Articles

The Organization of Prosecution and the Possibility of Order

David T. Johnson

In prosecution, as in armies, prisons, and schools, organization matters. Japanese prosecutors work in an organization that differs markedly from the organizations in which their American counterparts work. This fact has important implications for how prosecutors in Japan define and perform their central tasks and thus for the quality of Japanese criminal justice. Most critically, the Japanese way of organizing prosecution enables prosecutors to effectively manage the tension between two imperatives of justice that American regard as often incompatible and always in tension: the need to individualize case dispositions and the need to treat like cases alike so as to achieve "order." As mirror and model, Japan can teach the United States how to improve the level of order in its own systems of criminal justice.

> Comparative law, especially the study of legal institutions and procedures, should be ranked among the most illuminating branches of legal science. When teaching a course that emphasizes comparative procedure, I remind students of the justification that was given them when they were asked to learn Latin in school: We study Latin to learn English. So with comparative law. . . . The purpose of comparative study is to help understand what is distinctive (and problematic) about domestic law.
>
> —John H. Langbein (1995:545)

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Prologue: Scenes from Home and Abroad

Laconia, U.S.A.

I met Larry for the first time in July 1993. At the time, Larry was an 18-year veteran in the Laconia County District Attorney's Office,[1] one of 142 prosecutors in what may be the most highly respected local prosecutors office in California. Nearly two decades earlier Larry had graduated from a prestigious public law school in the same state. A former classmate, now a public defender in the Laconia County Superior Court, regards Larry as "a good guy," "an able prosecutor," and a more-or-less "typical" senior deputy district attorney.

Larry was a manager. As one of four "trial team leaders" in the Laconia office, he was the captain of a group of eight prosecutors, or deputy district attorneys, who handled trials and related hearings in Superior Court. Nonetheless, within ten minutes of our first meeting, Larry told me he consults little with other team members and wants them to consult him only in "extraordinary" circumstances. "My pet peeve," Larry explained, "is when other deputies send me stuff [cases] that they should decide on their own." Likewise, Larry said he only consults with his superiors in serious cases that are likely to attract significant media attention. Larry said that the best part of his job is doing jury trials—"they're a real rush"—but that since becoming a team leader he has become more occupied by other activities like plea bargaining. At least two days a week, Larry went to the chambers of 1 of the 14 criminal court judges in Laconia to plea bargain cases that had not settled in municipal court. Since this was an important part of his job, I asked if I could observe. Larry consented. Compared with Japanese prosecutors, Larry was remarkably open to outsiders. He obviously felt he had little to hide.

The next morning when I arrived at Larry's office I spent a few minutes skimming the stack of blue 3x5 cards on his desk. Larry explained that the cards summarized the cases he would plea bargain. Each card had space for information about bail, prior prosecutor and court actions in the current case, current charges pending, criminal record, the names of other police and prosecutors who had handled the current case, and a brief summary of the case facts—seldom more than a sentence or two, usually less.

[1] "Laconia" is a pseudonym, as are "Nakayama" and "Lakeville," discussed below. The persons identified by name at those location also have fictitious names.

While Larry acquainted himself with the cards, I asked him to explain how he and the other Laconia prosecutors plea bargain. Larry said that for some offenses, especially drug crimes, the office tries to standardize offers. In other cases, however, "offers vary a lot because reasonable people differ and because we [prosecutors] have different values." According to Larry, the hardest part about making fair offers is the prosecutor's feelings about the defense attorney. "Whether he's a friend or an asshole matters a lot," Larry explained. "Friends tend to get better deals." Larry also averred that problems in his personal life, such as fights with his wife, had little influence on what kind of offers he made. He then described two styles of plea bargaining, both common in Laconia. Some prosecutors make high offers ("overcharge") and then negotiate when the defense attorney counters. This strategy gives a prosecutor more leverage over the defense. Other prosecutors make "rock-bottom" offers right away, leaving little room for negotiation. Larry said he prefers the second style because "it saves time and monkey business."

I followed Larry to Judge Lancaster's chambers to see his style for myself. By the time we arrived, the judge and several defense lawyers were already present. Judge Lancaster sat in a chair behind his desk, feet propped up on the desk's edge. Like the others in the room, the judge drank coffee from a plastic cup and munched on donuts while waiting for the remaining participants to arrive. Larry and I sat on a big, overstuffed, black couch directly across from the judge. Soon we were joined by more coffee-consuming, donut-devouring defense lawyers, most of whom appeared to know each other well. The group chatted amiably about baseball and movies and vacation plans for another several minutes before the morning's business began.

From 10:10 A.M. to 11:10 A.M., Larry plea bargained with eight or nine defense lawyers (it was impossible to keep an exact count). During that period Larry disposed of six cases and tried to reach plea agreements in four or five more. At several points during the hour Larry was negotiating simultaneously with two, three, or even four defense lawyers about their clients' cases. It was like juggling: While one offer was in the air, another offer was on its way up so that still another could be caught and sent up yet again. I will not (and probably could not) capture the simultaneity here. Instead, consider these scenes from two of the cases I observed that morning.

- In one case the defendant was accused of stabbing a friend in the chest with a knife, thereby causing death. The defendant was charged with voluntary manslaughter. The victim had a blood-alcohol content of .32 (.10 makes one legally drunk in California). The victim and defendant had been best friends. The defense lawyer claimed the victim was a notoriously vio-

lent man who, in a drunken rage, backed the defendant into a corner, or at least that is what his client told him. Larry, relying on the two-sentence description of case facts on his blue card, said the defendant took a "roundhouse swing" at the victim, without provocation. Larry offered six years for a plea of guilty. The defense lawyer, soon to become a judge, countered with an offer of three years. Another lawyer in the room tried to convince the defense lawyer that there is not much difference between three and six years because "actual time served won't vary much anyway." The defense lawyer was unconvinced, however, and instead of accepting the six-year offer petitioned Larry again for a more lenient deal. "Look," he said, "the victim and my client were best friends and the victim was a very violent guy. It's a tragedy." Larry was unmoved. "Look man," he said. *"I don't know what the truth actually is. I'm just going by the card."* Judge Lancaster tried to pressure the defense lawyer into taking the six-year offer, hinting that he would make up part of the difference at sentencing. The defense lawyer left the room to ask his client if six years was acceptable but quickly returned to report it was not. He sought and obtained a three-week continuance. Later Larry criticized the defense lawyer for being unable to persuade his client to take "a good offer." In Larry's view the defense lawyer lacked adequate "client control." He said a better lawyer—someone like Bill—would have gotten a better deal.

- Bill was the defense attorney in the second case. His client was accused of raping a woman in the kitchen of her home after she tried to end what had been a long-term relationship. Larry initially offered 14 years. Bill replied with a stream of colorful invective ending with the imperative to "go fuck yourself." After another look at the appropriate blue card, Larry followed up with an offer of 6 years. A deal soon was struck.

Nakayama, Japan

In the summer of 1993 I also had the opportunity to watch Yoshio, a 10-year veteran of Japan's procuracy, decide what to do about a man accused of stealing 11 mushrooms from private property on a remote hillside on the outskirts of Nakayama, a large city in western Japan. Mushroom thiefs are not especially common in Japan, though they can make a good profit by selling their ill-gotten fungi to shops and restaurants.

Since the offender had fully confessed, the question for Yoshio was what punishment to seek. The court would make the final decision, but as the investigating prosecutor Yoshio had to decide whether to formally charge the offender and, if charged, what to recommend as a sentence. Yoshio telephoned the victim, who owned the land on which the mushrooms grew and asked what he would like done with the offender. The victim wanted the offender punished severely, though he stressed that above all he did not want his name mentioned in connection with the case. The victim recently had received several harassing phone calls, possibly from the mushroom thief, and he feared additional trouble if he openly pushed for a harsh punishment.

The mushroom thief had no prior criminal record, other than a few traffic offenses, which Yoshio said would not influence the present disposition. In the most serious such case, decided eight years earlier, the offender paid a fine of 20,000 yen ($160) for speeding. In the present case the offender had violated the Forest Law, which provided for no more than three years' imprisonment and/or a 300,000 yen ($2,400) fine. The offender was not detained in jail during the period his case was investigated and decided.

Yoshio had a problem: In the absence of precedents to guide him, how could he tell what precise punishment the mushroom thief deserved? Yoshio first had his assistant check the Nakayama office records to see if any other mushroom thiefs had been prosecuted in recent years. Nothing was found. Reasoning by analogy, Yoshio next figured that since stealing 11 mushrooms is less serious than breaking into someone's residence but more serious than shoplifting, the offender should get something in between the going rates for these two crimes. Further, Yoshio reasoned, shoplifters almost always get a suspended sentence for the first offense. Since this case was more like shoplifting than burglary, perhaps the mushroom thief should be forgiven too. However, after further discussion with his assistant, Yoshio determined that "if we forgive him he'll probably just do it again." A 50,000 yen ($400) fine seemed about right, but in the absence of guidelines to rely on, Yoshio was reluctant to follow his instincts.

So Yoshio conducted further research. A newspaper search using an electronic database uncovered no cases sufficiently similar to provide the guidance Yoshio sought. Next Yoshio had his assistant call the police to find out if they had disposed of any mushroom cases lately by using their powers to "dispose of trivial crimes." Still no help. Then Yoshio had his assistant call two prosecutor branch offices in rural areas well known for the production of mushrooms. Two days later the branches called back reporting that no precedents could be found. Determined to find something to go on, Yoshio then conducted, this time personally, another search of the Nakayama office records. Bingo. Two years

earlier a prosecutor had charged another mushroom thief and imposed a fine. Since the prosecutor-in-charge was still working in Nakayama, Yoshio telephoned him to ask for more details about the prior case. With this standard in hand, Yoshio decided to seek the same punishment he originally deemed proper: summary prosecution and a fine of 50,000 yen ($400). Before making the final disposition, Yoshio gained the approval of two of his superiors, just as office policy requires.

I. Introduction

> The most important social development in our century of remarkable social developments is both obvious and little understood. It consists of the movement to center stage of bureaucratic administration.
>
> —W. Boyd Littrell (1979:17)

> The rationalization and bureaucratization of the penal process has undoubtedly been the most important development to have taken place in penality in the nineteenth and twentieth centuries.
>
> —David Garland (1990:180)

The point of the prologue is that in prosecution, as in armies, prisons, and schools, organization matters (Wilson 1989). Japanese prosecutors work in an organization—a system of consciously coordinated activities—that differs markedly from the organizations in which their American counterparts work. This fact has profound implications for how Japanese prosecutors define and perform their tasks and thus for the nature and quality of Japanese criminal justice. It *should have* an equally profound influence on how Japanese criminal justice is studied, but, unfortunately, it has not. Instead, the crucial significance of organizations has been sorely neglected in previous works, a peculiar dereliction considering the central importance scholars ascribe to organizations in Japanese society (Nakane 1970; Vogel 1975).

At first glance, prosecutor organizations in Japan and the United States look much alike. Both share, on the surface at least, some of the essential conditions of bureaucracy: specialization of function, hierarchy of authority, commitment to a system of rules, and impersonal administration (Giddens 1971:157). However, these superficial similarities must not be allowed to obscure important underlying differences. The key differences, and thus the most important things to know, concern how prosecutor organizations define their core tasks, induce front-line operatives to perform those tasks, and coordinate activities. The Japanese procuracy devotes careful attention and substantial resources to each of these matters. As a result, it consistently and effectively manages the tension between two aspects of justice that Americans regard as often incompatible and always in tension—the

need to individualize case dispositions and the need to treat like cases alike so as to achieve "order."[2]

The aim of this article is to show how the organization of prosecution in Japan makes order possible. The account is largely descriptive, though the final two sections do explore some of the causal and policy questions raised by the descriptions. This is largely a story about the centrality of bureaucratic administration in Japanese criminal justice, one of the most important but little understood realities in the sociology of criminal justice. Because the story is comparative, it is also about how prosecution is organized in the United States. This is, in other words, an account of how Larry and Yoshio came to be such different prosecutors. Their stories matter because order and justice do.

II. The American Way: The Limits of Order

> A bureaucratic, rule-oriented administrative model of management does not fit the nature of the job of criminal prosecution. Both theoretical literature and case studies . . . support this position.
>
> —Lief H. Carter (1974:117)

In his seminal study of a large prosecutor's office in "Vario County," California, Lief Carter (1974) argues that attempts to impose organizational control over individual prosecutors either fail or, to the extent they succeed, impair the quality of case dispositions. Prosecutors cannot develop structured procedures for disposing of cases, Carter contends, and the best offices do not even try to do so. The overlapping objectives of order, regularity, consistency, and uniformity of dispositions—of *treating like cases alike*—must be sacrificed in order to enable prosecutors to learn, adapt, innovate, and thereby *individualize justice.* In short, both prosecutors and their students must recognize "the limits of order" (see Carter 1974:7, 9–14, 117, 138–39, 151–52, 158–60).

Many American scholars agree that ordered, consistent justice is neither possible nor desirable. Nearly two decades after Carter wrote *The Limits of Order,* a group of scholars summarized the 1950s American Bar Foundation Survey of the Administration of Criminal Justice as "the most extensive and, probably in constant dollars, most expensive empirical investigation of the criminal justice system ever undertaken" (Ohlin & Remington 1993:xiii). Their review focuses on the unavoidable "tension between individualization and uniformity" in criminal justice, and in a survey of "discretion by criminal justice decision makers" which introduces the volume, Lloyd Ohlin laments that individu-

[2] The term "order" has several cognates, including "regularity," "uniformity," and "consistency." In this article these criminal justice objectives all refer to the imperative to "treat like cases alike."

alized justice has been sacrificed at the altar of uniformity too often:

> The current assault on discretion by criminal justice officials may be producing a system that is too rigid in application and likely to be unresponsive to the need to temper criminal justice with social justice. Most of the authors [of the chapters in this book] would endorse a position stated as follows: Complexity is a fundamental attribute of the variety of problems officials encounter at all major points of decision in the system of criminal justice. Responses to criminal offenders must address this fact if they are to be sufficiently flexible to take account of individual differences. (Ohlin 1993:17–18)

In another chapter in the same volume, Frank Remington (1993) reviews the research on prosecution practices, both before and after the ABF studies. He singles out Carter's work as "one of the most useful studies of prosecutorial practices" and argues, in complete accord with Carter, that "the clear message of the ABF research" and "the conclusion reached by those who, in the ensuing three decades, have studied prosecutor day-to-day practices" is that "we should prefer that [efforts to control discretion] fail" (p. 113). Instead of pursuing the specter of order, criminal justice reform must primarily seek to develop people and organizations that "change, innovate, and learn in sustained rather than haphazard fashion." Like Carter and many others, Remington is devoutly skeptical of efforts to pursue order in the prosecutors office:

> We do not know what, if anything, should be done about the immense amount of discretion possessed by the prosecutor. . . . We lack the knowledge necessary to decide . . . how best to structure the charging decision so that it does focus on the substantive concern of how best to achieve the social control objectives of the criminal justice system. (Ohlin & Remington 1993:100)[3]

My own research in American prosecution offices reveals that many American prosecutors are similarly agnostic (or unconcerned) about how to control discretion and pessimistic about the possibility of harmonizing the two imperatives of justice: individualization and order.[4] One of the first American prosecutors I

[3] Remington notes that similar conclusions about the limits of order have been reached by Robert Weninger (1987) in his study of prosecution in El Paso, Texas; by Pamela Utz (1978), who studied prosecutors in San Diego and Alameda Counties in California; by Arthur Rosett and Donald Cressey (1976) in their analysis of prosecutors in California; and by several other observers of American prosecutors (Ohlin & Remington 1993:113). See also Pizzi 1993:1346.

[4] Belief in the "limits of order" is not confined merely to prosecutors; other American enforcement officials seem to share it as well. For instance, in 1994 the Internal Revenue Service sought criminal prosecution in 4,542 cases of alleged tax fraud, tax evasion, and money laundering. However, the chances of being recommended for prosecution were far greater in some areas of the country (such as Roanoke, VA, and Pittsburgh, PA) than in others (like New Mexico and Idaho). North Dakotans, for example, were nearly four times more likely to be referred for prosecution than South Dakotans. Critics charge

interviewed was the deputy chief of the Laconia County District Attorney's Office in California. Laconia is widely regarded as one of the most professional, well-run prosecution offices in the United States, and the deputy chief post is the No. 2 post in it, beneath only the elected district attorney. Having just returned from a year of field research in Japan, I was especially interested in *kessai* (see below), the Japanese system that requires front-line prosecutors to seek the approval of two or three superiors (or more in high-profile cases) before making any charge decision. Since I wanted to know if there was an American counterpart to Japanese *kessai*, I asked the deputy chief how he and other managers in the Laconia office reviewed and approved their subordinates' decisions. The response given by this 23-year veteran completely rejected the premise of my question. "This is a people business," he declared. "Every case is different. You can't be looking over everyone's shoulder to make sure they are doing the right thing, and you can't regulate their decisions. It just doesn't work."

Of course, soon thereafter I learned that front-line prosecutors in Laconia in fact are required to consult with the chief, the deputy chief, and other office superiors, but only in a small group of high-profile cases that are identified in an ad hoc manner as "anything likely to attract media attention or criticism." In high-stakes cases, *kessai*-like consultations and superior approvals also are required of federal prosecutors working in the 94 U.S. Attorneys Offices and the Department of Justice (Stewart 1987: 39, 139, 250). Compared with Japan, however, hierarchical review in American offices is extraordinarily uncommon. What stands out is not that such review occasionally occurs, but rather how infrequently and superficially superiors monitor their subordinates' decisions.[5]

Oversight in American offices is especially conspicuous by its absence in the great bulk of relatively "nonserious" cases—the American analogs to mushroom thefts. It is widely held that even if they wanted to, prosecutors in busy urban offices could not achieve the kind of order or consistency that Carter, for more principled reasons, says they should not seek anyway. David Heilbroner, for example, in his insightful ethnography based on three years working in the Manhattan District Attorney's office, describes that office as "awash in petty crime" and "numbed by

that "the data raise the question of whether the American people are getting equal treatment under the law." In response, the deputy commissioner of the IRS said that although the agency "strives to treat taxpayers in similar situations the same way everywhere in the country," because IRS agents have discretion "differences in how similar cases are handled are inevitable" (*New York Times,* 14 April 1996, sec. F:1, p. 9).

