

2000

Learning from Japan: The Case for Increased Use of Apology in Mediation

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Recommended Citation

Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 Clev. St. L. Rev. 545 (2000)
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LEARNING FROM JAPAN: THE CASE FOR INCREASED USE OF APOLOGY IN MEDIATION

MAX BOLSTAD¹

I.	INTRODUCTION	545
II.	THE NATURE OF APOLOGY	546
III.	THE APOLOGY IN JAPAN	551
	A. <i>The Cultural Context</i>	552
	B. <i>Japanese Criminal Law</i>	555
	C. <i>Japanese Civil Law</i>	558
IV.	THE APOLOGY IN THE UNITED STATES	561
	A. <i>The Cultural Context</i>	561
	B. <i>The Underlying Desire for Apology</i>	566
V.	THE APOLOGY IN MEDIATION	569
	A. <i>The Benefits of Using Apology in Mediation</i>	569
	B. <i>Hurdles to the Use of Apology in Mediation</i>	571
	1. Federal Rule of Evidence 408	572
	2. Private Contractual Agreements	573
	3. Confidentiality Statutes	574
	C. <i>Using Apology in Mediation</i>	576
VI.	CONCLUSION	578

I. INTRODUCTION

An apology, offered and accepted, has tremendous power to restore relationships between two individuals or entities after one party has breached one of the rules of social interaction. In Japan, the apology occupies a prominent place in the resolution of conflicts between individuals and entities and is utilized in both in-court and out-of-court methods of dispute resolution.

In the United States, the apology occupies a notably less vaunted position. Virtually no use of apology is made in American methods of dispute resolution and a general societal disdain for the act of apologizing, at least on the surface, can be discerned. Despite the apparent dislike of apology, there is evidence that Americans are often quite interested in both giving and receiving apologies. The conspicuous absence of apology in American society, and in particular in American legal mechanisms, constitutes a surprising failure given the importance of both apology and forgiveness in Judeo-Christian culture.

This article proposes that there is room for increased use of apology in the United States and in mediation in particular. Mediation offers the ideal setting for the

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offering of an apology because of its position outside the traditional strictures of the adversarial system and because of its oft-stated goal of reconciling parties and preserving relationships. Similarly, an increased awareness of apology among mediators is likely to provide another innovative method for helping parties reach a mutually satisfying and beneficial settlement.

Part II of this Article examines the nature of apology and its transformative power. Part II discusses the use of apology in Japan, while Part IV examines the apology as used in the United States. Part V discusses the symbiotic relationship between apology and mediation.

II. THE NATURE OF APOLOGY

Words of apology are a social lubricant which are necessary to keep interactions between individuals functioning smoothly. Apologetic words such as “I’m sorry” can be used to express sympathy for a mishap or a condition with which the speaker has no connection, such as the expression of sympathy that might be offered upon hearing that a friend is ill. The words “I’m sorry” and “I beg your pardon” can also be used to ask indulgence from a stranger or friend for breaching the accepted rules of public etiquette, such as when one accidentally cuts in front of another in line or bumps into another on the street. “Apologies” such as these are not the subject of this Article. Instead, this Article focuses on the apology which is sometimes offered when one does substantial injury to another, be it a friend or a stranger, whether the injury be financial, psychological or physical. Although the words used in this latter type of apology may be the very same words used in the former, they function in a manner altogether different.

The dictionary definition of apology shows that the original meaning of the word “apology” implied a defense. The Oxford English Dictionary lists the Greek root of “apology” as *apologia*, which was a speech in defense.² A speech or work in defense of a proposition was the original meaning of the English “apologia”³ and “formal justification” or “excuse”⁴ continue to be listed as definitions of “apology.”⁵ The more generally accepted modern usage of the word, however, is “an expression of error or discourtesy accompanied by an expression of regret.”⁶ It is this modern definition that I refer to in discussing apologies in this Article.

A true apology is a restorative act which attempts to, and often succeeds in, restoring a relationship, be it public or private, personal or impersonal, to a state similar to the state it was in prior to the imposition of an injury by one party upon another.⁷ Indeed, an apology can often work to place a relationship between two

²See OXFORD ENGLISH DICTIONARY 553 (1989).

³See, e.g., JOHN HENRY NEWMAN, *APOLOGIA PRO VITA SUA* (Dutton ed., 1934).

