COMMENT: THE IMPLICATIONS OF APOLOGY

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In this comment the author argues that Wagatsuma and Rosett correctly identify a critical cultural influence on the role of law and legal process in Japan. He suggests, however, a broader view of the implications of apology, notably for the United States in both civil and criminal suits.

Mention to someone who has lived in Japan even briefly the implications of apology and you are apt to provoke a smile if not an effusion of tales of apologies given or received to expiate both slight and serious offenses. Differences between the use and effect of apology in Japan versus in the United States, Europe, and apparently even other parts of East Asia quickly become familiar to even the most temporary expatriate. Nevertheless, apology has remained one of the few unexplored social phenomena of Japan. It receives scant attention by all but a handful of the burgeoning number of experts—real or imagined—writing on that society, including the Japanese themselves. For the most part the study of the cultural implications of apology has been relegated to dinner table or cocktail party anecdotes. Except for a few scholars concerned with the legal process and law enforcement in Japan, apology has been treated as if an inconsequential, albeit interesting, quirk of Japanese social life. There is no anatomy of apology.

Hiroshi Wagatsuma and Arthur Rosett (1986) at last give apology the undivided attention it deserves. It is perhaps not coincidental that it has taken the joint efforts of both an anthropologist and a legal scholar, one Japanese and the other American, to examine the subject. The effects of apology are most clearly manifest in the area of law enforcement. Hence those most sensitive to its importance have been lawyers or social scientists concerned with various facets of this aspect of Japanese society. What the lawyer observes is perhaps best left to the anthropologist or sociologist to explain. In Wagatsuma and Rosett we have an ideal team.

In the work of these two men we are finally able to iden-

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tify social phenomena that may be accurately described as cultural and perhaps even peculiar or unique to Japan. Wagatsuma and Rosett demonstrate what those who have spent any amount of time in both Japan and the United States have discovered by experience—that an apology is tendered in Japan in contexts that are far more likely to elicit an excuse or self-justification in the United States. To be sure, institutional or structural arrangements reinforce this contrast; for example, failure to apologize in Japan increases the likelihood of litigation and other forms of formal legal sanction. Nonetheless, in the use of apology in Japan or its neglect in the United States, we encounter broadly shared social behavior that is a mix of habit, expectations, and underlying values.

Wagatsuma and Rosett recognize that the cultural phenomenon of apology affects the Japanese legal system in two guises, for the role of *confession* in Japanese criminal law enforcement corresponds to the role of *apology* in other contexts. There is little question that the use of apology relates closely to the frequency and type of litigation in Japan. Perhaps most importantly, the use of apology reduces the likelihood that a dispute will be taken to court. Japanese judges uniformly acknowledge that the failure of an injuring party to apologize and offer at least "a nominal sum to express sympathy" (*mimaikin*) is more likely to produce a lawsuit even in cases in which there is no dispute that the injuring party lacks any legal liability. Following the 1982 Japan Air Lines crash in Tokyo Bay, for example, its president met with victims or their families to offer apologies and full compensation. No lawsuits were filed.[1] The combination of apology and adequate compensation eliminated any incentive to sue.

Apology can also be an end in itself, and as such it serves as an important informal sanction. In suits brought against Japanese government agencies and business firms in pollution and drug-related injury cases, apology was as important an issue as damages for both the plaintiffs and the defendants (see Gresser et al., 1981: 36; Haley, 1982: 275; Upham, 1976: 597). In the SMON cases,[2] for example, attorneys for the one foreign

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[1] This incident has been widely reported in the United States. See, for example, "For Japanese Lawsuits Are the Last Resort," *The Dallas Morning News* (August 15, 1985: 15A).

[2] The SMON (Subacute-Myelo-Optico-Neuropathy) litigation involved nearly two dozen separate private damage actions against several of Japan's leading pharmaceutical firms by victims of injuries attributed to use of the drug Clioquinol. The cases, as well as the terms of settlement and a summary of the Hiroshima District Court decision, are described in English in *Law in Japan*, 1978: 76–90; 1979: 99–117.

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defendant note the astonishment of their client over the refusal of the president of at least one of the Japanese defendant firms to agree to the plaintiff's demand for an apology, which held up a settlement for months (Haley, 1982: 275).

