



Content downloaded/printed from

[HeinOnline](#)

Wed Feb 19 13:06:04 2020

Citations:

Bluebook 20th ed.

John O. Haley, Punish Or Prevent: The Night and Day of Criminal Justice, 7 Va. J. Crim. L. 119 (2019).

ALWD 6th ed.

John O. Haley, Punish Or Prevent: The Night and Day of Criminal Justice, 7 Va. J. Crim. L. 119 (2019).

APA 6th ed.

Haley, J. O. (2019). Punish or prevent: The night and day of criminal justice. Virginia Journal of Criminal Law, 7(1), 119-172.

Chicago 7th ed.

John O. Haley, "Punish Or Prevent: The Night and Day of Criminal Justice," Virginia Journal of Criminal Law 7, no. 1 (2019): 119-172

McGill Guide 9th ed.

John O Haley, "Punish Or Prevent: The Night and Day of Criminal Justice" (2019) 7:1 Virginia J of Crim L 119.

MLA 8th ed.

Haley, John O. "Punish Or Prevent: The Night and Day of Criminal Justice." Virginia Journal of Criminal Law, vol. 7, no. 1, 2019, p. 119-172. HeinOnline.

OSCOLA 4th ed.

John O Haley, 'Punish Or Prevent: The Night and Day of Criminal Justice' (2019) 7 Va J Crim L 119

Provided by:

University of Washington Law Library

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

PUNISH OR PREVENT: THE NIGHT AND DAY OF CRIMINAL JUSTICE*John O. Haley***TABLE OF CONTENTS**

INTRODUCTION.....	117
V. THE NIGHT.....	118
A. INTO THE TWILIGHT: PRESUMED GUILTY.....	118
1. Alice's Story.....	118
B. FOUND GUILTY: INTO THE DARKNESS.....	123
1. Benjamin's Story.....	123
2. Profiles.....	130
3. The Gatekeepers.....	133
4. Costs and Consequences.....	142
5. To What Ends?.....	143
VI. THE DAY.....	143
A. THE SUN SHINES IN JAPAN.....	143
1. Jonathon's Story.....	147
B. WHERE THE SUN SELDOM SHINES: PRISON.....	160
1. Sam's Story.....	160
2. Conclusions.....	165
CONCLUSION.....	165

INTRODUCTION

Imagine two productive and prosperous industrial democracies:

One tends to criminalize nearly all behavior deemed socially inappropriate. It has thus created thousands of statutory and regulatory crimes. Compared to other industrial democracies, it has one of the highest rates of violent crime, particularly homicide. Throughout the society fear of crime remains rampant. Its citizens spend millions of dollars to secure their homes. In suburbs, gated communities have become the norm. More millions of dollars are spent on security guards for malls, schools, public facilities, and even hospitals. Parents do not permit their children to walk alone, even in their own neighborhoods. Few even venture into some urban neighborhoods in day or night. Thousands of well-armed police work in thousands of disparate jurisdictions. They patrol in bullet-proof cars and seldom, if ever, walk the streets. All exercise individual discretion with limited or no guidance or supervision. Their role is more to apprehend criminals than to prevent crime and they are rewarded more for the numbers they arrest than those they secure. This society also has more prosecutors and trial judges, whose courts are more clogged with criminal cases than almost any other. These law-enforcing authorities also exercise rarely supervised, individual discretion and are rewarded for the guilty pleas they garner and the punishments they inflict. It is a society that rejects corporeal punishment as “barbaric” and severely limits resort to the death penalty as “uncivilized” and yet, without any evidentiary hearing on guilt, hundreds of its citizens are consigned daily to jails or prisons where criminal gangs are in control and incidents of violence, rape, and death are notoriously endemic. It arrests and holds in local jails, without trial or even meaningful interrogation, thousands of persons for days and often months. It also imprisons millions more and has created the world’s largest and most costly prison system, which has become a major public and private industry that employs thousands at taxpayer expense. Most inmates will spend their lives in and out of the prisons that for them have become the schools of crime. Surely this is the Night of criminal justice—the United States of America.

In contrast, the second society enjoys extraordinarily low crime rates, especially those of violent crime. Moreover, for decades, but for only one brief interval, the actual number—not merely the rates--of violent crimes has steadily fallen. Those who live here are remarkably safe. They can expect to retrieve at a

lost-and-found office or local police station a camera, even a purse, left on a bus or dropped on the street in front of a restaurant days before. Without adult supervision, their children safely take buses, subways, and walk blocks to elementary schools far from home. They can leave their cars unlocked when dropping a package off at the post office. Secretaries can, without apprehension, collect bags full of cash at banks for themselves and friends each pay day.

In the case of accidents, regardless of any fault or legal liability, those who have been injured and are hospitalized can anticipate a visit by the person responsible, to express concern and sympathy with at least a token gift, often cash--the greater the likelihood and degree of legal responsibility, the larger the amount. Those who do commit crimes are generally apprehended, but they routinely apologize, express remorse, and seek to compensate any victims.

Few offend, but even fewer go to jail. Detention is rare and imprisonment is even rarer. Still violent crimes decrease in number. There are also relatively few prosecutors and judges, but these few are among the highly educated legal elite. Serving in separate but centralized agencies, their collective reputation matters. They all enjoy significant degrees of discretion but are subject to national, and often international, media attention for any serious indiscretion or error. By all accounts, all also enjoy high levels of public trust. Moreover, the number of those jailed or imprisoned who are later proven to be innocent is extraordinarily small by comparison with the first society—another difference, one might say, between night and day.

As one might also surmise, described here is a predominately communitarian society. Although highly urbanized, it is ethnically homogenous with relatively stable neighborhoods and families. Divorce rates are low and children born out of wedlock are few. It enjoys high per capita income and a relatively even distribution of wealth. Many will recognize Japan as this country. Its inhabitants bask in the sunshine of the Day of criminal justice.

I. THE NIGHT

A. INTO THE TWILIGHT: PRESUMED GUILTY

1. Alice's Story¹

The knock at the door of the apartment woke me up. I looked at the clock on the nearby table. It was 1:25 AM. Groggily, I got out of bed. I opened the door to find two uniformed police officers standing there. "Are you Alice Jones?" one

¹ This and the other stories in this article are true stories based on the author's interviews with the persons whose experiences are described. The names of these persons have been changed. —Eds.

asked. "Yes," I replied. "Well," the officer continued, "we are here to place you under arrest. You need to get your clothes on and come with us." I could not understand what was happening. "Oh," I protested, "there must be some mistake. Why are you here? I haven't done anything." One of the officers replied, "All we know is that we have a warrant for your arrest and have to take you into custody. We don't have a copy with us and can't tell you why," the officer went on. "You will have to take that up with the magistrate." With that said, the two officers escorted me, now handcuffed, to the police car outside of the building and drove me to the county jail. Once they had turned me over to the officer on duty at the entrance, they left without further word. I was then led to a counter in what appeared to be a receiving room. At the counter, another officer told me to take off my shoes and empty my pockets. I protested as I began to slip off my shoes. "I should not be here. There is no basis." The officer calmly responded, "Can't answer questions. Just do as you are told." That was the constant refrain of every officer I encountered during the next nine hours. "Can't answer questions. Do as you are told." No questions answered, no questions asked.

After depositing my personal belongings, including my cell phone, I was told to take a seat on one of the benches that lined two sides of the room. About a dozen rather bedraggled persons were sitting on the benches, mostly white males and all but one or two in their twenties or early thirties. Directly across from where I seated myself were two glass-enclosed cubicles, behind which two other officers seemed busy at desks and computers. Next to the cubicles was a third open section with two or three other officers and what turned out to be an apparatus for finger printing and photo equipment. After sitting for over an hour, I was told to go over to this section to be fingerprinted and photographed. Again, no questions asked or answered and then back to the bench. In the meantime, three or four other persons, all male, were delivered and received at the entrance and subjected to the same procedures.

Another hour or so passed when finally, at about four or five o'clock in the morning, a guard directed the entire group to go down a hall into another, much larger waiting room, with multiple rows of chairs linked together and divided into two sections. At one end was a circular desk behind which another police officer sat overseeing the entire group of about two dozen men and women, about half of whom were African Americans of various ages. Again, along one wall were several glassed-in cubicles behind which sat one or two officers at

computers. At one end was a larger, unoccupied office. At each end of the room were doors through which police officers came and went. They only spoke to each other, conversing and laughing, paying little if any attention to those sitting and waiting. They asked no questions and, in answer to any questions asked, they merely said, "sit down and be quiet."

Next to the desk at the center was a bank of telephones. Calls could be made but none could be received. I called my sister to tell her where I was and ask for her help. Two or three more hours passed. At about 8:30 there was a change of guards and then an officer entered from the receiving room with a handful of papers, which he handed to the officer at the desk, who began to call names. Two or three persons rose in response and were escorted back to the receiving room. Several minutes later another officer entered from a side door. More names of the women in the room were called, including mine. We were all ordered to follow the officer through the door from which he had entered. He then led us—all women—down a hall to an elevator and up to another floor, another receiving room and into a side cubicle into which all were told to enter. A young female officer appeared with a hamper filled with blankets, towels, and prison uniforms. Without a word, she began slowly to organize individual bundles. She finally turned to the assembled group and said that when our names were called each was to take the blanket, towel, and uniform handed to her and follow another female guard to a shower room where we were to undress, take a shower, and don the prison garb. We would then be escorted into the main room of the county jail.

Just before the first name was called, a guard appeared. I was taken back to the waiting room with another person, an African American who had been booked just after me. About 30 minutes later, we were escorted to a separate entrance and released. Bail had been posted for us both. My roommate was awaiting me at the entrance. Only then did I learn that I had been charged with a felony assault of my son. Several weeks later, at the first court hearing, the District Attorney agreed to dismiss the case.

The evening of my arrest, my teenage son had another one of his temper tantrums, which had become increasingly frequent and severe. I told him to go to bed. He did so, but apparently around midnight he had called 911 and told the person who answered that I was beating him and someone needed to come immediately. The so-called warrant for my arrest was apparently based on what he had said. He later admitted that his accusation was false. The charges against me were thus dismissed. Not, however, before I had spent several thousand dollars in legal fees. Several months after this ordeal, he attempted to commit

suicide and is now being treated in a center that specializes in therapy for persons suffering from a neurological malfunction known as Borderline Personality Disorder (BPD), which in my son's case may have been caused by a childhood injury to his forehead.

Alice was presumed and treated as if guilty from the moment a warrant—without any evidentiary basis beyond her son's allegations—for her arrest was issued. Today nearly all of those arrested are detained in jail. As stated in a recent Vera Institute study: “The likelihood that arrest will lead to a jail booking has increased steadily over the years. Thirty years ago, when crime rates overall were higher, there were 51 admissions into jail for every 100 arrests. By 2012, the most recent year for which national data are available, that number had climbed to 95 admissions per 100 arrests.”²

Alice's journey into the Twilight ended only because her bail was paid. Had Alice been without a relative or friend to call, she would have been jailed—who can say for how long. Had she been destitute, she would have remained in jail until a trial many weeks if not months later. Ironically, hours earlier in New York on the same day of Alice's arrest, the Vera Institute had released its study of jails in the United States.

Each day nearly a million Americans—most if not all supposedly presumed innocent—are held in jails for at least hours if not days. The average detention in 2013 was estimated at 23 days.³ Most have not been convicted of any crime and are thus legally presumed to be innocent but, unable to post bond, have been confined in jails to await trial. In the words of the Vera Institute study:

There are more than 3,000 jails in the United States, holding 731,000 people on any given day...This number, high as it may be, is only a one-day snapshot. In the course of a typical year, there are nearly 12 million jail admissions—equivalent to the populations of Los Angeles and New York City combined and nearly 19 times the annual admissions to state and federal prisons.⁴

² RAM SUBRAMANIAN ET AL., VERA INSTITUTE OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 22 (2015), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf>.

³ *Id.* at 10.

⁴ *Id.* at 4.

As in nearly all instances today, arrest was Alice's entry point into the criminal justice system. Officers from either a police or sheriff's department make the critical decisions. Although their discretionary authority may be more circumscribed if a warrant has been issued, when responding to a reported or observed criminal activity, they generally have several choices. They may decline to intervene or they may decide to make an arrest, issue a summons, or simply give the suspect a verbal warning. Ordinarily they may also refer the party to health or other services such as a community mental health clinic or substance abuse program outside of the criminal justice system. The no questions asked, no answers given approach that Alice encountered may be exceptional, but it is also unwarranted and contrary to principle. For a magistrate to issue an arrest warrant or for the police to make an arrest and detain a suspect more often than not constitutes a counterproductive predetermination of guilt.

Although presumed innocent, three quarters of those held have only been charged (but not convicted) with nonviolent traffic, property, drug, or public order offenses. In New York, nearly half were charged with misdemeanors or lesser offenses. In Los Angeles, the Vera Institute found, a majority were placed in custody for traffic and vehicular offenses.⁵ On average, those in jails, innocent or guilty, remain in custody for nearly a month (23 days).⁶ Nearly all are disadvantaged. A U.S. Bureau of Justice Statistics study published in 2002 and revised in 2004 found that 56% of jail inmates "grew up in a single-parent household or with a guardian. About 1 in 9 had lived in a foster home or institution."⁷

White or black, the poor suffer most. A large majority of inmates, regardless of race, cannot afford to post bond for release. As reported by Nick Pinto in the *New York Times Magazine*:

In New York City, where courts use bail far less than in many jurisdictions, roughly 45,000 people are jailed each year simply because they can't pay their court-assigned bail. And while the city's courts set bail much lower than the national average, only one in 10 defendants is able to pay it at arraignment. To put a finer point on it: Even when bail is set comparatively low — at \$500 or less, as it is in one-third of nonfelony cases — only 15 percent of defendants are able to come up with the money to avoid jail.⁸

⁵ *Id.* at 5.

⁶ *Id.* at 10.

⁷ DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES, 2002 1 (2004), <https://www.bjs.gov/content/pub/pdf/pji02.pdf>.

⁸ Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.

