

COMMENT ON *USING CRIMINAL PUNISHMENT TO SERVE BOTH VICTIM AND SOCIAL NEEDS**

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I

INTRODUCTION

I cannot judge how persuasive or convincing the argument underlying the article in this symposium by Erin Ann O'Hara and Maria Mayo Robbins might be to others. I was already a believer. The best I can do is to expand and to add further support for their argument. In so doing, however, I necessarily add a cautionary note with respect to their proposal.

By expanding the frame of reference, restorative justice can be defined as a paradigm whose scope encompasses more than victim-offender mediation (VOM) and whose emphasis includes the needs of society and offenders as well as victims. Restorative justice involves a wide variety of processes and programs that are more apt to restore both those who commit and those who suffer wrongs. It includes children-at-risk programs, drug courts, violence-treatment programs, as well as victim-offender mediation programs. It also includes efforts to assist former convicts returning to the community to engage in constructive lifestyles and sustainable roles in families, workplaces, and neighborhoods. It is a paradigm that includes any program or approach that satisfies the following criteria:

1. Offenders must acknowledge their wrongdoing, expressing remorse and apology.
2. Offenders must be accountable and accept responsibility for all harms or injury their actions have caused to themselves and others, and must be willing to take corrective or remedial action as well as make appropriate reparations to those they have harmed.

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3. In response, the community, including victims if appropriate and possible in some realistically effective manner, pardons and assists in the reintegration of such offenders.

O'Hara's and Robbins' emphasis on VOM and victims might be too narrow and the scope of their proposal too broad, to the extent that it includes within its ambit offenders who deny their culpability. Both of these concerns stem from a view of restorative justice as a process that begins with apology and ends with pardon.

II

APOLOGY AND PARDON

Apology has dual effects. The first is to reduce the sense of grievance of persons who suffer wrongs—the victims of atrocities, crime, all manner of injustice, as well as everyday wrongs. The second, equally important effect is to enable a process of correction to begin for those who commit wrongs—a process that serves both to prevent repeat offenses and to restore offenders to the community. Apology begins this process of healing, correction, and restoration. By all accounts, apology helps victims to recover from the emotional injury inflicted by the offender. It thus enables the victim to pardon. Apology is also an expression of remorse and acceptance of accountability, which enables offenders themselves to undertake whatever measures are necessary for correction. With pardon, offenders can be reintegrated into society, the most effective means of behavioral control. In short, apology and pardon together restore both the wrongdoer and the victim to society. Apology thus starts the process of correction and cure. Pardon enables its closure.

All empirical data of which I am aware support the proposition that, whatever the program or project, successful correction begins with the offender's acknowledgment of wrongdoing (confession) and a willingness to account for the wrong committed and to take the correctional measures necessary to prevent repetition (responsibility and remorse).¹ If the societal

1. Many of our best known and most effective programs to correct or to prevent behavior operate on these principles. Among the most familiar, strikingly effective, and cost efficient is Alcoholics Anonymous. Other examples include a variety of treatment programs for drug abuse as well as violence control that are similarly premised on the patient's acknowledgement of the need for correction. However, the dearth of empirical studies on the effect of acknowledging wrongdoing, apology, or remorse on the correction of offender behavior remains notable. Available studies include, in general, MICHAEL D. MALTZ, RECIDIVISM (1984); Ellen Berscheid & Elaine Walster, *When Does a Harm-Doer Compensate a Victim?*, 6 J. PERSONALITY & SOC. PSYCHOL. 435 (1967); Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151 (1973); Elaine Walster et al., *The Exploited: Justice or Justification?*, in ALTRUISM AND HELPING BEHAVIOR 179 (J. Macaulay & L. Berkowitz eds., 1970). For more-focused studies with respect to specific behaviors, see BRENT L. BAXTER ET AL., THE EFFECTIVENESS OF DEFERRED PROSECUTION IN REDUCING DWI RECIDIVISM: AN UPDATE (Alcohol and Drug Abuse Institute, Univ. of Wash. 1993) (examining the frequency of second DWI offenses as a function of whether the offender is prosecuted); Patricia Van Voorhis, *Restitution Outcome and Probationers' Assessments of Restitution: The Effects of Moral Development*, 12 CRIM. JUST. & BEHAV. 259 (1985) (correlating offender compliance with notions of reparation and

response is retribution and punishment, much—if not all—is lost. If the response is pardon and reintegration, the correctional and restorative processes are more likely to proceed.

