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“Weightier than a Mountain”: Duty, Hierarchy, and the Consumer in Japan

Anita Bernstein*
Paul Fanning**

ABSTRACT

The authors analyze the 1994 Japanese products liability law from a national-culture perspective. After examining the historical backdrop of the consumer's social role in both the United States and Japan, the authors argue that the new law cannot create a strict liability system like that of the United States in Japan, because the unique Japanese cultural context and its manipulation discourage the use of the legal process to advance consumer interests.

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Japanese names are rendered Western-style: given name first, surname second.

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I. INTRODUCTION

After twenty years of preparation and delay, Japan enacted its first products liability statute in June 1994.¹ The law became effective one year later, but observers could not wait to react. Consumer groups celebrated,² multinational brokers prepared to expand sales of liability insurance in Japan,³ and a U.S. journalist reported from Tokyo that the new law marked Japan's "transformation from a producer-oriented economy to one that favors consumers."⁴ Japanese officials added to the fanfare, announcing a 390-point package of steps to promote consumer awareness of the new law.⁵

Commentators agreed that the Japanese products liability law emulated recent change in Europe and brought Japan's doctrine closer to that of the leader of modern products liability, the United States.⁶ Although a few critics complained that the

1. See Kate McIlwane, *Japan Enacts Product Liability Law*, BUS. INS., July 18, 1994, at 87. A translation of the bill appears in *Japan: New Japanese Product Liability Law*, LLOYDS PROD. LIAB. INT'L, July 31, 1994, at 101. The law is hereinafter cited as *Japan Statute*. On the lengthy preparations that preceded enactment of the statute, see Younghee Jin Ottley & Bruce L. Ottley, *Product Liability Law in Japan: An Introduction to a Developing Area of Law*, 14 GA. J. INT'L & COMP. L. 29, 56 (1984).

2. See *Consumer Organizations Celebrate Growth of International Consumer Rights' Movement*, PR NEWSWIRE, Mar. 14, 1995, available in LEXIS, World Library, Txtline File [hereinafter *International Consumer Rights Movement*].

3. See McIlwane, *supra* note 1 (quoting insurance brokers); *Japan, Insurers Predicting Upturn in Japan*, LLOYDS INS. INT'L, Apr. 10, 1995, available in LEXIS, World Library, Txtline File.

4. Stephen H. Dunphy, *Japan Is Experiencing a Retail Revolution*, SEATTLE TIMES, Feb. 19, 1995, at J1.

5. See *Government to Promote Understanding of Product Liability Law*, KYODO NEWS SERVICE, Nov. 29, 1994, available in LEXIS, News Library, Txtnws File.

6. See, e.g., Ottley & Ottley, *supra* note 1, at 55-59 (characterizing Japanese products liability law as moving "toward strict liability"); Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 28, 40 (Peter W. Huber & Robert E. Litan eds., 1991) (comparing the draft version of the Japan Statute with European Union law); Akio Morishima, *Beyond Compensation: The Japan Experience: The Japan Scene and Present Products Liability Proposal*,

statute did little except appease manufacturers,⁷ the law was received as a source of new homogeneity; to borrow a phrase from one United States expert on Japan, the tone of the reception sounded like *More Like Us*.⁸ There is a basis for this sense of homogeneity. In its validation of products liability as a concept,⁹ its purported abandonment of negligence and proof requirements followed by retention of these older rules,¹⁰ and its allusion to safety and insurance concerns,¹¹ the Japanese statute is an exemplar of current products liability law,¹² and resembles the work product of numerous legislatures in the United States and Europe. By celebrating this statute, commentators hail similarities and, by implication, downplay differences between Japanese and other governments that have reformed their products liability laws.

Taking the Japanese products liability statute as a consumer law, we argue that this emphasis on similarity and homogeneity is misguided. Japanese consumer law remains unreformed, or, more precisely, impervious to reform. In an earlier article, we noted the clash between American-style products liability reform and the culture of another country, Italy.¹³ Here we contend that, for different cultural reasons, a comparable resistance

15 U. HAW. L. REV. 717, 724-25 (1993) (describing Japanese attention to European law).

7. See Michiyo Nakamoto, *Japanese Score a Victory for Consumers' Rights: But There Are Still Doubts About the Impact of a Planned New Product Liability Law*, FIN. TIMES, Apr. 2, 1994, at 3.

8. See JAMES FALLOWS, *MORE LIKE US: MAKING AMERICA GREAT AGAIN* (1989).

9. See *Japan Statute*, *supra* note 1, art. 3. On the reification of products liability, see ANITA BERNSTEIN, *Preface to A PRODUCTS LIABILITY ANTHOLOGY* (1995).

10. See *Japan Statute*, *supra* note 1, art. 4 ("Exemptions").

11. See *id.*, art. 1 ("Purpose").

12. Cf. David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241, 1243 (1994) (arguing that newer products liability law moves toward "middle ground and compromise").

13. Anita Bernstein & Paul Fanning, *Heirs of Leonardo: Cultural Obstacles to Strict Products Liability in Italy*, 27 VAND. J. TRANSNAT'L L. 1 (1994).

In this Article, "American" and "United States" are used with forethought. The laws, boundaries, and governments of the United States of America are described with reference to the "United States" or "the U.S." The term "American," however, fits better with references to national cultural or predilection; although it is unquestionably presumptuous for "Americans" to appropriate an adjective that belongs to the entire hemisphere, this hegemonic, even arrogant, approach to the world is a part of the national culture we describe and thus central to the thesis of this Article. On one or two occasions the Article uses "American" rather than "United States" solely for reasons of assonance. We acknowledge with thanks the willingness of our editors at the *Vanderbilt Journal of Transnational Law* to permit this departure.

blocks the effect of doctrine imported from the United States into Japan.

Generalization about cultural tendencies of a country is always a risky project, and the hazards are especially great when the country is Japan.¹⁴ Yet commentators do not resist. Searching for the Japanese essence is so integral to national culture in Japan that a word, *nihonjinron*, has been coined to describe this quest.¹⁵ Foreigners add to the theorizing. Perhaps because Japan is one of the few peers of the United States in the size of its economy and its ambition, American observers credit this nation with importance, and choose to grapple with its principal myth. The siren notion is often called Harmony,¹⁶ a mistranslation of the Japanese *wa*.¹⁷ The *wa* ideal has teased the imagination of the United States legal community, at least since Derek Bok, then president of Harvard University and a former law professor, praised Japan for its low opinion of lawyers.¹⁸

Although most writers familiar with the U.S. civil justice system are too sophisticated to believe completely in the dichotomy, the ideal of Harmony posits two distinct attitudes toward litigation: on the one hand, American lawyers, lawsuits, and strife; on the other hand, a "cooperative, nonlitigious people

14. See J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 2-3 (1993) (citing misuses of "culture" in studies of Japan); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 464 (1986) (noting that "all attempts to describe the factors contributing to cultural differences are reductionist").

15. See KAREL VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER 263-64 (1989).

16. Synonyms abound. See, e.g., John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978) ("reluctant litigant"); J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604 (1985) ("consensual myth" and "nonlitigious ethos"). We find Harmony, however, to be the pithiest term used to describe this myth.

17. On *wa*, see *infra* text accompanying notes 87-92. Regarding translation, unlike many who have presumed to write in English about "the Japanese," we disclose our linguistic limitations: neither of us speaks or reads Japanese, although we both have studied the language and know a bit about its grammar, vocabulary, and alphabets. On language barriers in comparative products liability, see JANE STAPLETON, PRODUCT LIABILITY 54 (1994) (alluding to the problems caused by having one European Union products liability directive in nine official languages).

18. "Engineers make the pie grow larger; lawyers only decide how to carve it up." Derek Bok, *The President's Report to the Board of Overseers of Harvard University for 1981-1982*, reprinted in 33 J. LEGAL EDUC. 570, 574 (1983) (quoting a saying attributed to "the Japanese"). The importance and appeal of Harmony, even before Bok's report, was described as "difficult to exaggerate." Haley, *supra* note 16, at 360.

who try to resolve disputes through mediation and outside of court."¹⁹ Reputable scholars deplore stereotypes, especially those with racial meanings. Still, the idea of a people too wise, too prudent, too polite, and too productive to spend their energies in litigation exerts a fascinating hold.²⁰ Can the ideal of Harmony be true? Partially true?

