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### The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan

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# THE CULTURE OF LEGAL CHANGE: A CASE STUDY OF TOBACCO CONTROL IN TWENTY-FIRST CENTURY JAPAN

*Eric A. Feldman\**

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## INTRODUCTION

This Article argues that the interaction of international norms and local culture is a central factor in the creation and transformation of legal rules.<sup>1</sup> Like Alan Watson's influential theory of legal transplants, it

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1. Scholars have found it notoriously difficult to explain how and why laws change. One difficulty is that legal change is a broad and ambiguous phrase. Some works examining

emphasizes that legal change is frequently a consequence of learning from other jurisdictions.<sup>2</sup> And like those who have argued that rational, self-interested lawmakers responding to incentives such as reelection are the engine of legal change,<sup>3</sup> this Article treats incentives as critical

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legal change are concerned with fundamental alterations to the structure or function of the legal system, others with the creation or revision of legal fields or individual laws. In some cases, studies focus on change brought about by legislative or administrative bodies; in others the focus is on courts and judges. Although the distinctions are important, there is clearly a good deal of overlap between the categories—Watson’s legal transplant theory, for example, aims to explain the changes in both legal systems and legal rules. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993). For a discussion of Watson’s view of the relationship between legal change and its social context, see ALAN WATSON, *SOCIETY AND LEGAL CHANGE* (1977). For a more rigorous, logical statement of the theory than Watson himself provides, see William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995). Scholars of comparative law continue to debate and elaborate on Watson’s basic insight. As Ugo Mattei notes, “comparative lawyers have been prolific in amassing evidence for [Watson’s] somewhat paradoxical conclusion” UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 124 (1997). For two recent evaluations of the transplant theory, see Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM J. COMP L. 163 (2003); Inga Markovits, *Exporting Law Reform—But Will It Travel?*, 37 CORNELL INT’L L. J. 95 (2004). Law and Society scholars have been strongly critical of Watson’s approach. See, e.g., Lawrence Friedman, *Some Comments on Cotterrell and Legal Transplants*, in *ADAPTING LEGAL CULTURES* (David Nelken & Johannes Feest eds., 2001); Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785 (1982). For an alternative historical account of legal change, see Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001) (using the idea of path dependency to explain the influence of history on legal stability and legal change). This Article is primarily concerned with national and local legislative and administrative actions that result in legal change, although it also discusses judicial decisions and more general systemic change.

2. WATSON, 1993, *supra* note 1. In their efforts to explain legal change, scholars have focused on the decisions of government officials, JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984); John W. Kingdon, *A Model of Agenda-Setting, With Applications*, 2 L. REV. M.S.U.-D.C.L. 331 (2001); the role of political entrepreneurs, NORMAN FROHLICH ET AL., *POLITICAL LEADERSHIP AND COLLECTIVE GOODS* (1971); broad sociological or historical perspectives (for an overview of such approaches, see JOHN R. SUTTON, *LAW/SOCIETY: ORIGINS, INTERACTIONS, AND CHANGE* (2001); the evolutionary nature of legal change, SIR HENRY MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* (1996) (1861); EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1933); the impact of class conflict on change, ANTHONY GIDDENS, *CAPITALISM AND MODERN SOCIAL THEORY: AN ANALYSIS OF THE WRITINGS OF MARX, DURKHEIM, AND WEBER* (1971); and the “formal rationality” of the bureaucracy, MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (1968). Despite these efforts, a distinguished legal scholar bemoans that “we are still at the stage where even the basic factors of legal change are not understood.” Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 320 (1978). Similarly, Kornhauser remarks that “the processes of legal change are in themselves maddeningly complex” (Louis A. Kornhauser, *Notes on the Logic of Legal Change*, in *SOCIAL RULES: ORIGIN; CHARACTER; LOGIC; CHANGE* 169 (David Braybrooke ed., 1996) [hereinafter *SOCIAL RULES*]).

3. An influential early work on incentives and government was ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957). The rational choice perspective, which argues that changes in law are a direct consequence of the self-interest of lawmakers, particularly their desire to be reelected, has been increasingly utilized by legal scholars, although it originated

motivators of human behavior. But in place of the cutting-and-pasting of black-letter legal doctrine it highlights the cross-border flow of social norms,<sup>4</sup> and rather than material incentives, it concentrates on a less easily measured factor—“cultural incentives”—and highlights its impact on the agents and outcomes of change. By identifying international norms<sup>5</sup> as the inspiration for domestic legal change and local culture as a

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in studies of business organizations. For a general and influential discussion of principal-agent theory, see John Pratt & Richard Zeckhauser, *Principals and Agents: An Overview*, in JOHN PRATT & RICHARD ZECKHAUSER, *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 1* (1985). For a more recent contribution, see JEAN-JACQUES LAFFONT & DAVID MARTIMORT, *THE THEORY OF INCENTIVES: THE PRINCIPLE-AGENT MODEL* (2001). An early and influential application of this theory to the U.S. Congress is DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974). A recent discussion of the rational choice model and political decisionmaking is STEPHEN PARSONS, *RATIONAL CHOICE AND POLITICS: A CRITICAL INTRODUCTION* (2005). See also Lewis Kornhauser, *Notes on the Logic of Legal Change*, in *SOCIAL RULES*, *supra* note 2. Legal change, from the perspective of rational choice, is the result of self-interested calculation by politician change-agents who are attentive to the demands of voter principles and will create laws they believe are likely to strengthen their reelection prospects.

4. This claim is related to writings on globalization, which generally assume or assert the importance of cross-border interactions to the legal system. Unlike much of that literature, however, this Article is not focused on the question of whether the world's legal systems are converging, nor on whether globalization and/or convergence is an inevitable or normatively desirable state of affairs. For examples of recent scholarship on globalization, see *POLITICAL SPACE: FRONTIERS OF CHANGE AND GOVERNANCE IN A GLOBALIZING WORLD* (Yale H. Ferguson & R.J. Barry Jones eds., 2002); *GLOBAL POLITICAL ECONOMY: CONTEMPORARY THEORIES* (Ronen Palan ed., 2000); *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* (Yves Dezalay & Bryant Garth eds., 2002) [hereinafter *GLOBAL PRESCRIPTIONS*].

5. A host of publications by scholars of international relations since the mid-1990s indicate that international norms are increasingly being analyzed as independent variables that trigger national responses. See, e.g., Kathryn Sikkink, *Transnational Advocacy Networks and the Social Construction of Legal Rules*, in *GLOBAL PRESCRIPTIONS*, *supra* note 4, at 37, 38 (stating that “a burgeoning literature in political science argues that norms are becoming increasingly consequential in international relations and international organizations and that transnational nongovernmental actors are key instigators and promoters of new norms”). Among the most theoretically sophisticated of those writings comes from Stanford sociologist John Meyer, who sets out a conceptual framework for understanding the connection between international norms and domestic policies. John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation State*, 103 *AM. J. SOC.* 144 (1997). See also Ann Florini, *The Evolution of International Norms*, 40 *INT'L STUD. Q.* 363 (1996) (seeking to provide a theory that explains why certain norms come to be accepted as standards at particular times). In Meyer's view,

[m]any features of the contemporary nation-state derive from worldwide models constructed and propagated through global cultural and associational processes. . . . Worldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors in virtually all of the domains of rationalized social life—business, politics, education, medicine, science, even the family and religion.

Meyer, *supra*, at 144–45. In a similar vein, Martha Finnemore and Kathryn Sikkink persuasively examine the link between international norms and political change, particularly

mediating influence that transforms international norms into domestic law, the Article seeks to contribute to the growing scholarly interest in the interaction of culture and law.<sup>6</sup> It shows legal change to be a culturally contingent process dependant upon the interaction of the local and the global, rational actions and cultural dispositions.

The Article illustrates the cultural approach to legal change with a detailed case study of changes in the legal control of tobacco in Japan.<sup>7</sup> Tobacco offers a particularly challenging and revealing puzzle that implicates the mechanisms and motivations that underlie legal change.<sup>8</sup> After almost half a millennium of tobacco cultivation, nearly a century of government monopolization of tobacco growth, manufacture, and sale, and the highest rate of tobacco consumption in the industrialized world,<sup>9</sup> Japan at the end of the twentieth century had few laws regarding tobacco consumption.<sup>10</sup> The political economy of tobacco, in the view of most commentators, was the reason for the absence of laws. The ruling Liberal Democratic Party (LDP) depended upon the electoral support of tobacco farmers and retailers, and the Ministry of Finance (MoF) was the majority shareholder in Japan's only tobacco company and enjoyed

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"international or regional norms that set standards for the appropriate behavior of states." Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 893 (1998). They liken the vulnerability of states to the influence of international norms to peer pressure, which leads states to respond because of "a combination of pressure for conformity, desire to enhance international legitimation, and the desire of state leaders to enhance their self-esteem." *Id.* at 895.

6. In contrast to much of the scholarly writing on law and norms, my focus in this Article is not on the interaction of formal and informal mechanisms of social ordering within a single domestic setting.

7. The literature on tobacco control conflates smoking, smokers, and tobacco. A more nuanced approach would distinguish between laws aimed at the product, the act, and the person, despite their substantial overlap (a law that prohibits the act of smoking in a bar, for example, also regulates the person and the product). This Article follows general usage and treats the three as interchangeable.

8. For a thoughtful effort to explain similarities and differences in tobacco-control policies in eight industrialized democratic societies, see Theodore R. Marmor & Evan S. Lieberman, *Tobacco Control in Comparative Perspective: Eight Nations in Search of an Explanation*, in UNFILTERED: CONFLICTS OVER TOBACCO POLICY AND PUBLIC HEALTH 275 (Eric A. Feldman & Ronald Bayer eds., 2004) [hereinafter UNFILTERED].

9. According to Japan Tobacco's annual Japan Smoking Rate Survey, 29.4% of all Japanese adults smoked in 2003, including 46.9% of men and 13.2% of women. *JT Annual Survey Finds 29.4% of Japanese Adults Are Smokers*, [http://www.jti.co.jp/JTI\\_E/Release/04/no21.html](http://www.jti.co.jp/JTI_E/Release/04/no21.html) (last visited June 22, 2005).

10. For a discussion of the legal, political, and economic issues related to tobacco in Japan, see Eric A. Feldman, *The Limits of Tolerance: Cigarettes, Politics, and Society in Japan*, in UNFILTERED, *supra* note 8. With the exception of a 1900 law that prohibited minors from smoking, laws targeting tobacco in Japan have primarily addressed the structure of the tobacco business and the taxation of tobacco products, despite the fact that tobacco has been cultivated in Japan since the sixteenth century. Most important is the 1985 Tobacco Business Law.

the income from tobacco sales (both tax and profit)—thus the LDP and MoF together ensured that the sale and use of tobacco products was largely unencumbered by legal restrictions.<sup>11</sup> In the first years of the new millennium, however, both the national and local governments rapidly passed a cascade of tobacco-related laws. Do the laws bear the imprint of legal transplants?<sup>12</sup> Do they result from a change in the political economy of tobacco? Or do they owe their origin to some other factor(s)? The rapid and seismic shift in Japan's legal control of tobacco, a legal change unanticipated and so far unexplained, is the puzzle this Article seeks to unravel. It does so by identifying specific cultural attitudes and agents and presenting evidence of their causal role in bringing about change.

Scholars have frequently and provocatively used Japan to illustrate theories of legal change, so it provides an ideal context in which to closely examine the how and why of change.<sup>13</sup> Comparative law scholars, for example, regularly emphasize the transplant process to account for Japan's key legal doctrines and institutions.<sup>14</sup> First from China in the seventh century, later from Europe in the nineteenth century, and most recently from the United States in the mid-twentieth century, changes in Japanese legal rules and practices are often directly traced to the importation (and sometimes imposition) of foreign legal codes, institutions, and constitutions.<sup>15</sup> In contrast, some influential political scientists argue that the Japanese bureaucracy plays an unusually active role in directing Japan's affairs of state, identifying policy priorities and drafting laws with minimal consultation with or interference from politicians.<sup>16</sup> Dissenting from claims about the dominance of the Japanese bureaucracy,

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11. See, e.g., H. Sato, *Politics of Smoking Control in Japan*, (1997) (unpublished Ph.D. dissertation, Harvard University) (on file with Harvard University).

12. Legal transplants are most frequently analyzed as cross-border transfers, but they can also be thought of as occurring interdoctrinally. See, e.g., Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 *Nw. U. L. Rev.* 651 (2002).

13. For a detailed study of policy change in Japan by a leader in the field of Japanese public policy, see JOHN CREIGHTON CAMPBELL, *HOW POLICIES CHANGE: THE JAPANESE GOVERNMENT AND THE AGING SOCIETY* (1992). A more recent, cross-sectional study of policy change is John Creighton Campbell, *How Policies Differ: Long-Term Care Insurance in Japan and Germany*, in *AGING AND SOCIAL POLICY: A GERMAN-JAPANESE COMPARISON* 157 (Harald Conrad & Ralph Lützelers eds., 2002).

14. See, e.g., RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (1985). A rigorous effort to evaluate the transplant theory in light of Japanese law is Hideki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 *AM. J. COMP. L.* 887 (2003). See also Robert Stack, *Western Law in Japan: The Antimonopoly Law and Other Legal Transplants*, 27 *MANITOBA L. J.* 391 (2000).

15. For an overview of the Japanese legal system, see JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (1991).

16. See, e.g., CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975* (1982).

public choice scholars argue that Japanese politicians make and/or change the law for the same reasons as politicians elsewhere; they respond to incentives—most importantly the desire to keep their jobs, which leads them to create laws that cater to constituent preferences.<sup>17</sup>

Yet theories that emphasize legal transplantation, bureaucratic dominance, and the wealth-maximizing behavior of politicians offer only limited insight into tobacco-related legal change in Japan. Japanese lawmakers have, as the legal transplant theory predicts, looked to foreign jurisdictions as models, but they have not focused on formal legal rules, and they have rarely imported fully articulated foreign laws.<sup>18</sup> Bureaucrats, particularly those at MoF and the Ministry of Health, Labor, and Welfare (MHLW), have played a role in the recent changes, but not one that could be described as unilateral or even dominant. Domestic political and economic factors have altered the incentives of lawmakers, but only slowly and gradually, and opinion surveys do not reveal any recent changes in the public's view of smoking. Lawmakers may have fewer reasons to strongly oppose the creation of tobacco-related laws than they did 15 years ago, but they appear to have few reasons to enthusiastically create them.

This Article advocates a different approach by suggesting that the legal changes reshaping the landscape of tobacco in Japan since 2000 started with the normative transformation of smoking in the West.<sup>19</sup> Over the past several decades, citizens in the United States and other Western nations have steadily condemned the act of smoking.<sup>20</sup> Once an activity

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17. The most significant such works are J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, *JAPAN'S POLITICAL MARKETPLACE* (1993); J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* (1999).

18. Since the 1960s, some individual states and international organizations have been crafting tobacco-related laws, and that process accelerated in the 1980s and 1990s. There are thus a variety of models that could be transplanted to Japan, and if the transplant theory is correct, that is exactly the process of legal change that one would expect. For a discussion of international, comparative issues in tobacco law and policy, see generally UNFILTERED, *supra* note 8. For a dissection of the metaphor of legal transplants, see David Nelken, *Beyond the Metaphor of Legal Transplants?: Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation*, in *LAW'S NEW BOUNDARIES* 265 (Jiří Přibáň & David Nelken, eds., 2001).

19. The changes to which I refer are not uniform across the states of the West, but they are evident everywhere, particularly in the United States, Canada, and Western Europe. I will use the "West" to refer to North America and Western Europe, but not Mexico or Central/South America.

20. R.A. MALATEST & ASSOCIATES LTD., *FRAMEWORK FOR DEVELOPING TOBACCO REDUCTION STRATEGIES FOR YOUNG ADULTS: REPORT* (2003), available at [http://tobacco.aadac.com/programs/community\\_programs/young\\_adults/Framework\\_young\\_adults.pdf](http://tobacco.aadac.com/programs/community_programs/young_adults/Framework_young_adults.pdf) ("Social denormalization of tobacco is defined as a range of activities that attempt to reinforce the idea that tobacco use is not, and should not be, a normal part of society. Tobacco product denormalization consists of activities that are focused on educating the public about the deadly effects of tobacco. Tobacco industry denormalization is intended point out the

of the upper class, it has come to be seen as a socially unacceptable habit favored by the poor, the uneducated, and the unwise. The denormalization of smoking in the West has been duly noted in Japan; the print media regularly highlights the contrast between smoking practices and perceptions in the West and Japan; fiction writers have popularized it; Japanese overseas travelers have witnessed it; Japanese and non-Japanese companies have built their businesses around the association of smoke-free spaces with Western chic; those who associate with Western tourists in Japan have been made aware of it; television dramas and documentaries have portrayed it; and lawmakers have discussed it.

Why does the increasingly powerful social condemnation of smoking in the United States and elsewhere have an influence in Japan? Because, this Article argues, it highlights the gap between Japan and Western states and implicates a broadly-held social norm—the norm of conformity with the West.<sup>21</sup> The conformity norm does not trigger blind or random copying; it neither presupposes that the “West is best” nor results in the importation of unaltered Western laws or practices.<sup>22</sup> With regard to tobacco, this Article argues that the conformity norm catalyzed law-making behavior; it moved elites (and some in the general populace) to reassess their tolerance of tobacco and caused lawmakers to create laws that expressed the approbation of smoking. No single factor can fully explain something as complex and multi-causal as legal change, and this Article emphasizes that the interaction of a number of forces was critical in bringing about Japan’s new legal regime of tobacco control.<sup>23</sup> But as it demonstrates, the conformity norm is a crucial variable in

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negative traits of the tobacco industry, in order to educate both smokers and nonsmokers about the motives and tactics of the industry.”). See also Anne M. Lavack, *Tobacco Denormalization in Canada*, 5 Soc. MKTG Q. 82 (1999). For a comprehensive analysis of the social changes surrounding tobacco use in the twentieth century, see ALLAN BRANDT, *THE CIGARETTE CENTURY* (2006).

21. Although the academic literature is rife with debate over how to define “culture” and “norm,” the definitions used in this Article approximate those most widely used among social scientists and legal scholars. For a discussion of the definition of culture relied upon in this Article, see Part I *infra*. I consider norms to be one of the elements (but not the only element) that constitute culture, so that within the umbrella of culture one finds many elements of culture, one of which is norms. On the definition of norms, see Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996) (“A norm can be understood as a rule that distinguishes desirable and undesirable behavior and gives a third party the authority to punish a person who engages in the undesirable behavior. . . . [A] norm is like a law, except that a private person sanctions the violator of a norm, whereas a state actor sanctions the violator of a law”). Norms thus describe informal, unwritten, and unenforced (by the state) ways of behaving that are generally accepted in a society or segment of a society as appropriate and/or desirable and thus exert pressure on individuals to conform or else feel like, and be treated like, social outcasts.

22. See *infra* Part I for a more complete discussion of the conformity norm.

23. To the extent that the gap between Japan and the West led the Japanese populace generally to an intolerance of smoking, the creation of new laws could be seen as a strategic



explaining the timing and intensity of tobacco-related legal changes in Japan.

The Article concentrates on a single case study because detailed empirical support is essential to building an argument for culture's influence. Only by examining the myriad elements of social interaction can one begin to identify their links to legal change. Specificity and induction, however, have a cost; although the Article argues for a cultural approach to legal change, its case-based approach makes theoretical generalization hazardous. Instead of asserting universal validity, therefore, the Article develops a theoretical perspective on legal change and tests the argument through an examination of Japan's changed tobacco-control laws.

The findings, although highly suggestive, could not (and do not) purport to definitively prove a theory. But they do complement and gain strength from a robust social science literature on "new institutionalism," which examines the causes and processes of policy diffusion. Starting with studies of the movement of policies between states in the United States in the 1960s and increasingly taking an international perspective, new institutionalists have sought to explain the dynamics of political change.<sup>24</sup> They have done so not only by pointing to the rational behavior of policymakers, but by demonstrating that "state officials look to other

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political response to a popular desire for tobacco control. There may be some truth to that interpretation. But it is important to note that tobacco has never been a campaign issue in Japan (the only candidate who has run on an anti-tobacco platform was soundly defeated), and as described in Part V, *infra*, general changes in tobacco-related norms in Japan occurred simultaneous with or after the legal changes.

24. An early and influential work on policy diffusion among states in the United States is Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969). A recent overview of the literature is Frances Stokes Berry & William D. Berry, *Innovation and Diffusion Models in Policy Research*, in THEORIES OF THE POLICY PROCESS (Paul A. Sabatier ed., 1999). Perhaps the most influential work in the area is THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991) (arguing that states and other organizations adopt similar structures, procedures, and practices in three ways: by being pressured formally and informally by other organizations and by cultural expectations of the society in which they function (coercive isomorphism); by modeling themselves on other organizations they see as more legitimate or successful (mimetic isomorphism); and by pressure from professionals to conform to certain standards (normative isomorphism)). See Walter W. Powell & Paul J. DiMaggio, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality*, in Powell & DiMaggio, *supra*, at 63. See also NEW PERSPECTIVES ON AMERICAN POLITICS (Lawrence C. Dodd & Calvin Jillson eds., 1994), particularly the contributions by Bert A. Rockman, *The New Institutionalism and the Old Institutions*, 143, 143 (examining the dynamics of political change and crediting "changes in meaning and values exogenous to an institution" as important factors in such change); Virginia Gray, *Competition, Emulation, and Policy Innovation*, 230 (providing an overview of the literature on policy diffusion); and David R. Mayhew, *U.S. Policy Waves in Comparative Context*, 325-40 (taking political scientists to task for overemphasizing the importance of parties and elections as the causes of U.S. policymaking and not sufficiently accounting for international comparisons).

states for policymaking guidance . . . because other states serve as cultural models of what is legitimate and appropriate.”<sup>25</sup> In short, the new institutionalism in sociology and political science argues that political change in a given locale is often a function of change in other locales. Among the most important factors that lead to cross-border influence are the “cultural rules, norms, and expectations” that shape the behavior of lawmakers.<sup>26</sup>

Building on the “new institutionalism” scholarship, this Article makes four contributions to the literature on legal change. First, it highlights the degree to which specific elements of culture establish the conditions for how and why laws change.<sup>27</sup> The question of what engine drives legal change has led to widely disparate responses, from those that emphasize rational, strategic behavior to others that focus on happenstance.<sup>28</sup> By pointing to a particular cultural incentive (the conformity norm) and exploring the ways in which it influences the behavior of lawmakers, the Article offers a novel view of what triggers legal change. Emphasizing culture does not suggest that other factors are irrelevant or unimportant; clearly, incentives like reelection are crucial to understanding the actions of lawmakers.<sup>29</sup> Instead, the Article draws attention to a compelling but largely neglected perspective that complements other approaches to legal change while offering a more textured analytical perspective than many are able to provide.

Second, like Watson’s legal transplant approach and various studies of law and globalization,<sup>30</sup> this Article argues that international factors increasingly shape domestic legal configurations. But it differs from those approaches in two ways: by looking at the influence of foreign

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25. Edward Alan Miller & Jane Banaszak-Holl, *Cognitive and Normative Determinants of State Policymaking Behavior: Lessons from the Sociological Institutionalism*, 35 *PUBLIUS* 191, 197 (2005).

26. Miller & Banaszak-Holl, *supra* note 25, at 193.

27. In fact, one of the liveliest debates over the legal transplant theory involves the question of whether culture inhibits, facilitates, or is irrelevant to the transplant of legal doctrines. For a summary of the debate between Watson and Otto Kahn-Freund on that issue, see Eric Stein, *Uses, Misuses—And Nonuses of Comparative Law*, 72 *Nw. U. L. REV.* 198 (1977); Philip M. Nichols, *The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code*, 18 *U. PA. J. INT’L ECON. L.* 1235 (1997).

28. Watson’s theory of legal transplants, for example, has no explanation for why transplants occur at a particular time or why certain legal rules are transplanted, which has led one commentator to claim that he relies on a “serendipity approach” to legal change. See P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 *HAST. L.J.* 479, 511 (2000).

29. See Miller & Banaszak-Holl, *supra* note 25, at 213 (“The rational-actor and cultural-based theories of state policy change offer complementary rather than competing frameworks for understanding why states choose the public policies that they do.”).

30. For an overview of the literature on globalization, law, and policy, see Daniel W. Drezner, *Globalization and Policy Convergence*, 2 *INT’L STUD. REV.* 53 (2001).

norms, rather than foreign laws, on domestic legal change and by providing an antidote to assertions that the world's legal systems are converging.<sup>31</sup> Pointing to the ways in which legal change draws on cross-border influences yet remains a particularly local phenomenon crafted and promoted by domestic agents, the Article reveals it to be a reflection of the distinctive links between law and its social context, not a mechanical or universal process.

Third, rather than merely asserting *that* culture matters to the process of legal change, the Article demonstrates *how* it matters. Establishing a causal relationship that implicates identifiable elements of culture in the process of legal change requires reference to a wide variety of sources that reveal culture's influence.<sup>32</sup> To make the case, the Article offers a spectrum of evidence: minutes of ministry deliberations, popular fiction, patterns of international travel, and media coverage, among others. By providing extensive documentation for the claim that the growing social unacceptability of smoking in the West created the conditions for legal change in Japan, and that a Japanese conformity norm sensitized elites in Japan to the West's increasingly clear rejection of the cigarette, the Article puts some meat on the bones of culture-based approaches to law.

Fourth, for over 30 years much of the mainstream scholarship on the Japanese legal system has focused on domestic political and economic factors, ranging from the deliberate political manipulation of legal institutions to the self-interested incentives of legal actors, to account for the substance and process of law in Japan. This Article represents a departure from that approach and an effort to bring culture back into the study of Japanese law.

The Article unfolds in four parts. Part I argues for a cultural approach to legal change. It specifies the element of culture—the

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31. See, e.g., Berkowitz, Pistor & Richard, *supra* note 1, at 188 (“[P]eople around the globe have by and large converged on Western type formal law both for the political laws (constitutions) as well as civil and commercial laws”). But see Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1 (2004) (arguing that fragmentation and divergence, not convergence, characterize different civil law approaches to plea bargaining). In a comparative essay on environmental regulation in the United States and Japan, Robert Kagan concludes that one finds a “[c]ross-national convergence in regulatory policy” that is “far from complete,” with “[n]ational legal traditions, political structures, industrial organization, and cultural attitudes” resisting “homogenization.” Robert A. Kagan, *Introduction: Comparing National Styles of Regulation in Japan and the United States*, 22 LAW & POL’Y 225, 226–27 (2000).

32. John L. Campbell, *Ideas, Politics, and Public Policy*, 28 ANN. REV. SOC. 21, 28 (2002) (providing an overview and analysis of new institutionalism scholarship that invokes factors like norms and world culture to account for policy change and criticizing it for, among other things, not identifying the causal mechanisms of policy diffusion). The criticism is warranted; here, I seek to be more explicit about casual links.

conformity norm—that underlies the relationship between changes in international norms and changes in domestic law and differentiates that norm from static, stereotyped notions of Japanese culture. In addition, it offers a set of criteria that distinguish between Western norms that will trigger change in Japan and those Japanese actors will ignore or resist. Part II describes the profound change that has occurred in Western smoking norms and the battery of tobacco-related legal changes brought about by national and local government in Japan. To build the case for a causal relationship between those two sets of changes, Part III presents a number of possible explanations for the legal change in Japan and highlights recent shifts in political and economic interests and their contribution to the new legal regime of tobacco. Part III.B offers a plethora of evidence that maps the relationship between changes in Western norms and Japanese laws. Part IV locates the cultural approach to legal change within the scholarly literature on the Japanese legal system, arguing that it represents an effort to rethink the role of culture in the study of Japanese law. Part V concludes by clarifying why legal change matters. It indicates that not only have Japan's tobacco laws been transformed, but the entire normative framework of smoking has undergone a profound shift.

