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Continuities of Legal Consciousness: Professor John Haley's Writings on Twelve Hundred Years of Japanese Legal History

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CONTINUITIES OF LEGAL CONSCIOUSNESS: PROFESSOR JOHN HALEY'S WRITINGS ON TWELVE HUNDRED YEARS OF JAPANESE LEGAL HISTORY

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History, as nearly no one seems to know, is not merely something to be read. And it does not refer merely, or even principally, to the past. On the contrary, the great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways, and history is literally *present* in all that we do. It could scarcely be otherwise, since it is to history that we owe our frames of reference, our identities, and our aspirations.¹

I. HOW WE MAKE SOUP

In the Law and Society in Japan class that I teach each year at the University of Hawai'i, I typically complete the history module of the course curriculum with a short talk about making soup. The story goes something like this:

Imagine that you work in a fine restaurant and that you have been asked to make a pot of soup. You begin by filling a large kettle with water, putting it over the flame, and adding ingredients that will create the basic stock underlying a more complex creation to follow.

Let's look on the pot of soup that we will be making as the complex mix we know to be Japanese law. Thus, we took our large kettle which represents Japanese society and filled it with the clear spring water which represents the ancient indigenous Japanese legal order. As we keep that over the flames of time, the water takes on a Japaneseness from the pot and the water.

The time is AD 660. It's time to make the stock. In the next century, you put into the water a host of distinctly Chinese vegetables and spices. At the outset, the soup's taste is unmistakably Chinese in character as is its

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1. James Baldwin, *White Man's Guilt*, in *THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948-1985*, at 409, 410 (1985).

appearance when you lift the lid and look into the pot. But its character changes while you simmer the soup over the flames of time for eleven centuries. Certainly there still is an essential Chinese character in flavor and appearance, but the nature of the soup also reflects a Japaneseness that emerges from the pot of Japanese society and the flavor of the water that fills the pot. While one might call it a Chinese vegetable soup, it differs from the authentic Chinese vegetable soup being served at the venerable Chinese restaurant across the street.

The late nineteenth century arrives and it is time to radically transform our creation. You take down a colander from the shelf and strain the soup into a newer, but still Japanese, pot. Consider what a rich stock you have! Although you've removed the visible structures of Chinese cuisine, needless to say, the centuries of simmering the Chinese vegetables and spices have created a broth profoundly imbued with a Chinese flavor at its core. And so now when you add French celery and carrots, German potatoes and onions, and even a tad bit of Anglo-American corn, the complexity of flavors that will delight your patrons begins to emerge. When we look at the soup, we might no longer call it a Chinese vegetable soup. Rather, it appears to be essentially a continental European dish (with a tiny bit of Anglo-Americanism). Nonetheless, any taster senses what is obvious. This continental European vegetable soup has both a strong underlying flavor of the full-bodied Chinese ingredients that were there for eleven hundred years and distinctly Japanese characteristics that emerged over time.

Now return your soup to the modern pot of Japanese society and simmer on the flames of time again, topping it off with a bit more clear Japanese spring water. Leave it on the heat for fifty years or so, allowing all of these influences to mix and develop. While the pot and water once again add Japaneseness to the flavor, the newly added "Western" vegetables are imparting new flavors on top of the "Eastern" stock. Certainly, when we arrive at 1925 and your assistant looks to see what you have, it now looks to be continental European vegetable soup. Of course, as chef, you know better. The older underlying East Asian tastes are still plainly in the background.

It's the late 1940s. Your guests will be arriving soon, so it's time to add the finishing touches. First, remove some, though not all, of the French and German vegetables, and add more Anglo-American ingredients—corn, wild mushrooms, and a full handful of midwestern constitutional bacon—surely that will add a whole new element to the creation! Turn up the flame to reflect modernity's faster pace and bring everything in the mix up to a full boil. Through the next sixty years, generously sprinkle

herbs into the pot—mostly American parsley but a bit of French thyme, German rosemary, and even new varieties of herbs coming out of the world culture of international law. Keep topping off the soup with pure Japanese water and watch as a Japaneseness is again infused through and through.

At last you are done. We've come to the present and we can enjoy our soup.

So what have we got?

Alas, the restaurant's owner insists on calling it "a kind of European vegetable soup." Granted, to look into the soup one sees mostly the French and German vegetables, though the later-added American vegetables and constitutional bacon are certainly immediately evident. But again you know better. This soup is unique, existing nowhere else. Aged undertones and modern sparkle combine in a remarkable collection of ingredients and flavors, some bitter and some sweet, to provide a special complexity worthy of acclaim by the greatest chefs in the world.

