President Young ALC Talk:

Dean Testy:

Well good afternoon everyone. I am really pleased to join Professor Zang in welcoming you all and in doing that I want to also extend my thanks to him for his leadership of our Asian Law Center. He is doing a spectacular job and as I look around the room I see so many of our faculty and staff from that center, our alumni and other friends who have made that center so successful over the years. So, please know that we are deeply grateful for that, very proud of the center’s accomplishments and look forward as well to its very, very bright future.

As Professor Zang noted, we have a lot of distinguished guests here today and we certainly want to hear from our president quickly. I want to just briefly mention, too, and I want to welcome especially Mrs. Marty Young to the law school today. It's wonderful to have you with us. And I will also want to welcome and introduce Jeff Riedinger who is the vice Provost for global affairs at the University and also an alum of this law school so you are both welcome here and I am really happy to see you here today.

Let me say that in introducing our president today it is just a special honor for me to do that because not only am I so proud that he is the leader of our university but he is also our colleague here in the school of law. This faculty appointment is in the law school and we often joke that that makes for a really interesting relationship between Dean and president, right on the way and? But let's just be clear: he is my boss we will be very, very clear about that. That is a real honor for us to welcome you here today President Young and to have you speaking about a topic that you are so experienced and skilled in. And I think many of you know that as an administrator President Young has had significant experience having began his faculty career at Columbia then gone on to be the Dean of George Washington's law school, the president of the University of Utah and of course we were very fortunate to recruit him as our president just very recently.

That administrative experience is itself remarkable an incredible, but all along the way he has also maintained a very active life as an academic and as a scholar. As I noted he began his teaching and scholarly career at Columbia as the professor of Japanese law there and also director for the Center for Japanese legal studies. And between 1978, 1998 had many years of experience in that role. But even after becoming an administrator he has continued to write very widely. He has published dozens and dozens of books and articles and monographs in both English and Japanese on a wide variety of legal topics. He has been frequently invited to keynote speeches all over Asia and also the United States on topics of Asian law. He has been a frequent visitor to many of the most distinguished and him and him academic institutions throughout Asia. And we're just very, very proud to call him our colleague and to call them our president. And today we have the honor of being with him to hear from him on the work entitled Japanese attitudes there toward contracts and empirical wrinkle in the debate.

President Young it is our great honor to welcome you. Thank you for being with us today.
3:34 President Young:

It is so nice to see this audience most of whom know more about this topic than I do so this should be an interesting conversation. I was struck by how professors saying described this lecture series. We have a number of really distinguished professors who have come to speak and then we have President Young coming appear as well. So I understand the pressure to perform today. On the other hand I have to tell you I keep telling people there are two things on my name card: president and professor and they can fire me from one of them but not the other. So I am particularly pleased to be here. I am grateful for the law school for paying all of my transportation expenses to come here and speak today.

This is an interesting topic, the interest in which generated some years ago as it would for anybody who had spent any time in the legal world related to Japan. It really starts with Prof. Khaled Shema. I was in elementary or junior high at the time he publishes this book in which he coined the term "Japanese legal consciousness" and says that somehow the Japanese have a lower level of legal consciousness. And that in order for us to understand and deal with Japan this probably culturally derived attitude is something that we need to understand and appreciate because it makes the operation of the legal system very, very different.

If you are in the field of Japanese law that has at some level defined everybody's relationship to it. Everybody has responded to it, has attacked it, has agreed with it, has had differences of opinion. The problem is for the most part, most of us still have a clue what it really means. And it really derived in part out of that question. Prof. Kato and I, Professor Kato Masonobu who was for many years at Nagoy University and then at Sophia University, he and I had been collaborating for many years. And I would say a considerable part of that collaboration involved arguing about this. He was a little more inclined to think it had some credibility. I was inclined to think it had less. And we fought and fought until we also realize that neither of us really were sure about what we are talking about. And neither were we sure Prof.Kawashima had every defined it in the way but certainly not many people had.

And so we got thinking about what he really meant by legal consciousness. And there were a number of possible meanings. One possible meaning was certainly that people use the law less as a device for ordering their affairs, that somehow people who are engaged in different kinds of activities may be using those structures for creating those relationships, mediating those relationships somehow different than law. That is sort of one possible meaning. It may also be... And that that diminished use was somehow culturally informed. It may on the other hand have been that they were a little less aware of what law was and therefore did not use it as much or it did not play as big a role. Or it may be... And certainly there were different elements that would suggest that: much lower litigation rates, fewer attorneys and shorter contracts. Those are the three things everybody's heard, right? But as you look into each of those questions arose that became interesting. One was John Haley's terrific work on litigation suggesting that perhaps the Japanese indeed litigated less than they did in the United States but it was perhaps for structural rather than cultural reasons. Even more similar work actually suggested the Japanese weren't outliers, the United States was the outlier. Virtually every other country litigated
except for one Nordic country, litigated at levels very much surrounding the Japanese and we litigated way out here suggesting that it wasn't so much that they had a low level of legal consciousness is much as the fact that we were all just deeply enamored of LA law. So that was sort of one issue.

The second issue had to do the number of legal professionals. This sounded again like possible evidence that this might be true because the number of “bengoshi” what is normally translated as lawyers in Japan is a fraction of that in the United States. But again it required somewhat more detailed work to look at what legal professionals actually did because to decide if you actually got a relatively discrete profession there are a couple of questions you want to ask which are: what are the lawyer substitutes and went to the monopoly rates look like? And at the end of the day when you actually look at a professional level of what the monopoly rents are for Japanese lawyers turned out they are relatively non-existent. And if they are nonexistent then it either suggests that there is little demand or suggests that there are lots of substitutes. Indeed because of the civil law structure of the nation you can find an awful lot of lawyer substitutes and if you start out in all of the lawyer substitutes you end up with a very different picture. See have different kinds of questions as to what this might mean and how one might define it.

In that context, we decided that it might be interesting to see if we could posit something that would actually be somewhat cross-cultural, that would determine whether the Japanese really are less inclined to use legal concepts to order their affairs as has been described or not. And contracts seem to be the appropriate place to do that. It seemed the appropriate place because that is of course where the central work that Kawashima had done over the years was reposed. So were the Japanese, as was described, more inclined to be flexible about the use of contracts, more inclined to view the terms of the contract to be less relevant in ordering their affairs? Were the Japanese likely to have shorter, less detailed contracts were they more likely to change those contracts and so on and so forth?

