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Salil K. Mehra*

ABSTRACT

Do Americans interpret accidents in a culturally distinct way? This article addresses the possibility of an affirmative answer; such a tendency has significant implications for comparative law studies of accidents and the attribution of harm. Differences in how individuals perceive accidents can translate into differences in how legal systems relate to their underlying society.

This article also reports the results of an empirical study designed to test the hypothesis that people understand accidents in culturally-inflected ways; this study was done as a preliminary effort to spark further discussion concerning harm, attribution, and culture. Subjects in the United States and Japan reviewed a nonverbal cartoon illustrating an accident that could be attributed to multiple factors and then were presented with a second set of images illustrating those factors. Some of the factors were images of human actors, and were thus more immediately suggestive of human agency; others were images of machines, animals, or conditions. Respondents were then asked to mark the images, if any, that they considered to be the factors to attribute the harm to. Results of the study were consistent with the hypothesis that Americans, in contrast to Japanese, were less likely to decide not to attribute harm to any particular cause, were less likely to

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attribute harm to the overall situation, and in some cases, were more likely to attribute harm to a salient human action.

These findings suggest that a line of empirical inquiry may be relevant to debates on the comparatively high U.S. litigation rate. In particular, if U.S. attitudes towards causation, blame, and liability tend to favor attributing harm to human action, then judicial resolution between plaintiffs and defendants may simply reflect U.S. attitudes. Additionally, the U.S. commitment to "adversarial legalism" may reinforce how Americans view accidents. As a result—and contrary to the claims of a generation of U.S. scholars on Japanese law—individual Americans may indeed be more "litigious" than their Japanese counterparts, if that term is redefined as the tendency to see things from the viewpoint of a potential litigant. With the caveat that further investigation is warranted, the divergence identified here should be taken into account in international and comparative law: these fields may be on a collision course with behavioral law and economics.

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> Some people have decided that nowhere in Fukushima is safe . . . . It wasn't just the Tokyo Electric Power Company [TEPCO] that caused all this. It was all of us who lived with it and enjoyed the benefits.
>
> –Mari Kobayashi, Fukushima prefecture farmer and evacuee, quoted in *The New Yorker*[1]

> Westerners tend to focus narrowly on individuals taking actions, while Asians are more likely to focus on context and relationships.
>
> –David Brooks, columnist for *The New York Times*[2]

Once upon a time, discussions of the differences between Americans and Asians were often cast in broad-brush generalizations that may well sound embarrassing in the twenty-first century.[3] However, in part due to striking findings from cultural psychology, such generalizations—which some might term stereotypes[4]—seem to be making a comeback, at least as far as the writers of *The New Yorker* and *The New York Times* are concerned.[5]

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[1] Evan Osnos, *Letter from Fukushima: The Fallout*, NEW YORKER, Oct. 17, 2011, at 46 (quoting Kobayashi).

[2] DAVID BROOKS, THE SOCIAL ANIMAL 141 (2011) (describing the findings of cultural psychologists).

[3] *See* Chin Kim & Craig Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L & COMP. L.Q. 491, 496 (1979) ("Logic has no place in Japanese thought.").

[4] Of course, others—including law professors—in the popular press also seek to disabuse us of our concern over such stereotypes based on recent empirical studies. *See* Amy Chua, *Why Chinese Mothers are Superior*, WALL ST. J., Jan. 8, 2011, at C1, *available at* http://online.wsj.com/article/SB10001424052748704111504576059713528698754.html ("Despite our squeamishness about cultural stereotypes, there are tons of studies out there showing marked and quantifiable differences between Chinese and Westerners when it comes to parenting.").

[5] *See* David Brooks & Gail Collins, *Western Men Are Doomed*, N.Y. TIMES OPINIONATOR (Nov. 11 2009, 4:11 PM), http://opinionator.blogs.nytimes.com/2009/11/19/western-men-are-doomed (stating that the "mode of thought more common in Asia is better suited to the complex networks that make up the modern world" and "[t]he contextual, associational style is simply more valid"). *See generally* BROOKS, *supra* note 2. The book debuted at #1 on the *Times*' bestsellers list for nonfiction. *Best Sellers*, N.Y. TIMES, Mar. 27, 2011, at BR 26, *available at* http://www.nytimes.com/best-sellers-books/2011-03-27/hardcover-nonfiction/list.html.

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This article addresses the implications of cultural differences in perception for interpreting accidents, and presents the results of a study investigating such differences. This study stands at the intersection of several different avenues of past research. It seeks to build on the ongoing debate about narratives, heuristics, and tort law. The U.S. legal system, and particularly its approach to tort law, has embedded within it a particular notion of blame, cause-and-effect, and responsibility. This is not surprising; for consistency's sake, the fundamental task of translating harm into liability requires that standards for evaluating causation be developed. While the need for such a mechanism is widely understood, the possibility that it will be culturally inflected is not always appreciated.[6] This article also seeks to address the field of cultural psychology, which has generated experimental findings showing perception differences between Westerners and East Asians.[7] Finally, the study applies insights from pre-existing exchanges concerning differences in litigiousness between the U.S. and Japan. Explanations for these differences have often turned on the question of whether or not there is a difference in "legal consciousness" between Americans and Japanese. This article is the first of its kind to consider whether one element of legal consciousness—the way individuals attribute blame for accidents—differs between Americans and Japanese.

The theme of cultural difference echoes throughout discussions in several academic fields. The law and economics movement's exaltation of the rational actor model draws fire from those who argue that, rather than being universal, the model relies on a constructed American tendency to highlight the "disposition" of

[6] *See* Justin D. Levinson & Kaiping Peng, *Valuing Cultural Differences in Behavioral Economics*, 4 ICFAI J. BEHAV. FIN. 32 (2007). *But see* Barbara Fried, *The Limits of a Nonconsequentialist Approach to Torts*, LEGAL THEORY (forthcoming 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957467## (referencing impact of cultural influences); *see* ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

[7] *See generally* RICHARD NISBETT, THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY (2003). This book has attracted a fair degree of criticism. *See, e.g.*, Sherry Ortner, *East Brain, West Brain*, N.Y. TIMES (Apr. 20, 2003), http://www.nytimes.com/2003/04/20/books/east-brain-west-brain.html (questioning the "framing [of] the whole argument as a contrast between Asians and Westerners in the first place" given salient differences within groups and the danger of "fostering or feeding unproductive stereotypes (or worse)"); Peter Gordon, *The Geography of Thought: How Asian and Westerners Think Differently . . . and Why*, ASIAN REV. BOOKS (Jul. 22, 2003), http://www.asianreviewofbooks.com/new/?revID=262# (review of Nisbett) (finding "Nisbett's attempts to draw links between the differences in thought processes [as found in psychological experiments] and sociology, history and linguistics to be somewhat tenuous").

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an actor rather than her situation.[8] Cultural psychologists examine whether Americans (or Westerners) display cognitive biases shaped by living in an "independent" culture—and whether Japanese (and other non-Americans and non-Westerners) display biases shaped by life in an "interdependent" culture.[9] Comparative law scholars, especially those who study the United States and Japan, debate the degree to which litigation behavior is shaped by "litigiousness" and a desire to vindicate individual rights in the former and a cultural aversion to litigation plus a desire for harmony in the latter.[10]

These debates all involve a similar question with a high degree of relevance for law: do Americans, as compared to, for example, the Japanese, particularly attribute occurrences to individual choices instead of to context—or rather than not making such attributions at all? In an increasingly interdependent world in which a variety of activities, from trade to war to environmental disasters, generate cross-border effects, the answers to these questions matter. The extent to which Americans perceive these issues distinctly from others may impede satisfactory resolutions to them. Accordingly, this article strives to inform the way American legal scholars think of their own assumptions, as well as suggest a reconsideration of the assumptions we make when we compare our legal system to that of Japan. It does so by bringing together theories and methods from both legal discourse on the process of "naming, blaming, and claiming"[11] across different societies and psychology studies of "cultural cognition" that focus in particular on the differences between how Americans perceive the same phenomena relative to Japanese (and others).[12] It is structured as follows: Part I provides a detailed

[8] *See* Adam Benfardo & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 382–83 (2008) (describing the theory that the degree to which different groups of Americans share this tendency is crucial to understanding contemporary debates over policy and law).

[9] *See generally* Melody Manchi Chao et al., *Personal and Collective Culpability Judgment: A Functional Analysis of East Asian-North American Differences*, 39 J. CROSS-CULTURAL PSYCHOL. 730 (2008); David Matsumoto & Hyi Sung Hwang, *Culture and Emotion: The Integration of Biological and Cultural Contributions*, 43 J. CROSS-CULTURAL PSYCHOL. 91, 107 (2011).

[10] *See infra* Part I.C.

[11] William Felstiner, Richard Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 LAW & SOC'Y REV. 631 (1981) (setting forth a framework for understanding the forces involved in the social construction of disputes).

[12] By "cultural cognition," I refer to the subfield of psychology, *see infra* Section I.B., not the similar body of work associated with Yale Law's Dan Kahan and his collaborators. *See* CULTURAL COGNITION PROJECT AT YALE LAW SCHOOL, http://www.culturalcognition.net/ (last visited July 1, 2012).

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description of the parallel and similar dispositionist/situationist, independent/interdependent, and litigious/nonlitigious dyads (see Figure A, Section 1.C., *infra*) that behavioral economists, cultural cognition psychologists, and comparative lawyers respectively have deployed to contrast the U.S. with Japan (and elsewhere). Part II describes the experiment and explains its results. The results confirm that, at least for the cartoon accident scenarios they were provided, Americans and Japanese do attribute harm from accidents differently; American respondents tended to attribute accidents to particular causes, and to human action rather than contextual factors, more often than Japanese respondents.[13] Part III explains how, based on the theories presented in Part I, these differences are likely meaningful manifestations of socially and culturally inflected patterns of attributing blame; Part III also sets forth several proposals related to how these results impact the U.S. view of other legal systems and transnational legal problems, and is followed by a brief conclusion.

I. CONTEXT

A. Multiple Causation, Social Construction, and Heuristics

1. Tort

You're starting your day like any other, waiting for your train to arrive to take you to work. A train is about to depart, but it is not yours. Just as it starts to move, a young man carrying a briefcase runs up to the open door. In a questionable move, the train staff helps him aboard, but he drops the briefcase. Its contents explode, sending the waiting commuters scrambling across the platform in panic, knocking over a luggage scale that injures an innocently bystanding woman.[14]

The story of *Palsgraf*, familiar to virtually all first-year American law students, raises a simple question with complex answers: How do we attribute harm when an accident has multiple causes?[15] There are familiar rules, of course, involving intervening causes, factual causation, and proximate cause. In fact, we might suspect that methods of attribution have cultural valence. As Hart and Honoré observed in their landmark work, *Causation in the Law*, which compares

[13] *See infra* Part II.

[14] Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928). There are conflicting accounts about whether the shock of the explosion or a panicked waiting passenger knocked over the scale. *See* Saul Levmore, *The Story of the Wagon Mound Cases: Foreseeability, Causation, and Mrs. Palsgraf*, *in* TORT STORIES 149 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

[15] *Palsgraf*, 248 N.Y. at 339.

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legal systems in the U.K. and the U.S., "[a]ll legal systems in response either to tradition or to social needs both extend responsibility and cut it off in ways which diverge from the simpler principles of moral blame."[16] Given the need to tailor harm attribution to local conditions, the desire for certainty might compel standards for causation—but it might not necessarily compel a single universal standard for causation.

In American tort law, the traditional tests inquire into factual causation ("but-for" causation—asking whether an event would have occurred "but for" the cause in question) and legal causation ("proximate cause"). But other tests are certainly possible. In addition to the "but-for" inquiry and the "substantial factor" test for accidents with multiple causes, some have advocated the "NESS" test, which asks whether a particular cause was "a necessary element of a set of conditions jointly sufficient for the result"[17]—a form of which has been incorporated in the *Restatement (Third) of Torts*.[18] Current critiques continue to apply philosophical insights to refine or shift causation standards.[19]

Concepts of factual causation and legal causation are particularly important in dealing with harms caused by multiple causes—a typical pattern in a complex world. Even within a single nation, in the U.S. for example, there may be different ideas about responsibility for harm with multiple causes. At one extreme, complexity may lead to the conclusion that no one is at fault, at least not in the traditional sense. As Senator Rand Paul described of attempts to hold BP (the former British Petroleum) responsible for the giant oil spill from its leased Gulf of Mexico rig:

> I think it's part of this sort of blame-game society in the sense that it's always got to be somebody's fault instead of the fact that maybe sometimes accidents happen.[20]

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[16] H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 67 (1985) (comparing murder and arson liability in England and New York State).

[17] *Id.*

[18] RESTATEMENT (THIRD) OF TORTS § 27 (2010).

[19] *See, e.g.*, MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY (2009).

[20] Kate Phillips, *After Explaining a Provocative Remark, Paul Makes Another*, N.Y. TIMES, May 22, 2010, at A10, *available at* http://www.nytimes.com/2010/05/22/us/politics/22paul.html.

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Examples also exist at the other extreme. In particular, Professor Mari Matsuda has advocated a broader conception of causation, rooted in a more traditional, and perhaps communitarian, ethos. In an interesting passage recounting her childhood in Hawaii and concerns about bad karma, she writes of a conception of collective causation that extends into the nonphysical world:

> I heard aunties say with casual certainty, "*bachi ga aru*,"[21] when they heard ill-spirited remarks about others, disrespectful comments about death or cemeteries, or gloating at personal success. You invite bad luck if you set yourself above and apart from others, when you act as if you believe you could not be the next one hit by a car or struck by lightning . . . . Every effect has multiple causes, and in a responsible society we should identify as the responsible cause all those that could have made a difference.[22]

The two extremes contrast a view of the world as a series of independent and discrete particles moving randomly versus a worldview in which everything is connected in a web of relations, seen and unseen.[23]

Where an actor commits a harmful act, there are always multiple causes, at least in a philosophical sense. In addition to actionable negligence, typically nonactionable factors such as the actor's very existence and the law of gravity are

[21] Roughly translated, and usually, *bachi ga ataru*, means "*bachi* will strike" or "*there will be consequences*." In the Japanese animated film TOKYO GODFATHERS (Mad House 2003)—a loose remake of THREE GODFATHERS (Argosy Pictures 1948) starring John Wayne—one of the three homeless people in Tokyo who find a lost baby refers to this conception of holistic causation and collective responsibility in arguing for their duty to act responsibly. The concept has apparently survived the immigration experience; a leading anthropologist has described the term as "quintessential West Coast Sansei [third-generation Japanese American] language." Dorinne Kondo, *The Narrative Production of "Home," Community, and Political Identity in Asian American Theater*, *in* DISPLACEMENT, DIASPORA, AND GEOGRAPHIES OF IDENTITY 104 (Smadar Lavie & Ted Swedenburg eds., 1996).