Now taste. Slowly. Carefully. After all, you've worked very hard and earned this chance. Though not immediately apparent to the eye, one senses the powerful Chinese stock developed in eleven hundred years over the flames of time as well as both the ancient and modern Japaneseness that the spring water and our cooking pots have transmitted. These flavors mingle with the modern European and Anglo-American vegetables which predominate the creation, though the just added herbs continue to enliven and change our soup even up until the moment we ladle it into bowls, which is now.

I hope this story of soup has meaning to you. As James Baldwin told us, "history is literally present in all that we do."² Understanding how the soup was created should provide you a foundation for understanding its appearance and the ability to knowingly search your taste buds for component flavors. That subtle tasting is the true delight of legal history for the epicurean Japanese law scholar.

II. ELEVEN HUNDRED YEARS OF HISTORY ALIVE IN THE PRESENT

Although the soup metaphor is mine, my pleasure in teaching Japanese law and my understanding of Japanese legal history come from the lessons I've learned from Professor John Owen Haley. I had the good fortune to study Japanese legal history in Professor Haley's Japanese Law course at

2. *Id.*

the University of Washington in the fall semester of 1989. It was precisely then that Professor Haley was finishing the manuscript of *Authority Without Power: Law and the Japanese Paradox*.³ And so, after working through the source materials Professor Haley presented in the course text and attending the corresponding lectures, the first four chapters of *Authority Without Power* were quite familiar to me as a reader. Moreover, they have been a fundamental resource for my subsequent work as a lawyer and law professor.

While other works have presented elements of Japanese legal history,⁴ to the best of my knowledge, no other English-language writing has presented the topic in a single coherent presentation from the ancient to the present.⁵ Only Haley gives us all the soup's ingredients—Japanese, Chinese, French, German, and Anglo-American.⁶ However, the careful historical record is not what ranks these four chapters as a *tour de force* in Professor Haley's *oeuvre*. This writing is significant because it explicitly connects the past with the present. It is what allows us today to taste flavors in the soup from faraway distant times, the middle ages, and the recent past. And drawing upon that understanding further helps us in trying to predict the future.

This result is hardly accidental. In fact, Professor Haley shares Baldwin's approach when he states his aims in the first paragraph preceding Chapter 1: "One cannot understand the present without an appreciation of the past and the role of present perceptions of that past. To appreciate the historical dynamics of Japan's legal tradition is vital both to

3. JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (1991).

4. See, e.g., the twelve English-language books and longer monographs cited by Harald Baum and Luke Nottage in the legal history section of their extensive bibliography of Japanese law. HARALD BAUM & LUKE NOTTAGE, *JAPANESE BUSINESS LAW IN WESTERN LANGUAGES: AN ANNOTATED SELECTIVE BIBLIOGRAPHY* (1998). Regrettably, Baum and Nottage overlook Haley's *Authority Without Power* in that portion of their work.

5. Carl Steenstrup's comprehensive historical work comes closest to the challenge, but as indicated by his title, the clock stops at 1868. CARL STEENSTRUP, *A HISTORY OF LAW IN JAPAN UNTIL 1868* (1991).

6. International law influences are missing from the work, presumably because these flavors were added primarily in postwar history, which is less developed in *Authority Without Power's* recitation. See, e.g., Hisashi Owada, *Japan, International Law and the International Community*, in *JAPAN AND INTERNATIONAL LAW: PAST, PRESENT AND FUTURE* 347 (Nisuke Ando ed., 1999); YUJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW* (1998); Kenneth L. Port, *The Japanese International Law "Revolution": International Human Rights Law and Its Impact in Japan*, 28 *STAN. J. INT'L L.* 139 (1991).

comprehend more fully the present as well as to predict more accurately the future.”⁷

But of course things can never be simple or we academics might go out of business. Professor Haley, who explicitly connects the word “paradox” to Japanese law in the title of his book, presents continuities from historical times amidst the dynamics of dramatic change as a puzzle for us to explore:

[S]ince change inexorably also confirms and reinforces something of the past, like all other social orders Japan’s too reflects elements of continuity with change. For those who wish to understand both, the puzzle is to identify and fit together pieces of the process and the links between past and present. This then is the aim of the chapters that follow.⁸

This then is also the aim of this brief Essay. Working from Professor Haley’s division of the historical process into four major temporal components—Nara, Kamakura, Tokugawa, and Meiji, I hope to suggest how pieces of the historical puzzle are evident in Japanese legal dynamics at work since the publication of *Authority Without Power* nearly twenty years ago. Then, I will conclude by trying to assess what we may be able to imagine coming soon in Japan’s future.