#### I. THE FRAMEWORK: CULTURE, CONFORMITY, AND LEGAL CHANGE IN JAPAN

To explain the cascade of legal changes surrounding smoking in Japan, this Article focuses on the influence of what it calls the norm of conformity.<sup>33</sup> The norm has led Japanese lawmakers to be particularly cognizant of the gap between the social acceptability of smoking in Japan and the West, and that awareness has prompted the creation of new laws that begin, at least symbolically, to fill the gap.<sup>34</sup>

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33. For an effort to theorize what the authors consider the emergence and perpetuation of conformity in Japan, see ALAN S. MILLER & SATOSHI KANAZAWA, *ORDER BY ACCIDENT: THE ORIGINS AND CONSEQUENCES OF CONFORMITY IN CONTEMPORARY JAPAN* (2000). My discussion of the conformity norm is distinct from the clichéd invocation of conformity as a Japanese cultural trait that supposedly explains “groupism” and many other allegedly unique Japanese characteristics.

34. As discussed in Part III below, lawmakers were not alone in noticing the normative changes in the West; these changes were also clear to many others in the population. To the extent the general population may have welcomed new tobacco-related laws, politicians passing such laws may appear to be acting rationally to ensure their reelection. But there is no evidence constituents were expressing preferences for new laws or elected representatives were cognizant of such preferences. Instead, I suggest the normative shifts discussed in this section influenced both representatives and constituents.

In her recent study of law, culture, and colonialism, legal anthropologist Sally Engle Merry describes a similar phenomenon in nineteenth century Hawaii, where kings embraced concepts like the rule of law as a way of being accepted by what they considered the world's civilized states.<sup>35</sup>

Elites [in Hawaii] welcomed new cultural forms and structures, both because of strategic calculations about the capacity of these structures to provide sovereignty and because of cultural commitments to the civilizing process. The rapid adoption of Western names, dress, houses, religion, and writing by the ali'i [royalty] was simultaneously driven by a recognition of the power inherent in these practices and by a desire to transform the self to conform to these images of the civilized person. Confronted with the image of the civilized person as one capable of commanding both resources and respect, many Hawaiians

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35. SALLY ENGLE MERRY, COLONIZING HAWAII: THE CULTURAL POWER OF LAW 20–21 (2000). Merry's analysis is based on the work of Norbert Elias, who in *THE CIVILIZING PROCESS* provides a conceptual framework for thinking about changes in social behavior. 1 NORBERT ELIAS, *THE CIVILIZING PROCESS: THE HISTORY OF MANNERS* (Edmund Jephcott trans., Basil Blackwell 1994) (1939). He examines why once commonplace behaviors became a source of disgust and were replaced by others that were, at least temporarily, considered more socially acceptable. His frame of reference encompasses the states of the West between the fifteenth century and the date of his writing (1939). "Western people," Elias states, "have not always behaved in the manner we are accustomed to regard as typical or as the hallmark of 'civilized' people." *Id.* at xi. What, he asks, has caused "this 'civilizing' of the West?" His answer highlights the way customs, behaviors, and fashions flow from court society to the upper middle class. In an effort to increase self-esteem and gain the respect of those in more elite social circles, people at the lower end of the social hierarchy imitate the habits of court society, thereby draining the behaviors of their function as markers of social class. *Id.* at 86. Although there is a constant drift of behavioral patterns, Elias believes that changes in court behavior move in a certain direction over time. The "threshold of repugnance and the frontier of shame" are redefined; what were once public pleasure are privatized; and the civilizing process thereby leads to increasing levels of self-regulation and the internalization of social control, which is inculcated into children and comes to be seen by them as the natural order of things. Alan Hunt describes this as a move from external restraints to self-constraints and criticizes Elias for failing to see that some degree of restraint was always present. Instead, in Hunt's view, Elias should have concentrated on explaining changes in "the mode and the form of self-discipline." See Alan Hunt, *The Role of Law in the Civilizing Process and the Reform of Popular Culture*, 10 *CAN. J. L. & SOC'Y* 5, 7–8 (1995). The transformations that preoccupy Elias occur inside national borders; he is not concerned with changes in England that trigger changes in Italy, for example, or other configurations of transborder influences. The substantial barriers to cross-border influence in the fifteenth to early twentieth centuries may justify the narrow geographical scope of his inquiry. With the advent of technologies that facilitate cross-border communication, interaction, and observation—like international travel, radio, television, transnational corporations, international organizations, and cross-national NGOs, among many others—analyzing the civilizing process should no longer be limited to the confines of state borders. The pressure to emulate certain practices, and the shadow cast by social change, is felt not only by those who inhabit the particular state where those practices and changes are manifest. It is, or may be, experienced in other parts of the world.

sought to refashion themselves without abandoning their commitments to Hawaiian traditions or selves. Instead, there was an expansion of consciousness, a multiplication of identities. The rule of law was central to this expansion, since it offered both the means to an enlightened government, as defined by the missionaries, and the sign of its accomplishment.<sup>36</sup>

Merry's analysis helps to illustrate the transformation of tobacco policy in Japan.<sup>37</sup> The kings of yesteryear in Hawaii realized that adopting some of the characteristics of the civilized world was a crucial step in gaining its approval. They sought to dress up their kingdom in the garments of the West, both strategically and symbolically, and among those they sampled were elements of the legal system. Similarly, acceptance as part of the Western world is important to Japan's lawmakers, as it signals shared values, confers status in the international community, and reaffirms Japan's global power and credibility.<sup>38</sup> In Japan as in Hawaii,

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36. MERRY, *supra* note 35, at 261.

37. The spread of tobacco consumption in Western states also illustrates how a behavior considered worthy of emulation can disseminate throughout the population. In early eighteenth century Georgian England, for example, members of the upper class shifted their method of consuming tobacco from pipes to snuff. JASON HUGHES, *LEARNING TO SMOKE: TOBACCO USE IN THE WEST* 66–67 (2003). To help them use snuff “properly,” special courses were held for fashion-conscious members of society. Just as the commoners had turned to the pipe, they now turned against it. As an early twentieth century account describes, “The middle classes in time imitated the freak of their social superiors and ceased smoking.” *Id.* at 67 (quoting W.A. PENN, *THE SOVERANE HERBE: A HISTORY OF TOBACCO* (1901)). Less than a century later, however, the cigarette had displaced other modes of tobacco consumption, as elites first took up the habit and were then emulated by the rest of the population. We are now witnessing the turn away from cigarettes in the “civilized” world, and, not surprisingly, at the vanguard are elites, individuals, and states with high literacy and high incomes. Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 79 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). Smoking is increasingly considered ill-mannered, and those who smoke, primarily the less well educated and less affluent segments of society, are increasingly seen as uncivilized. The change is sufficiently significant to lead some commentators to speculate about a tobacco-free future. As sociologist Ethan Nadelmann remarks, “Norms with respect to tobacco consumption, especially in public, have changed rapidly in the United States and some other countries in recent years . . . it is certainly conceivable that some nations, including the United States, will choose in coming decades to ban domestic production and sale and thereafter propagate their prohibitions to others . . .” Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 *INT’L ORG.* 479, 523–24 (1990).

38. The group of states that serve as the referent group for Japan's international role are not the ones geographically proximate to Japan—e.g., Korea, China, and Russia. Instead, they are the states located on the other side of the world, particularly the member states of the EU and the United States. I refer generally to those states, as well as international organizations like the WHO, as the West. See generally GERRIT W. GONG, *THE STANDARD OF “CIVILIZATION” IN INTERNATIONAL SOCIETY* (1984). For a discussion of the ideas of the “East” and the “West” and the degree to which they are more historical and political constructs than simply geographical designations, see Djamshid Behnam, *The Eastern Perception of the West*, in *GLOBALIZATION AND CIVILIZATIONS* 178 (Mehdi Mozaffari ed., 2002).

there are often strategic reasons for the reception of “cultural forms and structures”: lawmakers in twenty-first century Japan have crafted a newly vigorous framework of tobacco-related laws in part because those laws are instrumental,<sup>39</sup> but also because law is a symbol that communicates a nation’s commitment to the values of civilized states.<sup>40</sup> When the gap between the social acceptability of smoking in Japan and the West became uncomfortably wide, Japan’s leaders responded by creating tobacco control laws.<sup>41</sup>

Without clearly labeling it the “conformity norm,” many scholars have noted the degree to which Japanese individuals and institutions shape themselves in the image of the West.<sup>42</sup> “Japan’s postwar national

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39. See *infra* Part III.A.

40. When nineteenth century Japanese government officials put on suits and bowler hats, for example, they did so partly to shed what were considered old-fashioned, primitive garments that distinguished them from their Western counterparts and partly because they recognized their presentation could affect the power dynamics of their dealings with Western officials.

41. The fact that Japan adopts certain Western behavioral changes that take hold in the West does not imply that Western behavior is in any way superior. A notion that certain behaviors are markers of a civilized society is subjective and shaped by perceptions that are rooted in complex histories and ideologies. As Sinkwan Cheng states, “[m]odern Western societies have a tradition of associating civilization with (occidental) law . . . legal historians in the West often associate their societies with law and civilization, and set this in contrast to ‘primitive societies’ which are regarded as lawless and uncivilized.” Sinkwan Cheng, *Civilization and the Two Faces of Law: J.M. Coetzee’s Waiting for the Barbarians*, 24 CARDOZO L. REV. 2349, 2349 (2003). Japanese lawmakers bought into this worldview over a century ago, and while its power has waxed and waned, it continues to influence Japan’s contemporary legal order.

42. For an example of recent studies by political scientists that emphasize the influence of international norms in Japan, see Kim Reimann, *Building Global Civil Society from the Outside In? Japanese International Development NGOs, the State, and International Norms*, in THE STATE OF CIVIL SOCIETY IN JAPAN 298, 304 (Frank J. Schwartz & Susan Pharr eds., 2003) (arguing that “rising international interest in the role of IDNGOs and ‘participatory development’ that led to stronger state-IDNGO cooperation in other industrialized countries put pressure on the Japanese government to reexamine its own relationship to society and somehow show that Japan, too, had an active IDNGO sector.”). International norms caused the Japanese government to change its policy of engagement in the developing world and made it more willing to cooperate with international development NGOS in a wide range of international endeavors. Similarly, in a study of immigration policy in Japan, Germany, Malaysia, and Canada, Amy Gurowitz claims that a mix of insecurity and pressure makes Japan particularly porous to international norms regarding immigration policy. Amy Ilene Gurowitz, *Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State*, 51 WORLD POL. 413 (1999). Unsure of its international role while at the same time experiencing pressure to internationalize, Japan ratified the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; the Refugee Convention; the Convention on the Elimination of all Forms of Discrimination Against Women; the Convention on Elimination of Racial Discrimination; and it sought stronger ties with Europe via a variety of international organizations. International norms shape Japanese policy, Gurowitz concludes, because of Japan’s “extreme sensitivity to what peers in other states think about Japan.” *Id.* at 416–17. And in a comparative study of environmental policy and politics in Japan, Germany, and the United States, Miranda Schreurs asserts that Japan has

identity,” observes a Japanese political scientist, “has been predicated on the need to be more like the West, especially the United States.”<sup>43</sup> A senior Japanese diplomat discussing Japan’s 1956 admission into the United Nations explains that the Japanese population “longed for Japan to be accepted again as a legitimate member of the international community. UN membership symbolized the recovery of this legitimacy in the eyes of the world.”<sup>44</sup> A cultural critic opines that “no matter how strong its economy becomes, Japan is culturally and psychologically dominated by the West,”<sup>45</sup> and a scholar of postcolonialism argues that modern Japan has experienced an “impoverishing retreat and dependence on the West in cultural discourse.”<sup>46</sup> In a similar vein, an analysis of leisure in Japan concludes that the government has encouraged citizens to “behave in ways that broadly resemble activities of citizens” in the Western world,<sup>47</sup> a legal historian describes how Japan came to see certain criminal punishments in the nineteenth century as “offensive to the sensibilities of the ‘civilized world,’ and thus targeted for reform,”<sup>48</sup> and an historian of eighteenth and nineteenth century Japanese politics writes of “the ways in which Japan’s adoption of ‘Western’ models was rooted not in efficiency, rationality, or efficacy, but in the quieter forces of conformity and social reproduction.”<sup>49</sup> There is, in other words, a widely-noticed

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consistently looked toward the United States and Europe for policy ideas. MIRANDA A. SCHREURS, *ENVIRONMENTAL POLITICS IN JAPAN, GERMANY AND THE UNITED STATES* (2002). She argues that Japanese lawmakers approached environmental policy not simply as a domestic issue and not solely or even primarily as a response to the demand of their constituency. Instead, they were influenced by the unstated rules, or norms, that had come to shape the development of environmental policy in the West. Because “North American and European countries had many NGOs accompanying formal delegations to international conferences,” she writes, “the Japanese government too would have to encourage NGOs to participate to at least some extent in international environmental policy making.” *Id.* at 258. See also Thomas U. Berger, *Norms, Identity, and National Security in Germany and Japan*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* (Peter J. Katzenstein ed., 1996) (arguing that Japanese defense policy is better understood by examining cultural context, beliefs, and values than through models that assume rational actors).

43. Tamamoto Masaru, *Japan’s Uncertain Role*, 8 *WORLD POL’Y J.* 579, 582, 587–88 (1991).

44. Yasuhiro Ueki, *Japan’s UN Diplomacy: Sources of Passivism and Activism*, in *JAPAN’S FOREIGN POLICY AFTER THE COLD WAR: COPING WITH CHANGE* 347, 348 (Gerald Curtis ed., 1993).

45. IWABUCHI KOICHI, *RECENTERING GLOBALIZATION: POPULAR CULTURE AND JAPANESE TRANSNATIONALISM* 2 (2002).

46. EDWARD SAID, *CULTURE AND IMPERIALISM* 330 (1994).

47. DAVID LEHENY, *THE RULES OF PLAY: NATIONAL IDENTITY AND THE SHAPING OF JAPANESE LEISURE* 36 (2003).

48. DANIEL V. BOTSCHAN, *PUNISHMENT AND POWER IN THE MAKING OF MODERN JAPAN* 202 (2004).

49. Mark Ravina, *State-making in Global Context: Japan in a World of Nation-States*, in *THE TELEOLOGY OF THE MODERN NATION-STATE* 87, 104 (Joshua A. Fogel ed., 2005). In contrast, Katō Shūichi claims that “Japan is a group-oriented society, whose traditional values



Japanese tendency of conformity with Western political and social practices. But the implications of that tendency for the understanding of Japanese law have been unexplored.

To identify a conformity norm with the West is neither to suggest that it explains all foreign influence on Japan nor to claim cross-border influence is unidirectional.<sup>50</sup> Clearly, there are many international influences on Japan that do not come from the West.<sup>51</sup> For centuries Japan was influenced by Asia, particularly China and Korea. Japanese religion, language, crafts like pottery making, and social and political structure, for example, all have their roots in the East.<sup>52</sup> In addition, influence does not flow in a single direction; Japanese influence is clearly visible in both Asia and the West, as evidenced by the plethora of sushi shops in Paris, *butoh* dance performances in New York, the emulation of commercial systems like “just-in-time” delivery, and the international popularity of anime.<sup>53</sup>

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still resist openness towards the outside world.” Katō Shūichi, *The Internationalization of Japan*, in *THE INTERNATIONALIZATION OF JAPAN* 312 (Glenn D. Hook & Michael A. Weiner eds., 1992).

50. Katō Shūichi, in 1955, has been credited with being the first Japanese scholar to write about Japanese cultural hybridity, in a study in which he looked at what he considered Japan’s unique tendency to adopt various practices from the West. KATŌ SHŪICHI, CHOSAKŪ 7, *KINDAI NIHON NO BUNMEISHITEKI ICHI* (1979), discussed in IWABUCHI, *supra* note 45, at 57. Similarly, in a study of the origins of the property clause in South Africa’s new Bill of Rights, Heinz Klug highlights the way in which the “deployment of global forms, whether as norms or as stories of success or failure, has the ultimate effect of setting the limits of available options—on pain of global marginalization, an isolation imposed by capital markets, governments, or the international human rights community.” Heinz Klug, *Hybrid(ity) Rules: Creating Local Law in a Globalized World*, in *GLOBAL PRESCRIPTIONS*, *supra* note 4, at 276, 277. For a thoughtful analysis of culture and borrowing that simultaneously emphasizes the importance of cultural analysis and its hazards, see John C. Campbell, *Culture, Innovative Borrowing, and Technology Management*, in *TECHNOLOGY AND MANAGEMENT: AMERICA AND JAPAN* (Jeffrey K. Liker, John Etlie & John Creighton Campbell eds., 1995).

51. And there have clearly been periods, such as the early 1940s, when the West was demonized. For an historical account of Japan’s turn against the West in the 1930s and 1940s, see RICHARD STORRY, *JAPAN AND THE DECLINE OF THE WEST IN ASIA, 1894–1943* (1979). See also Ian Buruma, *Lost in Translation*, *NEW YORKER*, June 14, 2004, at 184.

52. While much of that influence occurred hundreds, and in some cases, a thousand years ago, there have been more recent historical moments, particularly in the 1930s and 1940s, when Japan asserted its Asian identity and turned away from the West. A complete analysis of external influences on Japan, well beyond the scope of this Article, would require significant attention to Asian influences on Japan. For a discussion of resentment toward the West in Japan and elsewhere, see IAN BURUMA & AVISHAI MARGALIT, *OCCIDENTALISM: THE WEST IN THE EYES OF ITS ENEMIES* (2004).

53. Mark Magnier, *Japan’s Lagging Readiness Could Disrupt U.S. Trade, Bank Systems*, *L.A. TIMES*, June 6, 1999, at C1. The recent spread of Japanese culture, or at least pop culture, to the rest of the world provides a particularly intriguing example. Douglas McGray marvels at what he sees as an increase in Japan’s exportation of culture. “Instead of collapsing beneath its political and economic misfortunes,” McGray writes, “Japan’s global cultural influence has only grown. In fact, from pop music to consumer electronics, architecture to fashion, and food to art, Japan has far greater cultural influence now than it did in the 1980s,

Since the mid-nineteenth century, however, with the arrival of Commodore Perry and the imposition of extraterritoriality laws (a result of Western states' insistence that Japanese courts were unequipped to legitimately judge Western nationals), the flow primarily has been from the West to Japan.<sup>54</sup> Japan's leaders had a clear incentive to follow the West; Western powers threatened their future political and economic stability, and their willingness to Westernize was an important adaptive strategy. To eliminate the laws of extraterritoriality, they needed legal rules and procedures that the Western powers accepted as adequate to impose on Western defendants.<sup>55</sup> As Arthur Taylor von Mehren writes,

The country's leaders understood that the external standards by which Japan's efforts would be judged, and to which the society would inevitably seek to conform, were Western. In the closing decades of the nineteenth century the political, economic, and educational leaders of Japan began, with an enterprise and dedication perhaps unmatched in history, to study and adapt for Japanese needs and conditions Western

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when it was an economic superpower." Douglas McGray, *Japan's Gross National Cool*, FOREIGN POL'Y, May 1, 2002, at 44, 44. Although Japan's aesthetic influence is hardly new (e.g., Frank Lloyd Wright in architecture, the Sony Walkman, etc.), McGray may be correct in pointing out an increase in Japanese cultural influence in the twenty-first century. Still, there is a difference between the types of cultural products implicated in that increase—shochu, Hello Kitty pencil holders, Pokemon, and green tea ice cream, for example—and the sorts of issues that would make Japan an international standard bearer that defines the behavioral norms of the developed, modernized, "civilized" world. The availability of sushi and ramen in cosmopolitan U.S. cities may well be a sign that certain Japanese tastes have been successfully disseminated, but this has not made Japan into a state that considers itself, or is widely considered, a template for the West.

54. At that time, a dichotomy took root between the "civilized" West and "primitive" Japan, echoing the division of the world into "advanced" and "follower" states that emerged around the industrial revolution. See REINHARD BENDIX, *NATION-BUILDING AND CITIZENSHIP: STUDIES OF OUR CHANGING SOCIAL ORDER* (1964).

55. See Onuma Yasuaki, "Japanese International Law" in *the Prewar Period: Perspectives on the Teaching and Research of International Law in Prewar Japan*, 29 JAPANESE ANN. INT'L L. 23, 28 (1986). Yasuaki offers an unconventional view of extraterritoriality laws. He claims that many of Japan's legal elite may not have been opposed to extraterritoriality, because it exempted Japanese courts from having to deal with conflicts involving "barbarians." *Id.* at 28. That perspective must have been reinforced by the Girard case. As Edward Hall describes, in the early days of the postwar U.S. occupation of Japan, a Status of Forces Agreement gave Japan the right to try U.S. citizens and soldiers for crimes committed against Japanese nationals. When a U.S. soldier, Girard, accidentally killed a woman and was brought to court, he was not contrite, as local custom dictated, but instead he bragged, acted out, and posed for the news photographers. Many Japanese were shocked at Girard's behavior. Rather than prolong the legal proceedings, the government decided to acquit him with the agreement of the United States that he would be sent home and never let back into Japan. See EDWARD T. HALL, *BEYOND CULTURE* 110, 111 (1976). But even Onuma makes clear that while some may have appreciated the benefits of extraterritoriality, they did not appreciate the way in which unequal treaties had been forced on Japan.

knowledge and institutions. The introduction of Occidental law was but one element in a wholesale importation of things Western.<sup>56</sup>

Japan translated and adopted European legal codes and embraced international law because Japanese elites understood they needed to accede to pressures to Westernize in order to politically and economically engage on more equal footing with Western powers.<sup>57</sup> Westernization was not limited to the legal system; as many commentators have pointed out, law was simply one of a bouquet of changes used to portray Japan as a “civilized” nation.<sup>58</sup> Among the most visible Western-style institutions developed in the Meiji era were post offices, the police force, newspapers, prisons, and schools, further indicating the “desire to make Japan into a modern nation that was the equal of the Western powers, one that would be respected internationally as a modern, ‘civilized’ society.”<sup>59</sup>

What may have started as a rational effort to equalize political and economic relations with the West increasingly became a more general cultural pattern of behavior that led both the elite and the populace to look West.<sup>60</sup> The emergence of a social behavior—one that started for

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56. Arthur T. von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486, 1486–87 (1958).

57. Though, as noted by Thomas Blakemore, “the Westernization of Japanese law which occurred in the Meiji era was relatively thoroughgoing.” Thomas L. Blakemore, *Post-War Developments in Japanese Law*, 1947 WIS. L. REV. 632, 636 (1947).

58. As Herbert Passin explains, Japan created legal codes based on those in the West to eliminate the unequal treaties and get rid of extraterritoriality by showing Western powers that “Japanese law was as civilized and modern as their own.” Herbert Passin, *Overview: The Internationalization of Japan—Some Reflections*, in THE CHALLENGE OF JAPAN’S INTERNATIONALIZATION 19 (Hiroshi Mannari & Harumi Befu eds., 1983). According to Onuma, international law in the nineteenth century was said in Japan to be the law of civilized nations, which justified Japan’s adoption of its principle tenets. Onuma, *supra* note 55, at 29. For a more general discussion of the adaptation of Western law and other Western institutions and how they were seen as making Japan more “civilized,” see generally GONG, *supra* note 38.

59. D.E. WESTNEY, IMITATION AND INNOVATION: THE TRANSFER OF WESTERN ORGANIZATIONAL PATTERNS TO MEIJI JAPAN 18–19 (1987). See generally BOTSMA, *supra* note 48.

60. The work of Norbert Elias provides an interesting framework for understanding this tendency. See ELIAS, *supra* note 35. His research focused on the states of the West and demonstrated how the “refinement” of manners started among those in elite court society and filtered down to the bourgeoisie. Since the late nineteenth century, when Japan embarked on its effort to modernize, the West has played the role of the elite innovator, and Japan, like the bourgeoisie in Elias’ account, has sought to “keep up” with changes in the West. What Elias describes as the “civilizing process” exemplifies the way international changes have led to the transformation of Japanese smoking law and behavior. Changes are embraced in Japan not because the status quo is objectively objectionable, but because the Japanese elite long sought to emulate Western practices. To consider Japan civilized, to avoid being an outlier among peer states, Japanese rulers (and voters) measure many of their domestic practices with a Western yardstick. When smoking in Japan deviated from Western practice, change was embraced. For an analysis of a quite different subject (the emergence and disappearance of public executions

concrete, instrumental reasons but morphed into a pattern no longer rooted in rational calculation—provides a concrete example of how culture and social norms are created.<sup>61</sup> And the variability in how and whether that pattern manifests itself—the blossoming of pre-WWII nationalism, the return to materials like wood and paper in contemporary architecture, the current fashion of wearing traditional Japanese yukata robes on the streets of Tokyo—exemplifies how culture is contested, politicized, manipulated, and transformed.

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in Western Europe) that also makes use of Elias' framework, see PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION: FROM A PRE-INDUSTRIAL METROPOLIS TO THE EUROPEAN EXPERIENCE* (1984). For a more recent analysis of culture that links social class, manners, and taste (for art, food, music, etc.), see PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* (1984). *See also* DAVID SWARTZ, *CULTURE & POWER: THE SOCIOLOGY OF PIERRE BOURDIEU* (1997). For an anthropological study that identifies a similar tendency of “tastes” to filter from the elite to the masses, see SIDNEY MINTZ, *SWEETNESS AND POWER: THE PLACE OF SUGAR IN MODERN HISTORY* (1985).

61. Although I argue that culture exerts an influence on law and legal change, I am wary of analyses that allude to “culture” as a monolithic force that shapes every aspect of the legal system and legal behavior. Since the late nineteenth century, scholars have battled over whether culture is a coherent conceptual entity and how they should define it. Mary Douglas famously critiqued the overbroad use of culture:

For all the volumes written about it, the concept “culture” has not become an incisive tool of thought. It remains a commodious cushion, a category in which anything can comfortably recline. Culture is custom, culture is learned behaviour, these are all comprehensive notions and lead to what Professor Geertz calls “pot-au-feu theorizing” in a “conceptual morass.”

Mary Douglas, *The Self-completing Animal*, *TIMES LITERARY SUPP.*, Aug. 8, 1975, at 886 (reviewing CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973)). More recently, Sally Engle Merry has written that

Constructing a definition of anthropology's core concept [culture] has always been difficult, but at no time more so than the present. Culture is everywhere a topic of concern and analysis, from cultural studies to literature to all the social sciences. At the same time, classic conceptions of bounded, coherent, stable, and integrated systems clearly are inadequate.