⁴See WEBSTER’S COLLEGIATE DICTIONARY (Tenth ed. 1998).

⁵Americans often accompany apologies with justifications for their transgression. See discussion *infra* notes 169-71 and accompanying text.

⁶See WEBSTER’S COLLEGIATE DICTIONARY 55. See also NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 19 (1991)(stating that a true apology must include a general display of regret or sorrow.) [hereinafter TAVUCHIS].

⁷See Deborah L. Levi, *Note, The Role of Apology in Mediation*, 72 NYU L. REV. 1165, 1167 (1997).

individuals on an altogether higher level than it occupied before the injury.⁸ An example cited by Nicholas Tavuchis is that of an argument the author had with a close friend in which his friend accused him of misconduct and insensitivity which went beyond the actual level of his transgression.⁹ The author demanded a “full and sincere apology,” not knowing exactly what that would entail.¹⁰ Days later he received a letter expressing regret and asking for forgiveness.¹¹ The apology was then repeated in person and both parties agreed to put the matter behind them.¹² The apology had salvaged the friendship and enabled the individuals to continue in a mutually beneficial relationship.

The power of an apology to restore social relationships is something that all children learn early on. A law professor recounts the story of a hypothetical posed to his first year Contracts class in which a long term installment contract is breached when on the third delivery the supplier provides only 999 widgets instead of the agreed upon 1,000.¹³ The professor asked the students what they would say if they were in the shoes of the seller.¹⁴ Finding no one willing to respond, as is so often the case in law school classes, the professor’s eye finally fell upon the eager face of the eight-year-old child of one of his students.¹⁵ Having no recourse, the professor called on the child, the only person in the class willing to respond, who said, “I’d say ‘I’m sorry.’”¹⁶ The story illustrates not only the fact that apologizing is a social lubricant learned early on by small children, but that its benefits are often forgotten by the time one reaches adulthood.

While sociologists differ on the essential ingredients of an apology, most would agree that the core ingredients are two: the offender must be sorry and must express regret for having offended the injured party.¹⁷ Wagatsuma and Rossett note that a true apology must contain five elements: 1) an acknowledgment that an injurious act occurred and was wrong, 2) an acknowledgment of fault, 3) willingness to compensate the injured party, 4) a promise that the injurious act will not happen again, and 5) intention to work for good relations in the future.¹⁸ As such, an

⁸*See id.* An apology cannot restore any relationship to the exact state it was in prior to the injury because the injured party can never totally erase the event from memory. *See id.* at 1176. *See also* TAVUCHIS, *supra* note 6, at 6 (noting Disraeli’s statement that “apologies only account for that which they do not alter.”).

⁹*See* TAVUCHIS, *supra* note 6, at 1.

¹⁰*See id.*

¹¹*See id.*

¹²*See id.*

¹³Stephen B. Goldberg, Eric D. Green & Frank E.A. Sander, *Saying You’re Sorry*, 3 NEGOTIATION J. 221 (1987) [hereinafter Goldberg, et al.].

¹⁴*See id.*

¹⁵*See id.*

¹⁶*See id.*

¹⁷*See* TAVUCHIS, *supra* note 6, at 3.

¹⁸*See* Hiroshi Wagatsuma & Arthur Rosett, 20 LAW & SOCIETY REV. 461, 469-70 (1986) [hereinafter Wagatsuma & Rosett].

apology is both backward looking and forward looking.¹⁹ It recalls the offending act and looks toward the possibility of restoration of a harmonious relationship.

An apology is a diplomatic act in which the offender places herself in an inferior position to the offended party and asks for forgiveness.²⁰ The apology is an acknowledgment that there is no excuse or justification for the behavior that occurred.²¹ The offending act has breached the accepted norms of interpersonal relations and the offender is at fault for acting as she did. The acknowledgment of a breach places the apologizer in a morally inferior position to the offended party, who has been asked for forgiveness. The offended party is consequently placed in a morally superior position from which she can either choose to forgive or not.²² As such, apology can be seen as a ritual in which the apologizer exploits the inferior position, in which she has voluntarily placed herself, in the hopes of restoring a relationship to its pre-injury, well-functioning state.²³