[22] Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195 (2000).

[23] That said, ideas of interconnectedness—including beliefs in personal magical causation—have been found to occur in facets of modern American life. *See* Emily Pronin et al., *Everyday Magical Powers: The Role of Apparent Mental Causation in the Overestimation of Personal Influence*, 91 J. PERSONALITY & SOC. PSYCHOL. 218 (2006) (finding that observers with thoughts related to an event, such as a basketball game, that occurs before the event occurs, leads those observers to infer that they caused the event).

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at least "but-for" causes.[24] As Professor Michael S. Moore wrote of the September 11th attacks:

> Even when one airliner alone crashes into a tower which collapses, the crash of the Boeing 767 does not by itself cause the collapse of the skyscraper. Such collapse requires, in addition: the fueling of such aircraft with sufficient gasoline to fire the building sufficiently as to weaken its structural steel, the decision to use only such-and-such amount of steel columns in the center and at the perimeter of the skyscraper; the presence of sufficient ventilation to allow the flames to build to the required intensity; the use of combustible items in constructing and furnishing the part of the skyscraper hit by the airliner, etc.[25]

Such considerations are all too familiar from disasters of the recent past. Was the hardship of so many New Orleanians after Hurricane Katrina the result of a powerful storm, incompetent governance, the diversion of levee maintenance funding to the Iraq War, or neglected, large-scale urban poverty? Was the Fukushima nuclear disaster the result of a monstrously large earthquake and tsunami, a failure of planning in placing backup cooling power diesel supply tanks above ground where they could be swept away, or a cozy relationship between the nuclear industry and its regulators?[26] Or some or all of the above? How we answer these questions—and indeed, whether we believe these are fair and appropriate questions—depends on our background assumptions about how to attribute harm to different factors. These assumptions may tend to reflect, as well as reinforce, the legal rules that filter down, whether formally through legal institutions, or more informally through the mechanisms of culture.[27]

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[24] Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 961 (2001) ("[T]hese factors are part of the full history of the transition to the outcome.").

[25] *See* MOORE, *supra* note 19, at 523.

[26] *See* NAT'L DIET OF JAPAN FUKUSHIMA NUCLEAR ACCIDENT INVESTIGATION COMM'N JULY 5, 2012 REPORT (2012), *available at* http://warp.da.ndl.go.jp/info:ndljp/pid/3856371/naiic.go.jp/en/report/ (last visited Sept. 10, 2012).

[27] The term "culture" here is used in the Talcott Parsons sense of "patterns relative to behavior and the products of human action which may be inherited, that is, passed on from generation to generation independently of the biological genes." TALCOTT PARSONS, ESSAYS IN SOCIOLOGICAL THEORY 8 (Glencoe, Free Press 1949).

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2. The Intersection of Naming, Blaming, and Claiming with Culture

The theory that harm attribution can depend on culturally inflected assumptions has been a mainstay of law and society scholarship since William Felstiner, Richard Abel, and Austin Sarat laid out their "naming, blaming, and claiming" framework for thinking about how injuries become disputes.[28] In their landmark article, Felstiner et al. sought to cast "disputes as social constructs," claiming that "a significant portion of any dispute . . . exists in the minds of the disputants."[29] Focusing on how experiences turn into disputes, they broke down the transformation into "naming" (concluding to oneself that a particular experience has been injurious), "blaming" (transformation of a perceived injurious experience into a grievance), and "claiming" (voicing the grievance to the person or entity believed responsible and asking for some remedy).[30] Subsequent writers have claimed that this process of construction will tend to be influenced by cultural norms.[31]

In the wake of Three Mile Island—not Fukushima—Felstiner et al. used as their lead example the problem of radiation exposure among a population. Because radiation is invisible and harms may surface years later in a probabilistic fashion that makes specific attribution to exposure difficult, problems related to education, culture, and institutions can make it difficult for "an unperceived injurious experience" to "be transformed into a perceived injurious experience." A further complication with blaming in this example is complexity. As has been noted of Three Mile Island, Fukushima, and other accidents, complex systems fail in

[28] Felstiner, Abel & Sarat, *supra* note 11. Their work has had a strong influence on the following several decades of law and society scholarship, including comparative work. *See, e.g.*, Marc Galanter, *Reading the Landscape of Disputes*, 31 UCLA L. REV. 4, 12 (1983) ("Disputes are not discrete events like births and deaths; they are more like such social constructs as illness and friendships, composed in part of the perceptions and understandings of those who participate in and observe them.").

[29] *Id.* at 631–32.

[30] *Id.* at 635–36.

[31] *See, e.g.*, Galanter, *supra* note 28, at 31 (contrasting the U.S. with "striking accounts of major injury litigation from Japan—in each instance people reportedly disinclined to pursue legal remedies in a calculating instrumental fashion, instead engage in group litigation which becomes the focus of an all-out struggle of great moral intensity"); Fried, *supra* note 6, at 16 (asserting a link between the American belief in the need for actual harm in order to regulate injurious conduct and relatively anomalous position of the United States reliance on tort litigation rather than administrative compensation and regulation schemes relative to comparable nations).

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complex ways;[32] whether this axiom is a reality or mere perception, it complicates the tasks of blaming and claiming.[33]

3. Causation Standards and (Other) Shortcuts

Causation standards ask whether a particular factor was "something . . . more than a slight, trivial, negligible, or theoretical factor in producing a particular result."[34] As a result, tort law applies a second test of *proximate cause* to limit the wide-ranging possibilities under the factual cause test.[35] Differences in gauging

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[32] *See, e.g.*, *The Fukushima Black Box*, THE ECONOMIST, Jan. 7, 2012, at 38 ("[s]ince the Three Mile Island disaster in 1979, it has become axiomatic to assume that complex systems fail in complex ways" and "[t]hat was broadly true of Fukushima); PERMANENT MISSION OF JAPAN, REPORT OF THE JAPANESE GOVERNMENT TO THE IAEA MINISTERIAL CONFERENCE ON NUCLEAR SAFETY—THE ACCIDENT AT TEPCO'S FUKUSHIMA NUCLEAR POWER STATIONS, at 56–60 (2011), *available at* http://www.kantei.go.jp/foreign/kan/topics/201106/pdf/chapter_iv_all.pdf (last visited Dec. 30, 2012); NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT—NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, at viii (2011) (stating the "[c]omplex systems almost always fail in complex ways"), *available at* https://s3.amazonaws.com/pdf_final/1_OSC_Intro.pdf (last visited Jan. 3, 2013); REPORT OF THE COLUMBIA ACCIDENT INVESTIGATION BOARD, at 6 (2003), *available at* http://www.nasa.gov/colombia/home/CAIB_Vol1.html (stating of the Space Shuttle Columbia accident that "[i]t is our view that complex systems almost always fail in complex ways, and we believe it would be wrong to reduce the complexities and weaknesses associated with these systems to some simple explanation") (last visited Dec. 30, 2012).

[33] To gauge how blaming differs across culture does bring up the risk that the observer may simply find what she is particularly looking for; that is, observers can easily import an unexamined normative baseline by starting with their own perceptions and legal concepts. Felstiner, Abel, and Sarat anticipated this problem, recognizing that, to study the mechanism by which an injury becomes a grievance,

> [T]he researcher must either impose a definition upon subjects and run the risk that that definition will fail to capture all injurious experience or permit subjects to define injurious experiences as they wish and run the risk that different subjects will define the same experience differently and include experiences the researcher does not find injurious.

Felstiner, Abel & Sarat, *supra* note 11, at 634. Both the problems of bias and over-/under-inclusiveness can be paraphrased in a way more conducive to understanding in the context of statistical and empirical analysis. Attempts to actually assess naming, blaming and claiming require categorizations that may create false positives and negatives, and those categories themselves may not reflect true underlying values, as they are brought in by an outsider. The resulting caveat is that efforts at gauging cultural differences in the transformation of experiences into claims must recognize and account for these issues.

[34] CALIFORNIA CIVIL JURY INSTRUCTIONS 3.76 (2011). This instruction originates in the RESTATEMENT (SECOND) OF TORTS § 431 (1965). *See, e.g.*, Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985) (discussing the prevailing approaches to the causation requirement).

[35] RESTATEMENT (THIRD) OF TORTS § 28 (2010). *See, e.g.*, Benjamin C. Zipursky, Third Restatement of Torts: *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1252 (2009) (proximate cause considers "which of the harms that would not have occurred but for

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proximate cause persist. For example, the *Second Restatement of Torts* embraced the "substantial factor" test in negligence cases, requiring that, where multiple causes exist, an actor's negligence be sufficient to bring about harm in order to be deemed a "substantial factor" causing the harm.[36] However, the *Third Restatement* discards the "substantial factor" inquiry and installs a different test, deeming each of multiple causes to be a "factual cause of the harm" if, in the absence of the others, it would be a "but-for" cause of the harm,[37] either alone or as part of a "causal set" of factors that would suffice.[38] The *Third Restatement of Torts* has not yet been adopted by all states, though case law is already being developed on the assumption that it will be.[39]

Whatever test is used for winnowing the large scope of "but-for" causes into the smaller subset to which the law will attribute harm, the choice of test represents a legal and social construction. Relatedly, the idea that the law builds in certain heuristics and narratives—though possibly false[40]—to simplify things and to track

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defendant's breach are among those for which liability in negligence may be imposed"); Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. REV. 293 (2002) (comparing competing approaches to proximate cause analysis).

[36] RESTATEMENT (SECOND) OF TORTS, § 432(2) (1965). *See also* PROSSER & KEETON ON TORTS 884–85 (William Lloyd Prosser et al. eds., 1984); Richard W. Wright, *Once More Into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1075–76 (2001) (examining the evolution of the substantial factor element); David A. Fischer, *Causation in Fact Omission Cases*, 1992 UTAH L. REV. 1335, 1347 (1992) ("[C]onduct cannot be a substantial factor in causing a result unless it was necessary to produce the result."); Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 89 (1956) ("There must be evidence that the force set in motion by defendant was a 'substantial factor' in bringing about the damage before the cause issue will be submitted to the jury."); Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 864–65 (2011) ([A]n actor's conduct might constitute "a" factual cause of an injurious outcome but not the sole or "the" cause . . . [the Restatement (Second)] treats a causal sequence as a factual cause of a harm when it constituted a "substantial factor" in causing the harm.").

[37] *See* RESTATEMENT (THIRD) OF TORTS § 27 (2010).

[38] *Id.* § 27 cmt. f. Professor David Robertson has argued that this is an unwise expansion. David W. Robertson, *Causation in the* Third Restatement: *Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007 (2009).

[39] *See, e.g.*, Covell v. Bell Sports, 651 F.3d 357 (3d Cir. 2011) (predicting that Pennsylvania will adopt the approach of the RESTATEMENT (THIRD) OF TORTS, though it has not yet done so); Berrier v. Simplicity Mfg., 563 F.3d 38 (3d Cir. 2009) (same). *But see* Arthur L. Bugay & Craig L. Bazarsky, *The Future of Pennsylvania Product Liability as Applied by Federal and State Courts:* Covell v. Bell Sports, Inc., 83 PA. B.Q. 139, 140 (2012) (arguing that Pennsylvania has not adopted the RESTATEMENT (THIRD) OF TORTS in products liability).

[40] *See, e.g.*, MOORE, *supra* note 19, at xii ("The law now tells [legal factfinders] that: there are two distinct causal enquiries, that of cause-in-fact and that of proximate causation (rather than one enquiry

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social expectations, is a central claim of behavioral law and economics.[41] Professor Jon Hanson, separately and with several coauthors, has argued that Americans discount the role of situations and context—including when they consider fault, blame, and liability. Instead, psychological research suggests that Americans overemphasize individual free will in considering the decisions people make.[42] In a critique that now forms part of the behavioral law and economics canon, Hanson argues that this bias has become deeply embedded in our law, including in our tort jurisprudence, and advocates instead a "situationist" perspective as a corrective.[43] Hanson's work does not directly concern itself with comparative legal analysis, nor with Asia. However, one implication of his work is that, if the bias he cites is particularly American, it may be testable through cross-cultural comparison. A comparison with Japan would be a preliminary step, though as the next section describes, Americans and Japanese are themselves frequently used as reified examples of individualist (dispositionist) and collectivist (situationist) societies, respectively.

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about substantiality of causal contribution); that the cause-in-fact enquiry exhausts the scientific question of causation whereas the proximate cause enquiry is a matter for normative judgment as to how far liability should extend . . . . These common legal sayings are all false . . . [but] successful heuristics are where you find them, and it is possible that telling literally false statements can produce better decisions than would be obtained by telling nothing but the truth.").

[41] *See* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163, 163–64 (Daniel Kahneman et al. eds., 1982); Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra*, at 84, 91–96; Ehud Guttel, *Overcorrection*, 93 GEO. L.J. 241 (2004) (claiming that people overvalue refutations); Ehud Guttel & Alon Harel, *Matching Probabilities: The Behavioral Law and Economics of Repeated Behavior*, 72 U. CHI. L. REV. 1197 (2005) (reporting that people engaging in repeated activity match probabilities instead of depending on a correct probability estimate); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61 (2002) (explaining people's tendency to focus on adverse outcomes rather than probabilities when intense emotions are involved). *See generally* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (giving thorough overview of behavioral law and economics).

[42] *See* Ron C. Chen & Jon D. Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*]; Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, *The Situation*].

[43] *See* Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345 (2008).

