Review Essay: Rejoinder

A Response to Johnson

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David T. Johnson's thoughtful review of *Authority without Power: Law and the Japanese Paradox* is somewhat akin to the proverbial Japanese gift. The wrappings of praise are considerably more appealing than the critical comments in the box. His criticisms do, however, raise important issues that, in my view, go beyond the merits or demerits of the book under review and deserve a carefully considered response.

Johnson's principal quarrel appears to be that my interpretation of the development of law and legal institutions in Japan and the role they play in contemporary Japanese society tends to exaggerate the distinctiveness of the Japanese legal system. Indeed, he understands the intent of *Authority without Power* to be an attempt to demonstrate the uniqueness of Japanese law. Haley "wants to show," he concludes, that "Japanese law is distinctive because it is more authoritative but less powerful than law in other countries." Throughout his essay he argues persuasively against the proposition. By defining "law" and "power" in broader, more inclusive terms, the Japanese experience, Johnson contends, becomes considerably less "unique" or distinctive than *Authority without Power* suggests.

As author I can only plead *mea culpa* if readers reasonably construe my words to mean something quite different from what I intended. Whether the primary thrust of *Authority without Power* can be reasonably viewed to demonstrate the distinctiveness of the Japanese legal system is thus for readers and not the author to decide. Intention, however, is altogether a different matter. Johnson misstates my motive. As I attempted to clarify—perhaps unsuccessfully—the paradoxical distinctiveness of the Japanese system is assumed at the outset. What I hoped to

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show were the nature and consequences of what I consider to be the truly distinctive features of the Japanese legal system and how understanding these characteristics enables us not only to explain—and thereby to resolve—aspects of Japanese society that otherwise appear to be paradoxical, but also to reconsider our own—American or more broadly Western—paradigms and preconceptions about law and its role in society. Johnson, in effect, takes up the challenge but redirects it as criticism. In arguing that the Japanese legal system is less distinctive than many have supposed, Johnson emphasizes features that the United States shares with Japan. Little that he says contradicts the interpretation of Japan in *Authority without Power* and much is in full agreement.

Johnson's initial difficulty is that although acting as a critic, he does not want to play the author's game. His assessment is thus largely based on objections to the definitions of "law" and "power" selected for the analysis of Japan. These definitions are in effect the rules of the game. It is, of course, appropriate for a critic to disagree with the author's choice of rules. Nonetheless, legitimate criticism does have bounds. A critic may fairly argue, for example, that the author has not followed his or her own rules or that the rules used are unclear, inconsistent, or otherwise flawed or that the game could have been played better under different rules or even that the game isn't worth playing. However, no author should be faulted simply for playing his or her own game. There is unfortunately at least a hint of this in Johnson's comments. His objections do, however, raise the issue of whether the narrow definitions of "law" and "power" in *Authority without Power* serve its analytical objectives better or worse than the broader definitions Johnson prefers.

We are dealing here with labels. To explain by analogy, Roy Andrew Miller's examples of the Japanese word *aoi* comes to mind. *Aoi* is the Japanese label for that segment of the color spectrum that is categorized variously in English from green to blue. Thus in Japanese the sky on a clear, autumn day is *aoi* and pedestrians are allowed to cross a street when the signal is *aoi*. To describe a forested landscape in the Tohoku region of Japan and the Big Sky country of Montana both as predominately *aoi* is therefore quite accurate but also quite misleading. In effect, this is precisely what Johnson would have me do. By defining "law" to include informal social rules and sanctions not sourced in state institutions and to include in the definition of "power" the full spectrum of influence to coercion, the Japanese legal landscape can indeed be described quite correctly in terms that obscure its distinctive features from other societies. Narrower and more closely defined labels, however, allow

greater precision and, it is hoped, insight into significant differences as well as, again Johnson shows, similarities.

The definitions Johnson prefers also suffer in comparison, I believe, by obscuring several of the critical attributes of "law" as I define it. By far the most important is the role of the state. It does make a difference whether the state or the community makes the rules or enforces them. As I argue, there are differences in justiciability and constitutional controls. Even in Japan individuals do have the freedom to leave communities, but not beyond the reach of state control. State-made rules are necessarily less consensual in nature than those of custom and community. And state-directed sanctions are almost always potentially more coercive.