In an effort to escape the soft bog of generalization about culture,²¹ one might attempt to answer this question by looking at factual information pertaining to Japanese civil justice, before moving to more subjective sources. But this avenue leads only to ambiguity,²² as a brief detour through "objective" data will show. For instance, products liability case law existed in Japan before the 1994 statute named it, and so one could try to count the number of decisions. It appears that since the end of World War II, Japanese courts have rendered no more than 150 judgments in cases involving defective products.²³ This low number is consistent with a larger picture: the popular supposition that Japan has far fewer lawyers than the United States is true.²⁴ But whether these low numbers indicate a national predilection for Harmony or simply cartelization is not self-evident, because the Japanese government creates this shortage of lawyers.²⁵ Whether or not the Japanese are nonlitigious by nature—some writers

19. Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 25 INT'L LAW. 443, 443 (1991) (citations omitted).

20. For an especially enthusiastic view of Japanese civil justice, see David J. Przeracki, Note, "Working It Out": A Japanese Alternative to Fighting It Out, 37 CLEV. ST. L. REV. 149 (1989).

21. The "bog" metaphor comes from Ramseyer, *supra* note 16, at 645 (citations omitted).

22. It is difficult to produce reliable country-by-country comparative data about litigation behavior. For elaboration on this problem, see Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

23. See *Discussion: The Japanese Experience*, 15 U. HAW. L. REV. 757, 758 (1993) (remarks of Professor Akio Morishima) (estimating number at "about 140"); Nakamoto, *supra* note 7 (quoting Ministry of International Trade and Industry (MITI) figure of 127 decisions between 1949 and 1991). It appears that more recent or precise data, if available, would not significantly raise these estimates.

24. In 1993, the American Bar Foundation counted over 846,000 lawyers in the United States, out of a population of about 250 million. See Patt Morrison, *Snapshots of Life in the Golden State*, L.A. TIMES, Oct. 14, 1994, at A3. For Japan, the figure is about 14,000 out of a population of 128 million. See Marcia Chambers, *Sua Sponte*, NAT'L L.J., Mar. 15, 1993, at 15.

25. In 1991, for example, the bar passage rate in Japan was fixed at 2.68%, so that 605 applicants were admitted to the practice of law, while in the United States 43,286 applicants were admitted in the same year. See Chambers, *supra* note 24.

believe they sue at about the same rate as citizens of Great Britain or Germany²⁶—Japanese plaintiffs compete on a tilted playing field. They must buy legal services at fixed prices,²⁷ and use credentialed lawyers, who tend to be scions of wealthy, conservative families,²⁸ while firms such as insurance companies and manufacturers obtain the cheaper labor of law-trained workers who are not admitted to the bar.²⁹ Predictably enough in a market economy, the scarcity of lawyers leads to high fees, high search costs for clients, and provincial stretches where lawyers are unavailable at any price.³⁰ Do facts such as these prove or disprove Harmony? The best quantitative datum to support the myth is the high rate at which cases are mediated or otherwise settled out of court,³¹ but even this fact is subject to varying interpretation.³²

Quantitative summary, neither refuting nor supporting the Harmony myth, thus keeps open the question of a Japanese perspective on litigation. In their efforts to encapsulate this perspective, scholars struggle with the concept of culture, often losing that struggle in one of two ways. One pitfall is to neglect its importance. Some writers vehemently reject the explanatory force of culture;³³ others never reach it, preferring to speak without elaboration about "structure" or "institutions."³⁴ The opposite pitfall is an essentialist tautology. It has been written that the Japanese are harmonious because they have a need for

26. See J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 267 (1989).

27. See Ramseyer, *supra* note 16, at 630.

28. Without such connections it is difficult to support oneself during the long years of repeating and re-repeating the arduous bar exam. See Chambers, *supra* note 24.

29. See Robert B. Leflar, *Personal Injury Compensation Systems in Japan: Values Advanced and Values Undermined*, 15 U. HAW. L. REV. 742, 754-55 (1993) (citations omitted).

30. See Ramseyer, *supra* note 16, at 632-33.

31. Ramseyer and Nakazato found that in 1984 there were 12,432 fatal traffic accidents in Japan, resulting in 10,529 claims paid by liability insurers. Ramseyer & Nakazato, *supra* note 26, at 272-73. This figure demonstrates not only the importance of settlement in Japan but also the high rate of compensation compared to Anglo-American negligence jurisdictions. *Id.*

32. Compare *id.* at 290 ("Litigation is scarce . . . because the system works") with Leflar, *supra* note 29, at 756 ("[W]ith reference to what goals does it work?").

33. Professor Ramseyer is the preeminent exponent of this approach to Japanese civil justice. See RAMSEYER & ROSENBLUTH, *supra* note 14, at 2-3; Ramseyer, *supra* note 16; Ramseyer & Nakazato, *supra* note 26.

34. E.g., Yamanouchi & Cohen, *supra* note 19.

consensus;³⁵ that "Japanese people, by nature, do not like law;"³⁶ that the Japanese are unconscious of law and rights because they are backward;³⁷ and that there exists "a peculiar Japanese penchant for compromise."³⁸ Whether they overlook culture, reject it, or view it as a seamless explanation of everything Japanese, many writers who address Harmony misunderstand the relation between Japanese culture and Japanese civil justice. From this seminal error, a misperception of Japanese products liability law results.

In our view, national culture can shed light on any society's practices to resolve disputes or proclaim norms of civil justice, although what that light reveals is not an all-purpose explanation but rather patterns and themes that may reinforce one another. Scholars who use this method find the cultural uniqueness of a nation in its history, literature (especially quasi-canonical literature like the works of Dante or *The Tale of Genji*), political expression, aesthetic and artistic innovations, and philosophical, ideological, or religious concepts.³⁹ These forces shape and modify law—especially civil justice, which is never entirely promulgated from above but depends in part upon volunteer citizen-players.

Among industrialized countries, Japan has an extraordinarily vivid national culture, introduced to many U.S. readers after the Second World War by the anthropologist Ruth Benedict, in whose book we found our title.⁴⁰ Duty "is weightier than a mountain," proclaimed the Meiji Imperial Rescripts to Soldiers and Sailors in 1882; "death is lighter than a feather."⁴¹ Appropriate roles in hierarchical Japanese society have been codified and taught since the beginning of the Tokugawa era,⁴² and neither the Meiji "restoration" of the late nineteenth century nor the post-World

35. See Jan M. Bergeson & Kaoru Yamamoto Oba, *Japan's New Equal Opportunity Law: Real Weapon or Heirloom Sword?*, 1986 B.Y.U. L. REV. 865, 867 (citations omitted); RAMSEYER & ROSENBLUTH, *supra* note 14, at 2 (noting circularity of assertion).

36. Hideo Tanaka, *The Role of Law in Japanese Society: Comparisons with the West*, 19 U. BRIT. COLUM. L. REV. 375, 376 (1985) (citations omitted).

37. See JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 699 (1994) (referring to work of sociologist Takeyoshi Kawashima).

38. Haley, *supra* note 16.

39. See Bernstein & Fanning, *supra* note 13.

40. RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* (1946).

41. *Id.* at 213.

42. See HERMAN OOMS, *TOKUGAWA IDEOLOGY: EARLY CONSTRUCTS, 1570-1680* (1985). The Tokugawa era extended from the sixteenth to the nineteenth centuries. See VAN WOLFEREN, *supra* note 15, at 36-37.

War II "democratization" represents a break with hierarchical tradition.⁴³ The Japanese explicitly call on the values of duty, responsibility, and hard work⁴⁴ to ensure production for export, and the deferring of consumerist gratification. From the Tokugawa *bakufu*⁴⁵ to the present government and business bureaucracy, the orientation of responsibility has been *upward*, a posture that does not permit challenges to superiors in business or to the government agencies that guide and promote enterprise.⁴⁶ Given this setting, a products liability lawsuit challenges not only a product and its maker, but an ethos expressed in many elements of Japanese life.

This Article contrasts Japanese traditions of duty and hierarchy with different traditions in the United States that, we argue, fostered the development of modern products liability law. Consistent with our national culture perspective, Part II of this Article discusses the consumer-as-litigant in the United States. Part III uses Japanese national culture to show various obstacles to the importation of a consumer-oriented U.S. products liability system and its necessary protagonist, the aggrieved plaintiff. Some consequences for the current Japanese products liability reform effort follow, and Part IV ventures a predictive analysis of how the statute is likely to develop and be received in Japan.