At every stage of the Japanese criminal process, those accused of an offense who confess and display remorse, cooperating with the authorities and compensating or otherwise reaching an accommodation with their victims, stand a reasonable chance of being released without further official action. Atonement does not automatically dictate punishment. For example, police statistics for 1978, as cited by George (1984: 52), show that Japanese police cleared 599,309 (52.73%) of the 1,136,648 known cases of theft. Of the 231,403 offenders involved in these cases, only 15 percent (36,790) were arrested, and only 73 percent were reported to the prosecutor. In Tokyo, as George notes, "police do not transmit [to the procuracy] approximately 40% of referrable cases because they involve minor property offenses, suspects have shown remorse, restoration has been made, or victims have expressed forgiveness" (ibid., p. 51; see also Shikita, 1982: 37). The procuracy treats suspects reported by the police in similar fashion. In exercising the authority provided under article 258 (KEIHŌ (Criminal Code), Law No. 45 of 1907), procurators suspend prosecution in roughly a third of all cases involving criminal code offenses. Again confession and repentance are primary considerations in granting such absolution. "Even an offender who had committed a rather serious crime might be relieved from prosecution," writes Procurator Kawada Katsuo, "if he was a first offender, if the injuries caused by the offense were compensated for, and if there was reasonable ground to believe that he would not commit another offense" (Kawada, 1979: 1). The pattern repeats in the trial process: Japanese courts have a conviction rate of 99.5 percent, yet routinely suspend jail sentences in two-thirds of all cases. The critical factor is the attitude of the accused: In over 80 percent of all cases there is confession (Haley, 1982: 271).

There is a pervasive emphasis on confession throughout East Asia. From at least the time of the T'ang Code of A.D. 653, the East Asian legal tradition has emphasized confession as a means to legitimate the exercise of prosecutorial and judicial authority and to protect the criminal process from error (Bodde and Morris, 1973: 42, 231–35; Johnson, 1979: 31, 202; Shiga, 1974: 122; Wu, 1979). In contemporary China, as in Japan, it is used to correct behavior. But Chinese procurators visiting Japan share the surprise of their American and European counterparts in finding that in Japan confession elicits suspended pros-

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ecution or sentences, not simply a lighter penalty. The pattern of confession, repentance, and absolution thus appears to be as alien to Chinese criminal justice as it is in the West.

Wagatsuma and Rosett are surely also correct in attributing to apology and confession a "commitment to a positively harmonious relationship in the future in which the mutual obligations of the social hierarchy will be observed" (1986: 478), in other words, to social conformity and integration. Between individuals apology evidences the priority attached to the personal or social relationship, not to the injury or the desire to avoid redress. Between the citizen and the state confession similarly evidences the former's acknowledgment of the legitimacy of authority and, at least ostensibly, the imposed norms of the legal and social order.

The contrasts may extend further. Japanese judges and procurators stress correction as their primary aim. They apparently see their formal office as integral to a correctional process in which the identification, apprehension, and prosecution of offenders as well as the adjudication of guilt become secondary. Their formal roles as judge or prosecutor are thus subordinated to their concern for the rehabilitation of the accused and the correction, or at least the control, of proscribed behavior. Japanese judges, for example, justify suspending sentences based on the remorse shown (or not shown) by offenders with comments like "if a defendant doesn't show remorse he is more likely to commit another crime" or "if a person doesn't accept his own guilt, how can he be corrected?" Consequently, certain judges refuse to let even convicted defendants leave the courtroom until they confess and show remorse. As expressed by Minoru Shikita, the former director of the United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders, "the relative effectiveness of the Japanese criminal justice system can be attributed to the fact that all of its subsystems recognize a unity of purpose and seek to achieve the dual aims of deterrence and rehabilitation under the guiding principle of reinforcement of moral responsibility" (1982: 36).