Critics are right to complain that an emphasis on apology and pardon represents the antithesis of retribution. Aside from the moral concerns, such emphasis serves the shared ends of any system of criminal justice better than does punishment. Those who argue for punishment—whether law-enforcement officials who see their role as retributive agents for society or those who presume to speak for victims—need to show that punitive alternatives to restorative justice are at least equally successful, that retribution, warehousing of criminals, or the death penalty can be as effective in preventing crime and restoring both victims and offenders as the various programs and approaches that rely on apology and pardon. Needless to say, they can only fail. More than two million persons are incarcerated today in U.S. prisons, the highest number per capita of any country on the globe.² Over double that number have served time.³ The social as well as dollar costs are staggering.⁴ Incarceration reduces the possibility of both correction and reintegration.⁵ Yet we continue to punish, increasing the number of prisoners and prisons, thereby producing more and better criminals.

victim concern). With respect to victim–offender mediation, see MARK S. UMBREIT, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* (1994); Tony Francis Marshall, *Restorative Justice on Trial in Britain*, 12 *MEDIATION Q.* 217 (1995); Mark S. Umbreit, *The Development and Impact of Victim–Offender Mediation in the United States*, 12 *MEDIATION Q.* 263 (1995). My own studies, still incomplete, began with programs in the Seattle metropolitan area. Most of the data collected remains unpublished except with respect to the Seattle (King County, Washington) Drug Court. In Seattle, an experimental “drug court,” which commenced in 1994, operated on these principles with similar success. See URBAN POLICY RESEARCH, *EVALUATION OF THE KING COUNTY DRUG DIVERSION COURT* (1995).

2. GORDON BARCLAY & CYNTHIA TAVARES, *INTERNATIONAL COMPARISONS OF CRIMINAL JUSTICE STATISTICS 2001*, at 22 (2003), available at <http://csdp.org/research/hosb1203.pdf>.

3. According to U.S. Justice Department statistics, at the end of 2007, 2,293,157 prisoners were held in federal or state prisons or in local jails. LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEPT. OF JUSTICE, *PROBATION AND PAROLE IN THE UNITED STATES, 2007 STATISTICAL TABLES 1* (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus07st.pdf>. And over 5.1 million adult men and women were either on probation or parole. *Id.* at 2–4. More than 8 in 10 were on probation (4,293,163), while less than 2 in 10 were on parole (824,365). *Id.*

4. According to a U.S. Department of Justice study, state expenditures for corrections totaled \$38.2 billion in 2001, an increase of 145 percent from 1986. JAMES J. STEPHAN, U.S. DEPT. OF JUSTICE, *STATE PRISON EXPENDITURES 2001*, at 1 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf>. Expenditures for inmate medical treatment totaled \$3.3 billion. *Id.* For the social costs, see JEREMY TRAVIS ET AL., *URBAN INST., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY* (2006), available at http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf.

5. For a critical study of the failure of prisons in the United States today to even ensure a safe environment, see JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, *CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS* (2006), available at <http://www.prisoncommission.org/report.asp>.

III

JAPANESE TREATMENT OF OFFENDERS

The Japanese experience is exemplary. Japan's per capita rates for violent crimes⁶ and victimization⁷ are the lowest in the industrialized world—rates that reflect significant declines for over a half century.⁸ Not coincidentally but equally significantly, Japan also enjoys one of the lowest rates of incarceration.⁹ This success with crime is at least in part a consequence of the prevailing approach to the treatment of offenders.¹⁰ No one denies the importance of social controls and other cultural factors that have contributed to low crime rates. However, to dismiss the Japanese experience—particularly the ways in which law-enforcement officials deal with offenders—is to miss an opportunity to learn significant lessons that we in the United States need desperately to heed.¹¹

In Japan, as in other civil-law jurisdictions, all convictions require judicial determinations of guilt based on evidence presented to the court in addition to or irrespective of confession. There are no guilty “pleas” or plea bargaining between the accused (with lawyer) and the prosecutor. (A form of “plea bargaining” does exist in Germany and in some other civil-law jurisdictions, but it involves the judge as well as some evidentiary presentment of guilt in addition

6. BARCLAY & TAVARES, *supra* note 2, at 10 (reporting 1.05 homicides per 100,000 people in Japan compared with rates in other countries of 0.95–55.86 per 100,000 people).

7. *Id.* at 17 (reporting a victimization rate of 15% in Japan compared with rates of 15%–30% in other countries).

8. *Id.* (reporting that Japan had one of the lowest rates from 1991–2001); see MINISTRY OF JUSTICE OF JAPAN, WHITE PAPER ON CRIME 2005, Fig. 1-1-1-1 (2005) available at http://hakusyo1.moj.go.jp/en/53/nfm/n_53_2_1_1_1_0.html (showing a violent-crime rate of about 500 per 100,000 persons in the 1950s steadily declining to about 300 per 100,000 persons in the late 1990s).

9. International Centre for Prison Studies, King's College, Univ. of London, World Prison Brief, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited October 3, 2008) (reporting 63 inmates per 100,000 people in Japan compared with rates in other countries of 20 to 762 inmates per 100,000 people).