[5] Hierarchical review is more common in federal prosecutor offices than in local ones, but it is still weak and infrequent compared with Japan. Most strikingly, in federal offices, noncharge decisions are seldom subject to internal review. For this and other reasons, Burnham (1996:83) calls the organization of federal prosecution "an adhocracy."

the numbers" (Heilbroner 1990:27, 141). In his first year Heilbroner and his fellow rookies were instructed by the deputy chief, "a reliable source of sage advice," not to fret over cases that, in Manhattan at least, were comparatively minor. "I don't know what you're all so worried about," the deputy chief counseled at the first training meeting. "For the first year nobody cares what you do. You're only dealing with misdemeanors" (p. 26). Before long Heilbroner and colleagues learned that "our job was to keep the wheels of the busiest and probably most chaotic court system in the world turning, or more appropriately, grinding" (p. 40). In order to "help free up the overburdened court system," the prosecutor's job was to "keep dispositions up" (p. 51). The real function of the DA's office, Heilbroner ultimately concludes, is "prosecuting serious cases" (p. 77).

With only slight modification, the statements of the Laconia and Manhattan deputy chiefs apply to prosecutor practice in the far more placid "Lakeville" office where I also conducted research. There, the elected chief of the office asks that subordinates seek his approval only in "some" murder and rape cases. Asked about this practice, the captain of one of the Lakeville crime divisions explained that "prosecutors learn by doing and by failing." Since "many cases are just not that important in the overall scheme of things," there is little need for prosecutors to consult about decisions or concern themselves with whether like cases are being treated alike. After all, order—at least in American prosecution offices—has its limits.[6]

III. The Japanese Way: The Possibility of Order

> Justice . . . is equality—not, however, for all, but only for equals. And inequality is thought to be, and is, justice; neither is this for all, but only for unequals.
>
> —Aristotle, *Politics,* book 3, chapter 9

> Treating similar cases differently is not a good thing. It's wrong as a matter of justice, and it stirs up public dissatisfaction and criticism.
>
> —Japanese prosecutor, 13 July 1994

[6] Some scholars contend that American prosecutors seek and achieve a high degree of order, but their arguments tend to be formalistic. William Pizzi (1993:1345), for example, argues that since "a scandal in the way prosecutorial power is exercised within the office could hurt the prosecutor's chances of re-election . . . internal controls over prosecutorial discretion aimed at assuring both fairness and consistency have obvious political advantages." From this electoral imperative and from the need to "process and resolve cases efficiently and expeditiously," Pizzi infers that "a prosecutor's office will usually find it wise to have some system of informal controls over charging decisions and plea bargaining decisions." American chief prosecutors do worry about scandals and reelection, and in busy jurisdictions they are pressed to be efficient. Moreover, most American offices do have some system of informal control. However, the point of this article is to show that compared with Japan, such concerns rarely get translated into the serious pursuit of order.

Justice obliges prosecutors to take into account the "special needs and circumstances of individuals"—that is, to individualize decisions (Wilson 1989:326). This is an imperative that Carter, Ohlin, Remington, and many other Americans stress, and Japanese prosecutors do it well (Foote 1992; Haley 1991; D. Johnson 1996). But justice also means treating similar people similarly—dispensing ordered justice—and Japanese prosecutors do this well too. Since the first fact has been well documented but the second has not, this section focuses on how prosecutors in Japan achieve a high level of order, much higher than most Americans think possible or even desirable (Tonry 1995:154). If both of these claims are correct, if Japanese prosecutors make individualized and ordered decisions, then Japanese criminal justice is one of the most remarkable accomplishments in a half-century of Japanese history replete with noteworthy achievements.

In an insightful article on the "Social Limits to Discretion," Martha Feldman (1992:173) contends that "bureaucracies, by their nature, are unsuited to dealing with individually distinct cases." She cites none other than Max Weber in support of her assertion. However, if Feldman and Weber are right, what are we to make of Daniel Foote's (1992) claim that "Japan's criminal justice system places great emphasis on the reintegration and rehabilitation of suspects in accordance with their individualized circumstances"? Foote further contends that "the most important distinction" between Japan's system of "benevolent paternalism" and the ideal-typic "crime-control model" is "uniformity":

> In sharp contrast to [the] crime-control model, the Japanese criminal-justice system does not seek simply to process cases as quickly as possible according to highly uniform standards and pursuant to routine, stereotyped procedure. . . . On the contrary, the Japanese system emphasizes the importance of individualized determinations, based on careful consideration of the individual's personal circumstances and other factors. . . . This emphasis on specific prevention does not simply come into play after a conviction. Rather, it affects, if not pervades, every stage of the system." (Foote 1992:341)

Japanese prosecutors *do* aim to individualize the treatment of suspects and offenders. Since they do so, unmistakably, in the context of a bureaucracy, Feldman and Weber are wrong: Japan's procuracy is in fact well suited to "dealing with individually distinct cases." At the same time, however, Japanese prosecutors pursue order with equal fervor. Hence, the claim that "a bureaucratic, rule-oriented administrative model of management *does not fit* the nature of the job of criminal prosecution" (Carter 1974:117) simply *does not fit* the Japanese case. Indeed, to prosecutors in Japan, order is not only possible, it is a prerequisite to doing justice and an everyday occupational reality. To an extent inconceivable to American researchers, the Japanese way of jus-

tice seeks and achieves concord, not discord, between individualization and order.[7]

A. The Prosecutor Organization: Structure, Roles, and Tasks

In order to understand how Japanese prosecutors achieve order, one must understand the structure of the procuracy and its primary roles and core tasks. These organizational features help the procuracy overcome "the limits of order" found in American prosecution systems.

1. The Structure of Japan's Procuracy

The United States has about 3,000 distinct prosecutors offices, each with its own chief, structure, policies, and practice (Flemming, Nardulli, & Eisenstein 1992:24, 39). Japan has exactly one, a national, centralized, hierarchical, career procuracy whose structure corresponds to the structure of the Japanese judiciary (Public Prosecutors Office Law, art. 2).

Formally the procuracy is only one part of the Ministry of Justice, but in fact prosecutors function as the ministry's head, directing almost all of its most significant activities. The titular boss of the ministry is the Minister of Justice, a cabinet member and, with few exceptions, an elected politician. However, as in Japan's other elite ministries, the minister does not run the department whose portfolio he holds, and the parliamentary vice-minister, always an elected official and formally the ministry's No. 2 person, wields even less power. Instead, the minister reigns while the prosecutors rule. In fact, prosecutors rule so thoroughly that while I was in the field, many could not even recall the name of their current boss. Similarly, most prosecutors dismiss the minister as "utterly irrelevant," except perhaps in cases of alleged corruption involving politicians in the minister's party. Like the postwar emperor, the minister principally exercises symbolic authority.

Official charts and other expressions of the "official reality" (*tatemae*) do not reveal it, but prosecutors monopolize all key posts in the Ministry of Justice. In other elite ministries the administrative vice-minister is the top career official, but not here. Instead, he—the top positions are always men—is "only No. 5" in the hierarchy, below the prosecutor general, the superintending prosecutors of Tokyo and Osaka, and the deputy prosecutor general (Omiya 1994:116–17). These top five posts are always filled by prosecutors, as are the leadership positions in the minister's Secretariat and the Criminal Affairs Bureau, the ministry's two

[7] A primary prosecutor work objective is "treating like cases alike." My survey revealed that 91% of Japanese prosecutors (213 of 235) regard "treating like cases alike" as an "important" or "very important" work objective. Only 2 said it was "not an objective."

most important organs. Elsewhere in the ministry, prosecutors occupy almost all positions of section chief or higher. In 1993, for example, prosecutors held 29 of the top 32 positions in the Criminal Affairs Bureau, widely recognized as the ministry's most powerful and prestigious bureau. In short, prosecutors run the Ministry of Justice (Kubo 1989:138–40; Nomura 1994:29–30; Tadaki 1981:170–74).

The Supreme Public Prosecutors Office stands at the apex of the procuracy proper, above the 8 high, 50 district, and 452 local offices. The 8 High Prosecutors Offices form a status hierarchy that all prosecutors learn soon after entering the organization. At the top stands Tokyo, followed by Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu. Tokyo, with approximately 45 prosecutors, is the largest high office, while the other 7 have from 4 to 13 prosecutors each.

The 50 district offices are located in the 47 seats of prefectural government and in three other cities on the northern island of Hokkaido. The district offices are responsible for investigating, charging, and trying all cases in the first instance, except those reserved by law for summary courts (offenses punishable by fine or other relatively light punishment), family courts (offenses harmful to the welfare of juveniles), and high courts (insurrection). Of the 50 district offices, 37 lack specialized divisions and are staffed by only five or six prosecutors (*kenji*) and assistant prosecutors (*fukukenji*). Since the other 13 offices have specialized divisions, one prosecutor investigates and charges a case and another tries it in court. The 50 district offices have 201 branches, geographically located to handle cases that prosecutors in the headquarters cannot process efficiently. Only the Tokyo and Osaka district offices have Special Investigation Divisions, home to the "elite troops" who are charged with prosecuting Japan's highest profile crimes (Nomura 1994: 32–33).

At the bottom of the hierarchy, the 452 local prosecutors offices are staffed exclusively by assistant prosecutors (*fukukenji*), not by prosecutors (*kenji*) who have passed the bar. The local offices correspond to summary courts, which by law cannot impose punishments greater than three years' imprisonment. Thus, local prosecutors only charge offenses punishable by fine and other minor offenses such as habitual gambling, theft, and buying or selling stolen property (Itoh 1994:2). More serious cases are transferred to a district office or one of its branches.

These prosecutor office levels—supreme, high, district, and local—are tied together, both in theory and reality, by "the principle of prosecutor unity," one of the most important of all facts about Japan's procuracy. This precept holds that "the procuracy is a national, united, hierarchical structure in which superiors command and subordinates obey and all prosecutors form one

body" (Nomura 1978:126; see also Tadaki 1981:176; Matsumoto 1981:310).

The principle of prosecutor unity is rooted in provisions of the Public Prosecutors Office Law which give the various office heads and, by implication all prosecutor managers, authority to direct their subordinates in any work-related area, whether investigation, trial, or the decision to charge. While the Minister of Justice (not a prosecutor) is the formal head of the procuracy, the same law restricts, in theory at least, his ability to control prosecutors by conferring power to direct only the Prosecutor General in respect to "particular cases." However, since the principle of prosecutor unity also gives the prosecutor general power to direct all prosecutors in all matters, whether general or specific, it is legally possible for the Minister of Justice, through the prosecutor general, to influence any case outcome.[8]

The principle of prosecutor unity stands in tension with another provision of the Public Prosecutors Office Law, the "principle of prosecutor independence." This tenet states that each individual prosecutor is an "independent government agency" with the authority to institute prosecution and perform other functions authorized by law. The principle of prosecutor independence thus distinguishes prosecutors from employees in other administrative agencies who act merely as "support organs" for the minister in whose name they act. Prosecutors have two forms of legal protection for their independence. The first gives them "guaranteed status." Hence, no prosecutor can be fired, suspended, or given a pay cut except in narrowly defined circumstances and through specific legal procedures. The second form of legal protection is the restriction on the Minister of Justice's authority to direct and manage prosecutors, as described above.

In reality, however, the principle of prosecutor independence "lies buried in oblivion" beneath the principle of prosecutor unity and the corollary demand for absolute obedience to superiors. As a prominent Japanese law professor and long-time student of the procuracy has noted, "the independence of prosecutors is merely nominal because, as a matter of fact, prosecutors

[8] In the postwar era a sitting Minister of Justice has openly used "the power to direct and manage" the prosecutor general in a specific case only once, in the so-called shipbuilders' scandal of 1954. In that case, Justice Minister Inukai, a member of Prime Minister Yoshida Shigeru's cabinet, directed the prosecutor general to delay the arrest of the Secretary General of the Liberal Democratic Party, Sato Eisaku, ostensibly because the Diet was deliberating two bills that concerned the status of Japan's Self Defense Forces and Defense Agency. The procuracy and public so strongly condemned this openly political move to protect a member of the LDP elite that Justice Minister Inukai was forced to resign. The investigation of Sato Eisaku, however, lost momentum, and he was neither arrested nor charged in this case. Ten years later, in 1964, Sato Eisaku became Prime Minister; in 1974 he won the Nobel Peace Prize for his antinuclear diplomacy (Nomura 1988:95-97). It is difficult to discern whether and how subsequent Ministers of Justice have used their authority behind the scenes to influence particular case outcomes. Predictably, politicians and prosecutors deny that it happens, while journalists and academics hold a range of opinions on the issue.

are not allowed to independently exercise authority" (Matsumoto 1981:310). The words of Kawai Nobutaro, one of the most esteemed prosecutors in postwar Japanese history, confirms that view. Writing in Japan's equivalent to the *Atlantic Monthly*, Kawai describes by analogy "the iron principle of the organization," namely, that "those above command and those below obey." His metaphor is as apt today as when he wrote it over 40 years ago.

> The law says that in the procuracy those above command and those below obey. We call this "the unity of prosecutors" [lit. "the one body of prosecutors"]. I'm sorry to employ such a plebeian example, but if we compare a criminal investigation to basic construction work, then the front-line investigating prosecutor is like a human wheelbarrow used for flattening the earth. The managing prosecutor wields a stick to direct the front-line prosecutor to "carry mud here" and "place a stone there," and then goes off to the next construction site to do more of the same. The human wheelbarrow then works very hard to carry dirt and pound cement as directed. The only job left to the human wheelbarrow is [to decide] how to pound the concrete and to what depth. (Kawai, quoted in Kubo 1989: 134–35).

In the next section, I explain in more detail (and less metaphorically) how the various prosecutor "wheelbarrows" define and perform their roles and tasks. Throughout, the principle of prosecutor unity will be evident in prosecutors' beliefs and behavior. Prosecutors' strong solidarity has been criticized for trampling the principle of prosecutor independence and for making decisionmaking in corruption scandals vulnerable to political pressures from above. Surely the "iron principle of the organization" does have its costs, both for particular prosecutors and for the quality of justice in some cases.[9] However, the remainder of the article shows that "prosecutor unity" has an extremely important virtue as well: It helps prosecutors treat like cases alike.

[9] Prosecutors who oppose their superiors are "eliminated on the spot," as happened to Abe Haruo, a former elite prosecutor and ex-convict (Kubo 1989:97–110, 134–36; see also Abe 1968). Born the second son of a judge in Hokkaido in 1920, Abe traveled the "elite course" from the time he became a prosecutor until the end of his prosecutor career. Abe graduated from the law faculty of Tokyo University in 1943. He joined the procuracy in 1951 and soon was sent to Harvard for additional study. On returning to Japan, he was assigned to several important positions in the procuracy. However, Abe had an unusual penchant for criticizing the organization openly. Such criticisms resulted in a series of undesirable transfers and job assignments. Disgruntled with his treatment, Abe quit to become a private lawyer. In the early 1980s, he was convicted of criminal extortion and attempted extortion while representing plaintiffs in the *Japan Automobile User Union* case. He was sentenced to two years' imprisonment, suspended for four years. Kubo argues that in the *User Union* case, prosecutors unfairly targeted Abe in order to stymie Japan's nascent "consumers' movement."

2. Prosecutor Roles and Tasks

Japanese prosecutors perform three major roles—as operators, managers, and executives. *Operators* investigate, indict, and try cases. These front-line prosecutors perform the organization's core tasks—processing suspects by clarifying the truth about alleged bad acts, determining legal guilt or innocence, and specifying appropriate sanctions. *Managers* monitor and coordinate the work of operators in order to attain organizational goals, while *executives* have special responsibility for securing the procuracy's organizational autonomy (or "turf") and maintaining public support. Acting in concert, these three sets of actors reduce the tension between the two standards of justice that seem fundamentally incompatible in many American prosecution offices—individualization and order.[10]

a) Operators: uncovering and constructing the truth

Operators do the work that justifies the procuracy's existence.[11] They perform its critical task, that is, the work that enables the organization to manage its most critical environmental problem (Wilson 1989:33–34). For Japanese prosecutors, the most critical task is to clarify and construct the truth about allegedly bad acts—to rescue such acts from their ambiguous past so that sound charge decisions can be made. Of course, operators perform many other tasks as well, such as deciding whether or not to indict suspects, presenting the state's case at trial, supervising the execution of sentences, and so on. But their central task, the fundamental work on which all other work depends, and the job prosecutors themselves regard as their primary duty, is to explicate the facts of cases by acquiring and organizing evidence during the pre-indictment investigation.

An abundance of evidence makes plain that Japanese prosecutors believe their core task is to "clarify the truth" about alleged criminal acts. In my survey, for example, I asked prosecutors to indicate the importance of each of 17 work objectives by circling one of four answers: very important, important, not very important, and not an objective. Of the 235 respondents, 216 (92%) ranked "explicating the truth about a case"[12] as a "very

[10] Although I borrow the labels for these roles from James Q. Wilson (1989:27–28), Japanese prosecutors use similar terms to make the same distinctions: *hira kenji*, or "ordinary prosecutors," are the main operators; *joshi*, or "superiors," are the managers; and *kanbu* translates literally as "executives."

[11] More precisely, prosecutors distinguish three types of operators: administrative officials (*jimukan*), assistant prosecutors (*fukukenji*), and rank-and-file, front-line, or "ordinary" prosecutors (*hira kenji* or *ippan no kenji*). I do not elaborate these distinctions because they are not central to the present argument. For a more detailed discussion, see Nomura 1988.

[12] The Japanese text reads "*jiken no shinso o kaimei suru koto*," which rendered literally means "to unpack and make clear the real facts of a case." As explained below, Japa-

important objective." Of the other 19 respondents, 18 ranked this objective as "important," and only one as "not very important." Thus, 234 out of 235 respondents (99.6%) regarded "explicating the truth" as either important or very important, thereby rendering this goal one of two "cardinal objectives."[13]

Japanese prosecutors define their core task differently than American prosecutors. When Lief Carter studied prosecutors in California, he asked them to rate the importance of nine office goals. "Clarifying the truth" was not among them (Carter 1974:178–80). When I was constructing the analogous part of my own survey, I borrowed liberally from Carter's questionnaire to save time and make comparison possible. Having read other research, mostly about American prosecutors, I added to Carter's list several other plausible objectives. Still, "clarifying the truth" was not among them. Only when I showed a draft of the survey to a Japanese prosecutor did I realize that I had made a glaring omission. The draft survey inquired about many prosecutor objectives, even some—like "keeping the cases moving"—that were utterly mysterious to Japanese prosecutors, but it did not ask about the one they consider central. After listening to a brief lecture on the importance to Japanese prosecutors of "clarifying the truth," I included the item which taps into their core task.