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B. Cultural Psychology

Over the past two decades, the field of cultural psychology has advanced the claim that cultural traditions and social practices regulate and transform mental processes.[44] Notably, cultural psychologists have claimed to find differences between North American and East Asian subjects on such dimensions as attention, perception, cognition, and the view of the self.[45] This field has its origins in the field of social psychology, and through that ancestry, shares kinship with the situationist critique and behavioral law and economics.[46]

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[44] There is a large body of research in the field. SHEENA IYENGAR, THE ART OF CHOOSING (2011); NISBETT, *supra* note 7; Shinobu Kitayama et al., *Self as Cultural Mode of Being*, *in* HANDBOOK OF CULTURAL PSYCHOLOGY 145 (Shinobu Kitayama & Dov Cohen eds., 2007) (claiming that experiments show that "whereas East Asians show a predominantly interdependent mode of being, middle-class North Americans exhibit a predominantly independent mode of being"); *id.* at 145–46 (surveying cultural practices, and concluding that, "[i]n North America, many more practices highlight the self . . . and the corresponding values and beliefs in self-directedness and active effort to cause changes to happen in the environment") (citing John Weisz et al., *Standing out and Standing in: The Psychology of Control in America and Japan*, 39 AM. PSYCHOLOGIST 955 (1984)); *id.* at 146 (asking North American and Japanese respondents separately to remember most recent instance in which they "influenced the surrounding" or "adjusted themselves to the surrounding" and finding that Americans reported more numerous recent situations that they influenced while Japanese reported more numerous recent situations that they adjusted to) (citing Beth Morling et al., *Cultural Practices Emphasize Influence in the U.S. and Adjustment in Japan*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 311 (2002)); Steven Cousins, *Culture and Self-Perception in Japan and the United States*, 56 J. PERSONALITY & SOC. PSYCHOL. 124 (1989) (asking Japanese and American students to generate self-descriptions and concluding that "East Asian students generate self-descriptions that are more likely to reflect their social identities ('I am a Keio student') or refer to relationships ('I am a brother')" than "Americans [who] more often generate self-descriptions that reflect abstract personality traits ('I am curious')"); Sheena Iyengar & Mark Lepper, *Rethinking the Value of Choice: A Cultural Perspective on Intrinsic Motivation*, 76 J. PERSONALITY & SOC. PSYCHOL. 349 (1999) (finding that US students expressed higher value on having individual choice over own situation than Japanese students); Ara Norenzayan et al., *Cultural Preferences for Formal versus Intuitive Reasoning*, 26 COGNITIVE SCI. 653 (2002) (administering tests and concluding that East Asian subjects were better on nonrule reasoning (like-family classification) while Americans were better at reasoning under a rule (rule-based classification)).

[45] *See* Takahiko Masuda & Richard E. Nisbett, *Attending Holistically Versus Analytically: Comparing the Context Sensitivity of Japanese and Americans*, 81 J. PERSONALITY & SOC. PSYCHOL. 992 (2001). *See also* Hazel Markus & Shinobu Kitayama, *Models of Agency: Sociocultural Diversity in the Construction of Action*, *in* CROSS-CULTURAL DIFFERENCES IN PERSPECTIVES ON THE SELF 91 (V. Murphy-Berman & J.J. Berman eds., 2004).

[46] For example, landmark works in social psychology feed into both the situationist critique in law and into the cultural psychology school. *See, e.g.*, LEE ROSS & RICHARD NISBETT, THE PERSON AND THE SITUATION (1991) (claiming that situations have a very strong effect on behavior and there is too strong a belief in disposition as the source of behavior).

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Comparative law has so far largely neglected the implications of cultural psychology, even though the chief claims of the latter have direct implications for the study of different legal systems.[47] This is not entirely surprising; a longstanding concern of comparative law has been its difficult struggle to properly integrate the study of law with its social, cultural, and psychological context.[48]

Cultural psychologists have advanced their claims via experimental results, studies of different cultural contexts, and, perhaps most controversially, claimed links between culturally-contingent mental processes and the philosophical traditions that inform different cultures' worldviews. As discussed below, each offshoot of the cultural psychology project has implications for the study of law.

1. Experimental Cultural Psychology

The field of cultural psychology has drawn recent attention because of its researchers' experiments on differences in perception between (for the most part) American and East Asian subjects.[49]

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[47] Westlaw and Hein Online searches turned up very few comparative law articles that even reference the existence of the "cultural cognition" school of psychology or of cross-cultural experiments in social psychology. These findings are rarely remarked upon, even in passing, in comparative law articles focusing on Asia. *See, e.g.*, Luke Nottage, *The Cultural (Re)Turn in Japanese Law Studies*, 39 VICTORIA U. WELLINGTON L. REV. 755, 770 n.61 (2008) (noting the "recent revival of cross-cultural psychology, particularly in comparing Japanese or other East Asians, but instead mainly using controlled experiments in the behaviouralist tradition"). *See also* Raffaele Caterina, *Comparative Law and the Cognitive Revolution*, 78 TUL. L. REV. 1501, 1537–38 (2004) (discussing the tension between cognitive science's gauging of the degree to which mental processes are innate and universal and so-called "difference theory" in comparative law, which seeks to locate law within its social and cultural context).

[48] *See* Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 180 (2002) ("The greatest confusion [of comparative law] continues to prevail about what is being compared, about the purposes of the comparison, and about appropriate techniques." (quoting Myres McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of World Order*, 1 AM. J. COMP. L. 24, 28–29 (1952))); Andrew Huxley, *Golden Yoke, Silken Text*, 106 YALE L.J. 1885, 1924 (1997) (criticizing comparative law as "forget[ting] about the historical, social, economic, political, cultural, and psychological context which has made that rule or proposition what it is" (quoting Pierre Legrand, *How to Compare Now*, 16 LEGAL STUD. 232, 235 (1996))).

[49] There is at this point a very large body of work in the field. *See, e.g.*, Masuda & Nisbett, *supra* note 45; Norman J. Finkel et al., *Commonsense Notions of Unfairness in Japan and the United States*, 7 PSYCHOL. PUB. POL'Y & L. 345 (2001); Steven J. Heine, *Self as Cultural Product: An Examination of East Asian and North American Selves*, 69 J. PERSONALITY 881 (2001); Masaki Yuki, *Intergroup Comparison Versus Intragroup Relationships: A Cross-Cultural Examination of Social Identity Theory in North American and East Asian Cultural Contexts*, 66 SOC. PSYCHOL. Q. 166 (2003).

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At base, the experiments tend to show that there are differences in how people from different cultures process information. In one well-known study, Richard Nisbett and Takahiko Masuda found that Americans viewing images of an underwater scene paid more attention to large fish in the center of the scene compared to Japanese subjects, who paid comparatively more attention to the background.[50] Similar cross-cultural experiments involving focal or dominant objects and context have further investigated whether there is a physical manifestation of such differences in cognition thorough the use of magnetic resonance imaging of the brain as it processes information.[51]

These experiments have gone beyond visual perception and brain function into an area that is directly relevant to law: how people perceive the actions and intentions of other people.[52] Experiments have suggested that Americans commit what is called the "fundamental attribution error"[53]—that is, the tendency of an observer to attribute another individual's action to his or her choice rather than his or her situation—more often than East Asians.[54] The key finding is that Japanese and other East Asian subjects are less likely than Americans to attribute effects to a particular internal cause or motive rather than the overall context.[55] For example, in

[50] Masuda & Nisbett, *supra* note 45. *See also* Hannah Faye Chua et al., *Cultural Variation in Eye Movements During Scene Perception*, 102 PROC. NAT'L ACAD. SCI. 12629 (2005).

[51] *See, e.g.*, Joshua O. Goh & Denise C. Park, *Culture Sculpts the Perceptual Brain*, 178 PROGRESS IN BRAIN RESEARCH 95 (2009) (finding that MRI results of Western and East Asian subjects were consistent with context versus focus object visual processing differences observed in cultural psychology research); Jonathan B. Freeman et al., *The Cultural Neuroscience of Person Perception*, 178 PROGRESS IN BRAIN RESEARCH 191 (reporting that fMRI study showing outline images of "dominant bodies" and "subordinate bodies" showed American subjects with stronger responses to dominant images as a stimuli relative to Japanese subjects).

[52] The question of subjective intent, objective manifestations, and the reasonable person standard are fundamental concepts in contract, tort, and other areas of law. *See, e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1909) (advocating reasonable person standard); RESTATEMENT (SECOND) OF TORTS §§ 283(a), 288(c) (1965); *see* ARTHUR CORBIN, CORBIN ON CONTRACTS § 4.12 (2008) (defining objective theory); 17 AM. JUR. 2D CONTRACTS § 31 (2004).

[53] "Fundamental attribution error" is sometimes referred to interchangeably with the less common terms "correspondence bias" and "correspondence inference."

[54] *See* ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 430, 532–33 (1999) ("East Asians are more likely than North Americans to pick up on cues pointing to the importance of situational constraints."); Eric D. Knowles et al., *Culture and the Process of Person Perception: Evidence for Automaticity Among East Asians in Correcting for Situational Inferences on Behavior*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1344, 1348–54 (2001) (discussing experiment that asked U.S. and Hong Kong subjects to characterize speaker's likely opinion, based on speaker's speech about a political issue).

[55] KUNDA, *supra* note 54, at 532.

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one of a series of experiments concerning this phenomenon, Korean subjects were more likely than Western subjects to consider factors other than individual disposition in trying to understand why another person would or would not help a stranger.[56] At least one experiment suggests that the differing focus on individual choice, rather than context, may extend to the degree of one's own preference for personal autonomy; Sheena Iyengar found that Americans, asked to list the aspects of their life they would or would not like to have a choice in, expressed "a nearly limitless desire for choice," while Japanese listed many more domains in which they would not want choice.[57]

2. Cultural Context Studies

Given these experimental findings, social psychologists have naturally probed whether such differences extend beyond the laboratory setting. In addition to research on experimental subjects, cultural psychologists have tried to broaden their claims by seeking support from the cultural environment beyond the lab setting. Researchers have focused on measurable differences between cultural contexts, especially between the United States and Asian countries.

Such analyses have often tried to draw conclusions from public events and media coverage. For example, the psychologists Shinobu Kitayama and Hazel Markus reviewed the acceptance speeches of the 2000 and 2002 Olympics. According to their study, American winning athletes explained their success in terms that were independent and disjointed, separate from the athlete's historical background or social and emotional experience. By contrast, Japanese winners tended to stress their success as strongly connected with their background and interpersonal relationships.[58] These differing tendencies towards attributing results to individual action rather than contextual factors remain consistent when explaining more dubious accomplishments.

Other researchers compared U.S. and Japanese newspaper coverage of financial scandals, such as those involving "rogue traders" at Barings Bank and Daiwa Bank, concluding that American papers tended to emphasize the traders' actions as individuals; in contrast, the Japanese papers tended to emphasize

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[56] *See* Ara Norenzayan et al., *Cultural Similarities and Differences in Social Inference: Evidence from Behavioral Predictions and Lay Theories of Behavior*, 28 PERS. SOC. PSYCHOL. BULL. 109 (2002).

[57] *See* IYENGAR, *supra* note 44, at 46.

[58] Markus & Kitayama, *supra* note 45.

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institutional failures such as poor oversight.[59] Taking this method to perhaps its ultimate conclusion, other researchers found that news coverage of murders in the United States tended to focus on the presumed disposition of the killer, while coverage in China tended to refer more to contextual factors.[60]

Such methods have drawn criticisms. Modern societies involve hierarchies, and those at the top of a given hierarchy may appear individualistic, while those further down seem more interdependent; attributing different sets of values to whole cultures may result from inappropriately comparing those in different roles in power relationships.[61] A related criticism is that individuals live and try to thrive in a collectively constituted environment; they may not actually personally endorse the cultural values that we might impute to them on the basis of that collective ecology.[62] Both criticisms point to the problem of scaling inferences from the individual to the collective, and vice versa.[63]

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[59] Tanya Menon & Michael W. Morris, *Culture and the Construal of Agency: Attribution to Individual Versus Group Dispositions*, 76 J. PERSONALITY & SOC. PSYCHOL. 701 (1999).

[60] *See* Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCHOL. 949 (1994).

[61] *See* Elliot Turiel, *Commentary: Beyond Individualism and Collectivism—A Problem or Progress?*, *in* CULTURE AND DEVELOPING SELVES: BEYOND DICHOTOMIZATION 91 (Michael F. Mascolo & Jin Li eds., Jossey-Bass 2004). *See also* Kitayama et al., *supra* note 44, at 165–66 (discussing criticisms of this work).

[62] David Matsumoto, *Culture and Self: An Empirical Assessment of Markus and Kitayama's Theory of Independent and Interdependent Self-Construals*, 2 ASIAN J. SOC. PSYCHOL. 289, 298 (1999). *See* Kitayama et al., *supra* note 44 (discussing this criticism).

[63] Perhaps the most controversial scholarship in this area has attempted to tie the cultural psychologists' experimental findings to purported philosophical sources of Western and East Asian thought—that is, Ancient Greece and China respectively. The most notable exponent of this theory is Richard Nisbett, who argues that a "strong sense of individual identity accompanied the Greek sense of personal agency," while "[t]he Chinese counterpart to Greek agency was harmony." NISBETT, *supra* note 7, at 3–5. Similarly, Sheena Iyengar points to the West's "individualism solidif[ying] mainly in the Enlightenment" as opposed to Confucianism, which she views as having engendered a "form of collectivism [that] remains in the East today," so that "individuals understand their lives relatively more in terms of their duties and less in terms of personal preferences." *See* IYENGAR, *supra* note 44, at 33–34. Iyengar & Lepper, *supra* note 44, at 364 (noting possible link between experimental results showing Anglo Americans' greater preference for personal choice to Jeffersonian political philosophy's impact on the American mindset). The reach from twenty-first century individuals living in industrialized societies back to the philosophers of millennia ago may give us pause. One objection to the broad leap from verified experimental results to such broad-brush characterizations is that it is effectively irrefutable; furthermore, it may remind us of the history of unfounded stereotypes of Asians and Asian Americans. *See* Ruskola, *supra* note 48, at 221 (observing that "the power of Orientalist tropes lies precisely in their irrefutability by empirical evidence" and "one prominent justification for the Chinese exclusion laws

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C. *Japanese Law Scholarship*

The comparatively low litigation rates in modern Japan have been called "the biggest issue in discussions of the role law plays" in that country.[64] Particularly for an American observer, the rates are stunningly low—indeed, on a per capita basis, contemporary Americans file civil actions more than three times as often as their Japanese counterparts.[65] This difference is longstanding; as Professor John Haley observed more than three decades ago, "[t]here is little question that the Japanese generally use their courts less frequently than do Americans."[66] Particularly in the 1980s and 1990s, this comparison entered the public debate, with everyone from prominent academics such as Harvard President Derek Bok to former Vice President Dan Quayle bemoaning America's "litigiousness"—with Japan often

was the putative inability of the Chinese even to comprehend the notion of individual rights"); Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823, 841 (2006) (arguing that, contrary to many commentators, "[c]ulture, however, is not the main obstacle to the realization of rule of law in China. Many of the most serious impediments are *institutional*."); Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 90 (2000) (considering how Americans "label behavior that we consider problematic as 'cultural,' and understand this term to mark racial or ethnic identity"); Koichiro Fujikura, *Administering Justice in a Consensus-Based Society*, 91 MICH. L. REV. 1529, 1531 (1993) (reviewing JOHN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX (1991)) (arguing Haley "overemphasizes distinctions and peculiarities, rather than similarities and common elements, of Japanese law and legal institutions that reflect opposite characteristics from those found in American law and legal institutions" and overly relies on cultural explanations which "are difficult to substantiate or disprove"). In short, the philosophical argument, particularly by Nisbett, has drawn criticism; it could be feared to be a form of "psychological Orientalism." *See* Ruskola, *supra* note 48. Regardless of whether the observed differences can properly be attributed to differences in the philosophical underpinnings of East and West, they would at least seem to have significant implications for comparative studies of law in East Asia. The possibility of this link has been noted by at least two (non-comparative law) scholars. *See* Hanson & Yosifon, *The Situation*, *supra* note 42, at 257 n.442 (querying whether a number of differences between the U.S. and Japanese legal systems might be attributable to the differences that cultural psychology claims exist between conceptions of the self as relatively more independent and relatively more interdependent in the two nations, respectively).