MERRY, *supra* note 35, at 28. In contrast to the view of culture as a memorized, inflexible script, contemporary anthropologists see culture as fluid and dynamic. Instead of treating group-oriented behavior, hierarchy, consensus, and patterns of obligation and reciprocity as “cultural or historical givens” in Japan, for example, Japanologist Theodore Bestor argues they are “social forms that reproduce themselves in conformity to normative expectations, even as norms and social patterns create the conditions under which they will be reproduced, reinterpreted, and reapplied in the future.” THEODORE C. BESTOR, *TSUKIJI: THE FISH MARKET AT THE CENTER OF THE WORLD* 16 (2004). Those in cultural studies make a similar claim, asserting that cultural change often results from a confrontation between parties with different interests in how culture is defined. In examining the link between culture and law, one is thus confronted with two interrelated concepts; like culture, law is also dynamic, both as a text that lawmakers often rewrite and as a set of ideas subject to a range of interpretations. Ultimately, cultural dispositions have an impact on legal change, but changes in the law also reshape culture.

Nonetheless, “conformity” is a loaded term, particularly when applied to Japan.<sup>62</sup> To point to a conformity norm does not suggest that Japan is simply a nation of copiers, that the norm leads Japan to indiscriminately transplant foreign practices, or that Japan imports these practices intact.<sup>63</sup> The view that “the Japanese” lack creativity and are thus dependant upon external models is a stereotype that has been repudiated so thoroughly that it warrants little further attention.<sup>64</sup> One hardly needs serious academic commentary on a claim that is contradicted by simple observation of Japanese invention and ingenuity in areas as diverse as institutions of governance, the arts, technology, and other aspects of social organization.

Moreover, to suggest that Japan imports in the form described by Watson’s transplant model—as “whole cloth”—is inaccurate. Japan does not simply transplant foreign practices intact; it observes them, borrows

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62. In fact, one reason that I have chosen to use the term is that it has been so regularly maligned by scholars of Japan.

63. Nonetheless, commentators often make overgeneralized claims about Japanese conformity. Celebrated social critic Honda Katsuishi, for example, writes that “the Japanese behavioral principle is like that of tadpoles. Neither theory nor logic nor ethics underlies or informs Japanese behavior. Quite simply, a Japanese looks around and does what others are doing; that is the principle of action.” HONDA KATSUSHI, *A Theory of Tadpole Society*, THE IMPOVERISHED SPIRIT OF CONTEMPORARY JAPAN: SELECTED ESSAYS OF HONDA KATSUICHI 129, 129 (John Lie ed., 1993) (1981). A similar emphasis on conformity as signaling a lack of individuality in Japan can be found in the writing of Miyamoto Masao and the films of Itami Juzo. The fact that such observations have superficial empirical support allows them to be regularly repeated. For example, in 2004, 43% of all cars purchased in Japan were silver or gray, and 80% were in neutral (silver, gray, black, white) tones. In the United States, in contrast, 28% were silver or gray, and 45% were neutral, with colors like blue, red, and brown each over 10%. Dupont, Inc., *Silver Still Strong, But Livelier Hues Lead Change—2004 Dupont Automotive Color Popularity Report Indicates Car Buyers “Yearn For Color,”* Dec. 9, 2004, [http://www2.dupont.com/Automotive/en\\_US/news\\_events/article20041209.html](http://www2.dupont.com/Automotive/en_US/news_events/article20041209.html).

64. Unfortunately, even some with a deep knowledge of Japan have been too quick to stereotype the tendency to conform to outside influence. Kurt Singer, for example, a thoughtful commentator who lived and taught in Japan from 1931–1939, claims that Japan’s “readiness to yield to foreign influences” is an example of the “feminine” trait of Japanese culture. The Japanese, he writes,

invent few things, receive passionately, and excel in the art of adapting, adjusting, fitting. They are exceptionally shrewd in sifting and excluding . . . The way in which the Japanese proceed in assimilating foreign elements of culture—ideas, styles, institutions, creeds—often resembles somewhat the mimicry of animals, or the submission by women to a new fashion. Models are selected and scrupulously copied in every detail. What attracts their attention is always the new, the contemporary, the modern.

KURT SINGER, *MIRROR, SWORD AND JEWEL: A STUDY OF JAPANESE CHARACTERISTICS* 98 (1973). For another example of the essentializing of Japanese culture, see EDWARD T. HALL, *BEYOND CULTURE* 109 (1976) (exclaiming, “Even more difficult [than the French] for Americans to fathom are the Japanese, whose language, customs, and dress have captivated and mystified Westerners ever since Commodore Perry’s 1853 opening of Tokyo Bay.”).

those aspects or elements that seem appropriate, and adapts them to its local needs.<sup>65</sup> As a result, it is abundantly clear that the tendency to conform to the West has not resulted in carbon copying. Instead, the more accurate image is that of Hans Christian Anderson's mechanical nightingale,<sup>66</sup> which simultaneously underscores and blurs the distinction between copying and inventing, imitating and innovating; it makes clear that Japan does not blindly emulate the West but instead takes account of Western forms and selectively adopts and adapts those that fit.<sup>67</sup> Inevitably, therefore, when Japan borrows from a foreign model, the indigenized version operates differently than it would in its original environment.<sup>68</sup>

That Japan does not indiscriminately conform to Western norms is also clear. It is easy to identify a long list of Western norms—crossing the street regardless of whether the light is green, not killing (or eating) whales, wearing bicycle helmets, talking loudly on one's mobile phone, eating on the local bus—that have not triggered legal or social change in Japan. In fact, some have done the opposite; in the case of whaling, for example, one finds a glorification of Japanese fishing and culinary traditions and an overt rejection of Western save-the-whale sympathies. Why do some Western norms go unheeded in Japan while others trigger change?<sup>69</sup> Although confident generalization depends upon a broad empirical foundation,<sup>70</sup> this Part argues that three criteria are critical: the

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65. John O. Haley & Veronica Taylor, *Rule of Law in Japan*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE, AND THE UNITED STATES* 446, 466 (Randall Peerenboom ed., 2004) (emphasizing that Japan does not simply mimic outside sources, but “heeds” them). Imitating New York City's smoke-free restaurant law, for example, would be difficult because of the scale, design, and function of Japanese dining spots, many of which are small counters with fewer than a dozen stools and serve as bars, restaurants, and nightclubs. Japanese lawmakers influenced by such laws, however, innovated an approach to tobacco control that affirms their allegiance to the international condemnation of smoking but fits the context of Japan.

66. Chalmers Johnson, *The People Who Invented the Mechanical Nightingale*, *DAEDALUS*, Summer 1990, at 71.

67. See WESTNEY, *supra* note 59, at 6 (rejecting the image of Japan as a “rational shopper” for useful foreign institutions and instead emphasizing the innovative ways that outside organizations were fit to Japanese needs).

68. SINGER, *supra* note 64, at 100.

69. Japan is surely not the only state in which foreign, particularly Western norms influence law and behavior, yet some states seem relatively impervious to international norms and others particularly vulnerable. When considering the groups of wealthy, developed democracies, particularly the United States and Japan, it is difficult to account for Japan's tendency to emulate and the U.S. inclination to export without reference to historical legacies and cultural contingencies, as well as to wealth and power. A classic work on the division of the world's nations into “leaders” and “followers” is BENDIX, *supra* note 54.

70. Finnemore & Sikkink, *supra* note 5, at 905, note an absence of hypotheses in the political science and international relations literature that try to identify the types of norms that are more or less likely to have an international impact. The depth and breadth of recent legal change in Japan—regulations to increase the training and production of lawyers, the

content of the norm, the existence of agents who will transmit and transfer the norm, and the receptivity of local conditions.

First, not all norms are created equal, and local judgments about the inherent utility of a given norm indicate that some are more appealing than others. Racism, for example, may qualify as a norm in certain parts of the United States, but it is hardly the type of behavior that inspires enthusiasm in Japan.<sup>71</sup> Likewise, acts like the honking of car horns and eating pungent fast food on public transportation do not serve particularly useful social functions; functionalism may be one measure of the attractiveness of foreign norms. In contrast, one can identify several types of norms that appear to have appeal in Japan. Norms that involve the treatment of vulnerable populations, for example, particularly when they are actively promoted by international advocacy groups, often generate a response.<sup>72</sup> Redressing the harms HIV-contaminated blood products caused to hemophiliacs became a major concern in Japan only after that issue emerged as a major conflict in France, the United States, and other industrialized democracies, and the legal response to claims of Hansen's disease patients in Japan was crafted in the shadow of Western norms about confinement and compensation.<sup>73</sup>

Norms implicating the equality of opportunity also carry particular weight.<sup>74</sup> Japan's legal initiatives on gender equality, particularly with regard to employment opportunities, emerged subsequent to the wide-

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creation of lay participation in criminal trials, the strengthening of laws regarding women's rights, the passage of a freedom of information act, the development of a product liability regime, changes in corporate governance, and many more—make it increasingly likely that there will soon be a larger empirical basis for generalizing about the substance and process of legal change.

71. Still, there are some who argue that "Japanese attitudes toward blacks reveal the influence of European and, particularly in the postwar period, American representations . . . Japanese images of blacks have been modeled on imported Western imagery and conceits . . ." John G. Russell, *Narratives of Denial: Racial Chauvinism and the Black Other in Japan*, 38 JAPAN Q. 416, 418 (1991).

72. Indeed, Keck and Sikkink argue that transnational advocacy groups are most likely to mobilize around issues that involve physical harm to vulnerable individuals and equality of opportunity. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 27 (1998). On the relationship between domestic and international social movements, see *SOCIAL MOVEMENTS IN A GLOBALIZING WORLD* (Donatella della Porta, Hanspeter Kriesi & Dieter Rucht eds., 1999); *TRANSNATIONAL PROTEST AND GLOBAL ACTIVISM* (Donatella della Porta & Sidney Tarrow eds., 2005); *TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS* (Jackie Smith, Charles Chatfield & Ron Pagnucco eds., 1997).

73. For a comparative analysis of the HIV/blood conflict, see ERIC A. FELDMAN & RONALD BAYER, *BLOOD FEUDS: AIDS, BLOOD, AND THE POLITICS OF MEDICAL DISASTER* (1999). On Hansen's disease, see Sato Hajime, *Politics of Leprosy Segregation in Japan: The Emergence, Transformation, and Abolition of the Patient Segregation Policy*, 56 SOC. SCI. & MED. 2529 (2003). The treatment of prisoners is another example; see Koichi Kikuta, *The Legal Rights of Prisoners*, 4 MEIJI L. J. 17 (1997).

74. See KECK & SIKKINK, *supra* note 72.

spread discussion and embrace of those issues in the West, and the Japanese debate picked up on the language and approach of the international conversation.<sup>75</sup> Legal changes in Japan regarding opportunities for immigrants, long a point of contention between Japan and some of its neighbors, also appear to be gathering support.<sup>76</sup> There is also a cluster of Western norms that involve standards of personal behavior and/or aesthetics that influence both the Japanese general public and Japanese elites. Norms that govern physical modesty, for example, led Japanese public bathhouses (where many people washed themselves before private homes were equipped with bathing facilities) to build dividing walls and eliminate same-sex bathing. Styles of dress, like the suit and the skirt, have moved from West to East, as European fashions have replaced the kimono and other forms of traditional Japanese clothing.<sup>77</sup> Western accessories like watches, umbrellas, and soaps, as well as literature, painting, and music, were quickly embraced during the early years of the Meiji Restoration.<sup>78</sup>

Second, the existence of norm agents is crucial; without local actors to promote the adoption of a new norm, the diffusion of norms is unlikely. Agency can take a variety of forms. In some cases, it may depend upon the activities of advocacy groups formed with the explicit purpose of facilitating social change. In others, agents may be state actors like bureaucrats, politicians, or judges. In still others, the media may be crucial. Although in most instances legal change triggered by Western norms will filter downward from the elite to the populace, the agents of change are not necessarily elites, and bottom-up agency but top-down change is possible. In the majority of cases, at least some norm agents are likely to be elites, and multiple agency will enable both a faster and broader degree of change.

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75. For a discussion of the connection between the Japanese women's movements and the international movement, see YOSHIE KOBAYASHI, *A PATH TOWARD GENDER EQUALITY: STATE FEMINISM IN JAPAN* (2004); JOYCE GELB, *GENDER POLICIES IN JAPAN AND THE UNITED STATES: COMPARING WOMEN'S MOVEMENTS, RIGHTS, AND POLITICS* (2003). An analysis of Japan's equal employment law can be found in FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987).

76. See Gurowitz, *supra* note 42.

77. When a group of Japanese politicians and statesmen visited President Grant in 1871 (the Iwakura mission, Japan's first post-Meiji Restoration diplomatic mission), they made one public appearance in traditional kimono but otherwise wore Western clothing because they were convinced that "Japan would never be considered a 'civilized' state until its official representatives wore Western-styled suits." See GONG, *supra* note 38, at 20, 179. Similarly, Honda Katsuichi explains the Japanese adoption of Western dress by arguing that "the power relations between the dominant and the dominated extend even to matters of clothing." KATSUISHI, *Why Can't We Squat?*, in *THE IMPOVERISHED SPIRIT OF CONTEMPORARY JAPAN: SELECTED ESSAYS OF HONDA KATSUICHI*, *supra* note 63, at 134, 136.

78. GONG, *supra* note 38, at 187.



Third, local conditions—values, politics, and markets, to name a few—establish the boundaries for the types of norms that Japan will welcome and those it will summarily reject. Western norms about the cruelty of whaling, for example, have been much discussed in Japan,<sup>79</sup> which has bent to international pressure by scaling back its commercial whaling fleet and continuing to whale only under the rubric of so-called “research.” But it has done so reluctantly.<sup>80</sup> This does not reflect Japan’s imperviousness to foreign pressure over environmental issues or international environmental norms—in fact, foreign pressure has succeeded in getting Japan to stop importing ivory and endangered turtle shells.<sup>81</sup> Instead, the reluctance is tied to the popular image of whaling in Japan—small coastal whaling vessels, ports with whaling histories that stretch back into the Tokugawa period, a way of life that in part defined what it meant to be Japanese.<sup>82</sup> Moreover, seafood is particularly symbolic in Japan; it is often said to be a distinctive element of Japanese cuisine, and criticism of Japan’s fishing policies and eating habits is seen as an ethnocentric assault on Japan itself.<sup>83</sup> Western norms have influence in Japan, but they are not strong enough to overwhelm all countervailing forces, particularly when they are linked to symbolic ideas about the “essence” of Japan.

The importance of local conditions, and their malleability, suggests the need to distinguish the conformity norm from what some political scientists call *gaiatsu*.<sup>84</sup> The term *gaiatsu*, which combines characters that mean “outside” and “pressure,” is regularly used in and out of Japan to describe what is seen as the overt and direct efforts of foreign gov-

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79. For a recent analysis of whaling that argues that Japanese culture can inhibit the import of international norms, see Keiko Hirata, *Beached Whales: Examining Japan’s Rejection of an International Norm*, 7 Soc. Sci. JAPAN J. 177 (2004).

80. See BESTOR, *supra* note 61, at 143, 346–47 n.11.

81. See LEONARD J. SCHOPPA, *BARGAINING WITH JAPAN: WHAT AMERICAN PRESSURE CAN AND CANNOT DO* 18 (1997).

82. This is in contrast to large scale, pelagic whaling that involves large scale industrial ships controlled by six major Japanese companies that were quite active into the 1970s. See BESTOR, *supra* note 61, at 143, 346–47 n.11. There may be an analogy between whaling and rice cultivation, in that Japan’s insistence that domestic rice production deserves subsidization can be linked to a particular cultural view of consumption and food self-sufficiency.

83. Hirata, *supra* note 79, at 189; BESTOR, *supra* note 61, at 143.

84. Aurelia George, *Japan’s America Problem: The Japanese Response to United States Pressure*, WASH. Q., Summer 1991, at 5. George argues that U.S. pressure followed by a Japanese response has characterized the U.S.-Japan relationship in the two key areas of defense and trade policy since 1853. She argues that Japan’s responsiveness to U.S. pressure increasingly seems out of step with its economic power and belies a preoccupation with the United States. Her taxonomy of patterns of Japanese response to U.S. pressure—tokenism, bilateralism, culturalism, package diplomacy, affirmative action, and incrementalism, among others—is useful in disaggregating Japanese responses to overt pressure. She does not examine cases in which there is no overt pressure and Japan responds to its perception of changed circumstances in the West.

ernments to shape Japanese law and policy.<sup>85</sup> Some influential analysts of Japanese politics have argued that external pressure is particularly effective when utilized to bring about political action in Japan, which has led them to describe the Japanese state as *judoteki* (passive)<sup>86</sup> and “reactive.”<sup>87</sup> In contrast, the conformity norm does not depend upon foreign pressure. Although external pressure may be a catalyst, the norm’s salience depends upon the degree to which it leads domestic actors to change their behavior in response to their perceptions of the West and their internalized impulse to conform, even in the absence of external Western pressure.<sup>88</sup>

These three criteria—a norm’s substance, its agents, and the conditions into which it will be introduced—go a long way toward explaining the influence of Western smoking norms in Japan.<sup>89</sup> The denormalization of smoking in the West may be criticized as punitive and unfair, since it is directed at a class of individuals who are arguably addicted (and thus lack a certain degree of free will) and are members of an identifiable social class. But norms that reduce smoking unquestionably save the lives of smokers and nonsmokers and have secondary benefits like reducing fires, litter, and the annoyance felt by many in smoke-filled environments. Moreover, smoking norms implicate propriety, and the power of focusing on social behaviors that involve manners is clearly illustrated by the expensive public relations campaign of Japan Tobacco, Inc. (JT), that implores smokers to “mind their manners” by smoking

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85. Leonard Schoppa analyzes trade negotiations between Japan and the United States, particularly the SSI and Clinton Framework talks, and concludes that “gaiatsu does indeed have the power to influence Japanese policy outcomes . . . its influence is greatest when the Japanese domestic political arena offers opportunities for employing synergistic strategies that take advantage of divisions of opinion and interest on the Japanese side.” SCHOPPA, *supra* note 81, at 6–7.

86. Masaru Tamamoto, *The Ideology of Nothingness: A Meditation on Japanese National Identity*, 11 *WORLD POL’Y J.*, 89 (1994).

87. Kent Calder describes Japan as a “reactive state,” by which he means a state that foregoes seemingly appealing foreign policy initiatives, particularly in economic policy, even when it has the power to pursue them and instead finds the impetus for policy change in outside pressure. Kent E. Calder, *Japanese Foreign Economic Policy Formation: Explaining the Reactive State*, 40 *WORLD POL.* 517, 519 (1988). Within Japan, gaiatsu is not always warmly embraced. It has sparked backlashes like the nationalistic book, *THE JAPAN THAT CAN SAY NO*, written in 1991 by Ishihara Shintaro, who was elected Governor of Tokyo in 1999. See ISHIHARA SHINTARO, *THE JAPAN THAT CAN SAY NO: WHY JAPAN WILL BE FIRST AMONG EQUALS* (1991).

88. A comprehensive discussion of what one might think of as U.S. global gaiatsu—the zeal to export its legal models and its efforts to do so is Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 *U. PA. J. INT’L ECON. L.* 179 (1999).

89. For a discussion of the substance of the norm, see Part II, *infra*; for an analysis of agency, see Part III.B, *infra*; for an examination of local conditions, see Part III.A, *infra*.

responsibly.<sup>90</sup> The substance of smoking-related norms, therefore, and the positive consequences that attend the reduction of tobacco consumption, make them a visible and vulnerable area of change.<sup>91</sup>

In addition, there were a variety of agents in Japan who played a critical role in bringing the norm to Japan. They included the media, Japanese officials involved in international tobacco-related negotiations, tourists from Japan traveling overseas, anti-tobacco activists, attorneys, and a host of others who either intentionally or by their circumstances became agents for the transmission of Western tobacco-related norms into Japan. Finally, although local conditions in Japan were once inhospitable to the type of denormalization of smoking seen in the West, by the end of the twentieth century those conditions were in flux, and ultimately they served as a fertile base for the cultivation of Western norms that shunned smoking.

To demonstrate that the conformity norm mediates the relationship between changes in the acceptability of smoking in the West and the newly invigorated regime of tobacco laws in Japan,<sup>92</sup> this Article offers a variety of illustrations that reveal a great deal of attention to and concern about Western tobacco-related practices and policies in Japan. The evidence provided—newspaper editorials, television documentaries, short stories, records from Ministry of Finance committee meetings, and more—is strongly suggestive of a causal link between the changed attitudes toward smoking in the West and Japan's new legal control of tobacco. Before turning to the evidence, however, the following Part details the normative change toward smoking in the West and the legal changes that occurred in Japan, thus laying the groundwork for a consideration of the causal relationship between those two phenomena.

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90. A 2005 JT ad in Tokyo's subways show a cartoon of a man "passing gas" and reminds smokers that it is impolite to soil the air with their odors.

91. For a discussion of the introduction of tobacco into Japan and the emergence of Japanese smoking norms prior to the twenty-first century, see Feldman, *in UNFILTERED, supra* note 10.

92. It is significant that the new patchwork of tobacco-related laws in Japan does not evidence a commitment to any particular set of principles, such as a belief that state paternalism justifies protecting smokers from themselves or a libertarian impulse to protect individual risk-taking choices that do not impose undue third party costs. Indeed, while some of the reasons given for the new laws are familiar, such as reducing the third-party harms from environmental tobacco smoke (ETS), others are barely credible, like the limitations placed on smoking while walking (*aruki tabako*) supposedly aimed at reducing the number of young children who get burning embers in their eyes. But rational, evidence-based policy is not always the primary consideration of lawmakers. In this and many other instances, law plays a symbolic role: it sends a message and indicates the state has identified and is acting to solve a perceived "problem," one that it considers sufficiently serious to justify government intervention.

## II. THE CHANGES

A. *The Transformation of Smoking Norms in the West*<sup>93</sup>

Only a few decades ago, smokers in the United States could light up at will. As Emily Post so sharply scolded her readers in 1940, “those who do not smoke cannot live apart, and when they come in contact with smokers, it is scarcely fair that the few should be allowed to prohibit the many from the pursuit of their comforts and their pleasure.”<sup>94</sup> By the end of the twentieth century, the norms of acceptable smoking behavior had been fundamentally altered, first through the norm of asking permission to smoke and ultimately by the re-zoning of both public and private space to exclude smoking. It was a remarkable change, not only for the rapidity with which smoking went from a quotidian act to a deviant habit but also for the thoroughness of the transformation.<sup>95</sup> A comprehensive review of the denormalization of smoking in the United States could fill a volume.<sup>96</sup> But seven factors are particularly salient and provide a context for understanding the subsequent legal changes in Japan.

First, the publication of the U.S. Surgeon General’s 1964 report on tobacco and health marked the start of the new era.<sup>97</sup> The report, supplemented by the Surgeon General’s 1986 study on second-hand smoke and later by a 1992 report from the U.S. Environmental Protection Agency

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93. This Part focuses on normative changes in the United States and at the WHO. Changes in other Western states—particularly Canada and Australia (Westernized, if not Western)—were also significant, and similar changes took place in a number of European states. For simplicity, I refer to the changes as Western, although the text herein concentrates on the United States and WHO.

94. Emily Post, *The Etiquette of Smoking*, GOOD HOUSEKEEPING Sept. 1940, at 37 cited in Allan M. Brandt, *Difference and Diffusion: Cross-Cultural Perspectives on the Rise of Anti-Tobacco Policies*, in UNFILTERED, *supra* note 8, at 255, 258.

95. The socioeconomics of tobacco consumption also shifted, as those with higher education and income abandoned their smoking habits while others with less education and affluence continued to smoke. See Centers for Disease Control and Prevention, *Cigarette Smoking Among Adults—United States, 2003*, 54 MORBIDITY & MORTALITY WKLY. REP. 509 (2004), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5420a3.htm>. See generally MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000) (discussing the mix of factors that are generally needed for social change).

96. In fact, it has filled a number of volumes. Several that do a particularly good job of explaining changes in the United States are SMOKING POLICY: LAW, POLITICS, AND CULTURE (Robert L. Rabin & Stephen D. Sugarman eds., 1993); RICHARD KLUGER, *ASHES TO ASHES: AMERICA’S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* (1996); ALLAN BRANDT, *THE CIGARETTE CENTURY* (forthcoming 2006).

97. UNITED STATES DEP’T OF HEALTH, EDUC., AND WELFARE, PUBLIC HEALTH SERVICE PUBLICATION NO. 1103, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* (1964) [hereinafter *SMOKING AND HEALTH*].

that classified environmental tobacco smoke (ETS) as a Class A carcinogen, laid the groundwork for a reconceptualization of smokers as enslaved by a dangerous habit and of nonsmokers as endangered innocent bystanders.<sup>98</sup>

Second, anti-tobacco activism went mainstream, with outspoken leaders like Stanton Glantz of the University of California, San Francisco and Richard Daynard of Northeastern University using their professional positions to bring credibility, intellectual muscle, and media scrutiny to their allegations of tobacco industry misconduct.<sup>99</sup>

Third, lawsuits brought by state attorneys general—first in Minnesota, Florida, West Virginia, and Mississippi and by 1997 in 41 states—asserted that the states were entitled to recover the expense of treating Medicaid recipients for tobacco-related illnesses.<sup>100</sup> The cases were ultimately settled by a multi-decade, \$246 billion agreement, the largest tort settlement in U.S. history.

Fourth, a cache of industry documents obtained through pretrial discovery and from whistleblowers detailed industry knowledge and legal strategies during the previous decades, much of which contradicted the industry's public statements about the health consequences of smoking.

Fifth, when seven tobacco industry CEOs testified before Representative Henry Waxman's Subcommittee on Health and the Environment on April 14, 1994,<sup>101</sup> each denied that nicotine was addictive, flatly contradicting the information later revealed by industry documents and facilitating the efforts of the tobacco control community to vilify the tobacco companies.<sup>102</sup>

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98. See UNITED STATES DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL (1986); ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992) [hereinafter HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING]; Ronald Bayer & James Colgrove, *Children and Bystanders First: The Ethics and Politics of Tobacco Control in the United States*, in UNFILTERED, *supra* note 8, at 8.

99. On anti-tobacco activism in the United States, see MICHAEL OREY, ASSUMING THE RISK: THE MAVERICKS, THE LAWYERS, AND THE WHISTLE-BLOWERS WHO BEAT BIG TOBACCO (1999); DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY (2002); MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS (2001).

100. The attorneys general distinguished their case from the more common claim of subrogation, in which the state would have had to seek recovery for each Medicaid recipient individually. Instead, the states asserted that the behavior of the tobacco industry directly injured them because they used tax revenues to pay for the treatment of Medicaid recipients with tobacco-related illnesses.

101. *The Regulation of Tobacco Products: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 103d Cong. 103–153 (1994).

102. An ABC *Day One* episode on the "spiking" of cigarettes with nicotine did further damage to the credibility of the industry by suggesting it carefully calibrated the amount of nicotine in tobacco products to ensure that there were maximally addictive.