Formal office statements in the two countries further reveal the difference in task definition. The Lakeville Prosecutors Office in the American Midwest declares that "the mission of the Adult Prosecution Division is to promote a fair, just, and orderly society by prosecuting adults who commit felony and other crimes in Lakeville County through the equitable application of criminal law." Although the phrase "who commit felony and other crimes" presupposes some determination of who did what, both the mission statement and individual Lakeville prosecutors pay that imperative little direct attention. In contrast, official publications of the Japanese procuracy stress that "a prosecutor's first role is to explicate the truth about cases" (Ministry of Justice 1986).

Many American scholars and legal professionals doubt that investigations and trials *can* determine the truth about past acts.[14] This skepticism existed long before the arrival of postmodern incredulity toward truth claims. For example, in one of the most influential articles of the Legal Realism movement,

nese prosecutors have wide powers to unpack and arrange the facts, and thereby construct the truth, as they deem proper.

[13] To prosecutors, since achieving the other "cardinal objective" ("not prosecuting the innocent and prosecuting and convicting only those who have really committed crimes") depends on first clarifying the truth, the latter is the most fundamental task.

[14] Although some commentators, dissatisfied with the American criminal justice system's relatively low regard for truth, argue that "the goal of discovering the truth should play a dominant role in designing the rules that govern criminal procedure" (Grano 1993; Amar 1997).

Jerome Frank (1949:14–36) argued that "facts are guesses." Quoting Frank, Lief Carter (1974:14) also contended that "the prosecutor's 'facts' are guesses." This epistemological skepticism has been transmitted to many contemporary American prosecutors. One, a veteran in Lakeville, stated his view:

> Our criminal justice system is not designed to find the truth. I am nervous talking about the truth. If we wanted to find the truth, we would not have the fifth amendment [guaranteeing the right against self-incrimination]. What we want is justice, not truth. The constitution teaches that truth is not paramount.

After stumbling across the importance of truth seeking to Japanese prosecutors, I confronted them with Frank's claim that "facts are guesses" and with the like-minded skepticism of American prosecutors. The details of their responses vary, but the main themes are sufficiently similar to reveal consistent agreement among themselves and disagreement with the Frankians. One prosecutor, a 35-year veteran, related the common Japanese themes in uncommonly eloquent English:

> I would say two things to Mr. Frank. First, he is right; we cannot know the truth. What we treat as truths really are guesses. Only god knows the truth. In that sense, you and Mr. Frank are correct as a matter of philosophy. But if we try hard we can come closer to the truth, even if we are never able to see it perfectly. Furthermore, I think the degree of such effort differs a lot between the U.S. and Japan. There are many reasons for that, of course. You have juries that simply convict or acquit, without elaborating reasons or particular findings of fact. That makes it possible, even logical, for prosecutors to present rough facts. Your investigators also have relatively little time to find the facts or be precise. But whatever the reasons, it seems that more than you Americans, we Japanese believe in the possibility of discovering the truth. And we have constructed a system of prosecution that makes finding the truth our first priority.

Japanese prosecutors agree not only about what their core task is but also about how to perform it. In brief, prosecutors clarify the truth by preparing written documents, or dossier, during the pre-indictment investigation. The most crucial part of the dossier is the suspect's confession, for prosecutors, judges, and defense lawyers agree that it "continue[s] to play an extremely important role in the criminal justice process" (Foote 1991:455). As it has long been, a confession is still the queen of evidence, "the decisive element of proof sought by every prosecutor before he takes a case into court and the single most important item determining the reception his efforts are likely to receive from most Japanese judges when he gets there" (C. Johnson 1972: 149).

Prosecutors and police do not record confessions verbatim. Instead, they prepare a summary statement that organizes and

summarizes the suspect's testimony. These summaries often synthesize statements the suspect has given over several sessions (or even days) of testimony. Though lengthy and highly detailed, they are also *the prosecutor's construction of the truth.* Prosecutors often sort through the raw materials suspects provide, using the parts deemed most relevant to assemble the suspect's confession. Sometimes prosecutors allow suspects to read the dossier before asking them to sign it, but more often they (or their assistants) read the dossier aloud to the suspect, ask if any revisions are requested, and then seek the suspect's signature. In the dozens of interrogations I observed in Japan, only a handful of suspects requested revisions. Prosecutors read the dossier to the suspect very quickly, even when confessions continue for 20 or more pages. At the very least, this made it difficult for suspects to digest the details in the dossier. Some defense lawyers believe that this method of constructing the truth enables prosecutors to generate "closely-knit and logically consistent accounts which judges may find difficult to resist" (Foote 1991:454). Certain prosecutor admissions, such as the following description provided by a former Tokyo prosecutor, unwittingly lend credibility to that criticism (Kawai 1986:102, quoted in Foote 1991:454):

> In major cases I would question for two or three days, taking notes on the confession in my notebook, and then prepare a statement covering that two or three days' worth of material. If you don't do that, you can't get an organized statement and you run the risk of getting a statement that contradicts earlier or later statements of the same suspect or statements of other suspects.

Prosecutors obtain and construct some confessions directly, by interrogating suspects and composing the results in one or more dossier, but more commonly they simply confirm the details of confessions gained by the police.[15] If the prosecutor files charges, the case then goes to trial, where large, liberally interpreted exceptions to the hearsay rule allow most dossiers to be entered as evidence (Hirano 1989:138). The judge's role is then, in fact if not in principle, to review the results of the investigation as recorded in the police and prosecutor dossier. As a former judge of the Osaka High Court put it, "criminal trials—and in particular the factfinding that lies at the heart of trials—are conducted in closed rooms by the investigators, and the proceedings in open court are merely a formal ceremony" and "an empty ritual" (Ishimatsu 1989:143).

[15] In the survey, 180 of 235 prosecutors (77%) agreed or strongly agreed that "police do the important investigative work in almost all cases." Only 14 (6%) disagreed or strongly disagreed, while 40 (17%) said it depends on the case. Responses to a related question reveal part of prosecutors' motivation for seeking confessions so single-mindedly: 217 prosecutors (93%) agreed or strongly agreed that "when a suspect does not confess, disposing of the case is much more difficult and time-consuming."

b) Managers: cultivating mission and controlling operators.

Japanese prosecutors almost unanimously agree that uncovering and constructing the truth is their core task. But how is this sense of mission inculcated, and how are operators coordinated and controlled so as to accomplish that task and, thereby, render individualized and ordered decisions? The answer, in large part, is managers, who perform two key functions. First, managers cultivate in operators a sense of mission—widespread agreement about and endorsement of the way their critical task is defined (Wilson 1989:24). Second, managers coordinate and control operators in order to attain organizational goals such as order.[16]

Managers cultivate mission. From the start of their careers as legal professionals, Japanese prosecutors are educated to believe in the crucial importance of truth through confessions. The lectures that managers and other veteran prosecutors gave to the legal apprentices (*shushusei*) during the apprentices' four-month stay in the Nakayama office repeatedly stressed that seeking "truth through confession" should be every prosecutor's main mission. In the two dozen such lectures I attended while doing field research, the pursuit of truth through the inducement of confession was by far the most prominent theme. Sometimes the message was explicit, as when a manager stated that "since only the suspect knows what really happened, the only way for you to find out is by taking his confession." The metaphor is revealing: because only the suspect possesses the truth, the prosecutor must "take" (*toru*) it from him. Usually, however, the point was driven home more subtly and powerfully through illustration, anecdote, and the sheer volume of words used to describe cases in which confessions were essential to obtain but hard to elicit. Like the Japanese detectives studied by Setsuo Miyazawa, prosecutors believe that "procuring confessions is primary" and "the first priority in an investigation" (Miyazawa 1992:81, 158).

Managers recite, elaborate, and emphasize this tenet to operators on numerous other occasions as well. Formal education and training programs further inculcate a shared sense of mission (Ando 1995), but the most important settings for instruction about how to be a good prosecutor are restaurants, bars, *karaoke* clubs, and, after hours, the prosecutors office itself. Japanese prosecutors are not especially busy (D. Johnson 1996:61). However, like Japanese working in other large organizations, whether business or bureaucracy, they spend a great deal of time together. Indeed, the prosecutor organization so envelops the prosecutors in it that in significant respects it resembles a "total

[16] Managers are found in a variety of positions in the procuracy, as assistant division chiefs, division chiefs, branch office chiefs, deputy district office chiefs, and district office chiefs, and in various posts in the high and supreme prosecutors offices as well. In this article the distinctions between types of managers are less central than their functional similarities.

institution"—a place where the usual barriers between play and work (and to a lesser extent sleep) break down (Goffman 1961:5). In urban offices most prosecutors spend at least 10 and often 12 or more hours in the same place, under the same authorities, and in the company of the same group of significant (prosecutor) others. In such settings young prosecutors are regularly instructed in prosecutor traditions and implored to carry them on.

When I first visited the Nakayama office, I drank little of the tea I was served for fear that the caffeine would exacerbate my stomach ache. At the conclusion of our chat, my prosecutor host, with evident concern in his voice, startled me with a question: "You are not a Mormon, are you?" He asked, of course, because Mormons do not drink caffeine (or alcohol) but prosecutors do—a lot. Or at least they spend significant time, together, in the presence of open bottles of alcohol. On these occasions the conversation almost inevitably turns to one of prosecutors' two favorite topics: transfers and personnel changes, on the one hand, and interactions with suspects on the other. While prosecutors express considerable anxiety and dissatisfaction about the former, they relish describing strategies they have used to extract confessions from recalcitrant suspects. Sometimes their stories are stranger than fiction (if not altogether apocryphal), but the text and subtext are always clear to the audience: a prosecutor's job is to determine the truth, and the best way to do that is by obtaining a full, detailed confession. The cumulative effect of these countless conversations is a strongly shared sense of occupational mission.

Managers coordinate and control operators. In addition to cultivating in operators agreement about and endorsement of the way their critical task is defined, Japanese managers coordinate and control operators' activities to an extent unseen in American prosecution offices (Tojo 1968:55). It seems axiomatic that "any large, bureaucratic organization must have some means of insuring that policy formulated by higher-ups will be applied by subordinates in the field," but such policies tend to be rare and primitive in the United States, and American prosecutor organizations have "virtually no instruments by which to enforce them" (Abrams 1971:53, 58; Feeley 1973:422). Japan's procuracy is different.[17]

First of all, to direct subordinates' exercise of discretion, Japanese managers articulate and communicate specific criteria in written manuals, guidelines, and standards. The importance of policy in the Japanese procuracy has been overlooked by most

[17] Comparison with other countries reveals that this feature of Japan's procuracy is not *sui generis*. Like Japan, in France, too, the managing powers of top prosecutors "are very strong, at least in comparative terms," with the result that every front-line prosecutor is "in large part controlled by his or her superiors" (Guarnieri 1997:185).

other commentators. For example, Seto Shuzo, a highly respected reporter who for years covered prosecutors for one of Japan's largest newspapers, claims that the procuracy has no policy besides doing justice (Seto 1983:1). In fact, Japanese prosecutors work in an organization saturated with policy directives. More important, these criteria are not dead letters, as guidelines in the United States often are (Abrams 1971; Vorenberg 1981; Burnham 1996). Instead, Japanese operators regard them as indispensable guides to action. In my survey, 232 out of 234 Japanese prosecutors (99.1%) agreed or strongly agreed that "formal manuals and rules are very important sources of information on how to do our job." Manuals and rules are always within arm's reach of Japanese operators, and they make frequent reference to them.

In contrast, when Lief Carter asked a nearly identical survey question to 36 prosecutors in California, only one agreed and all but six strongly disagreed (Carter 1974:198). Likewise, in a review entitled "Guides to the Exercise of Discretion: The Present State of the Art," Norman Abrams (1971:8–9) notes that even though the Department of Justice—the U.S. leader in this respect—"has articulated a great deal of policy," most of it is unsystematic and "difficult to describe as much advanced beyond the primitive." In other large American prosecution offices, one usually finds an office manual or handbook of some sort, but "in most instances it is difficult to say that these materials set forth prosecutorial policy." Most often, Abrams says,

> [T]hey amount to elementary instruction books for junior prosecutors which describe the procedures to be followed in particular types of cases and the applicable rules of law. If they occasionally lapse into statements of policy designed to guide discretion, that policy is usually of the most general and unsophisticated sort.

In federal prosecution offices in the 1990s the situation has improved so little that one prominent commentator calls the system an "adhocracy" (Burnham 1996).

Japanese managers further specify rules for performance by requiring operators to clear all decisions with supervisors, chiefly through the *kessai* system of consultation and approval. In order to make charge and sentence recommendation decisions, operators must consult with and obtain the approval of two or three managers, depending on the seriousness of the case. This is known as *shobun kessai*, or "disposition approval." Furthermore, in serious cases operators must obtain approval to arrest (*taiho kessai*), detain (*koryu kessai*), and extend detention (*encho kessai*) of suspects. In these cases, operators go to the office of the supervising manager, with dossier and other supporting documentation in hand, and describe the content of the case and the desired decision. To avoid logjams at the manager's office, many

prosecutors telephone the manager's secretary before going to *kessai*. *Kessai* interactions vary considerably in length, from five minutes or less in simple cases to an hour or more in complicated ones. *Kessai* styles also differ markedly. Some managers allow the operator to talk freely before asking any questions, while others pepper the operator with queries from the outset of the interaction. In cases where the pre-charge investigation lasts several days or even weeks, operators interact many times with *kessai* managers in discussing how to proceed. In cases of special importance (involving, say, a politician or prominent businessman), managers at the district office level consult with executives at levels higher up in the hierarchy—from the High Prosecutors Office to the chief of the Ministry of Justice's Criminal Affairs Bureau to the Prosecutor General. These are called "specially designated cases." Even for simple cases such as traffic violations or petty larcenies, *kessai* is still required, though often it is done more on paper than in person. In minor cases the operator simply sends the relevant records and draft decision to the supervising manager, who either stamps the documents, indicating approval, or asks the operator for further clarification.[18]

Some commentators stress the political control function of the *kessai* system, especially in high-profile cases. Karel van Wolferen (1989), for example, contends that "Japanese prosecutors have a highly selective approach to corruption in the political world," in part because of the *kessai* system.

> Individual prosecutors operate, in theory, on their own, but in practice they are expected, before taking action against influential officials, ministers, Diet members or local government leaders, to write preliminary reports for their superiors all the way up to the minister of justice, and to wait for their consent. This controversial *shobun seikun* (request for instructions as to steps to be taken) system of responsibility within the procuracy has led to the dismissal of many political corruption cases. Even when such corruption cases are not dismissed, the politicians involved will usually be allowed to emerge unscathed, and bureaucrats-turned-politicians need not at all fear being publicly tainted. (van Wolferen 1989:223–24)[19]

[18] In significant respects, the *kessai* system of prosecutor decisionmaking resembles decisionmaking in other large Japanese organizations. See, e.g., the discussions of *nemawashi* ("binding the roots of a plant before pulling it out") in bureaucratic agencies (Vogel 1975a:xxii–xxiii; Craig 1975:17–24) and of *ringisei* ("drafting and preparing a proposal in order to obtain approval") in business companies (Clark 1979:125–34).

[19] Shinichiro Tojo, a Japanese prosecutor, distinguishes three modes of supervising case dispositions. As described above, *kessai* is "approval by a senior prosecutor directly supervising each prosecutor." *Shobun seikun* ("request for instructions as to steps to be taken") is, in effect if not in name, a stronger form of *kessai*. Tojo says that when such a request is made, a superintending prosecutor—what I call an executive—directly decides how to dispose of the case. Thus, *shobun seikun* is less a form of consultation and approval than it is a complete "takeover" of the case by prosecutor executives. The third form of supervision, known as *hokoku* or "report," is a weak form of *kessai*. Here prosecutors simply notify executives of their disposition decision after the decision has been made (Tojo

Although van Wolferen is correct to point out the important political control function of *kessai* and its correlates (Kubo 1989:137–42; Tachibana 1993), this system of coordination and control plays an equally significant and salutary function in the far more numerous cases that do not rise to the level of a *shobun seikun* requirement. In short, *kessai* helps Japanese prosecutors achieve order, a goal many American prosecutors regard as peripheral, elusive, and even irrelevant. In interviews in Japan, managers consistently stressed the crucial role that *kessai* consultations play in treating like cases alike and unlike cases differently. As one manager put it, "*kessai* helps even out unwanted disparities between cases. The most important purpose of *kessai* is fairness."

The order-enhancing effect of *kessai* is also evident in manager and operator behavior. In social form, *kessai* is fundamentally an interaction between operator and manager. Since such interaction is required routinely, operators and managers are highly interdependent. Indeed, the way each defines his task depends on the nature of the interaction, or expected interaction, with the other. At *kessai*, for example, managers compare the current case with others that have come before it, reasoning by analogy across a number of dimensions to determine which cases from the past can guide decisionmaking in the present (recall Yoshio's behavior in the mushroom case). Sometimes, of course, a well-established principle or guideline (*kijun*) expresses the earlier decisions and so disposes of the present case without much analysis being necessary. At other times, however, the governing rules are discovered in the process of determining the similarity or difference between present and prior cases (Levi 1969:3). In either event, managers attend closely to the problem of order. Further, since managers must consult in other cases brought by other operators, they cannot gather by themselves all the information needed to make good decisions. They are, in other words, dependent on operators for much of the information they use to identify relevant similarities and differences. At the same time, however, operators learn to anticipate what questions of order managers are likely to ask at *kessai.* In preparation, operators conduct careful comparisons between past and present cases so as to avoid being vexed or embarrassed by a manager's "what about this case?" query. I have seen poor performance at *kessai* ruin a prosecutor's day, and repeated poor performance can cause significant damage to one's career. Thus, in both belief and behavior, and to both operators and managers, order is a primary work objective. *Kessai* consultations both express and reinforce that aim.

1968:66–67; *Kensatsu Kogian* 1994). Because of the sensitive nature of cases in which *shobun seikun* is used, prosecutors are reluctant to discuss that form of "strong supervision" with operators and outsiders.