We distinguish our approach from the essentialist tradition. Claims that the Japanese nature, or essence, dislikes confrontation or litigation are unprovable and indeed improbable; as Karel van Wolferen has pointed out, there exists some evidence to the contrary.⁴⁷ Instead, this Article argues that the Japanese citizenry has inherited a tradition, still vital, that presses constraints of duty and hierarchy from the top down.⁴⁸ This argument has its essentialist variations as well: several Japanese intellectuals have alluded to their compatriots' "submissiveness to authority," "preference for paternalism," and "tendency to revere

43. See VAN WOLFEREN, *supra* note 15; JAMES FALLOWS, *LOOKING AT THE SUN: THE RISE OF THE NEW EAST ASIAN ECONOMIC AND POLITICAL SYSTEM* 143 (1994); EDWIN M. REINGOLD, *CHRYSANTHEMUMS AND THORNS: THE UNTOLD STORY OF MODERN JAPAN* (1992); JOHN TOLAND, *THE RISING SUN: THE DECLINE AND FALL OF THE JAPANESE EMPIRE 1936-1945* (1970).

44. The phrase "hard work" was used as an all-purpose salutation and farewell in the imperial Japanese armed forces.

45. The *bakufu* constituted the administrators of the Tokugawa Shogunate. See VAN WOLFEREN, *supra* note 15, at 36.

46. See *id.* at 18-20; OOMS, *supra* note 42.

47. See VAN WOLFEREN, *supra* note 15, at 213-14.

48. J. Victor Koschmann, *Introduction: Soft Rule and Expressive Protest, in AUTHORITY AND THE INDIVIDUAL IN JAPAN* 1, 4 (J. Victor Koschmann ed. 1978) (citations omitted) [hereinafter *AUTHORITY*].

the powerful." We decline to speculate about the Japanese nature.⁴⁹ As detailed below, our argument refers to history, politics, and national traditions that have never been strongly influenced by countervailing Western views, and that buttress one another.⁵⁰ This ambiance affects civil justice in Japan.

II. THE CONSUMER AS POLITICAL ACTOR

A. *The American Consumer and Strict Products Liability*

A suitable place to begin a culture-focused contrast between U.S. and Japanese products liability law is the famous judicial opinion, *Escola v. Coca Cola Bottling Co.*⁵¹ Here Justice Roger Traynor announced his vision of mass-marketed products as a source of distributive justice within a postindustrial market. Gladys Escola had cut her hand on a Coke bottle. All the justices of the California Supreme Court agreed that she should be allowed to bring her case to a jury, despite her inability to explain how the bottle became defective; a majority favored using the doctrine of negligence. Traynor, in a separate opinion, wrote that he preferred to impose what he labeled "strict liability" on the manufacturer. He saw Coca Cola as a powerful economic actor, in a constant quest for profits and wealth. Mass marketing and advertising, he wrote, expand Coca Cola's obligations to the consuming public. The company, therefore, must seek to avoid harm, and pay for it when it occurs. This cost—a kind of insurance for consumers—can be passed along to the public in

49. Contrast Mark Ramseyer's attribution of rational choice to the Japanese. See RAMSEYER & ROSENBLUTH, *supra* note 14, at 2-3; Ramseyer, *supra* note 16; Ramseyer & Nakazato, *supra* note 26. Although academic tradition regards rationalism as a minimal condition to impute to another, it is more parsimonious to attribute even less. Accordingly, this Article notes aspects of culture in Japan, but makes no claim about their strength, variation, or direct effect on individuals. We confine ourselves to the point that law is influenced by its environment.

50. This view is consistent with at least one Japanese scholarly expression. In his 1983 book, *Nihonjin no hokannen* (*The Japanese People's Concept of Law*), Masao Ohki argues that what appears to be a lack of legal consciousness among the Japanese is the outgrowth of "historical processes during which governments or rulers discouraged citizens from bringing suits at law." Koichi Hamada et al., *The Evolution and Economic Consequences of Product Liability Rules in Japan*, in *LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES* 83, 104 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986) (citation omitted).

51. 150 P.2d 436 (Cal. 1944).

the form of price increases, and encourages the class of manufacturers to make all products ever safer.⁵²

As many writers have pointed out, *Escola* is only one event in the development of American products liability law, which has an extensive and varied ancestry.⁵³ Subsequent changes, however, make this particular landmark stand out. Traynor convinced a majority of his colleagues of the virtues of strict liability in a 1963 case.⁵⁴ Around the same time, strict products liability was codified in the *Restatement (Second) of Torts*. Today, almost every state accepts the strict liability doctrine, and attempts to limit it by federal legislation have thus far been thwarted in Congress. Strict products liability as a concept began to appear compelling around the world, especially in Europe, after the Thalidomide disaster.⁵⁵ During the postwar decades, European law students began to explore this American innovation, and tentative attempts to emulate it followed.⁵⁶ Rejecting doctrinal nicety for the sake of a result, the *Escola* concurrence brought together themes of accountability that many readers found both sophisticated and compassionate.⁵⁷

Traynor's path-breaking opinion envisions a consumer with distinct traits. Reminiscent of Traynor's contemporary Dagwood Bumstead of the comic strip *Blondie*, the consumer is an ordinary man,⁵⁸ something of a dupe, lulled into false security and manipulated into purchases that are profitable to a manufacturer. Using a product in his bumbling fashion, he risks physical injury,

52. *Id.* at 440-41 (Traynor, J., concurring).

53. See, e.g., George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (identifying writings of Friedrich Kessler and Fleming James as important sources); Dix L. Noel, *Manufacturers of Products: The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957) (emphasizing antecedent importance of contaminated food law).

54. *Greenman v. Yuba Power Products Co.*, 377 P.2d 897 (Cal. 1963).

55. See STAPLETON, *supra* note 17, at 42.

56. Interview by Anita Bernstein with Hans-Claudius Taschner, head, Directorate III of the Commission of the European Communities, in Brussels (Oct. 29, 1992).

57. See CONSUMER FEDERATION OF AMERICA, BENEFITS OF THE MODERNIZATION OF THE TORT LAW IN THE CONTEXT OF THE SOCIAL MOVEMENT OF IMPROVED SAFETY AND QUALITY IN THE NATIONAL ECONOMY (1987); Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993); *Murphy v. E.R. Squibb & Sons*, 710 P.2d 247, 258-61 (Cal. 1985) (Bird, C.J., dissenting).

58. "Man" is not intended to convey a generic meaning. The national-culture method makes gender-neutral language impossible, mainly because cultures are not gender-neutral; and products liability, in particular, reflects masculinist prejudices. For elaboration on this point, see Bernstein & Fanning, *supra* note 13, at 2 n.1.

for which he is presumptively not responsible. Moreover he cannot, according to Traynor, achieve fair redress through the old-fashioned doctrines of negligence and contract. Negligence obliges him to prove more than he often can, and the rules of contract were designed for sharp commercial transactions between equals, rather than between a manufacturer and an injured consumer.⁵⁹

Yet this Dagwood-Bumsteadish figure is a kind of hero. Not for him the paternalistic safeguards of regulation, which could make products safer, nor a social-insurance compensation scheme that would pay for his injuries! Instead the consumer is emboldened to challenge the product and its maker. The consumer can call the product "unreasonably dangerous,"⁶⁰ impugn its design or construction, deploy a lawyer to lead a fight even when he cannot afford to pay fees, and, perhaps, convince a court that the marketing of a particular object was wrongful conduct.⁶¹ Unlike his counterpart in every other country, the consumer can receive payment—including punitive damages and compensation for intangible suffering—as decreed by a jury of fellow consumers.⁶² This conception of the consumer is unique to the United States.

B. American Traditions and the American Consumer: The Vast Continent

When the United States of America became a nation, its citizens, along with Europeans, regarded its territory as having been unsettled and virtually unoccupied before the arrival of white colonialists.⁶³ North America was understood as a vast expanse containing wealth in all its forms—land, water, crops, timber, furs, minerals—that had no owners, nor even custodians. Its "discovery" profoundly changed the world, even at the level of philosophy. For instance, the new hemisphere inspired Locke to

59. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

60. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

61. See Schwartz, *supra* note 6.

62. On the significance of the availability of jury trials in U.S. products liability litigation, see Philip H. Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043 (1994).

63. For an attack on the persistence of this view, as well as a concise sociolegal history of African-Americans, Mexicans, Native Americans, and Asians in the United States, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

theorize that property rights can result after takings from a void-like state of nature, if they are combined with the work of cultivation.⁶⁴ As understood by the men of European origin who settled there and formed the United States, a nation in North America would be as unique as its astounding geography. Their blunders, murders, enslavements, and deceits notwithstanding, these men were correct about their perception of the uniqueness of the United States. In some ways, their United States endures.

The nation began with an extraordinarily high ratio of things to persons. Resources such as arable land and chattels were abundant, while the human population necessary to build wealth out of these things was scant. This peculiar ratio led to several related effects as the new country grew in the formative nineteenth century.