Sixth, in what has become known as the “third wave” of tobacco tort litigation, plaintiffs sought damages from tobacco companies for the alleged health consequence of smoking.<sup>103</sup> Underfinanced attorneys, complex questions of causation, and unsympathetic juries had resulted in an unblemished record of failure in past cases, but newly-available internal corporate documents providing evidence of malfeasance reinvigorated tort claims and raised the possibility that juries would be more sympathetic to plaintiffs’ cases. By 2000, jury verdicts in the millions, billions, and sometimes hundreds of billions emerged from Florida to California.<sup>104</sup> Although most were overturned on appeal, the final disposition of the cases did not reverse the reputational damage to the tobacco companies caused by juries that were willing to punish them with huge punitive damage awards.<sup>105</sup>

Seventh, the legal framework of tobacco was widely debated in the 1990s. While few federal smoking-related laws were enacted in the United States, there was a pitched debate over FDA jurisdiction, as well as a wide variety of state and local legislation, some of which imposed significant limitations on smoking in settings like bars and restaurants.<sup>106</sup>

Scientific studies and government reports about the health harms of smoking, anti-tobacco activism, the public release of previously confidential tobacco industry documents, Congressional hearings, the settlement between the industry and state attorneys general, tort litigation, and debate over tobacco control laws, together with cultural assumptions about risk and temperance, all contributed to the denormalization of smokers and smoking in the United States. By the 1980s and 1990s, according to social historian Allan Brandt, a “radical transformation” made smoking “an increasingly unacceptable behavior in public settings.”<sup>107</sup> Robert Kagan and Jerome Skolnick make a similar observation: “Throughout the United States, in universities, in other workplaces,

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103. Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, in REGULATING TOBACCO 176, 177 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

104. See, e.g., *Boeken v. Philip Morris* 19 Cal. Rptr. 3d 101 (Ct. App. 200); *Engle v. RJR Tobacco et al.*, No. 94-08273, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000).

105. The awards could not withstand appellate scrutiny in light of the U.S. Supreme Court’s rulings in the *BMW* and *State Farm* cases, which limited punitive damage awards by tying them to compensatory damages. Tobacco companies have paid compensation to plaintiffs in only a small number of cases. See e.g., *Brown & Williamson Tobacco Corp. v. Grady Carter*, 848 So. 2d 365 (Fla. Dist. Ct. App. 2003); *Henley v. Phillip Morris, Inc.*, 113 Cal. Rptr. 2d. 494 (Cal. App. 1st Dist. 2001).

106. In a recent example of the continuing hold of tobacco interests on the federal government, Congress in October 2004 passed the Corporate Tax Bill, which included a \$10 billion “buyout” of tobacco farm quotas but failed to provide a long-negotiated provision giving regulatory jurisdiction of tobacco to the Food and Drug Administration. See Edmund L. Andrews, *How Tax Bill Gave Business More and More*, N.Y. TIMES, Oct. 13, 2004, at A1.

107. Brandt, *supra* note 94, at 258.

in restaurants, there has been a dramatic change in the social acceptability of tobacco smoking. Smokers feel condemned, isolated, disenfranchised, alienated.”<sup>108</sup> By the 1990s, Joseph Gusfield writes, “the smoker was not only a foolish victim of his or her habit but also an obnoxious and uncivil source of danger, pollution, and illness to others.”<sup>109</sup>

International events amplified the shift in attitudes toward smoking in the United States.<sup>110</sup> In addition to changes within particular states,<sup>111</sup> and perhaps more importantly, the World Health Organization (WHO) has been increasingly active in changing attitudes toward smoking. In 1996, the World Health Assembly adopted a resolution requesting the WHO to initiate the development of an international tobacco control agreement.<sup>112</sup> When Dr. Gro Harlem Brundtland arrived at the WHO as Director-General in 1998, she made tobacco control a priority. Speaking at the Council on Foreign Relations in New York, she presented what would become a standard refrain in her public statements on tobacco control.<sup>113</sup> “Tobacco-related diseases are spreading like an epidemic and are likely to be killing 10 million people a year around 2020,” Dr. Brundtland asserted.

Into the next century, tobacco will climb the ladder to be the leading cause of disease and premature death worldwide. . . We

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108. Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 69, 79 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

109. Joseph R. Gusfield, *The Social Symbolism of Smoking and Health*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* *supra* note 108, at 49, 63.

110. See UNFILTERED, *supra* note 8.

111. The French government, for example, enacted a comprehensive tobacco control policy in 1976, which was further strengthened in 1991 and again in 2003, when the government declared “la guerre au tabac.” See Constance A. Nathanson, *Liberté, Egalité, Fumée: Smoking and Tobacco Control in France*, in UNFILTERED, *supra* note 8, at 138, 143, 145, 160. In 2004, the Paris government began issuing signs stating, “this is a 100 percent smoke-free place” to places that, in the words of a city official, offer “a new space of freedom for Parisians.” *Paris Launches “Smoke-Free” Label for Cafes, Restaurants*, AFP, October 26, 2004, <http://www.gymuser.co.uk/news/2004/october/story-36537.htm>. The EU passed a number of directives aimed at limiting smoking; in 1989, it urged that all television advertising of tobacco products be banned and that smoking be prohibited in public places and on public transportation, and in 1992 it pressed for minimum taxation levels for cigarettes. See Anna Gilmore & Martin McKee, *Tobacco-Control Policy in the European Union*, in UNFILTERED, *supra* note 8, at 219, 226. A consultant for a London company that analyzes social trends in England recently noted that “smoking used to be considered cool because it represented rebellion. Icons who smoked made it sexy. But that cool is wearing off.” Josh Sims, *Still Wanna be in Her Gang?*, INDEP., Aug. 3, 2004, at Features 6.

112. WHA Res. 49.17, *International Framework Convention for Tobacco Control*, World Health Assembly, 49th Sess., 6th plen. mtg. WHO Doc. A49/VR6 (May 25, 1996). Several years earlier, in 1993, the WHO had requested the Secretary General of the UN to prohibit the use of tobacco products in all UN buildings.

113. Gro Harlem Brundtland, Speech at the Council on Foreign Relations, New York (Dec. 6, 1999), available at <http://www.globalhealth.org/news/article/231>.

have the evidence. We know what works. Tightening legislation against advertising, increasing tobacco taxes and controlling the marketing of cigarettes will make a difference for the health of future generations worldwide. . . . This is not a challenge confined to independent states. It is a global challenge.

Brundtland quickly mobilized the UN Ad Hoc Inter-Agency Task Force on Tobacco Control,<sup>114</sup> created the Tobacco Free Initiative, and began working on the WHO's first-ever binding convention, the Framework Convention on Tobacco Control (FCTC), in 1999.<sup>115</sup>

Among the areas the FCTC addresses are restrictions on tobacco advertising, sponsorship, and promotion; the creation of new packet warnings for tobacco products; and the zoning of public space to limit the harms of ETS.<sup>116</sup> Because the WHO's regulatory powers are limited, however, the FCTC's provisions are aspirational, and national laws remain the most important factor in determining tobacco control policy. The FCTC's significance is thus more symbolic than practical; it indicates the premier international health organization has made the elimination of smoking a core policy objective. Instead of treating the act of smoking as an individual preference or a legal right, it presents it as an unacceptable risk obligating the national and internationally community to intervene in the name of public health. Like the new social norms of tobacco consumption in the United States, the WHO's FCTC communicates the view that the world is better off without cigarettes and smokers.

Thus, most strongly in the United States but also in other nations and the WHO, smoking is increasingly seen as an individual moral failing. In some cases, particular nations have embedded this new view in specific tobacco control laws.<sup>117</sup> In addition, the social climate surrounding smoking has undergone a fundamental change. Stated most starkly, by the

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114. For a brief discussion of the Task Force, see Crystal H. Williamson, *Clearing the Smoke: Addressing the Tobacco Issue as an International Body*, 20 PENN ST. INT'L L. REV. 587 (2002).

115. WHA Res. 56.1, *Framework Convention on Tobacco Control*, World Health Assembly, (May 21, 2003) available at <http://www.who.int/tobacco/areas/framework/en/> [hereinafter FCTC]. See also Sean Murphy, ed. *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 681, 689 (2003).

116. Gro Harlem Brundtland, *Achieving Worldwide Tobacco Control*, 284 J. AM. MED. ASSOC. 750, 751 (2000).

117. In a comparative study of tobacco control in eight such states, drawing on data from the late 1990s, Theodore Marmor and Evan Lieberman argue that Denmark, the United Kingdom, Australia, and Canada are most aggressive in their tobacco control efforts, followed by the United States, France, and Germany. Japan is the only state they describe as undertaking "minimal efforts to control the use of tobacco." Theodore R. Marmor & Evan S. Lieberman, *Tobacco Control in Comparative Perspective: Eight Nations in Search of an Explanation*, in UNFILTERED, *supra* note 8, at 275, 278.



early twenty-first century the unquestioned acceptability of smoking in the West had vanished. In place of the rugged individualist was the addict, wedded to an increasingly expensive habit that was a source of annoyance to others and a threat to public health. Denormalization was not uniform across the range of Western nations—it was most apparent in the United States and WHO. Together, and supplemented by new policies, practices, and outlooks on smoking in other Western industrialized democracies, they provide the context for the rapid changes that would soon emerge in Japan.

### B. Japan's New Legal Framework of Tobacco Control

Until the beginning of the twenty-first century, smoking in Japan was rarely the subject of regulatory concern, and rates of smoking among Japanese men were the highest in the industrialized world.<sup>118</sup> With the exception of a 1900 law that prohibited smoking among minors, state intervention was aimed at taxing the cultivation, manufacture, and sale of tobacco products.<sup>119</sup> Japan enacted its first tobacco tax in 1624, and by the early twentieth century the government had monopolized the tobacco business and placed it under the control of MoF.<sup>120</sup> Japan's move to monopolize tobacco appears to have been motivated, at least in part, by the perception that foreign tobacco companies—particularly U.S. firms that had an abundant supply of U.S.-grown tobacco and advanced technology to manufacture tobacco products—were in a position to make significant inroads into the Japanese tobacco market. In response, the government took action to protect the vitality of the domestic tobacco industry—tobacco was cultivated throughout the prefectures of Japan—and ensure state revenues from the sale of tobacco products.<sup>121</sup> The Japanese government's tobacco monopoly lasted for almost a century. In the late 1970s, U.S. tobacco interests began to lobby the U.S. government about what they considered unfair barriers to the sale of their tobacco products throughout Asia.<sup>122</sup> The response was a series of negotiations between U.S. Trade Representative Clayton Yeutter and trade officials in Japan, Korea, Taiwan, Thailand, and elsewhere.<sup>123</sup>

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118. According to JT, 61.6% of Japanese men smoked in 1987; a MHLW survey found that 55.4% of men were smokers. See BUNGAKU WATANABE, *SMOKING IN JAPAN* (Tobacco Problems Information Center ed., 2003) (on file with author).

119. Hajime Sato, *Policy and Politics of Smoking Control in Japan*, 49 *SOC. SCI. & MED.* 581 (1999).

120. Feldman, in *UNFILTERED*, *supra* note 10.

121. Mark Levin, *Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan*, 8 *STAN. L. & POL'Y REV.* 99, 100 (1997).

122. See Andrea J. Hageman, *US Tobacco Exports: The Dichotomy Between Trade and Health Policies*, 1 *MINN. J. GLOBAL TRADE* 175, 184 (1992).

123. *Id.*

In 1985, yielding to U.S. pressure to eliminate trade barriers against U.S. tobacco companies, the Japanese government prepared for competition from foreign tobacco products by formally creating Japan Tobacco, Inc. (JT), a domestic tobacco company that could compete with foreign tobacco corporations.<sup>124</sup> But the creation of JT did not end the government's involvement in tobacco. Under the terms of the Tobacco Enterprise Law, MoF must continue to own a majority of JT's stock (until recently it owned 66.7 percent, and since summer 2004 it has owned 50 percent), and it retained control of key aspects of tobacco policy, such as advertising, packet warnings, price, and taxation. The legislation also made clear MoF's regulatory goal: to foster Japan's tobacco industry in order to improve the national economy and increase tax revenues.<sup>125</sup> The key levers with which a state may affect tobacco consumption—increasing the price of cigarettes, banning tobacco advertising, and warning smokers of the health harms of smoking—were left in the hands of bureaucrats at the elite finance ministry. At the close of the twentieth century, Japanese tobacco policy was primarily focused on the business of tobacco.

Beginning in 2000, however, the legal control of tobacco in Japan took a dramatic turn. Elected politicians in the national Diet debated and passed legislation aimed at limiting tobacco-related morbidity and mortality. Local governments enacted laws that controlled the use of cigarettes. Even MoF officials took a new approach to smoking, using their policy powers in ways more likely to reduce tobacco consumption than ensure “the development of the national tobacco industry.” The laws they created were not, in most cases, transplants; neither individually nor as a group could similar legal restrictions be found in other jurisdictions. Instead, inspired by foreign changes and informed about them, Japanese lawmakers created a distinctive set of legal interventions. The following Part highlights the most important legal changes that have occurred in the new millennium.

### *C. Legal Changes by the National Government*

#### 1. Health Promotion Law

Japan's most significant national tobacco control legislation, the Health Promotion Law (HPL), went into effect on May 1, 2003.<sup>126</sup> Three

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124. Tobacco Enterprise Law No. 68 of 1984 (enforced from April 1, 1985, abolishing the Tobacco Monopoly Law No. 111 of 1949, and Tobacco Products Fixed Price Law No. 122 of 1965) (Japan).

125. Tobacco Enterprise Law, ch.1, *supra* note 124.

126. Kenkō Tsushin Hō [Health Promotion Law], Law No. 103 of 2002 [hereinafter Health Promotion Law].

years earlier, in February 2000, the MHLW had issued the final version of its blueprint for Japan's health, "Healthy Japan 21." Based on a public health campaign in the United States called "Healthy People 2000," the Japanese report presented recommendations for improving the health and life expectancy of citizens (and reducing health care costs) in the first decade of the twenty-first century.<sup>127</sup> The MHLW had not previously been active in the public health aspects of smoking; it had limited resources to devote to tobacco control (due to its dependence on MoF for its operating budget) and no political support for such activities. But emboldened perhaps by the international focus on tobacco-related morbidity and mortality and sensing a domestic political opportunity, the MHLW included in its first draft of the "Healthy Japan 21" a set of specific numerical goals for the reduction of smoking. After clashing with MoF, JT, and senior Liberal Democratic Party (LDP, the ruling conservative party) politicians over the contents of the report, officials at the MHLW abandoned their plan.<sup>128</sup> Beyond platitudes about the importance of reducing tobacco-related disease, eliminating smoking among minors and educating the public about the health consequences of smoking, when "Healthy Japan 21" emerged in 2000 it contained no legal restrictions on smoking.

The HPL, submitted to the Diet on March 1, 2002, as part of a legislative package that included amendments to the Health Insurance Law, was meant to provide a legislative basis for the various goals announced in the final report of "Healthy Japan 21." Central to that report was a focus on reducing "lifestyle-related disease," defined as "a group of diseases whose symptomatic appearance and progress are affected by living practices including eating, exercising, rest, smoking, and drinking."<sup>129</sup> Harms to nonsmokers from environmental tobacco smoke (ETS) were included in that grouping, so the report suggested that workplaces and public facilities contain smoke free areas. Because of the conflict between MoF and MHLW, the ETS-related recommendations in "Healthy Japan 21" were vaguely worded and demanded no specific ac-

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127. MINISTRY OF HEALTH, LABOUR, AND WELFARE, 21 SEIKI NI OKERU KOKUMIN KENK ZUKURI UND (KENK NIHON 21) [MOVEMENT TO IMPROVE THE HEALTH OF CITIZENS IN THE 21ST CENTURY: HEALTHY JAPAN 21], final report (Mar. 2000), based on the work of Kenkō Nihon 21 Kikaku Kentō Kai [Committee to Establish a Plan for Healthy Japan 21], Kenkō Nihon 21 Keikaku Sakutei Kentō Kai, 21 Seiki ni Okeru Kokumin Kenkō Zukuri Undō (Kenkō Nihon 21 ni Tsuite): Hōkokushō (Feb. 2000) [hereinafter HEALTHY JAPAN 21].

128. *Industry Opposition Thwarts Ministry Plan to Cut Smoking*, DAILY YOMIURI, Jan. 26, 2000, at 2.

129. MINISTRY OF HEALTH, LABOUR AND WELFARE, ANNUAL REPORT ON HEALTH AND WELFARE 1999, SECTION 4. PROMOTING LIFELONG HEALTH AND REGIONAL HEALTH, <http://www.mhlw.go.jp/english/wp/wp-hw/vol1/p2c6s4.html> [hereinafter PROMOTING LIFELONG HEALTH AND REGIONAL HEALTH].

tions by the government or private parties. As a result, they seemed unlikely to have a significant impact on tobacco policy or the public health impact of ETS.

Much of the HPL is devoted to outlining strategies that will create more uniform data among Japan's prefectural health authorities and to promoting public education efforts that will enable citizens to better care for their own health. Article 25 of the HPL, however, takes on the issue of ETS. Like "Healthy Japan 21," the HPL's tobacco-oriented section is cautiously worded. It includes neither requirements nor penalties with regard to the reduction of ETS, stating simply that "those charged with managing facilities where many people gather shall make efforts to take necessary measures to prevent passive smoking."<sup>130</sup> Included in the types of facilities the HPL targets are schools, hospitals, theaters, offices, restaurants, department stores, and public transportation, among others. In the legislative debate over the HPL, several members of the opposition Democratic Party of Japan argued that it should require action instead of simply asking parties to "make efforts," but they were unable to strengthen the legislation.<sup>131</sup> The bill passed the Lower House by a comfortable margin and was approved by the Upper House by a vote of 129–3.<sup>132</sup>

Despite its weak wording, the HPL has spurred a wide range of actions.<sup>133</sup> Soon after it went into effect, 10 private railway companies in the Tokyo metropolitan area banned smoking at all of their 730 stations. Eighteen of forty-seven prefectures banned smoking at prefectural schools, even though they could have created no-smoking areas or

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130. Health Promotion Law, *supra* note 126, art. 25. Numerous analysts of the Japanese legislative process have noted that lawmakers in Japan often draft bills with extremely vague provisions. A lack of specified action and absence of sanctions often enables them to flexibly enforce legislation. See, for example, the discussion of legislation in UPHAM, *supra* note 75; HALEY, *supra* note 15, at 197.

131. See the minutes of the legislative debate, <http://kokkai.ndl.go.jp> (last visited Mar. 29, 2006), particularly the deliberations of the Kōsei Rōdō Committee of the Lower House for May 17, 2002, and June 12, 2002.

132. See the minutes from June 21, 2002, (#11) and July 26, 2002, (#5), at <http://kokkai.ndl.go.jp> (Mar. 12, 2006).

133. Here too is an interesting cultural and legal puzzle; why do some weakly worded and sanctionless laws in Japan have an influence while others seem to have little impact and still others have exactly the opposite affect that one might imagine? As Frank Upham notes, many laws in Japan are "all rhetoric and no teeth," but their consequences are quite diverse. E-mail from Frank Upham, Wilf Family Professor of Property Law, New York University Law School, to Eric A. Feldman (July 2005) (on file with author). Robert Leflar makes a similar point in his study of informed consent in Japan, explaining that while Japanese lawmakers modeled informed consent laws on the United States and intended them to create only superficial legal change, they may ultimately have a far greater impact than initially desired or anticipated. Robert B. Leflar, *Informed Consent and Patients' Rights in Japan*, 33 HOUSTON L. REV. 1 (1996).

designated particular buildings as smoke-free.<sup>134</sup> West Japan Railway, a major carrier, banned smoking at all 1200 of its stations, and the number of smoking cars on the bullet trains has dwindled to just one or two cars per train.<sup>135</sup> The National Personnel Agency issued new guidelines for all central government offices in Tokyo aimed at reducing smoking among public employees.<sup>136</sup> Taxi drivers in Hamamatsu, a city with over a half million residents between Tokyo and Kyoto, pledged to not smoke while working. Their new-found resolve comes from a non-smoking initiative started by local taxi companies in April 2004 in response to the increasing number of passengers who have complained about the odor of tobacco. Customers may still smoke, but drivers will ask them to open the window and will spray the car with air freshener after they pay the fare. The Wakayama Prefecture's Board of Education has distributed brochures to all 3rd and 4th year primary school students about the harms of smoking, reducing by two years the Education Ministry's guidelines for 5th and 6th grades.<sup>137</sup>

A number of other HPL-related changes have been made or are under discussion. The National Personnel Authority, for example, issued guidelines in July 2003 that established a goal of eliminating smoking from all central government office buildings. Despite lacking a concrete timetable, the guidelines have had an impact. The MHLW banned smoking throughout its building in Spring 2004, with the exception of designated smoking areas in one of its restaurants, part of the reception area, and one smoking room. In addition, all ashtrays have been removed from the meeting rooms and hallways of both the Upper and Lower House, and smokers are now confined to glassed-in areas with smoke ventilators.

In addition to the concrete responses the HPL provoked, the legislation itself represents an important practical and symbolic change in the approach of nationally-elected representatives to tobacco policy. For the first time since 1900, the Japanese government had endorsed legislation with the potential to limit tobacco consumption. Despite the cozy relationship between the ruling LDP, tobacco farmers, tobacco sellers, MoF, and JT, which had long subdued any enthusiasm for smoking controls, the Diet's HPL broke with the past and endorsed a legal strategy that has started to marginalize the use of tobacco.

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134. More Prefectures in Japan Banning Smoking at High Schools, Kyodo World News Service, May 30, 2004 at [http://www.highbeam.com/doc/1P1:95049608/More+prefectures+in+Japan+banning+smoking+at+high+schools+.html?refid=holomed\\_1](http://www.highbeam.com/doc/1P1:95049608/More+prefectures+in+Japan+banning+smoking+at+high+schools+.html?refid=holomed_1).

135. Masaki Sayama, *Vise Tightening on Japan's Smokers*, DAILY YOMIURI, Apr. 7, 2004, at 4.

136. *Id.*

137. *See* Kids Get "No Smoking" Message, DAILY YOMIURI, May 14, 2004, at 15.

## 2. Youth Access

Japanese law has since 1900 prohibited minors from using tobacco products.<sup>138</sup> In December 2000, the Diet revised the law for the first time since its passage a century ago.<sup>139</sup> The new provisions, which took effect in September 2001, forbid retailers to sell tobacco products to those below the age of 20, impose a fine not exceeding ¥10,000 on parents (or parental authorities) who do not prevent their children from smoking, and permit fines of up to ¥20,000 for those who sell tobacco products to minors for their use.<sup>140</sup> The focus of the law is not on the act of purchasing tobacco—a minor would not be violating the law if she were buying cigarettes for a parent—but rather on purchasing with the intent to smoke. In addition, the tobacco industry has been experimenting with vending machine identification cards that limit access to those over the age of 20.<sup>141</sup>

After 2008, all cigarette vending machines in Japan will require cigarette purchasers to obtain a special ID card by providing proof of their age to the Tobacco Institute of Japan.<sup>142</sup> These interventions, like the Health Promotion Law, signal a willingness to rely on legal measures to control tobacco consumption among minors.

## 3. Taxation

In 2001, Finance Minister Shiokawa Masajuro called for an increase in the tobacco tax to make up for general revenue shortfalls. His proposal was met with strong criticism by JT and its political supporters and was soon abandoned.<sup>143</sup> The following year Shiokawa again proposed a tobacco tax increase, which he put forward through the Upper House Finance and Banking Committee.<sup>144</sup> It too was strongly opposed by JT, as well as by the Tobacco Institute of Japan, the Japan Tobacco Growers Association, and the Japan Tobacconist Federation, who threatened to collect petitions nationwide.<sup>145</sup> One indication of the waning power of the tobacco industry, discussed more fully below, is that the third effort to

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138. Act on the Prohibition of Minors' Smoking of 1900 (Japan).

139. See Mark Levin, *Tobacco Industrial Policy and Tobacco Control Policy in Japan*, in *TOBACCO FREE JAPAN: RECOMMENDATIONS FOR TOBACCO CONTROL POLICY* 298, 310 (Y. Mochizuki-Kobayashi, J.M. Samet & N. Yamaguchi eds., 2004), available at [http://www.jhsph.edu/IGTC/Resources/TFJ\\_Report](http://www.jhsph.edu/IGTC/Resources/TFJ_Report) [hereinafter *TOBACCO FREE JAPAN*].

140. Ohmi Hiroki et al., *The Centenary of the Enactment of the Law for Prohibiting Minors from Smoking in Japan*, 9 *TOBACCO CONTROL* 258 (2000).

141. JAPAN TOBACCO, JT ENVIRONMENTAL REPORT 2004 30 (2004) available at [http://www.jti.co.jp/JTI\\_E/environ/assets2004/report2004.pdf](http://www.jti.co.jp/JTI_E/environ/assets2004/report2004.pdf).

142. *IC Card System Planned for Buying Tobacco*, *DAILY YOMIURI*, Apr. 7, 2005, at 8.

143. *Tobacco Tax Increase Eyed*, *JAPAN TIMES*, Nov. 9, 2001.

144. *Shiokawa Eyes Tobacco Tax Hike*, *JAPAN TIMES*, Apr. 12, 2002.

145. *Tobacco Industry Plans Campaign Against Tax Hike*, *JAPAN TIMES*, Oct. 12, 2002.

pass a tobacco tax increase was successful; in January 2003 (effective July 2003), the Diet passed an increase of approximately ¥20 per pack. According to JT, the new tax has resulted in a reduction in its volume of tobacco sales, and the Ministry of Finance has stated that the tax will bring in an additional ¥215 billion in revenue.<sup>146</sup>

#### 4. Tobacco Litigation

Since 1980, smokers suffering from allegedly tobacco-related illnesses have been suing the government—and after 1985, JT—demanding compensation for their harms.<sup>147</sup> Courts have uniformly rejected the lawsuits, questioning the link between smoking and lung cancer, considering the externalities of smoking a tolerable risk, and rejecting claims about the addictiveness of nicotine.<sup>148</sup> Despite this record of failure, litigation is now beginning to percolate in settings where tobacco-related lawsuits would have previously been unthinkable. Perhaps the most unorthodox of the new lawsuits was brought by a fan of sumo wrestling who claims to have suffered for three hours while he watched a tournament at Tokyo's main arena. The plaintiff, a judicial scrivener, filed suit in the Yokohama District Court against the Japan Sumo Association (*Nihon Sumo Kyokai*) demanding compensation that amounted to 25 percent of the cost of his ticket, for which he paid approximately \$200 (¥22600). The legal basis of his case was the HPL, which advises (but does not require) managers of theaters and other public facilities to limit exposure to ETS.<sup>149</sup> A group of taxi drivers is also using the HPL as

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146. According to a press release from Japan Tobacco, the price increase caused by the new tax had exactly the impact desired by public health advocates. "Japan's aging population, growing health consciousness, the continuing downturn in the domestic economy and the aftereffects of the tobacco price hike due to the tax increase in July has negatively affected cigarette demand nationwide." Press Release, Japan Tobacco, JT Reports Tobacco Business Results for July–September 2003 Quarter, Oct. 28, 2003, [http://www.jti.co.jp/JTI\\_E/Release/03/031028\\_E.html](http://www.jti.co.jp/JTI_E/Release/03/031028_E.html). On the other hand, the Ministry of Finance estimates tax revenue increases of ¥215 billion annually from the price hike. According to a study by Ministry of Health, Labor, and Welfare's Institute for Health Economics and Policy, 16% of smokers would try to quit if cigarettes cost ¥300 per pack and 63% would make an effort to stop if the price was increased to ¥ 1,000 per pack, a price-point which the study claims would add ¥1 trillion to the government's budget. *Tax Hike Seen as Key to Kicking the Habit*, JAPAN TIMES, Sept. 4, 2002.