I sense that a very different set of attitudes is held by judges and prosecutors in the United States. A federal district court judge in Seattle was perhaps representative of prevailing American response when he observed to the author that his primary concern as a judge in criminal cases was to ensure fairness. "What concerns me most," he said, "is that the defendant—whether convicted or not—leaves my courtroom feeling that he has had a fair trial." Thus criminal justice authorities in the United States seem more likely than their counterparts

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in Japan to internalize their institutional roles and define their primary objectives in terms of their formal responsibilities: for the police, to identify and apprehend the offender; for the prosecutors, to win convictions; for the judges, to ensure fair determinations of guilt; and for all, to ensure that justice is done with little if any consideration of the psychological or other needs and circumstances of the individual offender or victim, except as delineated by formally prescribed programs and procedures.

Unfortunately, as is so often the case with analysts of Japanese society, Wagatsuma and Rosett tend to interpret the implications of apology in static rather than dynamic terms, which results in a one-sided description. They stress the conserving and restorative effects of apology at the expense of its role in the process of social change. Coupled with their concern with the contrasts between Japan and the United States, they buttress a false sense of immutability of culture and obscure important parallels.

First, to acknowledge the role of apology in the legal process as pivotal is not to explain its consequences. Despite the apparent importance of apology, its broader implications for the Japanese legal system and Japanese society remain obscure. While Wagatsuma and Rosett are correct in identifying a connection between the use of the apology and social integration, from this perspective apology simply reinforces the social and political order. In their words it demonstrates "the correct external acts that reaffirm submission to . . . [the social order]," "an acknowledgment of the authority of the hierarchical structure upon which social harmony is based," "maintenance of harmonious and smooth interpersonal relations," and "the explicit acknowledgment of commitment to future behavior consonant with group values" (1986: 492, 473, 465, 467). This repeated emphasis on the conservative impact of the apology neglects its role in process of social change. The plaintiffs in the pollution and drug-related lawsuits did not seek apologies by the government or the defendant firms as a means of maintaining the status quo or preserving social harmony. They instead demanded apologies as a recognition of redefined social norms and as an act of submission to a shifting hierarchical order. The apologies acknowledged the legitimacy of protest and protesters. With an altered moral and social authority thereby confirmed, the lawsuits were more important in forcing the apology than in modifying the legal rules on negligence or proof of causation or the damage awards. These lawsuits of the 1970s accordingly marked a turning point for postwar Japan, a

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shift in social values and the political order in which, I believe, apology played a role.

Wagatsuma and Rosett also stop short of fully identifying and analyzing even the conservative implications of apology. What is the impact, for instance, of the institutionalized emphasis on confession and repentance on crime or other forms of nonconforming conduct? Does this emphasis help to explain why, of all the industrial powers, Japan alone has experienced declining crime rates for most of the postwar period? Is the systematic pressure placed on offenders to compensate victims as a sign of remorse significant in explaining why Japanese are less likely to demand retribution than Americans?[3] Is this emphasis a key to understanding Japan's ability to maintain social cohesion, dependency relationships, and stability despite vast economic and social change? If so, are there lessons here for other societies?

My greatest concern is that in accenting the role of apology in Japan and the United States as an example of an enduring cultural contrast, Wagatsuma and Rosett may have unwittingly reinforced the view that there is nothing to learn from the Japanese experience. For many years I have repeatedly badgered colleagues who teach criminal law and procedure and related areas in social science to examine the leitmotif of confession, repentance, and absolution in Japan and its implications for the United States and other countries. The invariable response is to brush off such pleas politely with observations on the uniqueness of Japanese social organization and references to Japan's social cohesion and homogeneity. Perceived differences in culture thus become fixed barriers to further inquiry. Nonetheless, there are parallels in the United States that at least hint that we have much to gain from a more careful scrutiny of the Japanese experience. Let me describe two of these parallels:

First, there is evidence that the impact of apology in preventing litigation is similar in the United States and Japan. The Japanese experience echoes in the comments made by trial lawyers experienced in medical malpractice suits that a physician's failure to express sympathy and concern for the patient or the family promptly after an adverse operation or treatment significantly increases the likelihood of litigation. As an experienced Alabama lawyer once told the author, "I have never seen a malpractice case where the doctor said he was sorry or

[3] Of special interest is the study by Hamilton and Sanders (1985) in which they identify a stronger societal demand for retribution in the United States.

