

THE IMPLICATIONS OF APOLOGY: LAW AND CULTURE IN JAPAN AND THE UNITED STATES

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The significance of apology after serious injury depends on social and cultural factors that appear to be understood differently in Japan and America. As a consequence, what is considered a sincere apology is not the same in the two societies. Moreover, the role of an apology as an ingredient in the formal resolution of legal disputes diverges. Salient legal aspects of apology are discussed, along with the possibilities that an apology may be a defense to a claim, that it may be an admission of another's claim, and that an apology may be a legal remedy for injury. The role in Japan of the formal letter of apology, *shimatsusho*, is described. It is suggested that apology may be an underdeveloped aspect of dispute resolution in America. There are some injuries when an apology alone surely is inadequate compensation, but there are other injuries when traditional common law remedies are unsatisfactory and an apology may be a crucial element in the recognition and restoration of human relationship.

Apology is a social lubricant used every day in ongoing human relationships. People constantly utter words of apology in both Japan and the United States, most often to seek indulgence for a minor social breach, to ask for permission to violate conventional rules, or to express sympathetic regret for a mishap. They say "sorry," "beg your pardon," "much obliged," "thanks," "oops!," "*gomen nasai*," or "*sumimasen*" as they push ahead of their fellows or acknowledge bumps on the busy

This essay was one outgrowth of the authors' joint teaching and research between 1978 and 1985 (see also Wagatsuma and Rosett, 1983). A first draft was written by Professor Wagatsuma during his last illness on the basis of our research and discussion over several years. It has been revised to its present form by Professor Rosett.

As this and our other joint publication demonstrate, our work together often took the form of spirited debate. Readers will observe, therefore, that similar points may be approached from more than one angle. To suppress these disconnections would at least understate the cultural dissonance inherent in a joint study by an American and a Japanese and at worst demonstrate a crude form of intellectual imperialism.

My grief at losing a delightful and invaluable teacher, friend, and co-worker is very great. My loss is aggravated by the fear that, in clumsily completing my friend's part of our work, I have distorted his views. I wish he were here to set me straight.

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street. Themes of obligation and guilt, inadequacy, and shame and subordination are interwoven with gratitude and reassurance in the conventional terms used on such occasions. Such minor transactions are of little intrinsic concern to us. Yet the same words and behavior are also used in a more important set of situations—when an apology is offered after one person does substantial physical, economic, social, or psychic harm to another. Such behavior is an important part of what Goffman refers to as “remedial work,” which serves the crucial function of repairing relationships after injury (1971: 113). It is this quality that gives apology such importance to students of morality, culture, and law, for it lies at the heart of all hopes for a restored and pacific society.

Americans are said to be less likely than Japanese to apologize formally to those they have injured. When faced with a charge that they have seriously wronged another person, Americans typically will deny or challenge the claim or may try to explain and justify their actions. Unlike their Japanese counterparts, neither civil nor criminal defendants in the United States are called upon to express personal apology to those they have injured or to the society whose rules they have violated. An American who is found to have wronged another is likely to consider that paying the damages or accepting punishment ends further responsibility and that there is no need for personal contrition or apology to the injured individual. In fact, were any legal authority—perhaps a judge or the police—to seek an apology from an American as part of the settlement of a serious dispute, such an apology would probably be perceived as either insincere, personally degrading, or obsequious. In contrast, a basic assumption in Japanese society seems to be that apology is an integral part of every resolution of conflict. Offenders too willing to submit to damage payments or other punishment without expressing apology are suspect. Indeed, an offer to pay the damages or accept other punishment without offering apology is considered insincere (not *sei-i*) in the Japanese context.

The claim that there is a difference between Japanese and American views of apology is supported by what we and others have observed over the years in studying how serious disputes and claims are settled in the two cultures. Haley reports one example of this cultural difference:

A Japanese attorney recently related to my law class at the University of Washington his experience in defending two American servicemen accused of raping a Japanese woman. She had charged the two with the crime in an affidavit to the prosecutor, but then left

Japan with a third U.S. soldier. The affidavit was the sole basis of prosecution. The attorney advised the two defendants first to obtain a letter from the woman stating that she had been fully compensated and had absolved them completely. As advised the accused paid her 1,000 dollars and obtained the letter. The lawyer then argued that to convict the accused solely on the basis of the affidavit constituted an unconstitutional denial of a fair trial since they had no opportunity to cross-examine the witness. After listening attentively to the argument, the judge leaned forward and asked the soldiers if they had anything to say, "We are not guilty, your honor," was the immediate reply. The lawyer cringed. Although few Japanese attorneys are as knowledgeable as he about American law, it had not even occurred to him that the defendants might not offer apologies. The time and money spent on the letter were wasted. The judge sentenced the two soldiers to the maximum term of imprisonment, not suspended. More telling, Japanese students need only hear what the servicemen said to the judge to react. They know what happened next. Only Americans have to be told (1982: 272).

I. APOLOGY AND CULTURE

Apology is an objective act that can be observed and measured, but its primary significance is in the social context. In every culture people have a common way of defining interpersonal relationships and attributing significance to social actions. These definitions vary, but, for a person operating in a specific context, these attributions seem so real that the meaning of the situation cannot be otherwise. Members of different societies attribute different significance to social behavior because their assumptions about the world and themselves are different. In a previous article (1983) we considered contract law in Japan and the United States in light of our hypothesis that the Western insistence on protecting the rights of the weak against the powerful is based on the illusion that individuals are autonomous and free to choose their social commitments rationally, just as the Japanese perspective on enforcing promises is based on the *tatema* of *wa*, the illusion that social life reflects a strong order hierarchically connecting individuals and groups and that the aim of law is to realize the inherent harmony among the parts. These motifs of individual autonomy and social harmony describe realities found in both societies, but their significance is affected by cultural assumptions that overstate or downplay their role in a particular situation.

This study of the implications of apology in Japanese and

American law is motivated by our recognition that the behavioral differences we posit are connected to the processes by which serious disputes and accusations are resolved. This kind of study is inherently problematic, and our conclusions are therefore stated with full recognition of their tentative nature. In a real sense, all attempts to describe the factors contributing to cultural differences are reductionist and denature the essence of cultural coherence. No single contributing factor can be isolated from the rest without distorting the image of the whole. The evidence reported in this essay is incomplete and anecdotal. We believe, nonetheless, that there are real differences in the incidence of apologetic behavior by Japanese and Americans faced with a serious claim that they have injured another. We are even more confident, however, that there are differences in the significance that is likely to be attached to apologetic behavior or the failure of a person to apologize. These differences in significance are expressive of important cultural assumptions that influence many forms of social interaction and that form a central part of the foundation supporting the structure of the legal system. Studying them should reveal significant information about the formal and informal operation of both the Japanese and American legal systems and about the connections between culturally influenced behavior and the legal processes used to resolve disputes.

We would agree, for example, with Haley's recent suggestion (1982: 275) that apology in Japan is one of a number of social behaviors that compensate for the weakness of the formal enforcement sanctions of the law. Haley's point also can be turned inside out. The availability of social restorative mechanisms like apology obviates formal legal sanction in many cases. In the United States, the relative absence of recognition of apology may be related to the observed tendency of American society to overwork formal legal processes and to rely too heavily on the adjudication of rights and liabilities by litigation. Alternative means of dispute resolution accordingly receive less attention and social support. The relative absence of apology in American law may also be connected to the legal system's historic preoccupation with reducing all losses to economic terms that can be awarded in a money judgment and its related tendency either not to compensate at all or to award extravagant damages for injuries that are not easily reducible to quantifiable economic losses. Finally, the small role of apology or any other personal contact between criminal and victim also seems related to the disquieting tendency in American law to ignore and even abuse the victim during the formal process of criminal

prosecution (e.g., President's Task Force on Victims of Crime, 1982; Hall, 1975; Geis, 1975).

Haley persuasively connects the absence of effective sanction in Japanese law with the Japanese emphasis on group cohesion, conformity, and the maintenance of strong social sanctions against those who disturb the order and harmony of the community (1982: 275–79). Young offers a comparable explanation of the operation of “administrative guidance” that dominates governmental control of Japanese economic life when he describes it in terms of the weakness of the Japanese notion of rights (1984: 968–78). Traditional Japanese social norms emphasize harmonious interpersonal relations and group solidarity. Interpersonal and group conflict can be found in many forms in Japan as elsewhere, but in Japan many forms of self-assertion are strongly discouraged while great emphasis is placed on the sacrifice of personal needs and individual emotional self-expression to avoid confrontation with the group (see Steinhoff, *et al.*, 1984; Lebra, 1976: chaps. 2, 4). Japanese tend to make a sharp distinction between in-group and out-group, or between those they know very well and those they do not know at all (Nakane, 1970: chap. 2). Within a group, maintenance of harmonious and smooth interpersonal relations, interdependence, and mutual trust are of utmost importance. At the same time, vague animosity, competition, suspicion, or at least indifference is strong between groups. In-group solidarity and out-group hostility are two sides of the same psychodynamic coin. Aggressive feelings that are generated but not allowed to be expressed inside a social group are often directed outward in the form of hatred focused at a specific scapegoat or suspicion toward outsiders. The more the group insists that aggressive self-assertion and confrontation within the group be avoided, the more likely it becomes that these tensions will be directed outward. Consequently, the stronger the emphasis on in-group harmony and solidarity, the more intense the out-group enmity can be. Japanese are taught to accept such tensions and feelings of frustration as a natural consequence of social life, although they may not openly acknowledge the fact.

