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## Haley and the Blowfish

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# HALEY AND THE BLOWFISH

MARK D. WEST\*

The central debate of Japanese legal studies is easy to summarize, or, for that matter, to caricature. Takeyoshi Kawashima argued in the 1960s that cultural factors keep Japanese litigation rates low.<sup>1</sup> Kawashima's work in English was, according to John Haley, "probably the most widely cited English language article on Japanese law."<sup>2</sup> Haley countered a decade later that Japanese reluctance to litigate was a "myth," and that, in fact, institutions were responsible for the lack of litigation.<sup>3</sup> Haley's classic work appeared in Japanese and English contemporaneously,<sup>4</sup> and became a fixture in the United States and Japan for explaining Japanese litigation patterns.<sup>5</sup>

Over the next three decades, new explanations were offered,<sup>6</sup> the old ones were tweaked,<sup>7</sup> and more evidence was gathered,<sup>8</sup> but the basic institutions-versus-society paradigm remained. A few of us argued that the dichotomy was false,<sup>9</sup> a realization that law students reached in classrooms long before it was published. But a cursory examination of Japanese law

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1. TAKEYOSHI KAWASHIMA, NIHONJIN NO HŌISHIKI [JAPANESE LEGAL CONSCIOUSNESS] (1967); Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41 (Arthur Taylor von Mehren ed., 1963).

2. John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 359 n.1 (1978).

3. *Id.* Haley outlined the argument in a book review a year earlier in the same publication. See John O. Haley, Book Review, 3 J. JAPANESE STUD. 440, 446 (1977) (reviewing ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK (1976)) ("What little direct evidence there is of Japanese attitudes, however, fails to support any notion of a Japanese unwillingness to litigate even when mediation has failed. There is, on the other hand, ample evidence of institutional barriers to litigation. In Japan, for instance, the courts are even more strained to capacity than in the United States.").

4. John O. Haley, *Saiban Kirai no Shinwa*, (pts. 1 & 2) 902 HANREI JIHŌ 14, 907 HANREI JIHŌ 13 (1978) (Shintarō Katō trans.).

5. See, e.g., YASUO WATANABE ET AL., TEKISUTOBUKKA GENDAI SHIHŌ [TEXTBOOK ON THE MODERN LEGAL SYSTEM] 224–30 (4th ed. 2000).

6. Most notably, see J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 266–70 (1989) (arguing that predictability reduces litigation).

7. See, e.g., Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 LAW & SOC'Y REV. 219 (1987).

8. 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).

9. See, e.g., ERIC A. FELDMAN, THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY, AND HEALTH POLICY 160–62 (2000); Mark D. West, *The Resolution of Karaoke Disputes: The Calculus of Institutions and Social Capital*, 28 J. JAPANESE STUD. 301 (2002).

syllabi and casebooks reveals that the Kawashima-versus-Haley debate remains central to the field.<sup>10</sup>

If the debate is framed in those terms, Haley has been unjustly pigeonholed into the simplistic role of the cultural naysayer. His body of work is much more nuanced and complex. The 1978 article that took on cultural explanations also recognized the importance of reputation and the potential offensiveness of litigation in Japan.<sup>11</sup> His 1982 article on “law without sanctions” began by agreeing with Kawashima’s simile of an heirloom samurai sword to the law in Japan and ended with a discussion of reputation, community cohesion, consensus, and norms.<sup>12</sup> Four years later, Haley wrote that apology “may be accurately described as cultural and perhaps even peculiar or unique to Japan.”<sup>13</sup> His 1991 book, *Authority Without Power*, spoke of “harmony and cohesion,”<sup>14</sup> and his 1998 book, *The Spirit of Japanese Law*,<sup>15</sup> argued for the centrality of community in Japan.

I don’t think Haley is trying to hedge his bets unfairly by straddling the fence that separates culture and institutions; rather, the dual theoretical lines reveal a scholar who is able to keep two thoughts in his head at the same time, an ability we recognize as crucial for lawyers and legal scholars. Sometimes cultural arguments work better than institutional ones, sometimes institutional arguments make more sense, and sometimes the two work in tandem.

I credit Haley with a second insight in the field: law does not always affect behavior directly. A substantial literature shows how parties create their own rules in the absence of law, in Japan and elsewhere.<sup>16</sup> Haley has made a slightly different point: laws can help society order itself in

10. See, e.g., CURTIS J. MILHAUPT, J. MARK RAMSEYER, & MARK D. WEST, *THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY* 151–76 (2006).

11. Haley, *supra* note 2, at 371, 378.

12. John O. Haley, *Sheathing the Sword of Japanese Justice: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 65 (1982).

13. John O. Haley, Comment, *The Implications of Apology*, 20 LAW & SOC’Y REV. 499, 499–500 (1986).

14. JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 176 (1991).

15. JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* (1998).

16. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 CAL. L. REV. 313 (2006); Mark D. West, *Legal Rules and Social Norms in Japan’s Secret World of Sumo*, 26 J. LEGAL STUD. 165 (1997); Mark D. West, *Private Ordering at the World’s First Futures Exchange*, 98 MICH. L. REV. 2574 (2000).

indirect ways, functioning “more as tools for consensus building and leverage than coercive instruments of state control.”<sup>17</sup>

In this Article, I want to explore these two insights of Haley’s in an off-the-beaten-path subject of regulation: blowfish. (That I am able to get so far off the beaten path is a luxury I owe to Haley, who, with a few others, created the path in the first place.) I ask two questions. First, why have blowfish poisoning rates fallen over time? Second, why do so few blowfish poisoning cases go to court?