[64] *See* CURTIS J. MILHAUPT ET AL., THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY 141 (2006).

[65] *See* J. Mark Ramseyer & Eric B. Rasmussen, Comparative Litigation Rates (Dec. 2, 2010) (unpublished manuscript) (on file with author), http://rasmusen.org/papers/overheads/litigation-seminar.doc. Similar magnitudes of difference have been observed for decades. *See, e.g.*, John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 360 (1978) (observing that Japanese litigation rates are significantly lower than the U.S.).

[66] Haley, *supra* note 65 (adding that the differences had been overstated).

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cited as a convenient, contrasting example.[67] The contrast between litigious America and nonlitigious (or harmonious) Japan resembles the parallel divisions that behavioral law and economics sees between dispositionism and situationism, and that comparative cultural psychology sees between independence and interdependence (see Figure A).

Figure A. Parallel Comparative Frameworks Applied and Contested in Different Fields

	United States	**Japan**
Behavioral Law & Economics	dispositionist	situationist
Cultural Cognition Psychology	independent	interdependent
Comparative Law	litigious	nonlitigious (harmonious)

While the picture of comparatively nonlitigious Japan no longer regularly decorates American editorial pages, echoes of these arguments concerning the dangers of a caricatured American individualistic contentiousness have continued in Asia from the dawn of "Asian Values" arguments to the present.[68]

Much of the academic legal debate has taken the form of a series of responses to Professor Takeyoshi Kawashima's articulation of the view that the Japanese are comparatively "nonlitigiousness."[69] A prolific and highly influential scholar in his home country, Kawashima argued that despite modernization and industrialization, the Japanese people held a cultural aversion to litigation and similarly conflict-driven, adversarial methods of resolving disputes. Instead, by his account, they

[67] Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983) ("There is far too much law for those who can afford it and far too little for those who cannot."); DAN QUAYLE, STANDING FIRM 283 (1994) ("We have become a crazily litigious country . . . . In America we now sue first and ask questions later.").

[68] *See, e.g.*, NISBETT, *supra* note 7, at xvii.

[69] *See* Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41 (Arthur Taylor von Mehren ed., 1963) [hereinafter *Dispute Resolution*]; TAKEYOSHI KAWASHIMA, NIHON-JIN NO HO-ISHIKI (THE LEGAL CONSCIOUSNESS OF THE JAPANESE) (1967) [hereinafter LEGAL CONSCIOUSNESS].

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preferred informal methods compatible with hierarchical social roles and maintaining human relationships.[70]

The attempt to explain why Japanese litigation rates are so much lower than those in the United States by recourse to culture-based theories has long drawn counterarguments from scholars in both countries. In a landmark article, Haley argued that scholars should use the term nonlitigiousness to mean "a reluctance to litigate, not simply the [low] amount of litigation"; a truly nonlitigious party "accepts a less favorable result because of an aversion to litigation in general."[71] Haley concluded that lower litigation levels more likely resulted not from an innate taste for harmony, but from the costs that a capacity-constrained legal system imposed on potential litigants. Similarly, Setsuo Miyazawa argued that low litigation levels were the direct result of a deliberate public policy choice by the Japanese government, with strong support from the corporate sector, to keep the legal system weak and understaffed.[72] Like Haley and Miyazawa, J. Mark Ramseyer and Minoru Nakazato also rejected the claim that "Japanese ignore" modern law because "it clashes with their cultural structures." But in doing so, they pointed not to weakness in the legal system, but strength.[73] By modeling the incentives for litigants in what they saw as a highly predictable, rational Japanese judicial system, they explained how low litigation rates could result not from an overburdened legal system, but from a more efficient one whose results litigants could anticipate, inducing them to settle.[74]

In a trenchant analysis, Tom Ginsburg and Glenn Hoetker measured the impact of institutional factors, such as the number of lawyers and judges, as well as economic conditions, on Japanese litigation rates.[75] Ginsburg and Hoetker showed statistically that institutional factors, in particular the number of lawyers and judges, correlated strongly with an increase in civil litigation; to a lesser degree,

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[70] *See Dispute Resolution*, *supra* note 69, at 41.

[71] Haley, *supra* note 65, at 362.

[72] *See* Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: Rule of Law at Last?*, 2 ASIAN-PACIFIC L. & POL'Y J. 89, 102 (2001).

[73] *See* J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 270 (1989).

[74] *Id.*

[75] Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant?*, 35 J. LEGAL STUD. 31, 37 (2006).

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overall income per capita and income growth rates also mattered.[76] In doing so, they focused on the link between rising litigation levels and rising judicial capacity from 1986 to 2002.[77]

However, after 2002, though the number of lawyers and judges continued to rise and Japan's economic condition continued to stagnate,[78] the link between judicial capacity and civil litigation appeared to break down; new common actions actually stabilized or even fell (see Figure B). The litigation rate only started to rise again in 2007, the year of the global credit crunch, and then dramatically increased in 2008, the year of the global financial meltdown and the onset of the global Great Recession. In Japan, credit-related misfortunes translated into a large increase in litigation due to a legal sea change: in December 2006, the Diet enacted legislation that, effective January 2007, prohibited so-called "gray area" high-interest loans at above the civil (but below the higher criminal) usury limit.[79] The result was a flood of claims by borrowers against high-interest consumer lenders to recover overpayments.[80]

As a result, a new puzzle has emerged: why did Japanese civil litigation levels plateau and even decline for a period during the first decade of the twenty-first century, despite continued economic stagnation and a conscious expansion in the number of lawyers and judges due to legal system reform after 2001? In fact, Takao Tanase, Luke Nottage and Leon Wolff point out that "exclud[ing] credit-related cases," which tend to wax and wane in tandem with general economic distress, "contested [civil] litigation levels have remained steady over the post-war period."[81]

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[76] *Id.* (finding that the overall level of civil litigation was positively correlated with overall GDP per capita, but also that litigation increased when there were decreases in GDP per capita).

[77] *Id.*

[78] *See, e.g.*, *Moody's Says Japan Heading to Third Lost Decade*, INT'L BUS. TIMES (June 27, 2011), http://www.ibtimes.com/articles/170252/20110627/japan-lost-decade-third-lost-decade-moody-s-recession-earthquakes.htm.

[79] Law No. 115 of 2006 (Japan). *See* Andrew M. Pardieck, *Japan and the Moneylenders: Activist Courts and Substantive Justice*, 17 PAC. RIM. L. & POL'Y J. 529, 576–77 (2008).

[80] *Id.* at 569. *See also 1,800 Debtors Sue to Get Loan Overcharges Back*, JAPAN TIMES (Nov. 14, 2006), http://search.japantimes.co.jp/print/nn20061114b1.html.

[81] *See* TAKAO TANASE, LUKE NOTTAGE & LEON WOLFF, COMMUNITY AND THE LAW: A CRITICAL REASSESSMENT OF AMERICAN LIBERALISM AND JAPANESE MODERNITY 162 (2010).

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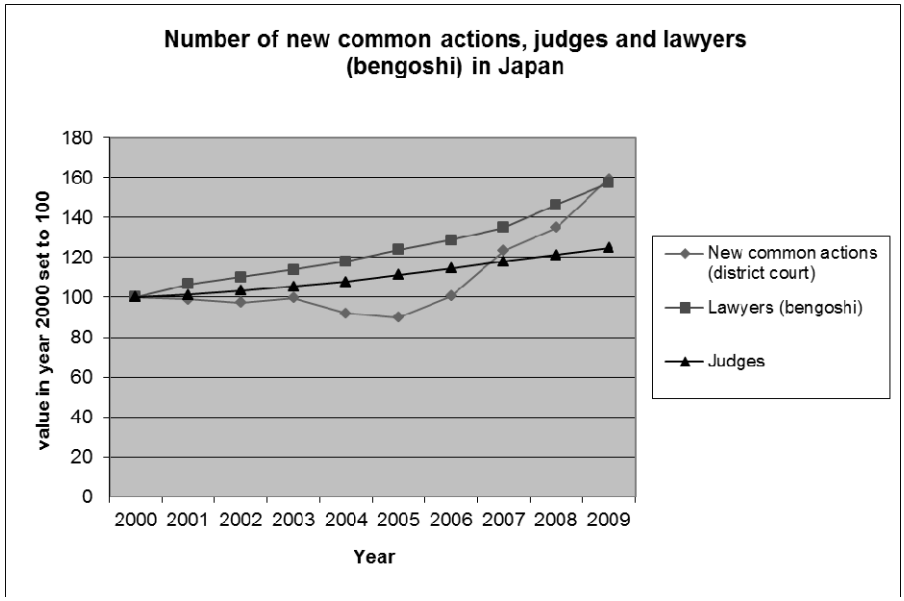
Figure B. Japan: New Common Actions in District Courts, Lawyer Population, and Judge Population, Per Year



Sources: For new common actions: *Shihou toukei nenpou* (Yearbook of justice statistics);[82] for lawyers and judges: *Bengoshi hakusho 2010* (Lawyer white paper 2010).[83] Underlying data is available in Appendix 5 of this paper.[84]

They claim that "Japan retains its general reluctance to engage the law," resisting "real pressures for change" by creating "systems to absorb such pressures."[85] As an example of this homeostasis, they point out how, faced with rising numbers of traffic accident cases, Japanese society "mobilized political

[82] *Statistical Tables*, SUPREME COURT OF JAPAN, http://www.courts.go.jp/english/publications/statistical_table/index.html (last visited Apr. 19, 2013).

[83] JAPAN FEDERATION OF BAR ASSOCIATIONS, WHITE PAPER ON ATTORNEYS, 60, 78 (2010), *available at* http://www.nichibenren.or.jp/library/en/about/data/WhitePaper2010.pdf.

[84] Salil K. Mehra, Appendices (Aug. 3, 2012) (on file with author), https://docs.google.com/open?id=0BxRoIM-dnJbIN1ZvTGxuRDRjS1U.

[85] *Id.*

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resources and social infrastructure to create a unique compensation system" that obviated the need for more civil litigation.[86]

This raises the question of whether, even as the Japanese system's capacity increases, there is something about the system or its players that continues to resist an increase in civil litigation. As Ginsburg and Hoetker note, "litigation rates provide a notoriously difficult field for cross-national study because institutional environments vary so widely"—that is, there is a strong risk of comparing apples to oranges when making comparisons between two different nations, such as Japan and the United States.[87] For example, comparing the number of cases can be misleading if successful cases lead to very different remedies. Instead, studies of aggregate litigation data try to isolate the factors within a single legal system to figure out what factors lead to more or less litigation and what these findings suggest about the likely responsiveness of the actors to possible reforms.[88]

Looking at aggregate data within the Japanese system directly addresses Kawashima's claim about Japanese culture on the societal level. However, such an approach only indirectly responds to Kawashima's alternative claim that culture leads to differences in legally relevant cognitive approach that take place at the individual level.[89] This aspect of his theory of legal consciousness at the individual level has been relatively unexamined.[90] It might be argued that aggregate data represents the sum total of individual decisions, and thus there is no need to address individual conceptions directly. Regression analysis has shown the responsiveness of overall litigation rates to changes in the institutions, personnel, and the predictability of their produced outcomes.

However, data analysis has not demonstrated why overall rates in Japan are so much lower than rates in the United States.[91] Additionally, gauging the

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[86] *Id.*

[87] Ginsburg & Hoetker, *supra* note 75, at 37.

[88] *Id.*

[89] KAWASHIMA, LEGAL CONSCIOUSNESS, *supra* note 69, at 6–14.

[90] *But see* Michael Young et al., *Japanese Attitudes Towards Contracts: An Empirical Wrinkle in the Debate*, 34 GEO. WASH. INT'L L. REV. 789, 851 (2002) ("suggest[ing] that legal training does not generate the attitudes that we have traditionally associated with high levels of legal consciousness").

[91] *See* Haley, *supra* note 65, at 364 (arguing that institutions are crucial here and comparing Japanese litigation rates not only to the United States, but also to other nations, relative to which Japanese rates are not as starkly low).

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responsiveness of litigation rates to changes in a single society does not account for possible differences in the underlying disputes (inputs) or differences in what a litigated case means (outputs) in that society compared to others. In the terms of Feldstiner, Abel, and Sarat, regressions on aggregate data in a single society conflate the effects of blaming with those of naming (what phenomena are perceived as injuries) and claiming (how attributed injuries become institutionalized facts such as legal cases).