10. I have argued this point on numerous occasions. See John O. Haley, *Apology and Pardon: Learning from Japan*, 41 AM. BEHAV. SCIENTIST 842, 852 (1998), reprinted in CIVIC REPENTANCE 97, 106 (Amitai Etzioni ed., 1999) [hereinafter Haley, *Apology and Pardon*]; John O. Haley, *Confession, Repentance and Absolution*, in MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS, AND COMMUNITIES 195, 207 (Martin Wright and Burt Galaway eds., 1989); John O. Haley, *Crime Prevention Through Restorative Justice: Lessons from Japan*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 349, 358 (Burt Galaway & Joe Hudson eds., 1996); John O. Haley assisted by Ann Marie Neugebauer, *Victim–Offender Mediation: Japanese and American Comparisons*, in RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM–OFFENDER MEDIATION 105, 117 (Heinz Messmer & Hans-Uwe Otto eds., 1992).

11. The Japanese experience provided the foundations for Australian criminologist, John Braithwaite, to construct a seminal argument for restorative justice. See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION, 61–65 (1989) (comparing the criminal-justice systems of Japan and the United States and discussing the Japanese restorative-justice model of shaming, apology, and reintegration); JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 119 (2002) (concluding that the reactive fault system of Japan, as opposed to the proactive fault system of the United States, provided greater opportunity for restorative justice).

to confession.¹² Such negotiated settlements are apparently quite rare if practiced at all in Japan.) Prosecutors make what is in effect an initial determination of guilt. Yet, based on evidence other than confessions that convinces the prosecutors of the suspects' guilt, a significant number of those deemed guilty are not prosecuted.¹³ Conviction rates in Japan are high.¹⁴ The trial courts find nearly all those who are prosecuted to be guilty.¹⁵ However, depending on the crime, judges routinely suspend sentences for eight to fifty-eight percent of those convicted.¹⁶ Sentences also tend to be short¹⁷ and probation is frequently granted.¹⁸

Various factors determine whether Japanese prosecutors will prosecute—and judges will suspend the sentences of—those deemed guilty.¹⁹ The nature of the crime is significant, as is a record of repeat offenses.²⁰ By all accounts, however, the critical factor is whether the accused has confessed and displayed a willingness to be held accountable to the victims.²¹ This accountability includes efforts to make reparation for the crime.²² The victim's pardon is also an essential factor.²³ Hence, in cases involving extortion and rape, both prosecutors and judges are either more likely not to prosecute or sentence when the victims have expressed a willingness to pardon, based, notably, on acceptable reparation. In rape and a limited number of other offenses, a complaint filed by the victim is a legal prerequisite for prosecution. Thus in such cases, victim pardon is determinative.²⁴ Many in Japan have long criticized this practice as

12. See, e.g., Joachim Herrmann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755, 763 (1992) (describing bargaining in German criminal trials).

13. HŌMUSHO [MINISTRY OF JUSTICE], HANZAI HAKUSHO [WHITE PAPER ON CRIME] 11 (2007), available at http://www.moj.go.jp/HOUSO/2007/hk1_2.pdf (reporting that in 2006, prosecutors only prosecuted 55.4 percent of cases in which they believed guilt could be proven).

14. See MINISTRY OF JUSTICE OF JAPAN, WHITE PAPER ON CRIME 2005, Table 2-3-2-1, (2005) available at http://hakusyo1.moj.go.jp/en/53/nfm/n_53_2_2_3_2_1.html (showing 99.9-percent conviction rates from 1995–2004).

15. *Id.*

16. MINISTRY OF JUSTICE OF JAPAN, WHITE PAPER ON CRIME 2005, Table 2-3-3-4, (2005) available at http://hakusyo1.moj.go.jp/en/53/nfm/n_53_2_2_3_3_5.html.

17. HŌMUSHO, *supra* note 13, at 12 (2007) (reporting that in 2006, 72.6 percent of all prison terms imposed were between one and three years).

18. *Id.* at 14 (reporting that in 2006, 52.6 percent of convictions resulted in probation).

19. DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 110 (2002).

20. *Id.* at 110–11.

21. *Id.* at 115.