In addition, a large percentage suffer from some form of mental illness, for which over 80 percent of whom receive no treatment.⁹ These data do not include those with mental problems who, like Alice's son, use the criminal justice system to vent a personality-disorder-induced anger.

For those unable to post bond or who are not otherwise released, the Twilight quickly turns into a dangerous Darkness. Despite the continuous presence of guards, jails are not safe. As a percentage of population, the risk of rape is higher in U.S. jails than in any U.S. city or suburb. According to a 2013 National Institute of Justice survey¹⁰ in 2011-2012, over 27,000 persons subject to custody in the 358 U.S. jails subjected to the survey were raped either by other inmates (11,900) or staff (13,200) or both (2,400).

Also, in the United States, innocent or guilty, those detained in jails pay a high cost. In the words of the Vera Institute study:

[M]ost jails have contracts with private telephone and video conferencing companies that charge higher rates to inmates than they do in the community. While each individual fee may be small, they add up. Some people have been required to pay thousands of dollars in fines and fees. Even when jurisdictions offer payment plans, they often include surcharges and other fees. Add to this child support payments, credit card debt, rent, and other living expenses that can accumulate during incarceration—often with late charges or compounded interest tacked on—the financial picture for many leaving jail is very bleak. [Footnotes omitted.]¹¹

Upon release, even with legal exoneration by subsequent dismissal of all charges, the arrest remains on a permanent public record for anyone to find as a socially stigmatic presumption of guilt.

B. FOUND GUILTY: INTO THE DARKNESS

⁹ SUBRAMANIAN ET AL., *supra* note 2, at 11—12.

¹⁰ ALLEN J. BECK, ET AL., BUREAU OF JUSTICE STATISTICS, *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12* 8 (2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

¹¹ SUBRAMANIAN ET AL., *supra* note 2, at 15.

1. Benjamin's Story

I was born in Illinois, the youngest of four children. My father moved out when I was five. I was essentially raised by my mother's father. When I was 13 my mother died of cancer. My father, now remarried and living in the southeast, returned and took custody of me and my two older brothers and one sister, apparently so he could get the state subsidy for dependent children, moving us to his home. I was physically and sexually abused by my step-mother over the next four years. When I turned 17, I joined the army. I served in Desert Storm, Somalia, and twice in both Iraq and Afghanistan. I was awarded two Bronze Stars and a Purple Heart. I left the army and returned home. I was also now married and had a son of my own. I decided to go to college and entered a state university in 2005. Among my classmates was a woman whom I befriended. I will call her Patricia.

Married to a husband who never seemed to find any paying job, Patricia constantly pleaded with her classmates for money to buy lunch or dinner, for incidentals, even clothes. I had an army pension and wanted to be generous and often helped her out, paying for her lunch, some bills, and other things. One day she told me about their need for a car. Theirs had broken down, she said. But they had found a suitable used one to replace it. She then asked me if I would help them pay for it. She wanted me to give her the full price. I told her I couldn't do this. She asked again. When I continued to refuse, she said, "You'll be sorry for this," and angrily turned and walked away.

One evening three or four weeks later, I heard a knock at the door to my apartment. When I opened it, a deputy from the sheriff's office stood there. He asked to come in. Once inside, he turned to me and asked, "Is there anything you need to talk about?" He then asked me, "Don't you want to tell me or don't you want to admit it?" He then left without another word. No arrest. Six months later, he returned with another deputy. "You need to come to the station and answer some questions." I was told. "Do I need a lawyer?" I asked. "No, you are not under arrest. We just want you to come down and answer some questions." I then learned that I had been accused of the sexual abuse of Patricia's two daughters, neither of whom I had even met. "Well," I said, "do a DNA test and see!" "Too late for that," a deputy answered. "They will have been washed clean." "I want a lawyer," I insisted. "You don't need a lawyer," he said. "You're fine. You just let us work on our case." I was taken home and told: "Don't leave!" In protest, I responded, "But you told me I didn't need lawyer!" "You are not under arrest, just don't leave," he retorted and left.

Two or three weeks later on a Friday night at 11 o'clock, I was alone with my 12-year-old son when the two deputies returned. "You are under arrest. We have to cuff you and take you in," one told me. "What about my son?" I asked. "I can't leave him alone." "We will call child services," he said. I protested and called my girlfriend who came and agreed to stay with him. I was then taken handcuffed to the station where I was fingerprinted and had my photo taken. I was never interviewed, then or before. No questions asked. No answers given. Bond was set at \$30,000. I did not have that kind of money, but I again called my girlfriend who somehow arranged for bail. A hearing was set for the next day. An elderly public defender appeared as my attorney. I had simply to appear in court every two weeks for almost a year.

Months passed before the preliminary hearing. My lawyer assured me that the prosecution had no evidence. "They only have written statements by the girls and family. They haven't even been interrogated. But I do not want to take you before a jury. In this county, I am certain a jury would convict you." He suggested that I plead guilty, saying that I would almost certainly get probation. "I know Judge P, who will handle this case," he assured me. "He would not sentence you to serve time." The DA had offered a 20-year sentence for a guilty plea. I held fast. No guilty plea.

The trial was held in November, three months later. The clerk announced "All rise!" Thereupon Judge G, not Judge P, walked in and sat behind the bench. Noting that Judge P was ill and that he was substituting, Judge G commenced the proceedings. My lawyer stood and requested that the trial be postponed until Judge P recovered and returned. Judge G denied the request and again ordered the trial to begin. The only witness for the prosecution was one of the two girls. When the defense began, Judge G turned and began whispering to a clerk. My lawyer stopped and asked the judge if he should proceed. The judge momentarily turned from the clerk and said that he should continue, then he added, "I have already made my decision." I was found guilty and sentenced to 6 years, 3 years in prison and 3 years on probation. We appealed all the way to the state supreme court, to no avail. I was taken into custody. Three years later at 5 AM, without notice to my family, my name was called and I was escorted out of the prison. I thought I was being released. Instead, I was loaded into a van and taken to a different prison.

We arrived after several hours at an “intake” facility. I noticed the inmates working as assistants looking at my papers, then at me. I knew they noted I was listed as a “sex offender” and that every inmate would soon become aware of my alleged offense. Every day for a week we were awakened at 6 AM and subjected to tattoo and assorted health inspections, blood tests, shots for all sorts of diseases, as well as instructions on the rules and admonitions against “affiliations.” In other words, gangs. We were given ID cards, which we had to have at all times. The penalty for not carrying your ID was three days in the “hole”—solitary confinement. They also explained the point system. Points were given based on the offense as well as good (or bad) conduct. First time offenders received one point. Those guilty of a second offense received 3 points to start with. Those with 5 points or lower were assigned to an annex where they could work outside of prison. Those with 6 to 11 points would be confined in a medium security prison. Those with 12 points or higher would be sent to a maximum-security facility. I remained at the intake facility for four weeks. The closest prison to my home was over three hours away by car. The others would require a six or even twelve-hour one-way trip for only a couple of hours’ visitation at most.

Because of over-crowded prisons, we were next sent to an “overflow” facility, which was an “open game.” Gangs were rampant. Incoming inmates would first be “targeted” by members. Someone would bump into you and then you would be “bum rushed” by others. As a consequence, many new inmates, especially those who were of slighter build, would have to be hospitalized.

There were at least a half-dozen gangs in all of the facilities I was assigned to, each competing for group control. Some were formed in prison but continued to operate on the outside as members were released. Others were outside gangs that reformed in prison as members were incarcerated in the same facility. The members of particular gangs could be identified by their distinctive tattoos. Most also had identifiable acronyms, such as MS13, MAM, or OMFG. Some, like the Aryan Nation and Aryan Brotherhood, were race or ethnicity based. At 6’2” tall and weighing over 200 lbs., I was seldom targeted and generally left alone, but on a couple of occasions I had to fight back and at least once was saved by a cellmate, who was a gang leader and had become a friend. His members provided me with some protection. On one occasion the mother of my girlfriend, my “Grammy” saved me. While visiting me, she noticed a lonely inmate nearby without any visitors. We had previously had a dispute and he was there eyeing me, just waiting for the visitation period to end. Over my protest, “Grammy” went over to him, said a few kind words and offered him some of the

muffins she had brought. After she had left and we were leaving the room he turned, thanked me, and said, "From now on, I've got your back."

Once in control the gang essentially maintained a kind of order. They maintained an "honor" system but one paid for "protection." We of course had no money, but family and friends could pay into an inmate's account, enabling debit card arrangements for purchase of various items at the prison commissary. New inmates using the commissary for the first time would again be targeted and made to "pay" for protection. With the goods they obtained, gang members—the "store men"—would barter 2 for 1 with inmates who wanted soft drinks or cakes. They even operated telephone systems. Cellphones would be smuggled in and one could "buy" minutes for a call using credit on a "green dot" card that was similar to a Walmart card. This was still less expensive than the state-provided phones that could cost \$20 per call.

After six months in the "overflow" facility, I was sent to a regular prison—a "compound"—where I spent the next seven months. After that I was allowed to enter an "annex" where all but sex offenders were allowed to work on the outside for minimum wages (with deductions for prison expenses). Because of my status I could not work outside, but I could work and take classes in the annex. Various classes were available—leather craft, wood-working, even knitting. With regular attendance, taking a class could reduce a sentence by 60 to 90 days. I chose a cooking class.

I was lucky. The chief instructor, who came from the outside, was a good man. For the remainder of my sentence I was able to cook whatever we had the ingredients for. Once we made "inmate" ice cream. On another occasion, I made a large plate of chocolate chip cookies that I passed around among the cells. The CO's, especially the "Dorm Daddy's," of course, helped themselves to whatever we made. "Hustling" we called it.

Five years after my arrest, I was released. I was given my few personal belongings, a new pair of blue jeans, a shirt, a jacket, 75 dollars, a voucher for a bus ticket, the cash for earnings, and what else was owed on my credit statement. I crossed the "white line" to freedom and left the annex. My release had for some undisclosed reason been delayed for two weeks. Until I could explain to my probation officer why I had not reported to him within the required time frame after my scheduled release, I briefly faced re-arrest. My prospects were and

continue to be bleak. I had no job and doubt that as a convicted sex offender I will ever find one. I lost my son. His maternal grandmother was given custody. The stigma will continue for life. Google my name and you will find me listed as a "sex offender." But for a few kind and loving friends, my life would be hopeless.

For those like Benjamin who stand trial and are convicted, the Twilight that Alice experienced at the edge only deepens into Darkness. As of 2004, seventy percent of those convicted of a felony in a state court (94% of all felony convictions) are sentenced to imprisonment either in a jail (30%) or prison (40%) for an average sentence of nearly 5 years. Less than a third are placed on probation.¹² In addition to the thousands in jails awaiting trial or sentencing, as of 2014 over a million and a half more persons are currently incarcerated in state or federal prisons.¹³ The good news is that the number of inmates has decreased significantly over the past five years. The bad news is that today the United States still has the largest number of persons incarcerated per capita for criminal offenses of any country in the world—perhaps the largest number per capita in world history. Moreover, during the past decade, despite significant declines in the rates of violent crime nationwide, the duration of incarceration has increased. Life sentences, for example, are reported to have increased by 83% between 1992 and 2003.¹⁴ More than triple that number are subject to some form of correctional supervision.¹⁵ For prisoners released in 2009, the overall average time served in state prisons was nearly three years—a 36% increase from the average length of time served by those released in 1990.¹⁶ No other country in the world imprisons so many for so long.¹⁷

¹² MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2004 1—2 (2007), <https://www.bjs.gov/content/pub/pdf/fssc04.pdf>.

¹³ ANN E. CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 5 (2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf>.

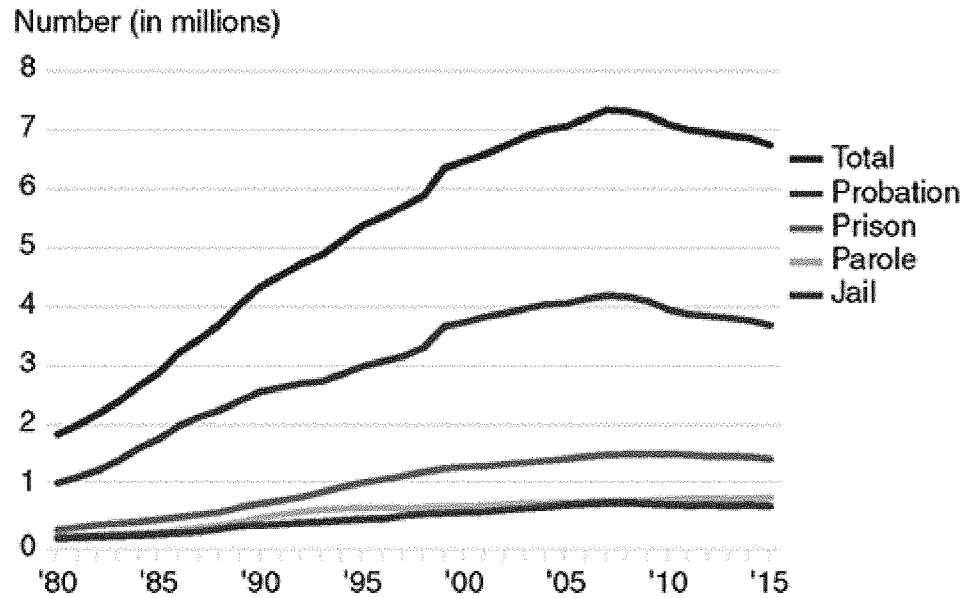
¹⁴ MARC MAUER ET AL., THE SENTENCING PROJECT, *THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT* 3 (2004).

¹⁵ DANIELLE KAEBLE & LAUREN GLAZE, U.S. BUREAU OF JUSTICE STATISTICS, TOTAL CORRECTIONAL POPULATION 2015 1 (2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf> (“At yearend 2015, an estimated 6,741,400 persons were supervised by U.S. adult correctional systems . . .”).

¹⁶ THE PEW CENTER ON THE STATES, *TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS* 13 (2012), https://www.pewtrusts.org/-/media/assets/2012/06/06/time_served_report.pdf.