Japanese describe a person's stated reasons or opinion as *tatemae* and his real intention, motive, or feeling as *honne*. These two terms describe two sides of a single reality; there can be no *tatemae*, or public character to behavior, without its linked *honne*, or private connotation (Doi, 1973b; 1986). *Tatemae* is that which one can show or tell others, while *honne* is that which one should not or had better not tell others. At the conversational level, *tatemae* may be an indirection in dis-

course, while *honne* is a more candid message underneath. Yet *tatemae* is more than conventional evasiveness. It can be the expression of one's commitment or compliance to the demands of social norms, while *honne* may be the expression of one's sense of frustration, unwillingness, or the feeling that the demands of the group are unreasonable or impractical. When Japanese recognize that there is a normative way of doing something and say that they do that thing in the normative way, this is an expression of *tatemae*. At the same time, they know and may confide to a friend that it is impossible for them to do the thing that way. The admission of this frustration is *honne*. Ames makes this point nicely in describing the conflicting expectations regarding law enforcement that operate in the work of a rural Japanese policeman (*chuzai san*):

There is a certain amount of tension in the role of a *chuzai san* enforcing the law within a social setting that stresses closeness between him and the surrounding community. Police officers by the nature of their job must formally intervene occasionally and invoke legal sanctions when violations of the law occur. Yet this can be at odds with the idea of rapport and understanding between the *chuzai san* and his tightly knit village neighbors. His dilemma is solved by the distinction between *tatemae* and *honne*. . . . The formal *tatemae* is that he enforces the law evenhandedly and rigorously, but in reality (the *honne*) the villagers neither expect nor want him to do so (1981: 28).

Disparity between operating by the rules (*tatemae*) and operating by pragmatic judgment (*honne*) is familiar to Americans also. Yet the typical American emphasis on internal emotional consistency makes it difficult for many Americans to understand the Japanese attitude toward *tatemae* and *honne*. It is said that when Americans feel positively and negatively toward the same object, they tend to repress one of their feelings so as to establish internal consonance in their minds (Festinger, 1957). Americans find it harder to live with the cognitive dissonance of ambivalent emotions than Japanese. They tend not to admit their ambivalence, to identify it with hypocrisy and insincerity, and to avoid it by repression. One might say that Japanese have a greater tolerance for ambiguity and ambivalence, which at times may appear as even a preference for the ambiguous. In a society that emphasizes group membership as a basis for personal identity, it is important to maintain the sense of "insideness" after a rupturing conflict. There must be a ceremony of restoration to mark the reestablishment of harmony. The process of "conciliation" (*chotei*) and "compromise"

(*wakai*)¹ and the show of benevolence by the insulted superior party are important, but an apology, and best of all a mutual apology, are even better as the explicit acknowledgment of commitment to future behavior consonant with group values.

A. *A Fable of Apology and Mutual Dependence*

A fable may clarify our point. In Aesop's Fables, as told in the West,² a mouse boasts to his friends that he is not afraid of a lion, who is sleeping peacefully nearby. To prove his courage, the mouse jumps on the head of the sleeping lion, who awakes and captures the insolent mouse. Desperate but undaunted, the mouse tries to negotiate his way out of this perilous situation. "Free me and someday I will save your life," he brashly promises. The lion thinks this self-aggrandizing mouse is ridiculous, but, because it happens that he is not hungry, he lets the mouse go. Time passes and one day the lion is trapped by a hunter's net. The mouse comes by and chews the net, releasing the lion and thereby keeping his promise. The lion thus learns the lesson that even a blowhard little mouse can rescue him and is not too small to be his friend.

The version of the same tale that is told to Japanese children is somewhat different in that the mouse does not boast to his fellow mice (they do not appear in the story). Instead, the absent-minded mouse climbs onto the head of the sleeping lion by mistake. The lion awakes and captures the mouse. The mouse apologizes profusely in tears for his terrible mistake and unforgivably impolite behavior. The lion feels pity for the mouse and lets him go. The reader is never told whether the lion is hungry, for that is irrelevant to this version of the tale. The Japanese mouse is deeply grateful to the lion for his generosity and kindness. Later, when the lion is trapped, the mouse comes by and "pays back the indebtedness" (*on gaeshi*). Now the obligation has shifted, and the lion, grateful to the mouse, expresses regret that he had previously behaved arrogantly toward the mouse. The lion then apologizes to the mouse, and they become faithful friends.

The differences in these two fables highlight apparent differences in cultural assumptions regarding the mutually depen-

¹ While the statistical evidence is somewhat confusing, it appears clear that a majority of the civil complaints filed in Japanese trial courts are resolved by these processes (see Henderson, 1965: chaps. 8–10; Yamashita, 1985: chaps. 2, 3; Hattori and Henderson, 1983: sec. 9.02).

² The emphasis on apology in the Japanese versions of such familiar fairy tales as Cinderella, Goldilocks, and Little Red Riding Hood is discussed in Lanham and Shimura, 1967: 33.

dent quality of relationships. Based largely on the seminal work of Doi (1973a; 1986), it is commonly recognized that Japanese social norms not only condone but also often encourage dependent behavior of adult individuals, in contrast to American norms that, it is said, teach that persons are expected to repress their dependent needs early in childhood in order to become autonomous individuals. Japanese often use the verb *amaeru*, which roughly translates as “to presume on someone else’s benevolence,” to describe the active behavior of moving into a state of dependence on and full acceptance by the person depended upon (a superordinate, a parent, a friend). Japanese adults *amaeru* toward each other, thus forming relationships of interdependence that are important elements of the social network. This interdependence can be hard for Americans to understand because they usually perceive dependence as a one-way affair and therefore as faintly pejorative, suggesting a parasitic relationship. In the American perception, an individual is either dependent or not, and much psychic energy is expended to prove one’s freestanding independence. The assumption is that a “weak” person is dependent on a “strong” person and that a dependent person therefore is at the mercy of the one upon whom he is dependent. In Japanese society the mutuality of the tie between subordinates and superordinates is perceived as being a more prominent aspect of the relationship. Thus Japanese are said to be socialized not only to *amaeru* (to be dependent on or succored) *by* others but also to *amayakasu* (to be dependable or nurturing) *to* others.³

The difference in the two versions of the fable of the mouse and the lion suggest differences in the connotations and functions of apology in the two cultures.⁴ Several of the themes embodying these differences will reappear throughout this essay. In the next section we will try to tease out some of the elements of apology by considering the minimal components of a sincere apology. The sincerity of apology is a central theme in both Japan and America, although, as we will suggest later, sincerity appears to refer to somewhat different aspects

³ The same polarity was observed by Rabbi Akiba in the second century A.D.: “More than the calf wants to suck the cow wants to suckle” (Babylonian Talmud, Pesahim 112a).

⁴ The tales also are distinguished by an aggressive assertion of self on the part of the American mouse and by the self-effacing attitude and spontaneous gratitude of the Japanese mouse. Also, the Western tale seems more essentially egalitarian, that is, it shows that the feisty little mouse is just as important as the big lion, while the Japanese tale is built more on the gracious benevolence of the lion to the inferior mouse, who remains at all times essentially subordinate.

of apology in the two cultures. In this discussion we also will introduce several other themes to be developed in a more legal context: the relationship between an apology and an admission of the act, the wrongfulness of the act, and the obligation to make compensation for resulting injury. We will consider the extent to which apology involves a disassociation of the person apologizing from some part of the self and the subtle linguistic and psychological ties between apology, gratitude, and forgiveness—the healing of social hostility. In the final part of the essay we shall focus on the legal aspects of apology in the two cultures. Special attention will be given to the use of formal apologies in Japan as part of our effort to connect the themes to cultural attitude and legal practice.

II. THE ELEMENTS OF APOLOGY

Apology becomes important when it provides significant evidence of the state of mind of the apologizer. From a Westerner's perspective the ambiguities of apology are therefore intimately tied to the uncertainties of human intention and their potential for manipulation. Apology relies too heavily on inferring from an external act the presence of a state of mind—remorse or nonhostility—and therefore seems to be too subject to manipulation by deceitful people who say they are sorry but do not mean it. Even when there is no conscious intention to deceive, the formal aspect of the act of apology inevitably tends to convert it into a conventional or stereotyped ceremony. Some of the more flowery forms of apology in English, for example “*I beg your pardon*,” or “*Oh, I'm terribly sorry*,” are used most commonly in precisely those minor social situations in which the literal meaning of the words are very unlikely to express the actual state of mind of the person saying them. Conventionality can erode the content of the concept and obscure its meaning. From a Western point of view, these features make apology a dangerous foundation upon which to build an important legal structure.

