

The Japanese Way of Justice: An Up-close Look at Japan's Jack McCoy
A Review of *The Japanese Way of Justice: Prosecuting Crime in Japan*
By David T. Johnson

Kent Anderson*

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Dah dum, the Mike Post driving theme song begins, and the baritone voiceover lectures: “In the criminal justice system, the people are represented by two separate, yet equally important groups, the police that investigate crime and the district attorneys that prosecute the offenders: these are their stories”¹ This is the memorable beginning to one of the most successful and longest running television shows in American history—*Law & Order*.² Despite its enduring appeal in the United States, *Law & Order* has not caught on in Japan even though the legal drama genre has been remarkably successful there—both *Ally McBeal* and *L.A. Law* have become wildly popular.³

After reading David T. Johnson's book, *The Japanese Way of Justice: Prosecuting Crime in Japan*,⁴ I now know why. The tensions and potential conflicts that are *Law & Order*'s *raison d'être* and which make it so compelling for American audiences simply do not exist in Japan. Thus, the show cannot surmount the significant hurdle of cultural and contextual familiarity necessary for a Japanese audience to appreciate the program's drama.⁵ As Johnson points out in

* Senior Lecturer, The Australian National University, Faculty of Law. An abbreviated and modified version of this review appears concurrently at, *Crime, Prosecution and Punishment in Japan: What Johnson, The Japanese Way of Justice: Prosecuting Crime in Japan (2002), and Schmidt, Capital Punishment in Japan (2002), Can Teach About the Japanese Curry Killer Case*, 5 AUSTL. J. ASIAN L. (forthcoming 2003). I gratefully thank Andrew Clayton for his comments and assistance on short notice.

¹ *Law & Order* (NBC television broadcast, 1990-present).

² *Id.* For background on the show, see The Internet Movie Database, at <http://us.imdb.com/Title?0098844> and Universal Television, at <http://www.uni-television.com/laworder/> (last visited Jan. 30, 2003).

³ *Ally McBeal* (known in Japan as *Ally My Love*) (20th Century Fox television broadcast, 1997-2002) and *L.A. Law* (known in Japan as *The Seven Lawyers* [*shichinin no bengoshi*], a wonderful allusion to *The Seven Samurai* [*shichinin no samurai*] and its remake *The Magnificent Seven*) (20th Century Fox television broadcast, 1986-1994) are among the few foreign television dramas that have been translated and aired on Japan's national broadcaster NHK. See Kaigai drama sōgō de-ta-be-su (The Comprehensive Foreign Drama Database), at <http://www.tora-2.com/index.html> (last visited Jan. 30, 2003).

⁴ DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* (2000).

⁵ This point is emphasized in a show such as *Law and Order* that is story-driven rather than character-driven like most television dramas including *Ally McBeal* and *L.A. Law*. See Dawn Keetley, *Law & Order*, in PRIME

The Japanese Way of Justice, the failure of the Japanese criminal justice system to resemble the one with which we in the common law world are so familiar does not mean that the two systems have completely different goals, objectives, or even techniques. Instead, it simply means that when approaching the Japanese system from a common law background, one has to cast a broad net and be aware of one's own presumptions when looking for the comparable sub-systems that make up the Japanese criminal justice framework.⁶ By doing this for us, and doing it so thoroughly and honestly, Johnson's book joins a small group of the best comparative legal work available.⁷

The Japanese Way of Justice is a superlative contextual examination of how crime is prosecuted in Japan. Johnson explains, "[t]he purpose of this book is to draw an empirical sketch of Japanese prosecutors, the contexts in which they work, and the powers they individually and collectively exercise."⁸ Like many things in this book, at first glance the structure appears to be simple and predictable, but as one turns the pages, the complexity and subtlety with which the subject is treated is revealed. It is therefore better to consider each section of the book separately. The Introduction sets up the arguments and conclusions Johnson seeks to make in the remainder of the book. More interesting, it also dedicates a large section to question formation and Johnson's research methodology. Section I, covering chapters 1 through 4, explores the context in which Japanese prosecutors work, considering in turn the general environment, its community of actors, prosecution culture, and organization of the prosecutors' office. Section II, covering chapters 5 through 8, examines the content of the justice that is produced by Japanese prosecutors, specifically focusing on consistency, corrections, convictions, and confessions. Finally, the book briefly concludes with a call for three substantive reforms and, after insulating itself with the necessary caveats, offers the final conclusion that: "[t]he Japanese way of justice is uncommonly just."⁹