¹⁷ See ANDREW COYLE ET AL., *IMPRISONMENT WORLDWIDE: THE CURRENT SITUATION AND AN ALTERNATIVE FUTURE* 14—16, 46 (2016); MARC MAUER, *THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS* 2 (2003); NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 2 (Jeremy Travis & Bruce Western eds. 2014); ROY WALMSLEY, *WORLD PRISON BRIEF, WORLD PRISON POPULATION LIST* 2 (11th ed.

Total adult correctional population, 1980–2015



Source: Bureau of Justice Statistics, Annual Survey of Jails, Annual Survey of Parole, Annual Survey of Probation, Census of Jail Inmates, and National Prisoner Statistics, 1980–2015.

As both Alice and Benjamin witnessed first-hand, most of those in prison and jail are underprivileged—regardless of ethnicity, race, color, or national origin. They comprise the poorest, least educated, and most disadvantaged members of U.S. society. African-American males, their families, and their communities suffer the most. In 2010, the incarceration rate for adult African-American males was 4,347 inmates per 100,000. The rate for adult Hispanic males was 1,775 inmates per 100,000. In contrast, the proportion of adult white males was 678 inmates per 100,000.¹⁸ Nearly half of all inmates are African-

2016),

http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf; Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html>.

¹⁸ LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010 8 (2011), <https://www.bjs.gov/content/pub/pdf/cpus10.pdf>.

Americans.¹⁹ In 2007, nearly 2 million children, over two-thirds African-American, had a parent in prison.²⁰ Moreover, one in four African-American men between the ages of 18 and 24 are serving time. Twice that number is on parole or probation.

African-American inmates are also disproportionately incarcerated in prisons located in distant communities with low African-American populations.²¹ Sheer distance cuts off relationships with family or potentially supportive members of their community. As Benjamin also discovered, this problem is not confined to African-Americans. For some the problem is even worse. Lacking sufficient jail or prison space, for example, the State of Hawaii assigns hundreds of mostly young native Hawaiians to prisons in Arizona.²²

Nor are U.S. prisons any safer than the jails. As Benjamin observed, younger, smaller, white males are especially vulnerable as “targets” within the first few weeks of incarceration. For protection, many inmates by necessity join a gang comprising inmates of the same race or ethnicity.²³ Violence is prevalent. According to the Bureau of Justice Statistics, the number of inmate deaths in jails and prisons in 2013 was 4,446, the highest number since 2007. Of those deaths, next to illness, suicide was the leading cause.²⁴ A 2011 Department of Justice Report states that in 2008 in adult prisons there were 26,200 cases of rape involving force or threat of force and 18,400 nonconsensual sexual acts involving pressure or coercion.²⁵ Yet, despite such long-term mass incarceration and recent declines (except for homicides), the U.S. suffers from high rates of crime generally and especially high rates of violent crime in comparison with other industrial democracies with credible statistics.²⁶

¹⁹ *Id.* at 8.

²⁰ THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007 1 (2009), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarcerated-Parents-and-Their-Children-Trends-1991-2007.pdf>; LAUREN E. GLAZE & LAURA M. MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN (2010), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf>.

²¹ Peter Wagner & Daniel Kofp, *The Racial Geography of Mass Incarceration*, PRISON POLICY INITIATIVE, 2015, <https://www.prisonpolicy.org/racialgeography/report.html>.

²² See also *Overrepresentation of Native Hawaiians in Arizona*, PRISON POLICY INITIATIVE, http://www.prisonpolicy.org/graphs/2010percent/AZ_Hawaiians_2010.html.

²³ Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prisons for Men*, 80 THE PRISON JOURNAL 379, 386 (2000), <http://www.spr.org/pdf/struckman.pdf>.

²⁴ *Mortality in State Jails and Prisons, 2000-2013—Statistical Tables*, U.S. BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=194>.

²⁵ U.S. DEPARTMENT OF JUSTICE, INITIAL REGULATORY IMPACT ANALYSIS FOR NOTICE OF PROPOSED RULEMAKING TABLE 1 15, https://ojp.gov/programs/pdfs/prea_nprm_iria.pdf

²⁶ International comparisons are difficult because of varied definitions and differences in statistical methodology. Outside of Africa and Latin America, the U.S. appears to rank within the nations

2. Profiles

We usually know what crimes have been committed, but who are the offenders? But for Benjamin's military service and his aspirations, he would have been typical--from a broken home, mistreated by a step-parent, his only memorably happy times with a grandfather. Those in prison represent the most disadvantaged and vulnerable members of our communities. Of black men in the United States, those without a high school diploma were more likely to be in prison or jail (37 percent) than to be working (26 percent).²⁷ The vast majority of those in jails and prisons suffer from drug or alcohol abuse, mental illness, poverty, failure in school, or victimization. Sixty-eight percent of people in jail have a history of abusing drugs, alcohol, or both.²⁸

Among the largest groups are those also suffering from some form of mental illness.²⁹ With respect to those held in jails, according to the findings of the Vera Institute:³⁰

Serious mental illness, which includes bipolar disorder, schizophrenia, and major depression, affects an estimated 14.5 percent of men and 31 percent of women in jails—rates that are four to six times higher than in the general population. According to the BJS [Bureau of Justice Statistics], 60 percent of jail inmates reported having had symptoms of a mental health disorder in the prior twelve months. People with serious mental illnesses are often poor, homeless, and likely to have co-occurring substance use disorders and, thus when untreated, are far more prone to the kinds of public order offenses and minor crimes that have been the focus of law enforcement in recent years and have helped

that have the highest total number of crimes per capita and within the upper half dozen for violent offenses. See, e.g., *International Statistics on Crime and Justice*, EUROPEAN INSTITUTE FOR CRIME PREVENTION AND CONTROL, 37 (2010).

²⁷ BECKY PETTIT, *INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS* 15 (2012).

²⁸ SUBRAMANIAN ET AL., *supra* note 2, at 11.

²⁹ Ana Swanson, *A Shocking Number of Mentally Ill Americans End Up in Prison Instead of Treatment*, WASHINGTON POST (April 30, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/04/30/a-shocking-number-of-mentally-ill-americans-end-up-in-prisons-instead-of-psychiatric-hospitals/?utm_term=.306a5d0a5d82.

³⁰ SUBRAMANIAN ET AL., *supra* note 2, at 11-12.

swell jail populations. [Footnotes omitted.]

Even higher is the percentage of those in prison with some form of mental illness. According to a 2006 Bureau of Justice Statistics Special Report authored by Doris J. James and Lauren E. Glaze,³¹ 56 percent of inmates in state prisons and 45 percent of those in federal prisons had a known mental health problem. Unknown is the number of persons suffering from unrecognized neurological mental disorders (organic or borderline personality disorders), that lead to outbursts of anger, violence, and other forms of dysfunctional behavior, resulting from sports injuries, frontal lobe injuries in infancy, or other causes that are as yet not fully understood much less recognized.³²

And what of collateral damage to the innocent “victims” of incarceration? Nearly all inmates have at least one living parent or grandparent. More than half of all prisoners are parents with children under the age of 18—two on average. A Child Trends Report issued in October 2015,³³ estimated that 1.7 million children under the age of 18 had a parent in prison. The number of incarcerated parents of minor children is estimated to have increased by 79% between 1991 and midyear 2007. 99 percent are fathers. A similar 2010 Pew Charitable Trusts report³⁴ estimated that 2.7 million minor children had a parent in jail or prison, which translates to 1 in 28 children (3.6%) with an incarcerated parent, up from 1 in 125 only 25 years prior. The Child Trends Report additionally estimated that nearly 7 percent of all children in the U.S. have at some time lived with a parent who was incarcerated.³⁵ The adverse effects on these children, who in most instances are already from the most economically, educationally, and socially disadvantaged communities in the nation, are staggering. The Child Trends 2015 Report cites research that shows these children suffer serious physical and mental health problems that continue into adulthood.³⁶ Many if not most of these children are placed under foster care with additional psychological cost to the children and

³¹ DORIS J. JAMES & LAUREN E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON INMATES 1 (2006); <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

³² On possible but neglected consequences of frontal lobe injuries, *See, e.g.*, Paul J. Eslinger, Claire V. Flaherty-Craig & Arthur L. Benton, *Developmental Outcomes After Early Prefrontal Cortex Damage*, 55 *BRAIN AND COGNITION* 84–103 (2004); Karen M. Barlow, Elaine Thomson & David Minns, *Late Neurologic and Cognitive Sequelae of Inflicted Traumatic Brain Injury in Infancy*, 116 *PEDIATRICS* 174 (2005), www.pediatrics.org/cgi/doi/10.1542/peds.2004-2739.

³³ DAVID MURPHEY & P. MAE COOPER, PARENTS BEHIND BARS: WHAT HAPPENS TO THEIR CHILDREN? 2 (2015), <https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>.

³⁴ Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, *DÆDALUS* 8 (Summer, 2010); http://www.amacad.org/publications/daedalus/10_summer_western.pdf.

³⁵ MURPHEY & COOPER, *supra* note 33, at 3.

³⁶ MURPHEY & COOPER, *supra* note 33, at 1-2.

financial cost to the states involved (Lawrence 2014, 992). The collateral damage extends beyond innocent children. In the words of the Pew report, “These costs are [also] borne by offenders’ families and communities, and they reverberate across generations.”³⁷ The Night envelops them all.

3. The Gatekeepers

Four categories of actors function as the gatekeepers of this descent into darkness—the police, prosecutors, judges, and those who manage and guard the jails and prisons. None take responsibility, and, in over 90 percent of all cases, none even make a determination of guilt based on a complete examination of all of the facts. In over 90 percent of cases, not even the courts determine guilt after a trial of the facts upon which guilt is presumed to be based.

For the gatekeepers, notwithstanding ardent claims to the contrary, neither truth-seeking nor even the prevention of crime is a priority. The primary concern of all, as experienced by both Alice and Benjamin, is to enforce the law by seeing to it that those whom they believe have committed a crime are punished. Retribution is the underlying, albeit seldom explicit, theme. Apprehending offenders and taking them into custody is one of the principal functions of the police. For these purposes, as of 2008 state and local governments employed 1,220,000 police personnel, including 765,000 full-time officers with authority to make arrests. Police officers are expected also to generate citations that produce fines and revenue. As witnessed by Alice, the police do not attempt to determine guilt. If they observe the commission of a criminal act first-hand, they may arrest on sight, using lethal force if deemed justified. Between 2003 and 2009, 4,813 arrest-related deaths were reported to the Department of Justice Arrest-Related Deaths program. Of these deaths, 61% (2,931) were classified as homicides by law enforcement personnel.³⁸

If the suspect is not caught in the act, the police generally depend on a warrant issued by a magistrate, which, as observed by Alice’s roommate, may be issued solely on the basis of an affidavit or statement by a complainant (who, from Alice’s roommate’s experience, may be clearly intoxicated or under the

³⁷ Western & Pettit, *supra* note 34, at 2.

³⁸ U.S. BUREAU OF JUSTICE STATISTICS, ARREST-RELATED DEATHS, 2003-2009 - STATISTICAL ARREST-RELATED DEATHS, 2003-2009 - STATISTICAL TABLES, (2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2228>.

influence of drugs) without any supporting evidence. The complaint suffices as “probable cause.” If the person arrested is later released as innocent of the crime, neither the magistrate nor the police involved accept responsibility.

Prosecutors play the central role. They are, in the words of Angela J. Davis, a former public defender, “the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official.”³⁹ Echoing these words in a seminal comparative study on prosecutors and politics, Michael Tonry notes that prosecutors, decide what crimes to prosecute; whom to charge; what to charge; whether to plea-bargain, offer concessions, or divert a case; how aggressively to seek a conviction; and what sentence to propose. Police arrest people, but prosecutors decide whether those arrests lead to charges. Judges preside over trials and sentence convicted offenders, but only those whom prosecutors bring before them.⁴⁰

As of 2007, there were 2,330 chief prosecutors' offices that handled felony cases in state courts of general jurisdiction in the U.S. They employed about 27,275 assistant prosecuting attorneys. They closed 2.9 million cases charged as felonies, or approximately 94 cases for each prosecuting attorney on staff.⁴¹

In all but five of the fifty states, chief prosecutors (referred to variously as district attorney, county attorney, commonwealth attorney, or state's attorney) are elected, in many cases, in partisan political contests.⁴² The chief prosecutors in five states and all U.S. attorneys are political appointments. They choose the assistant prosecutors who may be discharged at will. One consequence is that public opinion, media reports, and political considerations often influence the decisions about whom to prosecute.

In a 1999 survey of public prosecutors in King County (Seattle), Washington, Lauren Rayment found that their highest five priorities were—

1. protecting the public from crime and criminals,
2. discovering the accuracy of what occurred and respecting the right of suspects,
3. prosecuting and convicting only those you are certain have

³⁹ Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 25-26 (2008).

⁴⁰ Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 1 (2012).

⁴¹ W. PERRY & DUREN BANKS, U.S. BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007 2 (2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1749>.

⁴² GEORGE COPPOLO, STATES THAT ELECT THEIR CHIEF PROSECUTORS, <https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm>.

- committed crimes,
4. ensuring that offenders receive the punishment they deserve,
 5. treating like cases alike.⁴³

From these priorities, we can summarize the self-professed prosecutorial mission in the US to be to protect the public by convicting all criminals and ensuring that they are punished. They are remarkably successful in achieving these goals without any judicial determination of guilt based on evidence. Between 90 and 95 percent of all criminal cases do not involve evidentiary trials on the issue of guilt. Instead, defendants are routinely convicted on the basis of a “plea” of guilty that has been extracted by prosecutors prior to any trial. A “plea bargain” is typically based on negotiations between prosecutors and defense counsel (including public defenders) in which the prosecutor offers to charge the defendant with a crime or crimes for which the sentence is likely to be lower than the proposed alternative. In the words of Martin Yant:

“Even when the charges are more serious, prosecutors often can still bluff defense attorneys and their clients into pleading guilty to a lesser offense. As a result, people who might have been acquitted because of lack of evidence, but also who are in fact truly innocent, will often plead guilty to the charge. Why? In a word, fear. And the more numerous and serious the charges, studies have shown, the greater the fear. That explains why prosecutors sometimes seem to file every charge imaginable against defendants.”⁴⁴

If we keep in mind that a majority of those convicted suffer a mental illness, as noted above, Yant’s concerns become even more troubling. The likelihood of either innocent persons agreeing to plead guilty, or even those who are guilty of minor offenses accepting a plea of guilty for a more serious one, becomes even greater. In no other industrial democracy do prosecutors enjoy such advantage. As Stephen Schulhofer argued two decades ago, “Plea bargaining is a disaster. It can be, and should be, abolished.”⁴⁵ Yet, plea bargaining persists. The reason is

⁴³ LAUREN RAYMENT, A COMPARATIVE LOOK AT PROSECUTORIAL OBJECTIVES 2-5 (Analytical Research Paper, on file with the University of Washington Law Library, 1999).