In other respects Johnson's criticism of my definitions misses the point. The assertion that I have chosen an Austinian definition of law as commands backed by sanctions is patently false. As Johnson clearly and correctly states, the major theme of the book is the uncoupling of authority from power. To have used a definition of law that rejoins legal rules and principles with sanctions would have been an extraordinary failing. To the contrary, I have attempted to make it clear to the reader that as used in the book the category of "law" encompasses two fundamental but independent elements: norms, expressed as both rules and principles, and sanctions (including remedies). (Only rarely does the word "command" appear in the book.) The separation of legal rules from legal sanctions and the related processes for making and enforcing law is the critical element of the definition and the analysis.

For those who have had enough of *Authority without Power* from this review and response without reading the book, suffice it to say there can be legal rules without legal sanctions, but not legal sanctions without legal rules, inasmuch as formal legal processes in which state-directed sanctions are applied, such as adjudication, are in effect processes for enforcing and thereby "making" legal rules by recognition. The distinction is, I believe, an important one, as Johnson recognizes, for any society in which rules as law have legitimating capacity in that it gives law (as legal rules and principles) consensus-building influence without the need for coercive sanctions.

Johnson's preoccupations with a paradigm that restricts the definition of law to commands backed by sanctions leads him into the very thicket *Authority without Power* attempts to warn against. The principal focus of the book is the nature and role of the second element of law—sanctions—and the processes of law enforcement. Behind the American similarities with Japan in terms of law as rules and principles that Johnson highlights are more fundamental contrasts in law enforcement illustrated by Japan's relatively less frequent resort to state-directed as op-

posed to community-based sanctions. Putting aside the question of whether the book would have been better with a fuller and more explicit comparison, the Japanese experience does suggest that however effective informal mechanisms of coercive community control may in fact be in the United States, they do not enjoy either the degree of legitimacy or the institutional support found in Japan. Various forms of self-help the Japanese take for granted as appropriate responses to undesirable social behavior are in my experience viewed with distrust if not outright alarm in the United States. An example used in *Authority without Power* is the Japanese reaction to the lawsuit for damages for the wrongful death of a child filed against the neighbor who voluntarily agreed to babysit while the mother went shopping. While many Japanese expressed concern that neighborhood shopkeepers reacted by refusing to serve the plaintiff, the target of their disapproval was the community condemnation of the parents' lawsuit itself, not the means used to express disapproval. In other words, they objected to the norm, not the sanction. This episode exemplifies the differences between the legitimacy of informal control in Japan and the United States. I doubt that American shopkeepers would themselves consider such refusal to deal to be acceptable and the social response would, I venture, be equally hostile to such "taking the law into their own hands," to use the illustrative phrase. To explore these contrasts and their ramifications more explicitly is, however, another book, one I urge be undertaken. Unfortunately, works like the cited study by Robert Ellickson, *Order without Law: How Neighbors Settle Disputes* (1991) rarely address the question of sanctions but rather focus, as does Johnson, almost exclusively on law as norms.

Paradigms do count, particularly those that relate to the legitimate role of the instruments of state and community coercion. In the end, I argue, and Johnson albeit somewhat grudgingly seems to agree, that the Japanese historically have denied the state and its representatives the full array of coercive powers taken for granted in other industrialized societies but allows and relies on influence (authority) and coercive community controls often considered to be illegitimate in the United States and perhaps most other Western societies.

Other than questions of intent and definition, the only significant disagreement Johnson seems to have with *Authority without Power* relates to my apparent failure to deal adequately with "intentional political choice" as a factor in explaining how Japan got the way it is and my treatment of criminal justice in Japan, especially the conclusion that the Japanese system is lenient.

Johnson's concern may simply reflect a problem of semantics. I use the phrase "intentional political choice" to refer to a

political decision motivated by the wish to achieve the resulting consequences. Hence, the process of rule in Japan was, I argue, not the product of a single set of intentional political decisions but rather a series of political choices that had unintended consequences. Indeed, my understanding of the entire sweep of Japan's institutional history is that the particular features of the legal order that evolved were in fact the product of myriad political decisions and choices motivated by equally diverse aims. This distinction is especially important in assessing the contribution of the legal and political reforms undertaken under the Allied Occupation (1945–51). In many respects, what was intended was quite different from what resulted.