And so that is the area that we thought would be profitable to see if we could take a look at. Not a lot of documentation, a lot of thought about while the Japanese use shorter contracts then the Americans do. And they are listed here to buy how you really measure that? And certainly at least some preliminary evidence raised serious questions as to whether that might be the case. I want to show just a little of that evidence. Much of it comes from surveys by the (Japanese term 10:27:3), which is the Japanese Cultural Association which does periodic surveys of Japan and looks at attitudes about a whole range of things and certainly has some questions relating to law and legal behavior. Among the most interesting questions as we were thinking about how to order our analysis of their thinking was a survey that started out like this, it basically said: exchange of contractual documents is a proof that there is no mutual trust which of course is critical to the Japanese and therefore if there is that trust, if there is that stomach to stomach relationship that you don't really need a detailed contract or no matter how much the parties trust each other you ought to have the document. How many think the Japanese would identify with a? One, two. You know where this is going don't you? Okay. Well the answer to me, even having spent a lot of time with the Japanese in Japan was, I have to confess, surprising, probably not in result but certainly in degree. B, the attitude you would expect would be more American, more legalistic was favored by almost 90% of the participants. It was really a little startling as I looked at that data. Well the next question is will they won a document, fair enough, but the Japanese really are looking for that
document simply to define the contours of the relationship. In the context of defining the contours of the relationship they would be happy with a relatively loosely structured short document and one that did not have a great deal of detail in it. And so they asked the second question: if you exchange these documents... I apologize for these translations by the way but we were trying to be fairly literal about this... But if you exchange documents it should be as simple as possible or because you have to interpret it later on, which sounds of the legal task, it has to be specific. Now you all know where this is going now. Even a higher percentage said that if you have a legal document it ought to be really detailed. Well that kind of data as you begin to look at that makes one just a little bit surprised because that's not the conventional thinking we have. I'm not even sure Americans would be quite that high in that level of passion for documentation and detailed documentation in terms of any contractual relationship.

So we decided we might think about some sort of survey. And I want to do that great lawyerly activity of doing a little bit of plea and avoidance which is to say neither Prof. Kato nor I are trained sociologists. We did not have large research funding available and so we did something that looked a little more like winging it but it proved I think at least to be provocative enough to suggest avenues for further thinking and further study. We started with the hypothetical and here was the hypothetical: what we wanted to do was we want to take two companies. This is actually based on real case in Japan: a case of the Japanese and Australian companies. And the idea was that two companies enter into a long-term contract for the supply of a particular commodity. Now like all good amateurs sociologists we mixed up the contract. Could it be soybeans? Could it be sugar? Could it be steel? Could it be a number of other things? At the time of the contract is the market price was high and will posit $400 for soybeans for example. The buyer is required to purchase a certain fixed amount every year... All of his needs up to a certain amount or at least a minimum of a certain amount of all his needs over the course of a year and it was for five years. By the time of performance not only had... And they got this for half price by the way so at the time the contract was $400 a ton and then it was it was down to half price: $200 a ton in the contract. But at the time of execution the contract had actually gone down to a quarter of the price. So not was no longer $400 a ton on the world market, it was $100 a ton. So that was the hypothetical that presented some real questions about fidelity to contract of fidelity to law. And that was the question we want to pose.

Now to whom do we pose it? Well again with a certain resource limitation which would not have been of course if we were here at the University of Washington but we weren't. We figured that we couldn't really do yet, we had not proved enough yet that we could do a large-scale random multi-country survey of lawyers and businesspeople. So we did as Blanche Dubois once said, we relied on the kindness of strangers. We knew that we had a lot of friends out there in the legal and business teaching world and that perhaps we could glean something where there was some degree of parallelness between business students and law students and we could look at the attitudes of the business students, the attitudes of law students and you could actually even measure the amount of law that had been taught to see the actual legal training as opposed to the self-selection had created some bias in terms of their answers. And so we contacted a number of our close friends, at one point around the world, we had about 23 of these surveys going around the world, in 23 countries.
But the one I want to talk about today was Japan where we had very good luck in getting a good return. Now the reason we thought law students and business students would be potential surrogate is because in Japan as in most of these countries the professionals who go into the legal profession however that is defined or who go into the business world to some law degree graduate out of these majors. So it was a surrogate to be sure but one we thought at least would be provocative enough to raise some interesting possibilities and some interesting questions. And we wanted to get a sample size large enough to say it was statistically valid. Now I want to be clear about two things for those of you who are methodologist room: one was is large enough to have been statistically valid not random sample. We have to be clear about that this wasn't random sample but it was large enough to be statistically valid. Secondly, I always want to remind people that correlation is not necessarily causation. We found interesting correlations, speculated about the causation... Which is going to do today. But I want to make sure that everyone understands correlation isn't causation and so there is a lot of speculation involved here in this process.

So what did we do with that hypothetical? Well that was the basis and then we posited that some things happened in response to this contract and this business relationship. Essentially the first thing is that the buyer looking at that dramatic drop in price asked that he be permitted not to buy a certain amount of the imports from the seller and the seller said okay reduce the contract by 1/5. The next year the price continued to drop, the buyer now requests the seller to renegotiate the price. The seller thinks he has a good deal and says no. So now the buyer renews the request to renegotiate the price again and again. The seller keeps saying no. The buyer then tells the seller if you're not going to renegotiate the price I am not going to take delivery of the goods. This by the way is very much what actually happened between this Japanese and Australian company though it had happened enough years before that we were reasonably sure that most of the students didn't know very much about it. The seller still refused to modify the price the buyer then refused to take delivery. Finally the seller agreed to reduce the price by 10%.