One way to retrieve the essential connotations of the concept is to ask what constitutes a meaningful apology. For instance, one may ask whether a person can meaningfully apologize without acknowledging that

1. the hurtful act happened, caused injury, and was wrongful;
2. the apologizer was at fault and regrets participating in the act;
3. the apologizer will compensate the injured party;
4. the act will not happen again; and

5. the apologizer intends to work for good relations in the future.

III. APOLOGY AS AN ADMISSION OF THE ACT

At first glance the simplest sincere apology appears to be, "I'm sorry it happened." A logical distinction exists between an expression of sympathy or regret and an apology, but contextually the distinguishing element of admission by the speaker of responsibility for the object of regret is strongly inferred in most cases (Coulmas, 1981: 76). It is hard to imagine in the American context a sincere apology that does not acknowledge that the act occurred and caused injury. However, several well known Japanese cases⁵ indicate that while remorse, a strong intention to avoid repetition of the act, and a willingness to compensate the injured party may be present in an apology, it may be very difficult for the apologizer to admit that the events occurred or that he did them. Disassociation from the wrongful act can be used to maintain a coherent sense of self; for instance, one can accept such acts only by insisting that some external force, rather than the person apologizing, was primarily responsible.

Both Japanese and American criminal law can be extremely harsh on those who persistently deny responsibility and who, unlike the majority of those accused of crime, refuse to accept punishment docilely. In the Japanese case, such behavior is likely to lead to extended interrogation under very unpleasant and isolated circumstances of pretrial detention. This may motivate some Japanese defendants to adopt a very passive and submissive posture toward the authorities and "play the role of a carp laid out on the cutting board" (Bayley, 1976: 145). In America, the threat of severe punishment for those who resist the system also is an important incentive that leads most defendants to admit their guilt. In *North Carolina*

⁵ The difficulty of gaining an admission of responsibility and apology from governmental and industrial defendants was a major sticking point in resolving several notorious Japanese cases involving mass pollution and drug injuries. A fascinating diary kept by several of the plaintiffs' attorneys in the Thalidomide litigation that lasted for almost a decade during the period 1964-74 suggests that a major problem was not the monetary terms but the responsible ministry's insistence that it only express "regret" rather than apologize for the catastrophe (*Law in Japan*, 1975: 183-84). It took 9 distinct losses in the SMON (Subacute-Myelo-Optico-Neuropathy) court cases involving serious injury to many patients treated with the government-approved drug Clioquinol before the responsible minister apologized as part of a judicially engineered settlement (see Yoshikawa, 1978: 79-80; *Law in Japan*, 1979: 103). The extended refusal of industrial companies to apologize for their role in a disaster in which cooking oil contaminated with PCB poisoned thousands is described in Reich, 1982: 115-16.

v. *Alford*, 400 U.S. 25 (1970), the Supreme Court of the United States upheld a criminal conviction based on a plea of guilty in which the defendant at all times insisted that he had not committed the wrongful act. The defendant in *Alford* was accused of murder, which carried the possibility of a death sentence. His lawyer advised him that the case against him was strong. To avoid a death sentence, the defendant pled guilty to a lesser offense, and the judge accepted his plea. The acknowledgment of guilt was not accompanied by a concession of participation in the fatal event. In addressing the trial judge Alford said,

I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all (ibid., at 28, n. 2).

Another example of apology without admission of the act can be seen, particularly in the United States, when a corporation accused of commercial fraud may face not only administrative sanctions but also potentially great civil liability, including the loss of a license, franchise, or permit. Or the accused company may be confronted with a trial that could go on for years and sap the energy and resources of the entire enterprise. All of these factors are likely to lead to acceptance of liability and punishment without admitting the alleged act. Most antitrust cases and many administrative cases of other kinds are terminated by a consent decree in which the respondent agrees to cease and desist from the complained of conduct and to pay compensation and penalties without actually admitting the behavior (see Sullivan, 1977: 758; Hills, 1985: 634).

IV. APOLOGY AS AN ADMISSION OF THE WRONGFULNESS OF THE ACT

Apologizing for an act, without admitting the act itself, may be rare, but a person is more likely to apologize for acts that she does not recognize as wrongful, although she may regret the harmful consequences of her behavior. These uncertainties of apology are reflected in English in the two conflicting connotations of the word *apology* itself. Its original, now less common, meaning is derived from the Greek root of the word and denotes a defense, explanation, or justification (*Oxford English Dictionary*, s.v. "apology;" *Webster's Third New International Dictionary*, s.v. "apology"). *Apology* in the Socratic sense of a legal defense passed on to the Roman tradition and ultimately into English, where it can be seen in such exam-

ples as *Apologie of Syr Thomas More, Knyght; made by him, after he had geven over the Office of Lord Chancellor of England* of 1533, Philip Sidney's *Apology for Poetry* of 1595, or John Henry Newman's *Apologia pro vita sua* of 1865 (Peterson, 1985: 300). Its second, and now more common, definition suggests confession, expression of remorse for injury, and acceptance of responsibility for wrong, rather than defense of the act. Socrates' *Apology* is anything but a confession of wrongdoing, although it is a statement of acceptance of moral responsibility for acts. These two branches of the idea coexist in Western thought and to a degree characterize the differences between American and Japanese apologies. Nagano's survey of Japanese and American students (1985) indicates that in minor social situations, Japanese apologize by acknowledging their fault, while Americans believe that a statement of explanation or justification of their behavior is an appropriate apology.

Many Japanese seem to think it is better to apologize even when the other party is at fault, while Americans may blame others even when they know they are at least partially at fault. Americans, as a group, seem more ready to deny wrongdoing, to demand proof of their delict, to challenge the officials' right to intervene, and to ask to speak to a lawyer (Bayley, 1976: 145). Japanese criminal offenders are said to be more ready than Americans to admit their guilt and throw themselves on the mercy of an offended authority.⁶ Only when an individual "sincerely" acknowledges his transgression against the standards of the community does the community take him back.

An apology in the Japanese cultural context thus is an indication of an individual's wish to maintain or restore a positive relationship with another person who has been harmed by the individual's acts. When compensation or damages are to be paid to the victim, it is extremely important that the person responsible expresses to the victim his feeling of deep regret and apologizes, in addition to paying an appropriate sum. If a person appears too willing to pay the damages, that willingness may be taken as the sign of his lack of regret. He may be regarded as thinking that money can settle anything and as not being sincerely interested in restoring a positive relationship with his victim. In dealing with those who have offended them, the cultural assumption of social harmony would lead the Japanese to accept the external act of apology at face value and not

⁶ The weakness of this argument is that the Japanese only react this way to those in authority; they have more trouble dealing with equals and are quite unwilling to humble themselves before those they consider inferior. Compare the lesson the lion had to learn in the fable recounted earlier.

to disturb the superficial concord by challenging the sincerity of the person apologizing. The act of apologizing can be significant for its own sake as an acknowledgment of the authority of the hierarchical structure upon which social harmony is based. At a deeper psychological level, the restoration of a harmonious relationship is attained by the denial of one's self-serving and self-preserving tendencies. In this context, the external act of apology becomes significant as an act of self-denigration and submission, which of itself is the important message. Then the internal state of mind of the person who tenders the apology is of less concern. Conversely, if an offender is too willing to offer reparation without indicating his repentance and expressing apology, the response of other Japanese is likely to be unaccepting.

Sincerity of apology thus has different connotations in the two cultures, with the Americans preoccupied with the problematics of wholeheartedness and the Japanese focused on the more attainable externality of submission to order and return to harmonious relationship. Thus it appears that the Japanese view an apology without an acceptance of fault as being insincere, while an American is more likely to treat an exculpatory explanation as the equivalent of an apology at least to the extent that it is accompanied by a declaration of nonhostile intent in the future.

A. *The Connection between Apology and Gratitude— Sumimasen*

The difficulty of isolating a notion like apology from its cultural context is shown by the Japanese use of words of apology as the response to what is perceived as an undeserved kindness. The connection between apology and gratitude is not limited to the Japanese; Coulmas gives eight examples drawn from English, German, French, and Greek in which expressions of gratitude and of apology evoke identical conversational responses (1981: 72). This does not suggest, however, that the two notions are synonymous in those languages. In Japanese *sumimasen* is commonly used to express gratitude in situations when an American would say "thank you," although the Japanese phrase for "thank you" is *arigato gozaimasu*. Yet the core meaning of *sumimasen* is closer to "I am sorry," and its literal meaning is something like "it will never end," suggesting recognition of a limitless obligation. When a Japanese directly translates into English what he feels comfortable saying in his own language he is likely to confuse his American friends, who will

hear "I am sorry" when they expect to hear "thank you." Benedict has noticed this and offers an explanation:

In English *sumimasen* is translated "Thank you," "I'm grateful," or "I'm sorry," "I apologize." You use the word, for instance, in preference to all other thank-you's if anyone chases the hat you lost on a windy street. When he returns it to you politeness requires that you acknowledge your own internal discomfort in receiving. "He is offering me an *on* [a gift creating an obligation on the recipient] and I never saw him before. I never had a chance to offer him the first *on*. I feel guilty about it but I feel better if I apologize to him. *Sumimasen* is probably the commonest word for thank-you in Japan. I tell him that I recognize that I have received *on* from him and it doesn't end with the act of taking back my hat. But what can I do about it? We are strangers" (1946: 106–6).