### I. THE FISH

Blowfish is a generic name for several members of the fish family *tetraodontidae*, a fish that can swell itself to several times its normal size by swallowing air or water. The *tetraodontidae* family has 187 known species, of which about fifty can be found in Japan, and about ten of which are regularly eaten there.<sup>18</sup> The most common blowfish served in Japan is *torafugu* (*Takifugu rubripes*), or tiger blowfish, the largest among Japan’s species. It is also one of the most poisonous.

The poison, tetrodotoxin, is highly concentrated in the organs, especially the liver and the ovaries.<sup>19</sup> Generated by bacteria that live in the fish, the poison is 1250 times deadlier than cyanide<sup>20</sup> and 160,000 times more potent than cocaine. One fish can kill thirty adults.<sup>21</sup>

A small amount of poison creates a stinging numbness in the lips, tongue, and extremities.<sup>22</sup> A bit more produces the same effect, and eventually paralysis, in the lungs, which leads to death.<sup>23</sup> There is no known antidote; the treatment usually consists of pumping the patient’s stomach, placing him on artificial respiration and intravenous hydration, and feeding him activated charcoal to bind the toxin.<sup>24</sup>

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17. HALEY, *supra* note 14, at 200.

18. Nat’l Ctr. for Biotechnology Info., Taxonomy Browser, Tetraodontidae, <http://www.fishbase.org/identification/specieslist.cfm?famcode=448&areacode=> (last visited Feb. 7, 2009).

19. C.Y. Kao, *Tetrodotoxin, Saxitoxin and Their Significance in the Study of Excitation Phenomena*, 18 PHARMACOLOGICAL REVIEWS 997, 998 (1966).

20. Akiko Takeda, Trade Environment Database, Blowfish and Trade, Case Number 283 (May 18, 1996), at A(2), available at <http://www.american.edu/TED/blowfish.htm>.

21. It is possible to raise non-poisonous blowfish. Blowfish farmers can change the toxicity by keeping blowfish swimming well above the seabed and altering their diet to make it “clean.” TAMAO NOGUCHI, FUGU HA NAZE DOKU WO MOTSUNOKA [WHY ARE BLOWFISH POISONOUS?] 36–40 (1996).

22. See, e.g., *Tetrodotoxin Poisoning Associated with Eating Puffer Fish Transported from Japan—California 1996*, MORBIDITY & MORTALITY WKLY. REP., May 17, 1996, at 389.

23. *Id.*

24. *Id.* at 390. In a well-publicized U.S. case, three Japanese chefs in California ate one-quarter to one and a half ounces of blowfish that was not reported at customs. They survived. *Id.* U.S. law

The Kobe District Court set forth a maxim of blowfish preparation: “It is often said that blowfish poison lies in the organs, but not in the meat.”<sup>25</sup> But that conventional wisdom is untrue; the poison depends on the type of fish, and poison organs can easily be nicked.<sup>26</sup> Accordingly, blowfish preparation calls for a skilled chef. A chef first slices off the rear fin, then the mouth, then removes the skin. He then carefully separates the edible meat from the poisonous organs: into one pile go the inedible liver, bladder, gills, eyes, stomach, spleen, kidneys, ovaries (or testicles), heart, and mucous membrane. Once the organs are removed, the chef washes the fish carefully to remove blood and poison residue. It is then cooked (or not) and served.<sup>27</sup>

## II. POISONINGS

The Japanese government collects data on blowfish poisonings.<sup>28</sup> I cannot be sure that every physician always reports every poisoning incident, but I know of no systemic bias in reporting, and the government strongly encourages it.

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prohibits importation except to a small number of Japanese restaurants that have blowfish chefs certified by the Japanese Torafugu Buyers’ Association, and even then, “only on special occasions” pursuant to a 1989 bilateral agreement. *See* Exchange of Letters Between Japan and the U.S. Food and Drug Administration Regarding Puffer Fish (1988–1989), available at <http://www.fda.gov/oia/Agreements/japeol.htm>.

25. *Adachi v. Shōga*, 704 HANREI JIHŌ 80, 82 (Kobe D. Ct. Dec. 21, 1972).

26. MASARU KAINUMA, FUGU CHŌRISHI HIKKEI [INDISPENSABLE GUIDE FOR BLOWFISH CHEFS] 9–16 (1986).

27. *Id.*

28. Doctors are required to submit a detailed “Food Poisoning Incident Report” for each case that lists the cause of the poisoning, the location, and the age and sex of the patient. The system is described in *Kōseishō, Shokuchūdokū Tōkei* [Food Poisoning Statistics] 9–12 (2002).