And what we wanted to measure was what people's reaction was to each of those steps. The theory was, I think, relatively straightforward which is to say: if you had a high level of legal consciousness, if you had a high level of fidelity to contractual terms then he would be inclined to say that sellers should not have to renegotiate the price. This is the risk that the buyer took. The buyer cut a good deal but lost on the risk. That the buyer can request all they want but the seller has no obligation. The threat to not take delivery of the good would have been a threat to violate the contract. That's bad. The actual not taking of delivery was bad. And the sellers now, being bullied into basically taking a 10% reduction. That's a bad thing as well. So if you had this sense of real fidelity to the contract that's what you would expect the results to be. And that is what we sort of vaguely anticipated.

And here's what we thought: we fought the law students will be by and large inclined to adhere to the contract. The business students will basically be saying look you've got to get the stuff off the ships. You got a make a deal that works for everybody and we've got this mutual relationship and were Japanese so we basically don't really care about the contractual terms. It's all about this relationship and they will make it up to us sometime in the future. And it turns out we anticipated there would be differences in the attitude depending on whether they had studied law or business. And that turned out to be absolutely wrong. There were statistically significant differences of a number of different sorts. Some
surprises quite a bit and some not as much. What surprised us most is that the differences were exactly opposite of what we had anticipated. The law students generally thought: well it's not so bad for the buyer to request, it's a little bit bad, and this is an interesting wrinkle but I will talk about, is bad for the buyer to threaten not to take delivery but it's okay actually not take delivery. And the seller did a good thing negotiating. And they agreed with that in statistically significant differences from the business students who basically at almost every stage when there was some departure from the contractual terms condemned the person departing from the contractual terms. I have to confess that surprised us and made us think a lot about: well what do we really mean by this? What are we really talking about? We took Kawashima at his word. We somehow took him at his word that the Japanese were less inclined inherently to adhere to a contract, that legal training would make them more inclined. It would make them more aware and it would make them more inclined.

So we looked at this. We did by the way some other things in here. We did look at trying to reduce country bias as well, that this wasn't a Japan/Australia hypothetical. We mix the countries up quite a bit which also has a small interesting dimension. And you can ask at the end of the session who are the most nationalistic in Japan and we have a little bit of an answer for that. We also found some interesting regional differences in university-based differences which I'll just mention briefly. But the most interesting differences to us were the differences in the level of legal training.

So the question was: legal knowledge of legal training and what role did a play? The theory was that those with law would have an inherent more strict adherence to the contract, those with less law would be more flexible and so forth. Then as I say, the results were exactly the opposite but I think we had really anticipated. Law did make a difference and legal training could make a difference but in pretty much the opposite way from what I think we had anticipated.

So we then speculated on some reasons. I'm going to throw a few reasons out. One of the wonderful things about the survey I have discovered over the years, it's a Rorschach test. I can tell a lot about what you think about Japan by how you're going to explain this. And so we will invite explanations as well but let me offer a few to get started.

One is that a high level of legal consciousness does not actually mean strict adherence to contract. When I explained this to law professors and even law students a light bulb goes off which is to say we all sit around, I talked contracts for many years and we did not generally sit around spending a lot of time saying a contract the contract. Most of the time we said: well here's the base of the contract, here are all of the exceptions, here's the way to get your client out of the contract or a way to force the other side to comply with the contract but most of the time we were talking about the nuances and subtleties. Nobody was going to pay us $500 an hour to say what her five-year-old knew which is a contract is a contract. They pay us $500 to figure out how the hell to get out of this contract, this bad deal that we are in. And so there is a certain part that we thought well wait a minute it does make a certain amount of sense that legal training would cause you to think in a somewhat more democratic way about the facts in a more nuanced way about the actual obligation or the nature of the obligations that a person had accounted. And there is a good part to that which is a certain kind of sensitivity to the facts of the democracy affect. The reverse side of that is that it also could be interpreted as playing to everybody's
worst ideas about a lawyer is. The lawyer doesn't do what your five-year-old does, he doesn't believe a promise is a promise. The lawyer's job is to manipulate the doctrine in a way to get you out of an obligation that most people would otherwise think makes sense as a straightforward obligation. So, that was sort of one explanation that we thought.

But it still came as a surprise for a couple of reasons. One was as we put that description of legal training to its highest avoidance of contract responsibility would seem in an analytical sense to be evenly weighted with compliance. Why would there be a bias in favor of getting out of the contract as opposed to a mutual bias on the part of a lawyer? That was one question. And the second that made this interesting and relevant is that despite all of this we had never in the last... For 30+ years, probably 50 years now been talking about legal consciousness in exactly the opposite way as though it means strict adherence to the contract in this way. What it also permitted me to say to Prof. Kato and he didn't speak to me a week after his I said: well it makes it very clear then that the Japanese with their sense, if this is true, with their sense the contract isn't a contract and there ought to be flexibility and there ought to be a personal relationship that makes them highly legalistic and we Americans non-legalistic. He is speaking to me again but it took him a while before he would speak to me after I made that comment.

Now the other possible explanation is that it has to do with some lack of knowledge of legal rules. And in a way Kawashima server flex that in one of his seminal works on contracts. Which he says and uses is a prime example during the immediate postwar period when food was in such short supply: a person in the city goes out into the country and tries to buy some potatoes. And the person says: I don't have any potatoes but I will have some tomorrow. So the woman comes back the next day to buy the potatoes and he says I resold them. And she says: but you promised me he would sell me the potatoes. And he said: yeah but she didn't get it in writing. And Kawashima’s response to that is: isn’t that a low level of consciousness because we all know you don’t need to have it in writing to have a binding contract. Well unless he went to law school who the hell knows that? I mean that it isn’t so much a question of legal consciousness is the fact that people just simply may be quite legalistic but just not aware of the actual technical legal rules is in fact a farmer saying I would have given you these potatoes if we had had a written contract is indeed a pretty legalistic approach it seems to me. I always think of farmers as salt of the earth, my handshake is my word. “No, no, no got to get in writing or doesn’t count”. That sounds pretty legalistic in the absence of knowledge about it seems an odd way of defining law and the legal attitude.