In summary, Japanese managers not only cultivate a shared sense of mission in the organization's operators, they wield other strong controls over their subordinates' behavior as well. As we have seen, managers specify rules, standards, and procedures, orally and in writing, to guide operator discretion. In principle and in fact, those guidelines constrain and channel operator behavior. Similarly, through *kessai* consultations managers detect and discourage deviation from the principles of order while maintaining an equally strong commitment to the ideal that case dispositions should be individualized. Perhaps most important, managers carefully recruit, train, and socialize operators so as to develop the collective ability and desire to conform to the norms of individualization and order. In all these ways Japanese managers have far more influence on disposition decisions than do their American counterparts. In short, in the Japanese way of criminal justice, order is not only possible, it is a primary aim and routine achievement.

c) Executives: securing autonomy and maintaining the organization

Prosecutor executives create space for operators and managers to perform their functions and thereby dispense ordered and individualized justice. The executives' chief concern is acquiring sufficient freedom of action and external political support (or at least nonopposition) so that operators can define their critical task appropriately and so that managers can infuse that definition with a sense of mission (Wilson 1989). In addition, executives maintain the organization by acquiring the resources it needs to survive and thrive. Both tasks are easier for prosecutor executives in Japan than in the United States.[20]

Executives secure and preserve organizational autonomy. The chief concern of prosecutor executives is organizational autonomy. Autonomy has two dimensions, external and internal (Selznick 1957:121). *Externally,* executives try to minimize rivals and secure freedom from political constraints. Japanese prosecutors have an absolute monopoly on the decision to charge. Further, politicians grant prosecutors substantial independence to pursue crime control and criminal justice objectives, at least with respect to ordinary street crimes (van Wolferen 1994:110–11). In this re-

[20] One can define the executive class broadly or narrowly. Defined narrowly, the class would include only the prosecutor general, the deputy prosecutor general, the superintending prosecutors of the eight high offices, and the Administrative Vice-Minister of Justice. However, since other veteran prosecutors perform similar functions, I adopt a broader definition that incorporates all district office chiefs, supreme office prosecutors, and Ministry of Justice prosecutors at the level of bureau chief or higher. All prosecutors within this broad definition attend "executive meetings," at least occasionally (Kubo 1989:120; Mukaidani 1993:18; Nomura 1988:88). Thus, executives play many of the manager roles described above, such as cultivating mission and coordinating and controlling front-line operators. Here, however, I emphasize their other distinctive functions in the organization.

gard, Japanese prosecutors resemble bureaucrats in the Ministry of Foreign Affairs and other Japanese agencies that possess few divisible benefits for politicians to acquire and return to their constituencies. As a result, prosecutor executives need to devote comparatively little attention and few resources to achieve the external aspect of autonomy. Occasionally, of course, some aspect of prosecutor behavior, or misbehavior, becomes a public and political concern, as when death row inmates have been acquitted on retrial or prosecutors have hidden potentially exculpatory evidence from defendants (Foote 1993; C. Johnson 1972). At these times, executives concentrate on responding to and managing the crisis, much as do executive prosecutors in the United States. The key difference, however, is that Japanese prosecutor executives face relatively few such crises because crime and criminal justice have not been politicized in Japan as they have in the United States (Scheingold 1984, 1991).

Thus, instead of struggling to maintain external independence, executives are relatively free to focus their attention on the second, *internal* aspect of autonomy—cultivating a widely shared and approved sense of the procuracy's central tasks. With managers, executives have forged an impressive consensus about what the procuracy's main tasks are and how they should be performed. The consequence is a high level of internal autonomy as well.

Executives maintain the organization. The second major concern for executives is organizational maintenance: "assuring the necessary flow of resources to the organization." For the procuracy, organizational maintenance means obtaining sufficient capital, labor, and political support (Wilson 1989:181).

Obtaining adequate financial appropriations has seldom been a major problem for prosecutor executives. The "rite of budget revision" vividly reveals what one former bureaucrat has called "the village mentality of the Japanese bureaucracy," but in the Ministry of Justice, as in many other Japanese ministries, "no plan marking a significant break with established ways of thinking has the slightest chance of seeing the light of day" (Miyamoto 1994:79). Competition between different sections, departments, and bureaus in the ministry is sometimes fierce, but actual appropriations change little. In fact, the procuracy's share of the national budget has barely changed since 1980 when its budget was about 62 billion yen ($62 million), or about 0.132% of the national budget. In 1990 it had grown to nearly 80 billion yen ($80 million), though that constituted a slightly smaller share—0.12%—of the national budget. Throughout the decade of the 1980s the procuracy's share of the national budget was never more than 0.13% or less than 0.12%. About 90% of the procuracy's budget goes to pay personnel expenses, mostly salaries and bonuses. As a percentage of GNP the procuracy's budget

also remained steady at about 0.02%, or about one-third the size of the budget for Japan's courts.

Acquiring an adequate supply of operator labor has been a more difficult task for executives, yet they have always managed to do so satisfactorily. To be sure, recruiting enough able operators has been a perennial concern for postwar prosecutor executives. Shortly after the Pacific War ended in 1945, SCAP, the occupying power, purged hundreds of "thought prosecutors" for their repressive prewar practices. This prompted executives to create the new position of "assistant prosecutor" to help investigate, charge, and try cases. When the purged prosecutors were depurged three years later, the size of the procuracy far surpassed its prewar scale (Nomura 1994:17–18), but personnel worries soon reemerged. In 1963 Itoh Shigeki argued that the procuracy needed to better respond to its personnel problems. Ironically, when Itoh became Prosecutor General in the mid-1980s the mass media and bar associations were proclaiming a "prosecutor crisis," allegedly caused by the organization's inability to recruit and retain a sufficient number of able prosecutors. Others have noted that executive concerns about personnel long preceded Itoh's ascension to Prosecutor General. In the early 1970s, for example, prosecutor executives writing in the monthly magazine *Kenshu* (or "Training") argued that the organization needed a "new vision" in order to increase the number of new recruits, decrease the number of prosecutors leaving the office in mid-career, and stem the "salarimanization" of those who remained (Mitsui 1979:218).

The personnel problems, however, were especially serious from the mid-1980s through the early 1990s. Indeed, in the decade before 1993, no cause concerned executives more. Journalists have interviewed scores of so-called prosecutor-quitters (*yameken*) who express antipathy for the ubiquitous bureaucratic controls inside the organization and for the transfers to new office and job assignments that occur every two or three years. In 1989 when the procuracy was lobbying for an increase in the number of people who could pass the bar exam each year, the Tokyo Bar Association published the results of a survey of 144 "prosecutor-quitters" (56, or 39%, responded). The results reveal significant dissatisfaction, at least among the quitters, with the organization's bureaucratic controls. Respondents could select more than one answer, but only the most frequent responses are listed below.

1. Why did you quit the procuracy?
   —disliked transfers (14)
   —fairness in personnel matters is lacking (11)
   —stopped feeling meaning in the prosecutor's job (11)
   —cannot do the work independently (10)

2. Why is the number of prosecutor recruits decreasing in recent years?
   —problems in the prosecutor organization (30)
   —the prosecutor's job has no appeal (25)
   —the trend of the times is "separation from public officials" (18)
3. Why is the number of prosecutors who quit in mid-career increasing?
   —problems in the prosecutor organization (35)
   —the prosecutor's job has no appeal (26)
4. What do you think about the following statements concerning the present procuracy?
   a. Young prosecutors cower because hierarchical relations are severe.
      —agree (12) —disagree (22) —cannot say (21)
   b. The application of the *kessai* system must be reformed, and individual prosecutors should be given wider authority and responsibility.
      —agree (29) —disagree (8) —cannot say (18)
   c. The procuracy's sense of mission, such as exposing social evils and the like, has weakened, and overall it has bureaucratized and abandoned itself to a "peace-at-any-price" principle.
      —agree (32) —disagree (14) —cannot say (9)
   d. Family life is unstable because transfers are frequent.
      —agree (41) —disagree (4) —cannot say (9)

In short, the bar association's survey reveals that many prosecutors quit the organization out of discontent with its thoroughly bureaucratic character, especially the hierarchical controls such as *kessai* and transfers. In response to the perceived personnel crisis, prosecutor executives have taken a number of steps in recent years. For example, even though Japanese prosecutors are notoriously reluctant to grant public interviews, under these circumstances several executives appeared in the mass media and in specialist journals to appeal for public support and to proclaim a "new age" for the procuracy. The Secretariat and the Criminal Affairs Bureau of the Ministry of Justice also produced glossy brochures to explain the organization to prospective prosecutors and administrative assistants and to persuade them to join the procuracy. Most important, executives lobbied hard for, and obtained, significant increases in the number of persons permitted to pass the bar exam each year. In 1990 the quota of bar passers was fixed at 500. That increased to 600 in 1991 and to 700 in 1993. Late in 1994, executives in the Ministry of Justice called for more than doubling the number of bar passers, to 1,500, while the Bar advocated an increase of only 100, to 800. In response, prosecutor executives, judges, and lawyers in the Reform Council of the System for Training Legal Professionals presented a "proposal to investigate" the ministry's recommendation in exchange

for imposing a limit on the number of times aspiring legal professionals could take the bar exam. In August 1995, the Japan Federation of Bar Associations approved lowering the threshold for passing the exam to permit about 1,000 successful applicants annually, up from the current quota of 700.

Prosecutor executives have tried to increase the total number of bar passers because doing so will produce more new recruits for the organization. Since the reforms were passed, the number of new recruits *has* increased markedly. In April 1995, 86 new prosecutors were appointed, the largest number ever, and in 1996 prosecutors had to turn away recruits to avoid surpassing the organization's legal capacity, which is fixed at 1,173 prosecutors (*kenji*) and 919 assistant prosecutors (*fukukenji*). Executives also attribute the increase, however, to the economic recession which followed the collapse of the bubble economy in 1991 and only began to improve in mid-1995. When times are bad, executives argue, legal apprentices are more likely to seek the relative security of jobs with government, in either the judiciary or the procuracy. Executives still worry, however, that personnel problems will recur when the economy recovers. Indeed, in my last interview in the Nakayama Prosecutors Office in February 1994, the chief of the office stated that the personnel problem was one of the three main problems then facing the procuracy.[21]

In summary, prosecutor executives have had some difficulty acquiring and keeping enough personnel to maintain the organization, in large part because many potential recruits dislike the procuracy's pervasive bureaucratic controls. Still, the personnel problem has never been as extreme as critics of the organization allege. Indeed, even when the number of prosecutors is below official capacity, prosecutor caseloads have remained comparatively light (D. Johnson 1996:80). Thus, while executives have sometimes struggled to maintain the organization's personnel, they have done at least an adequate job. If the personnel problem were an illness, then the procuracy has seldom had more than a common cold.

The third way prosecutor executives maintain the organization is by *securing sufficient political support* to enable operators and managers to perform their jobs effectively. In general, executives are successful when they find and maintain the support of some key external constituency, that is, a group whose interests their organization represents (Wilson 1989:203–4). The key constituency for prosecutors is the general public, with whom executives cultivate good relations quietly but consistently.

Executives care about and thus manage their relationship with the public for several reasons. First, and as we have seen,

[21] The other two problems the Nakayama chief emphasized were crimes by foreigners in Japan and the "imbalance of advantage" in criminal procedure. The latter, he believed, wrongly confers too many rights on criminal suspects.

executives need to recruit qualified personnel to fill the organization's roles. The legal apprentices from whom the organization recruits participate in the wider culture and thus are influenced by popular perceptions of the procuracy. Hence, executives must care about how the public perceives them. Compared with the police, however, prosecutors devote relatively little attention to currying public favor or placating critics. The mass media often report on issues or reforms important to the police, largely because police executives invest substantial resources in shaping and managing public opinion (Ames 1981:226). Prosecutors admit that police are adept at explaining their behavior or desired reforms to the public, and they lament that in comparison the prosecutors office is "inept at public relations." Curiously, some executives even boast about the procuracy's longstanding custom of not defending or explaining itself to outsiders. The phrase they use (*benkai shinai*) connotes a range of meanings, from explanation to excuse to apology, and the norm it expresses proclaims that explaining or apologizing for one's behavior besmirches the reputation of both the prosecutor and the procuracy (Nomura 1994; Foote 1993; Kubo 1989). For example, prosecutor executives publicize Japan's relatively high conviction rates in order to cultivate constituency support, yet they do so in a relatively low-key manner because, at least to the uninitiated, convictions seem to speak for themselves (D. Johnson 1997a). The organization's version of *res ipsa locquitur*—that prosecutors should let their acts speak for themselves—also makes it difficult for researchers to acquire information about how the organization works. However, some prosecutors, especially young ones, believe that silence is not always golden. Once, when two young prosecutors learned I would interview an executive, they urged me to ask a question that they themselves could never ask directly: Why don't executives try harder to explain prosecutor practice to the public, as police elites do?

Prosecutors also care about their relationship with the public because article 4 of the Public Prosecutors Office Law imposes a duty to be "representatives of the public interest." They take this obligation seriously. Whether lecturing to legal apprentices, consulting about case dispositions, or explaining themselves to outside visitors, prosecutors often refer to their duty to act in the public interest. Of course, discerning that interest is sometimes difficult, and other imperatives sometimes deflect executives' behavior away from it, but prosecutors clearly feel bound by their duty to be responsive to the public (Uematsu 1981; Kawakami 1981). Mitsui Makoto, a legal scholar at Kobe University and one of the foremost experts on Japan's procuracy, has summarized the most salient themes in prosecutor culture between 1950 and 1980. To discern those themes Mitsui reviewed hundreds of publications written by and for prosecutors. Mitsui (1979:220) notes

that throughout this 30-year period prosecutor executives stressed their connection to the public and the need to continuously seek the public's "understanding and cooperation." If anything, this theme has only increased in importance.

An internalized obligation to the public and the organizational need to recruit new members are not the only forces that motivate executives to care about public opinion. Indeed, if prosecutors are to clarify the truth about cases and thereby perform the organization's critical task, they must have the public's cooperation, as victims, complainants, witnesses, suspects, and defendants, and as citizens interested in the processes and products of criminal justice. This, in fact, is the most important reason prosecutor executives need to secure public support.

The Kanemaru case: the day support sank

When public support for prosecutors is stable, it is difficult to perceive, but when public support erodes, it becomes clear just how dependent on it prosecutors are.[22] This happened while I was in Japan, in September 1992, when prosecutors charged Shin Kanemaru—then the most powerful politician in the ruling Liberal Democratic Party—with violating the Political Funds Control Law by accepting a 500 million yen ($4 million) cash contribution from the Sagawa Kyubin company, a sum far in excess of the maximum contribution allowed by law. Tokyo prosecutors did not require Kanemaru to suffer the indignity of appearing at the prosecutors office for an interview, as they often do in lower profile cases. Instead, through a process known as summary procedure (*ryakushiki tetsuzuki*) that enabled Kanemaru to pay his penalty through the mail, prosecutors fined Kanemaru 200,000 yen (about $1,600), the legal maximum.

The public was outraged. In a premeditated act of civil disobedience, the 45-year-old president of a corporation defaced the sign in front of the Tokyo District Prosecutors Office with yellow paint. Newspapers throughout the country printed editorials harshly rebuking prosecutors for giving Kanemaru "special treatment." Satoh Michio, a prosecutor executive in Sapporo, penned a harsh critique that was published on the front page of the *Asahi Shimbun,* Japan's second largest national newspaper. Thousands of other citizens sent letters of protest to executive prosecutors in Tokyo (Mukaidani 1993).

After these incidents, I asked several prosecutor executives about the public reaction to the Kanemaru disposition and what,

[22] The Kanemaru case shows that a lack of public cooperation makes prosecutors' work difficult to perform. At the other extreme, strong public support for investigation of the AUM-Shinrikyo religious group (following the subway gas attacks in April and May 1995) facilitated the most aggressive investigations and charging practices in postwar Japanese history (Hardacre 1996; Sayle 1996). Thus, both extremes clearly reveal what is usually hidden: prosecutors' dependence on the public's support.

if any, effect it had on the procuracy. Why, I inquired, do prosecutors even care what the public thinks? After all, no one has to worry about getting reelected, and in many respects the procuracy seems impervious to public pressures and demands. I expected vague replies, perhaps emphasizing the duty to represent the public interest or the need to protect the organization's legitimacy, but their response was surprisingly concrete. In the weeks following Kanemaru's summary prosecution, prosecutors throughout the country confronted a massive increase in uncooperative witnesses and suspects. In more harmonious times prosecutors rely heavily on the public's "voluntary" cooperation to get their work done (Foote 1992). However, after this disposition, countless citizens simply refused to come to the prosecutors office for interviews and interrogations, or came but refused to talk, or chided prosecutors about the Kanemaru case instead of responding directly to the investigators' questions. Others refused to pay fines, arguing that if Kanemaru only had to pay $1,600 for his flagrant violation, then their own fines were unfairly severe. To prosecutors accustomed to receiving a level of deference and compliance that few American prosecutors can even imagine, this backlash of uncooperation was a shock. It reminded prosecutors and their observers that the organization's ability to get its work done is deeply rooted in the soil of public consent. When the soil erodes, the roots give way and the organization quakes.

Finally, while prosecutor executives also attend to the organizational need to innovate, this concern is less pressing in Japan than in the United States. Of course, the well-known bureaucratic adage to "never do anything for the first time" arises from the fact that all organizations resist innovation. Indeed, since organizations exist in large part to "replace the uncertain expectations and haphazard activities of voluntary activities with the stability and routine of organized relationships," standard operating procedures are an organization's essence (Wilson 1989:221). However, if innovation means the creation of new programs or technologies to perform new tasks or alter the way existing tasks or performed, then Japan's procuracy has innovated relatively little. In the last 15 years, executives have increased the proportion of women in the office and have automated much office work. Similarly, in 1987 the procuracy changed its longstanding policy for charging traffic offenders, and in response to the recent increase in the number of crimes by foreigners in Japan, prosecutors have created new positions and procedures. Yet unlike many large prosecution offices in the United States,[23] Japanese execu-

[23] In September 1995, Arlo Smith, the longtime District Attorney of San Francisco, was the subject of a harshly critical four-part series in the *San Francisco Examiner* (Winokur 1995). The series appeared only two months before Smith ran for reelection (and lost). In his response on 17 September, Smith stressed that he had "continually innovated" and

tives have not multiplied new organizational units to attend to crimes of special concern. Given the low levels of crime and public concern about crime, they have not needed to. Furthermore, executives rarely alter internal guidelines or the other controls that channel front-line decisions. In the survey, only 9 out of 231 prosecutors (3.9%) agreed or strongly agreed that "policies in the office seem to change frequently," and in interviews prosecutors of all ranks stressed that regardless of the executive or issue, innovation is as rare as it is unnecessary.