⁴⁴ MARTIN YANT, *PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED* 172 (1991).

⁴⁵ Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L. J.* 1979, 1992 (2009).

simple—necessity. Over-criminalization has produced extraordinarily large caseloads and the necessity for some means for effective management. In California, of a total of almost 8.5 million cases filed statewide in the Superior Courts in the decade between 2002 and 2012, nearly 7 million were criminal cases.⁴⁶ How can the courts adjudicate with full evidentiary trials on guilt so gigantic a number of cases? Whatever the cost to the lives of the defendants--innocent or guilty--and their families, and communities, in the Night of criminal justice, plea bargaining is the preferred solution. As Tonry concludes, the United States, “is the last place in the developed world where an informed, rational, and self-interested person would choose to be prosecuted.”⁴⁷

Apparently, except when defined in terms of the apprehension and conviction of offenders, neither the police nor prosecutors in the U.S. consider the prevention of crime, or the correction of offenders, as among their professional functions or priorities. Nor have the prevention of persons from becoming offenders and the correction of those who do been tasks undertaken by the final set of gatekeepers—judges.

Nearly all state trial court judges are elected and nearly all who choose to run again are reelected.⁴⁸ In a few states and the federal judiciary judges are appointed by the executive and confirmed by the upper house of the legislature.⁴⁹ In the federal system and all but one state, appointed judges have life tenure.⁵⁰ In all cases the selection of judges in the U.S. involves a political process and decision. Moreover, many prosecutors, especially U.S. attorneys, become judges. One early study found that over a third of all state supreme court justices serving between 1900 and 1970 had served in their pre-judicial career as prosecuting attorneys.⁵¹ To what extent this influences their role as judges has long been an open question.⁵²

As in other common law systems, each judge serves for the designated term on the particular bench in the court to which they have been elected or appointed. In that position in no other legal system do judges enjoy greater

⁴⁶ JUDICIAL COUNCIL OF CALIFORNIA, 2013 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS: 2002–2003 THROUGH 2011–2012, xvii, <http://www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf>.

⁴⁷ Tonry, *supra* note 40, at 19.

⁴⁸ See John O. Haley, *The Civil, Criminal and Disciplinary Liability of Judges*, 54 AM. J. COMP. L. 281, 281–91 (2006).

⁴⁹ See *Id.*

⁵⁰ See *Id.*

⁵¹ Robert A. Kagan, et al, *American State Supreme Court Justices, 1900-1970*, 9 AM. BAR FOUND. RESEARCH J. 371, 377 (Table 2) (1984).

⁵² See Orley Ashenfelter, et al, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. OF LEGAL STUDIES 257 (1995); Martha Myers, *Social Background and the Sentencing Behavior of Judges*, 26 CRIMINOLOGY 649 (1988).

personal autonomy. Each is the master of his or her courtroom, from the selection of pictures and paintings to hiring the supporting staff. They enjoy the highest level of absolute immunity from suit of any public official. Except for disciplinary commissions that review claims of misconduct and judicial councils at the federal level with some general administrative responsibility for caseload management and case assignment, no superintending agency or office oversees their work. Except for judgments and other rulings subject to appeal, no higher authority exists to countermand their decisions. They are generally guided—except in cases involving mandatory sentencing laws--by only broadly worded, non-binding standards.

The American Bar Association defines the primary functions and duties of trial judges as follows:

The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.⁵³

The trial judge is above all else an umpire in an adversarial proceeding, who is obligated to ensure that the guilt of those accused has been proven “as required by law,” which includes convictions based solely on guilty pleas obtained by prosecutors. No evidence of guilt need be submitted. Once guilt has been thus established, the judge (or jury) is responsible for sentencing determined, under current guidelines as well as mandatory sentencing legislation, first and foremost by the offense. In effect, we repeat the ancient prescription of the *lex talionis* as well as the Chinese Legalists that the punishment must fit the crime not the

⁵³ STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-1.1(a) (AM. BAR. ASS'N, 3d ed. 2000), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/trial_judge.pdf.

offender.⁵⁴ Condemn the sin and punish the sinner.

Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage

Liam Stack,

New York Times, June 6, 2016

https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html?_r=0.

A recall effort against a California judge was announced on Monday in a sexual assault case at Stanford University that ignited public outrage after the defendant was sentenced to a mere six months in jail and his father complained that his son's life had been ruined for "20 minutes of action" fueled by alcohol and promiscuity.

In court, the victim had spoken out against the inequities of the legal process, arguing that the trial, the sentencing and the legal system's approach to sexual assault — from the defense lawyer's questions about what she wore that night to her attacker's sentence — were irrevocably marred by male and class privilege.

The case, which had made headlines after the suspect was found guilty in March, began to seize the public's attention anew after a Santa Clara County Superior Court judge, Aaron Persky, on Thursday handed the defendant, Brock Allen Turner, 20, what many critics denounced as a lenient sentence, including three years' probation, for three felony counts of sexual assault.

According to the judge: "A prison sentence would have a severe impact on him. I think he will not be a danger to others."

The next day, BuzzFeed published the full courtroom statement by the woman who was attacked. The statement, a 7,244-word cri de coeur

⁵⁴ The first known manifestation of the *lex talionis* is found in Sumerian and Babylonian law represented by the fragments of the edict of King Ur-Nammu of Ur (c. 2112–2095 BCE) and the Hammurabi stele (c. 1770 BCE). See SAMUEL NORTH KRAMER, *HISTORY BEGINS AT SUMER* (1981); MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* (1995). The Confucian philosopher and early Legalist, Xun Zi (or Hsün Tzu) ca. 312–230 BCE, is credited for coining the phrase "Let the punishment fit the crime." See 3 JOHN KNOBLOCK, *XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS* 166 (1988).

against the role of privilege in the trial and the way the legal system deals with sexual assault, was provided by the victim and has since gone viral. By Monday, it had been viewed more than five million times on the BuzzFeed site.

Also on Monday, the CNN anchor Ashleigh Banfield spent part of an hour looking into the camera and reciting the entire statement live on the air.

The unidentified 23-year-old victim, who was not a student of the university in Palo Alto, Calif., was attacked while visiting the campus, where she attended a fraternity party. In the statement, she spoke of drinking at the party, but not remembering the assault in January 2015.

She said she was told she had been found behind a dumpster, and learned from news reports that witnesses had discovered her attacker lying on top of her unconscious, partly clothed body. The witnesses intervened and held the attacker for the police.

The judge, identified by The Guardian as a Stanford alumnus, handed Mr. Turner, a champion swimmer, far less than the maximum 14 years after he was convicted, pointing out that he had no “significant” prior offenses, he had been affected by the intense media coverage, and “there is less moral culpability attached to the defendant, who is...intoxicated,” The Guardian said.

The victim said Mr. Turner had admitted drinking, but still had not acknowledged any fault in the attack, insisting the episode had been consensual. She said the court privileged his well-being over her own, and in the end declined to punish him severely because the authorities considered the disruption to his studies and athletic career at a prestigious university when determining his sentence. She wrote:

The probation officer weighed the fact that he has surrendered a hard-earned swimming scholarship. How fast Brock swims does not lessen the severity of what happened to me, and should not lessen the severity of his punishment. If a first-time offender from

an underprivileged background was accused of three felonies and displayed no accountability for his actions other than drinking, what would his sentence be? The fact that Brock was an athlete at a private university should not be seen as an entitlement to leniency, but as an opportunity to send a message that sexual assault is against the law regardless of social class.

Michele Dauber, a law professor and sociologist at Stanford, said Monday that she was part of a committee that was organizing a recall challenge to Judge Persky, whose position is an elected one. And by Tuesday, a Change.org petition calling for the judge's removal had garnered over 240,000 supporters.

Professor Dauber said the judge had misapplied the law by granting Mr. Turner probation and by taking his age, academic achievement and alcohol consumption into consideration.

"If you're going to declare that a high-achieving perpetrator is an unusual case, then you're saying to women on college campuses that they don't deserve the full protection of the law in the state of California," the professor said.

On Sunday, Professor Dauber posted to Twitter a statement read to the court by the defendant's father, Dan Turner.

As it stands now, Brock's life has been deeply altered forever by the events of Jan 17th and 18th. He will never be his happy go lucky self with that easy going personality and welcoming smile. His every waking minute is consumed with worry, anxiety, fear, and depression. You can see this in his face, the way he walks, his weakened voice, his lack of appetite. Brock always enjoyed certain types of food and is a very good cook himself. I was always excited to buy him a big ribeye steak to grill or to get his favorite snack for him. I had to make sure to hide some of my favorite pretzels or chips because I knew they wouldn't be around long after Brock walked in from a long swim practice. Now he barely consumes any food and eats only to exist. These verdicts have broken and shattered him and our family in so many ways. His life will never be the one that he dreamed about and worked so hard to achieve. That is a steep price to pay for 20 minutes of action out of his 20 plus years of life. The fact that he now has to register as a sexual offender for the rest of his life forever alters where he can live, visit, work, and how he will be able to interact with people and organizations. What I know as his father is that incarceration is not the appropriate punishment for Brock. He has no prior criminal history and has never been violent to anyone including his actions on the night of Jan 17th 2015. Brock can do so many positive things as a contributor to society and is totally committed to educating other college age students about the dangers of alcohol consumption and sexual promiscuity. By having people like Brock educate others on college campuses is how society can begin to break the cycle of binge drinking and its unfortunate results. Probation is the best answer for Brock in this situation and allows him to give back to society in a net positive way.

Very Respectfully,

Dan A. Turner

Mr. Turner's father said that his son should not do jail time for the sexual assault, which he referred to as "the events" and "20 minutes of action" that were not violent. He said that his son suffered from depression and anxiety in the wake of the trial and argued that having to register as a sex offender — and the loss of his appetite for food he once enjoyed — was punishment enough.

Brock Turner also lost a swimming scholarship to Stanford and has given up on his goal of competing at the Olympics.

In a statement, the Santa Clara, Calif., district attorney, Jeff Rosen, said the sentence “did not fit the crime,” and he called Brock Turner, who withdrew from Stanford, a “predatory offender” who refused to take responsibility or show remorse.

“Campus rape is no different than off-campus rape,” Mr. Rosen said. “Rape is rape.”

California passes mandatory sentences for sexual assault after Stanford scandal

The Guardian (US Edition)

<https://www.theguardian.com/us-news/2016/sep/30/stanford-sexual-assault-case-california-rape-law>

Governor Jerry Brown of California has signed two bills that emerged amid national outrage over the six-month jail sentence given to a former Stanford University swimmer who sexually assaulted a woman passed out near a trash bin.

The Democratic governor approved requiring sentences to be served in state prison for defendants convicted of assaulting unconscious victims, instead of a jail sentence like the one Brock Turner received in June and served in a county jail before obtaining early release.

Most common law jurisdictions have legislated mandatory sentences for certain offenses. In the U.S., the trend began in the early 1950s, with a focus on drug and sexual abuse. Today, mandatory sentencing laws have been enacted in virtually every state as well as at the federal level. Although the laws are intended to restrict the discretion of judges and to establish common and consistent standards for sentencing, in fact, as Michael Tonry notes,⁵⁵ they empower prosecutors, who control the charges brought and thus add to their already vast sources of leverage in plea bargaining. Both the prosecutors involved offered Benjamin and, presumably Brock, a lower charge if they confessed (and showed remorse) but with a term in prison to be determined by the judge (with the prosecutor’s recommendation within the parameters permitted, if a mandatory sentencing law applied). Benjamin states that the offer to him was to plead guilty and face the possibility of 20 years in prison. Both chose trial. In retrospect, for

⁵⁵ MICHAEL TONRY, SENTENCING REFORM IMPACTS 31 (1987).

either to have confessed and shown remorse would have surely been to their detriment. Better for each to plead not guilty, as they did, and let the chips fall.

4. Costs and Consequences

The dollar costs to taxpayers of the American Night are staggering. A widely reported 2012 Vera Institute study, based on a detailed survey of 40 states, estimated that the total annual cost of our prison system exceeds \$39 billion or on average \$31,286 per inmate.⁵⁶ These costs do not, of course, include the costs of the police, prosecutors, judges, or probation officers.⁵⁷ The average costs ranged from \$14,603 in Kentucky to \$60,076 in New York.⁵⁸ In 2017, the Institute reported that 13 of the 23 states that had reduced their prison populations since 2010 had saved 1.6 billion dollars.⁵⁹

And few felons find it easy to obtain work after release. They have “served their time” but continue to pay the price. Little imagination is necessary to predict the consequences for those who, on reentering society, have lost family, the means of livelihood, and community—except perhaps protective communities first formed in prison. Do we need to wonder why over two-thirds of those who have been incarcerated return to prison within three years for having committed another offense?⁶⁰ If one out of three African-American males today serves time in prison,⁶¹ we should not be surprised that three-fourths of all African-American children are today born out of wedlock—the highest rate in recorded history.⁶² As Pete Seeger might have asked, “[w]here have all the fathers gone?”

⁵⁶ RAM SUBRAMANIAN ET AL, *supra* note 2.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ VERA INSTITUTE OF JUSTICE, *THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010 – 2015* (2017),

<https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-from-the-director>.