I. THE INTRODUCTION

The primary purpose of an introduction is usually to provide a snapshot of the debate in which the work places itself and the conclusions to which the book seeks to come. Johnson does this by first pointing out the "contradictory claims" made by previous researchers of Japanese criminal justice.¹⁰ For example, one school (including Daniel Foote, John Haley, and John

TIME LAW 33 (Robert M. Jarvis & Paul R. Joseph eds., 1998). Stated differently, because *Ally McBeal* and *L.A. Law* are more about people than legal stories, they face significantly smaller cultural and contextual hurdles outside of the United States.

⁶ Johnson does not use systems method terminology, but it is applicable in describing his approach. See generally Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 482-83 (1997) (defining Systems Analysis methodology).

⁷ I must confess that I have not been as excited about a comparative law book since I read the stylistically very different P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987) as a reprint a number of years ago.

⁸ JOHNSON, *supra* note 4, at 4.

⁹ *Id.* at 280.

¹⁰ *Id.* at 4-7.

Braithwaite) has painted Japanese prosecutors as heroes of “Japan’s considerable crime control successes,”¹¹ while another school (including Chalmers Johnson, Karel van Wolfren, and Setsuo Miyazawa)¹² has cast the prosecutors as “obstinate, stubborn, and intransigent”¹³ while they “play God.”¹⁴ Johnson also points out that because no one has previously done a study specifically of the prosecutors, the split of opinion is understandable and the literary lacuna tempting.

Following this explanation of the formulation of his project, Johnson provides a refreshing personal narrative about his research methodology.¹⁵ While this portion of the book is the strongest humanization of the academic project, it is a style that continues throughout the work, particularly in the notes. I, for one, enthusiastically applaud the approach. It is attractive because we learn enough about the writer to know what his “angle” is.¹⁶ For example, in this case we learn that Johnson spent the decade of the 1990s considering the Japanese prosecution question. Johnson notes that his research included spending 1,000 days over two stints in Kobe and Tokyo, as well as significant time in prosecutors’ offices in Oakland, Minneapolis, San Diego, and Honolulu.¹⁷ Furthermore, there is valuable information to be had in “comparing notes” about the technical details of how a fellow researcher tackled a problem, both methodologically and practically. From a methodological standpoint, Johnson employs a “naturalistic” approach of prolonged participant observation, unstructured interviewing, general data-gathering, and a snowball sampling survey of prosecutors.¹⁸ From a practical standpoint, Johnson answers the basic question on the minds of many researchers, particularly comparativists: How does one open those closed doors behind which so much interesting data lies? In his case, it seems Johnson got through the door of the prosecutors by using connections, treading lightly, and being flexible.¹⁹ Good advice for researchers young and old.

The Introduction ends by tipping Johnson’s hand for the rest of the book.²⁰ As one who always reads the last chapters in mysteries first, this straightforward approach is appreciated.

¹¹ *Id.* at 5. Johnson cites Foote and Haley in making this assertion, but subsequently also includes Braithwaite in this school. *See, e.g.*, JOHNSON, *supra* note 4, at 186, n.9.

¹² *Id.* at 6. Johnson initially cites C. Johnson and van Wolfren in making this assertion, but later also treats Miyazawa within this school. *See, e.g.*, *id.* at 56-58.

¹³ *Id.* at 6.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 8-12.

¹⁶ Johnson has developed a reputation for himself before this work, perhaps most notably by challenging the *doyen* of comparative Japanese law, John Haley, in a biting review of Haley’s seminal 1991 study while Johnson was still a largely unpublished graduate student. *See* David T. Johnson, *Authority with Power: Haley on Japan’s Law and Politics*, 27 L. & SOC’Y REV. 619 (1993). The review begins with the memorable line: “*Authority without Power* is a significant book which is also significantly wrong.” *Id.* *See also* John O. Haley, *A Response to Johnson*, 27 L. & SOC’Y REV. 639 (1993) (responding to Johnson’s critique).