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made an effort to show concern for the feelings of the patient and the family." Sending a bill after an operation has gone badly is even more likely to provoke a lawsuit, as many insurers and hospital risk managers in the United States have learned. According to Dr. Loren C. Winterscheid, Associate Dean and Medical Director of the University of Washington School of Medicine in Seattle, the desire to avoid such legal actions underlies the procedures followed for the University Hospital. In cases in which the physician or other medical attendant is clearly responsible for the unsatisfactory outcome of treatment or even in which there is some question or doubt as to responsibility, the hospital's risk managers intercede. They meet with the patient or the family, apologize, and attempt to compensate or ameliorate the expenses by not billing at all or at least discounting the costs. "Risk managers are persuaded," says Dr. Winterscheid, "that early intervention is very important—going to the patient, apologizing, explaining what happened and why, and compensating for the costs" (Telephone conversation with the author, January 1986). Yet there appear to be no studies to show whether or why such measures are effective. Our American *tatemae* depicts an adversarial, individualistic culture in which apology has little significance. Yet we like the Japanese, seem to have an underlying *honne* in which apology is a critically important behavioral determinant.

The second example is a program begun in the mid-1970s by a small group of Mennonites and other concerned Christians in Elkhart, Indiana, as an alternative process for dealing with criminal offenders by providing an opportunity for mediated negotiation, restitution, and reconciliation (Umbreit, 1985: 99). Today the Victim Offender Reconciliation Program (VORP) has chapters in over forty cities or counties in twenty states. Seattle is home to one of the most recently established chapters.

VORP provides a mediation service intended to foster reconciliation between the offender and the victim as well as between the offender and the community. Referrals to VORP are made by cooperating judges and probation officers. If both victim and offender consent, a VORP volunteer arranges for them to meet each other, ask questions, express their feelings, and negotiate a restitution agreement. The agreement is then sent to the court or other referral agency for approval and enforcement, while VORP maintains contact with the victim until restitution is actually completed. As in the Japanese approach, VORP requires the offender to acknowledge and accept accountability for the crime, which facilitates contact between the

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victim and the offender along with a release of fear and anger. Finally, to the extent that agreement or restitution can be achieved, punishment is set aside. But does the VORP system work? Does it effectively promote rehabilitation and crime reduction? Although statistics for repeat offenses and fulfillment of restitution contracts show far greater success rates for VORP than for court-ordered restitution (Seattle VORP Report, 1986), the offenders referred to VORP may be those most likely to succeed. As in the case of evaluations of diversion and similar programs (see *Yale Law Journal*, 1973), the selection process may preclude any reliable conclusions. Yet however fragmentary and subject to question, the evidence is consistent with the view that in the United States as in Japan, the process of confession, repentance with victim confrontation and restitution, and absolution does in fact encourage correction of criminal behavior.

Both the essay by Wagatsuma and Rosett and this comment merely touch on a few of the implications of apology. Necessarily dependent on anecdotal data, we have been able to mine only the surface lodes. Hopefully, however, our efforts will stir others to probe and exploit the deposit more deeply and fully. Our observations should not be construed to mean that the Japanese experience offers a potential panacea for the American problem of overcrowded courtrooms or prisons. As Wagatsuma has so often and so eloquently written, Japan does have a distinctive social culture. Each element is integral and interrelated to the whole. Neither apology nor confession can be borrowed intact and used in the same manner or with the same consequences in another society, nor would this be advisable even if it were possible. There is a dark side. Japan too has its share of police coercion and false confessions (see Igarashi, 1984) and a disturbing use of private violence and psychological intimidation to induce self-criticism (Upham, 1976: 614). Yet to the extent that apology and repentance elicit similar behavioral responses across cultures, we do have something to learn from Japan. In Japan the legal system reinforces the social use of the apology. American institutions, on the other hand, encourage the resort to court and criminal justice for revenge and retribution. One can agree with the critics of alternative dispute resolution and view litigation as essentially a process of democratic law enforcement without denying claims that alternatives are needed (see Fiss, 1985; McThenia and Shaffer, 1985). Our courts and prisons are both too crowded. Not all disputes need be litigated. Not all laws need be enforced. If we are able to ameliorate demands for revenge and retribution by devising

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ways to reinforce the use of apology and remorseful confession, then we may be able to make our system of justice work at least a bit better.

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