But add to that the sort of two countervailing considerations. One is looking at the Sang Ni Ho Book of “kaidi” surveys that I was talking about earlier. They ask something interesting which was: how many people have a copy of the basic compilation of Japanese laws, the complete compilation of Japanese laws in their home, the (Japanese term 27:56)? As it turns out almost 35% said they did. Now I would bet you a lot of money that you could not find 35% of Americans who have US code annotated in their house. An interesting thing is of those people almost 100% of them said they had consulted it. Again, most of our knowledge comes from watching the good life and other critical legal dramas. We don't read this stuff. We don't have these books to my knowledge. So that is an interesting data point.
The second data point that is interesting is you actually think about per capita legal training. We produce about 39,000 law school graduates a year out of American law schools. Japan with now just about half of our population produces over 40,000 graduates. So per capita over two times as many people have actually studied law in Japan as have studied in the United States. And make no mistake about it for those who have been to Japanese law schools as I have you know that is not a general analytical framework to think about the law that you study. It's not like political science. It's not even like the case method. You learn the rules. As twice as many in Japan actually have serious knowledge of the law as would be the case in America. So the notion that somehow we could define this is a knowledge base seems a little challenging.

There is a somewhat more cynical explanation for this as well. Let me roll out a little bit. I'm going to go through some of the answers to these questions in a little detail for just a few minutes to see if I can tease this out in a way that is persuasive. If you start from the premise that law is indeed an artifice: not culturally derived, not a great that it was imposed on the Japanese and not part of the way in which they ordered their thinking or their relationships then perhaps law has a somewhat different role. It is somewhat more instrumental. And if you think about law as being instrumental then one thinks of the role of the legal professional as largely designed to try and manipulate the doctrine in favor of their particular client. There is no strong ethical imperative. There is no strong institutional imperative beyond that that you are able to successfully argue and successfully implement. And there is at least some interesting evidence that those with legal training nimbly jump from side to side in these hypotheticals in a way that suggests that there may be some truth in that: that they largely identify with a particular side, now there is some question as to why they would identify with one side as opposed to another but under this view it would suggest that legal training there is less respect for contracts and any kind of ethical imperative with respect to contracts or even some enforcement relationship to contracts but more of an inclination to think they should be obeyed when they are in your interests and disobeyed when they are not so much in your interests. That in no way raises legal consciousness debate to a new level but also raises really interesting questions about what we mean about the role of lawyers, but we mean about the role of law in society, what we mean about the role of legal professionals. What is the foundational set of issues from which all the stripes?

So a couple of other quick overviews before I get into the specific questions: we did find interesting gender-based differences almost across the board and almost in every issue. And they were interestingly consistent again with some of the Carol Gilligan's theory and other theories with respect to the difference between men and women and boys and girls in terms of their approach towards rules and relationships. The women were by and large in these surveys more inclined to be flexible, more inclined to say that the sellers should negotiate, more inclined to say that if the buyer asks the seller should be nice and do something about that, more inclined to approve the sellers eventual renegotiation of the contract to the 10% degree. That is I say there is some degree of consistency when you think about that if you look at some of this interesting work that Carol Gilligan and Carrie Meadows have done in the field of gender-based differences in the terms of both personal relationships and relationship to law as well as dispute resolution.
We also looked a little bit to see if there was a national bias. In other words, if the company that were disadvantage were Japanese and the company that was the seller was a foreign country, was there a bias in favor of Japan or against Japan in the circumstances? At interestingly, we found there was a little bit of bias based again interestingly on the part of the law students in favor of Japan not on the part of the business students. Business students were with three exceptions quite natural. The Japanese law students up were on the other hand more inclined to favor the party that was Japanese. Why would that be the case? Well, it's possible that an awful lot of law students believed that they are going out to be government bureaucrats to go out there doing things in relation to Japan. Business students knew better since that they live in a global world and that what's sauce for the goose is sauce for the gander later on and so forth. It's hard to say but the bias is there and it's statistically significant.

The three exceptions on the part of the business students are very interesting. They were more sympathetic to Korea, China, and France. If Korea, China, or friends were disadvantage, they were more likely to be sympathetic, or if they were the ones doing the bandaging in the advantage position, they were more likely to be sympathetic. It's hard to imagine quite why that might be the case. But a little bit about Korea and China perhaps a little bit of a residual sense of guilt, and we are going to lean over backwards to show how liberal we are in not favoring them. France on the other hand is harder to figure out. One explanation somebody offered to me is that the French are known as notoriously difficult to do business with in Japan. Therefore when they are playing hardball, it's a seller, or whenever they are trying to undermine the contract, they are living up to expectations. This is exactly what you would expect the French to do, and therefore you don't condemn them so much because this is sort of anticipate the French would do. The same explanation could prevail with respect to the Chinese and Koreans. It's hard to say.

And there were also some general regional differences. We found that students from the Tokyo region as opposed to Chu Kel and Nikyo and those areas of Japan were more inclined to the somewhat more authoritarian view that a contract is a contract and it should be here two. Again, that same bias prevailed with national universities as opposed to private universities. And that struck us as interesting and again possibly a reflection of the career tracks that a lot of these students will end up going through.

So let me turn just a little bit to the questions if I can. Let me show you how we sort of phrase the questions. These are the questions we asked: was it imprudent to enter into a contract of this sort? Was it reasonable for the buyer to request renegotiation? Was the seller inflexible in refusing to renegotiate? Was the buyer’s threat not take delivery unreasonable? Was the refusal to take delivery reasonable? And then asked was it ethically proper? What is the basis for being upset to the degree you are upset? Is there an ethical issue here in terms of doing this? And then was it sensible for the seller to finally reduce the contract price? And finally the end what if bankruptcy were looming? Would you evaluate the party somewhat differently?