B. The Possibility of Order: A Summary

> Individuals . . . have no other way to make the big decisions except within the scope of institutions they build.
>
> —Mary Douglas (1986:128)

> There is a need to see decision-making in organizational context.
>
> —Peter Manning (1992:250)

Japanese prosecutors make "big decisions" about justice within the context of the organization I have just described. That organization is especially well suited to resolving the tension between consistency and flexibility, between order and individualization, between treating likes alike *and* unlikes differently. Previous studies have failed to recognize this crucial point. On the one hand, research on American prosecutors concludes that since we cannot realistically expect to achieve order from prosecutors, we should not demand it from them. In this view, prosecutors ought to accept in good faith the ambiguity of their tasks and strive to learn from experience in order to individualize justice (Carter 1974:9–14, 151, 164–65). On the other hand, research on Japanese prosecutors concludes that they do individualize decisions, by emphasizing "the importance of individualized determinations, based on careful consideration of the individual's personal circumstances and other factors" (Foote 1992: 341). Yet in its silence on the subject, this research also seems to acknowledge "the limits of order" or, at most, the relative insignificance of order in the Japanese way of criminal justice.

In fact, however, in the Japanese procuracy, order is not only possible, it is consistently aspired to and achieved. The organization has engineered a remarkable consensus about its primary task—clarifying the truth—and operators in particular (with much help from the police) work diligently to uncover and con-

pushed his staff to "design programs specifically tailored to San Francisco's crime problems." Smith pointed in particular to several new organizational units he created to address the problems of hate crimes, deadbeat dads, domestic violence, juvenile gangs, check restitution, and child abduction. Since none of these problems are public issues in Japan, it is unsurprising that Japanese prosecutor executives have seen no need to innovate as Smith and other American chief prosecutors have. Lawrence Taylor (1996) describes similar innovations in the Los Angeles District Attorneys Office.

struct the truth during pre-charge investigations. Managers, employing a wide range of carrots and sticks, coordinate and control operators so that equals are treated equally and unequals unequally. Executives secure and preserve the organization's autonomy so that operators and managers can attend to their main tasks. Executives also maintain the organization by obtaining sufficient inputs of capital, labor, and public support. These are the roles and tasks—and prerequisites—of a highly ordered system of criminal justice. My major aim in this article is to describe the differences between the modal American and Japanese ways of doing criminal justice. In the next section I briefly explore some of the causes that may help to account for these differences.

IV. Explaining the Differences: Culture and Structure

> Instead of building on a foundation of our own cultural assumptions about organization, the anthropologist's task . . . is to seek first the architectural principles by which others build.
>
> —Thomas Rohlen (1974:261)

> Talk about institutions is just shorthand for talk about individuals who interact with one another and with people outside the institutions. Whatever the outcome of the interaction, it must be explained in terms of the motives and the opportunities of these individuals.
>
> —Jon Elster (1989:158)

Justice has two imperatives: order (or consistency) and individualization (or responsiveness). Order requires prosecutors to treat similar suspects similarly. Responsiveness requires prosecutors to take into account the special needs and circumstances of individuals. Since order implies rules and rules restrict responsiveness, the two imperatives seem to conflict—in both countries. Yet to a degree seldom seen in the United States, prosecutors in Japan try to resolve that tension without sacrificing the imperative of order. They succeed often. Why?

By describing the structure, roles, and tasks of Japan's procuracy, the previous section provided a descriptive account of the proximate causes of order. Of course, all explanations must be bounded—one cannot explain everything—but the preceding account is unsatisfactory to the extent that it fails to connect the organizational aspects of Japan's procuracy to broader cultural and structural realities. This section aims to make those connections more explicit.

A huge corpus of social science literature trumpets the causal importance of either culture or structure but seldom both. In the words of Mary Douglas (1986), this arbitrary separation of ideas from the institutions in which they work "creates a pernicious dichotomy, as if mind were out there, an existence, disembodied, supported by nothing, but somehow powerfully influencing the

solidly physical institutions in curious ways. This perspective allows insoluble questions to fill the central forum of sociological debate."

I want to avoid the harmful effects of creating such a dichotomy, but for ease of exposition I present the following causal account in two installments—on culture and structure. They clearly connect to and influence each other in a myriad of ways. And crucially, they are both important causes of order in Japan.

A. The Culture of Prosecution

> Saying culture shapes is not incompatible with saying culture is created.
>
> —David Bayley (1994:963)

In the study of Japanese criminal justice as in the study of almost every other slice of social life, culture is often used as a "black box" to construct "circular" and "tautological" arguments (Steinhoff 1993:829). But invoking culture as cause need not be spurious. As David Bayley (1994:963–64) has said,

> [W]e must be careful not to go to the other extreme of making no provision in our explanations for behavioral propensities that people carry into different situations. . . . Legal culture is not . . . primordial but is created. At the same time, it would be naive indeed to think that socialization does not make different people behave differently in similar circumstances or predispose institutional actors to act in characteristic ways in different cultural settings. Appealing to legal culture is not always unintelligent reductionism. Saying culture shapes is not incompatible with saying culture is created.

In the same way, saying that culture shapes prosecutor practice is consistent with saying that culture is created. Indeed, culture helps produce the order in Japan's prosecution offices in multiple ways. As the next few pages show, it seems to do so even in cases where one most expects to find discrimination and disorder.

1. Does Homogeneity Mask Discrimination and Disorder?

> If discretion can never be totally abolished from law . . . and if social discrimination inevitably arises from discretion, it follows that law will always be discriminatory. . . . A degree of systematic discrimination in law enforcement seems inevitable.
>
> —M. P. Baumgartner (1992:161-62)

Japan is not as uniform a society as many people like to insist (Sugimoto 1997), but in language, race, ethnicity, religion, education, and culture, it is far more homogeneous than the United States. Daniel Foote argues that the relative homogeneity of Japan makes it likely that prosecutors will treat outsiders differently than Japanese. "The dominant role of prosecutors," he says, "and

the extensive discretion vested in them increases the potential impact of official bias—whether conscious or not." In this view, prosecutors are likely to be most biased against leftists, Koreans, *burakumin* (descendants of outcast groups), indigents, day laborers, other "fringe groups," and especially foreigners. Criminal justice officials "have stepped up their surveillance and prosecution of [foreign workers]," and the influx of foreigners poses "the greatest external challenge" to the "benevolent paternalism" of Japanese criminal justice. Because of differences in language and values, prosecutors and other authorities are unlikely to devote significant resources to the rehabilitation and reintegration of foreigners, instead concentrating simply on "processing such cases efficiently." Thus, Foote predicts, the criminal justice process is likely to follow "a separate track" for crimes by foreigners. "Some degree of bias—on regional, class, or other grounds—seems inevitable [and] . . . there are numerous points at which such bias—conscious or not—could and at least in some cases clearly does affect outcomes" (Foote 1992:374–77, 387).

If this view is right, then the order I have described is a chimera caused by the relative homogeneity of inputs into the Japanese criminal justice system. In fact, however, assertions about "inevitable" bias are inconsistent with the best available studies of bias and discrimination among Japanese and American prosecutors. Though more research on this subject needs to be done, it appears that compared with their American counterparts, Japanese prosecutors possess fewer discriminatory attitudes toward the kinds of suspects one would expect them to be most biased against and that, therefore, they take less discriminatory action against them.

Consider American prosecutors first. Cassia Spohn and her colleagues have examined prosecutors' initial decision to charge and their subsequent decision to dismiss the charge in 33,000 cases in the Los Angeles District Attorney's Office from 1977 to 1980. After they controlled for a wide range of potentially confounding factors, the data reveal a "pattern of discrimination" in favor of female defendants and against black and Hispanic defendants. Thus, L.A. prosecutors "do appear to take both gender and race into account in deciding whether to charge the defendant." Women benefit, while blacks and Hispanics suffer. Spohn and her colleagues conclude by noting that other studies of American criminal justice have found little evidence of racial discrimination in the formal trial process and the less formal guilty plea process, but "what happens before conviction may not be so reassuring" (Spohn, Gruhl, & Welch 1987:183–84).

In contrast, the Research and Training Institute (RTI) of Japan's Ministry of Justice has conducted two extensive studies of the treatment of foreign suspects and defendants in Japan's criminal justice system (Kurata et al. 1992). The first study focused on

larceny cases, the second on assaults. Since both studies were conducted by prosecutor insiders with an obvious interest in the research conclusions, one should interpret their results cautiously. Still, their findings (which have been published in a wide array of prestigious Japanese law journals) contrast starkly not only with the results of the American research just described, but also with allegations that prosecutor discrimination against foreigners is widespread and egregious (Takahashi 1992). In fact, neither RTI study finds evidence that foreign suspects or offenders are treated worse than Japanese. In short, the hypothesis that the homogeneity of Japanese society masks prosecutor bias and localized disorder is not supported. The order in Japanese criminal justice appears to be real, and its origins are to be found elsewhere in the culture and structure of prosecution.

2. Justice Requires Facts

Justice is truth in action. —Benjamin Disraeli

One of the most important causes of order in Japan is prosecutors' belief that they *must* uncover the facts and construct the truth of a case before making a disposition decision. This widespread agreement about and endorsement of the way their critical task is defined—what I call the procuracy's "mission"—has been noted by other observers but never assigned the central significance it deserves. As emphasized throughout this article, justice implies two correlated imperatives: treating differents differently (responsiveness) and treating likes alike (order). The crucial question, of course, is which suspects are different and which are alike. Japanese prosecutors believe they can deliver responsive, ordered justice in a case only if they first know precisely what happened, for only then can they discern which suspects are sufficiently alike and which are not. This is one important meaning of the phrase prosecutors and other Japanese most often use to describe their system of "precise justice" (Hirano 1989). Justice, they believe, cannot be done in a factual vacuum. Before making big decisions about who gets what, Japanese prosecutors must first decide who did what. They must, in other words, resolve issues of factual uncertainty. For Japanese prosecutors as for the public they represent, justice is indeed truth in action.[24]

[24] In this respect, Japan seems to differ less from countries in the European civil law tradition than it does from the United States and other common law countries. Mirjan Damaska's classic comparative study of the legal process distinguishes two structures of state authority (hierarchical and coordinate) and two purposes of the legal process (conflict-solving and policy-implementing) in modern nation-states. For Damaska, these two axes determine four "faces of justice" or types of legal process. Damaska argues that for hierarchical states committed to a policy-implementing process, "getting the facts right is normally one of the preconditions to realizing the goal of the legal process." In contrast, in coordinate states that chiefly aim to solve conflicts, "truth seems elusive and reality, like the muses, seems always to have another veil" (Damaska 1986:160). Clearly the "face" of

American prosecutors define their tasks more ambiguously, and many reject truth construction through thorough investigation as altogether outside the scope of their duties (Carter 1974:195).[25] They do so not only because they consider truth a byproduct that emerges after an adversarial clash with the defense (Feeley 1987:754; Damaska 1986:119–25), but also because even if they were to seek truth directly they would be frustrated by numerous obstacles (Feeley 1992:167–77). David Heilbroner (1990:336–37), for example, disconsolately describes the lesson he learned after three years as a prosecutor in the Manhattan District Attorney's Office:

> Since starting work I had tried to use my discretion wisely, to do justice. But to be just, I had learned, you have to know the facts, and *in the DA's office facts were a rarity*. The true, the honestly mistaken, and the deliberately false stories of witnesses blurred indistinguishably into one another. I was doing the best I could under the circumstances, but the circumstances continued to wear me down. (Emphasis added)

The conclusion Heilbroner reached—that doing justice requires knowledge of the facts—is in Japan a taken-for-granted assumption that strongly influences almost everything prosecutors do. Furthermore, since the contexts of prosecution in Japan are so different from those in the United States (see below), circumstances do not "wear down" prosecutors and facts are, in fact, not "a rarity."

Of course, in any criminal justice system case, "facts" are not stable, objective realities (like palm trees or lizards) that can be directly apprehended through the senses. Rather, when deciding whether and what to charge, prosecutors start from a position of factual uncertainty. In the face of that uncertainty, prosecutors must rely on investigation, presumptions, or some combination of the two. The nature and balance of those options, however, differs dramatically in Japan and the United States.

American prosecutors draw on various sources for factual information: Defense lawyers, police, and probation officials all proffer data about the suspect's prior record, family history, and

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Japanese criminal justice described here seems much closer to the former than the latter. It thus resembles the criminal processes of Western European countries such as Germany and France.

However, there are at least two important differences between those countries and Japan. First, the commitment to "getting the facts right" seems substantially stronger in Japanese criminal justice than in Damaska's activist states of Western Europe (Damaska 1986:160–61). Second, the Japanese system places primary faith in prosecutors to discover the truth (Foote 1992:372), while Damaska's "activist states" place that responsibility mainly in the hands of other state officials, such as investigating magistrates (Damaska 1986:162–64; Merryman 1985:48, 124).

[25] More generally, many Americans seem to "prefer the autonomy, discretion, and theater which characterizes the adversarial process to the regulation and bureaucracy inherent in any effort to make the search for truth the principle goal of the criminal process" (Givelber 1997:1396).

the instant case. However, the American prosecutor's search for facts is constrained in at least three important ways that the Japanese' prosecutor's search is not. First, American prosecutors, especially in urban settings, have heavier caseloads and thus face more significant resource limitations on discovering and uncovering the facts (D. Johnson 1996:80). Second, American prosecutors are more dependent on defense lawyers to provide information because they lack direct access to the defendant. Japanese prosecutors routinely interrogate suspects before making charge decisions, while American prosecutors rarely do. One American prosecutor told me that she would not want to interrogate suspects even if she could because "they would just get in the way." Similarly, the focus of training programs in American offices is trial work, not investigations, charging, or plea bargaining, because, as another prosecutor explained, "that is what we do here." American defense lawyers, however, often fail to provide prosecutors with relevant information, either because it is not in their client's interest to disclose or else because they do not possess it themselves. This leaves many American prosecutors with vague, incomplete knowledge of case facts throughout the pretrial process. Third, the prosecutor's investigation sometimes reveals conflicting accounts of the truth in both Japan and the United States, but the problem is more pervasive in the United States because relationships in American criminal court communities are far more adversarial. American defense lawyers may believe that to "get along you must go along" with other criminal court actors, but they still go along far less than defense lawyers in Japan (Fisher 1988:228–29).

These constraints on the search for facts cause some American prosecutors to reject the fact-finding role, as when they proclaim that "whether the defendant did it is for the judge or jury to decide—it's not my job. . . . My job is to prosecute, not judge" (American prosecutor quoted in Alschuler 1968:63). Of course, even resolutely agnostic prosecutors cannot completely retreat from the fact-finding role, for in sending the case to trial they have simply passed judgment about "probable cause" instead of "reasonable doubt." Even so, this retreat from the fact-finding role is something Japanese prosecutors rarely even attempt. More important, the constraints on and the retreat from fact finding in American prosecutors offices have damaging effects on the quality of order and justice the prosecutors are able to dispense.

American prosecutors also resolve factual uncertainty by presuming facts that favor the suspect's guilt (Feeley 1992:167–77), something Japanese prosecutors do less often. While some scholars argue that American prosecutors do not make guilt-favoring presumptions as often as they should (Frohmann 1992:242), others contend that they routinely do and

should make presumptions—about the credibility of witnesses, the seriousness of the offense, and the character of the offender—against the suspect (Fisher 1988:230–32). In this view, the prosecutor should "avoid deciding contested cases herself," for several reasons. First, many prosecutors are young and inexperienced and thus unable to make reliable judgments themselves. Second, prosecutors have an obligation to ensure that victims and witnesses get their day in court, especially when their testimony supports conviction. Third, providing a forum for victims and witnesses helps "forestall public criticism of the district attorney's office." And finally, since prosecutors work in an adversarial system as advocates for the public's interest, they fail to present the strongest case for the public if they did not press for conviction in "borderline" cases.

While Japanese prosecutors possess powerful legal levers for uncovering the truth, especially in ordinary street crimes, when even those fail to resolve factual uncertainty, prosecutors make very different presumptions than their American counterparts. Most notably, prosecutors in Japan are more likely to resolve factual doubts—about credibility, seriousness, and character—in favor of the suspect's innocence. As a consequence, in many cases they do not charge suspects whom American prosecutors, in their own system, would. They do so for the converse of the reasons Fisher invokes to explain the contrary American presumptions. First, since charge decisions are made collectively in Japan, it matters little if front-line operators are young and inexperienced. The pervasive system of controls and coordination significantly mitigates the potential dangers of youth. Second, providing a forum for Japanese victims and witnesses is deemed far less important than making a "correct" decision about whether to charge. Prosecutors, like just about everyone else in Japan, believe that only the guilty should be charged and that the charged are almost certainly guilty. More than judges, prosecutors are the officials who actually try most suspects, and their careful screening is supported by "public confidence in the near infallibility" of prosecutors (Foote 1992:373, 387; Ishimatsu 1989; Hirano 1989; van Wolferen 1994:110–11). Third and related, failing to provide a forum for victims and suspects is highly unlikely to result in public criticism, because of the public's confidence in prosecutors, which largely insulates prosecutors from public criticism when it does occur, and because the public is in the first place unlikely to complain (Pharr 1990:207). Finally, as in the United States, prosecutors in Japan are advocates for the public interest. However, in Japan's decidedly nonadversarial system of criminal justice, prosecutors do not interpret that duty to mean a primary commitment to victims and complaining witnesses. In the Japanese view, suspects are considered part of the public too, and whether critics like it or not, that public believes suspects should

be charged only when there is sufficient evidence to support conviction (Hirano 1989:130).[26]

In summary, doing justice and thus creating order require knowledge of the facts. This may sound like a universally valid maxim, but it is invested with profoundly different meaning and importance in the United States and Japan. What is an impossible and therefore a banal truism to many American prosecutors is a foundational principle for the practice of prosecution in Japan. The Japanese commitment to finding the facts—the shared sense of mission—is an important cause, and in important ways a cultural cause, of the ordered justice they dispense.[27]

3. Cohesion and Control

> Certainly no difference is more significant between Japanese and Americans, or Westerners in general, than the greater Japanese tendency to emphasize the group, somewhat at the expense of the individual.
>
> —Edwin O. Reischauer (1977:127)

The high levels of social cohesion in Japan's procuracy and society help further explain managers' control over operator discretion and thus the high level of order in the justice they collectively dispense. This cultural feature, which may also be termed "solidarity" or "integration," accounts in large part for something many American prosecutors would find baffling: Why do frontline operators, themselves prestigious legal professionals who have passed perhaps the most difficult credentialing examination in the world, tolerate such pervasive controls over their exercise of discretion? Don't they resent, resist, and escape the controls, as American prosecutors do in the face of far less intensive managerial efforts (Carter 1974:117, 119, 139)?