Johnson also misreads my history of the political decisions following the Meiji legal reforms of the late 19th century. The new codes introduced legal rules, especially in relation to property, family relations, and employment, that upset traditional relationships. The codes and related statutes legally empowered as never before those in positions of authority—landlords, household heads, employers. As they began to exercise their new powers (legal rights) and conflicts increased, the political "elites," to use Johnson's phrase, were divided. Some urged progressive reforms to benefit tenants and workers, others objected. They could and did agree, however, that the recurring disputes should be settled through mediation and not by judicial enforcement of the codes, although in fact the courts had in many cases found in Western legal principles the means to deny full enforcement of landlord, household head, and employer rights.

Finally, despite my enormous admiration for Setsuo Miyazawa's (1992) work, I do not believe that anyone can reasonably assert that criminal justice in Japan is as harsh as in the United States or most other industrial nations. No one denies that Japanese police use their authority effectively or that they employ coercive measures—legitimate and illegitimate. Even, I suggest, in the restricted area of Miyazawa's study, by almost any measure Japan's treatment of offenders is extraordinarily mild. On this point every comparative study with which I am familiar agrees. Here too, however, Johnson's misunderstanding of the aim of my analysis leads him away from the main point of the chapter: that Japan's success in dealing with crime can be explained by the institutional emphasis on correction through what I purposefully label confession, repentance, and absolution.

Japanese "uniqueness" in criminal justice is not in doubt. Japan alone among its industrial peers, if not the rest of the world, has achieved spectacular success in reducing crime. The issue is how. On this point Johnson and I may be in fuller agreement. Citing Setsuo Miyazawa, he shows why the answer

is not simply a matter of police diligence. The argument can be made that because Japanese police have been effective in identifying offenders evidenced by high clearance rates, crime has gone down. Perhaps. Nonetheless, Johnson and I seem to agree that clearance rates do not fully explain Japan's achievement. To do so, one would have to show that clearance rates in Japan have been as significantly higher relative to all other states as the incidence of crime has been correspondingly reduced. Johnson could have added that there is also a chicken-and-egg quality about this argument. Although clearance rates may be a factor in Japan's success, the contrary argument can also be made—that is, that as crime has been reduced, clearance rates have increased. I am unaware of any evidence that establishes either proposition to the exclusion of the other. (Another relatively minor correction of Johnson's restatement of my data is also in order here: Only crime rates for penal code offenses and other nontraffic-related crimes have gone down in postwar Japan. Once traffic-related offenses are included, as they must be in assessing police and prosecutorial caseloads, crime rates overall have significantly exceeded any increases in resources devoted to the criminal justice system.)

Ample evidence does exist, however, that reintegrative methods of social control contribute to the reduction of wrongdoing. Unfortunately, one of the most seminal works was published just as I was completing *Authority without Power,* and I was unable to incorporate many of its insights: John Braithwaite's *Crime, Shame and Reintegration* (1989). As noted in *Authority without Power,* however, a variety of programs in North America and Europe that emphasize offender accountability and restoration to the community through victim restitution and community assistance duplicate at least in limited fashion the Japanese pattern with similar results. Yet in no country—except Japan—has the restorative approach of these programs been able to replace punishment and the isolation of offenders as the principal means of treatment of offenders.

Again preconceptions matter. Widely shared views of "just deserts" and a Benthamite paradigm of crime and punishment tend, I believe, to prevent us from even considering alternatives despite the manifest failure and socially destructive consequences of preferred approaches. Not captured by our values and models, the Japanese have been free to experiment and have found approaches that work better. In contrast, we have allowed a self-defeating model of law and criminal justice to prevail over more humane but still deeply embedded values that the Japanese have shown can and do work. Here, of course, is one of the principal lessons Japan offers the United States and the rest of the world, which many choose to ignore or try to explain away.

References

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