A. *Legacies of the Sinicized Administrative State*

Haley’s historical account begins at the end of the fifth century when “the *uji* controlling the fertile Yamato Plain in Southwestern Honshū . . . emerged as the dominant political force.”⁹ But the real story begins shortly thereafter when “the emergent political leaders of Japan would . . . find in imperial Chinese institutions and concepts welcome models for their own statecraft.”¹⁰ This “selective adaptation of Chinese legal institutions . . . remained in theory Japan’s fundamental national law for over a millennium.”¹¹

Haley describes this foundational legal system as paradigmatic of an administrative state. It was, at the core, a public law order—“an instrument of government control quite separate from any moral or religious order

7. HALEY, *supra* note 3, at 17.

8. *Id.* at 18.

9. *Id.* at 29.

10. *Id.*

11. *Id.*

serving the interests of those who exercised paramount political authority.”¹² Accordingly, the system lacked any conceptual footing in what the Western tradition terms “rights.”¹³ Similarly, the Western notion of “justice” through which “[l]aw was and continues to be fused with morality” was absent.¹⁴

Here begins the dynamic that gives Haley’s book its name. This sinicized legal order reserved an unbounded degree of legal authority for the state. “There was no developed concept separating ‘public’ and ‘private’ spheres of activity to contain state authority. Instead, private activity was in effect those areas that the state chose to exclude from its regulatory reach rather than a realm to which its authority could not extend.”¹⁵

How then might power have been lacking to create the so-called paradox of *Authority Without Power*? The answer is rather simple: “Much was in fact beyond coercive state control simply because of limitations in resources or political and social limits to official intrusion.”¹⁶ In short, Haley characterizes Japan’s administrative state as having boundless authority and yet profoundly constrained power.

The primacy of public law had practical implications in dispute resolution between private individuals as well as administrative governance. For example, given that the primary concern of the adjudicatory process was the interests of the state,¹⁷ there evolved an “emphasis on amicable settlement of private disputes—or more accurately, coerced compromise—[that] tended to preserve if not increase social inequalities, dependency relations, and the influence of those with social and economic power.”¹⁸

Later in the book, Haley shows how this eleven hundred-year-old history came alive in the recent past, first when the Japanized Chinese legal tradition blended with Western law in the Meiji period and then

12. *Id.* at 19.

13. *Id.* at 21.

14. *Id.* at 24.

15. *Id.* at 27.

16. *Id.*

17. Critical legal scholars would surely reply that Western legal systems share these circumstances. The difference is merely between the primacy of state interests being overtly displayed in the sinicized legal order and the same being strategically masked in our Western legal tradition. *See, e.g.,* Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 206 (1984) (“Law [for critical legal scholars] is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society.”).

18. HALEY, *supra* note 3, at 23. *See also* DAN FENNO HENDERSON, *CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN* (1965).

again in the postwar modern period.¹⁹ Through these later chapters, Haley reveals how efforts to incorporate Western notions of “rights” into the legal system and nascent claims to expect “justice” from that system defined the fault lines for an entire century in Japan.²⁰

Tensions from these historical traditions remain evident today as Japan has progressed through the administrative and judicial reform processes of the past fifteen years. The struggles have played out in the dynamics of old versus new in new administrative reform laws, a massive national government restructuring, and the judicial system reform processes.

For example, decades of legislative efforts were required to get Japanese bureaucrats to relinquish formal authority and be constrained by statutes.²¹ Change arrived with the 1991 Administrative Procedure Law.²² But despite the fact that a number of laws similarly redefining the role of Japan’s administrators has emerged more recently,²³ criticism remains that these laws have been inadequate to restructure the fundamental relationship between citizens and the administrative state in Japan.²⁴

Another aspect of the boundless authority of Japanese bureaucracies in the modern age that *Authority Without Power* documents are ministry

19. For a description of the emergence of rights notions in Meiji Japan, see HALEY, *supra* note 3, ch. 4 (especially 72–77). Regarding postwar administrative law, see *id.*, ch. 7 (especially 153–68). See also John O. Haley, *Japanese Administrative Law: An Introduction*, in LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES 37 (John O. Haley ed., 1988).

