cases?" asked Haley.

12. This symposium was memorialized in volume 15 of *Law in Japan* (1982).

13. See John Owen Haley, *Antitrust in Japan: Problems of Enforcement*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA, 121 (John Owen Haley ed., 1978); John O. Haley, *Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law*, 59 WASH. L. REV. 471 (1984); John O. Haley, *Japanese Antitrust Enforcement: Implications for United States Trade*, 18 N. KY. L. REV. 335 (1991); John O. Haley, *Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?*, 4 PAC. RIM L. & POL'Y J. 303 (1995); John O. Haley, *Culture, Competition and Deregulation: Japan's Challenge to International Harmonization of Competition Law*, in COMPARATIVE COMPETITION LAW: APPROACHING AN INTERNATIONAL SYSTEM OF ANTITRUST LAW 93 (Hanns Ullrich ed., 1998) (proceedings of the workshop, College of Europe, Bruges, Belg., July 3–5, 1997).

14. JOHN O. HALEY, ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY YEARS, 1947–1998 (2001).

15. See John O. Haley, *Competition Law for the Asia-Pacific Economic Cooperation Community: Designing Shoes for Many Sizes*, 1 WASH. U. GLOBAL STUD. L. REV. 1 (2002); John O. Haley, *Competition Policy for East Asia*, 3 WASH. U. GLOBAL STUD. L. REV. 277 (2004).

*The Reluctant Litigant* grew out of this concern over the cost of litigation. Even outside of antitrust, litigation was not free. Litigants needed to find a lawyer, but lawyers were few. This was not the result of any social hostility toward them, Haley noted.<sup>16</sup> They were few because the government flunked virtually everyone who applied.<sup>17</sup> Litigants also needed to devote time to the process, but time is money and litigation could take years. Perhaps litigation was rare, Haley suggested, simply because it cost money and took time.<sup>18</sup>

The debate Haley started with *The Reluctant Litigant* generated a large and increasingly sophisticated literature.<sup>19</sup> In the ensuing years, the problem continued to attract his attention. Recently, he summarized the field consensus:

Japanese prefer to resolve disputes in the manner that they perceive will maximize their interests or that they believe will best realize their personal, self-regarding goals. Litigation . . . will thus be avoided whenever thought to be a more costly, more time-consuming or less effective means to achieve a favorable result . . . .

Potential litigants negotiate and settle frequently-litigated disputes in the “shadow” of the law. . . .

By enhancing the predictability of litigated outcomes, Japanese judges promote negotiated settlements that conform to litigated outcomes . . . thereby indirectly but efficiently enforcing legal rules.<sup>20</sup>

### C. Bureaucrats

Antitrust also presented Haley with glaring examples of bureaucrats who could not enforce their orders. The Japanese Fair Trade Commission

16. Haley, *supra* note 8, at 385–86.

17. *Id.* Like so much of Haley’s work, the point was obvious only after he made it. And as in other fields, Haley’s insight has given rise to a rich and sophisticated literature. *See, e.g.*, Curtis J. Milhaupt & Mark D. West, *Law’s Dominion and the Market for Legal Elites in Japan*, 34 L. & POL. INT’L BUS. 451 (2003); Daniel H. Foote, *Forces Driving and Shaping Legal Training Reform in Japan*, 7 AUSTL. J. ASIAN L. 215 (2005).

18. *See* Haley, *supra* note 8, at 365.

19. *See, e.g.*, Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation*, 35 J. LEGAL STUD. 31 (2006).

20. John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WILLAMETTE J. INT’L L. & DISP. RESOL. 121, 127, 132, 133 (2002); *see also* John O. Haley, *Law and Culture in China and Japan: A Framework for Analysis*, 27 MICH. J. INT’L L. 895 (2006).

famously lacks the power of its U.S. peers, but Haley noticed that other agencies lacked it, too. In a well-known (to those of us in antitrust) 1980 case, the Tokyo High Court convicted several oil executives of criminal pricefixing.<sup>21</sup> The defendants claimed they had fixed the prices only because bureaucrats told them to do so.<sup>22</sup> The court threw out their defense. The bureaucrats lacked the power to make them comply, it observed.<sup>23</sup> Absent that coercive power, what they may have said made no difference.