So let me turn to the questions little bit and we just asked people on these questions in relationship to this hypothetical view, strongly oppose that view, oppose it, uncertain, support, or strongly support. And that was the analysis.
So the first question was is it imprudent to make the contract that lasts for five years on merchandise like sugar? To some degree everybody thought given what happened in the market you know the hypothetical kind of answer itself: yeah it's a little prudent to do that. But the most interesting point from our perspective is that the business students were appreciably less inclined to think it was prudent. Law students thought: okay it's not terribly imprudent. The business students thought it was pretty imprudent. We would have thought that the business students would be, this might be a reasonable answer, they would be more sensitive to the volatility of markets and so forth and the responsibility for profitability foster actually on their shoulders. Whereas a law student on the other hand use the transactional issues of spot transactions is more problematic so rolling the dice maybe makes a bit more sense. Although you would think the lawyers in some ways would be more attentive to the risk because if this falls apart they are likely the ones who have to clean it up. But it's also possible that lawyers and business people view loss differently. That is to say if you are a lawyer and this deal goes south you are only doing a client spitting. If you're a businessman in this deal goes south you're in real trouble. But at the same time why would the business students be biased in favor viewing themselves as the buyers as opposed to the sellers? I'm not sure what the answer is to that except there is some data in other kind of sociological study suggesting that we are more affected adversely by a loss then we are benefited by again. The other possibility is that success has 1000 parents and failure has one. Isn't this true? And Japanese companies are particularly attentive to this that if it's successful everybody gets credit. The person gets promoted in the company is not the one who was the principal architects of the deal but the one who kept the group together and so forth. But if, you remember those huge trading losses that the Japanese companies had some years ago in Hong Kong and other places, boy the finger pointing started almost instantly and so it's possible that in fact the structure of the way in which your career plays out that a loss is somewhat more devastating a more personal than in fact a success might be. So your benefit from successes discounted and your harm from loss is magnified in the business students would understand that more clearly and would therefore be more risk adverse than the law students would be in that regard too.

I suppose the only last thing I will say about the answer to this question, which I think is interesting to think about a little bit, is quite a law student or lawyer would view upside risk and downside risk in a slightly, even marginally different way because it is that there risk in either circumstance. The answer may be in part because they self-identify with the person who is in trouble as opposed to self-identifying with the person who has been successful in this, suggesting again a certain perception of those in the legal profession that the legal profession is largely designed to help people who have gotten in trouble as opposed to designed to create situations that sort of keep everybody out of trouble.

A little bit of different national bias, gender differences in national bias is pretty much what I have said.

So let me turn to the second question. The second question was: do you agree it's natural to alter the terms of the contract if the market price falls greatly? Would it be reasonable for the Japanese or whoever to take the course of action stated above which is to renegotiate price? And there we found overall that there is no, interesting, there is one of only a couple of questions where there really wasn't
a statistically significant difference in this answer between the law students in the business students. And this becomes interesting not so much for this question but a little later on. Everybody thinks to some degree or another that it's probably reasonable to ask for this when the deal just seems to be so difficult and so challenging for one party.

The third one was: even though had fluctuated greatly the Australian refuses is this too inflexible? Shouldn't the Australian or shouldn't the cellar cave a little bit in this regard? And here there is a slight degree of criticism of the seller if you look at the overall degree of criticism though it's quite close to neutral. This is another one in which there wasn't a lot of statistical difference. Business students, law students both thought to a small degree that the seller really ought to be more flexible. That would probably be a good thing.

Now here is where it begins to be really interesting: when we get to question number four. When we get to question number four we save now they are refusing to take delivery of the shipment. So the reaction here is either you applaud the buyer for the threat or you condemn the buyer. Generally speaking most students thought that the buyer should really go this far, that this threat was a real threat and they shouldn't really make the threat. Interestingly here the law students were more critical, normally to questions in which the law students are more critical of the buyer for trying to upset the contract. At this point they're basically saying the flexibility that you are asking for you shouldn't really even be asking for this. Business students thought: yeah, it's okay to ask, by and large it wasn't such a problem.

But what is interesting is that we skipped the next question and you basically say the buyer doesn't take delivery at this point and we ask is that okay? Here the law students thought out was more acceptable than the business students did. So then you have this interesting conundrum which is the law students were more inclined to condemn the threat and more inclined to be accepting of the actual action. What explains that? I don't know. I just remind everybody causation and correlation are different sorts of things. But what struck us as we were looking at this data was the nimbleness with which the parties change position. On one point you are condemning the buyer sings the terrible thing. And then the buyer actually does it and you say well it's okay. Is that an interesting example of role differentiation among legal professions? If you think about it as a lawyer this makes a lot of sense. They are going to threaten to do a. You tell them I don't know I think you've got a contractual obligation. This is your job as a lawyer: tell them what the risks are doing it. Once they have done it, all of a sudden you shift from this advisory capacity to and advocacy capacity: okay you did it and now I know it's all right that you did it even though I just was yesterday shouldn't do it. The nimbleness with which even law students, nobody thinks about teaching this and yet the nimbleness with which the law students made that leap is really quite remarkable suggesting again a very sophisticated understanding of not only the legal rules, not only of the way which law orders these transactions, but interestingly about role definition and role behavior. And that really seemed quite, quite startling to us.

I want to make sure that we have enough time for some questions and discussion here but just to conclude I can go through the rest of the questions but they turn out to look very much like you might've thought. Let me turn to one on the ethics which I think is a kind of an interesting question here.
There we ask: is this sort of sorted from an ethical perspective? You can use whatever translation you want in their but it basically comes out sort of is that and ask they want to measure the extent to which they viewed this as purely a finance-based transaction, legal-based transaction, or whether there was something ethical sort of underlying this and whether obedience to contracts had anything other than a purely instrumental view. People were overall somewhat critical but they became in this point when you started attaching words became quite a bit less willing to attach any of these attributes to the action of the buyer. Even respondents who disapproved of the buyer's actions as they had in the prior questions were not inclined to attach particularly strong words as appropriate to the actual behavior of them. Businessmen were more inclined to criticize on ethical grounds, interestingly, then the lawyers were suggesting perhaps that lawyers view the laws more a tool to structure economic relationships. You know we have only contracts think about the notion of ethical breach and efficient breach, efficient breach being something that is relatively acceptable if everybody ends up better off than they otherwise might have been. But for the business people compliance was viewed as an ethical issue somewhat before it was viewed as legal issue. Whereas, the law students were very unwilling to attach an attribute that term to it.