The Japanese who join the procuracy do not leave their values, norms, and taken-for-granted understandings at the office entrance as they would their shoes upon entering a Japanese home. Stated baldly, of course, this fact will be readily acknowledged, yet its importance is nonetheless often overlooked by "rational" and "moral" models of the relationship between an organization and the individuals who constitute it. In their shared stress on conscious reasons, whether tastes or norms, those models "neglect or marginalize the role of less overt, more taken-for-granted understandings" about, for example, the relationship be-

[26] Although American commentators disagree about whether it is proper for prosecutors to charge a suspect absent personal belief in the suspect's guilt, "the prevailing view, at least in the world of practice, surely permits prosecutors to do so" (Fisher 1988:230; see also Stewart 1987:332). I know of no Japanese prosecutor who subscribes to this view.

[27] Even comparativists too often take preferences for granted. Although "what people want" is as important a question as "who gets what," preferences are commonly assumed at the outset or, worse still, assumed away instead of made the subject of empirical investigation (Thompson, Ellis, & Wildavsky 1990:55).

tween the group and the individual (Suchman & Edelman 1996:903). But once this fact is recognized, it should be clear that Japanese prosecutors enter the procuracy with many of the same cultural assumptions that other Japanese workers bring to their organizations (Lincoln & Kalleberg 1990). Those predispositions help explain why prosecutors (for the most part) accept and expect controls rather than resisting and resenting them (Bayley 1994).

As the Reischauer quote beginning this section suggests, chief among the Japanese predispositions is the tendency for individuals to emphasize and identify with the group, a quality that has been documented extensively, not only in rural Japan but in a wide variety of other organizational contexts (Dore 1978:228). By diligent effort, Japanese prosecutors can be made to seem more and more like Americans, but the apparent convergence is not worth the sacrifice in sensitivity to real cultural differences. Thus, one key to accurate understanding, here as elsewhere in comparative research, is the will to "wrench ourselves out of well-worn ruts of assumption and expectation" (Smith 1983:6–7). Only then are we able to see Japanese prosecutors clearly rather than merely seeing in them pale reflections of ourselves or of American prosecutors. Put simply, Japanese prosecutors accept and expect hierarchical control because, in part at least, they regard the self as a "contextual actor" whose identity is in large part defined by social relationships rather than as an "individual actor" whose identity and sense of self stand apart from the group (Hamilton & Sanders 1992:49).

This cultural truth about Japanese—and thus Japanese prosecutors as well—must be qualified, of course, to acknowledge that sometimes they do resist hierarchical controls. Indeed, a favorite topic of conversation among prosecutor operators is the alleged incompetence and unjustified intrusiveness of their superiors. Similarly, before going to *kessai,* operators sometimes scheme, individually or in pairs or groups, to make the encounter with superiors as trouble-free as possible. That may even mean shading presentations of fact or selectively withholding and disclosing information in order to achieve the disposition they desire. Few things ruin an operator's day so completely as a *kessai* gone badly, just as few things delight one more than smoothly navigating a *kessai* that was expected to be difficult or to demand further investigation. Nonetheless, these qualifications, each of which could be liberally illustrated, do not alter the fact that Japanese prosecutors accept and expect controls on their discretion to a degree almost unknown in the United States.

Because this part of the argument may easily be misunderstood, a few additional comments about the cultural causes of order are in order. I am not claiming that Japanese prosecutors do what they do because they are Japanese. That charge is often

leveled at research that invokes a cultural argument, and when it sticks it does because the challenged argument forms a circle of unhelpfully short circumference (Steinhoff 1993; Ramseyer & Rosenbluth 1993). Culture is not the great uncaused cause, and saying that culture shapes the behavior of Japanese prosecutors is not inconsistent with saying that culture is itself shaped. Furthermore, saying that culture counts is not the same as saying that only culture counts or that culture can be counted. If Japanese prosecutors regard themselves and their colleagues as "contextual actors" whose identities are in large part defined by their relationship to the group, they do so because of the cultural assumptions they bring to the group but also because the group expects them to and sanctions them if they do not. In this way, Japan's procuracy deals effectively with "the fundamental problem of all organizations, that of tying together the interests of the individuals that make up the organization with the interests of the organization as a whole" (Abegglen & Stalk 1985:182). The procuracy, or more precisely the managers and executives in it, link those interests by using office, job, and case assignments to reward prosecutors who seek order and punish those who do not. But if this is true, some will claim that self-interest and incentives, not culture, are the bottom line. Perhaps. But then what explains why managers and executives care about matters like clarifying the truth and achieving ordered justice? They, after all, are the ones who create and implement the incentives. To recall Mary Douglas once again, the arbitrary separation of structure and culture and the tendency to privilege the causal force of only one side of that dichotomy does little to advance real understanding of the explanandum—in this case the ordered justice dispensed by Japanese prosecutors. One cannot escape the conclusion that both culture and structure count. It is to the causal force of the second of those interconnected categories that I turn next.

B. The Structure of Prosecution

> It is necessary to look at the totality of the interrelationships among institutional factors.
>
> —Erhard Blankenburg (1994:789-90)

The "interrelationships among institutional factors" in prosecution are important structural causes of order in Japan. These structural causes will be identified and displayed by examining the works of three American scholars—Michael Lipsky, W. Boyd Littrell, and Lief Carter—all of whom have written explanatory accounts of the behavior of American prosecutors and other "street-level bureaucrats."

1. The Conditions of Prosecutor Work

> The determinants of street-level practice are deeply rooted in the structure of the work.
>
> —Michael Lipsky (1980:192)

In his classic account of "the dilemmas of the individual in public services," Michael Lipsky (1980:xii, 111) argues that several "conditions of work" prohibit street-level bureaucrats[28] from providing their clients with either individualized or well-ordered services. "The very nature of this work," Lipsky explains (p. xii), "prevents [street-level bureaucrats] from coming even close to the ideal conception of their jobs." Lipsky points to five conditions of work that have an especially big influence on street-level bureaucrats (pp. 27–28):

1. *Resources* are chronically inadequate relative to the tasks workers are asked to perform.
2. The *demand for services* tends to increase to meet the supply.
3. *Goal expectations* for the agencies in which they work tend to be ambiguous, vague, or conflicting.
4. *Performance* oriented toward goal achievement tends to be difficult if not impossible to measure.
5. *Clients* are typically nonvoluntary; partly as a result, clients for the most part do not serve as primary bureaucratic reference groups.

Then, in a passage that reads like it was written with Japan's procuracy in mind, Lipsky notes that when a street-level bureaucracy faces different—that is, better—conditions of work, individualization and order can both be achieved:

> *If for some reason these characteristics are not present*, the analysis is less likely to be appropriate, although it is instructive to understand why this is the case. If a legal services office encouraged its staff to take only four or five cases at a time in order to maximize the quality of preparation of each case, *the lawyers would behave differently* than if they worked in an office with much higher demands. (P. 28; emphasis added)

Put simply, since the above five characteristics are either "not present" in Japan or else are present in highly attenuated form, Japanese prosecutors "behave differently" than American prosecutors do.

First and most importantly, with respect to the first two conditions of work—worker resources and client demands—Japan is

[28] Lipsky (1980) defines street-level bureaucracies as "agencies whose workers interact with and have wide discretion over the dispensation of benefits or the allocation of public sanctions" and says that "typical street-level bureaucrats" are teachers, social workers, health workers, police officers, judges, and public lawyers and other court officers. Lipsky demonstrates that the people who work in these seemingly diverse jobs "actually have much in common because they experience analytically similar work conditions" (pp. xi, 3–4).

paradise for a prosecutor. Claims of "institutional incapacity" notwithstanding (Haley 1991:121), Japan's procuracy has adequate resources to fulfill the tasks it is asked to perform (D. Johnson 1996:80). Similarly, since the number of serious offenders has declined in recent years, the "demand" for prosecutor services has not expanded to meet the available supply. The result is that prosecutors can devote careful attention to almost every case that enters their office—mushroom thefts included—an essential precondition to treating likes alike.

Second, this article has shown that Lipsky's third and fourth conditions of work—goal expectations and goal measurement—are less problematic in Japan than in the United States. Indeed, although Japanese prosecutors pursue many goals simultaneously, they have forged an impressive consensus about how to define their critical task. Furthermore, while constructing the truth by pursuing confessions cannot be measured perfectly, achievement of that goal is more amenable to hierarchical evaluation than other, more ambiguous goals.

Finally, even the most devout believers in the benevolence of Japanese prosecutors would not contend that suspects (what Lipsky calls "clients") constitute a primary prosecutor reference group. As shown earlier, that place is taken by the procuracy itself. It *is* true, however, that Japanese prosecutors have more voluntary or quasi-voluntary clients than American prosecutors do (Foote 1992:343), a fact that further facilitates prosecutors' ability to construct the truth and thereby achieve and measure their critical task. It is a much shorter step to ordered justice from there than it is from a position of greater uncertainty.

These comparatively benign conditions of work have at least two important consequences besides enabling Japanese prosecutors to achieve a relatively high degree of order. Both concern crime control. First, Japanese prosecutors are not compelled to ration services like street-level bureaucrats must when their conditions of work are more severe. Lipsky calls such rationing processes "triage" because in circumstances when client demands exceed worker resources, bureaucrats must assign potential clients to different treatment priorities (p. 106). The battlefield origin of the term is especially telling in light of the pressures many American prosecutors feel to triage cases for which they cannot afford to expend significant resources (Heilbroner 1990:26). American liberals often lament that their systems of criminal justice are too punitive (and in many respects they are), but the conditions of work that compel American prosecutors to triage cases also produce dispositions that are in many cases not severe enough (Humes 1996; Zimring & Frase 1980). Countless American offenders encounter the criminal justice system many times over without ever being taught the seriousness of their behavior (Braithwaite 1989:5–9). In fact, it seems likely that triage teaches

many offenders precisely the opposite lesson, that their offenses do not rise to a level of sufficient gravity to warrant even a careful look. The results of this triage are difficult to measure, but surely the United States pays a high cost in increased recidivism and victimization. Just as surely, the fact that Japanese police and prosecutors have far fewer "casualties" to process, and thus far less need to engage in triage, must have some salubrious crime control consequences (Miyazawa 1992:13).

Second, the benign conditions of prosecutor work in Japan retard the development of the kind of cynicism about work and clients that pervades less fortunate street-level bureaucracies, especially criminal justice agencies in America (Klinger 1997). American criminal justice officials, prosecutors included, are far more cynical about the work they perform than are Japanese judges, police, or prosecutors. Indeed, many American officials are contemptuous of the suspects and offenders with whom they deal. Japanese prosecutors are markedly more respectful of their clients—not perfect of course, for there are significant exceptions, but the dissimilarity will be obvious to anyone who has spent time in both systems. I seldom heard Japanese prosecutors speak ill of the suspects whom they interrogated or tried, and even when they did the tones were closer to disapproval than disdain. This fact will be unsurprising to those who know something about Japanese culture more broadly, for the Japanese are often—and accurately—characterized as more courteous and considerate than Americans. Even so, I do not believe that culture alone accounts for the vastly different levels of cynicism among Japanese and American prosecutors. Here, too, Lipsky helps explain why (1980:140–56).

American prosecutors confront a contradiction that is built in to their work because of its difficult conditions: Prosecutors want and are expected to exercise discretion fairly and responsively, but in practice they must process people through stereotyped routines such as triage in order to meet the demands on their time. American prosecutors "defend these patterns psychologically" in two ways, both of which breed cynicism (Feeley 1992). First, they *modify their conceptions of work* in order to reduce the cognitive dissonance that arises from the contradiction between what they would like to do and what they can. Like street-level bureaucrats in similarly difficult work conditions, American prosecutors employ a number of strategies: They adopt private goal definitions in order to "close the psychological gap between capabilities and objectives," they specialize in order to "avoid seeing their work as a whole," they develop ideologies that legitimate lowered goal aspirations, they privately restrict the scope of their discretion, and so on. Modifying conceptions of work in these ways produces in many American prosecutors a pessimistic

working personality—"there's not a helluva lot I can do"—rarely seen in Japan.

In addition, American prosecutors often *modify their conceptions of clients and offenders* by blaming, belittling, and bad-mouthing them. This aspect of their "client-processing mentality" further protects prosecutors from the intense dissatisfaction they would feel if they acknowledged how much working conditions force them to sacrifice aspirations to be fair and responsive. Such reactions, although psychologically functional for the prosecutors who employ them, can seldom be continued for long without also being communicated to suspects and defendants. Here, too, the consequences for crime control are undesirable, for people obey the law mainly because they feel the legal authorities are legitimate and the legal procedures are fair. In particular, "people place great weight on being treated politely and having respect shown for their rights and for themselves as people" (Tyler 1990:164). Thus, defendants who are treated impolitely and disrespectfully are more likely to reoffend. Although cross-cultural differences in prosecutor respect for clients is difficult to measure—not all that counts about culture can be counted—they are readily observed by anyone who spends time in both systems. Lipsky helps show how different conceptions of clients and levels of respect accorded them arise, at least in part, from the different conditions of prosecutor work in the United States and Japan. And not only does courtesy have structural roots, it also appears to have preventive consequences that often go unrecognized (Braithwaite 1989; Sherman 1993).

2. *The Structure of Uncertainty*

> But why is the construction of crime uncertain? There are two reasons: some uncertainty arises from the special nature of the organization of prosecution and some uncertainty arises from the ambiguity that surrounds criminal circumstances.
>
> —W. Boyd Littrell (1979:31)

Order is easier to achieve when prosecutors face low levels of uncertainty. W. Boyd Littrell's book on "bureaucratic justice" helps demonstrate the markedly different structures of uncertainty faced by prosecutors in the United States and Japan. It thus helps explain the different levels of order in the justice dispensed by each (Littrell 1979:29–57).

Littrell's account rests on two widely shared assumptions: that all crimes are constructed by officials and that the organizational or administrative context in which officials work shapes the crimes that officials construct (p. 29). Littrell argues that "an adequate explanation of criminal dispositions must begin" with the basic fact that "bad acts are not automatically converted into crimes." The construction of crimes is not automatic because it

results from "work that has some uncertainty." Littrell identifies two main sources of uncertainty in the administrative construction of crime: the special nature of the organization of prosecution, and the ambiguity that surrounds criminal circumstances (p. 31). Though both sources exist in Japan, they generate considerably less uncertainty than they do in the United States. Consider each in turn.

The first source of uncertainty in the construction of crimes is the fact that no one person makes the charge decision. In the United States the charge decision is usually the prosecutor's ultimate responsibility, but that decision is "shared" with more people than one might suppose: complaining victims and citizens, patrol officers who respond to complaints, detectives who investigate and gather evidence, witnesses, judges who conduct preliminary hearings, grand juries who decide whether or not to indict, and defendants who choose whether or not to end the case with a plea or a trial. Furthermore, in the United States the charge decision is "not made definitively at any single time" but rather is revised along the way (p. 32) and "manufactured" in stages (Feeley 1992:173–75). In contrast, Japanese prosecutors possess ultimate responsibility for all charge decisions, except the very rare case when judges permit private attorneys to "analogically institute" prosecution (D. Johnson 1996:108). Japanese prosecutors also "share" the decision to charge with fewer actors than American prosecutors do. Since they conduct investigations themselves, Japanese prosecutors are less reliant on police and detectives for information to make cases. Further, their charge decisions are not "shared" with judges (at preliminary hearings) or grand juries. Partly as a result, the charge decision is seldom revised once made (van Wolferen 1989:220). To be sure, Japanese prosecutors must interact with victims, complaining witnesses, and police in order to make cases. Even so, the organization of prosecution in Japan presents prosecutors with relatively little uncertainty and thus more potential to construct cases in an orderly way.

The second major source of uncertainty in the construction of crimes is the ambiguity of circumstances "surrounding the bad acts from which crimes are made" (Littrell 1979:47). Bad acts occur in the past and are stuck there. Prosecutors thus face "the historian's problem" of discerning what happened, not immediately through direct observation but rather by interpreting evidence. By now the implications for order should be clear. Order (and thus justice) require facts. In ways and for reasons discussed above, this premise is taken much more seriously by Japanese prosecutors than by their American counterparts. At the same time, the laws of Japanese criminal procedure enable police and prosecutors to gather evidence and thereby construct facts and build cases far more effectively than can American police and

prosecutors (Miyazawa 1992). In short, "the historian's problem" is less foreboding for Japanese prosecutors than for American ones. Thus, so is the problem of order.

In addition to these two sources of uncertainty there is, for American prosecutors only, a third one as well: juries. To prosecutors in the United States, juries are perversely unpredictable. American prosecutors have "a generalized preference for avoiding uncertainty" when deciding whether and what to charge, and usually assess the prosecutorial merit of a case in terms of the probability of conviction (Albonetti 1987:310). However, it is difficult to make those assessments in an ordered way because different juries do not treat like cases alike. In this way, the limits of order created by the jury cast a long shadow over prosecutor behavior at all previous stages, further complicating efforts to achieve order even when that is a prosecutor goal. Take away the jury, as in Japan, and an important cause of the limits of order disappears. Or, to put it in the converse, when judges write detailed opinions justifying verdicts and sentences, and when those decisions are themselves standardized by the judicial bureaucracy—as in Japan—prosecutors enjoy higher levels of predictability and produce higher levels of order. Here, too, the structure of uncertainty matters immensely.