¹⁷ JOHNSON, *supra* note 4, at 4, 8-12.

¹⁸ *Id.* at 8-9 (*citing* JOHN LOFLAND & LYN H. LOFLAND, *ANALYZING SOCIAL SETTINGS: A GUIDE TO QUALITATIVE OBSERVATION AND ANALYSIS* (1984)).

¹⁹ *Id.* at 9-10.

²⁰ *Id.* at 15-17.

Regarding the context of prosecution in Japan, some of the conclusions Johnson seeks to argue include that Japan is a comparative “paradise for [] prosecutor[s];”²¹ that prosecutors play a dominant, if not overwhelming, role in the Japanese criminal justice process;²² and that the hierarchical structural of the Japanese prosecutors’ office produces consistency, although with conservancy.²³ Regarding the content of Japan’s justice derivative from this context, Johnson submits that Japan is able to harmonize consistency with individualization, something thought impossible in U.S. studies;²⁴ that Japan places a high priority on correction, but only for certain types of criminal actors;²⁵ that the story of Japan’s high conviction rate is complex and layered, but largely the result of a conservative charging policy and hierarchical controls;²⁶ and that confessions, for better or worse, are the cornerstone of Japan’s entire criminal justice system.²⁷ The net result of these intertwining strings is a system that cannot practically serve as a model for a common law country such as the United States, but one that may function as a mirror to suggest areas where the Japanese framework provides comparatively superior justice, especially in the sense of valuing special circumstances, consistency, and factual truth.²⁸

II. CONTEXT OF JAPANESE PROSECUTION

Johnson’s book could well be a *Law & Order* episode itself: the first part focuses on establishing the facts, while the second part seeks to prove the importance of those facts. Under the context rubric, Part I begins with an explanation of why Japan is a comparative “prosecutor’s paradise.” This assertion is based on five factors that Johnson explores in detail. First, Japan has comparatively little crime.²⁹ Second, Johnson argues that because of the administrative support available to Japanese prosecutors, they have relatively light caseloads.³⁰ As a result, Japanese prosecutors can dedicate significant amounts of time to each case. This assertion is important because it directly contradicts another theory about Japanese prosecutors, namely that their caseloads are so heavy that Japan’s high conviction rate is a reflection of harried prosecutors pursuing only easily disposable “sure-winners.”³¹ Third, Johnson notes Japanese prosecutors operate largely insulated from political pressures.³² This is one of the few points where

²¹ *Id.* at 15.

²² *Id.*

²³ *Id.* at 16.

²⁴ *Id.*

²⁵ *Id.* at 16.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 17.

²⁹ *Id.* at 22-23.

³⁰ *Id.* at 23-29.

³¹ *See, e.g.*, J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW 181-82 (1999).

³² JOHNSON, *supra* note 4, at 29-33.

Johnson's admittedly limited bilateral comparison with the United States reveals its limitations.³³ Indeed, when contrasted with the highly politicized nature of many U.S. elections for District Attorney, Japan's bureaucratic system does appear remarkably protected. Similar to comparisons with the United States' unique system of electing judges though, if one examines the Japanese system from a multi-lateral perspective, Japan's divergence softens, if not fully disappears. Fourth, Johnson provides a laundry list of legal tools that Japanese prosecutors possess, which make their job comparatively easier than their American counterparts.³⁴ For example, Japanese prosecutors have the power to lead investigations from the discovery of a crime; the power to suspend or initiate prosecution without the need to go through a grand jury or similar screening mechanism; the power to bring about confessions in most cases; the power to control access to evidence; and the power to appeal acquittals. Other legal scholars might have been content to focus solely on these significant "hard law" differences to explain Japan's divergences from other countries. One of the significant aspects of Johnson's work, however, is his desire and ability also to introduce sociological, cultural, and structural analysis that provides a more complete picture of Japanese criminal law in action. Finally, Johnson notes that Japan's lack of juries makes the criminal system more predictable.³⁵ A number of scholars have emphasized this point in recent years,³⁶ and it will be interesting to see how Japan's introduction of a lay-judge system will affect the equation.³⁷