The forgiveness of the offended party is the natural goal of an apology whether the desire for forgiveness is stated or merely implied.²⁴ Forgiveness is thus the mate of apology. It completes the circle of interaction and enables the restoration of a normally functioning relationship.²⁵ Although an apology may be incomplete without an accompanying act or sign of forgiveness, there is some evidence that an apology may serve a useful social purpose even in the absence of forgiveness. Wagatsuma & Rosett note that an apology can be successful where there are “the beginnings of forgiveness.”²⁶ A mere agreement that the parties will coexist peacefully in the future, without an explicit statement of forgiveness may satisfy the forgiveness requirement and result in the restoration of a smoothly functioning relationship.²⁷

It is possible that the mere diplomatic act of placing oneself in a morally inferior position and placing the offended party in a morally superior position may be productive or at least emotionally satisfying to both parties after an injury. Studies conducted on criminal-victim mediation programs in the United States reveal that offering an apology to the victim is an important issue for 90% of the offenders who voluntarily choose to participate in such a program.²⁸ Thus, there may be an innate desire on the part of some offenders to apologize for their injurious acts even in the absence of forgiveness. Receiving an apology is an important issue for 75% of

¹⁹See *id.* at 475.

²⁰See TAVUCHIS, *supra* note 6, at 17.

²¹See *id.* at 33.

²²See Letitia Hickson, *The Social Contexts of Apology in Dispute Settlement: A Cross-Cultural Study*, 25 *ETHNOLOGY* 283, 290 (1986).

²³See *id.*

²⁴See *id.* at 283.

²⁵See Wagatsuma & Rosett, *supra* note 18, at 477 .

²⁶See *id.*

²⁷See *id.*

²⁸See MARK S. UMBREIT, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* 22 (1994).

victims who decided to engage in the mediation program.²⁹ In a victim-offender mediation program in Great Britain, one example shows that an apology can be gratifying to the victim even if she chooses not to forgive the offender.³⁰ A victim of a burglary and physical assault by an eighteen-year-old agreed to meet with the offender in the presence of a mediator.³¹ During the conference the burglar/assaulter apologized for his acts.³² The victim refused to forgive at that point in time, but later stated that she found the offering of an apology to be highly gratifying.³³ Thus, the mere offering of an apology in the absence of corresponding forgiveness may have significant emotional benefits for both parties.

A key issue for the offended party, whether she chooses to forgive or not, is the sincerity of the party apologizing. One commentator notes that in order for an apology to work, the injured party must be convinced that the apologizer believes she was at least partially responsible for an act that harmed the offended party, and *feels regret for the act*.³⁴ The apologizer convinces the offended party that she is worthy of being forgiven through the sincerity of the apology.³⁵ It is for this reason that written apologies are often not as effective as oral apologies given in person. Through observing the demeanor and facial expressions of the apologizer, the injured party can better gauge whether or not the offender truly regrets his act.³⁶ The timing of an apology is also important in evaluating the sincerity of the apologizer.³⁷ An apology offered too quickly or too glibly may be dismissed as inauthentic.³⁸ In general, where both parties to an apology are involved in an ongoing relationship that has ceased to function smoothly because of a serious breach by the offender, it is best to allow the injured party to recount his story before the apology is offered. The apology can thereby reflect full comprehension of the injured party's loss.³⁹

An apology that is not sincere, or which fails to communicate to the offended party a true sense of regret over the injury will not serve the purposes of a real apology. Often, the key to an effective apology lies in the psychological orientation of the parties. Rubin and Brown have observed that a person's heightened sensitivity to interpersonal relationship issues can affect whether an apology is desired, actually

²⁹See *id.* at 73.

³⁰See MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME 121 (1991) [hereinafter WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS].

³¹See *id.*

³²See *id.*

³³See *id.*

³⁴See Levi, *supra* note 7, at 1174.

³⁵See TAVUCHIS, *supra* note 6, at 23.