20. See HALEY, *supra* note 3.

21. Haley, *supra* note 19, at 42. See also Lorenz Ködderitzsch, *Japan’s New Administrative Procedure Law: Reasons for Its Enactment and Likely Implications*, 24 LAW IN JAPAN 105, 111–14 (1991). Lorenz Ködderitzsch reports that “any movement toward the codification of administrative procedure rules had to reckon with the inertia if not the opposition of most ministries.” *Id.* at 114.

22. Gyōsei tetsuzukihō [Administrative Procedure Law], Law No. 88 of 1993, translated in 3 ASIAN-PAC. L. & POL’Y J. 182 (2002). The 2005 revision is available in Japanese at <http://www.cas.go.jp/jp/seisaku/hourei/data/APA.pdf>.

23. See, e.g., Gyōseikikan no hoyū suru jyōhō no kōkai ni kansuru hōritsu [Law Concerning the Disclosure of Information Held by Administrative Organs (Freedom of Information Law)], Law No. 42 of 1999, translated in 3 ASIAN-PAC. L. & POL’Y J. 209 (2002) (2004 revision), available at <http://www.cas.go.jp/jp/seisaku/hourei/data/AAIHAO.pdf>; Gyōseikikan ga okonau seisaku no hyōka ni kansuru hōritsu [Government Policy Evaluations Act], Act No. 86 of 2001, available at <http://www.cas.go.jp/jp/seisaku/hourei/data/GPEA.pdf> (English translation); Gyōseikikan no hoyū suru kojūin jyōhō no hōgo ni kansuru hōritsu [Act on the Protection of Personal Information Held by Administrative Organs], Act No. 58 of 2003, available at <http://www.cas.go.jp/jp/seisaku/hourei/data/APPIHAO.pdf> (English translation).

24. See, e.g., John O. Haley, *Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan?*, 10 ZEITSCHRIFT FÜR JAPANISCHES RECHT [J. JAPANESE LAW] 7 (2005); Ichirō Ozaki, *Judicial System Reform and Legalization*, in EMERGING CONCEPTS OF RIGHTS IN JAPANESE LAW 211, 216–17 (Harry N. Scheiber & Laurent Miyali eds., 2007); LAWRENCE REPETA & DAVID M. SCHULTZ, JAPANESE GOVERNMENT INFORMATION: NEW RULES FOR ACCESS (2002), available at <http://www.gwu.edu/~nsarchiv/nsa/foia/japanfoia.html>.

establishment laws representing a “mission to manage.”²⁵ These subsequently came into focus in the Japanese government’s massive restructuring efforts of 2001. When enabling legislation was enacted for this reform in 1998,²⁶ the *Yomiuri* newspaper identified the authority allowed by unbounded laws as the foremost problem with the status quo. The *Yomiuri* editors’ hope for more restrictive establishment laws for the newly promulgated governmental organizations evidences the same grappling with the old sinicized public law order.

As the *Yomiuri* editors wrote:

The current establishment laws offer comprehensive, but somewhat vague, definitions of power. . . . Neither the United States nor any industrialized European nation gives such comprehensive discretion to authorities and government bodies. Therefore, it can be said that the old ministry establishment laws were at the root of Japanese style “bureaucratic” rule. . . . It is almost certain, however, that the bureaucrats will strongly resist any moves to weaken their authority. Healthy relations between politicians and bureaucrats in the 21st century will depend on how the politicians can deal with such resistance.²⁷

Finally, the 2001 recommendations of the Justice System Reform Council authoritatively delivered a transformative vision of the role of law and society moving into the twenty-first century.²⁸ But this work has not been easily implemented due to administrators’ foot-dragging as well as a conservative political backlash holding back progress for many of the proposed reforms.²⁹ Again, we can see the tight grip of vestigial historical consciousness. And the primary fault line lies precisely where *Authority Without Power* guides us to look: between the unbounded authority of the administrative state, established in the seventh century, and a more

25. HALEY, *supra* note 3, at 154. See also John O. Haley, *Mission to Manage: The U.S. Forest Service as a “Japanese” Bureaucracy*, in *THE U.S.-JAPANESE ECONOMIC RELATIONSHIP: CAN IT BE IMPROVED?* 196 (Kichirō Hayashi ed., 1989).

26. Kokka gyōsei soshiki hō [National Government Organization Act], Act No. 120 of 1948, available at <http://www.cas.go.jp/jp/seisaku/hourei/data/ngo.pdf>.