Perhaps foremost, feudalism was impossible. So much wealth was literally there for the taking that the great European pyramidal concentrations of land ownership and power could not be replicated. To suit these conditions, an American attitude of absolute rejection toward birth-based hierarchy developed during the settlement of the land⁶⁵ and continues today—in contrast to other industrialized nations, nearly all of whom, including Japan, have a heritage of feudalism.

Implications for law and government were numerous. The sovereign, who in feudal societies demanded tribute from his subjects, in the United States had to give away wealth.⁶⁶

64. See GOPAL SVEENIVASAN, *THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY* (1995); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 27, at 328-29 (Peter Laslett ed., 1960) (3d ed. 1698). See also MIHALY CSIKSZENTMIHALYI, *THE EVOLVING SELF: A PSYCHOLOGY FOR THE THIRD MILLENNIUM* 127-28 (1993) (arguing that the availability of tobacco from the New World entrenched smoking as a habit in Europe and thus buttressed slavery).

65. See U.S. CONST. art. I, § 9 (prohibiting the United States from granting titles of nobility); *THE POLITICAL THOUGHT OF ABRAHAM LINCOLN* (Michael N. Current ed., 1987). In his famous debates with Stephen Douglas, Lincoln spoke scornfully of "the divine right of kings" and tried to associate this contempt with hatred of slavery:

It is the same spirit that says, "You toil and work and earn bread, and I'll eat it." No matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle.

BARTLETT'S FAMILIAR QUOTATIONS 636 (14th ed. 1968) (from the seventh Lincoln-Douglas debate, Alton, Ill., Oct. 15, 1858).

66. Consider the Homestead Act, the policy of giving sections of land adjacent to the right of way to railroad companies, the building of the National Road, mining claims, grazing rights, and oil depletion allowances. See BENJAMIN H. HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* (1924).

Government became a source of the proverbial free lunch, rather than an oppressive ruler.⁶⁷ The high things-to-people ratio meant that it was easy to distribute goods relatively equally among the citizens; extra possessions held by the rich were of less marginal value to them. This distribution, like the open-handed posture of the sovereign, was a source of political as well as economic equality.

Vast spaces of land not only diminished the role of the patrol, but separated the courts from feudal-style tracts. Instead of holding court alongside a lord and his territories, a judge rode circuit, un beholden to any one community.⁶⁸ The courts came to see themselves as enforcers of fairness. Together with marshals and gunslinger lawyers, both of whom have counterparts today,⁶⁹ they tried to restrain equally those who would rob and those who would be robber barons. Although English-style common law as a method still continued, devices such as adherence to precedent were influenced by pragmatic demands.⁷⁰

A similar pragmatism affected the relationship of human beings to things. On the frontier, an object was viewed in terms of its function—if an object worked, it was good—rather than any rooted history.⁷¹ Modern products liability has some ancestry in

67. See Langdon Winner, *Silicon Valley Mystery House*, in *VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE* 31, 42-43 (Michael Sorkin ed., 1992) (arguing that the Silicon Valley was built on taxpayers' financing of a permanent war economy rather than risk-taking by business). Bureaucratic largesse in the European manner is rare; in the United States, the free lunch is obtained entrepreneurially. For one contemporary example, see Marlene Cimons, *Federal Officials Challenge AIDS Drug Monopoly*, *L.A. TIMES*, May 29, 1991, at A1 (describing federal-government contributions to AZT research that were unheeded in the granting of a private, unshared patent).

68. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 140 (2d ed. 1985).

69. See GERRY SPENCE, *WITH JUSTICE FOR NONE: DESTROYING AN AMERICAN MYTH* (1989); STUART M. SPEISER, *LAWYERS AND THE AMERICAN DREAM* (1993).

70. On the colonial courts, whose structure influenced later United States court systems, see FRIEDMAN, *supra* note 68, at 37 ("Necessity was the supreme lawmaker; the niceties came later."). Neglect of precedent in U.S. law took different forms. Jane Stapleton uses the word "substantivism" to describe an American view, arising in the late nineteenth century, that courts should seek social aims rather than hew to the rules of prior cases. See STAPLETON, *supra* note 17, at 70. Natalie Hull describes U.S. common law in the nineteenth century as being in disarray due to inaccurate case reporting and poor communication between courts. Judges stated the law as best they could, but were hampered by the proliferation of opinions (as well as of new jurisdictions). See N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 *LAW & HIST. REV.* 55, 57 (1990).

71. See WALTER PRESCOTT WEBB, *THE GREAT FRONTIER* (1952).

the frontier: for example, the American invention of a consumer expectations test to determine whether a product is defective has origins in this pragmatism.⁷² As we have argued elsewhere, more deferential attitudes toward objects exist in other societies,⁷³ whereas "this thing is bad; it didn't work right; compensate me" arose naturally in a continent where function meant survival and where abundance reduced the need and desire to venerate any object.

American products liability law also derives from a unique tradition regarding the making of things. Although art and artisanship survive in the United States, for more than a century mass manufacture has been generally understood as antithetical to good design. The success of a product is measured in terms of its sales or the fame of its trademarks, rather than its merits; the American phrase "quality control" refers to uniformity and homogeneity at least as much as quality.⁷⁴ American production of goods is different, in both ideals and effect, from production in many other countries. It is derived from the conception of a mass, democratic, and prosperous citizenry as the consumer class providing the fuel for the engine of production.

Implicit in the American Revolution is the rejection of production for a leisured, small, aristocratic class that was the only consumer and the arbiters of taste.⁷⁵ By contrast, a leisured, large, unaristocratic new caste flourished in the United States. To cater to this group, merchants competed with one another to invent installment buying, new forms of credit sales, and the most geographically dispersed advertising the world had

72. See Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function, and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

73. See Bernstein & Fanning, *supra* note 13.

74. Cf. W. EDWARDS DEMING, *OUT OF THE CRISIS* 276-77 (1986).

75. Another way to understand the nature of American production is to note its conspicuous absence from scholarship. A product is an object shaped twice by human intentionality: first, in its making and, second, in its use. See MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF* 14 (1981). In the United States, the latter type of intentionality has received far more attention from scholars. The discipline of marketing, to which both the making and the use of products are pertinent, has traditionally studied consumption rather than production. See, e.g., Raymond Benton, Jr., *Work, Consumption, and the Joyless Consumer*, in *PHILOSOPHICAL AND RADICAL THOUGHT IN MARKETING* 235 (A. Fuat Firat et al. eds., 1987). Neoclassical economics and its famous construct, consumer sovereignty, emphasize the decision to consume, maintaining that production follows the consumption function. See MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* (1953). These two disciplines are exceptionally influential in the United States, where the object is seen as a thing foremost to be acquired. Elsewhere, it is seen foremost as a thing to be designed, built, or perfected.

ever seen. Leisure activities such as golf, tennis, boating, and camping spread to the masses, while mass-marketed spectator sports united men and boys of every level of income and education.⁷⁶ Home "labor-saving" devices⁷⁷ and automobiles began to seem necessary, as did manufactured possessions of all kinds. A new utilitarian calculus appeared: the greatest number of goods to the greatest number of people equaled the greatest good for society.

Next we note what is perhaps the most famous development of all. An American ethos, exalting law, accompanied the growth of the anti-feudal and wealthy nation. Without a land-based hierarchy to tell individuals where they belonged, law filled the void, and in the nineteenth century created social places for citizens through legal abstractions such as rights.⁷⁸ In the United States, individuals, who have the power to change places in the hierarchy, develop appropriate notions of their importance (or their rights) vis-à-vis other people with more money, education, or power. Law buttresses these ideas. Put another way, in this antifeudal society law becomes a producer of the fairness to which a citizens felt entitled. Abstract and constant from setting to setting, law levels individuals below its principles: "justice for all," "no man is above the law," and so forth. In the United States, law may be seen as a substitute for, or an alternative to, deeper ordering.

We return to our hero, Dagwood Bumstead. The American consumer is heir to the myth of the common man. According to this myth, eloquently told in both history and fiction, the lone individual has, and should have, the power to assert his interests against a stronger antagonist, because both are in equal measure the common man.⁷⁹ "I am as good as he is" the American can

76. See WILLIAM J. MORGAN, *LEFTIST THEORIES OF SPORT: A CRITIQUE AND RECONSTRUCTION* 143 (1994); MARIAH BURTON NELSON, *THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL: SEXISM AND THE AMERICAN CULTURE OF SPORTS* 5 (1994).