³⁶See *id.*

³⁷See *id.*

³⁸See *id.*

³⁹See Goldberg, et al., *supra* note 13, at 223.

given, and if given, whether it is successful.⁴⁰ In a study of the interdependence of negotiators, they have reported that individuals with a high level of interpersonal orientation (IO) are generally attentive to interpersonal relations and often take the opposing party's actions seriously.⁴¹ Conversely, individuals with low IOs are both more likely to desire an apology and to offer one in response to a request.⁴² Denying an apology, or making an insincere apology, to a high IO individual can undermine any chance of reconciliation.⁴³ One mediator recounts the story of a plaintiff company that alleged fraud by the defendant company with whom it had a continuing relationship.⁴⁴ The owner of the plaintiff company demanded that the settlement agreement include an apology and refused to sign without one. The representative of the defendant company did not care at all about apologizing, and was certainly willing to apologize if it would mean reaching a settlement.⁴⁵ In the end, while a written apology was included in the settlement agreement, the half-hearted and insincere manner in which the apology was offered precluded the possibility of a continued relationship between the two companies.⁴⁶ Full reconciliation had not been achieved.⁴⁷

In addition, for the sincerity of the apologizer to be believed by the offended party, the intensity of the apology must be responsive to the intensity of the harm.⁴⁸ Where someone has received a physical injury the effects of which may linger for years, a brief "I'm sorry" is unlikely to have any effect on the victim.⁴⁹ A more serious and detailed apology, displaying the offender's understanding of the victim's plight, is necessary in order to even potentially ameliorate the victim's circumstances.⁵⁰ Conversely, a brief apology may suffice where the offending act has a less severe impact.⁵¹

There is some dispute as to what types of injuries lend themselves to the ameliorative effects of an apology. One commentator has suggested that there are clearly some injuries that are too offensive for an apology because they are

⁴⁰See JEFFREY Z RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING & NEGOTIATION* 158-59 (1975).

⁴¹*See id.*

⁴²*See id.*

⁴³*See id.*

⁴⁴*See Levi, supra* note 7, at 1184.

⁴⁵*See id.*

⁴⁶*See id.*

⁴⁷*See id.*

⁴⁸*See Ken-ichi Ohbuchi, Nariuki Agarie & Masuyo Kameda, Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 *J. OF PERSON. AND SOC. PSYCH.* 219, 220 (1989).

⁴⁹*See id.*

⁵⁰*See id.*

⁵¹*See id.*

essentially unforgivable.⁵² A murder would be an example of an offense for which an apology to the victim's relative (another victim of the crime) would seem unsuited.⁵³ Other commentators suggest that apologies are only suitable for non-economic psychological injuries.⁵⁴ Such opinions, while intuitively correct, may inadvertently undervalue the tremendous transformative power an apology sometimes has. Deborah Tannen relates the story of a woman involved in a class action suit over the Dalkon Shield.⁵⁵ Due to the injuries the victim received from the intrauteran device, she had to undergo a hysterectomy, forego having the children she desperately wanted, and was forced to live in continual pain.⁵⁶ Despite the severity and duration of her pain and suffering she was more interested in an apology than in monetary damages, stating that she wanted the company officials "to apologize to me; that would be worth millions."⁵⁷ Continued attempts by the Korean government to get the Japanese government to apologize for its murderous acts during World War II as well as recent interest in whether the Pope would apologize for the Catholic Church's role in the Holocaust suggest a possible benefit for apology even in the case of the most horrendous crimes.⁵⁸

It is important to note that apologies need not be between two individuals. In fact, at least four types of apologies can be observed: 1) an apology by an individual to another individual, 2) an apology from a group to an individual, 3) an apology from an individual to a group, and 4) an apology from one group to another group.⁵⁹ Of course, the method of successfully offering the apology may differ according to the type of apology. While a private apology may suffice in a dispute between two individuals, an apology on the part of one country to another is meaningless if the apology is offered privately by one head of state to another.⁶⁰

III. THE APOLOGY IN JAPAN

It has been noted that in Japan it is a basic assumption that apology plays a part in the resolution of every conflict.⁶¹ In a society in which group membership is an important part of identity, the apology plays a major role in maintaining harmonious relationships and a sense of "insiderness" when social norms are broken.⁶² Examples

⁵²See TAVUCHIS, *supra* note 6, at 25-26.

⁵³See *id.* at 26.

⁵⁴See Wagatsuma & Rosett, *supra* note 18, at 487.

⁵⁵See DEBORAH TANNEN, *THE ARGUMENT CULTURE* 148 (1998) [hereinafter TANNEN, *THE ARGUMENT CULTURE*].

