Review Essay

Authority with Power: Haley on Japan's Law and Politics

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John Owen Haley, *Authority without Power: Law and the Japanese Paradox.* New York: Oxford University Press, 1991. x+258 pages. $37.50.

Authority without Power is a significant book which is also significantly wrong. In it, John Haley aims "to use Japan as a window to law and law as a window to Japan" (p. 4). He argues that by considering Japan we can learn much about the concept, functions, and significance of law that other scholars have either missed or misconstrued, and that by considering Japanese law we can make sense of numerous "paradoxes" in Japanese society. But while Haley provides many insights into both Japan and Japanese law, he also exaggerates their distinctiveness, for when viewed in a more explicitly comparative perspective Japanese law and politics are neither as authoritative nor as powerless as Haley asserts. Similarly, Japanese society is far less "paradoxical" than Haley and many other commentators presume. In this essay I first summarize the main lines of Haley's argument and then discuss its theoretical, empirical, and comparative weaknesses.

I. *Authority without Power*: The Paradox Presented

Haley's title nicely captures his main points. Since at least the time of Max Weber, scholars have assumed that where there is political and legal *authority*—the socially recognized entitlement to rule and be obeyed—there is also *power* to compel obedience. Weber, of course, demonstrated that a person or ruling regime could have power without authority, but he never

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imagined the opposite possibility.[1] Haley challenges this orthodox "enthymeme of authority" (p. 193) by arguing that in Japan legal and governmental authority is divorced from power and by insisting that "no characteristic of Japanese political life is more remarkable or intrinsic than the separation of authority from power" (p. 13).[2] While the Japanese government is pervasive, thoroughly penetrating not only public but also personal, familial, and business spheres of conduct, it has little capacity to compel compliance with its authoritative pronouncements. Hence the capacity of the Japanese state to direct and control conduct is mainly a function of its ability to persuade, bargain, and cajole in order to induce consent (p. 193). Haley states this point—his main point—in several parallel ways: Japan is best understood as a society of authority without power, command without coercion, law without sanctions, consent without compulsion, and so on. However said, Haley's thesis should provoke much sociolegal soul-searching, for it directs us to stand Weberian orthodoxy on its head and to reconsider the assumed relationship between authority and power.

Haley's analysis rests on an Austinian theory of law which he makes explicit in chapter 1 (see esp. pp. 5–13). With Austin and other classical legal positivists, Haley argues that legal systems are comprised of two primary elements, norms and sanctions, plus the related institutions and processes for making and enforcing legal norms (p. 5). In a similarly Austinian style, Haley further asserts that the essential purpose or function of all law is to promote order and conformity. To effectively promote order law must be viable, and to be viable legal norms must either be consensual or enforced. Since consensus over legal norms commonly does not exist, norms must often be enforced, and this means that those who control the enforcement process control the viability of the legal rule. The methodological upshot of this theory of law is that inquiries into the role of law in society should concentrate on prosecutorial discretion, that is, control over the various forms of law enforcement. This is in fact Haley's empirical focus (p. 10).

Haley contends that the paradox of authority without power illuminates many other dimensions of Japanese law and society which are contrary to Westerners' received opinions about how societies do and should work. Consider the following examples. The imperial institution has long been a locus of considerable authority but little real power, with the emperor

[1] Weber defined power as simply "an actor's ability to impose his will on another, even against the other's resistance" and argued that "the difference between power and authority is that power does not imply the notion of the right to command and the duty to obey, whereas authority implies a probability of obtaining willing obedience" (Aron 1970:279–80).

[2] Haley has presented many of his main ideas in earlier works, especially Haley 1980, 1984.

reigning but not really ruling (pp. 30–31). Japanese bureaucrats have broad, seemingly limitless authority to intervene in business affairs, and often do intervene, but they possess not even a "relatively normal degree of coercive legal powers" (p. 143). Japanese judges have neither the broad powers of equity nor the contempt powers of all common law and many civil law courts, and hence cannot easily enforce their orders (p. 118). In criminal justice matters the Japanese state relies heavily on informal measures of control, via family, friends, and firm, and thus has in effect "abandoned the most coercive of all legitimate instruments of state control" (p. 138). Finally, the weakness of Japanese legal sanctions produces extralegal substitutes, thus accounting for the paradoxical coexistence of Japan's much celebrated cohesion and conformity with "widespread flouting of law, virulent conflict, and overt thuggery" (p. 169). Haley claims that one can only understand these legal and governmental "paradoxes" after first recognizing the fundamental fact that Japan's politicolegal system has much authority but very little power.[3]

According to Haley, viewing the Japanese state in this way explains its dependence on extralegal, informal mechanisms of social control and its transfer of effective control from government incumbents to those who are able to manipulate the informal means of enforcement.[4] This first effect of "authority without power" nicely illustrates Donald Black's (1976:6, 107 ff.) well-known proposition that "law varies inversely with other social control." Indeed, Haley extends the coverage of Black's proposition, for while Black showed that many preindustrial societies have relatively weak legal but strong informal social controls, Haley claims that a similar control combination also exists in one of the world's most advanced capitalist states.