FIGURE 1: ANNUAL BLOWFISH POISONING VICTIMS, INCIDENTS, AND DEATHS, 1952–2007<sup>29</sup>

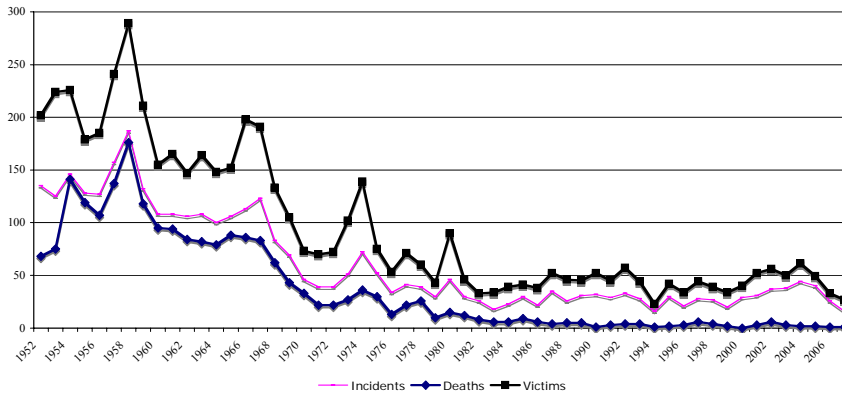


Figure 1 represents blowfish poisoning data from 1952 to 2007. The top line represents the number of victims, the middle line represents the number of incidents, and the bottom line represents the number of deaths. In each category, the numbers spike in the late 1950s and again in the 1960s, but otherwise decline steadily over time. Blowfish poisonings now are less likely to occur, and when they do occur, they are less likely to end in death.

Three other aspects of the data are worthy of note. First, even as a percentage of all food poisonings, blowfish poisoning has declined dramatically. Blowfish poisoning accounted for 12.5% of all food poisonings in 1890, 16% in 1895, 20% in 1900, and 12% in 1905. By the 1950s, the rate was 4%. In 1980, it was 4.6%, and in 2000, it had fallen to 2%.<sup>30</sup> The percentage decline suggests, among other possibilities, that Japan might be more effective in preventing blowfish poisoning than other types of food-caused illness.

Second, a tidbit of data from the period between 1913 and 1915 is intriguing.<sup>31</sup> For those three years, and apparently for those three years only, the Ministry of Health broke down its poisoning data into two

29. Kōseishō, Densenbyō Oyobi Shokuchūdoku Tōkei [Communicable Disease and Food Poisoning Statistics] (various years); Kōseishō, Shokuchūdoku Tōkei [Food Poisoning Statistics] (various years); Kōseishō, Nenjibetsu Shokuchū Hassei Jōkyō [Annual Food Poisoning Incidents], available at <http://www.mhlw.go.jp/topics/syokuchu/xls/nenji.xls> (last visited Mar. 13, 2009).

30. Calculated using data from sources *supra* note 29.

31. Kōseishō, Eisei Nenpō [Annual Sanitation Reports] (1913–1915).

separate categories: intentional and unintentional. The breakdown alone is fascinating, as it shows that some people apparently ingested blowfish purposely as a method of suicide. But the numbers are small: 49 of 201 victims in 1913, 8 of 163 victims in 1914, and 5 of 140 victims in 1915 were the result of intentional ingestion.<sup>32</sup> The Ministry never again used the category, and I suspect that the trend faded as potential suicide victims discovered less terrifying and more effective methods.

Finally, we have limited data on the location of blowfish poisonings.<sup>33</sup> The Ministry of Health categorizes poisonings by location: home, restaurants, hotels, and so on. The data were first published in 1952, when eighty-three percent of poisonings occurred at home, three percent at restaurants, and the rest were “other.” For the next ten years, the Ministry did not publish the location data. But from the time the data were first re-published in 1963 until 2007, seventy-three percent of poisonings occurred at home, and fifteen percent occurred in restaurants.<sup>34</sup> Poisonings at hotels, fish sellers, “other,” and “unknown” are rare (the two 1973 poisonings that occurred in “hospitals” are intriguing).<sup>35</sup>

### III. THE LAW

#### A. Regulatory Measures

The history of blowfish regulation in Japan is murky, and the standard account appears to be full of errors, until the post-war era.<sup>36</sup> In 1947,

32. *Id.*

33. Kōseishō, Densenbyō Oyobi Shokuchūdoku Tōkei [Statistics on Food Poisonings and Contagious Disease], various years; Kōseishō, Shokuchūdoku Tōkei Shiryō, various years, *available at* <http://www.mhlw.go.jp/topics/syokuchu/04.html> (last visited Mar. 13, 2009).

34. The typical poisoning victim is male and in his fifties or sixties. *Id.*

35. *Id.*

36. The folk story holds that when Hideyoshi Toyotomi sought to conquer Korea in 1592, he amassed a force of 158,800 troops on Kyushu, where blowfish was a favorite dish, for the task. Many men died of blowfish poisoning before they reached Korea, and as a result, Hideyoshi banned consumption. *See, e.g.*, YOSHIO AOKI, FUGU NO BUNKA [FUGU CULTURE] 152 (2003). The story is often told, but I find no evidence of it in primary or secondary academic sources.