Ideally, we might study how Americans and Japanese respond to the same accident in person; however, such a study would be impractical, expensive, and, if a staged accident, possibly unethical. Nonetheless, there remains the second-best possibility of providing Americans and Japanese a minimalist version of a legal system in a single case. Thus, we can gauge whether the Japanese system is embedded within different notions of causation at the individual level and whether Japanese individuals have assimilated a different notion of causation from their legal system. If that is true, differences in individual perception of causation may be measurable. In particular, if Americans really do tend to attribute harm to individual action more than the Japanese, that may suggest that there is some basis for the assertion that, in Japan, there may actually be a cultural aversion to litigation. Such varying perceptions might not be polar opposites, but may still be measurable and may create impressions of cultural difference. Americans may really be more litigious, that is, if by litigious we mean the degree to which one "thinks like a prospective litigant."

II. BLAMING AND CULTURE: AN EXPERIMENT

To test whether cultural differences manifest in the perception of harm and its causation and responsibility—that is, "blaming"—an experiment was conducted to examine whether Americans systematically tend to attribute harm to human actions rather than other factors. The test confirmed that, at statistically significant levels, we cannot reject the hypotheses that Americans are more likely to attribute harm to a human action, Japanese are more likely to attribute harm to non-human factors, and Japanese are more likely than Americans to decline to attribute harm to *any* cause.

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A. Methods

1. Participants

The study involved over 300 participants from the United States and Japan. The study was performed in two stages. First, 60 (J.D.) law students at an American law school and 73 (J.D.) law students at a Japanese law school participated using paper questionnaires handed out and collected prior to the start of a normal class meeting after their academic years were under way (samples of completed questionnaires in English and Japanese are available at Appendix 4).[92] Subsequently, a commercially-obtained, gender- and age-balanced sample of 212 lay adults from the United States (103) and Japan (109) also participated in an online version (printouts of the questionnaire as it appears on the Internet are available at Appendix 5).[93] Law students were chosen for several reasons (in addition to the obvious one of availability). First, today's law students are tomorrow's lawyers. Moreover, legal systems serve their citizens, but are intermediated by legal professionals—thus, lawyers' views matter.

A threshold concern about the law student samples is whether they are similarly-situated. All samples were drawn from graduate law schools. However, the U.S. is unique in combining graduate legal education with a virtual absence of undergraduate legal education;[94] in countries other than the U.S., including Japan, graduate law students often have studied law as an undergraduate major as well.[95] Thus, a completely identically situated sample may not be possible. Furthermore, because the bar exam is significantly more restrictive, graduate law students in Japan are much more focused on their bar exam and black letter law; few or no Japanese students enroll in such popular, but not core doctrinal, U.S. law school offerings as Law and Economics or Animal Law.[96]

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[92] Mehra, *supra* note 84.

[93] *Id.*

[94] Most countries where graduate legal training is common (such as South Korea and Japan) also have undergraduate law faculties, from which many if not most graduate law students are drawn. Even in Canada, which follows a very similar model to the U.S., several universities in Quebec plus the University of Ottawa, offer an undergraduate bachelors of law degree (civil law), after which further professional graduate study in law is available.

[95] *See* Mark D. West, *Making Lawyers (and Gangsters) in Japan*, 60 VAND. L. REV. 439, 445 (2007) (describing similarities and differences of the U.S. and Japanese systems).

[96] One concern may be the selection of the particular schools in question. However, there was reason to think that the American and Japanese law schools chosen would be appropriate comparisons. Both are

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Additionally, a commercially obtained sample of American and Japanese adults at large also participated; their results are compared below. The company that provided these samples, United Sample, Inc., operates in both countries, providing market research for major consumer products companies, as well as surveys. Because these participants were compensated financially, and because they used an online version, comparisons between, for example, U.S. lay people and U.S. law students are not appropriate. The purpose of the general sample is to generate cross-cultural comparisons of people who do not generally have formal legal education.

2. Materials

Participants read a short first page of instructions.[97] The instructions stated that their responses would be confidential, and that they were participating in a

located in the largest urbanized agglomerations in their respective countries. While the Japanese school ranks cardinally higher in relevant rankings of student quality relative to the American school, the difference may be less than it appears. Ranking of student quality are based on the following popular sources: Brian Leiter's Law School Rankings, http://www.leiterrankings.com/students/2008student_quality.shtml (last visited July 15, 2012); Shikakuseek Law School List, *available at* http://laws.shikakuseek.com/school.html (last visited June 25, 2012). First, the United States has 2.5 times the population of Japan; thus, the Japanese law school has a much smaller domestic pool of talent to draw from than a comparatively ranked U.S. school would—not even accounting for American law schools' uniquely strong draw on foreign applicants. Second, and crucially, in Japan, graduate (J.D.) law school is only the second-best path to becoming a lawyer. Critically, graduate schools of law in Japan do not get to enroll many of the "best" candidates to become *bengoshi* (roughly, barristers), because approximately 700 of the best students nationally are cherry-picked by an intensely competitive bar exam that allows them to become *bengoshi* without having to pay tuition for attending a graduate law school. *See* Annelise Riles & Takashi Uchida, *Reforming Knowledge—A Socio-Legal Critique of the Legal Education Reforms in Japan*, 1 DREXEL L. REV. 3, 10 (2009) (describing dual-track system). No comparable superior alternative to graduate law school exists for U.S. college graduates wishing to become lawyers. As a result, while it is difficult to be completely certain, law students at the two institutions may be similar in terms of how they are situated.

[97] The instructions were translated from English into Japanese (and back). During the translation process bilingual speakers and readers (from both directions) were repeatedly asked to critique both wording and whether they perceived that the instructions in both languages were asking for the participant to perform the same functions. The result was instructions that use fairly simple language and are a bit repetitive, and that are close, but not word-for-word, translations. This is the generally accepted procedure for translating questionnaires and instruments, per a significant literature on how to translate questionnaires for experiments. *See, e.g.*, ORLANDO BEHLING & KENNETH S. LAW, TRANSLATING QUESTIONNAIRES AND OTHER RESEARCH INSTRUMENTS (2000); Richard W. Brislin, *Back-Translation for Cross-Cultural Research*, 1 J. CROSS-CULTURAL PSYCHOL. 185–216 (1970); Richard W. Brislin, *Questionnaire Wording and Translation*, *in* CROSS-CULTURAL RESEARCH METHODS (Richard W. Brislin et al. eds., 1973); Fons van de Vijver & Ronald Hambleton**,** *Translating Tests: Some Practical Guidelines*, 1 EUR. PSYCHOLOGIST 89, 89–90 (1996) (observing that "[t]he application of an instrument in a new cultural group involves more than simply producing text in another language, administering the translated

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study designed to see how people generally thought about accidents.[98] They were not told that it would be a cross-national or cross-cultural study. They then viewed one or more "cases," consisting of two pages. On the first page, the participant viewed a nonverbal cartoon arranged vertically; time flowing down in a series is a fairly common convention for multipanel cartoon strips in both the US and Japan.[99] The author created the storyline for each cartoon, while a professional artist created the illustration specifically for this study.[100] Each cartoon illustrates the story of an accident in a relatively fluid manner. Per the instructions, the participants turned to a second page in which they saw isolated events in the story from the preceding page. These isolated events represented possible causes of, or acts responsible for, the accident. Participants were asked to mark the images of the factors to which they attributed the accident; they were explicitly told that they could mark more than one image, or none, if that accorded with their "reading" of the accident. Participants were also asked their age and their gender at the end of the study in order to calculate median age and gender breakdown for the samples. Participants in the U.S. were also asked whether they were U.S. citizens; those who responded "no" were not included in the U.S. sample.

The comic strip stories intentionally lacked the high level of detail that a judge or jury might have in a full trial—a kind of tort Rorschach test. The goal was to see how participants would fill in the blanks about causation and responsibility and what that would reveal about the narrative or heuristic could be inferred from their responses as they made sense of accidents. The experiment resembles others using textual narratives and follow-up questions to address underlying assumptions;[101] this appears to be the first such experiment to use cartoon stories, as well as the first to have a directly comparative law focus.

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instrument, and comparing the results" since there is the possibility of bias due to ethnocentric concepts; translation must involve an iterative process with critiques from bilingual individuals).

[98] Salil K. Mehra, Law Student Data (Aug. 3, 2012) (unpublished manuscript) (on file with author), https://docs.google.com/folder/d/0BxRoIM-dnJbISml1WVlZTGtlaDA/edit (raw data, law student sample); Salil K. Mehra, Lay Data (Aug. 3, 2012) (unpublished manuscript) (on file with author), https://docs.google.com/folder/d/0BxRoIM-dnJbIRk9oZUFhVWlPLTQ/edit (raw data, lay sample).

[99] Though most U.S. newspaper comic strips are arranged horizontally left to right, it is quite common to see comic strips arranged vertically also, from top to bottom.

[100] The artist, Matthew Bush, has had gallery showings of his work in Philadelphia.

[101] *See, e.g.*, Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 273–80 (2012) (testing with respondents reading passages about hypothetical actors whether perception of an actor's bad motive and bad moral character can increase not

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3. The Hypotheses

At the most basic level, the experiment presented here sought to test a general premise: when they observe the same accident, do Americans and Japanese vary in how they attribute the harm? In other words, do they "blame" differently? As discussed more fully, *infra*, the answer appears to be "yes," to a statistically significant degree.

Regarding this general claim, three more specific hypotheses were identified and presented for critique prior to deployment of the survey.[102] The hypotheses stem from the implications, as discussed in the prior section, of the work of law-and-society scholars, cultural cognition psychologists and Asia-focused comparative law scholars. Specifically, the three closely related hypotheses are:

Hypothesis 1: In attributing harm, Americans are *more* likely than Japanese to choose human action.

Hypothesis 2: In attributing harm, Americans are *less* likely than Japanese to choose factors *other* than human action.

Hypothesis 3: In attributing harm, Americans are *less* likely than Japanese to choose no factors ("an absence of attribution").

The reason for separate hypotheses is to capture several different possibilities by which the same claimed cultural divergence might be expressed empirically; *a priori*, the pathway that such a bias might take is difficult to predict. For example, if true, the idea that Americans favor human explanations while East Asian respondents tend to favor contextual explanations could lead to results that confirm any or all of these three hypotheses (Figure C).

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only perceived blame and responsibility but also increase perceived causal influence and intentionality); Janice Nadler, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, 75 LAW & CONTEMP. PROBS. 1, 12 (2012) (describing experiment in which respondents reacted with "character-based blame" mechanism, whereby perceptions of a defendant's general character affected the degree to which they were blamed for a particular act); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 390–404 (2007) (testing the hypothesis that judges and jurors misremember case facts in racially biased ways, and confirming the hypothesis that participants remembered and misremembered legally relevant facts in racially biased ways).

[102] Indeed, they were proposed early on as part of the review and critique process of the Japan Foundation/Center for Global Partnership and the Social Science Research Council, who funded this research, as well as at workshops at Harvard Law School in June 2010 and the Midwest Law and Economics Association in October 2010. The surveys were deployed subsequently in Japan and the United States.

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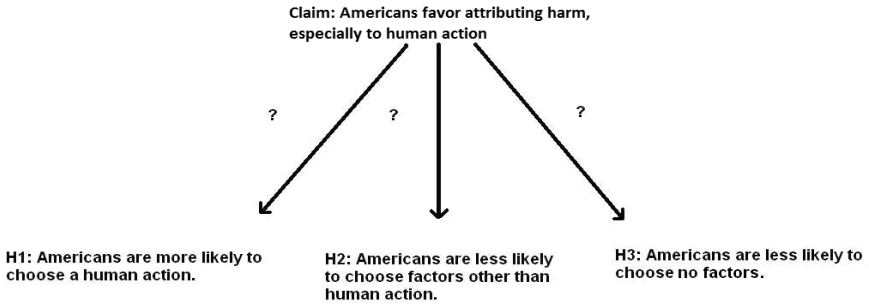
As described in greater detail, *infra*, respondents' answers provide data which is then used to test whether, with respect to each hypothesis, we can reject the null—that is, whether statistically significant results suggest we can reject the hypothesis that "American-ness" affects attribution as measured by responses to the questionnaire.

Figure C.



B. The Stories

Results below proceed story-by-story and present the findings, first for a comparison of law student samples, and then lay samples.[103] More detailed analysis, including demographic data, is provided in the appendices at the end of this article, in the same order that this narrative section progresses.

1. Story Number One: "Bicycle Accident"

Results from the deployment of Story Number One ("Bicycle Accident") provide support for one of the three hypotheses: Americans are *less* likely to attribute harm to nonhuman factors.

[103] For access to the underlying data in this section, please note:

(1) the appendices referenced in the text are available online at the link below:

https://docs.google.com/open?id=0BxRoIM-dnJbIN1ZvTGxuRDRjS1U

(2) law student raw questionnaires (.pdf), data files (.xls) and Stata-compatible data (.txt) and analysis (.do) files are all available in the folder at the link below:

https://docs.google.com/folder/d/0BxRoIM-dnJbISml1WVlZTGtlaDA/edit

(3) lay raw online survey data, data files (.xls) and Stata-compatible data (.txt) and analysis (.do) files are all available in the folder at the link below:

https://docs.google.com/folder/d/0BxRoIM-dnJbIRk9oZUFhVWlPLTQ/edit

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Bicycle Accident is not based on a specific legal case, but instead depicts an original, but typical scenario. The cartoon depicts a cyclist pedaling fast on a rainy day. A lackadaisical pedestrian, holding an umbrella and with eyes closed, steps out into the street in front of the cyclist, who looks surprised. In the final panel, the cyclist is depicted falling to the ground, while the pedestrian looks concerned; the cyclist is shown in an inset with an arm in a sling.

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Page 1

After viewing "Bicycle Accident" on page 1, respondents were given a choice on page 2 of marking either rain, the pedestrian or the cyclist to which to attribute

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the accident. In "Bicycle Accident," there are two human actions—cycling on a rainy day, and stepping out into the street inattentively. Respondents' answers were coded as dummy variables—if a respondent marks the picture of the rain, a variable named "RAIN" is set to 1, otherwise it is zero. The same procedure was followed for variables named "CYCLIST" and "PEDESTRIAN." While many conditions, including pooling rain, can be indirectly attributed to human action (construction of inadequate drainage?), the images of the cyclist and the pedestrian are immediate depictions of human actors. Two additional variables were created: "CYCLEPED," set to 1 whenever a respondent attributed harm to the cyclist, the pedestrian, or both; and "NOBIKE," set to 1 whenever a respondent chose not to attribute harm to any of the three depicted factors.[104]

[104] The responses and data analysis are available online at https://docs.google.com/folder/d/0BxRoIM-dnJblSml1WV1ZTGtlaDA/edit (law students) and https://docs.google.com/folder/d/0BxRolM-dnJbIRk9oZUFhVW1PLTQ/edit (lay people).