27. Editorial, *Establishment Laws Depend on Politicians*, DAILY YOMIURI, June 10, 1998, at 6.

28. JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATION OF THE JUSTICE SYSTEM REFORM COUNCIL FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> (English translation).

29. Professor Setsuo Miyazawa is the first to present this story with extensive documentation and detail in an English-language publication. See Setsuo Miyazawa, *Law Reform, Lawyers, and the Judiciary*, in *JAPANESE BUSINESS LAW* 39 (Gerald Paul McAlinn ed., 2007).

constrained approach finally offering power to the people in the twenty-first century.³⁰

We can see this in the Council's carefully chosen words:

This is a transformation in which the people will break out of viewing the government as the ruler (the authority) and instead will take heavy responsibility for governance themselves, and in which the government will convert itself into one that responds to such people.³¹

B. Feudal Village and Castle Town: The Quiet Dance of Law and Non-law

Chapters Two and Three of *Authority Without Power* bring the reader through the centuries between Japan's selective borrowings from T'ang China in the seventh and eighth centuries to the Meiji Restoration in 1868, after which open reliance upon Chinese models of the role of law in society would soon be set aside. Developments in Japanese law during these centuries were, perhaps not surprisingly, more Japanese in character, reflecting the particularities of state and society through those years.

Again the book introduces us to dynamics which remain alive and thereby help our understanding of Japan today. The most powerful societal force in Haley's account is the social cohesion of the village, emerging with fictive kinship relations as the basis of the feudal contract,³² leading to a "control system through dependency" after Hideyoshi's *hei-nō-bunri* edict removed the samurai from rural communities,³³ and finally culminating in the carefully structured relationships maintained and managed throughout the Tokugawa period.³⁴

30. Cf. JOHN LENNON AND THE PLASTIC ONO BAND, *POWER TO THE PEOPLE* (Apple Records 1971) (video available at <http://www.youtube.com/watch?v=Wos-dDxpJIQ>).

31. JUSTICE SYSTEM REFORM COUNCIL, *supra* note 28, at ch. I, pt. 1, § 1. Moreover, among the chief goals of the Justice System Reform Council's reform is to restructure dispute resolution between private parties. Here too, the sinicized emphasis on amicable settlement of private disputes—or more accurately, coerced compromise—should give way to a program in which "all people are treated equally and an impartial third party makes a decision based on fair and clear legal rules and principles through fair procedures." *Id.* ch. I, pt. 2.

32. HALEY, *supra* note 3, at 37–38.

33. *Id.* at 46.

34. *Id.* at 58–65.

1. *From the Minamotos to the Warring States*

At the outset, Haley frames “the institutional history of Japan from the late twelfth through the mid-sixteenth centuries [as] the repetition of earlier patterns—the conflicts and tensions between the holders of power at the center and those at the periphery, who in control of greater resources challenged the center and asserted their own independence.”³⁵ This tug-of-war is, needless to say, still very much alive in Japan and has played out through the public debates and struggles with regard to the principle of local autonomy provided for in Article 92 of the Constitution of Japan.³⁶ Presently, the center is clearly the dominant force, as it has been since the successful Meiji nation-building of the late nineteenth century. Perhaps there is no better example of this than Governor Masahide Ota’s unsuccessful challenge to national authority with respect to the compulsory leasing of lands for U.S. military bases in Okinawa.³⁷

Moreover, as noted above, Haley explains that from the early years of the Kamakura Period, Japan’s landowning elites drew upon fictive notions of kinship to establish the feudal relationship between vassal and serf.³⁸ This is in contrast to the fictive *contract* that had been the basis of such relationships in Europe.³⁹

Haley explicitly ties this notion of kinship to modern Japan:

[E]ach characterization had a certain logic of its own with consequences for each society. . . . [In Japan, c]ontinued reliance on real and fictive kinship, combined with neo-Confucianist emphasis on the reciprocal duties of benevolence and loyalty, was . . . to form the basis for the familial characterization of the modern Japanese state.⁴⁰

35. *Id.* at 2, 35.

36. “Regulations concerning organizations and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.” KENPŌ [CONSTITUTION], art. 92. See Yoshiaki Yoshida, *Authority of the National and Local Governments Under the Constitution*, in JAPANESE CONSTITUTIONAL LAW 109 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993).