A ban appears to have been in place during the Tokugawa period (1603–1868), but its scope and enforcement is questionable. Englebert Kaempfer, physician to the Dutch embassy in Nagasaki from 1690 to 1693, noted that “Soldiers only and military men, are by special command of the Emperor forbid to buy and to eat this fish. If any one dies of it, his son forfeits the succession to his father’s post, which otherwise he would have been entitled to.” 1 ENGELBERT KAEMPFER, THE HISTORY OF JAPAN 222 (J. G. Scheuchzer trans. 1906) (1971). The 1814 chronicle *Chiritsukadan* states that while warriors “without fail” did not eat the fish, it was an “inexpensive . . . food of commoners.” SHIN’ICHIRO WATANABE, EDO NO SHŌMIN GA HIRAITA SHOKUBUNKA [FOOD CULTURE OF EDO COMMONERS] 72-5 (1996). Yet when archaeologists dug up the garbage pits of the samurai-stocked Faculty of Law of the University of Tokyo, they found many blowfish bones. *See, e.g.*, EDO ISEKI

during the Allied Occupation, the Diet passed the Food Sanitation Law,<sup>37</sup> opening up the whole country to blowfish for the first time in 350 years. The law provides in article 6 that “No person shall sell, . . . handle, manufacture, import, process, use, prepare, store, or display with intent to sell any food . . . [that] contain[s] or bear[s] toxic or injurious substances, . . . provided, however, that this provision does not apply to the cases which are prescribed by the Minister of Health, Labour, and Welfare as not injurious to human health.”<sup>38</sup> The corresponding enforcement regulations of the Ministry of Health, promulgated the following summer, effectively exempted blowfish by providing an exception for “cases where substances, which, though toxic or harmful, are naturally occurring in or on foods or additives and are deemed not harmful to human health based on the degree of the toxicity or harmfulness thereof or the treatments to be applied thereto.”<sup>39</sup>

The Food Sanitation Law required prefectures to establish a health office and inspection system.<sup>40</sup> Many prefectures went a step further, enacting schemes to control the serving and preparation of the dangerous dish. Table 1 lists the nineteen prefectures that enacted regulations in order of adoption.<sup>41</sup>

KENKYŪKAI, EDO NO SHOKUBUNKA [EDO ERA FOOD CULTURE] 238–82 (1992); Constantine N. Vaporis, *Digging for Edo: Archaeology and Japan's Premodern Urban Past*, 53 *MONUMENTA NIPPONICA* 73, 93 (1998).

The standard account holds that the blowfish ban was lifted during the Meiji period (1896–1912) but reinstated by the legislature in either 1882 or 1885 pursuant to the Order for the Disposition of Petty Crimes. *See, e.g.*, AOKI, *supra*, at 154. The standard account further holds that in 1888, Prime Minister Hirobumi Ito traveled to his hometown in Yamaguchi prefecture, Japan's blowfish capital, and sampled the dish. He immediately lifted the ban—but only in Yamaguchi prefecture. *See, e.g.*, MARUO SHIODA, FUGU GA KUITAI [I WANT TO EAT BLOWFISH] 160–64 (2003). I find no evidence for this often-told story. The Order for the Disposition of Petty Crimes was enacted in 1885, but it is a general statute that contains no mention of blowfish or anything resembling blowfish. *Ikeizai Sokketsurei* [Order for the Disposition of Petty Crimes], Dajokan Decree No. 31 (Sept. 24, 1885) (reprinted in *NAIKAKU HŌKYOKU, HŌREI ZENSHO* [COMPLETE BOOK OF LAWS] 70 (1885)). But Prime Minister Itō had no authority to legislate or otherwise dictate policy in the Yamaguchi prefecture, and there is no primary source evidence that he did so.

37. *Shokuhin Eisei Hō* [Food Sanitation Law], Law No. 233 of 1947.

38. *Id.* art. 6.

39. *Shokuhin Eisei Hō Sekō Kisoku* [Food Sanitation Law Rules], Ministry of Health and Welfare Ordinance No. 23 of 1948, art. 1(a), *translation available at* <http://www.cas.go.jp/jp/seisaku/hourei/data/oeis.pdf>.

40. *Id.* art. 24.

41. *See, e.g.*, KAINUMA, *supra* note 26, at 74. The Osaka High Court has said that prefectures (in particular, Hyogo, where Kobe is located) may fulfill their duty under the Food Sanitation Law, and therefore can avoid civil liability, if they promote blowfish safety in some other way, such as regular safety campaigns and educational classes. *Shimizu v. Japan*, 381 *HANREI TAIMUZU* 101 (Kobe D. Ct. Feb. 27, 1979), *aff'd*, 969 *HANREI JIHŌ* 55 (Osaka High Ct. Mar. 14, 1980).



TABLE 1: ADOPTIONS OF BLOWFISH REGULATIONS BY PREFECTURES

Prefecture	Year of Adoption
Osaka	1948
Tokyo	1949
Kyoto	1950
Ehime	1952
Kagawa	1953
Kumamoto	1958
Miyazaki	1958
Tottori	1959
Kanagawa	1959
Kagoshima	1960
Kochi	1961
Shiga	1963
Okayama	1974
Chiba	1975
Aichi	1976
Shizuoka	1977
Nara	1978
Fukuoka	1978
Yamaguchi	1981

Aside from the three Tokyo metropolitan area prefectures of Tokyo, Chiba, and Kanagawa, every prefecture that adopted regulations is in southern or western Japan. This distribution might be based on blowfish availability and popularity; southern waters have always produced more blowfish.<sup>42</sup>

Tokyo's regulatory scheme is typical.<sup>43</sup> In Tokyo, only specially licensed chefs may prepare blowfish. With a few exceptions for reciprocal arrangements with neighboring prefectures, every applicant must apprentice for a two-year period and pass a blowfish test. The test, which costs ¥17,900 to take, contains two parts: a ninety-minute, thirty-question multiple-choice examination of knowledge of Tokyo rules and blowfish facts, and a practical test, consisting of three minutes of fish identification