Benedict's insight points to important aspects of apology and gratitude, but her interpretation is incomplete in several respects. It is questionable initially as a matter of Japanese usage, for in fact when a Japanese receives a real favor and feels truly indebted, he will not say *sumimasen* but *domo arigato gozaimasu*. For example, one says *arigato gozaimasu*, not *sumimasen*, to the doctor who has saved his or a relative's life or to the host of a sumptuous dinner. *Sumimasen* is used when an individual receives a minor gift or favor (catching someone's blown-off hat) to which the recipient may at least semiconsciously feel entitled because she is a social superior or because she was once a benefactor, or simply because it is such a small favor. It is less used to convey great gratitude than to express a mixture of gratitude and guilt about receiving a favor. The self-effacing words of apology are analogous to the English usage "*I am sorry to bother you, but would you please drop this letter in the mailbox on your way out?*" It is simply contrary to conventional norms to expect a favor, however small, at the expense of others. These norms are reflected in a number of idiomatic Japanese expressions. One often hears a person say "*jiman ja nai ga* (meaning "this is not boasting") and then go on to boast unabashedly. When a Japanese is appointed to an important position he is likely to say to his colleagues, "This job is too much of a burden for me," or "I am not qualified for this job," before accepting the promotion. When a superordinate asks a Japanese how he is doing in his new job, the answer is likely to be "*o kage samade*" (literally, "under your honorable shadow," which means, "Thanks to you, I somehow manage to do my work"). These same norms demand that an individual should feel guilty about receiving a favor or gift and therefore respond

"I am sorry" or "*sumimasen*" rather than more directly expressing one's appreciation with "thank you" or "arigato." Coulmas puts the matter this way:

In Japan, the smallest favor makes the receiver a debtor. Social relations can be regarded, to a large extent, as forming a reticulum of mutual responsibilities and debts. Not every favor can be repaid, and if circumstances do not allow proper repayment, Japanese tend to apologize. They acknowledge the burden of the debt and their own internal discomfort about it. It is in this context that one must view the many words the Japanese have to express obligation. Apologies, used in innumerable circumstances, and serving a variety of functions beyond the imagination of an Occidental, are not merely degenerate clichés with no substantial message associated with them. Rather they serve to balance debt and credit between parties, and, at the same time, they convey a sense of the omnipresent moral indebtedness so characteristic of social relationships in Japan (1981: 88).

V. APOLOGY AND DISASSOCIATION

The sincerity of an apology is connected with personal coherence and ambivalence on two distinct levels. An apology suggests change in attitude when the apologizer expresses remorse for past hurt and the commitment that future behavior will not be hostile and will make up for the rupture in relationship created by the hurtful act. Apology thus is Janus-like, with one face looking back remorsefully on the hurtful deed and the other looking forward hopefully to a better future. As Goffman has observed (1971: 113), an apologizing individual splits herself into two parts, the part that is guilty of an offense and the part that disassociates itself from the delict and affirms a belief in the offended rule. In this way apology is likely to involve a disassociation from that part of the self that committed the unacceptable act.

This disassociation can be accomplished in a variety of familiar ways: The bad behavior might be attributed to some external agency; it may be said to have been unintentional, unwitting, or otherwise not the work of the conscious self; or the individual might claim to be a new and different person who is no longer chargeable with the delicts of his old self. "Oh, I'm sorry, I didn't mean it!" is a typical American apology. The biblical sacrificial rite of atonement involved a confession of wrongdoing accompanied by the claim that the sins of the people were unwitting (Num. 15: 26). Later Christian practice adopted the rite of baptism, during which the sinner is reborn

and washed clean of the faults of the old self. Many traditions project bad behavior externally on the influence of devils and demons. The defense of temporary insanity in modern American criminal procedure reflects the same inclination to attribute bad behavior to something outside the actor's personality for which she is not responsible. The modern Japanese salaried worker is freed from the rigid hierarchical structures of the work world and can tell his boss just what he thinks without fear of punishment by means of the excusing ingestion of alcohol. Japanese workers and bosses often drink together after work, and it is widely reported that on such occasions matters can be raised that would be impermissible during the workday. Yet custom requires that what is said at such time be attributed to the influence of the drink and not be held against the speaker.

The Japanese word *mushi* literally means "worm" or "bug," but it is used in a number of idioms to describe some internal force distinct from the rest of the personality that influences feelings and emotions. When a person is depressed, he or she is said to be possessed by the "worm of depression" (*fusagi no mushi*). When someone is in a bad temper, the worm is said to be in the "wrong place" (*mushi no idokoro ga warui*). When a person persists in anger, it is said to be because "the worm in her abdomen has not calmed down" (*hara no mushi ga osamaranai*). When a man is tempted to have an extramarital affair, it is explained as the effect of the "worm of fickleness" (*uwaki no mushi*). If a child has temper tantrums, his mother may take him to a shrine to have the "worm of tantrum sealed off" (*kan no mushi*). A selfish individual who expects much of others without reciprocating is described as a "person with too good a worm" (*mushi ga yosugiru*). Impulsive behavior thus is attributed to an external agent, that is, the worm, that has found its way into the human's body. People acting according to their true selves would have to be condemned as disruptive members of society. However, since people are merely victims of their *mushi*, the worm can be "sealed off," thus permitting people to return to their true selves and to be restored to the community without guilt.

This view affirms a Japanese belief in basic human goodness and expresses an expectation that once relieved of the dire influence of the worm, people will return to a normal life. This view also suggests that, in dealing with those who behave badly, the appropriate attitude is one of "nurturant acceptance" (*amayakashi*) that does not hold them fully responsible for their impulsive behavior. This cultural assumption of basic

goodness also suggests a belief that each individual has innate capacity for eventual self-correction. Japanese thus not only believe that human character is mutable, but they also view an excessively bad person as “nonhuman (*hito de nashi*). When such persons reform, they are seen as “returning to being a real human” (*ma-ningen ni kaeru*).

Disassociation also exists on another level. The notion of sincere apology assumes that human feelings have a coherence and wholeheartedness that is not common in an emotionally charged conflict situation. When someone has hurt us (or when we have hurt someone), we are likely to have conflicting feelings at the moment of apology. Almost all apologies are insincere in the sense that the person apologizing probably continues to entertain at some level, certain hostile thoughts toward the other. Those tolerant of such ambivalence may admit while offering an apology that they do not completely mean what they are saying. Those intolerant of such ambivalent states of mind will insist that their apology is wholehearted and sincere. Western ideology places a higher value on the need to maintain internal consistency and has difficulty simultaneously holding ambivalent feelings. A common resolution of this ambivalence is to repress one feeling and insist that the other is genuine (Festinger, 1957).

A. *Apology and Forgiveness: The Connection to Restoration of Relationship*

The effectiveness of an apology cannot be judged simply by examining the behavior of the person apologizing. The response of the injured person is crucial, for the success of the apology depends on that person being mollified, appeased, or calmed. Apology mediates between frustration and aggression and can ameliorate an injured person's hostility toward the wrongdoer (Raven and Rubin, 1983: 274–80). An experimental study of the impact of apology on frustration is reported by Harris (1974: 561). Apology can be successful only if it is accepted and responded to by at least the beginnings of forgiveness. In an American setting, this element of apology may be satisfied by the restoration of nonhostile or peaceful coexistence. All that is needed is a nonaggression pact declaring that the parties do not mean to cause each other further harm. In Japan the response element of forgiveness seems more likely to emphasize the restoration of harmony in the sense of the restored order of the hierarchical parts and their reciprocal obligations.

These differences parallel other characteristics observed in the two cultures. For example, American law tends to look at commercial relations transactionally. As Macneil cogently observes (1980), the law of contracts and commercial transactions is weakest in dealing with ongoing relations and strongest in dealing with isolated transactions. The reform of the Uniform Commercial Code in America was in part designed to reduce this atomistic tendency and to look, for example, at the negotiations leading to the formation of a contract as part of an ongoing stream of communication rather than as discrete events. On a broader scale, a number of legal thinkers have critically analyzed the failings of American law and life in terms of the overstatement of transactional and individual values at the expense of communitarian values (see, e.g., Unger, 1976). This tendency to break everything into separate transactions as opposed to ongoing relations of open-ended duration can also be seen in apologetic behavior. The behavior we have described as typically American is a transactional apology, that is, the person explains and justifies behavior and may admit responsibility and perhaps liability for this one act. The Japanese behavior we have described is characterized by much stronger relational elements, with less emphasis on the specifics of the hurtful transaction for which the apology is being offered and much greater emphasis on the expression of commitment to a positively harmonious relationship in the future in which the mutual obligations of the social hierarchy will be observed.