After establishing the paradise in which Japanese prosecutors operate, Johnson explains in chapter 2 how prosecutors relate to others in the criminal justice community. The answer to this question is simple: prosecutors rule the roost. For example, since Japanese prosecutors actively participate in the investigation of criminal activity (indeed spending an estimated 60% of their time on this activity),³⁸ they tend to dominate the police. In other words, if there were a Japanese *Law & Order*, Detective Lenny Briscoe would only have a small part with the Japanese version of Jack McCoy, the prosecutor, taking control from the opening sequence. Similarly, prosecutors dominate defense counsel. This pre-eminence is derived from, among other factors, controlling access to and admission of evidence and the economic disincentives of defense work. Finally, Johnson argues that while the prosecutors do not dominate judges, as some argue, the prosecutors are able to predict judicial behavior so precisely that they leave the Japanese judges little with which to disagree.³⁹ This is an important, if not completely original, observation that adds to the vigorous and continuing debate in comparative Japanese law about the independence of the judiciary.⁴⁰

³³ *Id.* at vii.

³⁴ *Id.* at 33-42.

³⁵ *Id.* at 44.

³⁶ *See, e.g., supra* note 31, at 44-46.

³⁷ *See Limited Jury System Proposed in Japan*, A.P. ONLINE, June 13, 2001, 2001 WL 22914916, at 1.

³⁸ JOHNSON, *supra* note 4, at 52.

³⁹ *Id.* at 64-66.

⁴⁰ *See, e.g.,* John O. Haley, *Judicial Independence in Japan Revisited*, 25 LAW IN JAPAN 1 (1995).

In his discussion of the justice community, Johnson also provides an important anecdote about regional differences within Japan.⁴¹ The story documents the so-called “punishment problem” that arose in the mid-1980s when Tokyo-raised prosecutors noticed Osaka judges consistently handed down lighter sentences than Tokyo judges. This story emphasizes the often overlooked fact that even though Japan employs a unitary justice system, local culture produces regional differences, a phenomena that has been significantly researched in unitary areas of American law recently.⁴² Anyone watching Japanese television can appreciate the regional differences celebrated in every travel, cooking, comedy, and drama show; yet, legal researchers—both foreign and domestic—have often proceeded under the assumption that Tokyo practice is symptomatic of national practice, just as Tokyo dialect has become “standard” Japanese (*hyōjun go*).⁴³ Hopefully, Johnson’s work will spur future research into discovering other divergences, how and why they arise, and the practical implications—such as forum shopping—of these deviations.

Chapters 3 and 4 proceed on two basic premises—one, culture matters, and two, structure matters. One of the more interesting cultural facts is that the Japanese prosecutors’ office is a bastion of maleness—90% of prosecutors are men. The Japanese version of *Law & Order* would have no softening provided by one of the many female Assistant District Attorneys who assist Jack McCoy or District Attorney Nora Lewin. More important to his study, Johnson shows how prosecutors’ culture is responsible for one of the chief differences with the United States, that Japanese prosecutors would rather err on the side of not charging a questionable suspect (i.e., “suspending prosecution”), while United States prosecutors inevitably err in favor of charging.⁴⁴ This is one of the core discoveries of this book. It turns, in part, on the fact that Japanese prosecutors focus on rehabilitation along with a belief—or fear—that a person once charged will be irrevocably tainted.⁴⁵ In contrast, the U.S. prosecutorial culture, particularly with its political

⁴¹ JOHNSON, *supra* note 4, at 66-72.

⁴² See, e.g., Lynn LoPucki, *The Demographics of Bankruptcy*, 63 AM. BANKR. L. J. 289, 302, 304 (1989); Teresa Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence From the Federal Bankruptcy Courts*, 17 HARVARD J. L. & PUB. POL’Y 801, 839-57 (1994). Documenting the same phenomena in Canada, see Iain Ramsay, *Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy*, 74 AM. BANKR. L. J. 399, 407 (2000).