3. *Organizational Technologies and Environments*

> This book presented two arguments: first, we should not demand order and uniformity from those who do justice; second, we cannot realistically expect to achieve these goals. These arguments intertwine, since both derive from a body of organization theory dealing with consequences for organization of uncertain technologies and environments.
>
> —Lief H. Carter (1974:151)

Since this article was stimulated by Lief Carter's claims about the "limits of order" in American prosecution offices, it should come as no surprise that Carter's causal account of those limits helps illuminate the Japanese case. Carter stresses two main causes of American disorder, both borrowed from James Thompson's classic study, *Organizations in Action* (1967).

According to Carter, how people in an organization act depends mainly on what they want and on what they believe about cause-effect relationships. Carter calls the combination of desired outcomes and cause-effect beliefs *an organization's "technology."* Each dimension of organizational technology has two dichotomous aspects. Standards of desirability—that is, goals or objectives—are either "crystallized" or "ambiguous," while knowledge about cause-effect relationships is either "complete" or "incomplete." Following Thompson, Carter argues that "the degree to which organization members follow routinized or rule-ordered

patterns of behavior" depends on their organizational technology. Carter demonstrates convincingly that American prosecutors have ambiguous goals and incomplete information; readers interested in the details of his argument are encouraged to consult the richly textured original. In comparative perspective, however, what is especially interesting is how different the technologies possessed by American and Japanese prosecutor organizations are. In particular, Japan's prosecutor organization has engineered widespread endorsement of the way its primary mission is defined. At the same time, relatively light caseloads and a wide array of investigative tools make it possible for prosecutors to gather relatively complete information about ordinary cases. In the Thompson-Carter jargon, Japan's procuracy has a substantially less "intensive" organizational technology than do prosecutor organizations in the United States and a thus a higher potential for achieving order (Carter 1974:14–17).

Second, since Carter recognizes that organizations must deal with people and events outside their formal boundaries, he explores the influence of various *organizational environments* on prosecutors (Feeley 1992:15–21). Environments may be either "homogeneous" (environments that contain people and institutions with similar interests and needs) or "heterogeneous" (environments that make competing and inconsistent demands on the organization) and either "stable" (environments that make predictable demands on the organization) or "shifting" (demands and pressures change). Carter argues that organizations which confront heterogeneous, shifting environments "adopt flexible and decentralized operations which do not rely heavily on rules" (pp. 18–21). He also shows, again convincingly, that American prosecution offices face heterogeneous, unstable, and diverse environments that severely constrain their capacity to achieve order.

While Carter probably exaggerates the environmental obstacles to order in the United States (Nardulli, Eisenstein, & Flemming 1988:85), the comparative differences between Japan and the United States are unmistakable. First, while Japan's homogeneity is often overstated, Japanese society *is* more homogeneous than that of the United States.[29] Second, one theme of this article has been that the environments faced by Japanese prosecutors are more stable and predictable than those encountered by American prosecutors. Finally, prosecutor organizations in both Japan and the United States are "open systems," but not equally so (Feeley 1992:15–21). Indeed, Japanese prosecutors are well insulated from political pressures and public demands (D. Johnson 1996:91). As Carter's theory would predict, these three differ-

[29] It would be instructive to assess the importance of this cause by comparing prosecution practices in relatively homogeneous American jurisdictions—such as Fargo, ND, or Portland, ME—with prosecution practices in Japan.

ences give Japan's procuracy even greater potential for order.[30] To an impressive extent the procuracy turns that potential for order into reality.

V. Conclusion

> I think we Americans should learn from other nations that the huge discretionary power of prosecutors need not be unconfined, unstructured, and unchecked.
>
> —Kenneth Culp Davis (1971:224)

> We should hold Japan up as a mirror, not a blueprint.
>
> —Merry White (1987:8)

So what? For Americans there are two big bottom lines. As a mirror, Japan reflects an image of our own criminal justice system that, like the reflection of one's own face, partly pleases and partly disappoints. As a model, Japan suggests important possibilities for reform of an aspect of our own system which, if it does not already disappoint, should.

A. Japan as Mirror

> It is impossible to understand a country without seeing how it varies from others. Those who know only one country know no country.
>
> —Seymour Martin Lipset (1996:17)

> American jurists are disinclined to interest themselves in foreign example for the same reason that scientists at American medical schools are disinclined to investigate the merits of medicine as it is practiced among the witch doctors of the Amazonian rain forest. They operate on the assumption that the foreigners have nothing to teach. But whereas the shortcomings of Amazonian medicine have been objectively verified, the disdain for [foreign] law rests upon a witch's brew of ignorance, prejudice, and venality. Fortified in the lucrative fool's paradise that they inhabit, American legal professionals have little incentive to open their eyes to the disturbing insights of comparative example.
>
> —John H. Langbein (1995:554)

Organization matters. This is a fact that the Japanese—prosecutors and not—take for granted. It is a reality too many Americans deny. Following the economists, some Americans prefer to assume that organizations are like black boxes that, true to formula, convert inputs into outputs. This substitution of as-

[30] Since Carter's work is not explicitly comparative, it says little about how prosecution offices might vary on the "technology" and "environment" dimensions. Nonetheless, its conclusions about the "limits of order" depend heavily on circumstances more prevalent in the United States than in Japan. Where the relevant circumstances differ, Carter's theory would predict that more order is possible (pp. 113–18, 138–39).

sumption for observation badly obstructs our ability to understand the central importance of bureaucracy in criminal justice. It also helps explain why so few American scholars have even tried to research the inner workings of the organizations that are home to prosecutors, the persons with, arguably, "more control over life, liberty, and reputation than any other person in America" (Jackson 1940:18). Like the former deputy chief of the Laconia Prosecutors Office who told me, "This is a people business; if you get good people you don't have to hover over their shoulders," other Americans believe that "it's not the organization that's important, it's the people in it." To be sure, there is truth in this position, though it should hardly be cause for American complacency when one also notes that Japanese legal professionals compare favorably with the best and the brightest in any country, including our own. But there are at least two errors in the view that only "only people matter." First, people are in large part the products of their organizational positions or roles. If sociology has established anything in the last 100 years, surely this is it. Second, what people are able to accomplish in and through organizations depends greatly on "having the authority and resources with which to act" (Wilson 1989:23).

Organization matters because it can help create order. The hierarchical controls and ubiquitous standards, guidelines, consultations, and audits described here enable Japan's procuracy to confine, structure, and check discretion and thereby achieve "tolerable consistency"—that is, order—in prosecutorial decision-making (Abrams 1971:7). Order matters because justice does. As Aristotle said, "justice . . . is equality—not, however, for all, but only for equals. And inequality is thought to be, and is, justice; neither is this for all, but only for unequals." In short, this study of Japanese prosecutors matters because organization, order, and justice do.[31]

Yet when I ponder Japan's procuracy, I also see things that concern me, especially in how it reflects two values most Americans hold dear—autonomy and accountability. The capacity of Japanese prosecutors to treat like cases alike depends in no small part on the fact that their criminal justice system "countenances substantial intrusions on personal autonomy" (Foote 1992:368). Of course, American and Japanese conceptions of autonomy differ in pronounced ways, with the Japanese, in general, willing to accept conditions of criminal prosecution many Americans

[31] Ironically, it is largely in the pursuit of more ordered justice that many American jurisdictions have circumscribed the discretion of judges with sentencing guidelines and flat-time, mandatory, and determinate sentencing requirements (Walker 1993:112). Unfortunately, the effect of these reform movements has been to greatly increase the discretion of American prosecutors, with few increases in either external or internal controls (Nagel & Schulhofer 1996). Considering that prosecutors are one of the chief conduits of disorder to begin with, this seems an unwise direction to move if the aim is to make American criminal justice more ordered.

would neither welcome nor tolerate (Foote 1991). When I say this, I do not mean that they have got autonomy wrong (boo!) while we have got it right (hurrah!), but rather that we think about the issue in fundamentally different ways (Fingleton 1995:25; Fallows 1994:9). The achievement of order in Japan has come at a cost in autonomy, a cost I probably reckon higher than most of my Japanese friends but a cost nonetheless. If Japan's procuracy produces a level and quality of order that I and other Americans find appealing, and if we would like American prosecutors to produce more of that value here, then we better count the cost incurred in values like autonomy.

Since accountability links bureaucracy to democracy, when I look at Japan's procuracy I want to know how and to whom it is accountable. I believe that prosecutors are accountable if there is "a high probability that they will be responsive to legitimate authority or influence" (Lipsky 1980:160). As we have seen, Japanese prosecutors operating on the front lines are highly responsive to the managers and executives who supervise them. They hence are accountable to those legitimate authorities. But what about managers and executives, the pilots of the procuracy? Are they appropriately responsive to legitimate elected authorities and, through the latter, to the public?

Unfortunately, these questions admit no clear answer. Though I was given unprecedented access to front-line prosecutors working on ordinary cases, I had relatively few opportunities to learn about how prosecutors and electoral politics are connected. As in most Japanese bureaucracies (Miyamoto 1994:126), a norm of secrecy pervades the procuracy, especially concerning its connection to politics. At the same time, the Japanese nonprosecutors who should be most knowledgeable about this subject disagree among themselves about how accountable prosecutors are and how they are accountable. For example, Hatano Akira, a Minister of Justice for 13 months during the Nakasone administration and thus once the titular head of all Japanese prosecutors, argues that postwar prosecutors have changed little from the prewar era when they were accused of being "fascist" for trying to "change the world" (Hatano 1994:65). Hatano, who until recently was also a Diet politician in the Liberal Democratic Party, laments what he considers the postwar procuracy's reckless, runaway attacks on fellow LDP politicians, especially former Prime Minister Tanaka Kakuei. Hatano alleges that the root of the problem is prosecutors' almost complete unaccountability to elected political authority and disregard for the public's welfare. However, the opposite argument is also made, by equally respected sources. Tachibana Takashi, for example, one of the most highly respected journalists in all of Japan, contends that the worst Japanese "bad guys"—politicians in the LDP—are "sleeping soundly" because prosecutors refuse to investigate or

charge their crimes. And, Tachibana claims, prosecutor executives allow the bad guys to sleep precisely because they are bound too tightly to politicians and thus are too inclined to act in their friends' immediate political interests rather than in the interests of the public they ostensibly represent (Tachibana 1993:554, 649; D. Johnson 1997b).

When I confronted prosecutors with the contradictory claims of the Japanese intelligentsia, they took solace in the contradictions, arguing that being attacked from both sides is evidence that they must be doing a pretty good job. Perhaps. But to an American living in a land where prosecutorial decisionmaking is more open to public inspection and potential criticism (Hagan 1994:139), the link between Japan's procuracy and democracy remains troublesomely opaque (Kawasaki 1991). In this regard the Japanese procuracy—as mirror—reveals as much about myself as an American as about the subject of this study.

B. Japan as Model

> I am afraid many Westerners do not want to acknowledge that we do things as well as, or better than, they do.
>
> —Japanese prosecutor, 24 May 1995

> Our criminal justice procedures would seem as absurd to us as they do to foreigners if we were not so used to them. . . . Nothing could be healthier than for the American criminal bar to immerse itself in the study of comparative criminal procedure and thus discover that ours is not the only or even the best way of doing things.
>
> —Phillip E. Johnson (1977:407)

This case study shows that arguments about "inevitable" discrimination and "the limits of order" are not true. The two imperatives of justice—individualization and order—are not locked in ineluctable tension, and more of one is not necessarily purchased at the price of the other.[32] Claims to the contrary will persist as long as Americans refuse to open their eyes to the disturbing insights which the Japanese case presents. Claims to the contrary also perpetuate the pernicious myth that while the American criminal process may not *appear* to do justice, it *does* do justice nonetheless (Silberman 1978:255). The comparison with Japan suggests that the American criminal process does neither satisfactorily.

The first step to more tolerable consistency in American criminal justice is the recognition that things can be different—and better—than they are now, and I have tried to suggest how

[32] This account also undermines one of the most widespread beliefs about Japanese legal culture: that universal standards of justice are "alien to the traditional habit of the Japanese people" (Kawashima 1967). For Japanese prosecutors, that claim could hardly be more baseless.

looking at Japan as a mirror can spark that awareness. Unfortunately, considering the disdain most American legal professionals hold for all systems but their own, I am pessimistic about the chances for any significant change in Americans' ethnocentric conviction that their system works, at worst, better than other systems do. Nonetheless, if the first step were taken the natural question arises: Can Japan serve as a model for American reform?

One should not regard Japan's procuracy as a blueprint for reform of unsatisfactory American prosecutorial practices. The two systems differ in too many fundamental respects. In ways, however, the procuracy can serve as something of a model about how to improve the quality of order in our own systems of prosecution. This suggestion will make some Americans uneasy or insecure. Indeed, for a long time this thought disquieted me. But the facts are too clear and too numerous to deny: We have something to learn from Japan, if only we will listen. In some criminal justice respects, Japan is just another ordinary country (Miyazawa 1992); with respect to order, it is not.

The stakes are high. Criminal or related proceedings in which an individual may lose life, liberty, and reputation "constitute the principal indicator of the character of a society" (Skolnick 1975:v). Such proceedings reflect not only our ideals of justice but also how well we translate those ideals into reality. The prevailing tradition in Western philosophy "relates the core sense of 'justice' to the idea of equality" (Golding 1975:120). For the most part, we still agree with Aristotle that justice consists in treating equals equally and unequals unequally. In short, the stakes are high because we care—or say we care—about order.

But the status quo is intolerable, and the problem is order, or rather the lack of it in American prosecution offices. Almost three decades ago Norman Abrams, writing about how to guide the exercise of prosecutorial discretion through internal policy, concluded that "the present state of prosecutorial policy is primitive," leading to intolerable inconsistency instead of the "tolerable consistency" many claim to want (Abrams 1971:58). Today the level of disorder in American prosecution offices is still unacceptable. Some scholars have argued that in charging and plea bargaining, two primary prosecutor practices, "consistency prevails to a surprising extent" (Nardulli et al. 1988:245). Their surprise, I surmise, arises from unawareness of the consistencies prevailing outside their national borders. After comparing Lakeville and Laconia with Japan, I am most surprised by how much inconsistency prevails on our side of the Pacific. If the differences in order do not dismay us, why not?

The present prosecutorial system can be moved further along the road to tolerable consistency. In fact, the dominant theme in American criminal justice since the late 1950s has been "the at-

tempt to control discretionary decisionmaking," and the best review of that period concludes that "discretion can be controlled." Indeed, in some important areas it has been. The number of shootings by police has been reduced. Many municipalities have decreased the number of dangerous, high-speed police pursuits. And the Minnesota sentencing guidelines seem to have controlled the use of imprisonment in that state. In short, some things do work to control discretion. Meaningful change is difficult but not hopeless (Walker 1993). Unfortunately, prosecutor discretion is not one of the success stories. This critical part of our system remains untamed. Years ago American scholars, concerned about prosecution inequities, often wrote about how to guide prosecutor discretion in order to achieve more tolerable consistency (Davis 1969; Abrams 1971; Weinreb 1977; Langbein & Weinreb 1978; Weigend 1980; Vorenberg 1981). In recent years, however, such expressions of concern have slowed to a trickle, in part because many of the proposed reforms were neither politically feasible nor practically viable (Frase 1990:551, 664; Burnham 1996). To be more successful, we must "build on what we have" rather than supposing, wrongly, that we can import whole systems (Morris 1978:1369).

I have two modest suggestions. First, if order matters, then so must organization. The connection is nonnegotiable. Prosecution will never be as coordinated or controlled in the United States as it is in Japan, and many Americans and almost all American prosecutors do not expect it to be. But in the United States, decisions about whether and what to charge are so important and yet so unrestrained that prosecutor managers and executives must take a greater interest in the routine decisions which, in the aggregate, constitute their office policies. At present, those decisions are made either too early or too late and, above all, with too little regard for treating likes alike (Frase 1990:616). Second, managers and executives should make operators more accountable for their front-line decisions. Concretely, this could be done by implementing a modified form of *kessai*, so as to require at least one level of review of disposition decisions instead of the two or three levels customary in Japan. Or, if this seems impractical, prosecutor superiors could adopt and adapt methods from other systems (like that of France) for achieving more tolerable consistency (Frase 1990:617).

American prosecution offices are formidably resistant to change (Morris 1978:1367; Feeley 1983), in large part because prosecutors are reluctant to impose limits on their own discretion. Legislative and judicial restraints may be part of the solution (Vorenberg 1981), but in the last analysis it is prosecutors themselves who must see the need for more "decent restraint" in the service of more "tolerable consistency" (Abrams 1971:58). Three decades ago, Kenneth Culp Davis (1969) provided the first

comprehensive discussion of discretion in American criminal justice. In his penultimate section on the "Philosophical Underpinnings" of discretionary justice, Davis eloquently sets forth the heart of the matter:

> In an affluent country, I think the legal system's answers to such questions as these [about who to prosecute and for what] should be based upon the most careful deliberation, not on considerations of convenience and economy, which gain support from habits and assumptions. Yet I doubt that our prevailing practices rest upon the best thinking of which our society is capable. *Our whole system of selective enforcement is built upon the assumption*—and I think it is no more than an assumption—*that justice does not require equal treatment* by police, prosecutors, and other enforcement officers of those who are equally deserving of prosecution or of other governmental initiative. *This assumption*, in my opinion, *is in need of profound reexamination.* (Pp. 230–31; emphasis added)

Davis titled his last section "The Unfinished Task." Japan, as mirror and model, shows that the task of producing more ordered American criminal justice remains distressingly incomplete.

References

Abe, Haruo (1968) "Shinkensatsukanron," *Chuo Koron,* May, pp. 162–75.

Abegglen, James C., & George Stalk, Jr. (1985) *Kaisha: The Japanese Corporation.* New York: Basic Books.

Abrams, Norman (1971) "Internal Policy: Guiding the Exercise of Prosecutorial Discretion," 19 *UCLA Law Rev.* 1–58.

Albonetti, Celesta A. (1987) "Prosecutorial Discretion: The Effects of Uncertainty," 21 *Law & Society Rev.* 291–313.

Alschuler, Albert W. (1968) "The Prosecutor's Role in Plea Bargaining," 36 *Univ. of Chicago Law Rev.* 50–112.

Amar, Akhil Reed (1997) *The Constitution and Criminal Procedure: First Principles.* New Haven, CT: Yale Univ. Press.