In contrast to the coercion used by other states, Haley argues that Japanese legal control is largely a matter of persuasion and consensus building. While he acknowledges that all legal systems depend at least partly on voluntary compliance and consensus and not merely on coercion, he claims that what distinguishes Japan from other legal systems is the extent and legitimacy of its dependence (p. 198). Furthermore, Haley insists that even though Japanese legal controls are weak, they are still important. Japanese law may not often or effectively coerce, but it does legitimate authority, shape and reflect consensus, challenge the status quo, and give the state leverage in

[3] Haley refers to several other purported Japanese paradoxes (continuity with change, cohesion and conflict, hierarchy and equality, cooperation and competition, community control and independence, and "how Japan creates an ordered but free society") but does not explain how they are paradoxical or why they exist.

[4] The most obvious example of extralegal control is the gangster as enforcer. Japan's *yakuza* often collect debts, evict tenants, and perform a wide variety of other informal social control functions (pp. 183–86).

bargaining with other social actors. The role of the Japanese state is thus "more altered than diminished" (p. 200), and the role of Japanese law remains similarly significant, especially as *tatemae* ("principles"), which do not so much command obedience as demand respect and induce outward conformity (p. 199).

In earlier writings Haley argued that much that is important about Japanese law is the product of intentional political choices. Most notably, his 1978 article on "The Myth of the Reluctant Litigant" demonstrated that the Japanese rarely litigate not because they are culturally averse to formally adjudicating conflicts, but rather because the Japanese government has intentionally and artificially restricted the supply of attorneys and judges (mostly by making it extremely difficult to pass the Japanese bar), thereby rendering litigation prohibitively expensive for most disputes and disputants. However, in his current book Haley retreats from such political explanations, arguing that the process of rule in Japan—by authority without power, by "consensual governance"—"has been the product of institutional history and cultural environment, not intentional political choice" (p. 193).[5]

Haley devotes the first half of his book ("Continuity with Change: The Historical Foundations of Governance and Legal Control in Japan") to historical and cultural matters. In chapter 1, "Emperors and Edicts: The Paradigm of the Administrative State," he describes Japan's huge institutional debt to China, showing that for Japan the principal legacy of Chinese law was the lesson that law itself is an essential instrument of control in an administrative state (p. 32). In chapter 2, "Castellans and Contracts: The Legacy of Feudal Law," Haley explores the history of feudal law in Japan between the 12th and 17th centuries. During the early parts of this period authority and power were separated for the first time, but by the end of the 16th century they came close to uniting into the form we usually see in the West. However, in the Tokugawa period, roughly 1600 to 1868, power again shifted away from the authoritative center and toward autonomous villages and communities, and this is the subject of Haley's third chapter, "Magistrates and *Mura*: The Ambivalent Tradition of Tokugawa Japan." Finally, in chapter 4, "Constitutions and Codes: The Making of the Contemporary Legal Order," Haley shows how domestic elites and an alien occupying army imposed Japan's contemporary legal order, first during the Meiji Restoration which began around 1868, and then after Japan's defeat in World War II. These "impositions from above" radically transformed Japan's legal

[5] Clearly the two types of explanation are not as mutually exclusive as Haley here implies, for political choices shape institutions and culture, while institutional history and cultural environment constrain and channel political choices.

and political institutions but left Japanese culture pretty much intact. Consequently, the imposed legal forms came to function differently from the original models on which they were patterned. Most important, these legal transplants were never able to express the basic premises of the Japanese political tradition, especially the separation of power from authority.

In the second part of his book ("Cohesion with Conflict: The Containment of Legal Controls") Haley discusses the more contemporary realities of Japanese law and government, although here, too, he deftly locates those realities in their wider historical and cultural contexts. Chapter 5, "Lawsuits and Lawyers: The Making of a Myth" describes how the Japanese came to believe that they are a "nonlitigious people" and explains both why this belief is a myth and why it has persisted so tenaciously in spite of considerable evidence to the contrary. Legal changes in the Meiji era (1868–1912) gave the Japanese new legal rights, thus opening the door to social changes that the governing elites opposed. Beginning in 1919 and continuing throughout the 1920s and 1930s, elites responded to such threats in the same patterned way: first by reforming the substantive law, and then, when substantive reforms failed, by introducing and eventually requiring formal conciliation for a wide range of disputes (family, landlord-tenant, mangement-labor, and so on). From the first conciliation statute to the last, their chief aim was "to ensure that the outcome of any resolution of social disputes reflect[ed] Japanese morals rather than law" (p. 92).