⁴³ Some legal researchers have noted regional differences, though as far as I know the subject has not been embraced as a specific item of research. Noting regional legal differences see, Tōzai tōsan jitsumu kenkyūkai [East-west insolvency practice study group] (ed), *Kaisha kōsei / kaisha seiri* [Corporate reorganisation / corporate arrangement] (1989) (noting differences in Tokyo and Osaka courts’ granting of reorganisation relief); Michael K. Young & Masanobu Kato, *Japanese Attitudes Towards Contracts: An Empirical Wrinkle in the Debate, paper presented at Change, Continuity, and Context: Japanese Law in the Twenty-First Century*, Ann Arbor, MI, Apr. 6-7, 2001, at 16-18 (noting a student survey demonstrating regional differences between Tokyo and other Japanese regions towards contracts); Kent Anderson, *Small Business Reorganizations: An Examination of Japan’s Civil Rehabilitation Act Considering U.S. Policy Implications and Foreign Creditors’ Practical Interests*, 75 AM. BANKR. L. J. 355, 363-64, 368, 373 (2001).

⁴⁴ JOHNSON, *supra* note 4, at 105-107.

⁴⁵ This fear of tainting suspects in the public’s mind circularly relates back to Japan’s near 0% acquittal rate, discussed below. That is, because Japanese courts find guilty essentially everyone charged with a crime — politicians excepted of course—the public’s assumption that a charged suspect is guilty seems quite reasonable. Thus, to avoid this taint, the prosecutors are conservative in charging which in turn leads to a near 0% acquittal rate. JOHNSON, *supra* note 4, at 215, 220-230.

nature, makes it in a prosecutor's interest to risk convicting an innocent person rather than risk letting a guilty one go.⁴⁶

Johnson's discussion of the structure of Japanese prosecutors' office brings out the institution's prioritization of factual discovery, its dependence on mutual responsibility through the *kessai* system, and the hierarchical nature of the office. The organization's preoccupation with facts or discovering what really happened is not surprising. Given the time and resources, we would all like perfect information for our decisions. What is surprising is that Japan places a high enough priority on this objective to provide the legal and financial tools to achieve it. The legal tools are varied, but chiefly relate to those tools that facilitate confessions, while the chief financial tool is the ability to protect prosecutors' light caseloads. As Johnson points out, however, one of the striking things for a foreigner, particularly one trained in the cynicism of American politics and U.S. realist jurisprudence, is the apparent Japanese belief that what the prosecutors eventually present as "the truth" through their elaborately drafted dossiers is in fact what actually happened.⁴⁷

Johnson also argues that understanding the *kessai* system is essential to understanding the organization of the prosecutors. Simply stated, *kessai* is a rather elaborate and formalized way of getting superiors' approval for significant decisions. The consequences of this system are multifarious, including contributing to consistency across cases, education of subordinates, and risk-sharing. From a personal perspective, what was surprising to me as someone who had worked for American business and law firms that effectively had similar processes, was not that the Japanese prosecutors conduct *kessai*, albeit more stringently and formally than I had experienced, but rather that U.S. prosecutors do not. Johnson's response, I believe, would be that the heavy caseloads given to American prosecutors cause the deliberative process to become like battlefield triage where consultation is a luxury that practically cannot be pursued.⁴⁸ This is a troubling thought for anyone facing the wrong end of the American criminal justice system.

The final organizational point is the most basic: Japan's prosecutors' office is a hierarchical place. Because, as Johnson posits, organization matters, the nearly lock-step hierarchical nature of the prosecutors' office exposes the tension between the pressure to conform and the ideal of prosecutorial independence. In the end though, conformity appears to win. This is somewhat unexpected considering, arguably, one of the chief motivators for making the sacrifices necessary to pass the notoriously exclusive bar examination (*shihō shiken*) is personal independence, i.e., freedom from the constraints of typical career paths in the bureaucracy and business.⁴⁹

III. CONTENT OF JAPANESE JUSTICE.

The second section of the book discusses the impact of this contextual environment on the content of Japanese justice. Rather than paint a broad landscape, Johnson looks at four specific aspects of justice in Japan. In typical Japanese and Johnson fashion, these have been

⁴⁶ JOHNSON, *supra* note 4, at 106.

⁴⁷ JOHNSON, *supra* note 4, at 17, n.11 123-126.

⁴⁸ *Id.* at 169.

⁴⁹ Cf. Curtis Milhaupt & Mark West, *Law's Dominion and the Market for Legal Elites in Japan*, Sep. 1, 2002, 41-46 (on file with reviewer).

mnemonically categorized in what might be called the Four Cs: consistency, corrections, convictions, and confessions. Consistency means Japanese prosecutors are able to treat alike cases similarly. Johnson equates consistency with one element of justice. This consistency comes about by *kessai* review, a thorough discovery of facts, the lack of a jury system, as well as the prosecutors' cultural belief in, and organizational prioritization of, this goal. Unfortunately, what Japan's commitment to consistency most memorably shows is the American system's inability to achieve or even pursue this goal.