Finally we said was it sensible or not sensible for the seller to negotiate? Most were inclined, interestingly, to think that it actually wasn't such a good idea for the seller to actually renegotiate. Most thought that it made sense that the law students didn't. The law students thought it was perfectly appropriate to do it suggesting again an interesting view is that the business people viewed compromise is somewhat foolish and inappropriate. The law students viewed as somewhat more appropriate. And what explains that? I'm not sure. But at least one idea that comes across is that lawyers prize agreement because agreement is more likely to result in compliance than they do how you get to that agreement. The buyer wants to be that the seller a little bit. The seller caves. Okay we got a new agreement. Everybody seems ready. Everybody seems happy area and so again an interesting question about what we mean by legalistic in this term, about the notion that somehow however you get to this agreement is okay. Now that sounds as you read (Japanese term 49:05) And much of the Japanese literature on Japanese sociology and give trading and Labor Relations work that is done as well, the notion of getting to an agreement even if there is some abuse involved to getting to that agreement is what is really critical in Japanese society. Some evidence that that is a legalistic view. And let me add one other point: lest you think this is not somewhat legalistic not only was there some statistical difference between law students and business students but the more legal training you had the more the law students were moved in the direction I have described. So, first and second year law students looked a lot more like business students. Third-year law students looked less so and fourth year law students looked least of all. So the actual time in law school and the actual legal training seemed to have some demonstrable effect. And with the exception of one question legal training within the business school setting because there are a few courses of business law and things like that in most business courses in Japan seem to have very little effect. Students who have versus students who did not have that seem to have virtually no effect at all.

We then put in the bankruptcy question. It turns out everybody is somewhat more sympathetic if it looks like bankruptcy is in the offing but the law students were much more sympathetic than the
business students. Business students to some degree inclined to say: comply with the contract even if it means going to go out of business. Law students did not say that. They said: if bankruptcy is in the offing that we are even more likely to approve the actions of the buyer. And in fact the more law training you have the more likely you were to approve that.

So what conclusions do we draw from this? Well in some measure it raises for us at least anonymously larger number of questions than it answers. What we really mean by legal consciousness? What do we mean about how law is used as a device to order society? How do we think about what legal training really does to shape people's attitudes about how law mediates and structures relationships? And how do we believe people ought to behave in those relationships? And what to we think about the role that lawyers play in terms of those relationships with that always dual role that sits somewhere in our background between advising and advocacy? And we have some very interesting data from our perspective at least that raises more questions I think that it answers but at least suggests that the conventional simplistic view that has permeated a lot of the writing, including mine, I'm up here confessing to my priest, is maybe much more complicated I think that they thought.

So with that it would be happy to take a lot of counter arguments and kibitzing. Questions?

Audience 52:17:

I have one about whether or not when you look at this contract in the beginning it looks rather unbalanced with the price being out of balance, the market price being out of balance with the contract. It would seem to me a good lawyer if he had economic training would save why is the buyer and seller agreeing to a price that is so out of balance with the market?

President Young:

A really good question. Everybody here that? The question was would he make of the fact that the contract starts out seeming rather out of balance because the market price is 400 and they're getting a contract price half of that.

Audience:
It doesn't make sense.

President Young:

It doesn't make sense.

Audience:

Why is not a lawyer putting this together or the parties or the lawyers putting this together looking in this saying why don't we put something into this, structuring this of the in the future the pricing is set up so that it adjusts the market somewhat to make it equitable to both parties as the market changes so that we don't get into this problem?

President Young:

The simple answer is that we didn't give them that choice.

Audience:

I understand that but it seems to me from a lawyer, from the training of lawyers this would be a lawyer drafting issue.

President Young:

Absolutely, but we weren't training lawyers we are asking them questions. But your point is a good one and it may account in some measure for why the lawyers were less inclined to think that a long-term contract was a good idea. The law students to some statistically significant degree disapproved of the long-term contract in the business students basically approved. So, or maybe it's the other way around. Let me recall my notes. No it actually is the other way around. I apologize. The law students seemed to
like the long-term contract as opposed... Now part of it may have been that they thought the business people knew what they were doing in the business students knew that businesspeople never know what they're doing. So that may explain part of it. I'm not entirely sure. The only thing I could think of is number one that the law students may have had more confidence in the businesspeople and may have viewed their role is less judgmental. In other words the businessperson said: do this. So they said: here's how you do this. Secondly they may have been more attentive to the transaction costs of (inaudible 54:54) contracts and so forth. Presumably the business students were more attentive to the risk, inherent risk. Which again raises an interesting question of: at what point does the lawyer view his or her role as advisor as opposed to simply executory. There may be three roles we are talking about here. I mentioned to which is the advisory of the Council and the advocacy but there may be an executory role here too. The lawyers didn't seem inclined for the most part to play that executory role. They were fairly comfortable with this. The business students were not.

Audience 55:28:

That seems to me that the lawyer see themselves as representatives and not just the actual participants. The businesspeople see themselves as the people on the ground doing the deals.

President Young:

I think that's true as I say with a couple of exceptions. At the point at which the buyer threatens to not take delivery the lawyers get all hot and bothered. And then when they actually refuse delivery the lawyers are okay. So they move rather nimbly from this advisory to this advocacy role. But they are advisory and the other role. Make no mistake about it that this advisory position.

Audience 56:17:

I am thinking of a conversation I had recently with one of our alums who observed to me that one of the things he would like to see in terms of changes in legal education is to help our graduates see things not simply from an adversarial standpoint. And he recounted an instance in which relatively early in his career he negotiated a contract and got really great terms and was really proud of himself in the contract started going south because it was such a good deal that the opposing party was finding it didn't make business sense for them. And he eventually ended up renegotiating the contract. But it was
a real wake-up call for him in understanding that in a business deal, yes you’re looking to get a good deal but you also want your suppliers to your business partners to be able to stay in business.

President Young:

For sure, for sure. And the question at this point is: at what point does the lawyer move from the executory to the advisory to the advocacy roles? I certainly think it is frequently true they get too good a deal but I leave that to Dean Testy. Would you fix that at the law school?

Audience 58:02:

We have been hearing for years that the Japanese are not decisive. That is difficult to get a clear-cut decision where the American say: okay. Do you have a comment on that?