Conciliation did not displace litigation or reduce conflict, but it did foster the kinds of nonlitigious attitudes that have endured to the present (p. 96). According to Haley, those attitudes persist for several reasons. First, "much of what the Japanese understand about themselves is based on comparative frames of reference," and "comparisons with the United States have permeated Japan's postwar identity" (p. 110). Since postwar litigation rates have risen rapidly in the United States, Japan does seem nonlitigious by comparison.[6] Second, nonlitigious beliefs are self-fulfilling, for those who hold them are unlikely to press for more lawyers or judges (who could make litigation less costly and thus more accessible). The lack of political demand for more accessible justice is in turn viewed as evidence that the Japanese are in fact nonlitigious, and the self-fulfilling circle is complete. Finally, nonlitigious attitudes persist because the Japanese government consciously engineers and maintains them. Most significantly, the government severely restricts the number of persons who can pass the bar

[6] Of course, everything depends on the country of comparison. Norway, Sweden, and South Korea, to name but a few, all have lower litigation rates than Japan.

exam, enter the Legal Research and Training Institute (where prospective lawyers and judges must be apprenticed), and so become lawyers or judges. Japan's government thus artificially limits the supply of lawyers and judges and thereby the capacity to litigate. Haley calls this problem "institutional incapacity" (pp. 110–11).

In chapter 6, "Policemen and Prosecutors: Crime without Punishment," Haley argues that institutional incapacity is at least as serious a problem for Japan's criminal justice system as it is for civil law enforcement. Serious crime rates have fallen since World War II, but demands on prosecutors have increased, and hence system delay is chronic (p. 121). In many cases this institutional incapacity puts pressure on criminal justice officials to avoid prosecution, and so they create a second, informal, track of the criminal process in order to reduce the burdens on the system. The first track is formal and institutional, and closely resembles most contemporary legal systems derived from continental European models, with two significant exceptions: Japanese criminal justice officials enjoy more discretion, and Japanese punishments are extraordinarily lenient.[7] The second track is informal, for it stresses confession, repentance, and absolution as means to crime control and the correction of offenders. It is also far and away the most heavily traveled, and thus most important, of the two criminal justice tracks (p. 129).

In chapter 7, "Bureaucrats and Business: Administrative Power Constrained," Haley claims that the powers of the Japanese bureaucracy have been long vaunted but greatly exaggerated. He argues that Japanese bureaucrats are and always have been less intrusive in coercive impact than their U.S. counterparts, and that what makes the Japanese bureaucracy distinctive is neither its size nor its influence but rather its combination of broad authority and severely constrained power (p. 140). Lacking coercive powers, the bureaucracy must compromise with business in order to achieve compliance, and hence it negotiates and bargains far more than it dictates policy. This emphasis on informal enforcement has several effects: it gives bureaucrats autonomy in determining what policies they will and will not enforce; it gives private parties great leverage in dealing with officials; and it produces substantively good policy.

In his final chapter, "Hamlets and Hoodlums: The Social Impact of Law without Sanctions," Haley traces the broader social consequences of authority without power. He claims that the weakness of Japan's legal sanctions produces extralegal substitutes and reinforces the viability of preexisting means of

[7] See also Foote 1992 and Bayley 1991, who agree with Haley that Japanese criminal justice is lenient and that criminal justice officials exercise great discretion.

coercing behavior. Just as the village was the chief paradigm of effective governance in Tokugawa Japan, so now the chief loci of social control are family, firm, factory, and neighborhood. But these reinforced informal controls also have a "dark side," for in the absence of public means of direct coercion, private means become increasingly important. Most notoriously, yakuza gangsters collect debts, coerce conciliation, evict tenants, keep dissenting shareholders in line, and so on, and they do so literally by twisting arms.[8] Haley ends his book by asserting that since the formal levers of coercion are so constrained in Japan, consensus and fairness become essential components of the glue that holds the social system together. Authority is influential in Japan not because it is backed by coercive power, nor because it is adroitly manipulated, but rather because authoritative norms carry great "morally compelling force." Japan, Haley concludes, "maintains a remarkably just as well as stable social order" (p. 191).

Before evaluating these main arguments we should first note that Haley believes Japan could be a "useful antidote" to American thinking about law and society (p. 15). To declare that Japan and Japanese law are paradoxical is to say that they differ significantly from other countries and other legal systems. Japan, Haley insists, is not like America, not like the West, not like other industrialized democracies, and not even like other Asian countries.[9] More particularly, Japan and the United States differ greatly in the scope or breadth of law's domain as a system of social control (p. 14), for while legal regulation is extensive and coercive in the United States, it is confined and weak in Japan. Haley believes that Americans exaggerate the importance of law and neglect other equally valuable means for social ordering, and though he declares that they can and should learn from Japan, he often does not specify how or even what they should learn. Thus, and like so many proposals that we "learn from Japan," Haley's suggestion amounts to little more than a general lamentation about the American status

[8] For an interesting discussion of recent conflicts between the yakuza and mainstream Japanese society, see Sterngold 1992a. For an equally interesting report about how and why Japanese gangsters keep dissenting shareholders in line, see Sterngold 1992b.

[9] At the very end of his introduction Haley states that "except in its historical experience, Japan is not unique. While differences in emphasis do exist, we need to understand equally important similarities in kind" (p. 15). These sentences have a decidedly tacked-on quality, for the whole tenor of the subsequent eight chapters is to show how Japan is distinct and paradoxical. Indeed, Haley opens his concluding chapter with an assertion that could hardly be more at odds with the above caveat: "words fail to convey the nature and process of governance in Japan. No commonly accepted paradigm of how policy is made and enforced seems to fit" (p. 193). Moreover, earlier in his introduction Haley says that Japan "presents a multifaceted paradox" which is "notable" and "extraordinary" in numerous respects (p. 4).

quo and a similarly general plea to look to Japan in order to change that which he finds lamentable.