77. On the paradoxical effects of manufactured goods alleged to be labor saving, see JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991).

78. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 268 (J.P. Mayer ed., 1969) [1848]; MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

79. Consider the novels of Mark Twain, the archetypical "American" writer. See MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 121-44 (Heritage Press 1940) [1884] (on the Shepherdson and Grangerford families); *THE MAN THAT CORRUPTED HADLEYBURG* (1900); *A CONNECTICUT YANKEE IN KING ARTHUR'S COURT* (Alison R. Ensor ed., 1987). Without widespread knowledge of the myth of the common man and skepticism about feudal aristocracy, Twain would have had no audience. Instead, he is the most enduringly popular American author.

say, referring to the tycoon of the hour;⁸⁰ both scholarly and popular writings often portray entrepreneur-manufacturers ranging from Henry Ford and Andrew Carnegie to William Gates as flawed, ordinary men, if not bumbler or brutes.⁸¹ From "I am as good as he is," one can step easily to "Henry Ford is no better than I," and from there the intellectual and attitudinal distance to a products liability lawsuit is even shorter. Just as strict products liability presumes and proclaims that all manufactured things are in the end alike,⁸² the concept of the American consumer denies any hierarchical gap between user and maker. They too are alike, standing together on the level ground built on the law.

Of course, the common man cannot vanquish the product manufacturer without help. A powerful government—a force to counter force—is necessary to bolster the consumer-litigant. Libertarian scholars frequently complain that strict products liability arms the state and interferes with individual prerogatives, especially when it causes products to be withdrawn from the market or made prohibitively expensive.⁸³ One need not join in this condemnation to note that American products liability law and consumer law have retained a commitment to protecting product users through governmental power. Consumers are said to have a right to protection, and this right can be enforced only by government.⁸⁴

III. THE JAPANESE CONSUMER

A. *Traditions*

Japanese national culture stretches back to prehistory, although "[a]ll Japanese historians locate the birth of a new

80. This attitude relates to the image of the American man as malcontent. Tyrannous kings, overbearing aristocrats, greedy and unsanitary pork-packers, dictatorial railroads, and manufacturers of unsafe and shoddy products all provoke him. American writers portray his resentment with approval and sympathy. See UPTON SINCLAIR, *THE JUNGLE* (1905).

81. See DOUGLAS COUPLAND, *MICROSERFS* (1995); HAROLD C. LIVESAY, *ANDREW CARNEGIE AND THE RISE OF BIG BUSINESS* (1975); DAVID E. NYE, *HENRY FORD, "IGNORANT IDEALIST"* (1979); DONALD PIZER, *DOS PASSOS' USA: A CRITICAL STUDY* (1988).

82. See Bernstein & Fanning, *supra* note 13, at 11.

83. See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 161 (1988).

84. See Bernstein & Fanning, *supra* note 13, at 11, 15-17.

political era in the opening years of the seventeenth century," the Tokugawa era.⁸⁵ Accordingly, this Article places emphasis on national culture in Japan from the Tokugawa period forward. Despite the Meiji- and MacArthur-era borrowings from the West, Japanese feudal traditions remind modern citizens of their place in a hierarchy of ancient origin.⁸⁶ National imagery in Japan compares the citizenry to a hedge, where deviation has to meet the clipping-shears; or, in another metaphor, the nail that sticks up must be hammered down.⁸⁷ Whereas the American-style personal injury action reveals the individual consumer—one story, one set of losses, often only one name on the caption of the lawsuit, each unique as a fingerprint⁸⁸—Japanese citizens are urged to see themselves as a populace.⁸⁹ Their participation in the hierarchical order is often explained by Japanese reverence for *wa*, generally translated as Harmony.

The Westerner thinks of harmony as a created condition. In music, harmony is made by the organization of relative tones.⁹⁰ The harmonization of law in the European Union is the work of reconciliation and improvement of the differing laws of the member states.⁹¹ "Harmonious" relationships among differing ethnic and racial groups in the United States require efforts to

85. OOMS, *supra* note 42, at 3.

86. These traditions derive from Confucianism, but differ significantly from Confucian traditions as originated and perfected in China. Although Confucius detailed the importance of hierarchy generally and the need to remain in one's place, even to obey a "corrupt prince," Confucianism contains ideals of transcendent justice and theoretical, intellectual support for hierarchy—both of which are absent in the Japanese variants, Neo-Confucianism and Shinto. For elaboration, see CHUNG-YING CHENG, *NEW DIMENSIONS OF CONFUCIANISM AND NEO-CONFUCIANISM* (1991).

87. See TETSUYA KATAOKA, *THE PRICE OF A CONSTITUTION: THE ORIGIN OF JAPAN'S POSTWAR POLITICS* (1991).

88. Paradoxically, the United States leads the world in the development of class actions and mass torts, but these devices are regarded functionally, as a source of individual redress. On this emphasis, see JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 162 (1995).

89. See TAKESHI ISHIDA, *JAPANESE POLITICAL CULTURE: CHANGE AND CONTINUITY* 4-9 (1983) ("[T]he individual is submerged in a group-oriented society."). Ishida confines his assertion to prewar Japanese society, but *Japanese Political Culture*, like all work in the national-culture tradition, connects the past to the present.

90. See WILLI APEL, *HARVARD DICTIONARY OF MUSIC* 371-72 (2d ed. 1969).

91. See DOMINIC LASOK & J. W. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 458 (4th ed. 1987). On the musical metaphor, see Anita Bernstein, *L'Harmonie Dissonante: Strict Products Liability Attempted in the European Community*, 31 VA. J. INT'L L. 673 (1991).

improve one's understanding of others and to cooperate actively with them.

In contrast, *wa* is not active: it is the recognition of the natural order and the satisfaction of taking one's proper station in it. Feudal definitions of proper station have been explicitly inculcated from Tokugawa times through the end of World War II and, as controversy about appropriate teaching in Japanese public schools has illustrated,⁹² remain the norm for an influential segment of Japanese society. *Wa* is not produced, therefore, by a process of give-and-take in the marketplace of ideas or by the mutual compromise of conflicting interests. It is a condition of "enlightened" acceptance of one's immutable place, surrounded by others who also take their proper station.⁹³

Wa may have emerged from topographical and historical causes. As the sociopolitical theorist Jiro Kamishima has written, Japan is an assimilating unitary society, a contrast to the more pluralistic nations of the West, epitomized by the United States. Over the centuries Shinto religion, the emperor, the feudal lords below him, and even outside influences merged together into a single center of authority.⁹⁴ This unitary amalgam was enhanced, if not compelled, by Japan's geographic isolation, which caused non-Japanese wanderers to "fuse or perish."⁹⁵ Authority could function without crude force, confident in the inability of the population to flee. Set in a geography that assimilates rather than supports Western-style conflict, the Japanese could indeed find *wa* natural and immanent rather than created by agency.

Building on the writings of Kamishima and other observers of Japanese society, including the early work of the American communitarian scholar Robert Bellah, Victor Koschmann has identified a tradition of "soft rule" in Japan that once again contrasts with the Western tradition.⁹⁶ Koschmann argues that the Western past—subjugation, conflict, and violence—engendered rule by force, or "hard rule." In these conditions, looking around at conflicts and open brutality, the individual sees himself "as prior to social forms, as their creator."⁹⁷ The state becomes ab-

92. See VAN WOLFEREN, *supra* note 15, at 82.

93. See generally CHIE NAKANE, *JAPANESE SOCIETY* (1970) (arguing that Japanese society is arranged vertically).

94. The work of Kamishima, published in Japanese, is quoted and discussed in Koschmann, *supra* note 48, at 5-6.

95. G.B. SANSON, *JAPAN: A SHORT CULTURAL HISTORY* 9 (rev. ed. 1974), quoted in Koschmann, *supra* note 48, at 5.

96. See Koschmann, *supra* note 48; VAN WOLFEREN, *supra* note 15, at 202.

97. Koschmann, *supra* note 48, at 18.

stract and remote. This environment also supports the development of transcendent norms; when groups and individuals are frank about their interests and pursue them at the expense of others, they testify to the existence of a higher truth—principles that are constant in every setting.⁹⁸ In Japan, however, this open competition never flourished, and consequently authority could maintain an ideal of unity between citizen and ruler, a soft rejection of duality and individuation. Van Wolferen states the contrast in a sentence: “[W]hereas power in the West is masked by the illusion of principle, in Japan it is masked by the illusion of benevolence.”⁹⁹

Soft rule makes Japan rare among nations. Its rejection of abstractions, according to van Wolferen, distinguishes it from other Asian countries: one finds significant instances of “civic courage,” or protest for the sake of principle, in China, the Philippines, and South Korea, but seldom in Japan.¹⁰⁰ Younger Japanese continue the soft rule tradition. Makoto Oda, a writer who spent six years teaching twenty-year-olds, surveyed his students informally and found that half said they would serve their nation as *Tokkotal* (Special Attack Corps, or “kamikaze”) pilots, and eight of ten claimed to love their country, but none could answer when asked what about Japan merited their love or their suicidal loyalty.¹⁰¹ This antitranscendence has roots in pre-Tokugawa ideology: the fierce general and overlord Toyotomi Hideyoshi urged persecution of Christianity because Christianity transcended too much; as he wrote in 1591, it “does not maintain a separation between rulers and the people.”¹⁰² Law, in the role of enforcer and proclaimer of ideals, accordingly plays a different role in Japan than in the West.