37. *Ota v. Hashimoto*, 50 MINSHŪ 1952 (Sup. Ct., Aug. 28, 1996), available at <http://www.courts.go.jp/english/judgments/text/1996.08.28-1996-Gyo-Tsu-No.90.html> (English translation). See Masahide Ota, *At the Supreme Court of Japan As the Governor of Okinawa*, in ESSAYS ON OKINAWA PROBLEMS 233 (2000). See generally MIYUME TANJI, MYTH, PROTEST AND STRUGGLE IN OKINAWA (2006); MASAMICHI S. INOUE, OKINAWA AND THE U.S. MILITARY: IDENTITY MAKING IN THE AGE OF GLOBALIZATION (2007).

38. HALEY, *supra* note 3, at 37.

39. *Id.*

40. *Id.* at 37–38.

Professor Ichiro Ozaki and I have hypothesized that these feudal notions, brought forward to the modern state in the manner Haley portrays, remain profoundly significant today for Japan's many minority communities.⁴¹ The prevailing myth of Japanese homogeneity framed out of fictive Meiji kinship of all Japanese subjects with the Emperor was powerfully established as a core element of Meiji nation building⁴² and represents the nucleus of the notion of Japanese identity which I term *Wajin-ness*.⁴³ In some regards, this widely dispersed self-conceptualization is the original source of the destructive impacts on minorities associated with *Wajin-ness* in Japan today.⁴⁴

2. *In the Castle Town and Village*

Beginning from the mid-sixteenth century, Japan was vastly transformed by the “three unifiers” of medieval Japan—Nobunaga Oda, who unified Japan through military force; Hideyoshi Toyotomi, who established the fundamental governance policies that followed unification; and Ieyasu Tokugawa, who, together with his successors, sustained and adapted these structures to last for 260 years. “In this combination we find paradigms of governance that help explain the peculiar contours and multifaceted paradox of law and social control in contemporary Japan.”⁴⁵

As Haley explains:

All of these changes took place in the context of one of the pivotal events in Japanese history, the establishment of the castle town [*jōkamachi*]. . . . This coercive “push” out of the village and “pull” to the castle and the resulting resettlement of the samurai led not only to the expanded development of officialdom and judicial legal

41. Mark A. Levin & Ichiro Ozaki, Disparate Impacts of Family Law on Japan's Racial and Ethnic Minorities, Paper Presented at the 2008 Sho Sato Conference on Japanese Law: Japanese Family Law in Comparative Perspective, University of California, Berkeley, Boalt Hall School of Law (Mar. 6–8, 2008) (on file with author).

42. See HALEY, *supra* note 3, at 37–38; TESSA MORRIS-SUZUKI, RE-INVENTING JAPAN: TIME, SPACE, NATION 84–85 (1998); BENEDICT ANDERSON, IMAGINED COMMUNITIES 94–99 (1983).

43. See Mark A. Levin, *The Wajin's Whiteness: Law and Race Privilege in Japan*, 80 HÖRITSU JIHŌ 80 (2008) (Ozaki trans.) (on file with author).

44. In a similar fashion, the so-called “company-man” notion of employer-employee relations as a fictive kinship underlies the destructive forces that Professor Tatsuo Inoue has identified in his powerful essay on death by overwork (*karōshi*) in Japan. Tatsuo Inoue, *The Poverty of Rights-Blind Communitarianism: Looking Through the Window of Japan*, 1993 BYU L. REV. 517. Inoue points to a maternal “ethic of care” as underlying Japan's communitarian “*kaishashugi*.” *Id.* at 529–30.

45. HALEY, *supra* note 3, at 51.

controls in urban centers but also to intensified forms of extralegal social controls in the village.⁴⁶

While his primary focus is on the implications of the dynamics of village life, Haley first highlights the potency of administrative official controls in Tokugawa urban centers.⁴⁷ This phenomenon evidences how the ongoing bureaucratic state, already discussed above, not only remained a constant, but grew ever stronger through the centuries, building to the paradigmatic administrative state Haley portrays as vitally active in Japan today.

[A]t least within Japan's urban centers the regulatory controls of the public authorities were increasingly intensified and perfected. . . . The economic and social lives of merchants, artisans, and common laborers became increasingly regimented and restricted. . . . In short, urban Japan experienced, in John Whitney Hall's words, "a density of administrative supervision that few peoples have ever matched."⁴⁸

But again, Haley principally wants the reader to look to "a critical new element, the semiautonomous village"⁴⁹—which he presents in an extended section of Chapter Three as "[t]he pivotal element of the Tokugawa legal order."⁵⁰

Given the significance of this writing, I quote extensively:

Viewed from above, the *mura*, like its urban counterpart the *machi*, appeared to be an intensively regulated community. . . .