This is an elegantly written book which deserves to be widely read. First and foremost, it is extremely ambitious, both in historical and substantive scope. Most Western scholarship on Japanese law has focused heavily on contemporary issues, and even when explicitly historical such analyses seldom look much earlier than the prewar 1920s and 1930s. By contrast, Haley spends nearly half his book "getting to" the points where most scholars usually begin, and thus lays a solid foundation for future work in this field. The chapters on the legal legacies of ancient China and feudal and Tokugawa Japan synthesize a myriad of materials from both Japanese and Western sources, and will undoubtedly become essential reading for all students of Japanese law and politics. Haley's book fills a historical void in admirable fashion.

Haley's work is also substantively ambitious, for it addresses in depth and sophistication a wide range of civil, criminal, and administrative legal matters.[10] His Austinian concept of law and his focus on "authority without power" lead him to attend to "law in action" rather than merely "law on the books," and he thus tells us a great deal about what Japanese legal officials can do, how they do what they can, and how their activities matter for Japan's polity and society. Scholars who stubbornly stick with doctrinal and textual analyses of Japanese law learn comparatively little, for in most cases the important questions simply are not legal and the important legal questions are not doctrinal (Ramseyer 1990). Throughout his work, Haley asks the most important kinds of questions.

Ultimately, however, Haley's argument—that authority and power are uncoupled in Japan and that this sharply distinguishes Japanese law from other legal systems—is not convincing. In the next section I will try to show that Haley's book paints a picture of Japanese law which is misleadingly distinctive, and that in fact Japanese law resembles law elsewhere considerably more than Haley allows.

II. Authority WITH Power? The Paradox Probed

In presenting and supporting his "authority without power" thesis, Haley makes three major mistakes: his argument depends heavily on the content of his concepts, and he defines two of his central terms—law and power—in unorthodox and unhelpful ways; he significantly exaggerates how little power matters in Japan and Japanese law; and he similarly exaggerates

[10] The only other book-length theoretical treatment of Japanese law (in English) is Frank Upham's excellent *Law and Social Change in Postwar Japan* (1987), which through a series of case studies focuses on the powers of the Japanese bureaucracy.

how much law and power matter in the United States and his other countries of comparison. Each of these problems undermines a central pillar of Haley's argument, and together they raise serious questions about the purported distinctiveness of Japanese law and thus the validity of Haley's authority without power theme.

Reconsidering Haley's Concepts

As I noted above, Haley builds his argument on an Austinian jurisprudence which regards law as a system of rules backed by sanctions and which assumes the essential function of law is to promote order and conformity. This static conception treats law as primarily a set of do's and don't's, or direct commands requiring specific responses. It largely ignores the more dynamic rules in law, the "laws about laws" or "secondary rules" that instruct legal officials and citizens about such crucial matters as how to identify the primary rules of obligation (law's "do's" and "don't's"), how to introduce new or eliminate old primary rules, and how to authoritatively determine if a primary rule has been broken (Hart 1961). By treating law as a system comprised solely of two elements—primary rules imposing duties and sanctions punishing breaches of those duties—Haley disregards these equally important secondary rules which give law its dynamism, both in the United States and in Japan.

Haley's jurisprudence also forces him to miss the importance of nonrule standards in *all* systems of law. Ronald Dworkin refers to these nonrule standards as "principles," and argues that they differ from legal rules chiefly in that rules apply all-or-nothing while principles have more or less "weight" (or importance), depending on the particular case (Dworkin 1977, esp. pp. 14–45). Principles, such as the precept that "no man should profit from his own wrong," both articulate rights and justify legal and political decisions by referring to those rights. Principles are especially influential in "hard cases," where judges or other legal officials disagree with each other about what the legal rules require. Haley argues that Japanese law is most important and distinctive insofar as it functions as *tatemae*, or principles, which operate much like Dworkin's principles (pp. 186–90). However, Dworkin's work shows that legal principles are key ingredients of all legal systems, not just Japan's, and hence here, too, Haley seems to exaggerate the distinctiveness of Japanese law.

Haley's jurisprudence is problematic in another way as well, for centered as it is on a command model that treats law as

orders backed by threats,[11] it ignores several other equally important forms of law.[12] First, some laws do not command but simply define, and sanctions do not necessarily attach to such "laws of definition." For example, to obtain a valid driver's license in the United States, certain provisions must be met: one must be at least 16, have good vision, and pass a driving exam. If these conditions are not met, no license is forthcoming. Analogous conditions and consequences apply to marriage, divorce, contract, property, and a host of other legal realms. Japan, of course, has as many "laws of definition" as anywhere else, and they are just as important—and influential—there as elsewhere. Moreover, the Japanese state's relative incapacity to coerce or compel compliance matters little here, because there is no command to which to comply and thus no need to enforce compliance. Again, these laws simply define.