VI. LEGAL ASPECTS OF APOLOGY

Despite the obvious social and moral significance of apology, its legal implications are somewhat uncertain both in Japan and the United States. These uncertainties arise at several levels. At a formal level, the norms of substantive rights and liabilities announced in the codes and court decisions rarely treat apology as a significant factor. In American civil law, for example, we found no clear instance in which apology serves as a defense to a cause of action. A person is not relieved of liability for causing harm because he or she has apologized for the injury. The closest instance to the use of apology as a defense is the doctrine, now largely embodied in statute, that a retraction or apology mitigates damages in a defamation suit. If the retraction or apology is effective, the plaintiff is permitted to recover only actual damages, which in the vast majority of cases leaves the plaintiff with a moral victory but no substantial monetary recovery. Thus in states with such a statute or com-

mon law rule, an apology is a practical bar to a libel action, although the law does not quite say that. A somewhat similar situation exists in criminal law. Apology is not a defense to a criminal charge, but in both Japan and the United States the codes and rules permit apologetic behavior to be considered in mitigation of punishment. In distinction to the defamation law example, however, there is little reason to believe that those who apologize for serious offenses receive no punishment.

Uncertainty regarding the legal consequences of apology arises at two other levels as well. The procedural and evidentiary legal structures of Japanese and American law treat apology quite differently, although an apology is likely to have an impact on the outcome of a case in both systems. In American law, a statement that meets the standards of a sincere apology discussed above might also be characterized as an admission of liability admissible against the utterer. As we shall suggest, the law of evidence in America is torn between the pull to encourage compromise settlement of disputes by a process that is likely to include an apology and the countervailing attraction to a common lawyer of an admission, that "queen of proof," which can be used to prove the claim despite the hearsay rule and other artificial strictures that make proof at common law so complex. Such rules of evidence do not play a role in the judge-centered Japanese trial. As in the United States, few Japanese lawsuits are resolved by judgment after a full judicial trial. In both countries the slowness, expense, and uncertainty of the court process are used to motivate the parties to settle. What is notably different in Japan is the extent to which the court process includes and may actually require that the parties undertake to resolve the dispute by "conciliation" (*chotei*) and "compromise" (*wakai*) (see n. 1, above; Menkel-Meadow, 1986). In such a process, the tender of an apology is a crucial step toward resolution and has important practical consequences, even if the provisions of the civil code that define the legal obligations of the parties say nothing about apology.

A. *Apology and Defamation*

At common law, the retraction, withdrawal, correction of, or apology for a defamatory statement can be offered by a defendant as evidence in mitigation of punitive and compensatory damages (Sack, 1980: 371; Eldredge, 1978: chap. 18; Gatley, 1981: sec. 1171-73, 1441). This evidence weakens the inference of malice upon which the award of punitive and generous compensatory damages is based in defamation cases. In the modern

American setting, the mitigating impact of retractions and corrections has been incorporated in statutes in at least thirty states, which often are primarily designed to protect publishers of newspapers and electronic media from liability for defamation included in reports they innocently publish (Sack, 1980: Appendix 4; Libel Defense Resource Center, 1984). In this respect, the doctrine is connected to the contemporary social value placed on the free communication of news and politics, and the notion that the media should not be liable for defamation without some showing of actual fault (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). Although the emphasis in most of these statutes is on retraction or correction, it is noteworthy that seven states explicitly mention apology in addition to retraction as appropriate evidence in mitigation (FLA. REV. STATS. § 770.02 (1986); MISS. CODE ANN. § 95-1-5 (1972); N.C. GEN. STAT. § 99-2 (1985); TENN. CODE ANN. § 29-24-103 (1980); TEX. CIV. PRAC. REMEDIES CODE § 73.003(a)(3) (1985); VA. CODE § 8.01-48 (1984); W. VA. CODE § 57-2-4 (1966)). This language is traceable to an English statute, which in the first section describes as apology the mitigating behavior that may be shown (Lord Campbell's Act, 1843, 6 & 7 Vict., ch. 96, § 1). The common law approach upon which these statutes are based is in turn connected to the practice in the church courts, which until quite late retained primary jurisdiction over complaints of defamation (see Holdsworth, 1925: 333-36; Hair, 1972: nos. 180, 437, 547; Emmison, 1973). Helmholz characterizes the court records of the fourteenth- and fifteenth-century ecclesiastical courts as follows:

The court records do, however, provide frequent reference to "spiritual" penalties. These normally contained two elements: public penance and public apology to the party defamed. Open penance by the offender and restoration of the plaintiff's reputation were sought. The order from one York cause, for example, required the defendant to march in the parish procession in penitential garb and "at the time of High Mass, the parishioners being present, [to] say in a loud and intelligible voice that he had erred in his words, which were uttered from false information of others, and [to] humbly ask pardon" of the complainant. In a Hereford cause, the defendant had again to publicly ask pardon during divine service and to say "that he had uttered the words out of evil will, not from zeal and that he had been moved to anger." Such picturesque examples of public penances taken from the remaining act books could easily be multiplied, though they seem the object of special interest to the social,

rather than the legal, historian. To the latter, the evident goal of all of them: the public humiliation of the defamer and the restoration, as far as possible, of the reputation of the person defamed must be the essential point (1986: xl).

When the English common law courts assumed primary jurisdiction for libel and slander in the seventeenth and eighteenth centuries, they sought to fit the causes of action into familiar forms in which the essential gravamen is economic loss related to reputation, rather than the sting of degradation. Apology became primarily significant as evidence in mitigation of damages, rather than as a remedy imposed on the defamer or a defense against a claim of slander, although a few old American cases do appear to treat a prompt retraction or apology as a defense to slander (e.g., *Townsley v. Yentsch*, 98 Ark. 312, 135 S.W. 882 (1911); *Linney v. Maton*, 13 Tex. 449, 458 (1855); *Trabue v. Mays*, 33 Ky. (3 Dana) 138, 28 Am. Dec. 61 (1835)). This approach often fails to get to the heart of the plaintiff's complaint, which is usually the prayer for sizable general and punitive damages. When a plaintiff is relegated to his provable, specific economic losses, usually described as special damages, as he is under common law and statutory retraction and apology rules, the lawsuit is likely to lose significance.

The continuing importance of apology in defamation cases is indicated by a recent Los Angeles lawsuit against a number of right-wing groups by a survivor of Nazi concentration camps who claimed emotional distress and libel based on the defendants' statements that the Nazi Holocaust of the Jews never happened. The suit was settled in an unusual agreement in which the defendants agreed to a cash payment and the following statement:

The Legion for Survival of Freedom, Institute for Historical Review, Noontide Press, Elizabeth Carto, Liberty Lobby and Willis Carto do hereby officially and formally apologize to Mr. Mel Mermelstein, a survivor of Auschwitz-Birkenau and Buchenwald, and all other survivors of Auschwitz for the pain, anguish and suffering he and other Auschwitz survivors have sustained relating to the \$50,000 reward offer of proof that "Jews were gassed in gas chambers at Auschwitz" (*Los Angeles Times*, July 25, 1985: 1, 26).

B. *Apology and Criminal Law*

Although we have not found any criminal statute in either Japan or the United States that treats apology as a defense to a criminal charge, this gap belies the practical significance of

apology in both countries. In the United States most criminal charges end with conviction following a guilty plea in which the accused accepts punishment. The guilty plea is unknown in Japan, but the accused's confession foreshortens the trial process and makes the outcome foreordained. In both nations entry into the criminal justice system is dominated by official discretion that diverts a high percentage of offenders to relatively mild treatment and reserves the rigors of full prosecution for a few, including those who "fail the attitude test" by not showing appropriate contrition and apology (Rosett and Cressey, 1976; Hawkins, 1984: chap. 8). An apology may not of itself foreclose criminal punishment, but modern sentencing standards are likely to consider evidence of apologetic behavior as a major factor to be considered by the sentencing judge. For example, the California Sentencing Rules for Superior Courts include extensive lists of factors to be considered in deciding whether to grant probation to a convicted criminal, as well as numerous factors to be considered in aggravation and mitigation of punishment. One factor affecting the decision to grant probation is "whether the defendant is remorseful" (CAL. R. CT. 414(d)(9)). The rules require that the probation officer's presentence report include "any statement made by the defendant to the probation officer, or a summary thereof, including the defendant's account of the circumstances of the crime" (ibid., 419(a)(4)). Along the same lines, the rules mandate that one circumstance to be considered in mitigation by the sentencing court is that "the defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process" (ibid., 423(b)(3)).