147. As of December 2004, there had been 22 tobacco-related cases filed in Japanese courts. For a discussion of the lawsuits, see Eric A. Feldman, *The Landscape of Japanese Tobacco Policy: Three Perspectives*, 49 AM. J. COMP. L. 679, 690–97 (2001). See also Fujikura Koichiro, *Tabako Shakai o Utaeru* [*Suing the Tobacco Society*], 1711 TOKI NO HÖREI 46 (2004).

148. In contrast to the relatively limited impact of tort litigation on Japanese tobacco policy, tort law has been an influential factor in the United States. See Rabin, *supra* note 103.

149. *Smoke-filled Sumo Leads to Lawsuit*, ASAHI SHIMBUN, June 12, 2004. As of January 2005, the Japan Sumo Association imposed a 100% ban on smoking at all sumo tournaments. According to the security director of the association, "As secondhand smoke is

the basis for their legal claims. In their view, the Ministry of Land, Infrastructure, and Transport, which has jurisdiction over taxis, knows that drivers are at risk from ETS but presides over a system in which 99 percent of taxis nationwide permit smoking. Because of that neglect, the drivers are demanding ¥13.6 million in compensation.<sup>150</sup>

In July 2004, in a case involving a local government employee, a plaintiff in a tobacco case finally prevailed. The *pro se* plaintiff, who had worked in the Urban Renewal Department of Tokyo's Edogawa Ward since 1985, claimed to suffer from headaches and sore throats as a result of smoke from his co-workers' cigarettes. He complained to his boss and asked for the creation of a no-smoking section in his office or the installation of effective ventilation equipment, but no action was taken. After the plaintiff's physician informed him that he was suffering from damage to his larynx and his employer denied his request for the reimbursement of his medical expenses, he sued the Edogawa Ward government in the Tokyo District Court.<sup>151</sup> The resulting judgment carefully avoids the issue of causation; it says nothing about whether the plaintiff's harm was the consequence of his exposure to workplace tobacco smoke. Instead, it asserts that the Ward had a duty to make an effort to attend to the health problems of the plaintiff, and its failure to quickly transfer him to another section of the office makes it in part responsible for paying the costs of his health insurance. Although the plaintiff had requested ¥310,000 (approximately \$3000), the judge returned a verdict for ¥50,000 (approximately \$475). Despite the small size of the award, the case made headlines, hailed as the first time a plaintiff received compensation in a case involving tobacco.<sup>152</sup>

### 5. Advertising/Sponsorship

In March 2004, Japan became the 98th state to sign the WHO's Framework Convention on Tobacco Control, and the Diet subsequently approved the Convention in June 2004.<sup>153</sup> Because Japanese negotiators

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known to be harmful, sumo tournaments can't make an exception for smoking any longer. We believe smokers understand this." *Smoking Ban Takes Effect at Sumo Tournaments*, DAILY YOMIURI, Jan. 11, 2005, at 2.

150. *Taxi Drivers Sue Over Smoking in Cabs*, JAPAN TIMES, July 23, 2004.

151. *Jyudō Kitsuen Soshō [Passive Smoking Lawsuit]*, MAINICHI SHIMBUN, July 13, 2004.

152. *Jyudō Kitsuen de Hatsu no Baishō Meirei, Tokyo Chisai, Inga Kankei wa Furezu [The First Time Compensation is Ordered for Passive Smoking, Tokyo District Court Does Not Touch on Causal Relationship]*, SANKEI SHIMBUN, July 13, 2004.

153. Open-ended Intergovernmental Working Group on the WHO Framework Convention on Tobacco Control, *Status of the WHO Framework Convention on Tobacco Control*, U.N. Doc. A/FCTC/IGWG/1/3 (June 17, 2004), available at [http://www.who.int/gb/fctc/PDF/igwg1/FCTC\\_IGWG1\\_3-en.pdf](http://www.who.int/gb/fctc/PDF/igwg1/FCTC_IGWG1_3-en.pdf). See also World Health Organization, *Updated States of the*



had successfully worked to weaken the provisions of the FCTC, they had little to gain from rejecting the agreement; it had no real teeth and rejection would attract condemnation from the international tobacco control community. A refusal to sign, more importantly, would further highlight Japan's status as a tobacco control outlier; by the time it signed, almost all of the nations of Europe, as well as Canada and Australia, had accepted the FCTC, as had the United States (although many doubt whether it will be submitted to the Senate for ratification).<sup>154</sup>

Because the FCTC's provisions were fundamentally hortatory, signing the document did not obligate the Japanese government to make any changes to its tobacco control policy.<sup>155</sup> But in the period prior to Japan's signing, MoF initiated a number of changes. Under the Tobacco Enterprise Law, for example, MoF has the authority to regulate the advertising of tobacco products. It did so in 1989 when it issued guidelines restricting television ads during daytime programming, apparently in an effort to protect JT's cigarette market share from foreign companies that had recently started to sell their full range of products in Japan. In most cases, MoF relied on voluntary agreements between key industry actors to limit tobacco advertising. It was not until 2003 that MoF and the Tobacco Institute of Japan (TIOJ), a private group which represents the industry, began to discuss more rigorous advertising controls.

MoF's new advertising restrictions eliminated tobacco ads on buses and trains in October 2004 and prohibited new outdoor advertising as of April 1, 2005 (existing ads must be removed by September 2005).<sup>156</sup> The MoF permits newspaper advertising, but it limits tobacco manufacturers to twelve ads each year and a maximum of three per month. Tobacco industry sponsorship is now restricted to events in which participants and organizers are over the age of 20. The MoF allows tobacco advertising in the smoking areas of train stations, as well as ads that urge smokers to exercise good "manners" and those aimed at preventing youth smoking. The FCTC recommendations are subordinate to each state's "constitu-

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*WHO Framework Convention on Tobacco Control* (Feb. 27, 2005), available at <http://www.who.int/tobacco/framework/countrylist/en/print.html>.

154. Marc Kaufman, *U.S. Signs Tobacco Control Treaty*, WASH. POST, May 12, 2004, at A2, available at <http://www.no-smoking.org/may04/05-12-04-5.html>.

155. Some commentators argue that various sections of the FCTC are legally binding and impose obligations on signatories. See, e.g., Ruth Roemer, et al., *Origins of the WHO Framework Convention on Tobacco Control*, 95 AM. J. PUB. HEALTH 936 (2005), which provides a detailed and informative insider's view of the lifecycle of the FCTC from its origin to its ratification. Given the degree to which an individual state's laws are given deference in the document, however, it is relatively easy for a state to ignore the FCTC's most strongly worded provisions by simply invoking the trump card of national law.

156. Shigeki Kurokawa and Toshihiko Tamura, *Devil Blows into Smokers Paradise*, DAILY YOMIURI, Feb. 27, 2005, at 3.

tion or constitutional principles,”<sup>157</sup> which enabled MoF to offer a constitutional justification for a weak regime of advertising restrictions. Yet it did not do so, but instead yielded to the moral authority of the FCTC and strengthened its limitations on tobacco advertising.<sup>158</sup>

## 6. Cigarette Packet Warnings

Further, MoF has taken action on a new set of cigarette packet warnings, which are turning what has been a whisper of caution into more of a shout. Current warnings, dating from 1990, are benign, suggesting to smokers that they should “take care not to smoke too much” because it is bad for their health. Effective July 2005, manufacturers are required to select two of MoF’s eight authorized warnings and to place a different warning on the front and back of each pack of cigarettes.<sup>159</sup> The warnings must cover 30 percent of the display area of the box and must be rotated so that over the course of a year consumers will see each one of the messages.

Although the messages are less direct than those now found in the EU and elsewhere, which bluntly state that “smoking kills,” the new Japanese warnings are far clearer and stronger than what preceded them.<sup>160</sup> Included among the eight warnings, for example, are “smoking can be one of the causes of lung cancer;” “if pregnant women smoke, it could adversely affect the development of their fetus and cause premature birth;” and “smoke from your cigarettes could adversely affect the health of people around you, particularly children and the elderly.”<sup>161</sup> In addition, cigarettes sold as “mild” or “light,” such as the best-selling Mild Seven brand made by Japan Tobacco, will contain a notation indicating that they pose the same health hazards as other cigarettes.<sup>162</sup> The use of such designations as “mild” and “light” is a central issue in current U.S. tobacco litigation, and during the FCTC negotiations the WHO

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157. FCTC, *supra* note 115, art. 13(4).

158. *Japan to Crack Down on Tobacco Ads*, KYODO NEWS, Sept. 24, 2003.

159. *See Tabako Keikoku Kyōka 05 nen 7 Gatsu Kara [Strengthened Tobacco Warning From July 2005]*, TOKYO SHIMBUN, Oct. 4, 2003.

160. Ōkurashō, Zaisei Seido Shingikai, Tabako Jigyō Bunkakai, [Ministry of Finance, Council of Fiscal Systems, Subcommittee on the Tobacco Business], meeting no. 5, July 1, 2003 (covering translations of the cigarette packet warning from the United States, EU, Canada, and China).

161. In November 2004, JT began placing new warnings on a limited number of products, including its Hi-Lite brand of cigarettes. The warnings state, for example, that “Smoking is one cause of lung cancer. According to epidemiological studies, the risk of smokers dying from lung cancer is estimated to be two to four times greater than that for nonsmokers,” and “Although it varies depending on the individual, nicotine causes addiction to smoking.” Taiga Uranaka, *JT Ups Warnings on Cigarette Packs*, JAPAN TIMES, NOV. 9, 2004.

162. *Government to Require Stricter Warnings on Cigarette Packs*, KYODO NEWS, Oct. 2, 2003.

initially sought to ban them.<sup>163</sup> As a compromise, one that was important to Japanese negotiators who at the time were concerned about the future sales of JT's Mild Seven cigarettes, the FCTC requires only that a state take measures "in accordance with its national law" to ensure that cigarette packets do not carry misleading information.<sup>164</sup> MoF's actions appear to easily satisfy and perhaps go beyond the FCTC's mandate on this issue.

#### D. Legal Initiatives of Local Government

In many places, policies that affect smoking are the province of both the national and local government. Often local initiatives are bolder than national regulations.<sup>165</sup> State tobacco policies in the United States, for example, have generally outstripped federal regulations. Although it is able to regulate smoking because of the legal delegation of a variety of public health and environmental regulations to prefectural and other subnational units, local government in Japan does not have an entirely free hand in tobacco policy. A number of issues, like packet warnings and advertising restrictions, are solely within the regulatory purview of the MoF. As a result, local governments have focused most of their efforts on zoning (*bun'en*), the separation of smokers and nonsmokers. In doing so, they have dramatically expanded smoke-free zones to include outdoor areas.

Among the boldest local tobacco-control moves was made in Tokyo's busiest section, Chiyoda-ku, which can be likened to midtown Manhattan.<sup>166</sup> There, in October 2002, the Chiyoda Ward Assembly decided to impose fines on those who smoked on designated smoke-free

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163. Price v. Philip Morris, Inc., 2005 Ill. LEXIS 2071 (Ill. 2005).

164. Article 11 of the FCTC states:

Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that: (a) tobacco product packaging and labeling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar," "light," "ultra-light," or "mild."

FCTC, *supra* note 115, art. 11(1)(a).

165. In the United States, for example, much of the policy initiative in the area of tobacco control has been taken by the states rather than the federal government, and there is a great deal of variation among the states. *See, e.g.*, Frank J. Chaloupka, Ellen J. Hahn & Sherry L. Emery, *Policy Levers for the Control of Tobacco Consumption*, 90 Ky. L.J. 1009 (2001).

166. The City of Tokyo is divided into 23 wards, or "ku," each with its own governing body.

streets. It was not the first time the Assembly had passed an ordinance about smoking; some years earlier, it had promulgated a weakly worded and sanctionless law aimed at limiting litter from cigarette butts. But the new ordinance goes well beyond any that the Assembly had previously contemplated by imposing a ¥2000 (\$20) fine on those who smoke in smoke-free areas, enforced by retired Tokyo Metropolitan Police who patrol the streets with portable ashtrays and ticket pads. City officials offered three justifications for the new ordinance. The most important goal, in their view, was to reduce environmental pollution by cutting down on the number of butts discarded on streets and sidewalks. In addition, they expressed concern about the danger posed to children, particularly their eyes, by the burning embers of cigarettes carried by smokers, and they mentioned that smoke-filled streets were annoying to nonsmokers. Notable for its absence is any reference to public health.

The Chiyoda-ku law has been the inspiration for a number of other jurisdictions.<sup>167</sup> Outdoor smoking bans have spread throughout Tokyo, as neighboring wards of the city have decided to eliminate what is now called *aruki tabako*, or “walking tobacco.” In the northwest corner of central Tokyo, for example, the Toshima Ward government started a campaign in November 2004 dubbed “Toshima No-Smoking Manners,” which prohibits smoking around Ikebukuro Station. In an area full of nightclubs and sex purveyors, the city posts officials at station exits who distribute glossy leaflets about the new crackdown on smoking.<sup>168</sup> The most recent outdoor smoking ban took effect in the Shinjuku Ward in August 2005. With posters in four languages (Japanese, English, Korean, and Chinese) announcing the prohibition on smoking outdoors because “pedestrians include asthmatic patients and children,” Shinjuku officials have followed those in Toshima by prohibiting smoking in a section of Tokyo that includes Kabukicho, the most well-known and lewd of Tokyo’s red light districts. Similar bans have also taken root outside of Tokyo, with cities like Fukuoka (in the western part of the country) enacting laws prohibiting smoking in a rapidly expanding number of areas.

In addition to limitations on outdoor smoking, an increasing number of regions have prohibited tobacco consumption in government buildings and other indoor settings. In Nagano, for example, site of the 2000 Winter

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167. New local laws and regulations that target smoking are have been passed in: Chiyoda-ku (2002); Shinagawa-ku (2003); Suginami-ku (2003); Ota ku (2004); Chuo-ku (2004); Fukuoka-shi (2003); as well as in Hiroshima, Shirokawa, Aomori Prefecture, parts of Hokkaido, Kagoshima, Toyama, Miyagi Prefecture, and elsewhere. By 2000, there were approximately 1000 local ordinances addressing cigarette butt litter, but most were weak and not enforced. Mark Levin, *Japan: Can Local Action do the Trick?*, 10 *TOBACCO CONTROL* 205, 206 (2001).

168. The irony of a ban on smoking in an area lined with brothels and other similar businesses operating in violation of the law appears to have been lost on city officials.

Olympics, Governor Tanaka Yasuo banned smoking at most prefectural public facilities in September 2003. Other prefectures have also instituted limited indoor bans.

Smaller governmental units—towns and villages—have also gotten involved in tobacco regulation. In Fukaura, for example, a small town in the north of Japan, the local governing council decided to eliminate cigarette vending machines located on sidewalks and other easily accessible outdoor locations. The town had just 34 such machines, and the only penalty imposed on those violating the resolution was the public disclosure of their names. Nonetheless, the move attracted the lobbying of JT and anti-tobacco groups because it was the first governmental effort aimed at eliminating cigarette vending machines, a crucial sales outlet for JT.<sup>169</sup>

### III. THE EVIDENCE: LINKING CULTURE AND LEGAL CHANGE

#### *A. Informational, Political, and Economic Explanations for Japan's New Tobacco Laws*

The recent surge of tobacco control laws in Japan, this Article argues, reflects a cultural disposition to be influenced by Western norms. But culture is not an independent or unilateral force; it is intertwined with political and economic factors that can facilitate or complicate its influence. Consequently, examining the full range of possible explanations for the legal changes in Japan is critical to determining the degree to which any individual factor or set of factors played a role in bringing about change. Although this Article emphasizes the influence of the conformity norm, therefore, it does not claim that the norm can be isolated from other forces that have the potential to trigger change or shape its speed or direction. Instead, the Article simultaneously highlights the contribution of the conformity norm to the cascade of new tobacco laws since 2000 and examines the ways in which a host of other factors has amplified and echoed that norm.

The puzzle this Article seeks to resolve is not confined to the question of why Japan's leaders have enacted a variety of tobacco-related laws since 2000. In addition to the existence of the laws, a credible explanation must also account for the timing of their adoption and the different types of laws that have emerged. The timing of legal change is subject to a wide variety of influences, from the quotidian scheduling of

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169. As of 2003, there were over 600,000 cigarette vending machines in Japan. TOBACCO PROBLEMS INFORMATION CENTER (TOKYO) (TOPIC), SMOKING IN JAPAN—2004 PROFILE (2004).

legislative sessions to the careful calculation of political opportunities. In the case of tobacco laws, there was both an impressive delay in the government's turn to law, which took almost 40 years from the time the link between smoking and disease was established, and an extraordinary rapidity to its embrace of law after 2000. The long delay can be readily attributed to two factors: domestic conditions that enabled powerful actors, like MoF, the LDP, and JT, which benefited from the lack of law, to maintain the status quo; and a lack of countervailing pressures—normative, political, or economic—that pushed for change. The speed with which the Diet passed laws after 2000, discussed in more detail in this Part, is explained by such factors as anti-tobacco activities at the WHO, the widely-publicized legal conflicts over tobacco in the mid- and late 1990s in the United States, and political and economic changes in Japan. The conformity norm shadowed each of those concerns, but it was clearly not operating in isolation.

Similarly, the imprint of the conformity norm can be seen in the types of laws enacted in Japan. Ideally, one might hope for a bouquet of tobacco laws in which each law has a coherent rationale and a consistent set of principles supports and links the complement of laws. The laws constituting Japan's tobacco regime display neither of those characteristics. Laws supposedly aimed at reducing litter by banning outdoor smoking, for example, have mandated the removal of outdoor ashtrays but have not addressed the multitude of curbside vending machines. And while the litter cigarette butts cause justifies such laws, other new laws, like the HPL, are aimed at the health of nonsmokers. Lack of coherence, either internally or in overall policy goals, is not in itself evidence of the influence of Western norms, but it does suggest there are factors at play beyond the rational drafting of laws aimed at reducing tobacco-related morbidity and mortality.

A wide variety of evidence of the conformity norm's role in the recent legal changes will be detailed in Part III.B; in this Part I examine six explanations for the legal changes in Japan's smoking policy that to varying degrees augment the norm's influence. First and most obvious is the possibility that increasing knowledge about the health harms of smoking fueled changes in Japanese smoking laws. As the Japanese—both lawmakers and laypersons—came to better understand the dangers of smoking, they may have changed their habits and become increasingly receptive to tobacco control policies. There is certainly some evidence to suggest that the ill health effects of smoking drive some to give up the habit and dissuade others from ever becoming smokers. Since the early 1960s, for example, when the governments of the United States and United Kingdom issued reports documenting the link between

smoking and lung cancer, smoking has slowly but steadily declined.<sup>170</sup> The Japanese government, however, did not react to any of the key internationally-disseminated epidemiological studies by enacting tobacco control laws. When the United Kingdom's Royal College of Physicians in 1962 disseminated its report on "Smoking and Health," and the United States Surgeon General published its 1964 report linking smoking and cancer, the Japanese government did not respond.<sup>171</sup> When a prominent Japanese scientist published a groundbreaking study on the harms of "passive" smoking in 1980, the government did nothing.<sup>172</sup> When in 1986 expert scientific bodies in the United States, United Kingdom, Australia, and the WHO announced their conclusions about the connection between passive smoking and a variety of diseases, including lung cancer,<sup>173</sup> Japanese lawmakers were unmoved. The past decade, which directly preceded and then coincided with the emergence of tobacco control laws in Japan, was not a time of scientific discovery about the link between smoking and health. During that time, neither Japanese lawmakers nor the Japanese public learned anything particularly new about the health consequences of smoking. Nor was there a public education campaign that may have sparked a greater level of public awareness of the health harms of smoking. Although it seems clear that the long, steady decline in the smoking rate is at least in part a consequence of increased knowledge about the harms of smoking (see Appendix 1), the evidence of smoking's ills is a poor explanation for the speed and intensity of recent changes.

Second, *gaiatsu* (direct foreign pressure) has played at least a small role in the recent development of a tobacco control regime. With the emergence of JT as one of the world's 'big three' tobacco companies (along with Altria/Philip Morris and British American Tobacco), there have been international efforts to convince the Japanese government to reign in the power of JT at home and abroad. The WHO's Framework Convention on Tobacco Control, discussed above, is an example of such pressure, at least when it is exerted explicitly rather than as an interna-

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170. See Appendix 1 *infra*.

171. See ROYAL COLLEGE OF PHYSICIANS, SMOKING AND HEALTH, SUMMARY AND REPORT OF THE ROYAL COLLEGE OF PHYSICIANS OF LONDON ON SMOKING IN RELATION TO CANCER OF THE LUNG AND OTHER DISEASES (1962); SMOKING AND HEALTH, *supra* note 97.

172. See HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, *supra* note 98.

173. See *id.*; NATIONAL RESEARCH COUNCIL, ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS (1986); UK DEPARTMENT OF HEALTH AND SOCIAL SECURITY, FOURTH REPORT OF THE INDEPENDENT SCIENTIFIC COMMITTEE ON SMOKING AND HEALTH (1988); AUSTRALIAN NATIONAL HEALTH AND MEDICAL RESEARCH COUNCIL, EFFECTS OF PASSIVE SMOKING ON HEALTH, REPORT OF THE NHMRC WORKING PARTY ON THE EFFECTS OF PASSIVE SMOKING ON HEALTH (1987); INTERNATIONAL AGENCY FOR RESEARCH ON CANCER, IARC MONOGRAPHS ON THE EVALUATION OF THE CARCINOGENIC RISK OF CHEMICALS TO HUMANS: TOBACCO SMOKING (1986).

tional norm. So too is the activity of the Institute for Global Tobacco Control (IGTC), part of the Johns Hopkins Bloomberg School of Public Health, which assembled a group of Japanese scientists to collaborate on a report about the health harms of tobacco consumption in Japan. Led by a distinguished cancer epidemiologist and tobacco policy advocate in the United States, and funded in part by GlaxoSmithKline and Taisho pharmaceutical companies (manufacturers of smoking cessation products), the report, published in 2004 as “Tobacco Free Japan: Recommendations for Tobacco Control Policy,” was directly aimed at pressuring the Japanese government to more robustly regulate smoking. It states:

The authors of this report, an international team of medical, public health, and other scientists, stepped forward to write this report because of a shared expectation that the report would advance public health nationally and even globally. With the recent internationalization of the Japanese tobacco industry, Japan’s actions on tobacco control have not only national but global implications.<sup>174</sup>

Unlike 1980s *gaiatsu* from the United States government, which sought to open Japan’s tobacco market to U.S. companies and used the stick of economic sanctions to make a compelling case, the report from the IGTC was accompanied by no credible threats. More importantly, it was not backed by the imprimatur of the United States or other foreign governments and does not appear to have triggered a groundswell of domestic pressure on the government, in part because the media largely ignored it. In fact, one of the key goals of the IGTC was to press the Japanese government to sign the FCTC, something the government did before the IGTC report was published. Although the report fell short of its goal and was clearly not the trigger for the creation of tobacco laws, it did contribute to the accumulating concern in Japan about being out of step with the denormalization of smoking in the West. Given its recent vintage, the report may in the future come to play a greater role in Japan’s response to that concern.

Third, the increasing vilification of tobacco companies in the United States (see Part I above) turned public opinion against the industry and was a factor in jury decisions awarding punitive damages to plaintiffs. It also better enabled tobacco policy activists to successfully lobby states for tobacco control laws. One might have expected that information about the dangers of smoking, particularly the pioneering studies of secondhand smoke done in Japan, would have affected the Japanese public’s view of smokers and smoking, yet surveys reveal remarkably little

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174. TOBACCO FREE JAPAN, *supra* note 139, at 296.



change in public sentiment from the 1970s to 2002.<sup>175</sup> Among smokers, for example, the percentage of smokers who indicate a desire to quit remained steady; the percentage of the population that considers cigarette smoke annoying was virtually unchanged; and the percentage of people who believe smoking should be regulated by the government evidenced little variation. In addition, anti-tobacco activism in Japan involves an array of splintered groups that have failed to unite behind a single tobacco control strategy.<sup>176</sup> Public sentiment surely matters to politicians, but the public's view of smoking and smokers does not appear to have changed much in the period during which the new legal regime of tobacco in Japan was crafted.

Moreover, there have been only the most muted of accusations about the potentially counterproductive tobacco policy incentives that follow from the relationship between MoF, the LDP, and JT. No damaging internal documents that could serve as the smoking gun of industry misdeeds have been found; no pointed and well-publicized denunciation of JT has captured the public's imagination.<sup>177</sup> One is hard pressed, therefore, to make the case for vilification as the main explanation for the recently enacted tobacco control laws and policies. Vilification matters; it provides circumstantial evidence that the conformity norm is at work and establishes fertile ground for its continued operation. But in Japan it played only a secondary role.

Tobacco litigation, fourth, has been before the Japanese courts since 1980, but there have been no stirring victories, and the cases have not threatened the policy status quo.<sup>178</sup> Judges who have heard the cases—

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175. Because no single survey was repeated throughout this period, the data being compared is not always identical. But the questions and format are sufficiently similar to allow for the identification of general trends. Surveys examined were conducted by the Nihon Resachi Senta (3/1/1971); Asahi Shimbun-sha (10/1/1980); Mainichi Shimbun-sha (6/1/1980, 4/1/1982, 9/1/1983/4/5/6/8/9/1990/1/); Yomiuri Shimbun-sha (7/1/1982, 12/1/1986, 7/1/1988, 10/1/1988, 1/1/2002); and Jiji Tsūshin-sha (5/1/1987, 4/1/1989, 4/1/1990, 6/1/1991, 9/1/1993, 7/1/1994, 6/1/1996, 10/1/1998, 4/1/1999, 5/1/2000, 7/1/2001, 7/1/2002).

176. For a discussion of anti-tobacco activism in Japan, see Eric A. Feldman, *The Landscape of Japanese Tobacco Policy: Three Perspectives*, 49 AM. J. COMP. L. 679 (2001).

177. Two recent articles that use United States tobacco company documents to attack JT's marketing strategies are Kaori Iida & Robert N. Proctor, *Learning from Philip Morris: Japan Tobacco's Strategies Regarding Evidence of Health Harms as Revealed in Internal Documents from the American Tobacco Industry*, 363 THE LANCET 1820 (2004); Mary Asunta & Simon Chapman, *A "Clean Cigarette" for a Clean Nation: A Case Study of Salem Pianissimo in Japan*, 13 TOBACCO CONTROL 58 (2004). Both were published in English, and no similar analyses exist in Japanese.