While his findings regarding consistency are pioneering, in the remainder of the content section Johnson seeks to unpack those elements of Japanese criminal justice that have already received significant notice outside of Japan. First on the list is the claim—largely by the restorative justice movement—that Japan applies a benevolent paternalistic form of criminal justice.⁵⁰ Johnson indeed confirms that through leniency and instruction Japanese prosecutors try to rehabilitate offenders.⁵¹ Refreshingly, Johnson confesses that this result was in fact partially what he set out to disprove.⁵² The effect of this full disclosure is that the reader is much more willing to trust and rely on Johnson's stated and unstated assumptions and conclusions. Authors, particularly of a positivist or doctrinal bent, should take note. However, Johnson does not stop there, as the restorative justice clan has tended to do; instead, he goes on to show how Japanese corrections are actually bifurcated between this rehabilitation stream and a smaller get-tough, punitive stream. The punitive stream in Japan, however, is characterized by incarceration rather than suspended prosecution, longer sentences, harsh prison conditions, or ultimately, the death penalty.⁵³ The key question, of course, is what determines which stream one is led down. As in most countries, the determination is a balance between the seriousness of the offence and the sinisterness of the defendant's character.⁵⁴ Thus, things such as a confession, which shows contrition and may be educational, are important in diminishing the sinister aspect of a defendant's character. More interesting, Johnson shows how Japanese prosecutors rely on a number of indicia that almost automatically result in diversion into the harsher stream of corrections. They are: recidivism, drug offenses, gun possession, and membership in organized crime (*yakuza*, *bōryoku dan*).⁵⁵ Not surprisingly, the scarcity of these elements in greater

⁵⁰ See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CALF. L. REV. 317 (1992).

⁵¹ JOHNSON, *supra* note 4, at 182-192.

⁵² *Id.* at 186, n.9.

⁵³ JOHNSON, *supra* note 4, at 192-201. The last leg of the criminal justice system—the corrections or punishment phase—has yet to receive as detailed an examination as Johnson does for the middle phase and Ames, Bayley, and Miyazawa have done for the first phase of police work. See WALTER L. AMES, POLICE AND COMMUNITY IN JAPAN (1981); DAVID H. BAYLEY, FORCES OF ORDER: POLICE BEHAVIOR IN JAPAN AND THE UNITED STATES (1976); SETSUO MIYAZAWA, POLICING IN JAPAN: A STUDY ON MAKING CRIME (Frank Bennett trans., 1992). However, Petra Schmidt has addressed this recently with regards to the discrete issue of capital punishment. See PETRA SCHMIDT, CAPITAL PUNISHMENT IN JAPAN (2002).

⁵⁴ JOHNSON, *supra* note 4, at 184.

⁵⁵ *Id.* at 192-98.

Japanese society (with a possible qualification for organized crime)⁵⁶ is exactly what makes Japan a pleasant place to live for many—Japanese and foreigners alike.

Second, Johnson addresses Japan's conviction rate as evidence of the content of Japanese justice. Perhaps the best known fact about Japanese criminal justice is its nearly 100% conviction rate, or alternatively, its nearly 0% acquittal rate.⁵⁷ Commentators argue, contradictorily, that this rate is evidence of an either exemplary or defective system. After showing that the conviction rate is not as close to 100% as the aggregate numbers suggest, Johnson contends that the procuracy's conservative charging policy and bureaucratic controls such as *kessai* and job assignment produce the high rate of convictions.⁵⁸ Among a number of consequences, Johnson laments that the high conviction rate results in the trial, as an institution, becoming largely formalistic and thereby pre-empting it from performing a "critical communicative function" in the community. Indeed, barring another institution (for example, the media or politics) providing a venue for constant, critical discourse on the content of Japan's criminal justice, the idea that the high conviction rate has effectively, if indirectly, robbed Japan of its main forum for challenging and critiquing Japanese criminal justice is very troubling for me. On the other hand, colleagues rightfully point out that the absence of a venue for a persistent, and arguably destabilizing, debate might be a policy choice in itself and may quite easily be defended.⁵⁹