42. See, e.g., AOKI, *supra* note 36, at 18–27.

43. Tōkyō-to Fugu no Toriatsukai Kisei Jōrei, Ordinance No. 51 (amended 1986), available at [http://www.reiki.metro.tokyo.jp/reiki\\_honbun/g1010903001.html](http://www.reiki.metro.tokyo.jp/reiki_honbun/g1010903001.html).

and twenty minutes for preparation of the meal.<sup>44</sup> The multiple-choice section is simple for anyone who studies (one sample question: True or False? *Torafugu* is known in some areas as *shiro* or *monfugu*. Answer: True),<sup>45</sup> so those who study and nonetheless fail usually do so in the practical part of the test.<sup>46</sup> The pass rate is about thirty to forty percent.<sup>47</sup> Each prefecture's regulatory scheme penalizes non-compliance; Tokyo provides for up to two years imprisonment and fines up to five hundred thousand yen.<sup>48</sup>

In 1983, the Ministry of Health issued a circular that offered guidance to prefectures.<sup>49</sup> The circular was the first national attempt to bring science into the regulatory scheme. It identified various species of blowfish and specified their poisonous parts and measures of poison.<sup>50</sup> The Ministry outlined sanitary procedures for preparation and banned dangerous practices such as the serving of liver.<sup>51</sup>

### B. Tort Liability and Negligent Homicide

In the comprehensive Lexis JP database of more than 190,000 cases, I count only eight incidents (some of which led to more than one case) of accidental blowfish poisoning (and one murder).<sup>52</sup> Of those eight, two were prosecuted both civilly and criminally, five were prosecuted only in civil suits,<sup>53</sup> and only one solely in a criminal suit.<sup>54</sup> Every civil case

44. Tokyo Bureau of Soc. Welfare & Pub. Health, Fugu Chōrishi Shiken ni Tsuite [Regarding the Blowfish Chef Test] (2007), [http://www.fukushihoken.metro.tokyo.jp/kenkou/shikaku/csh\\_menkyo/hugu/huguh15/index.html](http://www.fukushihoken.metro.tokyo.jp/kenkou/shikaku/csh_menkyo/hugu/huguh15/index.html).

45. See KAINUMA, *supra* note 26, at 140.

46. Tokyo Bureau of Soc. Welfare & Pub. Health, *supra* note 44.

47. Telephone Conversation with Tōkyōto Fukushihokenkyoku [Tokyo Bureau of Pub. Welfare & Soc. Health], Kenkō Anzenbu Kenkō Anzenka [Health & Safety Group, Health & Safety Div.], Sept. 12, 2007.

48. Tōkyō-to Fugu no Toriatsukai Kisei Jōrei, Ordinance No. 51 (amended 1986), *available at* [http://www.reiki.metro.tokyo.jp/reiki\\_honbun/g1010903001.html](http://www.reiki.metro.tokyo.jp/reiki_honbun/g1010903001.html).

49. KŌSEISHŌ KANKYŌ EISEIKYOKUCHŌ, FUGU NO EISEI KAKUHO NI TSUITE [REGARDING THE SANITARY PRESERVATION OF BLOWFISH], CIRCULAR NO. 59 OF 1983, *available at* [http://www.whoirei.mhlw.go.jp/cgi-bin/t\\_docframe2.cgi?MODE=tsuchi&DMODE=SEARCH&SMODE=NORMAL&KEYWORD=%82%a3%82%ae&EFSNO=5159&FILE=FIRST&POS=0&HITSU=3](http://www.whoirei.mhlw.go.jp/cgi-bin/t_docframe2.cgi?MODE=tsuchi&DMODE=SEARCH&SMODE=NORMAL&KEYWORD=%82%a3%82%ae&EFSNO=5159&FILE=FIRST&POS=0&HITSU=3) [hereinafter REGARDING THE SANITARY PRESERVATION OF BLOWFISH].

50. *Id.*

51. *Id.*

52. Japan v. Anonymous, 878 HANREI TAIMUZU 87 (Tokyo D. Ct., Sept. 22, 1994), *aff'd*, 982 HANREI TAIMUZU 84 (Tokyo High Ct., Apr. 28, 1998).

53. Fujita v. Nishio, 370 HANREI TAIMUZU 117 (Osaka D. Ct., May 19, 1978) (finding liability for chef, owner of restaurant, wholesale company, and president of wholesale company); Noguchi v. Honma, 845 HANREI JIHŌ 97 (Chiba D. Ct., Feb. 27, 1976) (finding liability for fish seller and joint owners of the fish-selling company); Shimizu v. Japan, 381 HANREI TAIMUZU 101 (Kobe D. Ct., Feb. 27, 1979), *aff'd*, 969 HANREI JIHŌ 55 (Osaka High Ct., Mar. 14, 1980) (finding liability for fish seller

resulted in liability for at least one defendant, and defendants in two of the three criminal cases were found guilty. Courts have found liability for fish sellers, restaurant owners, and negligent doctors and hospitals. The only party for which courts have found no liability is the state, which courts found did not have a duty to create and enforce stronger regulations.<sup>55</sup>

Two incidents, each of which resulted in both civil and criminal suits, are sufficient to outline the state of court doctrine. In the first,<sup>56</sup> based on the events of February 25, 1966, five people, all employees of Nippon Telegraph & Telephone, shared a blowfish pot dish that included blowfish liver at a Kobe restaurant owned by Shōga. One customer, Sadao Adachi, had a beer on his way home, had a cup of tea, and went to bed around 11:30. At four in the morning, he awoke, vomiting. He began to lose control of his breathing and other muscle functions, and died at 6:45 a.m. The doctor listed the cause of death as blowfish poisoning.