Ames, Walter L. (1981) *Police and Community in Japan.* Berkeley: Univ. of California Press.

Ando, Miwako (1995) "The Education and Training of Public Prosecutors in Japan," Tokyo: Research and Training Institute of the Ministry of Justice.

Baumgartner, M. P. (1992) "The Myth of Discretion," in Hawkins, ed. 1992.

Bayley, David H. (1994) "Pursuing the Japanese Police" (Review Essay Rejoinder), 28 *Law & Society Rev.* 963–64.

Black, Donald (1989) *Sociological Justice.* New York: Oxford Univ. Press.

Blankenburg, Erhard (1994) "The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in The Netherlands and West Germany," 28 *Law & Society Rev.* 789–808.

Braithwaite, John (1989) *Crime, Shame and Reintegration.* New York: Cambridge Univ. Press.

Burnham, David (1996) *Above the Law: Secret Deals, Political Fixes, and Other Misadventures of the U.S. Department of Justice.* New York: Charles Scribner's Sons.

Carter, Lief H. (1974) *The Limits of Order.* Lexington, MA: Lexington Books.

Clark, Rodney (1979) *The Japanese Company.* New Haven, CT: Yale Univ. Press.

Craig, Albert M. (1975) "Functional and Dysfunctional Aspects of Government Bureaucracy," in Vogel, ed. 1975b.

Damaska, Mirjan R. (1986) *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process.* New Haven, CT: Yale Univ. Press.

Davis, Kenneth Culp (1969) *Discretionary Justice: A Preliminary Inquiry.* Urbana: Univ. of Illinois Press.

Dore, Ronald (1978) *Shinohata: A Portrait of a Japanese Village.* New York: Pantheon Books.

Douglas, Mary (1986) *How Institutions Think.* Syracuse, NY: Syracuse Univ. Press.

Elster, John (1989) *Nuts and Bolts for the Social Sciences.* New York: Cambridge Univ. Press.

Fallows, James (1994) *Looking at the Sun: The Rise of the New East Asian Economic and Political System.* New York: Pantheon Books.

Feeley, Malcolm M. (1973) "Two Models of the Criminal Justice System: An Organizational Perspective," 7 *Law & Society Rev.* 407–25.

——— (1983) *Court Reform on Trial: Why Simple Solutions Fail.* New York: Basic Books.

——— (1987) "The Adversary System," in Robert J. Janosik, ed., *Encyclopedia of the American Judicial System.* New York: Charles Scribner's Sons.

——— (1992) *The Process Is the Punishment.* New York: Russell Sage Foundation.

Feldman, Martha S. (1992) "Social Limits to Discretion: An Organizational Perspective," in Hawkins, ed. 1992.

Fingleton, Eamonn (1995) *Blindside: Why Japan Is Still on Track to Overtake the U.S. by the Year 2000.* Boston: Houghton Mifflin Co.

Fisher, Stanley Z. (1988) "In Search of the Virtuous Prosecutor: A Conceptual Framework," 15 *American J. of Criminal Law* 197–261.

Flemming, Roy B., Peter F. Nardulli, & James Eisenstein (1992) *The Craft of Justice: Politics and Work in Court Communities.* Philadelphia: Univ. of Pennsylvania Press.

Foote, Daniel H. (1991) "Confessions and the Right to Silence in Japan," 21 *Georgia J. of International & Comparative Law* 415–88.

——— (1992) "The Benevolent Paternalism of Japanese Criminal Justice," 80 *California Law Rev.* 317–90.

——— (1993) "From Japan's Death Row to Freedom," 1 *Pacific Rim Law & Policy J.* 11–103.

Frank, Jerome (1949) *Courts on Trial: Myth and Reality in American Justice.* Princeton, NJ: Princeton Univ. Press.

Frase, Richard S. (1990) "Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?" 78 *California Law Rev.* 539–683.

Frohmann, Lisa G. (1992) "Screening Sexual Assault Cases: Prosecutorial Decisions to File or Reject Rape Complaints." Ph.D. diss., UCLA Dept. of Sociology.

Garland, David (1990) *Punishment and Modern Society: A Study in Social Theory.* Chicago: Univ. of Chicago Press.

Giddens, Anthony (1971) *Capitalism and Modern Social Theory.* New York: Cambridge Univ. Press.

Givelber, Daniel (1997) "Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent?" 49 *Rutgers Law Rev.* 1317–96.

Goffman, Erving (1961) *Asylum.* New York: Anchor Books.

Golding, Martin P. (1975) *Philosophy of Law.* Englewood Cliffs, NJ: Prentice-Hall.

Grano, Joseph D. (1993) *Confessions, Truth, and the Law.* Ann Arbor: Univ. of Michigan Press.

Guarnieri, Carlo (1997) "Prosecution in Two Civil Law Countries: France and Italy," in D. Nelken, ed., *Comparing Legal Cultures.* Aldershot, Eng.: Dartmouth Publishing Co.

Hagan, John (1994) *Crime and Disrepute.* Thousand Oaks, CA: Pine Forge Press.

Haley, John O. (1991) *Authority without Power: Law and the Japanese Paradox.* New York: Oxford Univ. Press.

Hamilton, V. Lee, & Joseph Sanders (1992) *Everyday Justice: Responsibility and the Individual in Japan and the United States.* New Haven, CT: Yale Univ. Press.

Hardacre, Helen (1996) "Aum Shinrikyo and the Japanese Media." Japan Policy Research Institute, Working Paper No. 19, April.

Hatano, Akira (1994) *Tsuno o Tamete Ushi o Korosu Koto Nakare: Kensatsu Kenryoku wa Kokumin no Teki ka.* Tokyo: Kobunsha.

Hawkins, Keith, ed. (1992) *The Uses of Discretion.* New York: Oxford Univ. Press, Clarendon Press.

Heilbroner, David (1990) *Rough Justice: Days and Nights of a Young D.A.* New York: Dell.

Hirano, Ryuichi (1989) "Diagnosis of the Current Code of Criminal Procedure" (trans. Daniel H. Foote), 22 *Law in Japan* 129–42.

Humes, Edward (1996) *No Matter How Loud I Shout: A Year in the Life of Juvenile Court.* New York: Simon & Schuster.

Ishimatsu, Takeo (1989) "Are Criminal Defendants in Japan Truly Receiving Trials by Judges?" (trans. Daniel H. Foote), 22 *Law in Japan* 143–53.

Itoh, Osamu (1994) "The Criminal Justice System in Japan: The Court." Tokyo: UNAFEI.

Jackson, Robert H. (1940) "The Federal Prosecutor," 24 *J. of the American Judicature Society* 18–20.

Johnson, Chalmers (1972) *Conspiracy at Matsukawa.* Berkeley: Univ. of California Press.

Johnson, David T. (1996) "The Japanese Way of Justice: Prosecuting Crime in Japan." Ph.D. diss., Univ. of California at Berkeley Boalt Hall School of Law Program in Jurisprudence & Social Policy.

——— (1997a) "Japan's Dazzling Acquittal Rates and the Procuracy's Pursuit of Perfection." Harvard Univ. Program on U.S.-Japan Relations, Center for International Affairs & the Edwin O. Reischauer Institute of Japanese Studies, USJP Occasional Paper.

——— (1997b) "Why the Wicked Sleep: The Prosecution of Political Corruption in Postwar Japan." Japan Policy Research Institute, Working Paper No. 34 (June).

Johnson, Phillip E. (1977) "Importing Justice," 87 *Yale Law J.* 406–14.

Kawai, Nobutaro (1979) *Kensatsu Tokuhon.* Tokyo: Shoji Homu Kenkyukai.

Kawakami, Kazuo (1981) "Shakai Seigi to Kensatsu: Gendai ni okeru Kensatsu no Yakuwari," *Hogaku Semina Zokan,* August, pp. 19–28.

Kawasaki, Hideaki (1991) "Kensatsukanron no Kadai: Sengo no Kensatsu to Keiji Shiho," in *Keiji Sosho no Gendai teki Doko.* Tokyo: Sanshodo.

Kawashima, Takeyoshi (1967) *Nihonjin no Ho Ishiki.* Tokyo: Iwanami.

Kensatsu Kogian (1991) Tokyo: Homusho Keijikyoku.

Klinger, David A. (1997) "Negotiating Order in Patrol Work: An Ecological Theory of Police Response to Deviance," 35 *Criminology* 277–306.

Kubo, Hiroshi (1989) *Nippon no Kensatsu.* Tokyo: Kodansha International.

Kurata, Seiji, et al. (1992) "Iwayuru Rainichi Gaikokujin ni yoru Setto Jihan no Kenkyu." Tokyo: Nihonkoku Homusho Homu Sogo Kenkyusho.

Langbein, John H. (1995) "The Influence of Comparative Procedure in the United States," 43 *American J. of Comparative Law* 545–54.

Langbein, John H., & Lloyd L. Weinreb (1978) "Continental Criminal Procedure: 'Myth' and Reality," 87 *Yale Law J.* 1549–69.

Levi, Edward H. (1969) *An Introduction to Legal Reasoning.* Chicago: Univ. of Chicago Press.

Lincoln, James R., & Arne L. Kalleberg (1990) *Culture, Control, and Commitment: A Study of Work Organization and Work Attitudes in the United States and Japan.* New York: Cambridge Univ. Press.

Lipset, Seymour Martin (1996) *American Exceptionalism: A Double-Edged Sword.* New York: W. W. Norton & Co.

Lipsky, Michael (1980) *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service.* New York: Russell Sage Foundation.

Littrell, W. Boyd (1979) *Bureaucratic Justice: Police, Prosecutors, and Plea Bargaining.* Beverly Hills, CA: Sage Publications.

Manning, Peter K. (1992) "'Big-Bang' Decisions: Notes on a Naturalistic Approach," in Hawkins, ed. 1992.

Matsumoto, Ichiro (1981) "Kensatsukan no Dokuritsu-Ittai Gensoku," *Hogaku Semina Zokan,* August, p. 301.

Merryman, John Henry (1985) *The Civil Law Tradition.* Palo Alto, CA: Stanford Univ. Press.

Ministry of Justice, Government of Japan (1986) *Kenji: Sono Sugao.* Tokyo: Homusho Keijikyoku Somuka.

Mitchell, Richard H. (1976) *Thought Control in Prewar Japan.* Ithaca, NY: Cornell Univ. Press.

——— (1992) *Janus-Faced Justice: Political Criminals in Imperial Japan.* Honolulu: Univ. of Hawaii Press.

Mitsui, Makoto (1979) "Sengo no Kensatsu," *Juristo,* 15 Sept., pp. 214–20.

Miyamoto, Masao (1994) *Straitjacket Society: An Insider's Irreverent View of Bureaucratic Japan.* Tokyo: Kodansha International.

Miyazawa, Setsuo (1992) *Policing in Japan: A Study on Making Crime.* Albany: State Univ. of New York Press.

Morris, Norval (1978) Review of Lloyd Weinreb's *Denial of Justice,* 91 *Harvard Law Rev.* 1367–71.

Mukaidani, Susumu (1993) *Chiken Tokusobu.* Tokyo: Kodansha International.

Nagel, Ilene H., & Stephen J. Schulhofer (1992) "A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines," 66 *Southern California Law Rev.* 501–66.

Nakane, Chie (1970) *Japanese Society.* Berkeley: Univ. of California Press.

Nardulli, Peter F., James Eisenstein, & Roy B. Flemming (1988) *The Tenor of Justice: Criminal Courts and the Guilty Plea Process.* Urbana: Univ. of Illinois Press.

Nomura, Jiro (1978) *Kenji: Kenryoku to Jinken.* Tokyo: Kyoikusha.

——— (1988) *Nihon no Kensatsu: Saiko no Kenryoku no Uchigawa.* Tokyo: Kodansha International.

——— (1994) *Nihon no Kensatsukan.* Tokyo: Waseda Keiei Shuppan.

Ohlin, Lloyd E. (1993) "Surveying Discretion by Criminal Justice Decision Makers," in Ohlin & Remington, eds. 1993.

Ohlin, Lloyd E., & Frank J. Remington, eds. (1993) *Discretion in Criminal Justice: The Tension between Individualization and Uniformity.* Albany: State Univ. of New York Press.

Omiya, Kenichiro (1994) *Ji-Sha Renritsu Seiken: Seijika, Kanryo Jinmyaku Chizu.* Tokyo: Futabasha.

Pharr, Susan (1990) *Losing Face: Status Politics in Japan.* Berkeley: Univ. of California Press.

Pizzi, William T. (1993) "Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform," 54 *Ohio State Law J.* 1325–73.

Ramseyer, J. Mark, & Frances McCall Rosenbluth (1993) *Japan's Political Marketplace.* Cambridge: Harvard Univ. Press.

Reischauer, Edwin O. (1977) *The Japanese.* Tokyo: Charles E. Tuttle Co.

Remington, Frank J. (1993) "The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices," in Ohlin & Remington, eds. 1993.

Rohlen, Thomas P. (1974) *For Harmony and Strength: Japanese White-Collar Organization in Anthropological Perspective.* Berkeley: Univ. of California Press.

Rosett, Arthur, & Donald R. Cressey (1976) *Justice by Consent: Plea Bargains in the American Courthouse.* Philadelphia: J. B. Lippincott Co.

Sayle, Murray (1996) "Nerve Gas and the Four Noble Truths," *New Yorker,* 1 April, pp. 56–61.

Scheingold, Stuart A. (1984) *The Politics of Law and Order: Street Crime and Public Policy.* New York: Longmans.

——— (1991) *The Politics of Street Crime: Criminal Process and Cultural Obsession.* Philadelphia: Temple Univ. Press.

Selznick, Philip (1957) *Leadership in Administration.* Evanston, IL: Row, Peterson.

Seto, Shuzo (1983) *Homu-Kensatsu Ura no Ura.* Tokyo: Doyukan.

Sherman, Lawrence (1993) "Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction," 30 *J. of Research in Crime & Delinquency* 445–73.

Silberman, Charles E. (1978) *Criminal Violence, Criminal Justice.* New York: Random House.

Skolnick, Jerome H. (1975) *Justice without Trial: Law Enforcement in a Democratic Society.* New York: John Wiley & Sons.

Smith, Arlo (1995) "The City's DA Responds to the Examiner Series," *San Francisco Examiner,* 17 Sept.

Smith, Robert J. (1983) *Japanese Society: Tradition, Self and the Social Order.* New York: Cambridge Univ. Press.

Spohn, Cassia, John Gruhl, & Susan Welch (1987) "The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges," 25 *Criminology* 175–91.

Steinhoff, Patricia G. (1993) "Pursuing the Japanese Police," 27 *Law & Society Rev.* 827–50.

——— (1991) *Tenko: Ideology and Societal Integration in Prewar Japan.* New York: Garland Publishing.

Stewart, James B. (1987) *The Prosecutors: Inside the Offices of the Government's Most Powerful Lawyers.* New York: Simon & Schuster.

Suchman, Mark C., & Lauren B. Edelman (1996) "Legal Rational Myths: The New Institutionalism and the Law and Society Tradition," 21 *Law & Social Inquiry* 903–42.

Sugimoto, Yoshio (1997) *An Introduction to Japanese Society.* New York: Cambridge Univ. Press.

Tachibana, Takashi (1993) *Kyoaku vs. Genron.* Tokyo: Bungeishunju.

Tadaki, Keiichi (1981) "Kensatsu Soshiki Tokiko," *Hogaku Semina Zokan,* August, pp. 170–79.

Takahashi, Hidemine (1992) *Tokyo Gaikokujin Saiban.* Tokyo: Heibonsha.

Taylor, Lawrence (1996) *The D.A.: A True Story.* New York: William Morrow & Co.

Thompson, James (1967) *Organizations in Action.* New York: McGraw Hill Book Co.

Thompson, Michael, Richard Ellis, & Aaron Wildavsky (1990) *Cultural Theory.* Boulder, CO: Westview Press.

Tojo, Shinichiro (1968) "The Prosecutor's Discretion and Its Control in Japan and the United States." Master of Laws Thesis, Boalt Hall School of Law, Univ. of California at Berkeley.

Tonry, Michael (1995) *Malign Neglect: Race, Crime, and Punishment in America.* New York: Oxford Univ. Press.

Tyler, Tom R. (1990) *Why People Obey the Law.* New Haven, CT: Yale Univ. Press.

Uematsu, Tadashi (1981) "Koeki no Daihyosha," *Hogaku Semina Zokan,* August, pp. 160–61.

Utz, Pamela J. (1978) *Settling the Facts: Discretion and Negotiation in Criminal Court.* Lexington, MA: Lexington Books.

Vogel, Ezra F. (1975a) "Introduction: Toward More Accurate Concepts," in Vogel, ed. 1975b.

———, ed. (1975b) *Modern Japanese Organization and Decision-Making.* Tokyo: Charles E. Tuttle Co.

Vorenberg, James (1981) "Decent Restraint of Prosecutorial Power," 94 *Harvard Law Rev.* 1521–73.

Walker, Samuel (1993) *Taming the System: The Control of Discretion in Criminal Justice, 1950–1990.* New York: Oxford Univ. Press.

Weigend, Thomas (1980) "Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform," in N. Morris & M. Tonry, eds., *Crime and Justice: An Annual Review of Research.* Chicago: Univ. of Chicago Press.

Weinreb, Lloyd L. (1977) *Denial of Justice: Criminal Process in the United States.* New York: Free Press.

Weninger, Robert A. (1987) "The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas," 35 *UCLA Law Rev.* 311.

White, Merry (1987) *The Japanese Educational Challenge: A Commitment to Children.* Tokyo: Kodansha International.

Wilson, James Q. (1989) *Bureaucracy: What Government Agencies Do and Why They Do It.* New York: Basic Books.

Winokur, Scot (1995) "Mr. District Attorney," *San Francisco Examiner* (4 parts), 10–13 Sept.

Wolferen, Karel van (1989) *The Enigma of Japanese Power: People and Politics in a Stateless Nation.* New York: Alfred A. Knopf.

——— (1994) *Ningen o Kofuku ni Shinai Nihon to Iu Shisutemu.* Tokyo: Mainichi Shimbunsha.

Zimring, Franklin E., & Richard S. Frase (1980) *The Criminal Justice System: Materials on the Administration and Reform of the Criminal Law.* Boston: Little, Brown & Co.