98. *Id.* Koschmann adds:

It is interesting that a theory of rights—a concept, according to Kant, of man as an *end* in himself rather than a *means*—should have arisen in a political tradition characterized by slavery, violence, and conflict. When man is stripped of all protection, systematically defiled and degraded, reduced to a means in the most extreme sense of the word, and then in total despair discovers that he exists and that he is free at least to say no unto death, then he makes contact with that very core of his being that depends upon no one: the atom which is the irreducible unit of his unique personality. Because that atom can stand alone, it argues for an individual criterion of value.

Id. at 19.

99. VAN WOLFEREN, *supra* note 15, at 202.

100. *Id.* at 211.

101. See Makoto Oda, *The Ethics of Peace*, in *AUTHORITY*, *supra* note 48, at 154, 167.

102. OOMS, *supra* note 42, at 46.

This role is easier to see in the context of criminal, rather than civil, justice. Crime and punishment exist in Japan without significant regard for any rule of law. Tokugawa tradition held that knowledge about the law was an elite preserve; even the criminal law was unpublished, and statesmen kept "the correspondence between offenses and penalties an official secret."¹⁰³ Modern Japan follows the statist tradition, with almost unfettered prosecutorial discretion¹⁰⁴ and a criminal conviction rate of about 99.8 percent.¹⁰⁵ The American preoccupation with formalities in criminal procedure is disdained in Japan; and one sees Harmony at work in minor criminal-law enforcement as well as civil justice, with border-bureaucrats and beat-police imposing conciliation and acceptance on petty offenders.¹⁰⁶

A longstanding Japanese tradition of protest actually comports with *wa* and soft rule. Protest in Japan, lacking connection to law and ideals, appears more aesthetic than political. As Koschmann puts it, political activism in Japan is expressive rather than instrumental: "[I]t releases the internal pressure built up by the suppression of dissident views, but fails to go beyond a moral and psychological witness to encompass sustained, rationally planned, and organized action."¹⁰⁷

Thus rebellion from Japanese order follows Japanese patterns. Citizen protest movements by, or in behalf of, the *burakumin*—an oppressed minority, comparable to African-Americans in the United States or the *harijan* of India—resemble peasant protest in the Tokugawa era, with their deference, anti-

103. HIDEO TANAKA, *THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS* 164 (1976).

104. See VAN WOLFEREN, *supra* note 15, at 220.

105. *Id.* at 221.

106. See Wagatsuma & Rosett, *supra* note 14 (describing conciliation and apology imposed in cases of an expired visa and an unlicensed ride on a motorcycle). As a civil-justice device, rather than a technique of police intimidation, the Japanese-style apology has many admirers in the West, who see it as an antidote to the belief that injury can be redressed monetarily and as a source of psychological wholeness to a victim. On the inadequacy of money as a tort remedy and the spiritual or communal aspects of tort damages, see Leslie Bender, *Changing the Values in Tort Law*, 25 *TULSA L.J.* 759 (1990). We agree that an apology, as this word is understood in the West, can fulfill psychological needs, but we note the consistency of apology with *wa*, soft rule, and antitranscendence. Emphasis on apology necessarily comes at the expense of emphasis on principle and abstraction. The famous image of the Japanese businessman or minister humbly begging the pardon of his victims has a dark side: the victim needs an apology because a verdict, court decree, formal stipulation, or precedent is too abstract—and also unavailable.

107. Koschmann, *supra* note 48, at 22, 25.

abstraction, and emphasis on emotional redress.¹⁰⁸ During the famous water pollution crisis of the early 1970s, when thousands died or lost their livelihoods due to industrial discharge, Japanese consumer organizations did not protest the industry and government policies that lay at the root of the crisis; "they merely 'appealed to the authorities' to provide guidelines as to which fish were safe to eat."¹⁰⁹ The law-trained political scientist Keiichi Matsushita describes one of Japan's rare attempted *coups d'état* in 1936 as an effort not so much to gain political power as to "remove what [the rebels] considered evil influences from the court and restore power to a fair and impartial emperor."¹¹⁰ Even the Yakuza gangsters professedly identify themselves with samurai values and, judging from the success of films, magazines, and comic books with a Yakuza-samurai theme, much of the public finds this view congenial.¹¹¹

This mindset makes Japanese products liability law, in addition to the class of Japanese consumers, presumptively different from its U.S. counterpart. Adversarial litigation designed to wrest guarantees of safe products or practices from hierarchical superiors does not comport with a national view of Harmony as predetermined from above. Instead, in a characteristically Japanese pattern, a statutory law of products liability can emerge only after it is worked out among those who are considered the parties at interest: manufacturers, government bureaucrats, and elected politicians.

B. Traditions Continued: The Triumvirate

The last two centuries of Japanese history suggest that the modern triumvirate of manufacturers, bureaucrats, and elected politicians is a continuation of traditional Japanese order.¹¹² In the Tokugawa era, merchants achieved upward mobility by having their sons adopted into samurai families.¹¹³ When the Meiji Restoration began in 1868, the merchant-samurai business alliance became more explicit. The government paid the *daimyo*

108. See FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 118-23 (1987).

109. NORIE HUDDLE ET AL., *ISLAND OF DREAMS: ENVIRONMENTAL CRISIS IN JAPAN* 177 (1975) (citation omitted).

110. Keiichi Matsushita, *Citizen Participation in Historical Perspective*, in *AUTHORITY*, *supra* note 48, at 171, 185.

111. See REINGOLD, *supra* note 43, at 131.

112. See TADASHI FUKUTAKE, *THE JAPANESE SOCIAL STRUCTURE: ITS EVOLUTION IN THE MODERN CENTURY* 61 (Ronald P. Dore trans., 1982).

113. See BENEDICT, *supra* note 40, at 72.

(nobles) and samurai cash for their loss of feudal privileges and they, in turn, used this indemnity to start or buy into enterprises on favorable terms.¹¹⁴ These enterprises were financed, built, and brought to prosperity by the government.¹¹⁵ The merchant-samurai alliance continues: indeed, the prewar financial oligarchy, supposedly destroyed during the postwar U.S. occupation, has prospered in modern Japan beyond any prior expectations.

The state bureaucracy is a continuation of the *bakufu*, whose descendants became the architects of the Meiji central government and constitution.¹¹⁶ Industrial, social, and educational policy has remained consistent from the Meiji era to the current explication of *nihonjinron*, the unique nature of the Japanese and their society.¹¹⁷ Government agencies for the social control apparatus (planning, police, and education) survived the occupation essentially intact and remained permeated by prewar Imperial officials.¹¹⁸ Admission to the bureaucratic elite is still carefully controlled and carries generous rewards in prestige, power, and wealth, although wealth is sometimes deferred until retiring bureaucrats become well-paid *amakudari*¹¹⁹ executives in private or public corporations.

Japanese politicians at the national level are the successors of hamlet and village headmen who represented their communities in dealings with the state.¹²⁰ As members of the Japanese legislature, the *Diet*, they must demonstrate loyalty and effectiveness to their communities, primarily through success in obtaining state commitments for roads, schools, farms, and other expenditures.¹²¹ They also serve the interests of their financial supporters, far more obviously than U.S. citizens could tolerate from their own politicians, at least until recently.¹²² Their role in legislation is primarily in behind-the-scenes negotiations among

114. See HUDDLE ET AL., *supra* note 109, at 42.

115. See BENEDICT, *supra* note 40, at 92-93 (citation omitted).

116. See SIDNEY VERBA ET AL., *ELITES AND THE IDEA OF EQUALITY* 23 (1987).

117. See *supra* note 15 and accompanying text.

118. See VAN WOLFEREN, *supra* note 15, at 302-04.

119. *Amakudari* literally means "descent from heaven," and refers to the move of a bureaucrat at age 55 from government to serve for about 20 years as a director or senior adviser in a corporation. See VAN WOLFEREN, *supra* note 15, at 45.