178. The first case of tobacco litigation in Japan was brought to the Tokyo District Court in 1980 and decided in 1987. See 630 HANREI TAIMUZU 234 (Tokyo Dist. Ct. Final J., May 15, 1987). For a discussion of the tobacco litigation, see ISAYAMA YOSHIO, *GENDAI TABAKO SENSŌ [THE CONTEMPORARY TOBACCO WAR]* (1999); TABAKO BY SOSH NO H SHAKAIGAKU: GENDAI NO H TO SAIBAN NO KAIDOKU NI MUKETE [THE LEGAL SOCIOLOGY OF LITIGATION

there are no juries in Japan—have expressed skepticism about the epidemiological evidence linking smoking to disease and impatience with the claims of nonsmokers about ETS.<sup>179</sup> Neither the substance nor the dicta of the judgments contains anything that can be construed as encouraging the creation of new tobacco laws. The only case in which a plaintiff prevailed was decided in 2004, but it raised none of the core issues—the duty of JT and/or the government, negligence, product liability, the causal link between smoking and health, addiction—on which other smoking cases depend. Consequently, although tobacco litigation can be credited with the first concrete efforts to frame smoking as a matter of rights and has attracted a certain degree of media attention, it has not been a transformative event.

Fifth, bureaucratic enthusiasm manifested in health policy entrepreneurship also fails to explain the upswing in new tobacco control laws. Government agencies and actors with jurisdiction over or influence on the health policy aspects of tobacco have remained unchanged since the 1980s. The MHLW has general oversight responsibility for public health but devotes few resources to tobacco (the MHLW's budget for tobacco control in 2003 was approximately \$500,000) and the National Institute of Public Health has little direct policy influence. Only one maverick bureaucrat has emerged to stake her career on the regulation of tobacco, and the entrenched tobacco interests have, at least until recently, effectively contained her influence.<sup>180</sup>

Sixth, and more significant than any of the above factors, were changes in the political and economic landscape that eroded the strong opposition to the creation of tobacco control laws. One lesson of the U.S. "tobacco wars" has been that the industry can withstand a great deal of legal and political pressure and social change and still remain profitable. Despite the intensity of the U.S. tobacco conflict and the denormalization of smoking that has been both its cause and consequence, Altria's 2004 Annual Report states that Philip Morris USA "is on solid footing and has returned to both stability and predictability" and that Philip Morris International "is well positioned for growth in the

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OVER TOBACCO-RELATED ILLNESS: DECIPHERING THE CONTEMPORARY LAWS AND TRIALS] (Tanase Takao ed., 2000).

179. In June 2005, for example, Judge Akiyama Toshinobu of the Tokyo High Court dismissed an appeal in a case filed by a group of former smokers against the government and JT, expressing his doubts about the causal relationship between smoking and the plaintiffs' cancer and noting that substances like heroin, cocaine, and alcohol are more addictive than nicotine. Masami Ito, *Death, Disease Not Linked to Smoking: High Court*, JAPAN TIMES, June 23, 2005.

180. Yumiko Mochizuki-Kobayashi, formerly with the MHLW.

years ahead.”<sup>181</sup> Looking forward, JT and MoF surely understand that the cost of opposing tobacco laws may exceed the benefit.<sup>182</sup> Indeed, there are some clear advantages to legal controls; the U.S. government’s cigarette packet warning requirement has insulated the industry from duty to warn tort claims, and limitations on advertising have saved the firms countless dollars by obviating their need to compete through the purchase of expensive television ads.<sup>183</sup>

Moreover, like other large tobacco firms in industrialized nations, JT is well aware that its future financial health resides in the developing world.<sup>184</sup> Smoking is in decline in every industrialized Western state, which means that industry profits will increasingly come from China, Africa, Latin America, and other places where smoking rates remain high.<sup>185</sup> The best that can be hoped for domestically is enough legal and financial predictability and stability to attract investors and profitably expand international operations. JT’s international focus is clear. In 1999, it purchased the international operations of RJ Reynolds and created JT International, headquartered in Switzerland and employing over 12,000 people in 40 countries. It is currently the world’s third largest international manufacturer of tobacco products, with almost \$40 billion in sales in 2004.<sup>186</sup> Reports about JT’s market performance in 2005 stated that in contrast to a slumping domestic market, “JT’s overseas tobacco

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181. ALTRIA GROUP, INC., 2004 ANNUAL REPORT, available at [http://www.altria.com/download/pdf/investors\\_AltriaGroupInc\\_2004\\_AnnualRpt.pdf](http://www.altria.com/download/pdf/investors_AltriaGroupInc_2004_AnnualRpt.pdf) (last visited Mar. 12, 2006).

182. In fact, the three tobacco multinationals have collaborated on certain issues of common interest, like the International Marketing Code. See JT International, <http://www.jti.com>.

183. Both packet warnings and advertising limits were sought by public health advocates as a means of reducing tobacco consumption, but each has served industry interests and disappointed the public health community. The labeling law has insulated tobacco companies from a wide array of tort failure to warn claims, while the advertising limits, which appear to have little impact on tobacco consumption (as opposed to advertising bans, which do make a difference), have enabled the industry to more carefully target their advertising dollars in still-permitted advertising venues. See Public Health Cigarette Smoking Act, Pub. L. 91-222, 84 Stat. 87 (1969); Henry Saffer & Frank Chaloupka, *The Effect of Tobacco Advertising Bans on Tobacco Consumption*, 19 J. HEALTH ECON. 1117 (2000).

184. See Kenneth E. Warner, *The Role of Research in International Tobacco Control*, 95 AM. J. PUB. HEALTH 976, 976 (2005) (“The economic future of the industry rests in low- and middle-income countries, where rising incomes, trade liberalization, liberalization in terms of the treatment of women, and the widespread introduction of sophisticated Western-style advertising ensure a thriving future for cigarette sales.”).

185. Warner observes that by 2030, 70% of the world’s tobacco related deaths will be in poor and middle income states. *Id.* at 976. See generally TOBACCO CONTROL IN DEVELOPING COUNTRIES (Prabhat Jha & Frank Chaloupka eds., 2000).

186. See JT International, <http://www.jti.com> (last visited Mar. 12, 2006).

sales . . . gained steadily due to strong contributions from its global flagship brands.”<sup>187</sup>

Broad shifts in national politics were also important and help explain the speed and intensity of change since 2000. In 2001, Prime Minister Hashimoto, a heavy smoker who once said he felt a responsibility to help the national economy by buying cigarettes, was replaced by Prime Minister Koizumi, who had served as Minister of Health and Welfare in three different cabinets. Although both are members of the LDP, they represent different factions and embody contrasting political styles. In contrast to Hashimoto’s aggressive support of tobacco interests, Koizumi came into office with a reformist agenda and a willingness to stand up to entrenched political interests.<sup>188</sup> In keeping with Koizumi’s focus on “structural reform,” his senior cabinet ministers reconfigured many key governmental advisory committees (*shingikai*), including those at MoF responsible for its tobacco policy, most importantly the Fiscal Council. According to a senior member of that committee, the Council membership was changed soon after Koizumi’s election, and many of the new members were concerned about the rising costs of caring for those with tobacco-related diseases and worried about other financial pressures on the state health care system.<sup>189</sup> MoF also considered other costs, including the public’s attitude toward a government that profited from the sale of tobacco products, potential future litigation costs, and negative international opinion about Japan’s lack of tobacco laws. Together, those concerns made MoF more receptive to the idea of increasing the legal control of tobacco and smokers.

Along with the changes at MoF, a group of politicians has emerged to counteract the influence of the tobacco *zoku*—those identified by their willingness to advocate for tobacco interests. One of the most outspoken and powerful *zoku*, and a long-time advocate for Japanese tobacco farmers, was LDP politician Suzuki Muneo, who successfully led the effort to thwart past attempts to develop more robust tobacco laws in Japan, playing a key role in opposing the MHLW’s “Healthy Japan 21” recommendations. But Suzuki, usually an important powerbroker, played no role during the critical stages of the FCTC or HPL negotiations because he was in jail from June 2002 to August 2003 awaiting trial on

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187. *Japan Tobacco Sales Decline, Revenue Knocked*, Aug. 1, 2005, <http://www.marketwatch.com> (enter title of article in search field on website).

188. Koizumi’s effort to reform the Postal Savings System is a recent example of that tendency. His willingness to cut some ties to tobacco interests was made easier by their decreasing power; the number of tobacco farmers in Japan has rapidly decreased, for example, which has weakened their political clout.

189. Interview with Senior Member of the Fiscal Council (anonymity requested) (2005).

charges of bribery and corruption. His absence significantly limited the potential political opposition to Japan's new tobacco laws.

In 1978, several member of the Diet became active in protecting nonsmokers' rights and sought to organize their peers into a group of politicians that would work on behalf of nonsmokers. Because they were unable to attract more than a few members, however, the group dissolved before it had any visible impact on the legal control of tobacco. A different climate greeted lawmakers in 2002, when the bipartisan Federation of Diet Members for Promoting Anti-Smoking (*Kin'en Suishin Giin Renmei*) was established by 68 members.<sup>190</sup> Participants in the Federation came from all parts of the political spectrum, as well as from both houses of the Diet. Its leadership makes clear that those involved in the group have substantial political clout; Lower House Speaker Watanuki Tamisuke heads the group, and his deputy director is former Health and Welfare Minister Tsushima Yuji, both members of the governing LDP. They are aided by a prominent female politician from the opposition Democratic Party of Japan, Komiyama Yoko, who serves as the Executive Secretary of the Federation. Also active is Takemi Keizo, whose strong links to the Japan Medical Association may in part explain that group's increasing willingness to engage the tobacco issue.<sup>191</sup> Now numbering 81 members, the League has established a group to promote smoking bans throughout Japan and may undertake other actions to strengthen the legal framework of Japanese tobacco policy. The Federation has had little public visibility, and its members have not made their tobacco control stance an electoral issue, but its existence and activities represent the emergence of a new factor in the shifting field of smoking regulation.<sup>192</sup>

The main tobacco players in Japan, aware of how U.S. tobacco corporations have weathered the recent legal battles and the changing demographics of smoking, may therefore see the U.S. experience as a template for Japan. Rather than engage in a series of public battles over tobacco control, they may have concluded that a settled domestic to-

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190. A list of members can be found at <http://www.hirake.org/nosmoke/giren/index.html>.

191. Both the Japan Medical Association and specialty medical associations have long been more concerned with advocating for the interests of their members than with broader issues of public health, and they have never been active in the area of tobacco policy. An expert on Japanese health policy has suggested that their posture toward tobacco has changed, at least in part, as a consequence of their increasing engagement with Western medical societies like the American Cancer Society. E-mail from Robert B. Leflar to Eric A. Feldman (on file with author). Here too, in other words, one can see Western norms and Japanese culture at work.

192. The confluence of several factors—longer life expectancy, rising health care costs, and a falling birth rate, in particular—has created a financial strain on the government, which may be leading politicians to focus on the financial cost of smoking more than on tax revenues and other “benefits” of tobacco consumption.

tabacco control agenda will make it easier for the Japanese tobacco industry to seek its profits overseas.<sup>193</sup> Certain forms of regulation, such as advertising restrictions, could also help JT defend its domestic market share against foreign competitors by limiting their ability to advertise new products.<sup>194</sup> Such calculations would explain why the entrenched interests that control tobacco in Japan have not worked aggressively to defeat the move toward increasing legal control. Indeed, they have played the role of shadow architects; MoF is responsible for regulatory changes concerning taxation, advertising, and packet warnings, and the LDP pushed the HPL. JT's most visible response has been a series of ads on trains that promote smoking manners.<sup>195</sup> If the choice is between a potentially damaging political battle over tobacco control and a set of regulations that dampens domestic conflict and allows tobacco interests to concentrate on expansion overseas, the latter appears to be the politically preferable option.

In sum, scientific knowledge, *gaiatsu*, the vilification of the tobacco industry, litigation, and official public health advocacy each contributed to the legal turnaround in Japan, but neither individually nor collectively do they offer a full explanation for the recent emergence in Japan of new laws that affect smoking. MoF, JT, and the LDP are more significant; they have each played a role in creating the new legal regime, sometimes

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193. The rate of smoking in Japan has been falling gradually but steadily since the 1960s, and per capita cigarette consumption fluctuates annually but has been relatively flat since 1970. In addition, JT's share of the domestic market has been falling since 1985, and is likely to fall to approximately 65% when its 30-year license from Philip Morris to manufacture and sell Marlboros in Japan expires. As a result, JT has increasingly focused on foreign markets. It purchased the international operations of RJR Nabisco (Winston, Salem, etc.) in 1999 for \$7.8 billion, and it is reportedly interested in acquiring Gallaher Group PLC, maker of Benson and Hedges. See Jason Singer & Robert Guy Matthews, *Investors Bid Up Big Tobacco; Europe Rallies on Merger Talk, as Demand Shrinks Elsewhere*, WALL ST. J., Oct. 28, 2004, at C4. A recent report on JT's profits from April to September 2004 notes that the company "has tried to counter a fall in domestic tobacco demand with sweeping restructuring and by beefing up sales of its high-margin, flagship brands outside Japan." See *Japan Tobacco Back in Profit, to Buy Back Shares*, REUTERS, Nov. 1, 2004. The strategy is succeeding: JT's profits increased dramatically in the first half of fiscal year 2005 (through September 2005), thanks at least in part to its overseas business. Press Release, Japan Tobacco, JT's Consolidated Interim Results for the First Fiscal Half that Ended September 30, 2004 (Oct. 29, 2004), [http://www.jti.co.jp/JTI\\_E/Release/04/20041029\\_E.pdf](http://www.jti.co.jp/JTI_E/Release/04/20041029_E.pdf).

194. Studies on tobacco advertising in the United States have concluded that limiting advertising has little impact on tobacco consumption, unlike complete advertising bans, which significantly reduce consumption. See Saffer & Chaloupka, *supra* note 183, at 1134. JT may hope that advertising restrictions will make it more difficult for competitors to increase their market share without affecting overall tobacco consumption.

195. Indeed, JT has expended considerable resources in working to maintain control of the public rhetoric of tobacco use, which was particularly evident in its advertising campaign about smoking manners that blanketed the JR rail system during the summer of 2004. Copies of the ads can be seen at JT Smoker's World, [http://www.jti.co.jp/JTI/manner\\_kokoku/Welcome.html](http://www.jti.co.jp/JTI/manner_kokoku/Welcome.html) (last visited Mar. 12, 2006).

actively and perhaps more importantly by not devoting their resources to thwarting it. Without their involvement and assent, the changes that have occurred in Japan would have been impossible. Yet for their willingness to give up the fight against tobacco-related laws to be of consequence, the idea of creating tobacco laws in Japan first had to be put on the agenda. As the following Part demonstrates, international norms were critical during the agenda-setting process; once on the agenda, a powerful coalition of domestic actors wielded the norms to successfully drive policy change.

### B. *A Cultural Explanation for Japan's New Tobacco Laws*

To establish the causal link between Western norms and changes in Japan's laws, this Part offers a multiplicity of examples that demonstrate the vigor with which local agents—the media, government officials, tourists, and others—promoted the anti-smoking norm and the degree to which this norm permeated Japanese society, both among laypersons and, more importantly, the elite. In combination with the increasing receptiveness of local political and economic conditions to the norm, as discussed in Part III.A, and the appeal of the norm itself (see Part II), it becomes increasingly clear why Japanese officials rapidly enacted a series of tobacco-related laws. By the start of the twenty-first century, those in Japan who watched television, read the newspaper, took vacations in the United States, ate out, went to the movies, or engaged in a variety of other activities were well aware that smoking and smokers were increasingly shunned in Western states, particularly the United States. The fact that so much attention was directed at the gap between Japan and the West, that the media described the situation in Japan so unfavorably, that tobacco control advocates and corporations carefully used that information, and that government officials unambiguously came to see the differences and express their concern about them links the cascade of legal changes in Japan to their global context. The conformity norm directed attention to changes in the West, and local norm agents translated that attention to norms into domestic legal change.<sup>196</sup>

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196. The relative influence of international smoking norms in Japan but not Korea is telling. Korea and Japan have similarly high levels of smoking (in fact, smoking is more common in Korea than Japan) and share a history of government monopolization of tobacco early in the twentieth century. In both places, the central finance ministry has dominated tobacco policy. But there is no indication the international norms that have shaped Japan have in any way had a similar influence in Korea. See Song June Kim & Elliot Euel, *The Dimensions of Government Inaction on Smoking Policy: A Comparative Study of the United States and Korea*, 29 *KOREAN SOC. SCI. J.* 15 (2002).

A variety of agents have widely disseminated information about Western anti-smoking norms and the contrast they provide with smoking in Japan. First, in a large volume of articles and reports about tobacco litigation and policy in the West, the Japanese media has consistently drawn unfavorable comparisons with the situation in Japan. Until recently, newspaper coverage of tobacco was confined to the science pages, but in the late 1990s it migrated to the more visible political and social sections of all the major papers. All of the major Japanese newspapers devote extensive coverage to tobacco-related changes in the West—the banning of smoking in New York’s restaurants and bars, the elimination of smoking in Irish pubs, the jury verdicts for U.S. smokers, and the no-smoking beaches of Santa Monica, California, to cite only a fraction of the coverage of foreign tobacco-related issues.<sup>197</sup> In many instances, articles explicitly compare the smoking situation in the West and Japan and conclude, as did one article in the *Asahi Newspaper*, that “Japan is obviously a smokers’ paradise (*kitsuensha no tengoku*) in the developed world.”<sup>198</sup> A similar sentiment is conveyed by coverage of a public health conference on tobacco that resulted in the headline, “Europe—No Smoking is Healthy Policy; Japan—It’s Left to the Individual” and by an article about the FCTC negotiations titled, “From the Viewpoint of Protecting Health, It is Time to Broaden the Domestic Discussion.”<sup>199</sup>

Even some of the seamier Japanese publications have jumped on the bandwagon. *Tokyo Sports*, a publication that mixes coverage of legitimate sporting events with photos of bikini-clad (at most) women and stories about the beer consumption of professional wrestlers, published an article the day before 2001 World No Smoking Day about Japan’s “worst smokers,” a story prompted by a list created by an anti-tobacco

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197. *San Nin ni 13 Oku en Shiharae* [Three People are Paid ¥1.3 Billion], ASAHI SHIMBUN, Apr. 8, 2000; *Kitsuensha no Gan—Gyosha ni Sekinin* [Cancer Caused by Smoking—Company Responsible], ASAHI SHIMBUN, Apr. 8, 2000; *Bei de Tabako Zōzei Tsuzuku* [In the United States, Tobacco Tax Increase Continues], YOMIURI SHIMBUN, Apr. 12, 2002; *Zen Resutoran, Bā Kinshi: NY* [All NY Restaurants, Bars, are Smoke-free], ASAHI SHIMBUN, Dec. 12, 2002; *Kemuri no Kieta Pabu no Fūkei* [A View of the Smoke-free Pubs], NIHON KEIZEI SHIMBUN, Aug. 7, 2004; *Kinshi no Nami Ōshū Nimo* [The No Smoking Wave is Also Breaking on Europe], ASAHI SHIMBUN, Feb. 27, 2004; *Kinshi no Nami: Kaigan ni mo Tōtatsu* [The No-smoking Even Reaches the Seaside], ASAHI SHIMBUN, Mar. 25, 2004.

198. *Kitsuensha no Tengoku*, ASAHI SHIMBUN, Apr. 4, 2002; Taisei Saito, *Japan’s Smoldering Problem*, ASAHI SHIMBUN, June 1, 2002. Likewise, a set of graphs outlining smoking conditions around the world make clear that Japan compares unfavorably with the West. See *Sekai no Kitsuensha Jijyō* [World Smoking Conditions], HOKKAIDO SHIMBUN, Mar. 2, 2002.

199. *Ōbei: Kinen go Kenkō Taisaku ni; Nihon: “Kojin no Ishi” Makase*, ASAHI SHIMBUN, Aug. 23, 2000; *Kenkō o Mamoru Shiten de Kokunai Rongi Fukameru Toki*, YOMIURI SHIMBUN, Oct. 22, 2000.



NGO.<sup>200</sup> The article featured a discussion of TV commentator Furutachi Ichiro, who regularly says on his show that he hates anti-smoking groups, criticized members of a popular rock band who smoke while performing, made fun of a comedian quoted as saying anti-smoking groups “could eat shit,” and disparaged several actors and actresses who smoke on television.<sup>201</sup>

English-language publications within and outside of Japan have also regularly mentioned the gap between Western smoking norms and lax Japanese policy. Discussing a recent defeat in the Tokyo District Court, attorney Isayama Yoshio is quoted by the Australian Broadcast Corporation as stating that he “felt as if we had got in a time machine and gone back 40 or 50 years,” and a Japanese physician in the same interview stated that “[w]hen it comes to tobacco, Japan is really an undeveloped country.”<sup>202</sup> A senior journalist who often writes in English about tobacco for *The Japan Times* exclaims that “[w]hen it comes to controlling domestic tobacco consumption, Japan lags far behind North America and Europe.”<sup>203</sup> Editorialists at that same paper, who in 2003 decided to use their influence to advocate a more robust set of tobacco control laws, write that “Japan is the only country that permits cigarette vending machines to be placed outside in unsupervised areas. . . . Cigarettes are much cheaper in Japan than in Europe or the U.S.”<sup>204</sup> Australian newspapers also paint Japan as a “smokers’ paradise” where the Marlboro man can still be seen on television; a journalist for another Australian paper writes that “Japan is still 10 to 20 years behind the West in fighting smoking”;<sup>205</sup> and a report in *Time International* notes that “[w]hile countries in North American, Europe, and the rest of Asia are cracking down

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200. See Tokyo Sports, <http://www.tokyo-sports.co.jp/> (last visited Mar. 12, 2006).

201. Philip Brator, *It's All About Manners (Cough, Gasp), Not Health*, JAPAN TIMES, June 3, 2001.

202. *Lateline: Japanese Smokers Pursue the Government in Anti-Tobacco Case* (Australian Broadcasting Corporation broadcast June 8, 2004) (transcript available at <http://www.abc.net.au/lateline/content/2004/s1126678.htm>).

203. Kiroku Hanai, *Weak Tobacco Pact Reflects Japan's Lukewarm Attitude*, JAPAN TIMES, Mar. 25, 2003. The theme of Japanese tobacco policy being out-of-step with the West permeates Hanai's writing, who argues that “the government, which has a constitutional duty to protect public health, should reach quick out-of-court settlements on lawsuits regarding the health hazards of smoking, as have U.S. organizations” (Kiroku Hanai, *Time to Get Tough on Tobacco*, JAPAN TIMES, June 1, 1999); “Japan has fallen far behind other industrial nations in banning cigarette companies' television ads and smoking on airplanes” (Kiroku Hanai, *Common Sense up in Flames*, JAPAN TIMES, Jan. 24, 2000); and “Japan is among the few industrial countries that allow smoking in taxis” (Kiroku Hanai, *A Losing Fight Against Smoking*, JAPAN TIMES, May 30, 2000).

204. *Tighten Japan's Tobacco Controls*, JAPAN TIMES, May 24, 2003.

205. *Laws Give Free Rein to Smokers*, W. AUSTRALIAN, June 23, 1993; Alan Stokes, *Country That Can't Quit*, AUSTRALIAN, June 4, 1999, at 34.

on tobacco, Japan is still puffing happily away.<sup>206</sup> Articles by foreign residents living in Japan echo the same theme, with one exasperated expat pleading in the op-ed section of a local paper, “Come on all you local restaurant and coffee shop managers—give us a break! How about catching up with the rest of the world and providing non-smoking sections within your premises.”<sup>207</sup> English-language coverage of Japan is not only for foreign(er) consumption. Japan’s Ministry of Foreign Affairs and other government agencies carefully track international reporting about Japan and have undoubtedly followed the negative assessment of its approach to tobacco.<sup>208</sup>

Coverage of tobacco and smoking has also increased on television, with frequent discussions of smoking on so-called “variety” shows, some of which have created a “smokers’ corner” on the set for those who want to light up. Some TV documentaries have been particularly pointed in discussing the gap between smoking norms and law in the West and Japan. In 1998, for example, the Tokyo Broadcasting System (TBS) aired a show called “Let’s Clarify the Facts About Tobacco” (*Tabako Jyōhō o Kaishi Seyo*), which starts with the image of an American attorney walking into court as a narrator tells viewers that tens of thousands of plaintiffs are suing U.S. tobacco companies and quickly cuts to an interview with an American who says the cases “come down to a matter of justice.”<sup>209</sup> The documentary contrasts tobacco litigation in Japan and the United States, noting that unlike the group of seven Japanese plaintiffs suing JT, in the United States one finds individual cases and huge class actions brought on behalf of both smokers and nonsmokers. In addition, the show draws a variety of other contrasts between Japan and the United States. It indicates that advertising restrictions in the United States are stronger; smoking is eliminated rather than tolerated in many public places; warnings on JT-produced products are stronger in the United States than in Japan; and JT executives deny the link between smoking and cancer while their U.S. counterparts accept it. At the end of the show, the commentator tells the audience that U.S. tobacco companies have compromised by settling claims brought by the states for \$250 billion dollars and asks why the Japanese tobacco company, JT, is not part of this “big wave” (*ōkina nami*). The program ends with a rhetorical

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206. Donald Macintyre, *No Warning: On the Eve of a Major International Meeting on Smoking, Japan’s Lonely Anti-Cigarette Activists Wonder Why the Nation is Still Tobacco’s Best Friend*, *TIME INT’L*, Oct. 9, 2000, at 20.

207. Michel Hogan, *Tokushima ni Sundemite [Living in Tokushima]*, *TOKUSHIMA SHINBUN*, Mar. 3, 1997.

208. Stephen C. Mercado, *Sailing the Sea of OSINT in the Information Age*, 48:3 *Studies in Intelligence: Unclassified* (2004), <http://www.cia.gov/csi/studies/vol48no3/article05.html>.

209. *Tabako Jyōhō o Kaishi Seyo [Let’s Clarify the Facts About Tobacco]*, (Tokyo Broadcasting System Inc., Dec. 6, 1998).

question: “So what do you think of the United States and Japanese situation?”

A particularly poignant television commercial encapsulates the general image the media is providing to the public about the contrast between the acceptability of smoking in the West and Japan.<sup>210</sup> In the commercial, a Western woman confronts a Western man smoking a cigarette in a scolding voice, saying, “If you want to smoke so badly, go to Japan.” In the next part of the commercial, a “mockumentary,” a group of desperate men are shown in a rubber dingy washing up on a Japanese beach. A voiceover states, “In Japan today, boatloads of refugees continue to arrive from all over the world. No-smoking campaigns back home have driven them to leave their countries.” The commercial, pitching an air cleaner, ends with the refugees happily puffing on cigarettes with their new-found Japanese friends as their smoke is sucked into the proffered air cleaner.<sup>211</sup>

Second, Japanese lawmakers explicitly refer to changes in the West that influenced the crafting and substance of new tobacco control laws in Japan. One example is found in the “Healthy Japan 21” report MHLW wrote between 1998 and 2000 and intended as the blueprint for health promotion in the first decade of the new millennium.<sup>212</sup> The report describes the current state of tobacco policy in Japan and notes that controls failed to adequately limit tobacco consumption or tobacco-related diseases. Turning to the international situation, it declares that the tobacco policies of other nations have been more effective in limiting the health consequences of smoking than have those in Japan. Despite the lack of studies to support that contention (perhaps because there is little data that convincingly establishes a link between formal tobacco control policies and positive health outcomes, particularly if one’s focus is U.S. federal policy), the invocation of the actions of “other nations” is an effort to show that Japan is lagging; it is the idea that those nations have a larger number of smoking-related laws and the implication that smoking in such places is thereby discouraged, rather than the demonstrable impact of specific laws, that make a difference. The “Healthy Japan 21” report concludes that because other states have laws and policies, “it has become necessary in Japan as well to introduce more appropriate measures . . . .”<sup>213</sup> Once again, the report does not mention particular places or

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210. The commercial is described in Hisashi Uno, *Smokers’ Deadly Paradise*, JAPAN TIMES, May 31, 2001.