Adachi's family sued, basing its case on the general tort provision of the Civil Code, article 709, which provides that a person "who has intentionally or negligently violated the right of another is obligated to compensate for damages arising therefrom."<sup>57</sup>

The defendant, Shōga, argued that the blowfish he had served was so-called *nagoyafugu* (*Takifugu porphyreus*), the common puffer, which Shōga said was not as potent as *torafugu*.<sup>58</sup> He had washed it well. Only one person out of five became ill. Even if he did serve the liver, that was the custom in Kobe, which, being in Hyogo prefecture, had no regulatory scheme for blowfish. What's more, he had served the dish for seven years without incident.

The court sided with the plaintiff: "Even if Hyogo prefecture has no regulatory system, and even if the [local] health inspector's office has little

and restaurant owner but not for government); *Kimoto v. Tottori Prefecture*, 420 HANREI TAIMUZU 112 (Osaka D. Ct., June 26, 1980) (finding civil liability for hospital); *Ata v. Eishō Health Corp.*, 565 HANREI TAIMUZU 154 (Kobe D. Ct., May 30, 1985), *aff'd*, 1287 HANREI JIHŌ 80 (Osaka High Ct., Mar. 28, 1988) (finding liability for doctor, nurses, or hospital).

54. *Japan v. Anonymous*, 886 HANREI JIHŌ 113 (Nagano D. Ct., Dec. 24, 1977), *rev'd*, 966 HANREI JIHŌ 135 (Tokyo High Court, Nov. 19, 1979) (finding criminal liability for *gyōmujyō kashitsuchishō Zai*, or negligent manslaughter by chef).

55. *Shimizu*, 969 HANREI JIHŌ 55 (finding liability for fish seller and restaurant owner but not for government).

56. This first incident became *Adachi v. Shōga*, 704 HANREI JIHŌ 80 (Kobe D. Ct., Dec. 21, 1972).

57. MINPŌ [Civil Code of Japan], art. 709, *translated in* J.E. DE BECKER, ANNOTATED CIVIL CODE OF JAPAN, Vol. II (1909, reprinted 1979).

58. Fish names vary by regional dialect. *Nagoyafugu* is called *nagoyafugu* in Nagoya and Tokyo, *namefugu* in Sapporo, *namera* in Osaka, *meaka* in Kochi, *nametarō* in Shimane, *meijo* in Niigata, and its standard name is *mafugu*. See AOKI, *supra* note 36, at 8.

knowledge on the subject, and even if the custom in the Kobe region is to include the liver in the dish . . . Shōga knew that the liver was poisonous . . . and serving the dish that contained liver breached his duty of care.”<sup>59</sup> The court deducted twenty percent based on Adachi’s comparative negligence (he knew the fish was poisonous) when it awarded damages to Adachi’s family.<sup>60</sup>

The Japanese Criminal Code provides for a fine or up to five years’ imprisonment for a killing or injury that occurs when a person “fails to use such care as is required in the performance of profession, occupation, or routine.”<sup>61</sup> In Shōga’s criminal case, the Osaka High Court focused more on the preparation than in the civil case.<sup>62</sup> Shōga bought his fish from a company run by a woman named Shimizu, who cut the fish for him.<sup>63</sup> Shōga then received the fish, removed the liver, rubbed the liver with salt and let it soak in water for thirty minutes, washed the rest of the fish he had received in salt water for two to three minutes, placed the fish in Tupperware in the refrigerator, and waited for the customer’s order.<sup>64</sup> When Adachi and his friends ordered their pot dish, Shōga used the blowfish and included in the pot a portion of liver equal in size to the first joint of an adult’s pinky. The court found that these practices were ordinary custom in Kobe.<sup>65</sup>

While judges in civil law cases examine poisoning incidents through the lens of duty, criminal cases rely on foreseeability and a reasonable person standard. Determining that a reasonable person in Shōga’s position could not have foreseen Adachi’s death, the court found Shōga not guilty.<sup>66</sup>

The second, and more publicized, case is that of sixty-eight-year-old kabuki master and “Living National Treasure” Mitsugoro Bandō (real name Toshirō Morita).<sup>67</sup> On January 15, 1975, Bandō ate blowfish liver at a restaurant, and died eight hours later.<sup>68</sup> Unlike Shōga’s case, the restaurant in question was not in Kobe, but in neighboring Kyoto, a prefecture that had a local ordinance that specifically prohibited the

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59. *Adachi*, 704 HANREI JIHO at 83.

60. *Id.* at 80.

61. KEIHŌ [Penal Code], Act No. 45 of 1907, art. 211, no. 1, *translation available at* <http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf>.

62. *Japan v. Shōga*, 613 HANREI JIHŌ 101 (Osaka High Ct., June 16, 1971).

63. *Id.* at 101.

64. *Id.* at 101–02.

65. *Id.* at 102.

66. *Id.* at 102–03.

67. *Kigura v. Kasaoka*, 928 HANREI JIHŌ 87 (Kyoto D. Ct., Dec. 19, 1978).