The final piece to the prosecutorial puzzle is confessions. "Confessions are [the] cornerstone [of the Japanese procuracy]."⁶⁰ Confessions are achieved in the vast majority of cases and both the prosecutors' charge and judges' conviction have come to rely upon them almost absolutely. The first question Johnson raises is why everyone in the system puts such a high value on confessions. Johnson suggests primarily (1) because they can, since the police and prosecutors have the legal tools necessary to achieve confessions such as the ability to detain suspects for twenty-three days before charging; (2) because prosecutor and police cultures both value confessions and the art of achieving them; (3) because confessions facilitate "uncovering and clarifying the truth" and thereby save time in processing offenses; and (4) because confessions are the best evidence upon which to win convictions.⁶¹ The underside of the reliance on confessions, however, is that, when they are not forthcoming, prosecutors face immense pressure to achieve them, which can lead to circumventing the rules against plea-bargaining, factual-padding in charging dossiers, and physically and mentally abusing suspects. Despite a constitutional prohibition on forced confessions,⁶² Johnson makes the troubling speculation that

⁵⁶ A large body of literature in English exists discussing Japanese organized crime. See, e.g., Curtis Milhaupt & Mark West, *The Dark Side of Private of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41 (2000).

⁵⁷ JOHNSON, *supra* note 4, at 215.

⁵⁸ *Id.* at 219-230.

⁵⁹ I thank Andrew Clayton for pointing this out to me, although Johnson himself made the same point to me in a different Japanese context by citing, Peter Bachrach & Morton Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962) (noting that a controlling non-decision is also a policy choice and political function).

⁶⁰ JOHNSON, *supra* note 4, at 243.

⁶¹ See *id.* at 243-244.

⁶² See KENPŌ, art. 38, para. 2 ("Confessions made under compulsion, torture or threat, or after prolonged

plea-bargaining happens in ten percent of cases, fact-padding occurs “routinely,” and abuse transpires “often.”⁶³ The U.N. High Commission for Human Rights, among others including the Japanese Federation of Bar Associations, has regularly criticized this reliance on confession,⁶⁴ but with little impact on the prosecutors’ or courts’ continued belief in the system. As Johnson cautions, however, “[c]riticizing the system’s reliance on confessions without considering the aims and attainments that confessions serve is myopic, unfair, and inapt.”⁶⁵ In short, the individualization, precision, consistency, and rehabilitative nature of the Japanese criminal justice system are all, for better or worse, partially dependant on confessions.

IV. CONCLUSION

As is well-known, in 1835 Alexis de Tocqueville examined the United States from a foreigner’s perspective.⁶⁶ Unburdened by domestic clichés and presumptions, Tocqueville’s insights proved extremely perceptive and served as a positive impetus for change. Johnson’s *The Japanese Way of Justice* has the potential to execute a Tocquevillian role-reversal with an American providing insight into the foreign culture, here, Japan’s criminal justice system. In recognizing this possibility, Johnson concludes with three areas of needed reform. These include relaxing the sufficiency requirement for charging practice, videotaping interrogations, and disclosing the evidence accumulated by the prosecutors. Relaxing charging norms, he argues, will mitigate abuse by prosecutors in trying to attain confessions and padding dossiers.⁶⁷ Videotaping will also likely curb over-enthusiastic prosecutors from seeking coerced confessions, as well as empower defense counsel in disputing confessions.⁶⁸ Similarly, requiring disclosure of evidence will allow defense counsel to act as effective “external checks” on prosecutors who otherwise hold so much power.⁶⁹ The reforms appear to be modest and attainable. Hopefully with the translation of the book into Japanese, a similar Tocquevillian effect can be realized.⁷⁰

arrest or detention shall not be admitted in evidence.”).

⁶³ JOHNSON, *supra* note 4, at 264.