120. See RAMSEYER & ROSENBLUTH, *supra* note 14, at 123.

121. See *id.* at 122-24 (describing exploits of former prime minister Kakuei Tanaka, "a face that launched a thousand trains").

122. See REINGOLD, *supra* note 43, at 238-62.

interest groups; publicly, they routinely approve bills designed and submitted by the bureaucracy.¹²³

How this hierarchy affects Japanese life has been the subject of confusion and misunderstanding. Powerholders in Japan do not comprise an evil cabal to oppress the citizenry. Rather, they function outside of leadership, accountability, or explicit subservience. Van Wolferen uses the helpful metaphor of the "truncated pyramid" to describe the tacit, decentralized system of compliance and leverage that characterizes political power in Japan.¹²⁴ Although the triumvirate of businessmen, politicians, and bureaucrats runs Japan in a hierarchical setting, hierarchy in the sense of chains of command, or even a boardroom dictatorship as suggested by the popular phrase "Japan Inc.," is absent. Japanese citizens, at the base of the truncated pyramid, take a place in the nation far different from that of the American consumer.

IV. PRODUCTS LIABILITY REFORM

Against this background of differences, it is appropriate to examine how the Japanese products liability statute may function for the benefit of an existing coalition of powerholders, rather than for consumers. The statute is not likely to disrupt Japanese society or the function of law in Japan, despite optimistic expressions heard from American consumer advocates.¹²⁵ Two conditions suggest the futility of codifying American-style strict products liability in Japan: first, Japan appears to lack the necessary players; second, Japanese law tends to absorb rights-based principles or assertions into an existing bureaucratic regime.

A. *The Missing Players*

In our earlier study of culture and products liability we alluded to the necessity of "players" in products liability, especially the consumer-litigant and his lawyer. Simultaneously eager to make money and convinced of the disinterested rightness of their cause, these players embody the American values of enterprise, egalitarianism, pragmatism, exultation of the common

123. See VERBA ET AL., *supra* note 116, at 166 (describing submission of elected officials to bureaucracy).

124. VAN WOLFEREN, *supra* note 15, at 41.

125. See *supra* note 2.

man, dependence on an open-handed government, and admiration of law and rights as champions of the individual.¹²⁶ Without players to animate the ideal, we have contended, products liability reform enjoys a brief spell of publicity and then lies inert in the law books.¹²⁷

The robust consumer-litigant is alien to Japan. Ordinary Japanese citizens have no reason to believe that the law exists to protect them.¹²⁸ Traditions of duty and hierarchy weigh down on them from above, emphasizing the law as authority rather than a source of citizen-initiated power.¹²⁹ Following this pattern, for example, Japanese law lacks a concept of the private attorney general, an absence illustrated by an antitrust law without treble damages provisions and an air pollution statute that provides for criminal, but not civil, enforcement.¹³⁰ These traditions generate the realities of legal culture in Japan—scarce lawyers, compelled mediation and conciliation, a statist regime of criminal procedure, and other barriers to the courts—and also nurture a psychological posture of Harmony that creates a reluctance to sue.

Integral to the concept of consumer is the idea of rights, an association amplified in former U.S. President John F. Kennedy's famous 1962 speech about the four freedoms of the consumer.¹³¹ Consumers need this abstraction to think of themselves as entitled to complain and receive redress, but the Japanese citizen barely has a word for rights. *Kenri*, a portmanteau word coined during the Meiji era, contains two morphemes, "power" and "impartiality." But while the dictionary definition of *kenri* is equated with rights, to a Japanese native speaker the word means something like egotism.¹³² Without a basic vocabulary to boost rights-consciousness, the Japanese consumer cannot make use of a products liability statute.

126. See Bernstein & Fanning, *supra* note 13, at 23-24; Ottley & Ottley, *supra* note 1, at 59 (contending that "social conditions" in Japan are more important than "formal codal provisions" of products liability in determining whether codification will be used).

127. See Bernstein & Fanning, *supra* note 13, at 1-2, 31.

128. VAN WOLFEREN, *supra* note 15, at 209.

129. See *supra* Part II. A.

130. See Ottley & Ottley, *supra* note 1, at 40 (citations omitted).

131. President Kennedy proposed a Consumer Bill of Rights containing the right to safety, the right to be informed, the right to choose, and the right to be heard. See *International Consumer Rights Movement*, *supra* note 2.

132. See VAN WOLFEREN, *supra* note 15, at 211; Koschmann, *supra* note 48. On the etymology of *kenri* based on a reading of Japanese sources, see Eric A. Feldman, Patients' Rights, Citizens Movements, and Japanese Legal Culture (1995) (unpublished manuscript, on file with authors). Feldman writes that in Japan "the rhetoric about rights makes clear the identification of such assertion with selfishness and arrogance." *Id.* at 5.

The consumer's lawyer, heir to the gunslinger of the American frontier, is also absent in Japan. As was mentioned, Japanese lawyers are scarce, expensive, members of the upper-middle or upper class, and products of an elite educational system capped by *Todal*, Tokyo University.¹³³ The Japanese legal profession contains an increasing number of progressives and Western-trained individuals, but these lawyers are not of the same breed as the solitary and colorful personal-injury entrepreneur, who helped to build strict products liability in the United States.

Other players are absent from the Japanese products liability stage. For example, litigation requires judges, but the number of judges in Japan has not even doubled in the hundred years following 1890, while the population of the country trebled.¹³⁴ Jurors—or fellow-consumers from the point of view of plaintiffs and their lawyers—are unavailable in Japanese civil cases.¹³⁵ While American employees of a manufacturer must be concerned about how they will look to a jury in a future products liability lawsuit,¹³⁶ in Japan such employees are either working-class laborers with no tradition of union pride,¹³⁷ or white-collar "salarymen," tied to a paternalistic and rigid workplace.¹³⁸ They are not likely to applaud an antagonist's insistence on principle.¹³⁹

In the wings near the American products liability stage are regulators and prosecutors, who buttress civil liability exposure with the threat of public law.¹⁴⁰ The Japanese legal system, lacking private law players, needs these authorities of the state in order to approximate some of the beneficial effects of American

133. *Todal* is so integral to the Japanese power structure that van Wolferen, having asked himself what could be done about a system that turns citizens into subjects, suggested its abolition. See VAN WOLFEREN, *supra* note 15, at 432.

134. *Id.* at 214.

135. See Schwartz, *supra* note 6, at 73-74. The United States uniquely provides a constitutional right to jury trial in civil cases. See U.S. CONST. amend. VII.

136. See Bernstein & Fanning, *supra* note 13, at 23-24.

137. See VERBA ET AL., *supra* note 116, at 24-28, 65.

138. See REINGOLD, *supra* note 43, at 228-31; NAKANE, *supra* note 93. On the powerlessness of Japanese women workers, see UPHAM, *supra* note 108, at 124-65; Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83 (1995).

139. Further, the prior actions of these employees remain hidden to plaintiffs and their lawyers: like the civil jury, American-style discovery is absent in Japan, which provides for only limited depositions and production of documents. See Yamanouchi & Cohen, *supra* note 19, at 444-47.

140. See Michael B. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L.J. 1 (1984).

strict products liability. But informal and collusive regulatory measures make the effect of Japanese safety regulation hard to find,¹⁴¹ and the criminal sanction is negligible; contrary to the common-law rule, a corporation in Japan cannot be prosecuted, and individual officials have been treated gently in the handful of cases involving serious product-related harms.¹⁴²

B. Preemption and Bureaucratic Informalism

In response to the sentiment that "Japan is changing" under the weight of new developments such as environmental awareness and attention to civil rights, Frank Upham used the phrase "bureaucratic informalism" to describe the Japanese reaction to these novelties. As Professor Upham describes this tendency, Japanese authority when confronted with a grievance absorbs it into an official response center designed to ameliorate and conciliate, rather than set precedents related to rights.¹⁴³ The famous Minimata pollution protest, for example, gave rise not only to environmental constraints on industry, but also to new laws that discourage citizen redress through the courts.¹⁴⁴ Bureaucratic informalism frequently offers genuine relief and support to harmed citizens; but it never empowers.