Haley quickly realized the implication for conventional claims about bureaucratic strength. If his arguments no longer seem novel, it is only because (as with those in *The Reluctant Litigant*) they have won the day. In the early 1980s, few claims in Japanese politics were more basic than claims about strong bureaucrats. Although closely identified with Chalmers Johnson,<sup>24</sup> the claims had long constituted conventional wisdom. Even Harvard economist and future dean Henry Rosovsky could describe Japan as “the only capitalistic country in the world in which the government decides how many firms there should be in a given industry, and then sets about to arrange the desired number.”<sup>25</sup>

To demonstrate how weak bureaucrats were, Haley studied the legal framework within which they acted. As he put it: “State actors in Japan have generally not had the capacity to develop and direct policy or, more importantly, to compel compliance for its implementation typically enjoyed by either Japan’s East Asian neighbors or its American and European peers.”<sup>26</sup> In the end, “[I]legal command and formal coercive

21. *Japan v. Idemitsu Kōsan, K.K.*, 985 HANREI JIHŌ 3, 8 (Tokyo High Ct., Sept. 26, 1980); see also John O. Haley, *The Oil Cartel Cases: The End of an Era*, 15 LAW IN JAPAN 1 (1982).

22. *Idemitsu Kōsan*, 985 HANREI JIHŌ at 17.

23. See *id.* at 34–35.

24. See generally CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925–1975* (1982) (discussing the Japanese economic bureaucracy).

25. Henry Rosovsky, *What Are the ‘Lessons’ of Japanese Economic History?*, in *ECONOMIC DEVELOPMENT IN THE LONG RUN* 229, 244 (A.J. Youngson ed., 1972). When Haley stressed how little bureaucrats could do, he echoed the claims he made about the courts. He similarly claimed judges lacked the powers they needed. See generally John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 265, 266 (1982); JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (1991) [hereinafter HALEY, *AUTHORITY WITHOUT POWER*]; and JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 23 (1998) [hereinafter HALEY, *THE SPIRIT OF JAPANESE LAW*]. If Haley’s bureaucrats were weak, so too were his judges sometimes.

26. John O. Haley, *The Paradox of Weak Power and Strong Authority in the Japanese State*, in *ASIAN STATES: BEYOND THE DEVELOPMENTAL PERSPECTIVE* 67, 67 (Richard Boyd & Tak-Wing Ngo eds., 2005); see also John Haley, *The Context and Content of Regulatory Change in Japan*, in *THE AGE OF REGULATORY REFORM* 124, 126 (Kenneth Button & Dennis Swann eds., 1989).

power to ensure compliance and conformity with policy objectives” are just “rarely available.”<sup>27</sup>

Haley’s claim had a variety of dimensions. When scholars characterized “administrative guidance” as distinctly Japanese, Haley reminded them that bureaucrats regulate informally everywhere: “In all countries or cultures, administrative officials generally prefer to enforce policy informally. It saves time and effort.”<sup>28</sup> When they asserted that Japanese bureaucrats determine policy, he replied that “the dominance of the Japanese bureaucracy in the political process has been grossly exaggerated.”<sup>29</sup> When they claimed bureaucrats obtained the results they wanted, he found “a consistent pattern of compromise and negotiation . . . that can only be characterized as a reflection of failure . . . to achieve their original goals. Veiling such failure from view has been the ability of the bureaucracy to retract or recast its original demands . . . .”<sup>30</sup> And when they complained about the lack of procedural controls over bureaucratic discretion, he asked, “who cares?” The lack of real bureaucratic power “precluded most arbitrary exercises of power” anyway.<sup>31</sup>

#### *D. Victim-Offender Reconciliation*

Having noticed how powerless Japanese officials could be, Haley asked why the social order stayed so stable.<sup>32</sup> Police, prosecutors, and judges were few. They had little power. They imposed only modest criminal penalties.<sup>33</sup> Yet crime stayed scarce. “Why?,” asked Haley.