Focus on the volume and scope of regulatory edicts alone is misleading, however.

. . . .
 . . . To the contrary, official reliance on village self-government and indirect rule through the mediation of village headmen enabled the village to disregard unwanted restrictions. . . .

Autonomy had a price. For the community and the individual, conflict avoidance and deference to authority were the prerequisites of self-governance and independence. So long as peace prevailed and taxes were paid, there was little to draw official attention and

46. *Id.* at 46.

47. *Id.* at 55.

48. *Id.* at 56–57.

49. *Id.* at 51.

50. *Id.* at 58.

scrutiny. However, any open conflict or breach of peace threatened that autonomy and invited investigation and more stringent controls. By suppressing intracommunity quarrels and satisfying formal fiscal obligations, a village community could restrain or avoid unwanted official regulation. The consequence was an institutional structure that in allowing evasion of official legal controls also promoted external deference and internal cohesion. . . .

To achieve or maintain such autonomy with ostensible conformity the community itself had to develop mechanisms of control. The most prominent included the psychological sanction of collective community displeasure as well as more severe forms of community coercion, such as ostracism and expulsion. . . .

In this environment individual interests were generally subsumed by community and family concerns. . . .

. . . At each level of social organization from family through the village, overt and superficial conformity to legally prescribed rules of conduct would thus be emphasized at the expense of actual compliance. Truly secret behavior would not matter. . . .

. . . .
More influential than either the administrative or judicial instruments of government control and ordering, however, was their containment. Indirect governance of the *mura* and the *machi* prompted resort to a complex variety of consensual or contractual means of social control. . . . Formal legal rules were best acknowledged with an obsequious bow but kept at arm's length and, if possible, ignored or evaded.⁵¹

These pages give us a treasure trove of information for understanding multiple elements of modern Japanese society, including its political and business worlds. To begin with, if truly secret behavior does not matter, this should help explain an environment where it is better to keep a dark secret for the sake of the nation or organization than divulge it for the public benefit. For example, Japan's tobacco industry, with approximately ten percent global market share, surely protects a vast body of yet unexposed secret stories of knowingly harmful commercial behavior that is responsible for hundreds of thousands of deaths annually.⁵² And might

51. *Id.* at 59–64.

52. See, e.g., Mark A. Levin, *Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan*, 8 STAN. L. & POL'Y REV. 99 (1997); see generally JUDITH MACKAY & MICHAEL ERIKSEN, *THE TOBACCO ATLAS* (2d ed. 2006).

this emphasis on secrecy also explain why it took decades for Japan's gruesome history of sexual slavery in the mid twentieth century to come to light?⁵³ Haley's pages thus connect us directly to the frequency of scandal⁵⁴ as well as the "near-total absence"⁵⁵ of the whistleblower in modern Japan, at least until recent years.

Finally, the "obsequious bow" that Haley mentions also sheds light on another modern phenomenon—administrative guidance (*gyōsei shidō*).⁵⁶ Haley's presentation may help us see how the "beauty" of administrative guidance varies greatly by the subjective eye of the beholder. If Japanese businesses have inherited the status of the Tokugawa semiautonomous village, then regardless of whether the bureaucrats' dictates are lawful or not, a Japanese firm's wisest strategy should be to show external deference while an inspector is present and then to patiently await her departure. This should generally suffice to enable the company to get back to business as it wishes.

But then let us imagine an outside observer traveling together with the inspector. It seems extremely unlikely that the locals would candidly reveal the law's impotence to the outsider, who would instead think he had witnessed bureaucratic autocracy. And yet at the same time, if a few unfortunate firms are selected out to genuinely suffer a bureaucratic heavy hand,⁵⁷ their representative's true testimony would nonetheless be inaccurate when extrapolated out to a global generalization.

53. See Mark A. Levin, Case Comment, *Nishimatsu Construction Co. v. Song Jixiao et al.*; *Kō Hanako et al. v. Japan*, 102 AM. J. INT'L L. 148 (2008). See generally YUKI TANAKA, *JAPAN'S COMFORT WOMEN: SEXUAL SLAVERY AND PROSTITUTION DURING WORLD WAR II AND THE US OCCUPATION* (2002).