⁵⁶See *id.*

⁵⁷See *id.*

⁵⁸See Yossi Klein, et al., *Zionism's Gift*, *THE NEW REPUBLIC*, Apr. 10, 2000, at 6; *Editorial*, *THE ORLANDO SENTINEL*, Mar. 30, 2000, at A14.

⁵⁹See TAVUCHIS, *supra* note 6, at 69-110.

⁶⁰See *id.* at 98.

⁶¹See Wagatsuma & Rosett, *supra* note 18, at 462.

⁶²See *id.* at 466.

of the importance of apology in Japan can be found in certain cultural examples as well as in the Japanese legal structure and legal norms.

A. *The Cultural Context*

The importance of apology in Japanese culture can be seen in a version of one of Aesop's Fables which is commonly taught to children in Japan.⁶³ As told in the West, the story involves a mouse who brags to his cohorts that he is not afraid of a lion sleeping nearby.⁶⁴ To prove his fearlessness to his friends, the mouse jumps on the head of the lion.⁶⁵ The lion awakens and captures the mouse. The mouse attempts to negotiate with the lion, promising that if he is freed, he will someday save the life of the lion.⁶⁶ The lion finds the mouse's promise ridiculous but releases him because he is not hungry.⁶⁷ One day the lion is trapped in a hunters net and the mouse arrives to chew the net, freeing the lion and fulfilling his promise.⁶⁸ The lion thus learns that even a seemingly unimportant creature such as a mouse is worth having as a friend.⁶⁹

In the Japanese version of the same fable, the mouse does not begin by boasting to his friends, who do not even appear in the story.⁷⁰ Rather, the careless mouse accidentally stumbles onto the head of the lion.⁷¹ The lion awakens and grabs the mouse.⁷² The mouse proceeds to apologize over and over again for his impolite behavior.⁷³ The lion pities the mouse and releases him.⁷⁴ The mouse expresses gratitude to the lion for his kindness and generosity.⁷⁵ Years later, when the lion becomes trapped in the net, the mouse returns and repays the kindness to the lion by releasing him.⁷⁶ The lion apologizes for having acted arrogantly towards the mouse during their previous encounter and the two become faithful friends.⁷⁷

The Japanese version of the tale transforms the story into a lesson on apologies, despite the fact that in the Western version of the fable a single apology does not

⁶³*See id.*

⁶⁴*See id.*

⁶⁵*See id.*

⁶⁶*See* Wagatsuma & Rosett, *supra* note 18, at 462.

⁶⁷*See id.*

⁶⁸*See id.*

⁶⁹*See id.*

⁷⁰*See id.*

⁷¹*See* Wagatsuma & Rosett, *supra* note 18, at 462.

⁷²*See id.*

⁷³*See id.*

⁷⁴*See id.*

⁷⁵*See id.*

⁷⁶*See* Wagatsuma & Rosett, *supra* note 18, at 462.

⁷⁷*See id.*

appear. The Japanese version underscores the importance of mutual interdependence that is a hallmark of Japanese culture.⁷⁸ Numerous sociologists have noted that Japanese social norms not only condone, but actually encourage, dependent behavior on the part of adults.⁷⁹ Hierarchical relations, whether they be within the family, at the office, or in society at large, are a fundamental part of Japanese culture.⁸⁰ The complex hierarchical structure is held in place by an interlocking system of obligations binding both parties to a relationship to each other. Thus, for example, while a corporate employee owes a duty of loyalty and diligence to her superior at the office, the superior also owes a duty of protection and nurturing to his subordinate.⁸¹ Similarly, just as the mouse in the fable owes a duty of respect to the superior lion, the lion also has a duty to treat the inferior mouse with nurturing leniency. The mouse becomes indebted to the lion for the lion's generosity in setting him free, but returns the generosity in setting the lion free, which binds the two parties further and enables a closer relationship in the future.