Second, Haley's jurisprudence largely ignores laws that confer official statuses on particular classes of people. These "status-conferring rules" neither command obedience nor sanction disobedience but rather facilitate both public and private activity by enabling people to do what they otherwise could not. Public officials who make, change, or adjudicate laws and private citizens who marry, divorce, contract, or own property can do so because the law makes such activities possible. In its capacity to confer status and thereby facilitate conduct, here, too, Japanese law is remarkably like legal systems elsewhere.

Third, and finally, Haley's command theory of law overlooks the many forms of law that selectively and strategically distribute incentives. Haley repeatedly argues that Japanese law lacks the sanctioning power necessary to coerce compliance, but in so doing he concentrates too heavily on the coercive stick of the law and not enough on its carrot incentives. Like their Western counterparts, Japanese legal officials calculate and control legal forms such as taxes, subsidies, outright grants, and the like, and thereby encourage or discourage a broad range of corporate or individual activities. By managing these instruments of social control, legal officials exert just as much influence over conduct—or "power" in the orthodox sense of the term[13]—as they do when they impose more punitive sanctions. Thus, even if one agrees with Haley that Japanese law lacks coercive power, one could still argue that it possesses another kind of power, in the form of positive incentives either given or withheld, which is as influential and thus every bit as important as the coercive powers Haley so stresses.

[11] Ultimately, of course, Haley wants to argue that it is the uncoupling of those orders and threats that most distinguishes Japanese law from other legal systems.

[12] The following three paragraphs rely heavily on Feeley 1976.

[13] Below I argue that conceiving power broadly and in the orthodox way (as "influence over conduct") is the most useful way to proceed.

Haley's Austinian jurisprudence is thus conceptually problematic in several ways: it is implausibly static, for it discounts too heavily the important dynamic roles played by secondary legal rules; it misses the importance of nonlegal rules, or principles, in all legal systems; and in its implict reliance on a criminal law model it ignores other equally important forms of laws.

Haley's jurisprudence is also functionally problematic, for with Austin and other classical legal positivists he assumes that the essential purpose or function of all law is to promote order and conformity, and such is clearly not the case. To be sure, there is wide consensus that the main function of many criminal laws is to preserve order (Braithwaite 1989:13–14). But for most other laws there is little agreement on purpose, and Haley's model of law misses that dissensus. For example, tax laws control conduct by systematically altering the incentives actors encounter, but they also raise revenue for the government and so enable it to perform a wide variety of tasks. Tort law is even more functionally diffuse, for it pursues numerous goals only remotely related to control or order. While it does deter harmful behavior, or at least tries to, tort law also redistributes income, spreads risks, promotes efficient industrial growth, and so on. These latter functions easily get lost in command and control models of law and are given no place in Haley's treatment of Japanese law and society.

So far I have tried to show that Haley's concept of *law* is both conceptually and functionally misleading. Now I want to show that another of his key terms—*power*—is also misconceived. I will then briefly explore what would happen to his argument if we defined power in a more orthodox way.

By *authority* Haley means "the legitimacy or socially recognized entitlement to command and to be obeyed" (p. 13). While this is a standard and useful way of conceiving authority, Haley's conception of *power* is more problematic. Although he recognizes that power "can be viewed as both a capacity to influence as well as to coerce," Haley also believes that "we usually think of law . . . as a coercive command at least in enforcement" and thus concludes that "a narrow definition of power as coercion is to be preferred" (p. 13).

However, by equating power with coercion, Haley defines power too narrowly, and his "authority without power" thesis leans heavily and precariously on that too-narrow definition. A person may "realize his own will even against the resistance of others" (Max Weber, in Gerth & Mills 1946:180) and thus exercise power in the classical Weberian sense, even without coercing those resisting others. Indeed, "the resistance of others" is most commonly overcome not by coercing but by persuading, inducing, and appealing to shared normative commitments and beliefs. When they prevail, we also commonly and properly re-

fer to these noncoercive activities as exercises of *power*. A broader and more illuminating definition would thus treat power as "a capacity to get things done" (Stinchcombe 1968: 157; see also Parsons 1960:181–83; Dahl 1961:ch.1), and when power is so conceived it becomes clear that Japanese law is much more powerful than Haley's narrower conceptualization allows. As Haley himself admits, "divorce power from authority as in Japan . . . and the capacity of the state to direct and control . . . becomes principally a function of its ability to persuade, bargain, or cajole in order to induce consent. . . . Without adequate means of coercion the state can only assure the effective enforcement of policy through influence and inducements" (p. 193). These noncoercive means of "influence and inducement" are the most common instruments of power employed by legal officials everywhere, not just in Japan. They are, in short, power's everyday clothes, and we would be wrong to say that power does not much matter in Japanese law simply because it rarely parades around naked.