68. *Id.* at 90.

serving of blowfish liver.<sup>69</sup> The court easily found the chef and restaurant owner liable, and after taking off thirty percent of the damages for comparative negligence, awarded Bandō's heirs about sixty million yen.<sup>70</sup>

As in Shōga's case, Bandō's chef, Kasaoka, was prosecuted on criminal charges as well.<sup>71</sup> Kasaoka used the same argument that Shōga did: he was only following customary practice.<sup>72</sup> But unlike Shōga, who used customary practices in ordinance-less Kobe, Kasaoka was licensed in Kyoto, where regulations existed.<sup>73</sup> Bandō's death was foreseeable, the Supreme Court ruled in 1980, and his chef was guilty.<sup>74</sup>

#### IV. ANALYSIS

Between 1952 and 2007, more than five thousand people in Japan were poisoned by blowfish. About two thousand of them died. Why are there only eight court cases? As the academic commentator on one case wrote in the Japanese court reporter, "given the number of this type of incident that appear in the newspapers, there are very few lawsuits."<sup>75</sup> Even if not all poisoning cases are published, eight seems to be a very low number.

The cultural answer is simple: the victims (or their families) did not want to disrupt harmony through the filing of a lawsuit. That answer is not necessarily wrong, but it is not very helpful, as the best evidence of the preference for harmony (who *doesn't* prefer harmony?) is the non-filing of the lawsuit.

A more complete answer, Haley teaches, focuses on institutions. As in the general case, blowfish poisoning suits might be rare because of various roadblocks to litigation erected by the state: low damages, a small number of legal professionals, lengthy court dockets, and filing fees keep numbers down. The particular case of blowfish adds another dimension: plaintiffs always win. If plaintiffs always win, and damages are easy to calculate, restaurateurs would find it cheaper to settle rather than pay legal fees.<sup>76</sup>

69. *Id.* at 91.

70. *Id.* at 93.

71. *Japan v. Anonymous*, 374 HANREI TIMES 158 (Kyoto D. Ct., May 26, 1978), *aff'd & rev'd on damages*, 387 HANREI TAIMUZU 155 (Osaka High Ct., Mar. 23, 1979).

72. *Id.* at 159–61.

73. *Id.*

74. *Japan v. Dasaoka*, 34 KEISHŪ 149 (Sup. Ct., Apr. 18, 1980). The effective start of the Products Liability Law, in 1995 also raised concerns, as it purports to replace negligence with strict liability for defective products, but I found no blowfish cases that use it. *Seizōbutsu Sekinin Hō* [Products Liability Law], Law No. 85 of 1994.

75. Comment for Osaka High Court, 613 HANREI JIHŌ 101 (June 16, 1970).

76. On predictability, see J. Mark Ramseyer & Minoru Nakazato, *supra* note 6.

Yet a role for societal causes exists as well. More than three-fourths of poisonings occur at home.<sup>77</sup> We have no details on most poisonings, but a Ministry of Health circular from 2002 gives details on four “recent incidents.”<sup>78</sup> In the first, a woman bought unprepared blowfish from a friend, prepared it and ate it herself, and died the next day.<sup>79</sup> In the second, a woman purchased unprepared blowfish from a fish market and contracted poisoning but lived. In the third, a man received unprepared blowfish from a fishselling friend; he ate the liver and was poisoned.<sup>80</sup> Finally, a group of three ate liver at a restaurant, and one was poisoned.<sup>81</sup>

The cases and the Ministry of Health circular show that most poisonings occur as a result of fish caught by friends or fishsellers (presumably many cases exist in which fishers eat their own catch). In both cases, the fish is sold unprepared, perhaps under the assumption that the home chef can prepare it correctly. Comparative negligence rules might reduce suits, but a social effect on litigation might also be at work, as a home cook would be unlikely to sue a friend or a fish seller whose relationship with the cook was such that he was trusted to prepare the blowfish properly. Doing so in a close community might be even more uncomfortable.

A second central puzzle is why poisoning rates fell over time. One possibility is effective law. As one commentator notes, “Many accidents occurred before licensing was demanded.”<sup>82</sup> According to another, “Thanks to strict regulations of restaurants and wholesalers, the number of deaths decreases each year.” The Health Ministry’s 1983 circular<sup>83</sup> precedes a period of sustained low poisonings, the lowest ever. The announcement from the central government might have played an important role in reducing poisonings.

Table 2 lists the prefectures with the highest incidence of blowfish poisoning per capita in the past five decades. In the first five columns, prefectures that had a regulatory scheme in place at the time of their ranking are identified with an asterisk. In the final cumulative column, prefectures with a regulatory scheme in place at any time are so identified.

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77. *See supra* note 33.

78. KŌSEI RŌDŌSHO IYAKUKYOKU SHOKUHIN HOKENBU KANSHI ANZENKACHŌ, FUGU NO EISEI KAKUHO NI TSUITE [REGARDING THE PRESERVATION OF SANITARY BLOWFISH], CIRCULAR 1024002 (2002), available at <http://www.mhlw.go.jp/topics/syokuchu/kanren/kansi/1024-1.html>.

79. *Id.*

80. *Id.*

81. *Id.*

82. Itsuko Matsuura, *Product Liability Law and Japanese-Style Dispute Resolution*, 35 U. BRIT. COLUM. L. REV. 135, 143 & n.17 (2002).

83. *See supra* note 49.