⁶⁴ See *Report of the Human Rights Committee*, U.N. GAOR, 54th Sess., Supp. No. 40, U.N. Doc. A/54/40, Vol. 1 at ¶¶ 164-168 (1999), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/62c401d821727f9d80256818003012fa/\\$FILE/N9928230.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/62c401d821727f9d80256818003012fa/$FILE/N9928230.pdf); *Concluding Observations of the Human Rights Committee: Japan*, U.N. CCPR, Hum. Rts. Comm., 64th Sess., U.N. Doc. CCPR/C/79/Add.102., (1998), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.102.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.102.En?Opendocument).

⁶⁵ JOHNSON, *supra* note 4, at 268.

⁶⁶ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds. and trans., University of Chicago Press 2000) (1835).

⁶⁷ JOHNSON, *supra* note 4, at 271.

⁶⁸ *Id.* at 272.

⁶⁹ *Id.*

⁷⁰ It is understood that a translation into Japanese is under way and will appear in 2003. See DAVID T. JOHNSON, *NIHON NO KEIJI SHIHO* (Kazuo Yoshioka, trans., forthcoming 2003). Of course, one would hope that the book’s impact would be the same in English, but unsurprisingly, works that are translated into Japanese tend to make a greater impression in Japan. See Hiroo Sono, *The Multiple Worlds of “Nihon-ho”*, in *THE MULTIPLE*

Returning to Johnson's initial question of whether Japanese prosecutors are, in essence, the good guys, benevolently using their powers for rehabilitation, or the bad guys, obstinately playing God, I read the book's conclusion to favor the optimistic school of thought, yet tempered with some important qualifications. Johnson's contribution is a tightly argued explanation of why "the Japanese way of justice is uncommonly just."⁷¹ I disagree with other reviewers who have charged that Johnson has "scorn" for adherents of the optimist school such as Foote and Haley.⁷² Rather, I read Johnson to be making his assertions and conclusions on the shoulders of these scholars, as well as on those of the prosecutors-as-bad-guys-school, such as Chalmers Johnson and Miyazawa.⁷³ In so doing, Johnson achieves what I think most of us hope to do—that is, to make significant contributions to general understanding based on the (sometimes flawed) work of our predecessors.

The complete picture of Japanese prosecution that Johnson paints explains why the American version of *Law & Order* has failed in Japan. But, it also suggests that a Japanese version of the show might be an equally compelling, if completely different, program. Think about it: the trademarks of the American show would be gone. There would be no detectives running investigations—instead, it would be the prosecutor, our Japanese Jack McCoy, controlling the process from the start. There would be no investigation disputes about complying with the Fifth Amendment—instead, the question would be how hard the Japanese McCoy would have to push to get the defendant's confession. There would be no heated debate with defense counsel in judges' chambers about getting a piece of evidence admitted—instead, the question would be how many times our McCoy had to redraft and elaborate his dossier to satisfy his superiors for *kessai*. Finally, there would be no dramatic trial with the jury reading out the surprise verdict at the last moment—instead, we would either see McCoy struggling with whether or not to suspend prosecution against a borderline suspect or we would see the less dramatic courtroom confirmation of the defendant's confession by three slightly bored judges.

Although a show about the Japanese McCoy would be unrecognizable from its American inspiration, it would still be damn good TV. Although the sub-systems that make up the greater criminal justice system are different, the personal, professional, legal, and moral dramas involved are the same for all humankind, whether these be in New York City or Tokyo. As for the Japanese *Law & Order*, I nominate David Johnson to direct the pilot.

WORLDS OF JAPANESE LAW: DISJUNCTIONS AND CONJUNCTIONS 50 (Tom Ginsburg et al., eds., 2001).

⁷¹ JOHNSON, *supra* note 4, at vii.

⁷² Annette Marfording, *The Japanese Way of Justice*, 12 L. & POL. BOOK REV. 147, 147-48 (2002) (the reviewer also mistakenly attributes her conclusions regarding Johnson's intent to the fact that he is not a legal scholar, which is incorrect as Johnson is a product of University of California, Berkeley's Boalt Hall School of Law).

⁷³ Beyond the numerous citations to Foote and Haley, I think this reading is also supported by the fact that Johnson refers to Foote as "the leading foreign authority on criminal justice in Japan." JOHNSON, *supra* note 4, at 5. Foote provides the promotional blurb on the back of the book, and both Foote and Haley (as well as C. Johnson and Miyazawa) are thanked graciously in the Acknowledgments. *Id.* at ix-x, 5.