Haley's definition of power is narrow in a second sense as well, for it overlooks an aspect of power which, while less obvious, is no less important than the more direct and visible aspect I outlined above. This "second face of power" denotes the capacity of power holders to get others to act in ways they desire *without* direct intervention or sanctions (Bachrach & Baratz 1962:947–52). The outcome of this form of power is a nonevent, since the power holder gets the desired conduct and outcome without directly acting "on" his agent at all.

J. Mark Ramseyer and Frances Rosenbluth (1993) nicely illustrate the "second face of power" in their discussion of political principals and bureaucratic agents. They argue that observers of Japanese politics routinely exaggerate the independence and autonomy of Japanese bureacrats because "policy administration by autonomous bureaucrats is observationally equivalent to policy administration under strict legislative control." That is, when one observed that the ruling Liberal Democratic Party usually left the bureaucracy alone, one can make either of two very different inferences: either the bureaucracy operates autonomously and thus ran much of the political show, or else the LDP ruled but left the bureaucracy alone simply because the bureaucracy anticipated and did what the LDP wanted, even without LDP intervention. Ramseyer and Rosenbluth demonstrate that the second inference was most often the correct one, and thus show that power is often perfectly consistent with nonevents (in this example the nonevent is nonintervention by the LDP). In similar ways, Japanese legal officials may seem to exercise little direct, visible power over citizens or businesses when in fact they appear passive simply because citizens and businesses have anticipated official desires

and the adverse consequences that would attend behavior inconsistent with those desires, and have adjusted their behavior accordingly. As I will show in the next section, this "second face of power" is especially important in Japanese criminal justice, although it is often mistaken for the absence of power altogether.

Reconsidering Haley's Japan

To support his "authority without power" thesis, Haley attempts to make two complementary and comparative points: first, that compared to other legal systems Japan's law and government have little actual power, and second, that compared to Japan other legal systems rely very little on legal authority (as opposed to legally coercive power) or informal norms. However, since Haley exaggerates the extent of these comparative differences, we have not only solid conceptual grounds but also good empirical reasons to challenge the validity of his argument.

Few scholars would dispute Herbert Packer's (1968:5) assertion that "the criminal sanction is the paradigm case of the controlled use of power in a society." Haley certainly does not, although in his chapter on Japan's criminal justice system he does argue that Japan relies so little on the criminal sanction and so much on repentance, confession, and absolution that "it has in effect abandoned the most coercive of all legitimate instruments of state control" (p. 138). While Haley's view appears to be the orthodox understanding of the role and importance of the criminal sanction in Japan (Foote 1992; Bayley 1991), it is also misleading, for it ignores key reasons why Japan's criminal justice officials so rarely need to resort to criminal sanctions.

Consider policing. In his new book *Policing in Japan: A Study on Making Crime* (1992), Setsuo Miyazawa describes how the formal rules of Japanese criminal procedure "are designed and implemented to *enable* detectives to dominate the criminal process and to promote a detective's interest to a far greater extent than is true in the U.S. or Canada" (p. ix). More specifically, Japanese police have fewer and, on the average, less serious crimes to clear than do Western police, and therefore can afford to spend more time and use more officers to clear cases and secure confessions (confessions having long been the "king of evidence" for Japanese criminal justice officials) (p. 15). In addition, several salient features of Japanese criminal law *enable* Japanese officers to secure those confessions with comparative ease. Two statutes enable police to interrogate even unarrested suspects, thus giving the interrogation enterprise a character of voluntariness which helps police avoid judi-

cial scrutiny of their tactics (pp. 16–18 & ch. 6). Moreover, suspects who are detained by police have few procedural protections and, most important, "are left without counsel during the most crucial times of investigation [i.e. until indictment]" (pp. 18–19, 22–23, & ch. 8). As long as a suspect denies the charge and refuses to confess, meetings with his attorney can be denied, and "confession will become prerequisite to the exercise of his constitutional right" (pp. 22–23 & ch. 9). In violation of numerous international treaties to which Japan is a signatory, police can legally detain suspects in police detention cells rather than regular detention centers for up to 23 days (and in extraordinary cases far longer) and thus may interrogate suspects at their convenience, thereby further facilitating confessions (pp. 19–21 & ch. 9). Furthermore, in interrogation a suspect's statements are neither recorded verbatim nor tape recorded. Instead, Japanese detectives "rewrite statements into coherent stories, and the suspect is simply asked to sign them" (pp. 21–23 & ch. 10). Finally, Japanese courts are extremely reluctant to exclude physical evidence and confessions that police have illegally seized or extracted (pp. 23–25 & ch. 7).

Miyazawa's detailed description of how the Japanese legal environment "enables" police to obtain confessions reveals that in fact these legal officials have significant powers (or "capacities to get things done"), powers that far exceed those that their Western counterparts wield. Haley may be right that Japanese police have extraordinary authority, or legitimacy to command and be obeyed,[14] but Miyazawa shows that they have at least equally extraordinary powers. Far from having "abandoned the most coercive of all legitimate instruments of state control" (p. 138), Japanese police are legally empowered to influence and control criminal suspects in ways that American police can only dream of. Thus, in this critical legal realm, the realm which would seem, a priori, to fit best with his Austinian concept of law, Haley's central thesis can be recast more accurately as "authority with power."