In Japan, offering apology and particularly letters of apology have been frequently used as an alternative to filing criminal charges. Apology apparently is an important "condition subsequent to the commission of the offense," which under Article 248 of the Japanese Penal Code (KEIHŌ, Law No. 45 of 1907) authorizes the prosecutor to choose not to institute formal proceedings. Although some aspects of the Anglo-American adversary system of criminal procedure were introduced into Japan by the postwar constitution and code revision, "adversarial" relations are evident only in unusual cases, such as the Tanaka/Lockheed bribery case. In most cases an older pattern persists and the submissive attitude of the accused is an important element. A defendant's repentant and apologetic attitude may induce the police not to refer the case for prosecution to the Public Procurator's Office, it may lead the procurator not to prosecute or to demand a more lenient level of

punishment, and it may lead the judges to impose a milder sentence. As Haley puts it:

Confession, repentance, and absolution provide the underlying theme of the Japanese criminal process. At every stage, from initial police investigation through formal proceedings, an individual suspected of criminal conduct gains by confessing, apologizing, and throwing himself upon the mercy of the authorities (1982: 269).

Conversely, very few defendants appear to escape conviction and punishment by defying the system or relying on a presumption of innocence. Ministry of Justice statistics report that there was a conviction rate of more than 99.8 percent of final adjudications of criminal charges in Japanese courts during each of the years 1975–79 (Ministry of Justice Research and Training Institute, 1980: 34). The lack of repentance or apology, let alone a defiant attitude, is more likely to result in heavy punishment and long-term pretrial detention. Apology is one factor (together with the nature of the offense, the character and environment of the offender, previous criminal involvement, and the like) that is considered as an aggravating or extenuating circumstance at time of punishment.

C. Apology as an Admission

A crucial inhibition to a person making an apology in an American legal proceeding is the possibility that a sincere apology will be taken as an admission: evidence of the occurrence of the event and of the defendant's liability for it. It is safe to assert that most disputes, both civil and criminal, are not as concerned with liability as with how much is due. The insurance company realizes it will eventually have to pay for the other driver's fender, but it does not want its insured to apologize since that may be taken as an admission of liability and interfere with the company's negotiations of the appropriate payment for the repair. To the extent that the amount of compensation that is due is still unsettled, an apology that is potentially damaging evidence in the lawsuit raises troubling questions. Is it consistent with remorse and the intention to restore a positive relationship in the future for the wrongdoer to apologize while at the same time haggling over the amount that is due? In general, an apology seems to connote that the person apologizing will pay reparations without indicating what he will pay. It may be that an apologizer does not have to agree to pay what the injured party thinks is owed or even what the judge thinks is owed, although an apology seems less than full and acceptable if a person expresses regret without agreeing to pay

what is "owed." When the damages are easily calculable, a prompt apology is a realistic possibility. This may be more easily done in Japan, where civil damages are measured by well known, fixed formulas and are quite limited in terms of the interests protected. However, the possibility of apology is more limited in the United States. Here definitions of the losses cognizable by a claim for damages are very expansive and are likely to turn ultimately on the personal reactions of a randomly selected group of jurors. For example, we have been told that Japanese corporations preparing to send their executives to work in the United States have prepared a training program and materials designed to introduce the Japanese to social situations they are likely to find difficult in America. One topic that is discussed in detail for those coming to California is the operation of an automobile, including the appropriate behavior if one is involved in an accident. Along with advice on the handling of insurance, the police, and injuries, the instructions urgently warn the Japanese, "Do not apologize." This advice is considered necessary because, in a parallel situation in Japan, the cultural assumption would be that both sides would immediately apologize to each other, without regard to where fault for the accident might lie. The Japanese advice might be something of an overreaction, for it is not certain that serious adverse consequences will follow in the United States from the tendering of an apology in these circumstances, but many cautious American lawyers and insurance agents might well be tempted to offer similar advice.

The influence of insurance practices on apology in such situations appears to be substantial, although we are uncertain what its impact is in either the United States or Japan. Liability insurance effectively splits the moral and the short-term financial responsibility for accidental injury. The driver causing the injury is morally responsible, while the insurer bears the primary economic risk and must compensate the injured person. In this situation it might be easier to apologize, since it carries no risk of direct economic obligation. Conversely, the absence of adequate insurance coverage may sometimes lead the Japanese to be reluctant to apologize. For example, the failure of the proprietor of the New Japan Hotel in Tokyo to promptly apologize and compensate the victims of the fire in that hotel has been pointed to as an example of "un-Japanese" behavior (Mayer, 1984: 113, 117–18). Several stories in the Japanese press suggest that the heart of the problem may simply have been that the hotel was underinsured and that the proprietor therefore had no insurance proceeds to pass on to the vic-

tims (*Ashahi Shimbun* (Tokyo), July 28, 1982: vol. 2, p. 657; vol. 7, p. 1052). On the other hand, an insurance company may not be pleased by a driver's apology if it is deemed an admission of responsibility that increases the insurer's liability to the injured person. Indeed, the insurance company may well consider the apology a breach of the insured's obligation to cooperate in defending the claim. The admission of fault may also have an adverse impact on the insured's premiums in the future. The presence of the insurer in the situation may also isolate the person causing harm and relieve him of a felt need to deal directly with the injured person, thus reducing the likelihood of apology. Despite these uncertainties, two points are clear: (1) In such circumstances, the anticipated behavior of many Americans would be defensive, hostile, and unapologetic; and (2) if a person asked an American lawyer (or more likely an insurance company claims adjuster) for advice on how to behave in this situation, the advice would likely be that an apology could be treated as an admission of liability that would adversely affect the legal obligations relating to the accident and also might complicate the apologizer's relations with his own insurance company.

Common law rules of evidence have been willing to provide only very narrow protection from the offering of an apology as an admission of liability. Only if the apology is found to be an integral part of the negotiation of a compromise is it likely to be excluded, and even then the scope of the protection is uncertain (see, e.g., FED. R. EVID. 408, 409; CAL. EVID. CODE 1152). Among the complicating factors are requirements that to come within the protection of the rule the defendant must offer "valuable consideration" or, in the California rule, "money or any other thing, act, or service." Although commentators on the federal rule suggest that the requirement of "valuable consideration" be given its broadest interpretation to carry out the policy of the rule (Weinstein and Berger, 1975: 407-12-13), it would certainly stretch the words to the point of meaninglessness to find that a simple apology by itself would be excluded by this rule (Wright and Graham, 1980: sec. 5305). The problems of the modern evidence rules and codes with this issue reflect the longstanding uncertainty on the issue when the principle was purely a judge-made rule.

The exclusion from evidence as an admission of liability of apologies and other behavior that is part of the process leading toward a settlement of a dispute without litigation was recognized at common law (Wigmore, 1972: sec. 1061-62). There was persistent disagreement whether it was a privilege, rested on

some fictitious contract theory or, as Wigmore insisted, it was grounded on the reasoning that an offer in compromise does not imply a belief that the adversary's claim is well founded. The scope, basis, and application of the rule long divided the experts and led Wigmore and McCormick in conflicting directions in their influential writings (McCormick, 1954: sec. 76; 1938: 457–59; Bell, 1953: 241–46). The English law on the subject became quite formalistic during the nineteenth century and often appears to turn on whether the party offering the apology uses the right conditioning formula—“without prejudice”—to make it clear that the apology cannot be used as evidence against him. Recall Mr. Guppy's proposal of marriage “without prejudice” to Esther Summerson in Charles Dickens's *Bleak House*. The English and Commonwealth law is painstakingly reviewed by Vaver (1974).

A California criminal lawyer told us a story that, in many respects, is the mirror image of Haley's story that was quoted at the beginning of this essay. A Japanese matron was stopped as she arrived in the United States and found to be carrying a large amount of American currency, which she had not accurately reported on the entry form. Because there was no reason to think that the money was the proceeds of illicit activities, this was not the kind of importation of unreported cash that the law was intended to punish. Nonetheless, her behavior was a violation of the statute. After the woman was released at the airport, she sought advice and turned to an official of a Japanese bank in California. Instead of taking the matter to an American lawyer, they decided to behave in a fashion that seemed appropriate to them by writing a letter to the Customs Service acknowledging her violation of the law, raising none of the excuses or explanations that were available, and apologizing profusely while at the same time seeking forgiveness. This letter became the centerpiece of the Department of Justice's insistence that the woman be prosecuted. From an American lawyer's perspective, the case was murky: Among other things, it was unclear whether the woman had understood the form in which she had recorded the amount of currency she was bringing into the country, and it did not appear that the dereliction, if any, was part of an illegal scheme. Nonetheless, the prosecution went forward because *the woman had confessed*, and the officials therefore felt obliged to take her apology at face value and exact the price demanded by the law for this behavior. When we last discussed this matter with our friend, he was still trying to persuade the prosecutor to reduce the offense to a

more sensible level that might reflect the seriousness of the accused's act.