TABLE 2: PREFECTURES WITH THE HIGHEST PER CAPITA POISONING INCIDENTS

1950s	1960s	1970s	1980s	1990s	1950-2000
Yamaguchi	Ehime*	Hiroshima	Hyogo	Kagawa*	Hyogo
Okayama	Kagawa*	Yamaguchi	Shimane	Fukuoka*	Hiroshima
Fukuoka	Yamaguchi	Ehime*	Fukuoka	Hiroshima	Fukuoka*
Kagawa	Hyogo	Hyogo	Hiroshima	Yamaguchi*	Ehime*
Hyogo	Okayama	Okayama*	Tokushima	Nagasaki	Okayama*

SOURCE: Compiled from annual issues of KŌSEISHŌ, SHOKUCHŪDOKU TŌKEI (1982–), KŌSEISHŌ, DENSENBYŌ YOBI SHOKUCHŪDOKU TŌKEI (1952—1982), and KŌSEISHŌ, EISEI NENPŌ (pre-1982).

The table suggests no direct relation between regulation and poisoning. Instead, another relation is clear: incidents correlate with geography. The northernmost prefecture in the fifty-year period, Hyogo, is south of Tokyo, Kyoto, and Osaka. Only nineteen prefectures fall to its south, and ten of them, most of which had appeared in the top five over multiple decades, are in the table. Not coincidentally, those prefectures are prefectures in which blowfish catches are large and the dish is popular. If regulation is successful, we cannot find evidence of such here.

To examine the relation between regulation and poisoning on the national level, I ran several regressions on prefectural per capita poisoning rates, controlling for regulation. I found no statistically significant correlation.

The *ex post* prong of the law, tort and criminal liability, might have created deterrent effects. Blowfish preparers might have taken extra steps to prepare food carefully so as to avoid civil and criminal liability. But there is no evidence that chefs actually responded to liability in this fashion, and it seems likely that chefs would take as much care to avoid death of their customers as they would to avoid liability.

I suspect that the *ex ante* and *ex post* legal treatment of blowfish functioned, as Haley puts it, “more as tools for consensus building and leverage than coercive instruments of state control.”<sup>84</sup> The law helped solidify a consensus on the dangers of blowfish, in the minds both of chefs and of the public. The death of kabuki master Mitsugoro Bandō and the lawsuits that followed were well-publicized.<sup>85</sup> The implicit finding that

84. HALEY, AUTHORITY WITHOUT POWER, *supra* note 14, at 200.

85. *See, e.g.*, KAINUMA, *supra* note 26, at 76–78.

even a careful chef and a careful diner can die from improperly prepared blowfish was clear.

Bandō's death was followed in 1983 by the Health Ministry's circular. One of the stricter provisions of the circular is a complete ban on blowfish liver sales.<sup>86</sup> The ban, enforced by the threat of health inspector restaurant closings even in the absence of customer poisoning, was more onerous than the threat of tort liability. But the circular played another powerful role: it set national standards of care and put customers and chefs alike on alert as to the dangers of improperly prepared blowfish. As that consensus was built, poisoning incidents fell—even in the category of at-home poisonings, even as blowfish consumption increased, and even as some scientists argued that blowfish toxicity was increasing.<sup>87</sup>

For this claim I have a nugget of evidence that I hope Haley will appreciate. In a review of a book (not mine) that relied largely on quantitative data, Haley remarked that the authors “offer no data, not a single incident, not even one anecdote . . . not even a whisper, a wink, or a nod. The silence deafens.”<sup>88</sup> In (tenuous) support of my case, then, I offer the following incident.

At a blowfish dinner in Oita, the chef approached my table to ask how we liked the variously prepared dishes. I expressed my appreciation, and turned the conversation to regulation in the hopes that I would have an anecdote for this essay. What effect, I asked, does a licensing scheme have on blowfish poisonings? The chef answered, “For chefs like me, it makes no difference. I trained to prepare blowfish to serve it properly, not to pass a test.” I led my witness further: “So are you saying that the test doesn't matter? Oita doesn't even require it.” His response: “No, the test is important, even if we don't have one here. It sends a message to laypeople that they can't prepare up blowfish on their own. Even my own mother stopped trying to serve blowfish when I told her that it was so hard to do it right that you had to have a license.”

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86. REGARDING THE SANITARY PRESERVATION OF BLOWFISH, *supra* note 49.

87. “[O]ne speculation is that since tetrodon fish have become scarce in off-shore waters in Japan, the fishing fleets had to go farther out to sea to obtain such fish which may be more toxic than those living closer to the shores.” Kao, *supra* note 19, at 1005.

88. John O. Haley, Book Review, 30 J. JAPANESE STUD. 235, 236 (2004) (reviewing J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003)).



## CONCLUSION

In the most comprehensive scientific study of blowfish poisoning to date, C.Y. Kao wrote in 1966 that “it may be fair to say that the incidence of tetrodon poisoning in Japan has been brought to the lowest possible rate. To further reduce this incidence may require very drastic measures that would probably be as successful as Prohibition was in the United States.”<sup>89</sup>

He probably was wrong. The measures that Japan used to lower poisoning rates—licensing schemes and the like in less than half of its prefectures—were anything but drastic. And yet they mattered. Poisonings likely fell not because of the threat of legal action, but because of the law’s role in publicizing the problem, a consensus-building function that Haley’s work predicts.

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89. Kao, *supra* note 19, at 1006.