Haley's claim that Japan's criminal justice system is "extraordinarily lenient" likewise leans tenuously on problematic assumptions and methodologies (p. 129). Like many other students of Japanese crime and crime control, Haley argues that Japan's criminal justice system is both extremely efficient and exceptionally lenient. He accurately reports that Japan has relatively few police officers (as measured by population per police officer) and that Japanese police have, by international standards, very high crime clearance rates. By these measures Japanese police seem efficient indeed. However, since Japanese police have far fewer and less serious crimes to clear, "a more

[14] Bayley (1991) agrees; see his ch. 7.

realistic indicator of the police workload may be the number of crimes police *must* clear, and a more meaningful measure of police efficiency may be the number of crimes they *actually clear*" (Miyazawa 1992:15). By these more appropriate measures, Japanese police are in fact no more efficient than either American or most European police.

Haley further argues that comparatively few convicted offenders "are punished with more than a minor penalty," since "except for detention during police interrogation few offenders . . . ever see the inside of a jail." Moreover, even the few sentenced to prison stay only a short while (pp. 128–29). However, in building this leniency argument Haley makes two critical omissions: he provides no comparative data (from the United States or elsewhere) for his explicitly comparative conclusion, and he fails to control for many factors that could account for the apparently low imprisonment rates and sentence lengths—factors such as severity of crime, prior criminal record, employment history, social and economic status, and so on. Had he tried to control for such factors, and had he made the kinds of explicit comparisons his comparative assertions imply, Haley might well have had to conclude that Japan's criminal justice system is not especially lenient.

Japan's governmental officials have the power "to get things done" in noncriminal areas of the law as well. Consider again the relationship between the formerly ruling Liberal Democratic Party and ministry bureaucrats. As I described above, Ramseyer and Rosenbluth (1993) argue that Japan's bureaucrats are not as powerful as is usually supposed, and that in fact they usually implement LDP preferences faithfully. Contrary to much conventional wisdom, Japanese bureaucrats really "administered in the shadow of the party." They were responsive to the LDP because, much as the laws of criminal procedure enable Miyazawa's detectives to obtain confessions so often and easily, other laws enabled LDP leaders to monitor, police, and sanction wayward bureaucrats. The constitution (art. 41) gave the LDP-controlled Diet veto powers over anything the bureaucracy might do, either by refusing to pass bills which bureaucrats have drafted or else by overturning bureaucratic regulations with statutes. Japan's constitution (art. 73) also gives LDP politicians control over bureaucratic careers, for LDP leaders headed the bureaucracy as ministers and therefore LDP controlled, directly or indirectly, the hiring, firing, and promotion of all bureaucrats beneath them. Knowing this, career bureaucrats rarely flouted LDP preferences, and often paid through the nose when they did. The law enables LDP politicians to wield power over bureaucrats in other ways as

well,[15] but I think I have already made my point. Just as U.S. legislators can compel bureaucrats to comply with their wishes, so Japanese legislators can do likewise. Moreover, in both countries the source of the legislators' power is legal and, notwithstanding Haley's thesis, legally powerful.

Ramseyer and Rosenbluth also demonstrate how LDP politicians exercised power over judges, by manipulating the legal and institutional apparatus so as to constrain judges' behavior. That capacity to manipulate stemmed mainly from the LDP-controlled Cabinet's constitutional and statutory rights to appoint Justices to the Supreme Court and administrating judges to the Secretariat of the Supreme Court (the administrative organ that oversees the entire judicial system). These LDP appointees monitored the judicial behavior of their underlings and punished those judges who criticized or flouted either LDP or Supreme Court preferences (usually by selectively promoting and transferring noncompliant judges). In this critical area as well, then, Japanese law is sufficiently powerful to compel obedience.

A final aspect of Haley's Japanese evidence I want to reconsider concerns the causes of the main characteristics of Japanese law. As I noted above, Haley argues that the chief distinguishing feature of Japanese law—authority without power—is the product not of intentional political choice but of institutional history and cultural environment (p. 193). While Haley is undoubtedly correct about the nature of the causes for some legal areas, he discounts too heavily the political causes of "institutional incapacity," which he claims is an important manifestation of "authority without power" and an extremely serious problem for both the civil and criminal justice systems (p. 121). On the civil side, there are very few judges or attorneys in Japan, and hence litigation is expensive, time-consuming, and infrequent. Analogous incapacity exists on the criminal side, where prosecutors are so few (fewer than 2,200 in the whole country) that the press of heavy caseloads forces them to channel a disproportionate number of cases to the informal "second track" of the criminal justice system where confession and repentance are the norm.