⁶⁰ See U.S. BUREAU OF JUSTICE STATISTICS, [PRISON] REENTRY TRENDS IN THE U.S., (2015), <http://www.bjs.gov/content/reentry/recidivism.cfm>.

⁶¹ SENTENCING PROJECT, *Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System*, (2013), http://www.sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf.

⁶² See BIRTHS TO UNMARRIED WOMEN, <https://www.childtrends.org/indicators/births-to-unmarried-women>.

5. To What Ends?

With one of the highest rates of violent crime of any industrial democracy and the greatest reliance on mass incarceration, we need to ask: to what ends? To ensure “just punishment” for offenders? To reduce crime rates by preventive incarceration? Or simply because we cannot conceive of any more “civilized” or effective alternative? We enact mandatory sentencing laws to deter rapists and violence but ignore the rapes and violence inflicted on those in jail—housing, as noted above, a great many innocent persons—or prison. Keep in mind that the United States also enjoys the broadest scope of criminalization. By one relatively conservative estimate, there are today over 4,000 federal regulatory crimes with new ones being added almost daily.⁶³ From more gun control to more proactive policing, our most commonly touted solutions all involve the creation of new crimes and more offenders. We need to pause and ask ourselves, is there no alternative to stepping even further into the Night of criminal justice?

II. THE DAY

A. THE SUN SHINES: SAFE IN JAPAN

Even in big cities like Tokyo, small children take the subway and run errands by themselves.

Selena Hoy
The Atlantic, 5-6 Oct. 5-6, 2015.

It's a common sight on Japanese mass transit: Children troop through train cars, singly or in small groups, looking for seats.

They wear knee socks, polished patent-leather shoes, and plaid jumpers, with wide-brimmed hats fastened under the chin and train passes pinned to their backpacks. The kids are as young as 6 or 7, on their way to and from school, and there is nary a guardian in sight.

*A popular television show called Hajimete no Otsukai, or *My First Errand*, features children as young as two or three being sent out to do a*

⁶³ John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, THE HERITAGE FOUNDATION, (2008), <https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes>.

task for their family. As they tentatively make their way to the greengrocer or bakery, their progress is secretly filmed by a camera crew. The show has been running for more than 25 years.

Kaito, a 12-year-old in Tokyo, has been riding the train by himself between the homes of his parents, who share his custody, since he was 9. "At first I was a little worried," he admits, "whether I could ride the train alone. But only a little worried."

Now, he says, it's easy. His parents were apprehensive at first, too, but they went ahead because they felt he was old enough, and lots of other kids were doing it safely.

"Honestly, what I remember thinking at the time is, the trains are safe and on time and easy to navigate, and he's a smart kid," Kaito's stepmother says. (His parents asked not to publish his last name and their names for the sake of privacy.)

"I took the trains on my own when I was younger than him in Tokyo," his stepmother recalls. "We didn't have cellphones back in my day, but I still managed to go from point A to point B on the train. If he gets lost, he can call us."

....

The Japanese enjoy a degree of safety that eludes most people in the world. Tokyo and Osaka along with Singapore are deemed today the three safest major cities in the world.⁶⁴ The accolade is not new. In 1975, after an exhaustive study of the Japanese criminal justice system by Arthur C. Kaufmann and Ian H. Lennox, the Citizens Crime Commission of Philadelphia reached the same conclusion.⁶⁵ Although the overall number of reported crimes (but not per capita rate) has increased over the past six decades, the figures remain extraordinarily low by international standards.⁶⁶ More striking, it is the only industrial democracy

⁶⁴ SAFE CITIES INDEX 2015, <http://safecities.economist.com/the-safe-cities-index-2015> (last visited Oct. 20, 2018).

⁶⁵ CITIZENS CRIME COMMISSION OF PHILADELPHIA, TOKYO: ONE CITY WHERE CRIME DOESN'T PAY (1975).

⁶⁶ The increase was primarily in the reported number of thefts. It was relatively short-lived and

to have reduced violent crime by so much over so long a period. In 1954 a total of 1,360,405 crimes were reported (a per capita rate of 15.3 crimes per 1000).⁶⁷ In 2014, the number of total crimes reported had increased to 1,762,912 but with the growth of the population the rate per 1000 had decreased to 13.9.⁶⁸ Even more impressive, the absolute number of the most serious penal code offenses—homicide, robbery, arson, and rape—fell during the same period. For, example, the reported incidents of homicide fell from 3,081 in 1954 to 1,054 in 2014; the number of robberies, from 5,753 to 3,056, incidents of arson from 1,902 to 1,093, and the number of reported rapes from 4,148 to 1,250 despite more than a 40 percent increase in population.⁶⁹ The declines have not necessarily been steady or consistent. During the period since the end of World War Two—the number of reported rapes reached a postwar peak of 6,857 in 1964 and the number of reported penal code offenses (mostly theft) did rise significantly during the period between 1996 and 2002.⁷⁰ Nonetheless, Japan reached a new low in reported crimes in 2018.⁷¹ The following graphs illustrate Japan’s unique success in reducing violent crime for over a half century:

reportedly, despite public perceptions and media attention, did not reflect a significant increase in violent or other major crimes. See Koichi Hamai & Thomas Ellis, *Japanese Criminal Justice: Was Reintegrative Shaming a Chimera?* 10 PUNISHMENT & SOC’Y 25 (2008), <http://journals.sagepub.com/doi/abs/10.1177/1462474507084196>.

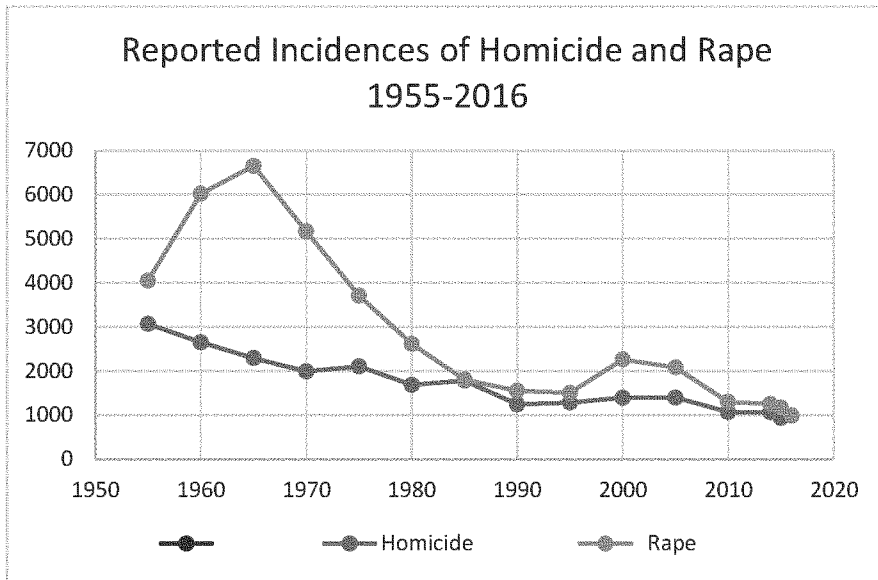
⁶⁷ JAPAN MINISTRY OF JUSTICE, WHITE PAPER ON CRIME, Part 1, Chapter 1, § 1 (2016), http://hakusyo1.moj.go.jp/en/65/nfm/n_65_2_1_1_1_0.html.

⁶⁸ *Id.*

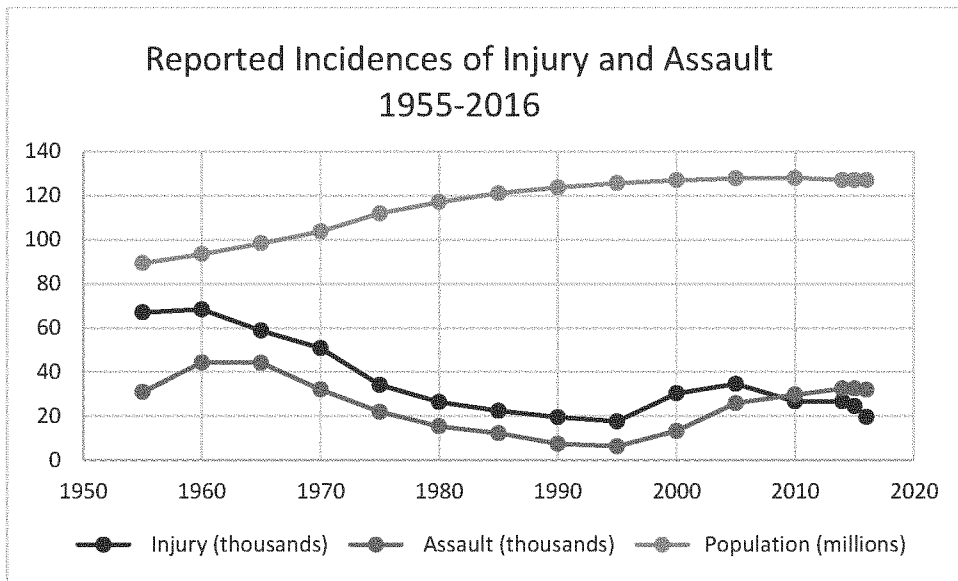
⁶⁹ *Id.*

⁷⁰ JAPAN STATISTICS BUREAU, PENAL CODE CRIME CASES KNOWN TO THE POLICE AND CASES CLEARED UP BY TYPE OF CRIME (1924--2004) (2017), <http://www.stat.go.jp/english/data/chouki/28.html>; JAPAN MINISTRY OF JUSTICE, WHITE PAPER ON CRIME (2016).

⁷¹ See *Crime in Japan at Lowest Postwar Level in 1st Half of 2018*, JAPAN TODAY, July 19, 2018, <https://japantoday.com/category/crime/crime-in-japan-at-lowest-postwar-level-in-1st-half-of-2018>.



Data source: JAPAN MINISTRY OF JUSTICE, WHITE PAPER ON CRIME, § 1-1-1-1 (2019), http://hakusyo1.moj.go.jp/en/65/nfm/n_65_2_1_1_1_0.html



Data source: JAPAN MINISTRY OF JUSTICE, WHITE PAPER ON CRIME, § 1-1-1-1 (2019), http://hakusyo1.moj.go.jp/en/65/nfm/n_65_2_1_1_1_0.html

Given the low and falling crime rates, it is not surprising that Japan has also long had the lowest rates of incarceration per capita globally.⁷² What is surprising is the low rate of incarceration for those few who do offend—less than 2 percent.⁷³

Japan's success is generally ignored. When brought to their attention, most, both within and outside of Japan, dismiss it as a product of a unique homogenous population, economic growth, and communitarian culture. Yet, no one argues that these have changed so significantly over the postwar era so as to have produced not merely low crime rates but an actual reduction in the incidents of crime. More deliberate focus and analysis, however, reveal a mix of cultural and structural factors that help to explain Japan's success and deserve special attention. Of primary significance are the shared values—the culture—of law enforcement authorities. They separate the condemnation of the offense from treatment of the offender. Crime prevention, not punishment for the crime, is their primary goal. Police, judges, and especially prosecutors share the view that incarceration weakens family ties and produces more crime. They also share the belief that persuading offenders to confess, to apologize, and to accept their accountability to victims are critical first steps in a process of correction and reintegration.

We begin with the work of the police.

1. Jonathan's Story

I had just arrived in Japan to begin a semester in my university's Japan study program. My first weekend in Japan, along with a couple of friends, I went to a well-known shopping area of the city known for its electronics outlets. I wanted to buy a Sony Walkman, which was the rage at the time. I bought the Sony. Then I went to a store to buy some tapes. At that store, a fairly large record and tape dealer, I noticed that tapes in Japan were about three times the price of those in the US. My solution for the problem was to take three but pay for only one. When I walked outside the store I was confronted with the theft and the police were called. I was taken into custody but not charged. The police held me for a time, but then released me to go back to the university dormitory later that night.

⁷² *Highest to Lowest- Prison Population Rate*, WORLD PRISON BRIEF (2017), http://www.prisonstudies.org/highest-to-lowest/prison-population-rate?field_region_taxonomy_tid=All

⁷³ See JAPAN MINISTRY OF JUSTICE, *supra* note 70.

The police called the faculty coordinator of my U.S. university's Japan program as well as the foreign student advisor of the Japanese university. Both were out-of-town for the weekend, but when they returned, they had telephone messages about the incident. They were both summoned to the police station. Upon their arrival the next day, they were informed that the police had concluded several things about me through their interrogation. The first, and most important, was that I was a student and not a professional thief. When asked how they concluded this, they said "a professional thief never pays for one." They were also taken with the fact that I was very open about my act, explaining exactly why I had done what I had done, concealing nothing. Professionals don't do that either, they said. In short, they were convinced that this was a first-time offense, at least in Japan. The next question was whether the prosecutor would charge me. They were not certain about what would happen. But it seemed the store would be involved in that; that is if the store wanted to have charges pressed or not. After all, the store had gotten their goods back. The store also allowed me to keep the tape I had paid for.

The faculty coordinator then visited the store with his wife, spoke with the manager, and apologized profusely. The couple also spent a good deal of money there buying records and tapes. The coordinator thought the student should do some restitutional work for the store, mentioning this to the manager. The manager replied that he didn't want that to happen, and in fact told the coordinator that he was being too "kibishii"(strict) with the boy. He obviously saw Johnathan as a teenager and not a professional thief as well. The store decided to leave things there and not press charges. That was the end of the case as far as the police and the store were concerned. The police did not even report the incident to the prosecutor. That was that. No twilight, only the dawn.