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a. American and Japanese Law Students

For "Bicycle Accident," a comparison of American and Japanese law students yielded support for hypothesis two, that Americans would be less likely to choose a nonhuman factor (Stata data analysis software output is available in Appendix

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1.)[105] With respect to that hypothesis, the sole nonhuman factor that respondents could choose in "Bicycle Accident" was the rain. American respondents were substantially less likely to attribute the accident to the rain compared to Japanese respondents; this result was statistically significant and leads us to reject the null hypothesis that no association exists between being a self-identified American and the likelihood of attributing harm to non-human factors (see Table 1-A).[106]

Table 1-A: US and Japanese Law Students[107]

			substantive significance (statistically significant results in **bold**)		
	US	Japan	relative risk ratio	95% CI cutpoints	
Percent attributing harm to human action (H1: expect US > non-US)	90.0%	91.7%	0.9806	0.7987	1.0538
Percent attributing harm to non-human factors (H2: expect US < non-US)	**26.7%***	**45.2%***	**0.5899**	**0.3285**	**0.9539**
Percent attributing harm to no factors (H3: expect US < non-US)	0.0%	0.0%	n/a	n/a	n/a

With respect to substantive significance, Americans were only 58.99% as likely as Japanese respondents to attribute the accident to the rain (see Table 1-A).[108]

[105] Mehra, *supra* note 84.

[106] Pearson chi squared analysis confirmed significance, with $p = 0.027$.

[107] 1-A, 2-A and 3-A are from <Law_Students.do>, *supra* note 103.

[108] The risk ratio was 0.5899, with cut points for the 95% confidence interval at 0.3285 and 0.9539, meaning we can be 95% confident that the true increased likelihood of American respondents choosing the rain, relative to Japanese counterparts, falls between 32.85% and 95.39%. With respect to hypothesis 1, American respondents were actually very slightly less likely to choose either the cyclist or the pedestrian relative to Japanese respondents; however, this result was not statistically significant (see Table 1-A). Pearson chi squared analysis confirmed that this result was not significant, as $p = 0.721$. With respect to hypothesis 3, no American or Japanese respondents chose not to attribute the harm to any factor (see Table 1-A).

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b. American and Japanese Lay People

With respect to lay people, the results for Bicycle Accident did not provide support for any of the three hypotheses. In fact, the results were similar for both groups.[109]

Table 1-B: US and Japanese Lay People[110]					
			substantive significance (statistically significant results in **bold**)		
	US	Japan	relative risk ratio	95% CI cutpoints	
Percent attributing harm to human action (H1: expect US > non-US)	80.6%	82.4%	0.9779	0.8182	1.0833
Percent attributing harm to non-human factors (H2: expect US < non-US)	31.1%	25.0%	1.2427	0.7912	1.8069
Percent attributing harm to no factors (H3: expect US < non-US)	6.8%	7.4%	0.9175	0.3351	2.3324

2. Story Number Two: "Horsedrawn Carriage"[111]

Between the law student and lay samples, results from the deployment of Story Number Two ("Horsedrawn Carriage") provide support for all three hypotheses: among both law students and lay people, Americans are *more* likely to

[109] With respect to hypothesis 1, American lay respondents were actually very slightly less likely than Japanese respondents to attribute the harm to either the cyclist or the pedestrian, but this result was not statistically significant (see Table 1-B). Pearson chi-squared test of "CYCLEPED" versus "US" yielded $p = 0.733$. With respect to hypothesis 2, American lay respondents were slightly more likely to attribute harm to nonhuman factors than their Japanese counterparts; however, this difference was not statistically significant (see Table 1-B). With respect to hypothesis 3, American respondents were only slightly less likely than Japanese respondents not to attribute harm to any factor; this difference was not statistically significant (see Table 1-B).

[110] 1-B, 2-B and 3-B are from <Lay.do>, *supra* note 103.

[111] The data analyses for Stories One ("Bicycle Accident"), Two ("Horsedrawn Carriage"), and Three ("Bacteria-Shot") is contained in two STATA do-files, one for the law students, <Law_Students.do> and one for the lay people <Lay.do>, *supra* note 103.

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attribute harm to a human actor, among law students, they are *less* likely to attribute harm to nonhuman factors, and among lay people, Americans are *less* likely to attribute the harm to no cause at all (holistic causation) (Stata output is available in Appendix 2).[112]

Horsedrawn Carriage is partially (but not completely) based on *Brown* v. *Collins*.[113] The opinion that appears in some torts casebooks held that the driver of the horsedrawn carriage was *not* liable because he was not negligent.[114] "Horsedrawn Carriage" (below) depicts a driver unsuccessfully trying to restrain his horses after they are spooked by a nearby train; he is injured and the horses damage a landowner's property. The cartoon ends with his being scolded by the landowner. This case was specifically selected because the facts are well suited to cartoon depiction, and because the opinion's literal conclusion (no liability for the driver) runs counter to the hypothesis that Americans attribute harm to the driver.

[112] Mehra, *supra* note 84.

[113] 53 N.H. 442 (1873).

[114] *Id.* at 451.

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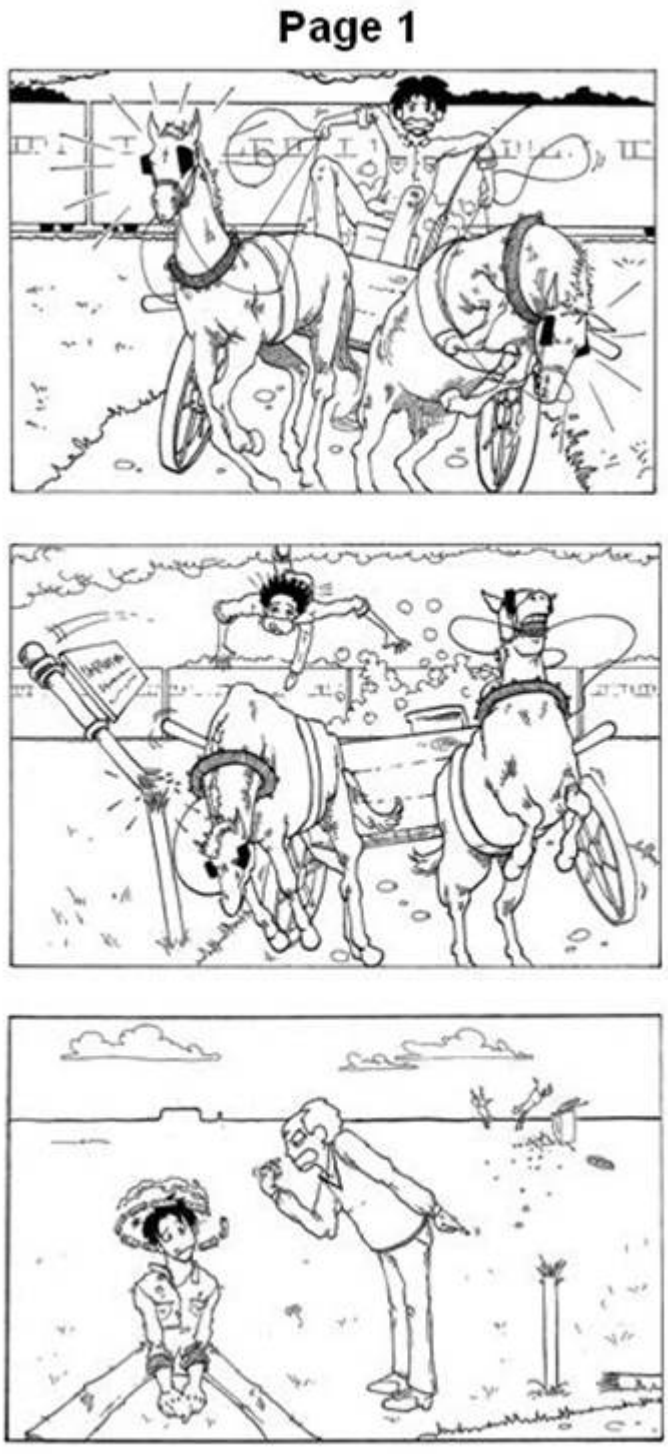

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After viewing "Horsedrawn Carriage," on page 1, respondents were given a choice on page 2 of marking images representing the horses, the train or the driver to attribute the accident to. In "Horsedrawn Carriage," only one of the three choices, the driver, depicts a human actor. Respondents' answers are coded as dummy variables—if a respondent marks the picture of the driver, a variable named "DRIVER" is set to 1, otherwise it is zero. The same procedure was followed for variables named "HORSE" and "TRAIN." While all factors, including the horse (humans raise and train horses) and the train (humans build and operate trains), can indirectly be attributed to human action, the image of the driver is an immediate depiction of a human actor. Two additional variables were created: "HORSETRAIN," set to 1 whenever a respondent attributed harm to the horse, the train, or both (reflecting a choice of a nonhuman actor); and "NOCARRIAGE," set to 1 whenever a respondent chose not to attribute harm to any of the three depicted factors.[115]

[115] The responses and data analysis are available online at https://docs.google.com/folder/d/0BxRoIM-dnJbISml1WVlZTGtlaDA/edit (law students) and https://docs.google.com/folder/d/0BxRoIM-dnJbIRk9oZUFhVWlPLTQ/edit (lay people).

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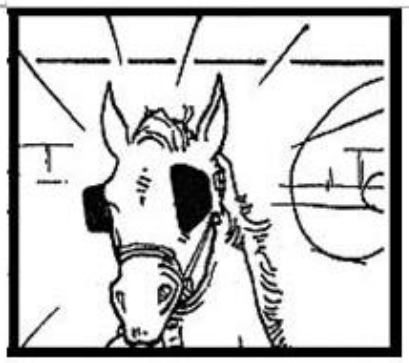

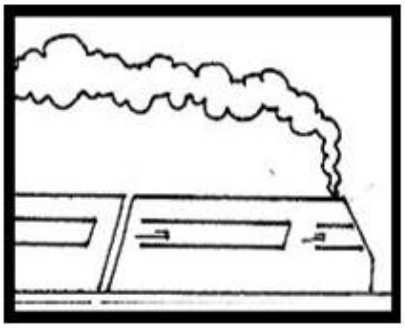

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a. American and Japanese Law Students

American law students attributed the accident to the driver by a statistically significant and substantively significant margin relative to their Japanese counterparts. By comparison, Japanese law students attributed the accident to nonhuman factors (the train and/or horse) by a statistically and substantively significant margin.[116]

The driver was the only human actor depicted to whom participants could attribute the accident. American respondents were more likely to choose the driver than Japanese respondents; this difference was statistically significant and tends to confirm hypothesis 1.[117] With respect to substantive significance, American respondents were 53% more likely to attribute the accident to the driver.[118] This result supports the hypothesis that Americans are more likely to choose a human actor.[119]

Participants could also have attributed the harm to either or both of two nonhuman factors: the train or the horse. American respondents were less likely than Japanese respondents to attribute the accident to a nonhuman factor; this result was statistically significant and tends to support hypothesis 2.[120]

[116] Results for hypothesis three were not statistically significant. Pearson chi squared analysis of variable "NOCARRIAGE" versus "US" yielded $p = 0.774$.

[117] Pearson chi-squared of $p = 0.048$. *See infra* Table 2-A.

[118] The risk ratio of Americans to Japanese was 1.5341. The lower boundary of the 95% confidence interval is 1.0018 and the upper boundary is 2.0785, meaning we can be 95% confident that the true additional likelihood fell between 0.18% and 107.85%. *Id.*

[119] This cartoon is loosely based on the facts of *Brown* v. *Collins*, 53 N.H. 442 (N.H. 1873). Notably, the result actually goes *against* the holding of *Brown* v. *Collins*, in which the Supreme Judicial Court of New Hampshire actually ruled in favor of the driver, overruling a lower court's finding of his liability. *Id.*

[120] Pearson chi-squared of $p = 0.033$. *See infra* Table 2-A.

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Table 2-A. "Horsedrawn Carriage": US and Japanese Law Students[121]					
			substantive significance (statistically significant results in **bold**)		
	US	Japan	relative risk ratio	95% CI cutpoints	
Percent attributing harm to actor (H1: expect US > non-US)	**48.3%***	**31.5%***	**1.5341**	**1.0018**	**2.0785**
Percent attributing harm to non-human (H2: expect US < non-US)	**53.3%***	**71.2%***	**0.7487**	**0.5028**	**0.9836**
Percent attributing harm to no factors (H3: expect US < non-US)	6.7%	5.5%	1.2167	0.3067	4.1952

With respect to substantive significance, Japanese respondents were 62.2% more likely than their American counterparts to attribute the harm to either the horse or the train.[122]

b. American and Japanese Lay People

For "Horsedrawn Carriage," comparisons among lay people yielded statistical support for hypotheses one and three.[123] Among Americans, 34.0% (35/103) attributed the harm to the driver, compared to 13.9% (15/108) of Japanese respondents; this result was statistically significant and tends to confirm the hypothesis (see Table 2-B).[124] With respect to substantive significance, Americans were 2.447 times as likely as Japanese respondents to attribute the harm to the driver (see Table 2-B).[125]

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[121] Tables 1-A, 2-A, and 3-A are from the STATA (.do) file <Law_Students.do>, *supra* note 103.

[122] The risk ratio of Americans to Japanese was 1.6222. The outer boundaries of the 95% confidence interval are 1.0405 and 2.2312, meaning we can be 95% confident that the true additional likelihood fell between 4.05% and 123.12%. *See infra* Table 2-A.

[123] Tables 1-B, 2-B, and 3-B are from the STATA (.do) file <Lay.do>, *supra* note 103. With respect to hypothesis 2, American and Japanese respondents' responses were nearly identical, *see infra* Table 2-B, and so there was no statistically significant difference.

[124] Pearson chi-squared of DRIVER versus US yielded $p = 0.001$. *See infra* Table 2-B.