D. Apology and Liability: Obligation to Make Compensation and Accept Punishment

In both the Japanese and American cultures, acceptance of responsibility for the hurtful act by making compensatory reparations to the person injured and by accepting punishment for the violation of criminal rules are stronger elements of apology than mere admission of the act itself. An apology without reparation is a hollow form, at least when the injured person has suffered a clear economic loss and when the actor has the capacity to make compensation.

At the same time, punishment and compensation for injury alone probably are an insufficient basis for forgiving the offender. A felon who has served his time or a tort-feasor who has paid the damage judgment is not entitled to be restored to social acceptance without some acknowledgment of guilt and remorse. As we mentioned above, in Japan a person too willing to pay damages may be thought to lack regret. When industrial pollution, dangerous pharmaceutical drugs, or a commercial aircraft crash cause injury to a large number of people, the company president, as the most senior official of the wrongdoers, is expected to make a public apology, bowing deeply and preferably shedding tears. In such a situation it is important that compensation not be mentioned openly, because it is felt that money does not bring back the dead or restore health. It is important that the company official not appear too eager to settle the matter with money. It also is important that victims not appear too interested in receiving cash payment; they should mourn instead of displaying greed. This behavior reflects multiple layers of consciousness, for the individuals behave as the culture suggests they should while, at the same time, they are entertaining concerns that are quite inconsistent with the externality.

The important point here is that while there are some injuries that cannot be repaired just by saying you are sorry, there are others that can *only* be repaired by an apology. Such injuries are the very ones that most trouble American law. They include defamation, insult, degradation, loss of status, and the emotional distress and dislocation that accompany conflict. To the extent that a place may be found for apology in the resolution of such conflicts, American law would be enriched and better able to deal with the heart of what brought the controversy to public attention. It would also be relieved of some of the

pressure to convert all damages into dollars—a pressure that produces absurdly large punitive damage judgments when a trier of fact sympathetically identifies with the claim of degradation and emotional distress but the economic loss is fictive. More to the point, society at large might be better off and better able to advance social peace if the law, instead of discouraging apologies in such situations by treating them as admissions of liability, encouraged people to apologize to those they have wronged and to compensate them for their losses. Lawsuits may never be filed in such situations.

VII. FORMAL APOLOGY AND *SHIMATSUSHO*

A striking difference in apologetic behavior in the two legal cultures is the frequency with which a formal, ceremonial apology is tendered in Japan, often by an abject public apology by the senior official of an organization responsible for injury or by a written letter of apology (*shimatsusho*). For example, following the crash of a Japan Air Lines DC-8 caused by a mentally unstable pilot in 1982, the president of the airline personally called on the bereaved families of the crash victims and was pictured in the press on his knees, bowing in remorseful apology. The ceremony was accompanied by a large cash payment, which apparently obviated litigation of the legal claims arising from the accident. By contrast, American executives whose enterprise has been accused of injury or wrongdoing are thought to be more likely to deny or evade charges of any responsibility and to avoid direct contact with the victims. They are less likely to acknowledge publicly any responsibility and remorse, and even less likely to call on the victims personally and apologize tearfully. The behavior of Union Carbide officials after the Bhopal disaster in 1985 combined an attempt to meet promptly the human problems engendered by the corporation's operations with a desire to avoid admissions of unlimited legal liability. The efforts appear to have satisfied no one.

Although its origins are not clear, it has long been the custom in Japan that a person who breaks a rule should express regret by writing a *shimatsusho*, or "letter of apology," in lieu of facing official punishment. These letters are a common and significant aspect of Japanese apology. The practice suggests the use of a formal, written apology as the basis for relieving a wrongdoer from the legal consequences of the misbehavior. A number of examples suggest the range of ways in which a *shimatsusho* may serve the needs of both the wrongdoer and, equally important, the injured person or the official interested

in resolving the hurtful situation without recourse to formal legal sanctions.

For example, it is common in Japanese schools and government offices for teachers or officials to work occasional night duty in rotation. In a family court being studied by one of us, an officer forgot that it was his turn for night duty and went home as usual. The clerk of the General Affairs Department of the court called on the negligent officer and "asked" him to submit a *shimatsusho*. The officer wrote that he had neglected his duty on a certain date, which he regretted deeply, and pledged himself never to repeat his dereliction. The *shimatsusho* was filed with others in the General Affairs Department, but not in the personnel file of the officer. The clerk explained that it was only a "customary procedure." It was the officer's impression that his supervisor never officially examined the *shimatsusho* of those working in his unit. It would have been unusual if he did, because a Japanese supervisor is expected to know in intimate detail the character and family circumstances of individuals working under him. That he had to look through a bundle of *shimatsusho* to find out which workers were neglectful of their duties would suggest that he was unqualified to be a supervisor.

Bayley describes many instances in which people were required to write *shimatsusho* at the police station and indicates that sample letters are kept on file for future writers to copy (1976: 134-37). He also points out that the practice of writing apology letters is reported in popular fiction of the pre-World War II era (Ito, 1962: 258). Interestingly enough, in response to our inquiries officers in the juvenile and patrol divisions of several prefectural police headquarters said that they did not ask people to write *shimatsusho* and that they did not have standard forms to guide those writing such letters. Our findings thus appear different from those of Bayley, who reports that Japanese police are open about their exercise of discretion, in contrast to what he found to be the denials by American police that they exercise similar discretion (1976: 138). We suspect that the responses we received were the "official" statement of the *tatemaie*, namely that there is no legal procedure in the code for the writing of such letters, which therefore cannot be officially acknowledged as a police action. We believe that the fact, or *honne*, is that police do obtain *shimatsusho*, although we have no way of knowing how many of them do so or how often. The letters are received by the officers as their "private" act, although it is probable that most citizens who write the letters do not know that they are not official documents.

During a field study in Japan by one of us, he encountered the case of a sixteen-year-old high school student who took a motorcycle from a parking lot in front of a railway station. Unfortunately for him, the gasoline tank was empty, and he therefore could not start the engine. Undaunted, he rode the cycle downhill without using the motor and was stopped by a policeman. The student had no driver's license, but, since the engine was not running, his act did not legally constitute the offense of driving a motor vehicle without a license. The officer undoubtedly was suspicious of the student's tale of borrowing the motorcycle from a friend, yet he did not want to blow the incident out of proportion by treating it as a theft. Accordingly, the officer summoned the student's father to the station and told the student to sign the following *shimatsusho*:

On December 24, 1977, at 1:30 PM, I was found by a police officer while riding on a motorcycle without a driver's license on P Street of Block D of City Z. I was warned by the officer. I regret deeply what I have done and I pledge myself never again to ride a motorcycle without obtaining a driver's license. Please deal with me leniently this time.

Both the student and his father signed the letter, which the police officer kept himself, although it was addressed to the chief of the patrol division. The officer thought that if the student had stolen the motorcycle his father certainly must have discovered this and could be relied on to deal with the boy. If it was not stolen, the father would admonish his son not to drive without a license. "In either case," said the officer, "the matter has been dealt with effectively."

A book of Japanese legal advice describes the hypothetical situation in which an employee of the accounting office of a company lost a check for 300,000 yen on her way to the bank. Fortunately, the check was found and returned to a nearby police station. Since this was a serious act of carelessness for an employee responsible for large financial transactions, her supervisor decided to make her write this *shimatsusho*, which was addressed to the head of the accounting department and carries the seal and signature of the writer:

I seriously regret that I have carelessly lost the company's check for 300,000 Yen on such and such a day and caused my company serious trouble. Fortunately the check has been recovered, but I am willing to pay for the expenses that might have been incurred in the process of its recovery. I pledge myself never again to make such a careless mistake and I would ask your generous forgiveness (*Jiyu Kokumin Sha*, 1961: 375).

While visiting Japan on a research project, a colleague of the authors discovered that his American passport had expired. He obtained a new passport from the United States embassy, but the new document did not contain a Japanese visa. This was discovered as the professor was passing through immigration at the airport, trying to leave the country. The absence of a valid visa is a serious offense in the eyes of Japanese officials, who tend to assume a tough and formal attitude toward foreigners who do not comply with Japan's strict laws to control aliens and who fail to maintain their legal permission to remain in Japan. The professor's initial reaction was to try to explain how he came to be present in Japan without a valid visa, but the explanation was to no avail. Until he changed his approach from explanation to apology, it appeared that our colleague was going to miss his plane and be held in custody. His *shimatsusho*, hastily written on an available piece of paper, was then accepted and duly filed by the immigration officials as the American ran for his airplane.