Jonathan's experience was not exceptional. Japanese police make few arrests. In 2002, a typical year, the police arrested fewer than 30 percent of suspects whom they concluded after investigation had committed a non-traffic

Criminal Code offense.⁷⁴ The police seek first to determine whether the suspect has actually committed a reported offense. Once satisfied that they have identified the offender and thus cleared the case, they next decide whether custody and further interrogation are necessary. Jonathan confessed. All that was necessary then was to bring together the manager of the store and those responsible for Jonathan—in this case his faculty coordinator. Had Jonathan been a Japanese national, a parent, guardian or other close relative would have been contacted and asked to come to the police station. Once satisfied that Jonathan was not likely to repeat the offense and that someone would be responsible to monitor his behavior, he was released without charge or further custody. In 2014, for example, Japanese police did not report 29.4 percent of the total number of persons identified in cleared cases. Nearly all—73,894 of the total 73,907 cases--involved non-traffic penal code offenses.⁷⁵

The police officer in charge, at least initially, would probably have been an officer assigned to the closest *koban* (police box). Had the store been in a more remote, less populated area, the single officer of the *chuzai* (residential police box) would have been in charge. The *koban* and *chuzai* constitute the core of community policing. It is usually a two-story building with a couple of rooms housing from one to five police officers. As described in official literature:

Koban and Chuzai are at the heart of police activities in Japan. Koban (police box) is a place where community police officers mainly carry out their work by a relatively small number of police officers (3-5 officers). There are also residential police boxes called Chuzai usually staffed by a single officer.

Each Koban and Chuzai covers specific areas and they are situated as a branch of the police station. They are responsible for maintaining the safety of the respective areas by figuring out each security situation and taking requests and concerns of residents into consideration.

There are approximately 6,300 Koban and 6,300 Chuzai in Japan.⁷⁶

⁷⁴ JAPAN MINISTRY OF JUSTICE, WHITE PAPER ON CRIME: TREATMENT OF OFFENDERS (2003).

⁷⁵ JAPAN MINISTRY OF JUSTICE, WHITE PAPER ON CRIME: TREATMENT OF OFFENDERS (2015).

⁷⁶ JAPAN NATIONAL POLICE AGENCY, POLICE OF JAPAN 2018: OVERVIEW OF JAPANESE POLICE 13 (2018), http://www.npa.go.jp/english/Police_of_Japan/Police_of_Japan_2018_full_text.pdf.

Jonathan appears to have been taken to the nearest koban but then perhaps to a Tokyo police station, one of the 1,173 prefectural police stations nationwide. The 47 Prefectural Police Headquarters are responsible for day-to-day police duties within each prefecture--in the language of article 2 of the Police Law:

“Responsibilities and duties of the police are to protect the life, physical body and property of individuals, and take charge of prevention, suppression and investigation of crimes, as well as apprehension of suspects, traffic control and other affairs concerning the maintenance of public safety and order.”⁷⁷

The National Police Agency has no policing duties except with respect to national security.⁷⁸ Its other responsibilities relate to policy planning at the national level and co-ordination of police administration. As of 2016 the police force comprised 258,600 police officers (287,000 authorized) and 28,300 police staff. The National Police Agency comprises 2,100 police officers (7,700 authorized), 900 Imperial guards, and 4,800 police staff.⁷⁹

Like virtually all government as well as private organizations—including the procuracy and the courts—prefectural police headquarters are centralized organizations. They have a personnel office that recruits and assigns police officers, who themselves usually spend their entire careers within the organization. Recruited upon graduation from high school or university—nearly half of Japanese police officers are college graduates--those without a university degree undergo a year of police school followed by 3 months of field work.⁸⁰ They then return for 6 more months of training and discussions about what they experienced.⁸¹ University graduates also experience 3 months of field work but are only required to attend police school for 8 months beforehand and 4 months after.⁸² Ninety-five percent complete the programs. The curriculum is set by the

⁷⁷ KEISATSUHŌ (Law No. 162, 1954), art 2, *translated in* LAWS AND ORDERS RELEVANT TO POLICE ISSUES (Police Policy Research Center et al. eds.), <http://www.npa.go.jp/english/seisaku7/hourei1-4.pdf>.

⁷⁸ JAPAN NATIONAL POLICE AGENCY, *supra* note 76, at 4.

⁷⁹ JAPAN NATIONAL POLICE AGENCY, POLICE OF JAPAN 2017: OVERVIEW OF JAPANESE POLICE 7 (2017).

⁸⁰ JAPAN NATIONAL POLICE AGENCY, *supra* note 76, at 10.

⁸¹ *Id.*

⁸² *Id.*

National Police Agency, ensuring nationwide standards.⁸³

As is the case with other organizations in Japan, common training programs and life-long careers help to create shared values and habits that constitute a distinctive police culture. By all accounts, what matters most to the police at all levels, aside from the offense itself, is the attitude of the offender. To what extent the offender confesses, expresses remorse and a willingness to make amends are among their primary concerns.⁸⁴ The willingness of family to share responsibility to prevent future offense and of any victim to allow the offender to go free are also taken into consideration.⁸⁵ Jonathan satisfied all requisites for release.

Suspects are interrogated but, as noted, few are actually detained or arrested. The police have only forty-eight hours to hold a suspect. They must then either release the suspect or transfer the case to the prosecutors. Prosecutors then have only twenty-four more hours to seek a judicial warrant to hold the suspect for ten more days. A court ordered ten-day extension may be sought after which the suspect must either be released or indicted. The maximum period of detention before indictment is twenty-three days.⁸⁶ In 2006 (excluding crimes involving death or bodily injury through professional negligence and violations of traffic laws in traffic accidents) of nearly 400,000 persons determined by the police to have committed a penal code offense only 153,270 were arrested, of whom 146,480 (95%) were reported to prosecutors and 136,110 detained. Of those detained, 92,430 (68%) were prosecuted but prosecution was suspended for 25,640 (19%).⁸⁷

Most offenses are not trivial. These the police must report to the local prosecutor's office. The prosecutors then commence a separate investigation and make a second determination of guilt.⁸⁸ The dawn may still break, however, even for those who have committed a serious non-traffic related penal code or special act offense.

Actor Yuta Takahata arrested for alleged sexual assault of hotel staffer
Daisuke Kikuchi, Staff Writer,
Japan Times, August 24, 2016

⁸³ See *id.* at 4.

⁸⁴ See JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER* 129–38 (1991).

⁸⁵ See *id.*

⁸⁶ See Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 *PAC. RIM L. & POLICY J.* 11, 86, 92 (1992).

⁸⁷ *Police Detention Administration in Japan*, JAPAN NATIONAL POLICE AGENCY (2008), http://www.npa.go.jp/english/ryuchi/Detention_house-Eng_080416.pdf.

⁸⁸ See John O. Haley, *Public Prosecution in Japan*, *OXFORD HANDBOOKS ONLINE* (2015).

Actor Yuta Takahata, 22, was arrested early on Tuesday after he allegedly sexually assaulted a hotel worker in Maebashi, Gunma Prefecture.

The victim, who is in her 40s, reportedly sustained injuries.

Police say Takahata admitted assaulting the woman, telling them he “couldn’t control” his desire after looking at her. They sent him to prosecutors Wednesday.

The son of popular actress Atsuko Takahata, Yuta is one of the young stars of Japanese show business, with regular TV appearances and roles in movies.

He is currently appearing in the Fuji TV drama “Tonari no Shinsengumi.” An episode due to air Thursday has been pulled from the schedules, while a second TV network scrubbed Takahata’s name from the lineup of an upcoming telethon.

Police say Takahata attacked the worker in his room after returning from a night out drinking.

Takahata said there was no premeditation, but police are keeping open the possibility that he and the victim were already acquainted.

Investigators said Takahata asked the employee to bring him a toothbrush and then pulled her into the room around 2 a.m. Tuesday. He allegedly pinned down her arms and legs during the assault.

At around 3:30 a.m., an acquaintance of the victim alerted police.

“A female friend was pulled into a hotel room and was assaulted after being pushed down onto the bed. The criminal is Yuta Takahata,” the individual said, according to investigators.

Police took Takahata to the Maebashi Police Station, where he was formally arrested at around 1:30 p.m.

Takahata has been staying at the hotel since Sunday for a film shoot. He reportedly went out drinking with staff on Monday night but is not thought to have been drunk at the time of the incident.

Meanwhile, Nippon Television Network dumped Takahata from a major upcoming appearance, scrapping his headline billing on the network's 24 Hour Television live telethon, which airs Saturday and Sunday.

On Tuesday, the Sports Hochi newspaper quoted NTV as saying all Takahata's planned appearances are suspended for now.

His name and images were no longer on the 24 Hour Television website as of Wednesday, and internet bloggers said posters bearing his name had been taken down.

Apology culture in Japan: Takahata's mother says sorry for adult son's alleged sexual assault

*Daisuke Kikuchi, Staff Writer,
Japan Times, August 26, 2016*

Actress Atsuko Takahata delivered a groveling apology Friday for the actions of her adult son, Yuta, who was arrested Tuesday over a sexual assault.

It was a time-honored piece of choreography: a parent apologizing, and the 300 or so reporters and photographers present knowing just what to expect. The actress said that, as a mother, it is her who is partially responsible for her son's actions.

The 22-year-old actor allegedly dragged a hotel worker into his room in Maebashi, Gunma Prefecture, and assaulted her.

Some say it is uniquely Japanese for family members to make such apologies.

American TV commentator Dave Spector said such a scene would be unthinkable in the U.S.

"A recent example is Michael Douglas' son, who was in prison for seven years for drug dealing. But it has no effect whatsoever on the father," Spector said.

As for Japan, Spector believes celebrities in particular face heavy expectations for a perp walk.

“There is a certain amount of responsibility felt by the Japanese when their offspring do something bad, no matter how old they are,” he said.

In June, actress Reiko Takashima faced reporters on behalf of her husband, Noboru Takachi, when he was arrested on a drugs charge. Her apology? She bore responsibility for “being his wife.”

Similarly in 1998, when 18-year-old actor Yuya Takahashi was held over a drug offense, his mother, actress Yoshiko Mita, convened a news conference and voluntarily stayed off TV for 10 months. Advertisers dropped her from seven commercials.

Spector said Mita’s career suffered heavily because the news conference was seen as taking place too late. He credited Atsuko Takahata with responding swiftly, potentially limiting the damage to her career.

She has, however, already suffered fallout, with cosmetics manufacturer Kao dropping a TV commercial she stars in.

But she is still listed as appearing in an upcoming play, “Yukimaroge,” which begins a nationwide tour from late September.

Takayuki Asami, a lawyer who specializes in crisis management, said Atsuko Takahata’s agency did well to arrange a prompt public apology.

“Parents make apologies on behalf of their children partially to protect their own image, to underscore that they did nothing wrong,” Asami said. “It’s good that the agency is protecting the career of their talent.”

The news conference was organized jointly by Seinenza Theater Company, Atsuko Takahata’s agency, and stage promoter Toho Co.

Her son is represented by Ishii-Mitsuzo Office. The agency's president, Kumiko Ishii, has so far released only a short written statement that was sent to media by fax. Contacted by The Japan Times, an official said no news conference is scheduled at the moment.

Takahata rape case dropped; actor says he is sorry

Japan Times, Sep. 9, 2016

MAEBASHI, GUNMA PREF. – Actor Yuta Takahata, 22, was released on bail from Maebashi Police Station in Gunma Prefecture on Friday after prosecutors decided not to pursue rape charges over an incident involving a hotel worker in the city.

“I am truly sorry,” Takahata said as he bowed his head in apology before media reporters gathered at the police station.

Takahata reportedly settled the case with the victim, which led prosecutors to drop the case.

Police say Takahata admitted raping the woman, telling them he “couldn’t control” his desire after looking at her. The victim, in her 40s, sustained injuries.

In 2013 the police cleared 1,163 cases of reported sexual offenses, including rape,⁸⁹ and in 2014 reported a total of 1400 persons for the crime.⁹⁰ Rape is not a minor or “trivial” offense but one can only wonder whether in a less high-profile case unreported by the victim (but not a friend) and with a settlement reached, the police would have reported it at all. Prosecutors ostensibly enjoy wider discretion than the police, however, to select which cases to investigate and prosecute. Unlike the police, under the Code of Criminal Procedure, prosecutors “may” initiate an investigation if they deem it necessary.⁹¹

The procuracy comprises a national agency of, as of 2015, 1,845 public prosecutors (*kenji*) and 899 assistant prosecutors (*fuku kenji*). Among the features shared in common with the police and other government agencies, they have entry level appointments with little if any lateral hiring and a central personnel office responsible for recruitment and assignments. Prosecutors can expect in the early

⁸⁹ JAPAN NATIONAL POLICE AGENCY, POLICE OF JAPAN 2015, Appendix 2; https://www.npa.go.jp/english/kokusai/pdf/POLICE_OF_JAPAN_2015_full.pdf.

⁹⁰ JAPAN MINISTRY OF JUSTICE, *supra* note 70, Appendix 2-1.

⁹¹ KEIJI SOSHŌ HŌ [Code of Criminal Procedure] Law No. 131 (1948), art. 191 (Japan).

years of their careers to serve for two or three years in offices at various levels nationwide. The first assignments include in nearly all cases the Tokyo or Osaka offices, but then in succession to cities as far removed as Naha, Okinawa and Sapporo, Hokkaido. One of the highest posts a career prosecutor can attain is Superintending Prosecutor, of either the Tokyo or Osaka High Public Prosecutors Office.

Prosecutors enjoy unrestricted authority to suspend prosecution (*kiso yūyo*) in cases where, after investigation, they have separately determined a suspect to be guilty. Such discretionary disposition has been used increasingly. In 1982, out of a total of 212,220 persons determined to be guilty of non-traffic penal code offenses, for only 70,868 (36.7%) was prosecution suspended. By 2014 less than half of those reported to prosecutors and determined to be guilty were actually prosecuted (38.5%). Prosecution was suspended for slightly over half (50.6%).⁹² This pattern does not hold, however, in cases involving sexual offenses, including rape. The decision to suspend prosecution in Takahata's case appears to have been exceptional. Each year, between 2002 and 2007, more than 50 percent of persons determined to have committed a sexual offense, including rape, were prosecuted.⁹³ Prosecution was suspended for less than 10 percent. However, the responses by Yuta and his mother were not extraordinary. Profuse immediate public apologies along with settlement with the victim were essential.

As noted, the procuracy has structural and cultural features common not only to the police but also nearly all other government agencies and private firms in Japan. In addition to entry level appointment with little if any lateral hiring and a central personnel office responsible for all appointments and assignments, short-term assignments, especially in the early years of a career, to offices at various levels nationwide are normal. These structural features foster a highly cohesive organization with a carefully cultivated collective culture.