22. *Id.*

23. *Id.*

24. See generally Atsushi Yamaguchi, *Victim Restitution and the Japanese Criminal Justice System*, in *CRIME PREVENTION AND CONTROL IN THE UNITED STATES AND JAPAN* 167, 168 (Valarie Kusuda-Smick ed., 1990) (explaining that victim restitution often leads prosecutors to drop criminal cases). The crimes of rape, KEIHŌ, art. 177; criminal breach of a duty of confidentiality, KEIHŌ, arts. 133–34; criminal defamation and injury to reputation, KEIHŌ, art. 230; damage of documents for private use, KEIHŌ, art. 259; damage of property, KEIHŌ, art. 261; and kidnapping, KEIHŌ, arts. 224–28, all require that the victim file a formal complaint before prosecution is permitted to proceed, KEIHŌ, arts. 135,

overly lenient, paternalistic, or even, by the left, as feudal.²⁵ Yet such responses work to correct offender behavior and thus to prevent crime. The more “lenient” the response, the less likely a repeat offense.²⁶

In determining whether to suspend prosecution, to sentence, to fine or incarcerate, to grant probation, or to require that the full sentence be served, Japanese law-enforcement officials consistently take into consideration the offender’s attitude and their victims’ responses.²⁷ Apology (with reparation) and pardon is the leitmotif of the process.²⁸ At each stage in the formal process, those in authority seek confessions that include apology, expressions of remorse, and willingness to compensate the victim for harm done, and they greet such confessions with a willingness to be as lenient as the law allows.²⁹ Law-enforcement officials believe that acknowledgment of wrongdoing, contrition, and accountability, including a willingness to make reparation, are essential factors for offender correction.³⁰ Victim pardon is also important. In response to offender contrition, officials also routinely encourage victims to pardon.³¹

The degree to which restorative approaches to criminal justice reflect official rather than popular attitudes is also notable. David Johnson’s exhaustive study³² of Japanese prosecutors, their work, and their attitudes is particularly revealing. He found that they consider invoking remorse in offenders and victim-offender reconciliation to be among their highest professional priorities.³³ Presented with a similar list of priorities, King County, Washington, prosecutors placed both remorse and reconciliation at the bottom.³⁴ Had the questionnaire used for the King County prosecutors not listed both, they would likely not have even considered either.

180, 229, 232, 264. Thus, victim pardon essentially means that the victim either does not file or withdraws the complaint.

25. JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 80–81 (1998).

26. Takeo Momose et al., *Study on the Actual Administration of the System of Suspended Prosecution After World War II and the Trend of Crime Recommended by Those for Whom Prosecution Has Been Suspended*, 29 HÖMU SÖGÖ KENKYÜJÖ KENKYÜBU KIYŌ [MINISTRY OF JUSTICE COMBINED RESEARCH INSTITUTE–RESEARCH DIVISION BULLETIN] 1, 3 (1986) (reporting recidivism rates three times higher when offenders were arrested than when prosecution was suspended).

27. Shigemitsu Dando, *System of Discretionary Prosecution in Japan*, 18 AM. J. COMP. L. 518, 525–26 (1970); B.J. George, Jr., *Discretionary Authority of Public Prosecutors in Japan*, 17 LAW IN JAPAN: AN ANNUAL 42, 59 (1984); Katsuo Kawada, *Suspension of Prosecution in Japan*, 8–14 (1978) (unpublished paper prepared for UNAFEI program, Tokyo, on file with *Law and Contemporary Problems*).

28. See, e.g., Yamaguchi, *supra* note 24, at 168.

29. Yamaguchi, *supra* note 24, at 168.

30. JOHNSON, *supra* note 19, at 115.

31. *Id.* See also works cited in Haley, *Apology and Pardon*, *supra* note 10, at 842.

32. JOHNSON, *supra* note 19, at 88–118.

33. *Id.* at 97–98.

34. *Id.*

Official attitudes favoring lenient treatment for confessing offenders are not necessarily shared by the Japanese public. Empirical evidence suggests that Japanese citizens harbor sentiments as retributive as those harbored by their counterparts in the United States—at least with respect to strangers.³⁵ However, the process itself—especially offenders' need to negotiate for victim pardon itself—may reduce victim demand for retribution by establishing personal connections like mutual friends and community acquaintances—linkages that tend to reduce the sense of estrangement and to reinforce community.

Japan's experience provides lessons, but not a novel paradigm. Nor is the effectiveness of these approaches unique. How the legal system deals with those who commit legally recognized wrongs should concern us all. Either we seek ways of ensuring that offenders are less likely to offend again (correction) and that victims receive satisfaction, or we will continue to move along a path that promises more crime and more-skilled offenders, as well as an increasing number of embittered victims who will seek harsher and harsher punishments and other forms of retribution. Unless we find ways to correct the offending behavior, the United States will continue to incarcerate or put to death more persons than any industrialized nation on the globe. The ultimate choice is between some form of effective strategy for correction and social reintegration, or permanently casting out those who offend by incarceration or death. A criminal-justice paradigm with apology and pardon at its core at least helps identify those most likely to correct their behavior and thus less likely to reoffend. Apology is a starting place.

35. See V. LEE HAMILTON AND JOSEPH SANDERS, *EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES* 144 (1992) (finding that 92–100% of citizens in Yokohama advocate intervention compared with 52–96% in Detroit).