[125] The risk ratio of Americans to Japanese was 2.4466. The outer boundaries of the 95% confidence interval were 1.4481 and 3.6302, meaning we can be 95% confident that the true multiple is between those two levels. *Id.*

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Table 2-B. "Horsedrawn Carriage": US and Japanese Lay People					
			substantive significance (statistically significant results in **bold**)		
	US	Japan	relative risk ratio	95% CI cutpoints	
Percent attributing harm to actor (H1: expect US > non-US)	**34.0%***	**13.9%***	**2.4466**	**1.4481**	**3.6302**
Percent attributing harm to non-human (H2: expect US < non-US)	68.9%	68.5%	1.0060	0.8078	1.1659
Percent attributing harm to no factors (H3: expect US < non-US)	**5.83%***	**21.35%***	**0.2735**	**0.1103**	**0.6444**

With respect to hypothesis 3, American respondents were substantially less likely than Japanese respondents to choose to attribute the harm to no factor, a result that was statistically significant and tends to confirm hypothesis 3 (see Table 2-B).[126] With respect to substantive significance, American respondents were 27.4% as likely as Japanese respondents to choose not to attribute the harm to any of the three causes in Horsedrawn Carriage (see Table 2-B).[127]

3. Story Three: "Bacteria Shot"

In "Bacteria Shot," a man drinks water out of the bottle; an inset shows that there is some sort of microorganism in the water. He feels ill and goes to the doctor, who gives him an injection. He leaves the office happily, shaking the doctor's hand, but in the next panel is shown falling to the ground, perhaps unconscious or dead.

[126] Pearson chi-squared of variable "NOCARRIAGE" versus "US" yielded $p = 0.001$. *Id.*

[127] The relative risk ratio was 0.2735, and the outer boundaries of the 95% confidence levels were 0.1103 and 0.6444, meaning we can be 95% confident that the true value for the likelihood of Americans attributing harm to none of the causes lies between 11.03% and 64.4% of the likelihood of Japanese respondents doing so. *Id.*

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After reviewing "Bacteria Shot," on page 2, participants could mark images of either the bacteria, or the doctor's hand administering the shot to the patient's arm. "Bacteria Shot," a single human actor is depicted—the doctor's hand injecting an unknown substance into the patient. Respondents' answers are coded as dummy variables—if a respondent marks the picture of the doctor's hand, a variable named "DOCTOR" is set to 1, otherwise it is zero. The same procedure was followed for a variable named "BACTERIA." While many conditions, including microbial contamination, can be attributed indirectly to human action (improper sanitary precautions?), the image of the doctor injecting the patient is a more immediate depiction of a human actor. An additional variable was created, "NOSHOT," set to 1 whenever a respondent chose not to attribute harm to either of the two depicted factors.[128]

[128] The responses and data analysis are available online at https://docs.google.com/folder/d/0BxRoIM-dnJbISml1WVlZTGtlaDA/edit (law students) and https://docs.google.com/folder/d/0BxRoIM-dnJbIRk9oZUFhVWlPLTQ/edit (lay people).

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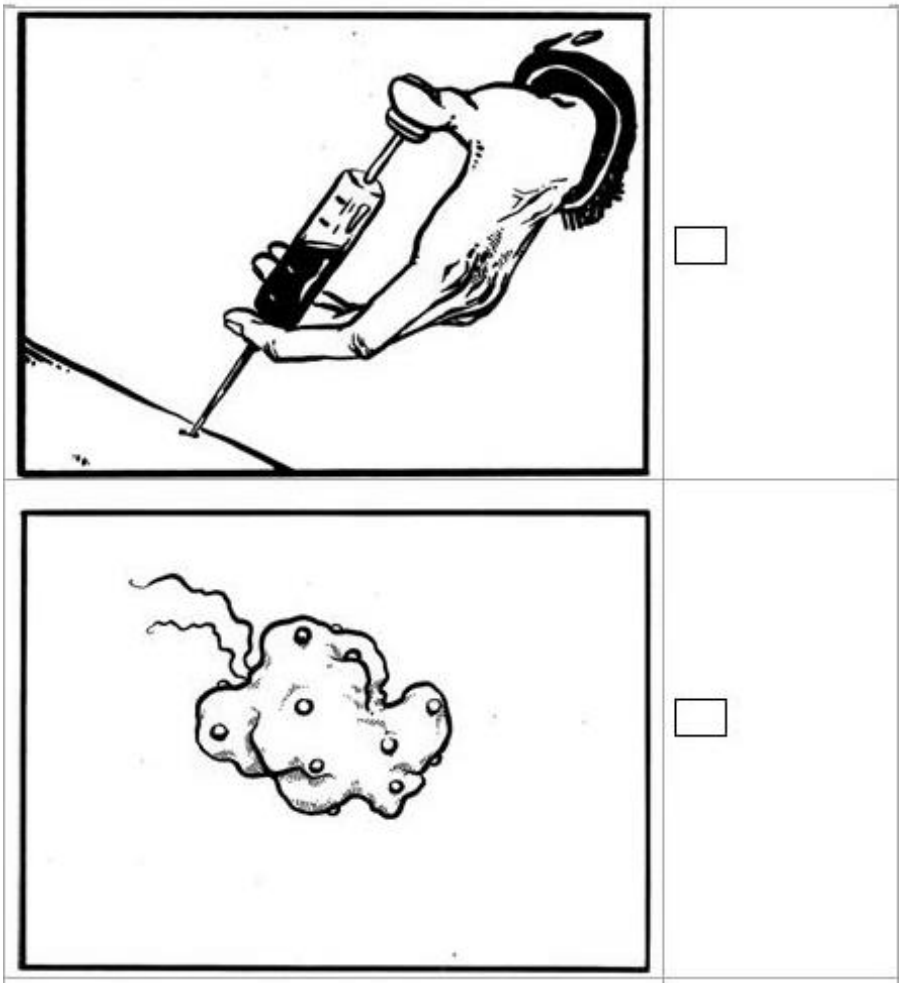

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a. American and Japanese Law Students

The deployment of the third story ("Bacteria Shot") among law students yielded no conclusive results for hypotheses two and three,[129] but did result in a conclusive result in the opposite direction for hypothesis one (Stata output is available in Appendix 3).[130] As discussed below, because of the medical context of this story, this surprising result may actually accord with the larger theme of this experiment, that culturally available narratives guide the interpretation of an accident.

With respect to hypothesis 1, American respondents were actually less likely than Japanese respondents to attribute the harm to the image of the doctor's hand administering the injection; this finding was statistically significant and contradicts hypothesis 1 (see Table 3-A).[131]

Table 3-A: US and Japanese Law Students[132]

			substantive significance (statistically significant results in **bold**)		
	US	Japan	relative risk ratio	95% CI cutpoints	
Percent attributing harm to actor (H1: expect US > non-US)	**50.0%***	**67.1%***	**0.7449**	**0.4933**	**0.9965**
Percent attributing harm to non-human (H2: expect US < non-US)	60.0%	46.6%	1.2882	0.9210	1.6097
Percent attributing harm to no factors (H3: expect US < non-US)	3.3%	2.7%	1.2167	0.1712	7.3551

[129] With respect to hypothesis 2, American law student respondents were actually more likely to attribute the harm to the nonhuman factor (the bacteria) than their Japanese counterparts; however, this result was not statistically significant. *See infra* Table 3-A. Pearson chi-squared analysis did not confirm significance ($p = 0.123$). *Id.* With respect to hypothesis 3, there were only slight differences between American and Japanese respondents; these differences were not statistically significant. *Id.*

[130] Mehra, *supra* note 84.

[131] Pearson chi-squared analysis confirmed significance ($p = 0.045$). *See infra* Table 3-A.

[132] Tables 1-A, 2-A, and 3-A are from the STATA (.do) file (<Law_Students.do>), *supra* note 103.

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For this story, this result tends to support the conclusion that Japanese respondents are actually more likely to attribute the harm to a human factor; they were 74.5% more likely to do so (see Table 3-A).[133]

What could explain this surprising result? One possibility is that Japanese respondents are influenced by a newly developed narrative tending to attribute poor medical outcomes to medical malpractice. This may be evidence of a powerful recent shift; as Professor Eric Feldman writes of the past decade in Japan:

> [M]ore malpractice claims are reaching the courts for both cultural and structural reasons. First, formidable structural barriers to civil litigation have been softened, some that affect all civil cases and others specific to medical malpractice. The increasing size of the bar, for example, makes it easier for potential plaintiffs to find attorneys, and the creation of a new expert witness system expedites malpractice suits. Second, these structural changes have occurred in, and are intertwined with, a broader social and political climate that is increasingly fertile ground for the escalating rates of malpractice claiming. An overall decrease in the trust placed in medical elites, for example, and media coverage that highlights malfeasant doctors have created an atmosphere in which malpractice litigation is increasingly attractive.[134]

A Japanese social dynamic in which the number of malpractice claims are rising, highlighted by media coverage and eroding trust in physicians, may have particularly salient effects on a sample of law students.[135] A big chunk of their lives would have fallen under this recent trend, and there is the additional sample bias

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[133] The risk ratio was 0.7449, with the outer boundaries of the 95% confidence interval at 0.4933 and 0.9965, meaning we can be 95% confident that the true increased likelihood of Japanese respondents choosing the doctors, relative to Japanese counterparts, falls between 49.33 and 99.65%.

[134] Eric A. Feldman, *Law, Society, and Medical Malpractice Litigation in Japan*, 8 WASH. U. GLOBAL STUD. L. REV. 257 (2009); L. Jay Starkey & Shoichi Maeda, *Doctor as Criminal*, BMC HEALTH SERVS. RESEARCH (2010), *available at* http://www.biomedcentral.com/1472-6963/10/53 (reporting data on the number of patient deaths reported to police in Japan between 1998-2008 and finding a significant increase in the number of healthcare providers criminally prosecuted); Soichiro Nagamatsu et al., *Healthcare Safety Committee in Japan: Mandatory Accountability Reporting System and Punishment*, 22 CURRENT OPINION IN ANESTHESIOLOGY 199 (Apr. 2009) (describing Japan's creation in 2007 of "a new accountability adverse event reporting system as a tool for investigating the cause of death to clarify liability and derive apologies from medical professionals" and the difficulties of implementing that new system).

[135] *See also* Robert Leflar, *"Unnatural Deaths," Criminal Sanctions, and Medical Quality Improvement in Japan*, 9 YALE J. HEALTH POL'Y L. & ETHICS 1, 12–13 (2009).

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towards believing in medical misconduct that may prevail among those choosing recently to enter law school; they may form the leading edge of this trend. Of course, similar beliefs and selection effects may exist in the United States. However, compared to Japan, these beliefs may not represent a prominent recent shift. As a result, further investigation into the specific perceptions surrounding medical malpractice apart from other types of accidents may be warranted.

b. American and Japanese Lay People

Results among from the comparison between American and Japanese lay people provided support for hypothesis three. American respondents were substantially less likely than Japanese respondents to choose not to attribute harm to either factor (choosing neither the doctor nor the bacteria); this result was statistically significant (Table 3-B).[136]

Table 3-B: US and Japanese Lay People

			substantive significance (statistically significant results in **bold**)		
	US	Japan	relative risk ratio	95% CI cutpoints	
Percent attributing harm to actor (H1: expect US > non-US)	41.7%	31.5%	1.3261	0.9199	1.7709
Percent attributing harm to non-human (H2: expect US < non-US)	62.1%	52.8%	1.1773	0.9220	1.4015
Percent attributing harm to no factors: (H3: expect US < non-US)	**6.8%***	**25.0%***	**0.2718**	**0.1172**	**0.5992**

[136] Data analysis for 1-B, 2-B and 3-B is available in <Lay.do>, *supra* note 103. With respect to hypothesis 1, Pearson chi-squared test of "DOCTOR" versus "US" yielded $p = 0.122$ (see Table 3-B). With respect to hypothesis 2, American respondents were actually more likely than Japanese respondents to attribute the harm to the nonhuman factor (the bacteria); however, this result was not statistically significant (see Table 3-B). Pearson chi-squared test of "BACTERIA" versus "US" yielded $p = 0.146$. With respect to hypothesis 3, Pearson chi-squared test of "NOSHOT" versus "US" yielded $p = 0.000$. American lay respondents were more likely to attribute the harm to the human action of the doctor's injection than Japanese respondents; however, this result was not statistically significant (see Table 3-B).

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With respect to substantive significance, Americans were 27.2% as likely as Japanese respondents to not attribute the harm to either factor (see Table 3-B).[137]

C. Summary

The results above support the inference that the American tendency to attribute results to human action, rather than situation or context, extends to tort scenarios—in short, Americans blame differently than Japanese respondents. Statistically and substantively significant differences emerged among comparisons of both law student and lay samples. These differences should not be exaggerated; it was not generally the case that American and Japanese responses were photonegatives of each other. In particular, the experiment provides evidence for two different theories. First, Americans may have adopted a notion of tort law, including constructions of proximate causation, that reflects, reproduces and reinforces an American narrative tendency concerning how accidents happen: "harm can be attributed to a cause," and "individuals' action is to blame." Secondly, as a result, Americans may really be more litigious than others, including Japanese—if the word "litigious" means "to think more like a prospective litigant." Such differences can help explain not only the American taste for litigation, but our construction and maintenance of the institutions that supply it.

III. IMPLICATIONS

A. General Points

What lessons should we draw from this experiment? The results here are only a tentative first step. Three stories and eighteen comparisons are admittedly not enough to establish the existence of a culturally-inflected transmission belt of harm attribution; at any rate, the results merely tend to allow us to reject the null hypothesis, that is, we can reject the proposition that American-ness does not correlate with these attribution differences. And, indeed, there may be other cross-cultural differences that could matter.[138] However, it has long been accepted that the model of litigants as rational actors operates within practical limits of mental

[137] Relative risk ratio of 0.2718, with the outer boundaries of the 95% confidence interval at 0.1172 and 0.5992, meaning that we can be 95% confident that the true likelihood of American compared to Japanese respondents deciding not to attribute the harm to either the doctor or the bacteria lies between 11.7% and 59.9%.

[138] *See, e.g.*, Amitai Etzioni, *Behavioral Economics: Towards a New Paradigm*, 55 AM. BEHAV. SCIENTIST 1099, 1107 (Aug. 2011), *available at* http://icps.gwu.edu/files/2011/09/Beh-Ec-New-Paradigm.pdf (last visited Dec. 21, 2012) (noting findings of culturally-transmitted preferences that may affect individuals' economic decision making).