The differences in the cultural attitudes of Americans and Japanese toward *shimatsusho* are indicated by the experience of a research assistant of one of the authors, who worked as an English teacher at a school in Tokyo. The teachers were required to complete computer-card forms for classes taught, student participation, and like matters. The forms were tedious and confusing, and the teachers sometimes made errors in entering the detailed data required. When this happened, the school administration required the teacher to submit a *shimatsusho*. The response of most of the American teachers was serious resentment at being treated like children. The response of our informant was to write a stilted and flowery letter that he and his compatriots interpreted as facetious and ironic. The letters were always accepted and filed without comment by the school authorities. The American teachers were concerned about the intended use that the administration had for these letters and were a bit worried that one day they would return from the file drawer to haunt them. The Japanese teachers, however, were not surprised that the letters were accepted at face value by the administrator, nor were they concerned that adverse future use would be made of them. In their view, the writing, tendering, accepting, and filing of the *shimatsusho* resolved the matter forever.

Shimatsusho are usually written when authority figures have exercised discretion in favor of an offender to give them a break (*o me ni miru*). Writing such a letter is inevitably somewhat demeaning and thus is a mild form of punishment. None-

theless, it is a much less severe sanction than others that might have been imposed. The recipient of the favor is therefore likely to feel a sense of obligation to repay the benefactor with either a material gift or an act of service or gratitude showing enduring loyalty. The letter is the documentation of reestablished mutual trust and the promise of a future relationship between a forgiving benefactor and an indebted penitent. It evidences the acknowledged obligation to repay the debt created by the beneficence by not repeating the mistake, by observing law, and by conforming to norms. At another level, the leniency is a form of nurturance on the part of the authority figure, gratifying the offender's dependent needs (*amae*). The mitigation of punishment—of which the writing of the *shimatsusho* is a part—can be an inducement to reinforced dependence upon the authority figure and consequently more effective observance of norms.

VIII. CONCLUSION

We said earlier that there are real differences in apologetic behavior in Japan and the United States. We are even more confident that there are differences in the significance that is attached to such behavior or to the failure to apologize in each nation. Americans attach greater significance and legal consequence to the perceptions of autonomy and internal coherence, thus making apology important as an expression of self. This leads apologetic behavior to be accompanied by a justification or an emphasis on the acceptance of liability along with responsibility. The act of apology must accordingly spring from internal motivations, not from the request of external authority, and must not be weakened by mixed motives. In Western eyes, ambiguity and ambivalence detract heavily from the worth of an apology. Sincerity in an apology means internal coherence and wholeheartedness.

In contrast, the Japanese concept of apology attaches primary significance to the act as an acknowledgment of group hierarchy and harmony. Less concern is expressed for paying the damages and more on repairing the injured relationship between the parties and between the offending individual and the social order that has been disturbed. Sincerity therefore becomes less a function of the internal mental state of the person apologizing and more a matter of performing the correct external acts that reaffirm submission to that order. The presence of internal ambivalence is expected and accepted as not threatening.

Apology may be given a lower legal priority in the United States because American society does not place as high a value on group membership, conformity, and harmonious relationships among people as Japanese society does. In a social context that highly values group hierarchy and harmony, the appearance of conflict is likely to trigger a search for accommodation and compromise that will restore the sense of group coherence. An emphasis on individual autonomy, in contrast, is likely to lead to the vigorous assertion of narrowly defined personal interests that will appear in polar conflict with the rights of others. Compensation for the economic damage done may thus become more important to the hurt party than the restoration of the relationship that has been threatened. The admission of fault is dominant, and one may refrain from making an apology in order to protect oneself from demand for undue compensation. Thus Americans may not apologize to each other when their cars collide, although the same individuals may freely offer apologies when they bump into each other on a crowded street. Along the same lines, when emphasis is placed on individual rights, one's tendency is to assert oneself and to be suspicious of any assertion of authority ("What right have you to talk to *me* like that?"). By contrast, in a society in which the hierarchical order of the group is emphasized, the characteristic posture before authority is one of compliance and subservience. As Bayley has observed:

An American accused by a policeman in [sic] very likely to respond "Why me?" A Japanese more often says "I'm sorry." The American shows anger, the Japanese shame. An American contests the accusation and tries to humble the policeman; a Japanese accepts the accusation and tries to kindle benevolence. In response, the American policeman is implacable and impersonal; the Japanese policeman is sympathetic and succoring (1976: 150).

Indeed, in situations in which the maintenance of the relationship is a particularly strong interest, both Japanese and Americans may apologize to the other party, even when deep down each one believes that the other is actually at fault. Only in saccharine movies and novels can it be said that "love means never having to say you are sorry." In Japan it is believed that the settlement of any amount of compensation will go smoothly if both parties start out apologizing to each other. This insight—that apology is an important ingredient in resolving conflict—is hardly unique to the Japanese. It is something every eight-year-old knows, yet somehow it tends to be swallowed up during adult American discussions of law and business. Heg-

land makes this point nicely in discussing a classroom experience:

In my first year Contracts class, I wished to review various doctrines we have recently studied. I put the following:

In a long term installment contract, seller promises buyer to deliver widgets at the rate of 1,000 a month. The first two deliveries are perfect. However, in the third month seller delivers only 990 widgets. Buyer becomes so incensed that he rejects deliveries and refuses to pay for the widgets already delivered.

After stating the problem, I asked, "If you were Seller, what would you say?" What I was looking for was a discussion of the various common law theories which would force the buyer to pay for the widgets delivered and those which would throw buyer into breach for cancelling the remaining deliveries. In short, I wanted the class to come up with the legal doctrines which would allow Seller to crush Buyer.

After asking the question, I looked around the room for a volunteer. As is so often the case with first year students, I found that they were all either writing in their notebooks or inspecting their shoes. There was, however, one eager face, that of an eight year old son of one of my students. It seems that he was suffering through Contracts due to his mother's sin of failing to find a sitter. Suddenly he raised his hand. Such behavior, even from an eight year old, must be rewarded.

"OK," I said, "What would you say if you were the seller?"

"I'd say, 'I'm sorry'" (1982: 69; see also Riskin, 1982: 44-46).

The underdevelopment of American legal doctrine based on apology suggests the degree to which other, individualistic values—most notably compensation, declaration of right, punishment, professional self-interest, and administrative convenience—have been elevated at the expense of the restorative capacity of law and social ceremony. The American lawsuit is designed to deal with claims of economic loss; indeed, its lawyer-dominated, adversarial structure is not suited to resolve other kinds of issues. The legal system tends to reduce disputes to the types it is comfortable handling. Claims for personal injury are treated as if the issue is how to put a dollar price on pain and suffering, while claims essentially based on insult and psychic hurt are not dealt with well, if they are recognized at all.

In this respect the argument of this essay is parallel to that of our 1983 article on contract: The crucial differences between

Japanese and American law in operation may be less substantive than expressive. The central differences may be traceable to the American assumption of individual autonomy and choice, which implies that individuals' interests are to be viewed in isolation and often in competition with those of others. In such a view, the role of law is to deal with the tensions and troubles that are a dominant feature of relations among people. The Japanese cultural assumption, in contrast, is that the various parts of the social organism are hierarchically ordered and in harmony and that those individuals who are not in their place and in harmony with the rest are outside the group. Conversely, those who are outside are a threat to the harmony and order of the group. In such a view, the role of law is to express and reinforce social harmony against external disruptive influences.

Each of these sets of cultural expectations works to entrench itself. In Japan apologies reinforce the hierarchical order and individual submission to it, while the American view of apology reinforces the separateness of the self. Each set of cultural expectations also exacts a price from its adherents, for each must deal with the side of reality it would suppress. In Japan the tolerance of ambiguity summed up by the contrast of *tatemae* and *honne* is needed to paper over the disparity between how one behaves and how one feels. *Shimatsusho* are requested, written, received, and filed, but there is a certain uneasiness when the heavy reliance on this practice is pointed out. The denial by Japanese police that they demand written apologies or that they keep model letters to help those who must write them suggests this uneasiness. The American insistence on internal coherence of feeling means that many opportunities for useful public ceremonies of apology and reconciliation are lost. Pragmatic Americans realize that an apology is a potentially useful tool of informal or nonlitigated resolution, even if the apology is formal and there is some cause to doubt the wholeheartedness of the person tendering it. A process built around apology and compensation would fit well into a justice system that increasingly seeks to resolve conflicts by settlement, mediation, or alternative methods of dispute resolution, rather than trial (Menkel-Meadow, 1984: 789).

In both cultures the connections between apology and compensation need to be more fully explored. As we have suggested, compensation would appear a necessary part of a sincere apology, yet the process of determining the appropriate kind and amount of compensation often interferes with apology. This is seen most clearly in the American situation in

which an apology may well be taken as an admission of liability that complicates the process of settlement—a process in which the denial of liability serves as a lever to negotiate an acceptable level of damages. Moreover, the connection between apology and noneconomic damages remains obscure. On the one hand, apology would appear to mitigate insult, degradation, and the suffering of having been wronged. On the other hand, it would seem to invite manipulative and insincere behavior by wrongdoers if the law were to adopt a firm rule that relieved them of liability if they apologize. The pragmatic ability to overlook the distinction between what we say the rule is and what we do may provide a useful screen behind which to seek justice.

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