54. "[T]he number of incidents that come to light as public scandal in the United States pales in comparison to that in Japan, its famed quality control notwithstanding." MARK D. WEST, *SECRETS, SEX, AND SPECTACLE: THE RULES OF SCANDAL IN JAPAN AND THE UNITED STATES* 135 (2006). Arguably, pharmaceutical and environmental scandals have provided the most notorious stories in Japan's postwar years, but giant scandals concerning food products and other consumer goods have been notable in recent years. Mark West's book gives us the clearest window into these circumstances in Japan today. See also *id.* at 49 (listing major whistleblowing incidents between 2000 and 2005).

55. *Id.* at 45. It is perhaps with Haley's historical framing in mind that West aptly notes "[t]he roots seem deeper than the laws on the books." *Id.*

56. Some readers may recall a time when literature on the so-called Japanese phenomenon of administrative guidance overflowed the pages of legal scholarship written by outside observers of Japan. As Mark Ramseyer wryly noted, this dynamic of businesses ostensibly being compelled to follow illegal bureaucratic dictates "surely comes near the top of any ranking of Japanological topics by their pages:ideas ratio." J. Mark Ramseyer, *Rethinking Administrative Guidance*, in *FINANCE, GOVERNANCE, AND COMPETITIVENESS IN JAPAN* 199, 199 (Masahiko Aoki & Gary R. Saxonhouse eds., 2000).

57. Such is the reported experience of some foreign firms under intense bureaucratic scrutiny. See, e.g., JACKSON N. HUDDLESTON, *GAIJIN KAISHA: RUNNING A FOREIGN BUSINESS IN JAPAN* (1990).

III. THE INERTIA OF HISTORY VERSUS THE MOMENTUM OF REFORM

Professor Haley gets it. Though James Baldwin argues that “nearly no one seems to know” of history’s engagement in the present, John Haley shows us that he knows.

This brief Essay, drawn upon Haley’s writings, has addressed Japan’s recent events of administrative law reform, judicial system reform, local autonomy conflicts, the marginalization of minorities, scandal, whistleblowers, and a realpolitik glimpse at the dynamics underlying administrative guidance. For all of these topics, the first chapters of *Authority Without Power* introduce us to deeply resonant flavors in the soup of Japanese law today.

John Haley’s historical writings help us predict the future by presenting so clearly the powerful inertial forces rooted in the history of law in Japan. These forces are precisely the weights dragging upon the momentum of Heisei reforms.⁵⁸ But then we have seen much change happen in Japan recently. Many, if not most, Japanese law scholars are presently exploring the possibilities for major change caused by the wave of legal reforms underway in Japan today. This points to the million-dollar question of which reforms will succeed and which will silently fade away.⁵⁹

I conclude with one contemplation that ties back to the absence of the Western notion that justice fuses law and morality during Japan’s eleven hundred years of experience with Chinese law traditions.⁶⁰

The concept of justice⁶¹ serves as Polaris, the navigational target for many Western discussions of law. Perhaps the endpoint is unattainable, but at the very least, justice provides the direction toward which lofty idealists in our tradition steer their ships. And so in this regard, given that justice is a new arrival to Japanese legal discourse, it is interesting to note that the concept was presented as one of the cardinal points for the Judicial System Reform Council’s grand mission:

Justice is expected to correct illegal actions and to provide a remedy for injured persons’ rights in concrete cases and contests by properly resolving the cases and contests in question through proper

58. As noted above, Professor Haley has questioned whether these present reforms are “really changing Japan.” Haley, *supra* note 24, at 5.

59. See EMERGING CONCEPTS OF RIGHTS IN JAPANESE LAW, *supra* note 24, and LAW IN JAPAN: A TURNING POINT (Daniel H. Foote ed., 2007) for two extensive collections of essays addressing these vital issues.

60. HALEY, *supra* note 3, at 24.

61. If justice can not be “known,” at least we know it can be endlessly debated. For one starting point, see JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) and its vast progeny.

interpretation and application of law; to play a role in coping with violations of rules appropriately by properly and promptly realizing the power of punishment through fair procedures; and thereby to maintain and to develop the law. Accordingly, the judicial function has an aspect of realization of public values, and the courts (the judicial branch) shall be positioned as a pillar supporting “the space of the public good” (*kokyosei no kukan*) in parallel with the Diet and the Cabinet (the political branches), which seek to create order by mapping out policies against the backdrop of majority rule and by fixing and conclusively executing norms in the form of law for the future.⁶²

At least in theory, justice has arrived in Japan. The challenge for all involved will be to help transform that theory into reality. And with John Haley’s teachings, we are far better prepared for the journey.

62. JUSTICE SYSTEM REFORM COUNCIL, *supra* note 28, at ch. I, pt. 2, § 1.