Like the police, prosecutors seek confessions along with expressions of remorse that will normally involve efforts to compensate and obtain a pardon from any victim of the crime. According to the seminal study by David Johnson, their highest five priorities are (1) to discover the truth about the case, (2) not to prosecute the innocent, but to prosecute and convict only those who have really committed crimes, (3) to invoke remorse by the defendant, (4) to rehabilitate and

⁹² JAPAN MINISTRY OF JUSTICE, *supra* note 75, at Figure 2-2-2-2.

⁹³ JAPAN MINISTRY OF JUSTICE, WHITE PAPER ON CRIME 2008, Appendix 2.3, <http://hokusyo1.moj.go.jp/en/57/nfm/mokuji.html>.

reintegrate the offender, and (5) to protect the public from crime.⁹⁴ Although not their highest priority, over two-thirds believe that repairing the relationship between the offender and victim is a major goal. In a related survey of U.S. prosecutors, none expressed a similar concern.⁹⁵

The community also responds. In addition to the stigma attached to Yuta and his family, others connected to them, potentially at least, also shared the consequential social disapproval “shaming,” to use John Braithwaite’s term.⁹⁶

Had the prosecutors in the Takahata case decided to indict Yuta, he would have had no grounds for acquittal—after all he did confess—but his prospects would not have been too bleak. Judges too value remorse and accountability. As reported by Jake Adelstein in the *Japan Times*, Nov. 5, 2016:

Kensuke Matsumi, a University of Tokyo student, was convicted of sexually assaulting a classmate with several of his friends in May. The victim rejected his offer of a settlement.

On Sept. 20, the Tokyo District Court ruled that Matsumi’s actions were “despicable and caused unbearable suffering.” However, the 22-year-old student received a sentence of two years in prison, suspended for four years, because he had expressed remorse for his actions and had vowed to refrain from ever drinking alcohol again.⁹⁷

That the victim refused to settle and presumably favored prosecution may help to explain why the prosecutors proceeded to indict. One might ask of those prosecutors who did indict and try a case of rape or another sexual offense in 2014, how many of the victims reported the crime and were unwilling to settle. The court’s actions in convicting Matsumi but suspending his sentence were not extraordinary. Of the 1,649 persons tried and convicted for rape or other sexual offenses in district courts in 2014, the sentences were suspended for 866 (53.6%).⁹⁸ Matsumi’s remorse and willingness to be accountable to the victim mattered.

The accountability of the offender to any victim is critical at each stage of the criminal justice system. From the decision by the police whether to report the offender to the prosecutors, the decision by prosecutors whether to suspend prosecution, the decision by judges upon conviction whether to suspend the

⁹⁴ DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 97 (2001).

⁹⁵ Rayment, *supra* note 43.

⁹⁶ JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989).

⁹⁷ Jake Adelstein, *The Dubious Cost of Sexual Assault in Japan*, *JAPAN TIMES* (Nov. 5, 2016).

⁹⁸ JAPAN MINISTRY OF JUSTICE, *supra* note 70, at Table 2-3-2-1.

execution of the sentence, to a decision to release a prisoner on parole. The willingness of the offender to compensate those injured by the commission of the wrong is a determinative factor for each. As a result, as expressed by Yamaguchi Atsushi, “[v]ictim restitution is an integral part of the Japanese system.”⁹⁹

None of this is new. The pattern has persisted for a century. Ninety-four percent of those charged with a criminal offense in 1972 admitted guilt and expressed remorse. In a third of the non-traffic offenses, prosecutors suspended prosecution. The prewar pattern was basically the same. Out of 228,693 people charged from 1912-1916, 73,864 were suspended; from 1917-1921, 84,618 out of 307,035; from 1922-26, 105,575 out of 330,539; from 1927-1931, 150,562 out of 402,339.¹⁰⁰ In 1972, over 99 percent of those indicted were convicted, but the judges suspended the sentences they handed down in more than two-thirds of the cases. Dan Foote describes these actions as “benevolent paternalism.”¹⁰¹ In 1948, the first and only case in which the Diet attempted to interfere with judicial independence centered on such judicial decisions to suspend execution in what the then Socialist members of the Upper House judiciary committee considered a “feudal” legacy. The Supreme Court protested and the Diet did not again question the courts’ authority or practice.¹⁰² Judicial independence established, whether deemed “benevolent” or feudal,” the pattern has been repeated consistently for over seven decades.

Fifty district courts (*chihō saibansho*) with 203 additional branches are first instance courts of general jurisdiction.¹⁰³ In addition, 438 summary courts (*kan’i saibansho*) handle relatively small civil claims, minor criminal offenses subject to fines or lighter punishment, and certain statutory crimes such as theft and embezzlement.¹⁰⁴ Summary courts cannot impose imprisonment without

⁹⁹ Atsushi Yamaguchi, *Victim Restitution and the Japanese Criminal Justice System*, CRIME PREVENTION AND CONTROL IN THE UNITED STATES AND JAPAN, 167, 168. (Valarie Kusuda-Smick ed., 1990).

¹⁰⁰ John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions*, 8 JOURNAL OF JAPANESE STUDIES 265, 270-271 (1982) (citing RICHARD BREYER, DIE STELLUNG DER STAATSANWALTSCHAFT IN JAPAN 125 (1940)).

¹⁰¹ Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317 (1992).

¹⁰² JOHN O. HALEY, THE SPIRIT OF JAPANESE LAW 104-105 (1998).

¹⁰³ John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and Public Trust*, in LAW IN JAPAN, A TURNING POINT 99-135 (Daniel H. Foote, Ed., 2007).

¹⁰⁴ *Id.*

work or harsher punishment.¹⁰⁵ However, imprisonment with work for not more than three years may be imposed as specially permitted under the law.¹⁰⁶ If the judge—always a single judge—considers a heavier sentence to be appropriate, the case must be transferred to a district court.¹⁰⁷ First appeals are heard by one of the eight appellate high courts (*kōtō saibansho*).¹⁰⁸ The highest court is the fifteen justice Supreme Court (*saikō saibansho*). Each district also has a Family Court which deals with criminal cases involving juveniles aged 14 to 19 who have committed or are likely to commit a crime, and minors under 14 years old who have violated or are likely to violate penal provisions.¹⁰⁹ The measures taken are intended to be protective or educational. As of 2014, Japan had only 2,921 career judges, including 1,000 assistant judges, and 806 summary court judges, the majority of whom are retired career judges, prosecutors, or judicial clerks or secretaries.¹¹⁰

Since the 2006 reforms, career judges, like prosecutors (and lawyers), must have completed a one (for law school graduates) or two-year (for others) training program from the Legal Training and Research Institute (LTRI) administered by the Supreme Court.¹¹¹ Prior to 2006, the entrance examination (*shihō shiken*) was one of the most difficult in the country with a passage rate of less than 5%.¹¹² As expanded in 2006, the exam remains demanding with a 25% passage rate.¹¹³ As a result, by almost any standard, Japanese prosecutors and judges have long enjoyed special social status. After completing the LTRI program, those who seek to become judges must then satisfy the standards set by the Personnel Affairs Bureau of the Supreme Court for appointment (with formal cabinet approval) as an assistant judge. After ten years assistant judges are eligible for reappointment as regular career judges.¹¹⁴

The Bureau assigns all assistant and regular judges to judicial posts throughout their careers with predictable patterns. Today, the Bureau initially assigns assistant judges to a major district court for three years usually followed by another three-year assignment to a family court. For the next four years, an assistant judge, like prosecutors, can expect to be transferred to various posts nationwide. Typically, a judge will have served in courts at all levels nationwide

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

as well as at least a stint in one or more sections of the General Secretariat. Many if not most three-judge panels, which are standard for both trials and appeals, will have an assistant or at least newly appointed regular judge, in addition to a mid-career and senior presiding judge. In this process judges develop what is termed “the legal mind” — a judicial culture that enables consistency and greater certainty than most judicial systems can ever achieve.¹¹⁵

Those convicted, whose sentences are not suspended, spend little if any time in prison. For decades, conviction rates have hovered around 99.9%.¹¹⁶ Moreover, over half of those whose sentences are not suspended serve only a limited term in prison. In 2014, the figure for suspended sentences reached 59.5% overall and 58.6% for non-traffic penal code offenses.¹¹⁷ Of these offenses, the suspension rates were lowest for robbery (19.9%) and homicide (24.6%) and highest for causing injury through negligence (94.8%) and counterfeiting (84.3%).

Less than 2 percent of all offenders are ever incarcerated in a detention facility or prison. As explained, about 30 percent are not reported to prosecutors by the police. For half of those who are reported, prosecution is suspended.¹¹⁸ Another quarter today agree to be subject to summary orders for which the penalty is a relatively minor fine.¹¹⁹ Consequently, only about 7 percent of all persons found to be guilty by prosecutors ever go to a regular trial and, if convicted, could possibly be sentenced to a term in prison.¹²⁰ Upon conviction, the execution of such sentences is then routinely suspended in over half of the cases.¹²¹ For example, of, say, a thousand offenders, the police release 300 without further process, the prosecutors suspend prosecution for an additional 385 and send for regular trial only 51, and the courts convict but suspend the sentences for 28 of these. Only 23 offenders would even be subject to imprisonment. For these offenders, the penalty is not pleasant but is at least safe. Perhaps most significant, victims are compensated in the process.

B. WHERE THE SUN SELDOM SHINES: LIFE IN PRISON

¹¹⁵ *See id.*

¹¹⁶ *See* JAPAN MINISTRY OF JUSTICE, WHITE PAPER ON CRIME, Figure 2-3-2-1 (2017), and the same figure in each previous annual WHITE PAPER ON CRIME at http://hokusyo1.moj.go.jp/en/nendo_nfm.html.

¹¹⁷ JAPAN MINISTRY OF JUSTICE, WHITE PAPER ON CRIME, Figure 2-3-2-1 (2015).

¹¹⁸ JAPAN MINISTRY OF JUSTICE, *supra* note 70, Figure 2-2-2-1.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*, Figure 2-3-2-1.

1. Sam's Story

Convicted for possession of two kilograms of marijuana, I was sentenced to two years in prison. I actually served only 18 months because I had been confined for two months pending the trial. As a foreigner, I was incarcerated in a two-block unit of single cells in the Fuchu prison outside of Tokyo. Mine was a 9-by-5 room with only a hard, narrow bed. I could not even touch it, much less lie down during the day. When the lights went out at night I had to lie down or be punished. Cameras in the room recorded my every move. A sink served as a desk and I could not use the toilet unless given permission by the guards. My mail was censored. All gifts from home were stored until my release. I could only read approved books. Fish, seaweed, and rice were the staples of the prison diet. I lost 55 pounds. My scalp was completely shaved every two weeks. I was required to work, making paper bags in my cell for eight hours each day.

The experience was bad but I'll take the Japanese legal system over ours. Above all, it was fair. The Japanese never tried to trick me, even in interrogation. They were always trustworthy. I could have gotten five years, and they gave me two. The Americans who were helping them wanted me to get 20. The guards at Fuchu were hard, but they never messed with you unless there was a reason. You didn't have to worry about other prisoners coming after you either.

In 1994, a group of Japanese human rights activists seeking prison reform, met with a delegation from Human Rights Watch visiting Japan. They issued a report in 1995 confirming Sam's experience as typical.¹²²

As indicated by our interviews, rules are generally similar from prison to prison, and they all regulate prison life down to the most minute details and govern virtually all areas of a prisoner's life, leaving no room for personal choices...Examples of what aspects of life are covered by the rules include: where to place any object in the cell and how; where to write anything; what position to stand or sit during the daily cell inspection; how to sleep; how to march and more.

Rules are strictly enforced, and any departure leads to punishment...The most commonly applied disciplinary measure is

¹²² HUMAN RIGHTS WATCH/ASIA, PRISON CONDITIONS IN JAPAN (1995), <https://www.hrw.org/sites/default/files/reports/JAPAN953.PDF>.

solitary confinement, for up to two months at a time. Solitary confinement meant as punishment (as opposed to the placement in a single cell with practically no contact with other inmates) involves no contacts with the outside world, no reading, and no exercise. Using the toilet is allowed only at specified times and throughout the day the prisoner is required to sit motionless in a prescribed position. Solitary confinement is meted out for a wide range of infractions, including some trivial ones, such as calling out to a fellow prisoner or refusing to keep one's eyes shut during a daily "reflection period." More serious infractions, such as attempted escapes or participation in fights, are punished with additional time in so-called protection cells. These cells are ostensibly meant to subdue prisoners who had become violent or to protect those in danger of committing suicide. In most cases, prisoners are placed in these cells in restraints consisting of a leather contraption that holds one arm in the front of the prisoner's body and the other one in the back, making it practically impossible, or in any event very humiliating, to use the toilet or to eat. The length of time spent in those cells ranges from several hours to several days. Usually, after the period in the "protection cell" a prisoner is placed in solitary confinement, his or her formal punishment.

....

Foreign prisoners account for some 5 percent of the total prison population in Japan, and their proportion is growing rapidly. As a rule they are placed in single cells, and their sense of isolation is even stronger than that among the Japanese inmates.¹²³

The Report mentions at the outset that as of March 1994 the prisons held 37,000 sentenced prisoners with 21,000 correctional officers.¹²⁴ It also notes, "[The] system...has not experienced riots since the period immediately after World War II. Escapes are very rare (twenty-two in the period from 1983 through 1992), and the ratio of assaults by prisoners on fellow inmates or staff members is also low."¹²⁵

Headlined "Prisons in Japan Are Safe but Harsh," a subsequent article in the *New York Times* in July 1996, featured an experience by a U.S. citizen

¹²³ *Id.*

¹²⁴ *Id.* at vi.

¹²⁵ *Id.* at viii.

similar to Sam's in both the crime (smuggling 25 ounces of marijuana) and sentence (four-and-a-half years in prison), confirmed the Human Watch Report, adding:

Most prisoners follow the rules scrupulously, partly because of what happens to those who resist, said Toshikuni Murai, dean of the law department at Hitotsubashi University. As a result, many are released early on parole for good behavior.