To answer the question, Haley focused on what he saw as the integrative, “restorative” potential of the Japanese criminal justice system. Police, prosecutors, and judges all pushed defendants to confess. They encouraged defendants to do what they could to compensate their victims. They urged a defendant’s family to take responsibility for his behavior. They “actively involve[d] the community in the law enforcement

27. John O. Haley, *Japan's Postwar Civil Service: The Legal Framework*, in *THE JAPANESE CIVIL SERVICE AND ECONOMIC DEVELOPMENT* 77, 78 (Hyung-Ki Kim et al. eds., 1995).

28. John O. Haley, *Governance by Negotiation: A Reappraisal of Bureaucratic Power in Japan*, 13 *J. JAPANESE STUD.* 343, 353 (1987).

29. *Id.* at 344.

30. HALEY, *AUTHORITY WITHOUT POWER*, *supra* note 25, at 158.

31. John O. Haley, *Administrative Guidance Versus Formal Regulation: Resolving the Paradox of Industrial Policy*, in *LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY* 107, 119 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986).

32. *See, e.g., id.* at 121–38; HALEY, *THE SPIRIT OF JAPANESE LAW*, *supra* note 25, at 71–89. For a fine exploration of some of these criminal issues, see generally Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 *CAL. L. REV.* 317 (1992).

33. HALEY, *AUTHORITY WITHOUT POWER*, *supra* note 25, at 121–38.

process.”<sup>34</sup> Ultimately, argued Haley, they integrated criminals back into the social networks they had so forcefully rejected.<sup>35</sup>

In all this, Haley did not try to identify a Japan-specific approach. He did not explain the low crime rates as a function of anything distinctively Japanese. He did not argue that “this is the way Japanese behave.”

Instead, Haley argued that “this is the way human beings behave.” To him, the crime control difference between Japan and the United States lay not in different morals, much less in a different “culture.” Instead, it lay in a different institutional framework. As he put it, “The moral imperative of forgiveness as a response to repentance is surely as much a part of the Judeo-Christian heritage as the East Asian tradition . . . . However, whatever the reason, unlike Japan, Western societies have failed to develop constitutional props for implementing such moral commands.”<sup>36</sup>

Having identified what he considered a universal restorative potential, Haley forged ties to groups developing similar programs here. He published his studies with them.<sup>37</sup> They in turn studied his accounts. In the process, he brought the study of Japanese law to readers who otherwise had ignored the Japanese experience. He did not attract this audience by looking to the peculiar in Japan. He attracted it by looking to the universal in us all.

### III. CONCLUSION

Haley entered the world of U.S. studies of Japanese law in the 1970s. Three decades later, he had transformed it. In 1970, the field had served primarily as a venue for speculation about alternative (and largely imaginary) means of social organization. By sheer force of argument and example, Haley made it a venue for the rigorous exploration of the effect that specific legal rules and institutions could have on real human beings.

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34. HALEY, *THE SPIRIT OF JAPANESE LAW*, *supra* note 25, at 17.

35. *Id.*

36. John O. Haley, *Crime Prevention Through Restorative Justice: Lessons from Japan*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 349, 363 (Burt Galaway & Joe Hudson eds., 1996).

37. See John O. Haley, *Confession, Repentance and Absolution*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* 195 (Martin Wright & Burt Galaway eds., 1989); John O. Haley, *Victim-Offender Mediation: Japanese and American Comparisons*, in *RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION: INTERNATIONAL RESEARCH PERSPECTIVES* 105 (Heinz Messner & Hans-Uwe Otto eds., 1992); John O. Haley, *Victim-Offender Mediation: Lessons from the Japanese Experience*, 12 *MEDIATION Q.* 233, 234 (1995); John O. Haley, *Apology and Pardon: Learning from Japan*, 41 *AM. BEHAV. SCIENTIST* 842, 842 (1998); John Owen Haley, *Apology and Pardon*, in 1 *ENCYCLOPEDIA OF LAW AND SOCIETY* 77 (David S. Clark ed., 2007).

In the process, Haley integrated the field into the U.S. legal academy. Before Haley, our colleagues used Japan to speculate about cultural peculiarity; after him, they discussed human universals. Before Haley, they debated how different Japan was from anywhere else; after him, they asked what motivated people everywhere. Japan became, as Haley might have put it, “Just like any other legal system. And maybe even more so.”