211. The product being advertised is made by Midori Anzen Co., the biggest manufacturer of air particle removal equipment in Japan. See Midori Anzen, <http://www.midori-anzen.co.jp/> (last visited Mar. 12, 2006).

212. HEALTHY JAPAN 21, *supra* note 127.

213. PROMOTING LIFELONG HEALTH AND REGIONAL HEALTH, *supra* note 129.

policies; the notion that other states were enacting effective policies was more powerful than any specific references.

An examination of discussions within the MoF's Fiscal Council reveals the degree to which finance officials who were considering making changes to the regulations governing cigarette packet warnings and advertising were concerned about practices in the West.<sup>214</sup> When lawmakers in the United States debate the virtues of advertising restrictions on tobacco products, they are generally unaware of and unconcerned with the policies of other states.<sup>215</sup> But in Japan, finance bureaucrats in charge of tobacco looked carefully at the details of Western practice. When they discussed changing the limits of permissible tobacco advertising in Japan, for example, they debated the advertising restrictions in place in the United States and Europe.<sup>216</sup> When they considered strengthening cigarette packet warnings, they reviewed, in both English and Japanese, the packet warnings used in the United States, the EU, Canada, and China. Indeed, at every gathering of the Fiscal Council, MoF's most elite advisory body, members discussed the minutes of the most recent WHO FCTC meeting, which were translated into Japanese to guard against misunderstanding.<sup>217</sup> Clearly worried about subtle differences in language, the meeting minutes include a glossary of key terms and their translations in English and Japanese, including a comparison of the definition of words like "may-can-will," "cause-result in," "harm-damage," "addiction-addictive," and "hazardous-injurious-detrimental-harmful."<sup>218</sup> In part, as owners of a multinational tobacco company, MoF officials may have been concerned about the potential for litigation and were exercising appropriate caution. But there was also another factor at play: a desire to bring Japan's legal controls on advertising and packet warning

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214. MoF was not alone in using the packet warnings of Western states to frame its discussion. The Japan Medical-Dental Association for Tobacco Control, for example, held a symposium on smokeless tobacco at which much of the discussion was devoted to comparing packet warnings in various states, particularly Canada (where warnings like "smoking kills" are written in large black type and some warnings are color photos of gruesome mouth diseases), Australia, the United Kingdom, and others in the EU.

215. In the conflict over Massachusetts' effort to limit tobacco advertising, for example, which ended up before the U.S. Supreme Court, there are few if any references to advertising restrictions in other parts of the world but a great deal of detailed constitutional analysis of the regulation of commercial speech. *See* *Lorillard Tobacco v. Reilly*, 533 U.S. 525 (2001).

216. Ōkurashō, Zaisei Seido Shingikai, Tabako Jigyō Bunkakai, [Ministry of Finance, Council of Fiscal Systems, Subcommittee on the Tobacco Business], meeting 6, Oct. 3, 2003, included a chart of the regulations governing sponsorship in a number of states, as well as a discussion of advertising restrictions in the United States and the EU.

217. Interview with senior member of the Fiscal Council (anonymity requested) (2005).

218. Ōkurashō, Zaisei Seido Shingikai, Tabako Jigyō Bunkakai, [Ministry of Finance, Council of Fiscal Systems, Subcommittee on the Tobacco Business], meeting 5, July 1, 2003, included translations of the cigarette packet warning from the United States, EU, Canada, and China.

in line with those in the West. As one senior MoF advisor put it, WHO's tobacco policies represent the international trend, and Japan should change its policies to support that trend.<sup>219</sup> That same logic, in 2004, led the MHLW to announce that it would appoint a tobacco czar to coordinate Japan's public health strategy toward smoking. Ministry officials did not say that such a position was critical to reducing tobacco-related morbidity and mortality in Japan. Instead, they justified the creation of a new position by saying that "officials specializing in tobacco control have been playing active roles in the WHO, many European countries and in the United States"—so Japan needed someone in a similar position.<sup>220</sup>

Third, Japanese who travel to the United States visit areas where smoking has been most rigorously controlled, thus experiencing first-hand the new smoking norms. Hawaii is one popular destination for Japanese tourists. Between 2000 and 2003, over 30 percent of Japanese visitors to the United States traveled to Honolulu, which has the second highest cigarette excise tax in United States, making a pack of cigarettes there far more expensive than in Japan.<sup>221</sup> Fewer cigarettes per capita are sold in Hawaii than in any other state; it has the second lowest rate of tobacco-related deaths in the country, and smoking rates among women and men in Hawaii are lower than the mean in the United States.<sup>222</sup> The Honolulu City Council in 2002 passed a measure that made restaurants in Honolulu smoke-free, and in Maui the County Council did the same. Other popular destinations for Japanese tourists include Los Angeles, which attracted more than 10 percent of all Japanese visitors to the United States; New York City, with approximately 8 percent of Japanese tourists; and San Francisco, with between 5 percent and 8 percent.<sup>223</sup> California and New York are distinctive for their robust tobacco control policies, and Japanese visiting those states could not help but notice the relative absence of cigarette consumption and see (or join) smokers gathered in the limited public spaces where they are still permitted to smoke. Likewise, Japanese lawmakers and business people traveling to

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219. Interview with senior member of the Fiscal Council, *supra* note 217.

220. *Japan to Appoint Antismoking Czar Ahead of Global Treaty*, JAPAN TODAY, Dec. 18, 2004, <http://www.japantoday.com/e/?content=news&id=322385> (last visited Dec. 15, 2004).

221. More specifically, in 2003, 38%; 2002, 34.4%; 2001, 32.3%; and 2000, 32.5%. INTERNATIONAL TRADE ADMINISTRATION, OFFICE OF TRAVEL & TOURISM INDUSTRIES, JAPANESE ARRIVALS TO THE U.S. (2004) <http://tinet.ita.doc.gov/view/f-2003-146-001/index.html>.

222. See AMERICAN LUNG ASSOCIATION, STATES RANKED BY LAWS ENSURING SMOKE-FREE AIR (2005) <http://lungaction.org/reports/rank-states05.html>.

223. INTERNATIONAL TRADE ADMINISTRATION, OFFICE OF TRAVEL & TOURISM INDUSTRIES, *supra* note 221.

the United States also encounter environments that differ significantly from their own. Few of their U.S. counterparts smoke; while almost half of Japanese men were smokers in 2003, including a high percentage of those with high educations and incomes, that was true of only 7.5 percent of Americans with graduate degrees.<sup>224</sup> And whereas smoking was permitted in Japanese government ministries, Diet meeting rooms, and almost all other official settings prior to 2000, smoking is prohibited in similar settings in the United States.

Fourth, Japanese officials sent to Geneva to negotiate the WHO's FCTC quickly found themselves in an environment that treated smokers like pariahs.<sup>225</sup> Unlike the officials sent by other states, many of whom were drawn from the public health sector, the Japanese negotiating team was dominated by individuals from the MoF.<sup>226</sup> Further complicating their situation, they represented a government that was the majority shareholder in one of the world's biggest tobacco corporations—unlike other government tobacco monopolists like France, Spain, and Italy, which had divested themselves of their tobacco holdings.

The FCTC presented a particularly complex dilemma to Japanese lawmakers. On the one hand, they were united with the United States and Germany in opposing many aspects of the document.<sup>227</sup> Japanese negotiators, for example, sought to make the provisions of the treaty optional, hoping to preserve the discretion of national governments. Opposing the blanket elimination of cigarette descriptors like “light” and “mild,” they argued that restrictions on such terms should only be

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224. Centers for Disease Control and Prevention, *supra* note 95, at 511.

225. In fact, Switzerland, a non-EU nation, has weak tobacco control policies and has been a site of controversy concerning the alleged attempts of Philip Morris to exert undue influence on national policy. See CHUNG-YOL LEE & STANTON A. GLANTZ, CTR. FOR TOBACCO CONTROL RES. & EDUC., *THE TOBACCO INDUSTRY'S SUCCESSFUL EFFORTS TO CONTROL TOBACCO POLICY MAKING IN SWITZERLAND* (2001), <http://repositories.cdlib.org/tpmi/Swiss2001>. But the environment at the WHO, and at the FCTC negotiations, was strictly non-smoking. See WHA Res. 46.8, *Use of Tobacco Within United Nations System Buildings*, World Health Assembly (May 10, 1993) (calling on the international organizations of the UN system to ban smoking on their premises).

226. During the several years of FCTC negotiations, the Japanese government reconfigured its team. Of its seven negotiators in October 2000, four were from the MHLW and none from the MoF; by February 2003, twenty negotiators represented Japan, six from MHLW, six from MoF, and four from the Ministry of Foreign Affairs (more sympathetic to MoF than MHLW). WHO, FCTC, Intergovernmental Negotiating Body (INB), 1st Sess., *Organe Intergouvernemental de Négociation de la Convention-Cadre de l'OMS pour la Lutte Antitabac*, U.N. Doc. A/FCTC/INB1/DIV/2 Rev.1 (Oct. 18, 2000); WHO, FCTC, INB, 2nd Sess., *Organe Intergouvernemental de Négociation de la Convention-Cadre de l'OMS pour la Lutte Antitabac*, U.N. Doc A/FCTC/INB6/DIV/2 Rev.2 (May 5, 2001). As the stakes increased, in other words, the influence of the MHLW waned, and MoF took control of the proceedings.

227. For two accounts of the FCTC negotiations, see Roemer, *supra* note 155, and Stephen D. Sugarman, *International Aspects of Tobacco Control and the Proposed WHO Treaty*, in *REGULATING TOBACCO* 245 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

imposed by domestic laws; instead of a convention that required states to eliminate vending machines, raise taxes, or ban tobacco advertising, they pressed for provisions that would make such policy interventions optional. They opposed what Axel Gietz, Vice President of Japan Tobacco International (the multinational company formed by JT after its 1999 acquisition of the international operations of RJ Reynolds) derisively called “a one size fits all solution for the planet.”<sup>228</sup> Instead, Gietz argued, WHO should be the “champion, facilitator and coordinator” of national governments, not “a global legislator and regulator.”<sup>229</sup>

On the other hand, the NGOs that were a constant presence outside the negotiating chambers subjected Japan’s involvement in the FCTC to withering criticism. The Framework Convention Alliance, for example, representing over 200 NGOs from 93 states, called Japan “a strong contender for the world title of Public Health Enemy No. 1” for its positions on the Convention,<sup>230</sup> and the Network for Accountability of Tobacco Transnationals, representing 75 groups from 50 states, gave Japan its Marlboro Man Award for opposing cuts in tobacco consumption even before the treaty talks began.<sup>231</sup> They intensified their rhetoric when they accused Japan of being part of the “axis of evil” (*warui no sūjiki*, along with the United States and Germany) opposing global tobacco control and called it a “dinosaur” for its lax domestic tobacco control laws.<sup>232</sup> These accusations were reported by the Japanese press and troubled Japanese officials, who felt unfairly blamed and singled out for their position on the FCTC. MoF negotiators talked about being associated with the “axis of evil,” and a prominent tobacco control advocate in the Japanese government chaired a session at the 2003 World Conference on Tobacco or Health in Helsinki, Finland, to discuss how Japan could

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228. Public Hearings on the Framework Convention on Tobacco Control Before the World Health Organization (Oct. 13, 2000) (Statement of Axel Gietz), available at [http://www.jti.com/english/press\\_room/press\\_releases/pr\\_article\\_13\\_10\\_2000\\_2.aspx](http://www.jti.com/english/press_room/press_releases/pr_article_13_10_2000_2.aspx).

229. Press Release, Japan Tobacco, Comments by Japan Tobacco on the Proposed Framework Convention on Tobacco Control (Aug. 1, 2000), [http://www.jti.com/English/press\\_room/press\\_releases/pr\\_article\\_01\\_08\\_2000.aspx](http://www.jti.com/English/press_room/press_releases/pr_article_01_08_2000.aspx).

230. Santi W.E. Soekanto, *NGOs Go All Out in War on Tobacco*, JAKARTA POST, Nov. 13, 2002.

231. Press Release, Network for Accountability of Tobacco Transnationals (NATT), Japan’s Outrageous Position on FCTC Earns Marlboro Man Award Before Treaty Talks Begin, (Oct. 15, 2002), <http://www.infact.org/101502mm.html>.

232. See *Seifu ga Hone Nuki ni Shita* [The Government Lacks Integrity], YOMIURI SHIMBUN, Jan. 25, 2003; *Tabako Kisei Wakugumi Jyōyaku: Nihon wa Mada Shomei* [The FCTC: Japan Hasn’t Yet Signed], YOMIURI SHIMBUN, Aug. 26, 2003; *Japan Called a “Dinosaur” By NGOs at Tobacco Talks*, JAPAN TIMES, Oct. 26, 2002.

overcome that designation.<sup>233</sup> The Japanese government's solution to this bad press was to sign the FCTC and demonstrate it was a well-intentioned international player that accepted the smoking norms being propounded by the WHO.<sup>234</sup> Senior MoF officials involved in the FCTC negotiations were surely affected by being treated as pariahs in Geneva, and they are likely to have communicated those experiences to their colleagues back in Tokyo.

Fifth, Japanese tobacco control policy activists, despite their inability to achieve any concrete policy goals, played a role in connecting denormalization in the West to law and policy creation in Japan.<sup>235</sup> For example, the lead attorney in a number of Japanese tobacco-related lawsuits, Isayama Yoshio, not only followed legal and policy developments in the United States; in 2001 he went to Northeastern University's Tobacco Control Resource Center to learn about the U.S. situation from Richard Daynard, an academic lawyer who has played a central role in the U.S. anti-tobacco movement. Isayama and his anti-tobacco colleagues have invited U.S. tobacco industry whistleblowers like Victor DeNoble and Jeffrey Wiegand to Japan, visits that attracted media attention. Similarly, a former tobacco policy officer from the MHLW, Dr. Mochizuki-Kobayashi Yumiko, has attended prominent international tobacco control conferences and was involved with the WHO's effort to develop the FCTC, and she has explicitly used those experiences to influence tobacco policy in Japan. Both Isayama and Mochizuki-Kobayashi, among others, shared their overseas experiences with their contacts in the media, who wrote about them and highlighted what they saw as deficiencies in Japan. Their actions reflect the more general strategy of the Japanese anti-tobacco movement; its members regularly claim that "smoking restrictions

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233. Interview with Yumiko Mochizuki-Kobayashi, Chief, Information Design Section, National Institute for Public Health in Japan (Dec. 2004).

234. Those active in the global anti-tobacco movement treated the capitulation of Japan and other opponents as a major victory. As former Chairman of the Federal Trade Commission Michael Pertschuck put it:

Against the determined opposition of the tobacco companies, and their formidable government allies, whom advocates ironically labeled, the tobacco "axis of evil," principally Germany, Japan, and the United States, Dr Brundtland and her WHO colleagues carried on a 5 year struggle to achieve approval by the world's 150 health ministers of a strong, mandatory treaty requiring each country to adopt comprehensive national tobacco control laws and regulations.

Michael Pertschuk, Address Before the Southwest Regional Tobacco Control Conference, Tobacco Control Advocacy: America's Life Saving Export (July 22, 2004).

235. For two complementary discussions of international tobacco control research and advocacy, see Frances A. Stillman et al., *Building Capacity for International Tobacco Control Research: The Global Tobacco Research Network*, 95 AM. J. PUB. HEALTH 965 (2005) and Harry A. Lando et al., *The Landscape in Global Tobacco Control Research: A Guide to Gaining a Foothold*, 95 AM. J. PUB. HEALTH 939 (2005).



in Japan are some of the least stringent in the world” and point out, for example, that “many states of the US sued tobacco companies and recovered taxes spent for smokers’ medical expenses by settlement. Japanese local governments and health insurance organizations should file similar lawsuits.”<sup>236</sup> Even some who have until recently distanced themselves from smoking-related advocacy, like the Japan Medical Association, have sprung into action, with the president of that organization stating that “Japan not only lags behind other countries in terms of tobacco regulation, it remains primitive in its thinking.”<sup>237</sup>

Sixth, Western smoking norms have made themselves felt in Japan through the presence of foreign corporations. The most vivid example is the Starbucks chain of coffee shops, brought to Japan as a joint venture with the Japanese company Sazaby. With a name that invokes the elite British auction house Sotheby’s, Sazaby has positioned itself in the Japanese market as a “life-style company” with a European accent and includes in its portfolio a group of smoke-free cafes called Afternoon Tea, clothing stores like Agnes B and American Rag, a British flower shop, a spa, and a high-end handbag retailer.<sup>238</sup> Sazaby confronted a challenge in selling the idea of Starbucks to Japanese consumers; there is no tradition of take-out coffee in Japan, and the “coffee and a smoke” association was clearly visible in successful franchised coffee shops like Renoir and Doutour. When the first Starbucks store opened in the Ginza in 1996, it was billed as “bringing to Japan the Starbucks Coffee store experience and the new coffee and espresso culture that had proved so successful in North America.”<sup>239</sup> Part of that culture was the decoupling of coffee and cigarettes; the first two Starbucks had smoking sections on the second floor, but they were quickly eliminated and all successive stores have been smoke free. The strategy appears to have worked. By 1998 there were 12 Starbucks in Japan, a number that grew to 97 in 1999, 321 in 2002, and 503 in 2003.<sup>240</sup>

Unlike the parody and criticism regularly aimed at Starbucks in the United States,<sup>241</sup> Starbucks has been warmly received in Japan and was awarded the highest possible ranking by anti-tobacco groups who rate

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236. TOPIC, SMOKING IN JAPAN—1997 PROFILE 6, 9 (1997).

237. Eitaka Tsuboi, President of the Japan Medical Association, *quoted in* Daniel P. Dolan, *Japan’s Incredible Anti-Public Interest Tobacco Policy*, GLOCOM, June 19, 2003, available at [http://www.glocom.org/debates/20030619\\_dolan\\_tobacco](http://www.glocom.org/debates/20030619_dolan_tobacco) (last visited Mar. 12, 2006).

238. See Sazaby, <http://www.sazaby.co.jp/> (last visited Mar. 12, 2006).

239. See Starbucks Japan, <http://www.starbucks.co.jp> (last visited Mar. 12, 2006).

240. *Id.*

241. For a variety of entertaining anti-Starbucks web posting, see <http://www.ihatestarbucks.com>. The chain has been parodied on *The Simpsons*, *South Park*, and in the Austin Powers films.

public facilities.<sup>242</sup> Although the reason provided by Sazaby/Starbucks in Japan for their smoke-free policy is that tobacco smoke adversely affects the aroma and taste of their product,<sup>243</sup> the smoke-free approach is characteristic of many Western or Western-style chain restaurants like McDonald's, Denny's, Royal Host, Jonathan's, Subway, and Johnny Rockets, and is increasingly common in Japanese fast food shops like Matsuya, Yoshinoya, Koko Ichiban, and conveyer-belt sushi shops. The degree to which "smoke-free" is associated with the West in Japan is clearly illustrated by a local coffee shop next to the author's Tokyo apartment, which in 2005 posted signs stating that "we observe New York City smoking law out of consideration for our customer's health."<sup>244</sup> Not only culture is at work here; eliminating smoking in restaurants saves money on burnt carpets and emptying ashtrays, limits the amount of time people linger after finishing their meal, and attracts customers who prefer to eat in the absence of tobacco smoke. But the Starbucks story also indicates that Western smoking norms have a more symbolic appeal.<sup>245</sup> The smoke-free atmosphere of Starbucks was successfully marketed to those who shop for Western designer handbags and buy their clothes at Agnes B, at least in part, for the simple reason that sipping a cappuccino in a smoke-free faux living room is what people in the West do.

Seventh, even creative writers have presented dramatic accounts of the denormalization of tobacco in the West. In Tsutsui Yasutaka's 1987 short story, "The Last Smoker," for example, which was made into a TV drama in the 1990s, the protagonist tenaciously continues to smoke despite Japanese society's condemnation of the cigarette.<sup>246</sup> All smoking advertisements are banned in Tsutsui's imagined Japan. Tobacco imports are terminated. Smoking cars that remain on the bullet trains are decrepit ("the seats were in tatters and the windows were covered with dirt"). Tobacco shops are driven out of business. Those who continue to smoke are hunted and killed. Tsutsui includes in his narrative an explanation for the radical transformation of smoking in Japan; he hyperbolically asserts

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242. *Tabako Sensō: Kūki mo Ryōri mo Oishiku* [Tobacco Wars—the Air and Food Get Tastier], NIKKEI SHIMBUN, Dec. 13, 2002. See also Anti-Smoke Site, <http://www.anti-smoke-jp.com/kakuduke.htm> (last visited Mar. 12, 2006).

243. Correspondence with Akutagawa Akiko, Public Relations Department, Starbucks Japan (Jan. 2002) (on file with author).

244. The sign reads in full: "Welcome to our New York Style Café. We observe New York City smoking law out of consideration for our customer's health. But you can still enjoy smoking on the terrace. We have provided two big ashtrays for habitual smokers. Thank you very much for your cooperation."

245. *Shien ni Kufū Kafe Chān* [Cigarette Smoke, The Artifice of a Coffee Chain], ASAHI SHIMBUN, May 31, 2001.

246. TSUTSUI YASUTAKA, SAIGO NO KITSUENSHA [THE LAST OF THE SMOKERS] (Andrew Rankin trans., 1987), available at [http://www.jali.or.jp/tti/story/smokers/smo1\\_1.html](http://www.jali.or.jp/tti/story/smokers/smo1_1.html).

that the “awful Japanese trait of blindly following the crowd came to the fore and discrimination against smokers became rampant.”<sup>247</sup> As Tsutsui’s narrator exclaims,

The countries of Europe and America had already managed to ban smoking entirely. Of course, Japan being a backward country, cigarettes were still on sale and people were still smoking. People said that Japan ought to be ashamed of such a situation. Consequently, smokers were treated like scum and people who lit up in public were often beaten up.

In a story that portrays the United States and Europe as the “enemies” of Japan’s smokers and points a finger at “the World Health Organization and the Red Cross who were supported by the common sense of the whole world,” Tsutsui ensures that Japanese readers understand the gap between the acceptability of smoking in the West and Japan.<sup>248</sup> His intent, of course, was to satirize Japan’s “blind” following of the West, but like all satire, the story’s resonance results from its effectiveness at identifying a fundamental truth and exposing it in a discomforting manner.

The same year that Tsutsui published his story, Japan hosted a major international meeting of public health experts concerned with tobacco-related harms, the Sixth World Conference on Smoking and Health. Although almost 25 years had elapsed since the publication of the U.S. Surgeon General’s 1964 report confirming the health consequences of smoking,<sup>249</sup> the Japanese government had not yet taken any official action regarding tobacco consumption. With the imminent arrival in Japan of a large group of international health officials, the government quickly took action to avoid criticism from visiting delegates, and the Ministry of Health and Welfare issued a report on tobacco, the “White Paper on Smoking and Health,” just before the start of the conference.<sup>250</sup> Those two 1987 events, Tsutsui’s story and the MHW White Paper, were among the earliest catalysts of legal change in Japan.

One can also learn about the importance of external factors as catalysts for change by examining the types of changes that have occurred in Japan and the degree to which they are coordinated. A distinctive quality of Japan’s new tobacco control laws is how poorly they appear to be integrated. The MHLW, for example, announced in “Healthy Japan 21” that it “regards tobacco measures as one of the important themes in pub-

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247. *Id.*

248. *Id.*

249. SMOKING AND HEALTH, *supra* note 97.

250. Interview with Isayama Yoshio (Dec. 2004); MINISTRY OF HEALTH WELFARE, KITSUEN TO KENKŌ-HAKUSHO [WHITE PAPER ON SMOKING AND HEALTH] (1987).

lic health, partly for the prevention of lifestyle-related diseases. Accordingly, the ministry will execute a variety of measures in succession.<sup>251</sup> One might justifiably expect the new measures to be related to some governing principle, perhaps the importance of limiting the third-party harms of smoking or protecting individual smokers from themselves. At the very least, one might hope to find policies that had some proven track record in reducing tobacco-related diseases or were at least connected to public health. Yet the assortment of new tobacco-related laws in Japan resists all efforts to identify any systematic theme or any significant connection between them. One law prohibits outdoor smoking for the stated reasons of litter control and preventing the burning of children; another urges public facilities to limit ETS because it is annoying; a third targets the sale of cigarettes to youth through vending machines. The creation of smoke-free areas is similarly haphazard; one large chain of Tokyo coffee shops supplies portable no-smoking signs, which customers carry to their tables (like an ashtray) if they want to sit in a smoke-free area. None of those are illegitimate policies or policy goals, but as a group they are odd bedfellows—odd enough, that is, to serve as evidence that the denormalization of smoking in the West was an underlying reason for the legal changes in Japan.

#### IV. THE IMPLICATIONS: RETURNING CULTURE TO THE STUDY OF JAPANESE LAW

This Article argues that culture—in the case of tobacco, a propensity to conform to certain Western social norms—offers an explanation for the pace and intensity of legal change in Japan. In contrast, for almost 30 years most mainstream scholarship on Japanese law has strongly criticized the use culture as an explanatory variable and instead proposed that it be treated as a residual variable, only useful when all other analytic approaches have been exhausted. The deemphasis on cultural analysis is largely a response to overgeneralized, overemphasized, and underanalyzed assertions about Japanese law and culture—that there is, for example, a universal Japanese cultural distaste for litigation, a reification of harmony, and a singular focus on duty (with a corresponding disinterest in rights). The justifiably negative reaction to such unsubstantiated claims has detracted from the study of the Japanese legal system by deemphasizing the degree to which there may be certain distinctive cultural attributes that illuminate particular aspects of Japanese law.<sup>252</sup>

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251 HEALTHY JAPAN 21, *supra* note 127.

252. There remain, of course, a variety of dangers in invoking the idea of culture—culture is difficult to define, is dynamic, engenders conflict and contestation, and does not

This Article attempts to redress the imbalance. An examination of smoking enhances our understanding of the interplay between law and culture in Japan: how culture creates the conditions for legal change, how legal change reshapes social practice, and how new social practices reconfigure culture.

During the first decades after WWII, an orthodox view emerged in the legal academy that emphasized how deeply Japanese culture inscribed Japan's legal system. After spending a year living in Japan, for example, Arthur Taylor von Mehren in 1958 described his view of how culture shaped the Japanese legal system:

Japanese society does not wholeheartedly accept . . . three assumptions probably basic to Western thinking about the private, civil law: first, that a high degree of predictability is to be assured as to the consequences of particular conduct long before the conduct has occurred or any dispute has arisen; second, that full effect is to be given to a party's legally justified claims, a plaintiff ordinarily receiving all or nothing at all; finally, that individual disputes should be resolved without regard to the social and economic backgrounds of the persons involved.<sup>253</sup>

Knowing whether one's actions would have legal consequences, in von Mehren's view, was not of the utmost concern in 1950s Japan, and the notion that "justice is blind" was neither an ideal nor the reality of the Japanese legal system. If a Harvard Law School professor made such claims about the U.S. legal system, academics would have greeted them with incredulity and perhaps outrage. But von Mehren's musings about law in Japan barely elicited a reaction, perhaps because U.S. scholars simply assumed that Japan's legal system shared little with their own.<sup>254</sup>

Von Mehren's article was followed five years later by Takeyoshi Kawashima's *Dispute Resolution in Contemporary Japan*.<sup>255</sup> Kawashima argued that the reason why disputes rarely ended up in Japanese courts

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conform to neatly drawn national or regional borders. Nor does a consideration of culture replace or contradict claims about the importance of institutions, economics, or interests.