Even before the products liability statute took effect, the process of bureaucratic informalism in products liability had begun. Around the time the law was passed, the Ministry of International Trade and Industry asked various sectors of Japanese industry to establish organizations to settle claims out of court.¹⁴⁵ Home electronics manufacturers and manufacturers of housing parts were among the first to set up such industry-specific organizations, with the automobile, gas, and petroleum industries expected to follow suit soon.¹⁴⁶ Drug-related products liability claims will be "dealt with" by the Federation of Pharmaceutical Manufacturers' Association of Japan and its affiliates at every prefecture. According to the drug manufacturers, a committee including representatives of

141. See Hamada et al., *supra* note 50, at 103-04.

142. See Ottley & Ottley, *supra* note 1, at 41.

143. See UPHAM, *supra* note 108.

144. See *id.* at 64-67, 76-77.

145. See *Product Liability Mediators*, YOMIURI SHIMBUN [THE DAILY YOMIURI], Mar. 30, 1995, at 9, available in LEXIS, Aslapc Library, Dayami File.

146. *Id.*

consumer interests will accept complaints and attempt to "settle the troubles concerned."¹⁴⁷

As Upham points out, bureaucratic informalism is preemptive: what starts out resembling rights becomes the prerogative of government officials. Preemption of a more literal kind is evident in Japanese products liability reform. The statute was enacted to replace the doctrines of contract and tort that formerly were used to redress product-related injuries. Japanese contract and tort laws have been impressively unhelpful to consumers, imposing doctrinal hurdles for plaintiffs in addition to the cultural hurdles of an antilitigious, hierarchy-controlled society. Article 570 of the Civil Code, the basis for a contract remedy, appears to demand privity and limit damages.¹⁴⁸ Article 709, the tort provision, requires that the plaintiff prove negligence.¹⁴⁹ Inasmuch as modern products liability in the United States moved forward by eliminating these doctrinal difficulties,¹⁵⁰ one might assume that Japan, by discarding contract and tort requirements, now evinces a similar state of progress.

Yet the prior division of products liability between two separate doctrines afforded Japanese plaintiffs a strength that is now endangered by the preemptive potential of unification. Different doctrinal bases gave Japanese judges a degree of freedom to expand the law. For example, in one case of salmonella contamination in which two girls died, their heirs were permitted to bring claims under Article 570, after the court stretched privity almost beyond recognition in order to cover all defendants in the chain of distribution.¹⁵¹ One of the most famous and successful lawsuits in Japanese history was the Thalidomide litigation, brought by numerous Japanese families under Article 709.¹⁵² Scant as they are, products liability precedents in Japan derive from decades of tort actions. Although the conclusion of Koichi Hamada and his colleagues that "Japanese court decisions have quite flexibly extended tort

147. *Committee Due to Handle Drug Complaints Under PL Law*, COMLINE DAILY NEWS BIOTECH. & MEDICAL TECH., May 18, 1995, available in LEXIS, at News Library, Camlne File.

148. See Ottley & Ottley, *supra* note 1, at 44.

149. For discussion of Japanese negligence doctrine, see Seimei Hayashida, *The Necessity for the Rational Basis of Duty-Risk Analysis in Japanese Tort Law: A Comparative Study*, 1981 UTAH L. REV. 65, 65-67.

150. See *supra* text accompanying note 59.

151. See Hamada et al., *supra* note 50, at 89.

152. See Ottley & Ottley, *supra* note 1, at 47-50. For details of this action, see *Diary of a Plaintiffs' Attorneys' Team in the Thalidomide Litigation*, 8 LAW IN JAPAN 136 (1975).

law in the Civil Code to meet the needs of modern society"¹⁵³ is, to put it mildly, overstated, a progressive legal system certainly could fashion meaningful products liability law out of Japanese contract and tort rules.¹⁵⁴ Centralizing products liability law may actually take away opportunities from creative lawmakers, especially plaintiffs' attorneys and trial judges.

The preemptive effect of the new Japanese products liability reform law seems to accomplish centralizing national purposes. It assures foreign consumers that Japanese manufacturers are at least as concerned about the safety of their products as are other producers. It assures foreign governments, particularly the United States, that the Japanese are sincerely trying to create the mythical level playing field in international economic competition, a surface as devoutly worshipped by free-market enthusiasts as were the playing fields of Eton by an earlier generation of romantic capitalists. Its enactment mutes the argument of United States producers that they are handicapped vis-à-vis the Japanese by their obligations to conform to a doctrine that limits innovation and adds costs to production.¹⁵⁵ And it enables Japanese manufacturers, in the home market that may be becoming of greater interest to them, to assure buyers in this market of the manufacturers' sincerity.¹⁵⁶

153. Hamada et al., *supra* note 50, at 92.

154. See Frank A. Orban, III, *Product Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive*, 8 GA. J. INT'L & COMP. L. 342, 346-50 (1978) (describing liberal use of civil codes in France, Belgium, and Luxembourg to create analogues to United States strict products liability).

155. For a summary of these arguments, see Marc S. Klein, *Will Tort Reform Help U.S. Competitiveness?*, N.J. L.J., Nov. 22, 1993, at 10.

156. But what is the meaning of sincerity, *makoto*? It does not mean what U.S. citizens would assume: words or actions coming from the very core of one's being or genuine, visceral reactions. For the Japanese, *makoto* is acting according to the Japanese code (i.e., playing the game of life with full knowledge of the rules). Thus, the manufacturer profits from his enterprise as a natural consequence of hierarchy, not as a self-seeker. See BENEDICT, *supra* note 40, at 215-19. By obeying the products liability law, he demonstrates the *makoto* of his acceptance of responsibility for his acts, and that he would not insult the consumer with shoddy or unsafe goods—now that shoddy and unsafe goods have been condemned by the law. In van Wolferen's telling phrase, *makoto* "involves rearranging one's conscience to fit one's demeanour." VAN WOLFEREN, *supra* note 15, at 252. In the *Hagakure*, the famed Way of the Samurai, the wise Samurai who discovers the meaninglessness of etiquette is counseled, as a demonstration of *makoto*, not to give a hint of this knowledge to youth. *Id.* If this definition of sincerity sounds to a Western ear like an example of insincerity, it may underline the need for caution in matters of language where borrowing of doctrine is concerned. See *supra* note 17.

V. CONCLUSION

To become consumers on the American scale remains a future to which the Japanese aspire. This aspiration is reflected in current Japanese fiction, most notably that of the "my home" school, whose veneration of consumer objects has been the subject of considerable comment.¹⁵⁷ Thus far the aspiration has not been fulfilled,¹⁵⁸ and Japanese wisdom continues to emphasize savings, production for export, and hard work for the domestic population.¹⁵⁹ The Japanese have been producing excellent consumer goods for many years, of such numbers and quality that their sale in the United States has escalated a menacing balance-of-trade problem.¹⁶⁰ Why are these goods not in the hands of the Japanese in equal abundance?

The universalist premises of economic analysis and consumer sovereignty, favored by some legal scholars studying Japan, cannot explain this divergence from outcomes in other prosperous nations. Essentialist generalizations about the Japanese nature are equally unconvincing. An explanation such as the one offered here, distinguishing national attitudes toward acquisition and entitlement, is needed to describe the consumer in Japan. Consumer scarcity in Japan demonstrates a larger plight of the Japanese consumer: for these individuals, the benefits of law reform are undeveloped.

Cultures do change over time. Distinct national cultures in particular may be eroded by trade, communications, and shared concerns.¹⁶¹ But one-world homogenization of national culture has yet to triumph. Among industrialized countries the last citadel of monoculturalism, the place where identity and history and nationality remain most tightly fused, will likely be Japan.

157. See Michitaro Tara, *The Glory and Misery of "My Home,"* in AUTHORITY, *supra* note 48, at 207. An acclaimed specimen of the genre is Banana Yoshimoto's novella *KITCHEN* (Megan Backus trans., 1993).

158. See VAN WOLFEREN, *supra* note 15, at 410-11 (noting exorbitantly priced housing, food, clothing, highway access, gasoline, telephone services, and utilities in Japan, and the related absence of consumer comforts despite high per capita income levels).

159. See *id.* at 165-70; REINGOLD, *supra* note 43, at 213-17.

160. See FALLOWS, *supra* note 43, at 247.

161. For a sampling of contrary indications gathered from newspapers, see *Sovereignty to End Multiculturalism: PQ*, TORONTO STAR, Feb. 25, 1995, at A12 (reporting monocultural trend in Quebec); Sharon Waxman, *Unspeakable Truths for the French*, WASH. POST, June 28, 1994, at B1 (describing language-purification effort in France); Irmgard Kern, *At Birth, Foreign Babies in Germany Head for Second-Class Citizenship*, DEUTSCHE PRESSE-AGENTUR, Feb. 28, 1995.