President Young:

Well as in many assertions about the Japanese I always remember what my colleagues at Columbia medical school used a toenail the time which is that the plural of anecdote is not data. So I think we need to be a little attentive to what is anecdote and what is data and try and drill down on that. That is one of the things I found so interesting about this. When we actually began to do a real data cull how complicated the issue. Yeah I mean I think there’s a lot of anecdotal data that the Japanese take a long time to negotiate but when they actually reaching agreement that they adhere to the agreement things like that. I think there are lots of stories out there. I will tell you the one other study which relates to this which I did with a group of professors from Tokyo University, Kanda Hideki, and some others is we actually wanted to see if we could identify differences in long-term supply contracts in Japanese settings as opposed to American settings. And so over the course of about a six-months I interviewed probably 50 or 60 legal counsel at major corporations particularly on the East Coast. Some number of them are pharmaceutical but not all by any stretch. And my counterparts in Japan were doing the same thing and we compared it. We came up with some pretty startling and straightforward results, with remarkable similarity. And here's one of the things we discovered. We discovered that new kinds of transactions on both the Japanese parties between two Japanese corporations. And the American parties between two American corporations were highly likely to be very lawyer intensive-a lot of negotiations, a lot of questions about this part of the deal at that part of the deal, very long documents you know etc. etc. heavenly intensive and so forth. Once those deals were done and became repetitive transactions they
were by and large done on the back of a napkin because silly things that ever changed were ricin delivery date. It was an interesting kind of thing to see how remarkably parallel they behaved in those settings. The other interesting conclusion from that by the way is that in 60 companies that I interviewed I could not find a single contract litigation going on. Now a lot of employment litigation, a lot of slip and fall litigation, a little bit of antitrust occasionally but not a single piece and 60 companies in America I couldn't find a single piece of contract litigation. For no contract professor broke my heart but that was the truth. Which is just another aside from the same study. But I think that, again, I'm not sure how to answer that because at least what it anecdotal data we could find was remarkably similar behavior in terms of lawyer intensity versus lawyers backing out when that occurred and so forth. In fact in parallel industries, I do a lot of interviews in the pharmaceutical industry, in parallel industries we found the timeline almost identical in terms of agreement, negotiation, and so forth. So it's hard to say. I certainly feel like that when I am negotiating with the Japanese. But every time I go to Olympia to negotiate with the legislature I feel like it's even longer. So good question.

I heard some story about negotiation between Japanese and American. So when the American representative go to the airport and the Japanese they are very, very warm how long are you staying here welcome to Japan? And they say: seven days. Oh great. And then in the coming five days they take control the sceneries and do a lot of visiting but do not talk about business at all until the sixth the seventh days they start to talk about business and deal because they only have two days left so he wants to make a deal in a hurry and it ends up the negotiation was not so good for American side. Another thing I heard is about they save when doing a negotiation Japanese they are good use pause and silent because in Asian culture is perfectly fine not to worry if we're to have a long pause and silent while in America maybe they feel like a what's going on something is wrong and they have to fill the pause by saying something. So I heard about some little tricks during negotiating and I wonder based on your experience do they have the strategies using only one reaching negotiating in a contract?

Well I will reiterate my level of uncomfortableness with "they". Can I set experiences? Absolutely. My favorite was a fellow who went over to Japan and they did what they had often done to him much as they wined and dined him with a rotating cast of characters so he was exhausted and they were fresh every day at the negotiating table. At which point he could see that this could go on for months. He said: well I've got to go to the Middle East on Wednesday we have to have a deal by Wednesday there's no deal it's all off. So Wednesday morning they cut it deal. Now he had no intention of going to the Middle
East but that is what he told them. They basically picked up at his hotel driven to the airport escorted him onto the plane to Abu Dhabi and he flew all of the way around the world back to LA but he got his contract. So I don't know. There is also lots of anecdotes. I don't find the Japanese particularly non-talkative and I find them the chatty as people in the world. If you want to shut them up just Japanese looking person in the room and they were silent in a heartbeat. But I have never found and not talking in negotiations. They may not talk to you. I don't know these are kind of in the category of anecdotes and if you collect enough of those and write a book it will sell at the airport. I just don't know. I have done a lot of negotiation with Japanese. I know that Rick kiddo and Jane Lee and others have done a lot of negotiation with the Japanese as well. And I'm sure we all have stories. But as I say: the plural of anecdote is not data. It's I'm just not sure.

Audience 1:04:55:

I apologize for my voice I have been busy all day long but I will try to get to the question. Just a quick clarification what year did you do the surveys?

President Young:

This survey was done, we did the principle set of surveys just about seven or eight years ago.

Audience 1:05:13:

So one is a comment and the other is a more serious question. It would be curious to see whether students in the law schools, the professional law schools after the reform would have responded differently or more in the direction that you have demonstrated with some of your data than the law faculty students. So this is just if you wanted to rerun the surveys you can do a law faculty to law school it might be interesting in itself. But I am wondering take the timeline where Yamashito develops the theory and I appreciate the empirical wrinkle because I do think that it puts into question a lot of the theories that are out there. But I am wondering if you think the globalization of legal services and generally the broader opening of trade and international sales plays into this and maybe the business students of the business schools were just ahead of law schools in recognizing that in a world where you are transacting in a much broader world you need to stick with the rich and contracts or vice versa?
President Young:

I probably would be inclined to think that that's true to certain level but as is true in Japan as is true in the United States the vast, vast, vast, vast majority of transactions are internal. The vast majority of legal activities are internal. The vast majority of training focuses on internal laws. The Japanese are like us: one international law class and maybe if you really created you get a trade law class. So I don't know that I would suspect there is an enormous amount of change based on that. One thing I will tell you that I think it's interesting. I mentioned earlier if you look at the number of lawyers in Japan and ask if they're too many or too few comparatively speaking. A good place to start, you know follow the money, look and see if their monopoly rents in there. But interestingly the only place, and this is something I used to negotiate with the Japanese government a little bit in different incarnations, is in the international practice area. They're the Japanese lawyers seem to have excluded the Americans of a certain kind of grace that is occasion to most of monopoly rents actually in the international legal profession which is again a reflection maybe that is not as pervasive because that capacity to deal internationally were it completely unrestrained market would even out throughout the profession but it hasn't. Suggesting again may be that this idea of internationalization is somewhat more confined concept in terms of actual training and behavior and otherwise might be. But both of those are current speculative.