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capacity;[139] the experiment here suggests we cannot safely assume that the heuristics[140] and narratives[141] stay fixed across cultures. But they may be enough to suggest that, in a number of areas, as described below, American scholars involved with foreign, international, or transnational legal issues need to grapple with the implications of cultural psychology and behavioral law and economics.

B. Comparative Law: American, Japan, and Beyond

Narratives have power. As a result, comparative legal analysis should consider the possibility that not only the legal rules and institutions may differ, but also that the perspectives of players themselves—potential and actual litigants, jurors, lawyers and judges—may differ in important ways. Certainly, this will complicate comparisons. But it need not thwart them, and it should enrich them.

Rather than simply point to "culture" and end the academic inquiry there, scholars can really examine and investigate the nature and mechanics by which cultural narratives may influence litigants' behavior. The impact of law and economics and its embrace of statistics-laden empiricism has forced rigor onto a number of legal subfields, including the comparison of different legal systems.[142] Similarly, the insights of behavioral law and economics may prove useful in refining these comparisons.

There remains an important caveat. First, the fact that there is an observable difference between how Americans and Japanese treat an accident case does not show which way the causation runs between individuals' perceptions and the social

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[139] *See* Herbert A. Simon, *From Substantive to Procedural Rationality*, *in* 2 MODELS OF BOUNDED RATIONALITY 424, 430 (Herbert A. Simon ed., 1982) (noting that while economics traditionally has assumed actors to be infinitely capable of rational calculation in order to optimize their behavior, in the real world we must consider the limits on human mental abilities to gather and process information); *see also* BEHAVIORAL LAW AND ECONOMICS, 59–60 (Cass Sunstein, ed., 2000) (discussing relationship between bounded rationality and heuristics).

[140] *See* Ward Edwards & Detolf von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986) (analyzing several cognitive biases); Jolls et al., *supra* note 41, at 1477–79, 1541–45 (discussing bounded rationality); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1075–1102 (2000) (highlighting numerous decision-making strategies, heuristics and cognitive biases).

[141] *See* GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT 15 (1999) (discussing use of frameworks and shortcuts to order our perceptions); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 117 (2007) (discussing the "mechanisms that moor our perceptions of societal danger to our cultural values").

[142] *See* Ramseyer & Rasmussen, *supra* note 65, at 37; Ginsburg & Hoetker, *supra* note 75.

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and legal system in which they form that perception. That is, to what degree does the American tendency to blame human action produce a stronger civil litigation system, and to what degree is it instead a product of that system? Additional work might focus on harm-attribution over a longer time frame with the hope of capturing changes in individual perception in response to major legal changes or significant attention-getting accidents. Moreover, we might try to gauge how "sticky" such changed perceptions are in the wake of salient but discrete and short-lived, newsworthy accidents or legal cases.

Even without resolving the question of which way causation runs, further work on the space between individual perception and legal action can help explain significant differences observed between legal systems. For example, a hallmark of the Japanese system is the repeated development of administrative compensation systems that handle complaints that otherwise might have found their way into the court system.[143] If Japanese individuals are less litigation-minded than their American counterparts, this characteristic may both reinforce and reflect the reliance on administrative compensation measures.

The possibility that "viewing things like a prospective litigant" is a particularly American habit can shed light on the difficulty of legal reform and legal transplants. Japan has recently commenced a lay judge system in criminal trials as part of a decision to broaden citizen participation in its legal system.[144] A repeated impediment to installing this system was the oft-reported claim that Japanese citizens were apprehensive of sitting in judgment of fellow citizens.[145] While Americans who seek to avoid jury duty may sympathize, Japanese

[143] Such administrative compensation schemes tend to cover mass torts, and include the Pollution-Related Damage Compensation System, the Relief System for Injury to Health with Vaccination, the Relief System for Sufferers from Adverse Drug Reactions, the Relief System for Sufferers from Infections Arising from Biological Products, the Relief System for Injury to Health Caused by Blood Donation, and the Asbestos-related Health Damage Relief Program. Professor Eri Osaka has argued that the tort liability system has significant shortcomings as a tort system per se, but provides a vehicle for plaintiffs to address the limitations of the administrative compensation system. Eri Osaka, *Reevaluating the Role of the Tort Liability System in Japan*, 26 ARIZ. J. INT'L & COMP. L. 393 (2009).

[144] Although Japan had a prewar jury system, the system started in 2009 is more of a lay assessor system resembling that in Germany, rather than a U.S.-style jury system.

[145] *See Preparing for Lay Judge System*, JAPAN TIMES, Apr. 22, 2008, *available at* http://search.japantimes.co.jp/cgi-bin/ed20080422a1.html (noting that many citizens do not want to serve as lay judges); Mark Levin & Virginia Tice, *Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform*, JAPANFOCUS, http://www.japanfocus.org/-Virginia-Tice/3141 (last visited Dec. 15, 2011).

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reluctance might well relate not only to a desire to spend one's time otherwise, but also to the degree of cognitive dissonance they might experience playing a role antithetical to their own dominant narrative.

As a result, legal reform may have to involve more than change to doctrine and institutions: it may require changes in the framework by which ordinary citizens view the underlying cases that legal systems address. The benefits of increased focus at the individual level should go beyond the narrow focus on the United States versus Japan. More generally, some law and development scholars have pointed out an analogous need to inculcate "rule of law" as a cultural change.[146] They seek to increase what they perceive to be law and development's insufficient focus on "the individual culture-bearers who are law's users."[147] Similarly, positive studies of legal system reform or legal transplants—or normative attempts to improve such changes—may benefit from asking whether attention to the conceptions at the individual level may matter.

C. International Human Rights and Asian Values

To the extent that international law problems interweave with or derive from domestic legal systems, an approach cognizant of divergent narratives and heuristics may similarly prove informative. The law and economics rational actor model already informs international law theory.[148] To the extent domestic politics help drive the tastes and preference that states as rational actors seek to maximize, the narratives that shape the domestic sphere may matter.

To take one example, some proponents of the "Asian Values" theory have argued that the prevailing view of human rights in international law has an

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[146] *See* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275 (2003); Lan Cao, *Culture Change*, 47 VA. J. INT'L L. 337, 357 (2007); Chantal Thomas, *Max Weber, Talcott Parsons and the Sociology of Legal Reform: A Reassessment with Implications for Law and Development*, 15 MINN. J. INT'L L. 383 (2006).

[147] *See* Amy Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 512–13 (2009) (assessing the views of "neocultural interventionists" and questioning their underlying definition of culture).

[148] Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1119–20 (1999); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L. L. 541 (2005); Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 149–150 (2005); Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 VA. J. INT'L L. 839 (2002); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002).

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"individualist" bias.[149] Critics have rejected this argument as a convenient defense for soft (and not-so-soft) authoritarianism.[150] These views are not mutually exclusive; it is possible that the prevailing view of human rights *does* have an individualist bias and that some observers point this out to defend regimes that suffer from a democratic deficit. However, greater interaction with cultural psychology and behavioral law and economics may help illuminate the degree to which there is some truth—and how much—to each view.[151] In particular, it may be useful in the future to assess the degree to which inhabitants of allegedly "Asian Values"-laden societies place more weight on social versus individual welfare in assessing the optimality of a situation. Patterns that emerge may or may not actually support the claimed link to views of individual human rights.

D. Extraterritorial Enforcement

An American emphasis on individual action may also have implications for the extraterritorial application of U.S. law. A range of federal statutes applies extraterritorially, including the Sherman Act,[152] the Foreign Corrupt Practices

[149] *See* Takashi Oshimura, *In Defense of Asian Colors*, *in* THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM 141 (Mansfield Ctr. for Pac. Affairs ed., 2000) [hereinafter RULE OF LAW] (arguing that the individualist orientation of liberal democratic rule of law is adverse to Confucianism and the "communitarian philosophy in Asia"); Barry M. Hager, *The Rule of Law: Defining It and Defending it in the Asian Context*, *in* RULE OF LAW, *supra*, at 1 (summarizing complaints of critics). *See also* Joon-Hyung Hong, *The Rule of Law and Its Acceptance in Asia: A View from Korea*, *in* RULE OF LAW, *supra*, at 145 (advocating redefinition of the rule of law in a way that is compatible with those who subscribe to "Asian values").

[150] *See* Simon S.C. Tay & Goh Chien Yen, *Human Rights Revisited in the Asian Crisis*, 3 SING. J. INT'L & COMP. L. 26, 29–30 (1999) (noting criticism that "so-called Asian values served to mask sustained human rights abuses"). *See also* JOANNE R. BAUER & DANIEL A. BELL, THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Cambridge Univ. Press, 1999); Eric Jones, *Asia's Fate: A Response to the Singapore School*, NAT'L INTEREST, Spring 1994, at 18.

[151] *See* Randall Peerenboom, *Human Rights and the Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 945 (2005) ("[I]nternational efforts to promote the establishment of rule of law should continue, but with greater sensitivity to the normative and practical issues involved, more attention to local circumstances and greater willingness to tolerate deviations from the increasingly specific liberal democratic thick conception of rule of law which currently serves as the model for reform in today's law and development movement.").

[152] 15 U.S.C. § 1 (2012).

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Act,[153] and the Alien Tort Statute (ATS).[154] The overseas application of U.S. law has long been controversial,[155] and continues to be so.[156]

To take a single timely example, in the appeals court opinion in *Kiobel* v. *Royal Dutch Petroleum*,[157] Judge José Cabranes, in concluding that the ATS did not extend liability to corporations, wrote that "the fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law (and, therefore, under the ATS)" in the same manner as natural persons.[158] In so ruling, Judge Cabranes imported a viewpoint from international criminal law into the civil context of the ATS.[159] In particular, he relied on the notion that individuals, not entities, are uniquely morally culpable.[160] Whether it is appropriate to borrow from criminal law jurisprudence under customary international law is beyond the scope of this Article. But it is worth observing that a particularly American emphasis on individual action as uniquely characteristic of criminal law—and uniquely morally relevant—may be driving this view of customary international law and the ATS.

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[153] 15 U.S.C. § 78dd-1 (2012).

[154] 28 U.S.C. § 1350 (2012).

[155] *See, e.g.*, Diane P. Wood, *United States Antitrust Law in the Global Market*, 1 IND. J. GLOBAL LEGAL STUDS. 409, 415 n.33 (1994) (observing that "the extraterritorial reach of the U.S. antitrust laws has been controversial since the U.S. Supreme Court abandoned the narrow, strictly territorial approach of *American Banana v. United Fruit*" in 1909). *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (SECOND) 1208–09 (ABA 1984) (describing other nations' resistance to extraterritorial application of U.S. antitrust laws); F. Hoffman-LaRoche Ltd. v. Empagran, 542 U.S. 155, 167 (2004) (stating that "[t]he application . . . of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy").

[156] There is in particular a prominent split on the issue of whether corporations can be held liable under the Alien Tort Claim Act. *Compare* John Doe VIII v. ExxonMobil, 654 F.3d 11 (D.C. Cir. 2011) (holding affirmatively), *with* Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010) (holding negatively).

[157] 621 F.3d 111, *aff'd*, 133 S. Ct. 1659 (Apr. 17, 2013).

[158] *Id.* at 118.

[159] *See* Chimène I. Keitner, Kiobel v. Royal Dutch Petroleum: *Another Round in the Fight Over Corporate Liability Under the Alien Tort Statute*, 14 ASIL INSIGHTS, Sept. 30, 2010 (questioning this borrowing from international criminal law).

[160] *Kiobel*, 621 F.3d at 118 (concluding that "for the commission of such crimes individuals are responsible) (quoting Robert H. Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial* (1946), *reprinted in* 20 TEMP. L.Q. 338, 342 (1946)).

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E. Transnational Torts and Environmental Damage

The study reported here may also have implications for a nascent unfortunate phenomenon: transnational environmental harm. Recent disasters involving the BP-leased oil rig *Deepwater Horizon* and TEPCO's Fukushima Dai-ichi nuclear power plant have involved a mix of human and (foreseeable) natural factors, to which harm and the extent of the harm can be attributed. In the BP case, failure of the blowout preventer on the Deepwater Horizon and the lack of redundant safety measures found on other rigs were human factors in the disaster; nature compounded the problems via the currents that brought oil and dispersants to places far from Louisiana's coastal waters. In the Fukushima case, human factors include the siting of the reactors on a tsunami-vulnerable coastline and a backup cooling power source (diesel fuel stored in above-ground tanks) susceptible to the same waves that could bring about their necessity; natural factors included the tsunami itself as well as the winds and ocean currents that carried radioactive material away from Japan's shores.

But why stop there? As with the greater concern over climate change generally, the BP and TEPCO disasters implicate a larger situation: developed societies' need for the power that enables our modern way of life. Depending on how holistically one attributes harm, offshore drilling and nuclear power plants—and their attendant risks—are consciously fostered by state policy in the United States and Japan, respectively. And in both countries, state policy and corporate power investment respond to democratic pluralism and market incentives.

In deciding how to attribute harm, apportion fault, or point blame, members of different societies may use different narratives to shape how widely responsibility should be shared. As the frequency and awareness of transnational environmental harm increases, awareness of the law-related narratives used in different cultures can help increase the understanding required for positive resolutions of the issues involved.

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IV. CONCLUSION

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.
>
> –Oliver Wendell Holmes[161]

Justice Holmes was not writing about comparative or international law, but his point may be as valid for other legal systems as for our own. The "prejudices which judges share with their fellow-men" are still with us, and continue to be important in the present day. The study reported here has sought to measure whether what might be seen, in Holmes' words, as a particular American "prejudice"—the orientation towards the individual—differs from non-Americans, specifically the Japanese, in ways that matter to the life of the law.

This article seeks to spark a discussion about how the limits of the rational actor model relate to comparative, international and transnational law—that is, American views of law involving non-Americans. The boundaries of bounded rationality may vary with geography. In particular, Americans may have a particularly strong attachment to specific views of the world, bound up in an individualistic orientation that may impact our reading of other societies' legal rules and institutions. Raising our consciousness about our own actualizing narrative of causation can serve as a starting point towards a richer understanding of not only the role of law in Japan or other societies, but of our own as well.

[161] HOLMES, supra note 52, at 1.

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