253. Mehren, *supra* note 56, at 1496.

254. The article was rarely cited in law journals, and even when it was, the citations were cursory, suggesting that it provoked little interest or debate in the legal community. It was completely neglected by social scientists; the Social Sciences Citation Index does not contain a single reference to the article during the five years following its publication.

255. Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41 (Arthur T. von Mehren ed., 1963). The article was followed by TAKEYOSHI KAWASHIMA, *NIHONJIN NO HŌ-ISHIKI* (1967), a seminal work of Japanese legal sociology. For a discussion of Kawashima's work and its enduring influence, see Eric A. Feldman, *Kawashima's Legacy: Four Decades of Research on Dispute Resolution in Japan*, in *LAW IN JAPAN: A TURNING POINT?* (Daniel Foote ed., forthcoming 2006).

was culture, or more specifically what he described as widespread deference to authority, respect for hierarchy, and preference for consensus and harmony over conflict. Kawashima's emphasis on culture was, and remains, a landmark. J. Mark Ramseyer advises that "serious Western students of Japanese law would . . . do well to begin their studies with Kawashima," and Hilary Josephs notes that since WWII, "studies of Japanese law by both Japanese and Western scholars have been dominated by the Kawashima hypothesis."<sup>256</sup>

In the wake of Kawashima, other prominent Japanese legal academics wrote extensively about the "traditional characteristics" of Japanese society and their influence on law-related beliefs and behavior.<sup>257</sup> U.S. legal scholars also heeded Kawashima's call. Those with expertise in Japanese law were generally careful to contextualize their use of culture. The definitive work on the history of conciliation in Japan, for example, focused on the political underpinnings of policies that encouraged extrajudicial dispute resolution, and in doing so the author grappled with the influence of culture. But scholars without much expertise in the Japanese legal system often subscribed to an exaggerated and unidimensional version of Kawashima's relatively limited claims, asserting the overwhelming influence of Japanese culture on law without defining culture or specifying the mechanism of its influence.<sup>258</sup>

Since the late 1970s, approaches to Japanese law that attribute significant explanatory value to culture have been in retreat. In their place one finds a variety of alternative explanatory variables for Japanese legal behavior. Some highlight such factors as the low number of trained legal professionals and the high financial cost of going to court, arguing that what Kawashima saw as behavior borne of tradition and culture is actually a consequence of barriers the Japanese government intentionally

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256. RAMSEYER & NAKAZATO, *supra* note 17, at 289 (1999); Hilary K. Josephs, *The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation*, 18 EMORY INT'L L. REV. 53, 62 (2004). Such claims need to be understood in context. Josephs minimizes Kawashima's emphasis on culture, asserting: "Professor Kawashima's seminal work . . . stands for the proposition that the Japanese use law to a much lesser extent in ordering their affairs than Americans do and that they are less litigious in resolving disputes than Americans." *Id.* at 62. In fact, Kawashima's contribution was his culture-based explanation of this state of affairs, not simply his statement of the issue. Ramseyer's suggestion is not that one should read Kawashima for his useful insights, but that one needs to be familiar with him because those who do not know any better too often believe him. Some have argued that many Japanese legal scholars continue to subscribe to his views. *See, e.g.*, TANAKA SHIGEAKI, *GENDAI SHAKAI TO SAIBAN: MINJI SOSHŌ O ICHI TO YAKUWARI* (1996).

257. *See, e.g.*, YOSHIYUKI NODA, *INTRODUCTION TO JAPANESE LAW* (1976).

258. *See, as one of many examples*, Chin Kim & Craig M. Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L & COMP. L. Q. 491 (1979).

created to make litigation a burdensome form of dispute resolution.<sup>259</sup> Others look more broadly at the relationship between litigation and social change, placing bureaucrats at center stage. In that view, bureaucrats have one primary motivation—to control the process of social change in order to maintain their jobs and their agency’s turf.<sup>260</sup> Still others emphasize the rational motivations of lawmakers and potential litigants, stressing the degree to which legal actors make choices that reflect their assessment of how best to maximize their interests—reelection for politicians, for example, and financial returns for litigants.<sup>261</sup> Despite the important conceptual differences between these approaches, they share a skepticism about efforts to explore Japanese law through the lens of culture, which they see as conceptually weak, undefined, and tautological.

For the past several decades, therefore, most U.S. contributors to the study of the Japanese legal system have championed various forms of institutionalism and economic rationalism and ignored (or rejected) the importance of culture.<sup>262</sup> There are, of course, some important exceptions. Despite his compelling attack on Kawashima in the 1970s, for example, John Haley has in his more recent work increasingly emphasized the importance of culture to a comparative understanding of law, noting the “deep divisions between the United States and Japan in the most basic cultural assumptions about universal values, rules, and their application as well as the role of the state and fundamental patterns of

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259. See John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 349 (1978). But note that as discussed in the following paragraphs, Haley’s more recent work increasingly acknowledges what he considers to be salient cultural differences between the United States and Japan.

260. UPHAM (1987), *supra* note 75.

261. Ramseyer does not entirely reject the possibility that something called “culture” could help to explain certain aspects of Japanese law. But as he replies to a hypothetical critic who insists that he include culture in his law and economics model, “what we would gain in explanatory breadth . . . we would lose in theoretical parsimony.” RAMSEYER & NAKAZATO, *supra* note 17, at xiii.

262. I am to some degree overstating the case. Rarely do serious scholars of Japanese law suggest that culture is irrelevant. Instead, they step over it as if it were an unavoidable but rather unseemly obstacle in the path of more “rigorous” analysis. Political scientists, like legal academics, have also been wary of cultural explanation. As Patricia Maclachlan has recently written, “Culture is the bete noire of Japanese political studies.” Patricia L. Maclachlan, *From Subjects to Citizens: Japan’s Evolving Consumer Identity*, 24 JAPANESE STUD. 115, 115 (2004). In her recent work, Maclachlan, relying on contemporary anthropology’s focus on culture as meaning, has been examining the “attitudes, values, beliefs, orientations, and the myths and metaphors in which those elements are often embodied,” which she argues “are the mechanisms through which ordinary citizens relate to their political systems.” *Id.*

In some instances, the word “culture” was avoided; Kawashima, for example, often wrote of “traditional” attitudes and behaviors, and others made reference to society, social values, or other general terms. But avoiding the word “culture” did not avoid the conceptual difficulties that cultural analyses raised.

social ordering.”<sup>263</sup> In addition, those who study the Japanese criminal justice system are more receptive to certain culture-based explanations than those who examine Japanese corporations or other business organizations, as are scholars writing about Japanese health care, particularly informed consent.<sup>264</sup> And the work of a newer generation of Japanese law scholars grapples with certain aspects of culture—primarily from the perspectives of postmodern social theory and “new institutional economics.”<sup>265</sup> Yet even when these scholars give culture a nod of recognition, they rarely grant it center stage in their analyses.<sup>266</sup>

The scholarly move away from culture in the study of Japanese law has as much to do with sociological factors as with purely intellectual concerns.<sup>267</sup> The emphasis on culture emerged in the postwar period,

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263. HALEY, *supra* note 15, at 197. See also JOHN O. HALEY, *THE SPIRIT OF JAPANESE LAW* (1998).

264. For studies of Japanese criminal justice that emphasize some aspect of Japanese culture, see Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317 (1992); DAVID JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* (2001); DAVID H. BAYLEY, *FORCES OF ORDER, POLICING MODERN JAPAN* (1991). For an analysis of informed consent that considers cultural and institutional perspectives, see Leflar, *supra* note 133. For a recent study of nonprofit organizations in Japan that rejects the role of culture in explaining shareholder activism in Japan and other East Asian states, see Curtis J. Milhaupt, *Nonprofit Organizations as Investor Protection: Economic Theory and Evidence from East Asia*, 29 YALE J. INT’L L. 169, 198–99 (2004).

265. See, e.g., Annelise Riles, *Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 94 (Annelise Riles ed., 2001); CURTIS J. MILHAUPT & MARK D. WEST, *ECONOMIC ORGANIZATIONS AND CORPORATE GOVERNANCE IN JAPAN: THE IMPACT OF FORMAL AND INFORMAL RULES* (2004).

266. Thus, in their jointly authored book on Japanese corporate governance, Milhaupt and West are enticed by the literatures of law and economics, and norms, to examine the formal and informal rules that shape economic behavior. Less wary scholars may have found it tempting to affix the label “culture” to what Milhaupt and West call informal rules or norms. But the authors are well aware of the hazards of invoking culture in the same breath as Japan and therefore dismiss those who invoke culture by caricaturing their view of the Japanese as people who are “captives of their culture, incapable of adaptation due to deeply rooted, shared understandings of how their world is supposed to work.” They are surely correct to dismiss such an essentialized notion of culture; but outside the field of Japanese legal studies such notions have been dead for two decades. In fact, the authors go on to say that they “do not dispute that Japan has a relatively distinctive ‘culture,’ if that means a set of mutually reinforcing formal and informal institutions that affect behavior and people’s understandings of their behavior.” MILHAUPT & WEST, *supra* note 265, at 4–5. Aside from several brief references to corporate culture, however, the word culture does little analytical work in the book.

267. Note, for example, that worries about the difficulty of defining and limiting one’s basic unit of analysis—as are so often raised vis-a-vis “culture”—have not led serious scholars to shy away from using the concept of institution. In fact, rarely do writings focusing on institutional analyses of the Japanese legal system offer a definition of “institution” that has any more conceptual clarity than the sorts of definitions that are regularly offered for “culture.” In a sophisticated institutional analysis of Japanese corporate law, for example, Milhaupt and West define “institution” as “any formal or informal constraint on human behavior” MILHAUPT & WEST, *supra* note 265, at 1. That definition leaves almost nothing out—everything from handcuffs, I.Q., and the weather qualify as constraints on behavior—and at the same



when many scholars were trying to explain how (or if) Japan could escape its pre-war militarism and become more modernized and Westernized. Noting what they perceived as a gap between the modern legal institutions of the West and those in Japan, legal scholars focused on culture as a way of understanding the roots of Japanese law-related behavior and the types of cultural changes necessary to support a more Westernized legal system. Institutional analyses arose on the heels of the 1960s, a period of social unrest in both the United States and Japan. Many Japanese intellectuals saw the state as increasing powerful; the most widely cited works on the Japanese political economy of that era credit the government with a remarkable degree of effectiveness at avoiding social upheaval and creating an economic “miracle.” It is therefore unsurprising that legal scholars were particularly interested in the exercise of power from above and were confident the Japanese state could manipulate (for better or worse) the legal system and manage social change.<sup>268</sup> The application of economic methodologies to Japanese law reflects the more recent emphasis on free market thinking and the logic of incentives rooted in self-interest as the engine of human behavior.

Moreover, the rejection of culture was, perhaps unconsciously, part of a survival strategy for those with expertise in Japanese language and law.<sup>269</sup> Scholars of Japanese law could easily see cultural approaches to the study of the Japanese legal system as threatening the relevance of their field. After all, if one reduces the study of law to the study of Japanese culture, then expertise in Japanese law is hardly the province of those with knowledge of courts, procedures, legal doctrine, or statutory drafting.

Ironically, the general neglect of culture in the study of Japanese law has persisted despite a resurgence of interest in culture among social scientists and the flourishing of a closely related concern—social norms—among legal scholars. In the social sciences, particularly anthropology, sociology, and political science, there has been an outpouring of literature that ranges from politically charged essays on the relationship

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time its focus on behavioral constraints rather than behavioral facilitators seems overly limiting. Like culture, the concept of institution is analytically useful, even though it eludes a reasonably tailored definition. Unlike culture, however, institution is a term economists frequently use, and the comfort with which legal scholars embrace it (while avoiding culture) says more about the contemporary presence of economics in law schools than it does about its inherent utility.

268. Of course, the focus on power from above did not obscure a concern with other aspects of power and protest in Japan. Much of UPHAM (1987), *supra* note 75, for example, treats the exercise of governmental authority as a reaction to social upheaval.

269. See Frank K. Upham, *The Place of Japanese Legal Studies in American Comparative Law*, 1997 UTAH L. REV. 639 (1997).

between culture and economic development to theoretical meditations on the meaning of culture and careful methodological discussions about its study.<sup>270</sup> In the legal academy, culture attracts the attention of a sophisticated group of legal sociologists, and the social embeddedness of law-related rules and behaviors has received a great deal of attention from those writing about behavioral law and economics, norms, risk, and other areas.<sup>271</sup> In different ways, scholars in all of those areas are seeking to understand individual behavior under conditions that involve a mix of formal legal rules and less explicit social constraints. Yet among many who work in the field of Japanese legal studies, the study of culture has for three decades been almost a taboo. This Article aims to redress the balance, building on the insights of recent scholarship on Japanese law while offering a robust approach to analyzing the influence of culture on Japan's legal system.

## V. CONCLUSION

This Article argues that the denormalization of smoking in the West was a critical factor in causing the emergence of newly robust legal controls of smoking in Japan. The relationship between Western norms and Japanese law, it asserts, is mediated by a conformity norm that facilitates the translation of Western smoking norms into Japanese laws. Law is not the only manifestation of the conformity norm, but the creation of new laws is an effective way of signaling the government's acquiescence to a particular aspect of Western influence. As those in positions of power experienced the discomfort of presiding over a society regularly described as a "smokers' paradise," one increasingly out of step with how

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270. One particularly influential effort to provide a systematic analysis of culture is Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273 (1986). See also BEYOND THE CULTURAL TURN (Victoria E. Bonnell & Lynn Hunt eds., 1999); MICHAEL KEATING, JOHN LOUGHLIN & KRIS DESCHOUWER, *CULTURE, INSTITUTIONS, AND ECONOMIC DEVELOPMENT: A STUDY OF EIGHT EUROPEAN REGIONS* (2003); *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* (Lawrence E. Harrison & Samuel P. Huntington eds., 2000); Douglas, *supra* note 61.

271. See, e.g., MERRY, *supra* note 35; LEGAL CULTURE AND THE LEGAL PROFESSION (Lawrence M. Friedman & Harry N. Scheiber eds., 1996); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 295 (2001); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Richard Posner, *Law, Economics, & Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000); BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); David Nelken, *Towards a Sociology of Legal Adaptation*, in ADAPTING LEGAL CULTURES, *supra* note 1, at 7; Dan M. Kahan et al., *Fear and Democracy or Fear of Democracy? A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. (forthcoming 2006).

the West regards smoking and smokers, they turned to the law as a way of marking their concern.

Given the plethora of norms that govern behavior in the United States and other Western nations, how does one account for the fact that some norms appear to have a powerful influence in Japan while others are ineffective?<sup>272</sup> In Part I, the Article argues that three criteria are particularly important: the substance and content of a norm, the availability of local agents to introduce and promote the norm, and the degree to which domestic conditions are receptive to the norm. The substance of the anti-smoking norms fits well in Japan, Part I claims, both because the consequence of adopting the norm involves obvious health benefits and because it implicates a set of behaviors involving manners and propriety that have long served as markers of Japan's "civilized" status. Local agents, detailed in Part III, were active and diverse. They included the media, government officials who negotiated the WHO's international tobacco treaty, foreign companies operating in Japan, anti-tobacco activists, some politicians and finance ministry officials, and others. Those agents were critical to the transmission of Western tobacco-related norms; after the conformity norm served to put Western smoking norms on the policy agenda, a coalition of domestic actors brandished the norms and successfully impelled policy change. Domestic conditions, as Part III.B discusses, were receptive to the influence of the new tobacco-related norms. Most importantly, the power and resolve of the tobacco lobby, which had for decades defeated all efforts to create a more robust set of controls for tobacco, had waned, defanging what had been a powerful opposition to robust tobacco policy.

Although substance, agency, and local conditions account for the ability of Western smoking norms to shape Japanese laws, they do not explain the speed or intensity of the legal changes. To do so, the Article highlights the intersection of three conditions in the late 1990s and early 2000s: major international changes, particularly the WHO's aggressive pursuit of the FCTC and piqued legal battles over smoking in the United States; domestic political and economic changes in Japan, especially the election of Prime Minister Koizumi, the reconfiguration of a key Ministry of Finance advisory committee, and the jailing of an important tobacco power broker (Suzuki Muneo); and changes in the material interests of Japan Tobacco, which increasingly sees its future in its international, rather than domestic, tobacco sales. Those conditions came together to spark rapid and concentrated legal change.

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272. For a recent and insightful analysis of cross-national learning in the area of health policy, see Theodore Marmor, Richard Freeman & Keike Okma, *Comparative Perspectives and Policy Learning in the World of Health Care*, 7 J. COMP. POL'Y ANALYSIS 331 (2005).

As the Diet and local authorities enacted new laws that emphasized who can smoke, created limited smoking zones, and regulated the disposal of cigarette butts (among other measures), they sent a clear message to the Japanese citizenry and the international community: Smoking is no longer the unquestioned, “natural,” assumed state of affairs. In place of smoking normalcy, the new legal regime draws attention to the smoker as outcast, evoking a bygone era when *murahachibu*, or expulsion from the village, was considered the ultimate punishment. Together with a newly robust legal framework for tobacco, therefore, Japan is experiencing another equally far-reaching set of changes—a reshaping of informal smoking norms.<sup>273</sup>

There is evidence of the new smoking norms in Japan in a variety of quarters. One telling sign is JT’s aggressive advertising campaign that trumpets the virtues of new “reduced odor” products like Frontier Neo Box and fragranced cigarettes like Lucia Citrus Fresh Menthol.<sup>274</sup> On subways, buses, and vending machines, advertisements have appeared touting cigarettes with the fresh scent of lemongrass, the tangy smell of citrus, and the sweet perfume of a rose, or in contrast, almost no smell at all. Starting in 2004, JT announced it would triple its production of scented cigarettes, investing ¥7 billion in the effort with the expectation of manufacturing 13 billion such cigarettes annually.<sup>275</sup> The emphasis on smell is particularly significant; whereas the smoke from cigarettes was once widely considered pleasing in Japan and elsewhere, it is now thought of as a stink.<sup>276</sup> Reduced odor and perfumed cigarettes in Japan thus symbolize one element of the shift in the social norms of smoking.

Indeed, throughout Japan, public and private actors, individuals and institutions have come to see smoking as an inconvenience, an indiscretion, and an inappropriate activity in shared space. As a result, Japanese society is slowly pressing smokers to its margins. How thoroughly they will be sidelined, not whether, is the relevant question. There are many telling examples of Japan’s rapidly shifting smoking norms:

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273. The change can be described as a “norm cascade,” which Sunstein describes as the rapid proliferation of a norm that has reached a tipping point and is being disseminated throughout society. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929–30 (1996).

274. Taiga Uranaka, “Reduced Odor” Smells Like Desperation, JAPAN TIMES, Jan. 18, 2005.

275. Mari Murayama, *Japan Tobacco to Triple Output of Cigarettes with Less Smell*, BLOOMBERG ONLINE, Apr. 9, 2004.

276. George Orwell pointed out that class distinctions are intertwined with aroma, and a recent study of smell argues that “evoking or manipulating odour values is a common and effective means of generating and maintaining social hierarchies.” See CONSTANCE CLASSEN, DAVID HOWES & ANTHONY SYNNOOTT, *AROMA: THE CULTURAL HISTORY OF SMELL* 8 (1994).

- The Koto Ward of Tokyo printed 30,000 yellow paper cards (an unfortunate color choice, given the message of social opprobrium, though perhaps another sign of Western influence) with disapproving messages about smoking to be handed to anyone seen smoking in a public place.<sup>277</sup> The small cards, meant to minimize the direct confrontation that could result from a verbal admonition, stated that “[c]igarette smoke is harmful to others. Please follow the law and help reduce passive smoke.”<sup>278</sup>
- A couple who had been abducted by North Korean agents and spent many years in Korea was recently allowed to return to Japan. Soon thereafter they wrote an angry letter denouncing a weekly magazine that had described their 16-year-old son as a smoker, claiming that the “article deliberately spoils the innocent image of our son . . . .”<sup>279</sup> Stung by the accusation, the magazine issued a formal apology.<sup>280</sup>
- Smokers working in Otemachi, the location of Japan’s most elite corporate and political institutions, crowd into SmōCar, a mobile smoking station provided by JT that contains vending machines, counter-space for boxed lunches, and a bar.<sup>281</sup>
- Fuchu, a suburb of Tokyo with a population of over 200,000 and best known as the home of a race track, military base, prison, and cemetery, made the littering of cigarette butts a legal offense in late 2004.<sup>282</sup>
- An article bemoaning what it considered an increase in juvenile delinquency highlighted the fact that underage smokers gather in karaoke clubs for late night carousing.<sup>283</sup>
- Since 1934, Japanese emperors have given away cigarettes emblazoned with the gold imperial insignia to everyone from

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277. *Smoked Out*, METROPOLIS OF JAPAN TODAY, Oct. 22, 2004, at 4. available at <http://metropolis.japantoday.com/Tokyo/552/smallprint.asp>.

278. *Id.*

279. *Chimuras Protest at Weekly Magazine Over Article on Son*, JAPAN POL’Y & POL., June 7, 2004, [http://www.findarticles.com/p/articles/mi\\_m0XPQ/is\\_2004\\_June\\_7/ai\\_n6279728](http://www.findarticles.com/p/articles/mi_m0XPQ/is_2004_June_7/ai_n6279728).

280. *Magazine “Regrets” Article on Abductees’ Son*, JAPAN TIMES, June 6, 2004.

281. A photo of SmōCar can be seen at <http://www.jti.co.jp/JTI/tobacco/smocar/index.html>.

282. *Smoked Out*, *supra* note 277, at 4.

283. See *Karaoke Boxes Smoky Dens of Juvenile Delinquency*, MAINICHI DAILY NEWS, Apr. 3, 2004; of the more than 18,000 offenses in karaoke boxes, most of them (14,000) involved smoking.

visiting dignitaries to kamikaze pilots. But in 2005, the Imperial Household Agency announced it would stop handing out cigarettes in 2007, explaining that its action “reflects the trend of the time.”<sup>284</sup>

Not surprisingly, the new smoking norms take some distinctively local forms. According to a recent study of tobacco consumption in the workplace, for example, it appears that those of higher employment rank will generally smoke without inquiring about the preferences of others, and if they do ask their subordinates, they will readily be encouraged to smoke. Subordinates, on the other hand, do not smoke around their bosses.<sup>285</sup> Consequently, a newly coined term, *sumo hara*, (echoing the imported language of sexual harassment, *seku hara*) denotes smoking harassment, the “abuse” of subordinates by smoking bosses.<sup>286</sup>

New smoking-related norms have also infiltrated academic institutions. One might imagine that university professors would carve out an intellectually nuanced position on smoking. They could attack the new tobacco control edifice as an unprincipled intrusion of the state into the risk-taking preferences of individuals. They could marshal the authority of John Stuart Mill, or even the meditations on tolerance and mortality found in Buddhist writings, to disparage a set of formal rules that punish people who have freely chosen to smoke, or who can’t stop, or who are harming no one but themselves. When Wakayama University announced that it would become the first smoke-free campus in Japan (others have confined smoking to limited areas), however, two of the three associations representing Wakayama University professors opposed the ban and succeeded in having it rescinded. Their claim was that faculty members would be less productive if the university prohibited them from smoking.<sup>287</sup> Here too, one can detect the impact of changing smoking norms in Japan. The professoriate, unaccustomed to having its behavior scrutinized, appears to have grabbed onto the only justification it thought

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284. Richard Lloyd Parry, *After 71 Years, Emperor Declares Gifts Smoke-free*, TIMES (London), June 9, 2005, available at <http://www.timesonline.co.uk/printFriendly/0,,1-3-1646443,00.html> (last visited June 10, 2005).

285. See *Poll Finds Nonsmokers Unlikely to Say “No” to Smokers’ Pleas*, DAILY YOMIURI, May 30, 2004, at 2, available at <http://www.yomiuri.co.jp/newse/20040530wo61.htm>, discussing a survey by the Smoking-Cessation Information Center of 600 male employees, 67% of whom refrain from smoking around their superiors but only 31% of whom refrain from smoking around subordinates.

286. As Robert Bullock has pointed out, the use of katakana indicates that the *sumo hara* norm is thought of as something international (katakana is only used for foreign words) but sufficiently localized to be incorporated into the Japanese language. E-mail from Robert Bullock, Professor of Political Science, University of California-Riverside, to Eric A. Feldman (on file with author).

287. *Academics get Fiery over Ban on Lighting Up*, MAINICHI DAILY NEWS, Apr. 3, 2004.

persuasive—academic productivity, not the right to smoke, or personal choice, or any other more generalizable claim—as the reason for insisting they should be able to smoke on campus.

The denormalization of smoking in Japan has not realized Tsutsui's vision of a smoker-less nation. In his account,

the National Tobacco Company was set on fire, and when the company was eventually forced into bankruptcy the Dark Age for smokers really arrived. Each night, parties of Anti-Smoking League members roamed the streets wearing pointed white masks and carrying torches above their heads, setting fire to the few tobacco stores that remained.<sup>288</sup>

Japan's only tobacco company has not been burned or bankrupted, but the shrinking domestic market has made it increasingly dependent upon international expansion. Instead of carrying torches, those who object to smoking hand out yellow cards to "offenders" that contain scolding messages. Tobacco shops are not being attacked, but sales of cigarettes are often faceless transactions with vending machines that will soon require consumers to insert an ID card to verify they are of smoking age. In sum, a normative change toward smoking in the West has gradually affected every aspect of smoking in Japan. Japanese lawmakers changed the legal apparatus of smoking as a reaction to the new Western no-smoking norms, and social approval of smoking vanished, replaced by intolerance and the expulsion of smokers from public spaces. Culture has led to changes in law, just as the law has influenced the transformation of culture.

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288. TSUTSUI, *supra* note 246.

APPENDIX I  
SMOKING RATES IN JAPAN, 1960–2004 (PERCENT OF POPULATION)

	1960	1965	1970	1975	1980	1985	1990	1995	2000	2001	2002	2003	2004	2005
Men	85.5	82.3	77.5	76.2	70.2	64.6	60.5	58.5	53.5	52.0	49.1	48.3	46.9	45.8
Women	13.2	15.7	15.6	15.1	14.4	13.7	14.3	15.2	13.7	14.7	14.0	13.6	13.2	13.8

Source: *Kitsuen to Kenkō ni Kansuru Hōkokusho*, KōSEISHŌ 7 (1987) (for 1960–1985 data); *Nihon no Tabako Jijyō*, TOPIC (2003) (for 1990–1995 data); *JT News Release*, Oct. 19, 2004, at <http://www.jti.co.jp> (for 2000–2004 data); *Smoking Rate Falls to Record Low of 29.2%*, JAPAN TODAY, Nov. 2, 2005, available at <http://www.japantoday.com/e/?content=news&cat=9&id=352507>.