Audience 1:08:14:

Alright so I was thinking as I was listening to the hypothetical that the two companies sound relatively equal in power and it would be interesting you know with a larger budget more time and more data points to maybe make set the size of the company and see how people respond because again just anecdotally when I have dealt with American clients there tends to be a fear of large companies that they are going to believe you. And anecdotally with Japanese clients a larger company there is a sense of almost paternalism that there is a taking care of, you. To me as an American it was little startling at first: what you mean there take care of you, you know they're going to step on you. They're like: no, no it's okay they have done it this way for many years and they're watching out for me. So it will be interesting you know with a greater budget and more time or maybe there was nuances that you go into to see how companies size or company sophistication would impact the way people feel about asking for a better price or moving terms in the midst of it.

President Young:
Way that is a great point and I guess I could respond just a couple of ways. One is that I think, the question is is there a particular affinity for affection, appreciation, paternalism the people identifying the corporate world as different than would be true here in America? That might be the case but one is more inclined I think to see as an empirical matter is it depends on the level of repetitive transactions. That is to say if you look at film distributors for example, until little work and thinking about film distributors and movie theaters in Japan. And what you find is an interesting interplay where there is a long-term sort of balance in the books. Remember of serving him and taking some data on the case where the film was likely to be a blockbuster where everybody of course makes the most money. It was to be shown up in Niigata. Niigata had a lot of snow. People couldn't get to the theater. The theater was closed. And so they sort of lost their shirts having paid quite a bit of money for this. They went back to the distributor him and said: will you make a concession? And they said: no. Now this seems quite on paternalistic but if you trace forward about a year and a half all of a sudden Niigata got a preference on another blockbuster that did not go out to Sendai or some of the others it got to Niigata first. And the only way that I can explain it really the people could explain it to me was that there was this sort of longitudinal balancing of the books. And so if you have a set of repetitive transactions and you have more likely a sense of some mutuality innocence. And I think, I guess if that's a structural situation I would suspect that it might be true in America as well when you have those. What you may have in America and this is an interesting structural question for me: is that you may have fewer repetitive transactions of that sort. When you think about where people shop in Japan: their neighborhood shops, the relative paucity of big-box stores. There is a repetitive transactional dimension to that that is probably less apparent in the United States. Such answer that question: partially what I would ask to is how are these transactions structured over time and what is the relationship? I think that would be a really interesting when thinking about that but I think it's an interesting point. The one thing I will say is we did another survey. Apparently we deluded a funding agency enough with this survey to think that we might have something interesting to actually ask and we did do a major three country survey: China, Japan, the United States, asking not this hypothetical but a whole series of questions about the use of law in a whole range of different kinds of areas in the most interesting one was landlord-tenant Where we found actually landlord-tenant relationships in Japan are much more legalistic and complicated and fraught with disagreements and so forth that is true in either China or the United States. Suggesting that whatever paternalism is felt in the part of a large corporation you didn't necessarily think that with respect to the landlord. It's hard to say but that's a great question it would be really interesting to be able to pursue it in more detail. As I say we have a little tiny bit of data that hints at something I don't know how generalizable that is.

Audience 1:13:06:

Please correct me if I am wrong. Did you say that this survey of hypothesis was conducted in 23 different countries? Could you tell us a little bit about what the result was an United States? That's one. In the second regardless of the gender or region or country is it okay or safe to say to conclude that the more
legal training you have you put more importance to the process, democratic process regardless of your answer is yes or no?

President Young:

Well it depends on what you mean but I process I think. I'm going to answer your second question then will punt on the first question. It depends a little on what you mean by process. I mean if you read what Hirst's work and a lot of the defining characteristics of how we order society in America. His point which I think is a very profound one is that we tend to come from many, many different backgrounds and therefore, with many different cultural experiences, historical experiences, attitudinal differences and therefore we tend to price process. We price enormously. And that at the end of the day we get really upset, we care if we lose something in let's say a legislative session or you lose a court case but we get furious if we think the process has somehow been destroyed. There is a very strong sense and I think a lot of support in scholarship in that regard. Now if that's what you mean by sort of formal process than you would imagine because his had gone through a formal contractual process of that sort that the Japanese law students would be more inclined to say well then yes you should adhere to it. In fact they are just the opposite to the extent that you can process is whatever gets you to agreement whether it's getting the thugs out to break your legs or it's threatening to not take delivery or whatever it is to get you to the agreement once you agree that the end of the process and that's a good thing. Japanese law students seem sort of more comfortable with that. At least that's one interpretation of the data. But that is a funny way of saying adherence to process I think. I mean that is a different kind of process and the Japanese have a remarkable tolerance it seems to me in any event for process distortions that would appall us. I have done some writing in the area of (Japanese term 1:15:54) And these are the organized crime groups that will for example go to a shareholder meeting and threatened to disrupt the meeting unless they are paid off. Or the same people who will take over the bankruptcies in the Osaka area will take over bankruptcies, will get on the creditors committee and then will basically shut off the auctions that anybody except their little group and then they will knock down all of the assets at a very low price and walk away with them. The same is true of the (Japanese term 1:16:26) I remember translating an article once when I was in law school for Prof. and when you look technically at what the term means it is dispute resolver which is how I described it: these professional dispute resolver's. It was an admirable noble profession but as it turns out they are Mafia they are thugs they are (Japanese term 1:16:44) who go in and you have a car accident may persuade you that you are asking for too much money from the company and you are going to have just a little bit of problem walking out of your house if you don't resolve this dispute. Same with the(Japanese term 1:17:02), the bill collectors who will stand in front of your house and people let them do this. They will stand in front of your house and scream there's a deadbeat in there. So there's a remarkable capacity and tolerance for distortion of process I find breathtaking. Now they have tried since the mid-80s to kind of crackdown on it with mixed success. The tolerance for that is breathtaking. I take your point but as I say this data to some degree suggests that
law students are more inclined to get you to an agreement then they are with fidelity to the process think it's either. Thank you.

Dean Testy:

Please join me in thanking President Young. President Young we really enjoy having you here and thank you very much for that wonderful contribution to our Asian Law Center’s Lecture Series. Very much in the kind of blond society style and gives a lot to think about In terms of what it is we do to law students when we are educating them and how that goes. So you can bet we take that under consideration as we continue to work together here at the Law School.

I want to thank everybody for being here this evening. It’s very good to be with you all and gather. I hope you all have a pleasant evening and thank you for coming. Again, President Young, thank you.