But Mr. Murai, who has visited prisons in China, South Korea, Europe and the United States, says discipline in Japanese prisons is the strictest he has seen.

"In Japan," he said, "some prisons have no walls, just bamboo fences, and all the prisons have no armed guards with guns. But inside, inmates have no right to an appeals system, and they don't have the right to conversation on the job."

Japanese officials say prison conditions are not as bad as human rights organizations suggest. They acknowledge that rules are strict, but they emphasize that this is an effort to build discipline and teach inmates the importance of obeying society's rules so they will not get in trouble again.

Moreover, the strictness of the rules means that there is no chance for gangs to develop in Japanese prisons. And while inmates may be subject to the whim of guards, they are unlikely to be brutalized by other inmates.¹²⁶

The Miyagi prison in Sendai appears to be typical. Housing the largest percentage of those serving life sentences, the prison is a large, red brick structure typical of Meiji period architecture. Prisoners have no privacy and are subject to extraordinary, regimented discipline. Walking through the halls, the warden is greeted by guards with military salutes shouting out the number of prisoners in their immediate custody, with the added assurance that all are accounted for, while the prisoners are ordered to face the walls with arms extended and palms flat against the concrete. What is most striking to an American visitor is a contrasting lack of security. Although Japan's Fuchu prison is listed as one of the

¹²⁶ Sheryl Wudunn, *Prisons in Japan Are Safe but Harsh*, N. Y. TIMES, July 8, 1996, <http://www.nytimes.com/1996/07/08/world/prisons-in-japan-are-safe-but-harsh.html>.

10 most highly secured prisons in the world,¹²⁷ the Miyagi prison is hardly a maximum security prison. The walls enclosing the complex are lined with barbed wire, but inside the building no special barriers or check points exist. Visitors are not subject to any search or electronic detectors. Instead, they are politely asked to empty their pockets of any cigarettes. Smoking is not allowed and those in charge seek to avoid any temptation.¹²⁸ Yet, even attempted escapes are apparently almost nonexistent.

Efforts to reform the system resulted, in 2005, in the Law on Penal Detention Facilities and Treatment of Inmates and Detainees¹²⁹ as supplemented in 2006 by the Ordinance on Penal Institutions and the Treatment of Sentenced Inmates¹³⁰ and amended through 2014. This was reportedly the first major prison reform since 1908.¹³¹ The statute and related ordinance attempt to ameliorate the most severe practices by regulation rather than outright prohibition.¹³²

Has life in a Japanese prison changed? Apparently not. In the words of one recent non-Japanese observer, “[t]he good news is that Japanese prisons have almost no prisoner-on-prisoner violence; no revenge killings, no shower rapes. The bad news is the techniques prison officials utilize to realize that.”¹³³

The criminal justice system in Japan is not perfect. One study found that between 1910 and 2010 there were at least 162 cases of “confirmed or strongly

¹²⁷ Sammy Said, *Top 10 High Security Prisons in the World*, THE RICHEST, <https://www.therichest.com/business/technology/top-10-high-security-prisons-in-the-world/>.

¹²⁸ HALEY, *supra* note 102, at 82–83.

¹²⁹ *Keiji shūyō shisetsu oyobi hi shūyōsha tō ni kansuru hōritsu* (Law No. 50 of May 25, 2005), as amended (Law No. 69, 2014). For an English translation, see <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=inmates&x=23&y=12&ia=03&ky=&page=2>.

¹³⁰ *KEIJI SHISETSU OYABI HI SHUYOSHA NO SHOGU NI KANSURU KISOKU* (Ministry of Justice Ordinance No. 57 May 23, 2006, as amended by Ordinance No. 14, 2016.) For an English version of the 2006 ordinance, see <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=inmates&x=23&y=12&ia=03&ky=&page=1>.

¹³¹ Eric Johnson, *Prison Reforms Seen as too Little, and Way too Late*, JAPAN TIMES (June 26, 2007), <http://www.japantimes.co.jp/news/2007/06/26/reference/prison-reforms-seen-as-too-little-and-way-too-late/#.WXDirYWcHIU>.

¹³² Since 2005 the Japanese Federation of Bar Associations (*Nichibenren*) has published up-to-date guides for inmates on the law in Japanese and English. See JAPAN FED’N B. ASS’N, INFORMATION FOR PRISON INMATES (4th ed. 2016), https://www.nichibenren.or.jp/library/ja/legal_aid/on-duty_lawyer/data/jvukeisha_jp4.pdf.

¹³³ Philip Van Buren, *You Don’t Want to Go to Prison in Japan*, EXPAT NATION (Oct. 8, 2015), <http://xpatnation.com/what-is-prison-like-in-japan/>.

suspected wrongful conviction[s] ... more than half of which involved homicide.”¹³⁴ However, unlike the U.S., Japan does not recognize sovereign immunity as a barrier to legal claims against the state or law enforcement officials. Under both the postwar constitution¹³⁵ as well as statute,¹³⁶ those wrongfully detained, arrested, or imprisoned have a legal claim for state compensation. In 2013, for example, the Tokyo District Court awarded Govinda Prasad Mainali, 68 million yen (approximately 680,000 U.S. dollars at the prevailing exchange rate) for spending 15 years in prison after he was exonerated.¹³⁷

2. Conclusions

Japan is an exceptionally communitarian society. Although highly urbanized, it is ethnically homogeneous with relatively stable neighborhoods and families. Divorce rates are low, and children born out of wedlock are few. It enjoys high per capita income and wealth. Such factors help to explain low incidence of crime but not the reduction of violent crime over a half-century. One set of factors, however, does help to explain this success: the shared emphasis of law enforcement authorities on crime prevention rather than punishment with the corollary focus on offender expression of remorse and accountability to victims with family responsibility. Incarceration is a last resort to be avoided if possible. In terms of criminal justice, Japan is truly the Land of the Rising Sun.

CONCLUSION

The criminal justice systems of the United States and Japan represent opposite poles. The consequences and causes are equally divergent. They share similar trajectories, but they spiral in opposite directions. The United States has the highest number of violent crimes (homicide, rape, robbery, and aggravated assault) of any industrial democracy.¹³⁸ Japan has the lowest. The incidence of

¹³⁴ David T. Johnson, *Wrongful Convictions and the Culture of Denial in Japanese Criminal Justice*, 13 ASIA-PACIFIC J. 3 (2015) (citing Nishijima, Katsuhiko, *Enzai Jiken Ichiranhyo: Kaisetsu*, in *ENZAI GEN'IN O CHOSA SEYO: KOKKAI NI DAISANSHA KIKAN NO SETCHI O KEISO SHOBO* 155 (Nichibenren Enzai Genin Kyumei Daisansha Kikan Wakingu Gurupu, eds. 2012)).

¹³⁵ Nihonkoku Kenpō [KENPŌ] [CONSTITUTION], art.40 (Japan).

¹³⁶ Keiji Songai Hō [Criminal Compensation Law], Law No. 1 of 1950, art. 1 (Japan).

¹³⁷ ¥68 Million Redress Eyed for Mainali, JAPAN TIMES (May 25, 2013), <http://www.japantimes.co.jp/news/2013/05/25/national/68-million-redress-eyed-for-mainali/>.

¹³⁸ St. Louis, Baltimore, Detroit, and New Orleans rank among the cities with the highest homicide rates in the world. All of the other 46 cities are in Latin America (43) or South Africa (3). Jessica Dillinger, *The Most Dangerous Cities in the World*, WORLD ATLAS, <http://www.worldatlas.com/articles/most-dangerous-cities-in-the-world.html> (last updated Apr. 25,

crime is not, however, the proper measure. What matters is direction. Despite a significant reduction in crime rates in the U.S. from the early 1990s to at least 2012,¹³⁹ and a smaller increase in violent crime rates in Japan from the late 1990s to 2002, in terms of both incidence and rates, the trends from 1960 to the present show an upward track in the U.S. and a much greater decrease in Japan.¹⁴⁰

The criminal justice systems of the United States and Japan share two basic features in common. The first is a shared reliance on the death penalty, incarceration, and fines as the three formal criminal penalties. The second is that recidivism rates for those who have been imprisoned are similarly high and rising in both countries. In the United States, a 2014 Bureau of Justice Statistics study found that of 404,638 state prisoners released in 2005 in 30 states, 67.8 percent were rearrested within 3 years of release, and 76.6 percent, within 5 years of release. A majority in both instances involved parole or probation violations.¹⁴¹ A 2016 White Paper on Crime documented a Japanese recidivism rate between 1995 and 2013 that had increased from 28.2 percent to over 46 percent.¹⁴² Any differences between recidivism rates for the United States and Japan may not be especially significant, however. In Japan, repeat offenses are not merely probation or parole violations. They included theft, fraud, and drug-related offenses. Every study of recidivism in Japan indicates that offenders not reported by the police (30 to 40 percent of those the police have determined to be offenders) to prosecutors

2018).

¹³⁹ NATHAN JAMES, CONG. RESEARCH SERV., R44259, *IS VIOLENT CRIME IN THE UNITED STATES INCREASING?* 5 (2015). See also Monica Davey & Mitch Smith, *Murder Rates Rising Sharply in Many U.S. Cities*, N.Y. TIMES, Aug. 31, 2015 (explaining that “[c]ities across the nation are seeing a startling rise in murders after years of declines”).

¹⁴⁰ In 1960 the statistics (and rates per 100,000) for the U.S. were comprised of a total of 288,460 (160.9) violent crimes that included 9,110 (5.1) murders, 17,190 (9.6) rapes, 107,840 (60.1) robberies and 154,320 (86.1) aggravated assaults. HINDELAG CRIMINAL JUSTICE RESEARCH CENTER, UNIVERSITY AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Table 3.103.2012. In 2015, the statistics (and rates) encompassed 1,199,310 (373.7) violent crimes including 15,883 (4.9) murders, 91,261 (28.4) rapes, 328,109 (102.2) robberies, and 764,057 (238.1) aggravated assaults. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2017: VIOLENT CRIME, Table 1. In Japan, despite nearly a 73 percent increase in population, during the period between 1960 and 2014, the actual number of reported homicides fell from 2,648 to 1,054, the number of reported rapes decreased from 6,342 to 1,250, robberies from 5,198 to 3,056, and bodily injury from 68,304 to 26,653. JAPAN STATISTICS BUREAU, *supra* note 70, at 28-1; JAPAN MINISTRY OF JUSTICE, *supra* note 70.

¹⁴¹ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ244205, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (2014).

¹⁴² JAPAN MINISTRY OF JUSTICE, *supra* note 70, at Part 4, Chapter 1.

are the least likely to reoffend. Those offenders whose prosecution prosecutors choose to suspend (50 to 55 percent of those determined by prosecutors to be offenders) are the next least likely to reoffend. Those convicted but whose sentences are suspended (nearly 60 percent) are in turn the next least likely to reoffend. Those who are imprisoned are the most likely to reoffend.¹⁴³ As the Japanese prosecutor told Arthur C. Kaufmann of the Citizens Crime Commission of Philadelphia in 1974 when asked why so few offenders are imprisoned, "[w]e do not believe in imprisonment; jails are the schools for crime."¹⁴⁴

Low incidence and rates of crime in Japan seem relatively easy to explain. With implicit contrast to the United States, Craig Parker lists the most common factors—racial and cultural homogeneity, the role of “groups,” a concern for interpersonal “harmony” (*wa*) and related emphasis on non-adversarial dispute resolution, economic equality, social conformity, respect for authority and governmental institutions, and lack of guns.¹⁴⁵ In other words, Japan enjoys unique cultural attributes (as well as gun control laws) that lead to low crime and a relatively safe society. None of these attributes are new. Nearly all have long been considered foundational aspects of Japanese society.¹⁴⁶ None of these embedded features of Japanese social culture help to explain why they have contributed to so dramatic a decline in violent crime in Japan over the past six decades. The Nordic countries (Denmark, Finland, Norway, Sweden) share many of these cultural, economic, and demographic traits and have also had low crime rates. Yet throughout Scandinavia the number of violent crimes has almost steadily increased since 1960.¹⁴⁷ One distinguishing feature of Japan’s criminal justice system is that it imprisons only a tiny percentage—less than 2 percent, as noted above—of those determined to be offenders. Japan relies instead on expressions of remorse and a willingness to compensate victims for injuries inflicted as well as, importantly, parents or other family or community members to take responsibility to ensure future infractions of the law (and community norms) are not repeated. As in the case of plea bargaining in the U.S., Japanese offenders are confronted with a choice—show remorse, apologize, compensate

¹⁴³ HALEY, *supra* note 102, at 84.

¹⁴⁴ Haley, *supra* note 100, at 273.

¹⁴⁵ L. CRAIG PARKER, CRIME AND JUSTICE IN JAPAN AND CHINA 7–14 (2013).

¹⁴⁶ See TAKIE SUGIYAMA LEBRA, JAPANESE PATTERNS OF BEHAVIOR (1976); CHIE NAKANE, JAPANESE SOCIETY (1972).

¹⁴⁷ Tapio Lappi-Seppälä & Michael Tonry, *Crime, Criminal Justice, and Criminology in the Nordic Countries*, 40 CRIME & JUSTICE 1, 10–14 (2011).

victims, and seek their pardon, or face conviction, social stigma, and the sanctions set out by law. In the U.S. the “bargain” is to plead guilty and perhaps face a reduced charge and set of sanctions or risk more by contesting the case in a trial.

In the end, the American Night is best explained by a retributionist culture that pervades both the public and those who act as gatekeepers. Fueled in the early 1990s by rising crime rates and concern over violence within families, shared retributionist values led to new crimes, expanded legal means to arrest and jail potential offenders, and massive increases in the population of jails and prisons throughout the United States. The Japanese Day reflects an opposite culture. Particularly among law enforcement authorities, Japanese values emphasize offender remorse and willingness to make amends to any victims with the view that these responses signal the possibility of correction. Such shared beliefs in Japan combine to create a prevailing communitarian orientation that emphasizes mutual responsibility and the accountability of each member of the community to the collective whole.