Surely history and culture must figure into any comprehensive account of such civil and criminal justice incapacities, but in recent years several scholars have made it clear that politics stand out most prominently in any such explanations. For example, Takao Tanase (1990) shows how in automobile accident disputes "the Japanese elite" (bureaucratic and political lead-

[15] Ramseyer and Rosenbluth (1993:ch.1) argue that the law also enables LDP politicians to gather information about bureaucratic performance and to require bureaucrats to post large portions of their earnings as bonds that the bureaucrats then receive only if they perform their duties satisfactorily during the course of their tenure.

ers) provide real alternatives to litigation and so "manage the demand" for law and lawyers' services. Those elites create agencies that provide free legal consultations to prospective litigants, standardize compensation schemes, and set up nonjudicial forums in which parties can have their cases heard and decided. This "unified, concerted effort of the social elites" fulfills the needs of Japanese who seek compensation, and so also helps to secure their satisfaction with the more formal but "institutionally incapable" legal system. And for Tanase, "the success of the Japanese elite in disarming the legal weaponry of the people" (p. 687) is an essentially *political* achievement.

Other scholars also stress the political context of Japanese law. Frank Upham (1987:1) describes how "elites use legal rules and institutions to manage and direct conflict and control change at a social level" and argues that in explaining how Japanese law works "politics may ultimately be the controlling factor" (pp. 3–4, 218). In some of his case studies Upham describes how litigation was an important lever of change in Japan, but more often and more importantly he shows how Japanese bureaucrats manipulate the legal rules and institutions they control in order to prevent courts from becoming central arenas for dispute resolution and policy formulation. Contrary to Haley's assertion about causes, Upham's model of Japanese law (which he calls "bureaucratic informalism") is not the result of impersonal historical forces or traditional values but is instead created by elites who have political aims and the resources necessary to achieve those aims (pp. 205–27).

Reconsidering Haley's America

Haley's thesis is explicitly comparative. He wants to show that Japanese law is distinctive because it is more authoritative but less powerful than law in other countries. His most frequent point of comparison is the United States, and he contends that Japan and the United States are at "opposite poles" of the spectrum which measures "breadth and density of legal controls" and that "in no other industrial society is legal regulation as extensive or as coercive as in the U.S. or as confined and weak as in Japan" (p. 14). Surely the scope of law's domain is broader in the United States than in Japan (Kagan 1991), but Haley exaggerates the extent of that difference by underemphasizing how much informal norms supersede law even in America. Scholars have shown that in numerous American contexts informal norms matter more than law does, but perhaps none has done so in more interesting fashion than Robert Ellickson in his recent *Order without Law: How Neighbors Settle Disputes* (1991).

The title of Ellickson's book is obviously analogous in form

to Haley's title, but the similarities go far deeper than that, for their substantive arguments also significantly resemble each other. Empirically, Ellickson studied disputes between cattle ranchers and farmers in northern California's Shasta County. His main finding is that "Shasta County neighbors apply informal norms, rather than formal legal rules, to resolve most of the issues that arise among them." In the second part of his book Ellickson uses his main Shasta County findings to help develop "a theory of how people manage to interact to mutual advantage without the help of a state or other hierarchical coordinator" (p. 1). Together, Ellickson's findings and theory show that law is less important in America than Haley thinks. Many Americans govern themselves largely by means of informal rules or social norms that develop independent of the state. As Ellickson's title suggests, in America—just as in Japan—order is often achieved without law.

Haley also argues that Japanese law is unique because when it matters it is usually as authority, not as coercive power. He claims that Japanese law seldom effectively coerces, but as *tatemae* (or principles) it does legitimate government action, shape and reflect consensus, and demand respect and a measure of outward conformity (pp. 186–90). Here too, however, Haley paints a picture of Japanese law that is misleadingly distinctive, for he dilutes too much the authoritative and moral hues that must be central in any realistic portrait of the American legal scene.

Tom Tyler's *Why People Obey the Law* (1990) persuasively makes this point. Tyler presents the results of a large representative survey he conducted in Chicago in 1984–85, and his findings cast further doubt on claims about the uniqueness of Japanese law. Tyler shows that Americans comply with the law mostly because they believe law is just and legal authorities are legitimate. This central finding contradicts the widely held assumption (an assumption it seems Haley shares) that Americans are motivated by self-interest and obey the law solely or mainly because they fear punishment. The key implications of Tyler's study are that "normative issues matter" (p. 178) and that "the obligation to obey the law is based on trust of authorities," not on the presence or threat of coercive sanctions (p. 172).

If Tyler is right, then it seems Americans obey the law for the same reasons Haley says the Japanese do—because they believe law is fair and legal authorities are legitimate. In the end, this essential similarity renders Japanese law far less unique and paradoxical than Haley would have us believe. Moreover, Haley's closing contentions that "consensus and fairness become essential aspects of the social glue that holds the system together" and that laws have clout because they carry "morally

compelling force" (p. 191) fit the American scene as well as they do the Japan to which he intends them to apply.[16] Just as we saw that legal power matters in Japan, so legal authority matters in the United States. Together these two facts empty the "Japanese paradox" of much of its mystery.

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[16] Like Tyler, Feeley (1976:514) argues that when law matters, it is usually as authority, not as coercive power. Feeley shows that focusing on how the state mobilizes legal sanctions (as Haley does) misses "the most important way in which law intrudes into people's lives . . . [for] the genius and the power and the importance of legal authority is precisely because it is self-applying and self-mobilizing."

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