The Japanese version of the fable also underscores the prevalence of mutual apologies in Japan. In the story, both the lion and the mouse end up apologizing to each other. It has been noted that many Japanese believe it is beneficial to apologize even when they believe the other party is at fault.⁸² Thus, disagreements between two individuals or even situations in which one individual has been physically injured by another, often end with both parties apologizing profusely to each other.⁸³ In Japan, apologizing is a sign of an individual's desire to restore or maintain a positive relationship with the other party despite the temporarily disruptive harmful act.⁸⁴ In Japan, unlike in most Western cultures, adults do not lose the knowledge which is intuitive to most young children; an apology can be an effective means of restoring a broken relationship to a normally functioning condition.⁸⁵

It is important to note that apology in Japan does not substitute for making reparations. Instead, apology is most often offered, at least in situations which might result in legal liability, in tandem with an offer to make reparations for an injury.⁸⁶ An offer by an offender to the injured party to make financial reparations alone, made in the absence of an apology, will often be rejected because a person too

⁷⁸See generally, TAKEO DOI, *THE ANATOMY OF SELF* (1986).

⁷⁹See, e.g., RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD*, 98-113 (1946) (discussing the existence of a complex system of interpersonal obligations which encourage interpersonal dependence).

⁸⁰See *id.* at 57.

⁸¹See Wagatsuma & Rosett, *supra* note 18, at 468 (discussing the process by which Japanese are socialized both to *amaeru* [to be succored], and to *amayakasu* [to be nurturing to others]).

⁸²See Wagatsuma & Rosett, *supra* note 18, at 472.

⁸³See Deborah Tannen, *I'm Sorry, I Won't Apologize*, N.Y. TIMES, July 21, 1996, Wed. 6, 34 [hereinafter, Tannen, *I'm Sorry, I Won't Apologize*].

⁸⁴See Wagatsuma & Rosett, *supra* note 18, at 472.

⁸⁵See Discussion, *supra* notes 13-16 and accompanying text.

⁸⁶See Wagatsuma & Rosett, *supra* note 18, at 487.

willing to offer to pay damages is thought to be lacking in sincere regret.⁸⁷ Similarly, a mere apology, offered in the absence of a willingness to make financial restitution, is usually not enough to satisfy most plaintiffs.⁸⁸

A story recounted by an American professor living in Japan illustrates the tremendous power an apology can have in that country.⁸⁹ The professor had recently renewed his passport at the American consulate in Tokyo.⁹⁰ The professor's new passport did not have his work visa printed in it as only the proper Japanese government agency is authorized to stamp foreigners' passports with visas.⁹¹ The professor then attempted to leave the country without a visa, something considered a serious offense in Japan.⁹² Japanese customs officials detained him at the airport and questioned him about the absence of a visa in his passport.⁹³ The professor immediately tried to explain why the passport lacked the visa which only seemed to further annoy the customs officers.⁹⁴ Only when the professor changed his mind and began apologizing for his mistake did the customs officers release him from custody.⁹⁵

The story illustrates two important characteristics of apology as used in Japan which may distinguish it from apology as used in the United States. First, while an American apology is often accompanied by an excuse or explanation of why the offending party did what he did, less emphasis is placed on the explanation or justification in Japan.⁹⁶ Thus, the customs officers are more concerned with the fact that the professor was apologizing than with his explanation of how he happened to end up in that particular situation.

Second, in Japan, less of an emphasis may be placed on the sincerity of the speaker when offering an apology than is usually the case when an apology is offered in the United States.⁹⁷ The Japanese are accustomed to acting within the framework of prescribed social interaction, which sometimes requires saying things in order to smooth the waters even when one does not necessarily believe what one is saying.⁹⁸ The Japanese refer to what is stated to others, in order to be polite or in order to follow the rules of social interaction, as *tatemaie*.⁹⁹ The Japanese refer to the

⁸⁷*See id.*

⁸⁸*See id.*

⁸⁹*See id.* at 490.

⁹⁰*See id.*

⁹¹*See* Wagatsuma & Rosett, *supra* note 18, at 490.

⁹²*See id.*

⁹³*See id.*

⁹⁴*See id.*

⁹⁵*See id.*

⁹⁶*See* Wagatsuma & Rosett, *supra* note 18, at 472.

⁹⁷*But see* discussion, *supra* notes 168-70 and accompanying text.

⁹⁸*See* Wagatsuma & Rosett, *supra* note 18, at 472.

⁹⁹*See id.*

true sentiment which often goes unexpressed as *honne*.¹⁰⁰ The dichotomy between *tatemae* and *honne* is part of daily existence in Japan and undoubtedly influences the way the Japanese view apologies.¹⁰¹ For example, recognizing that a certain amount of insincerity may be inherent in the apologies offered every day for minor breaches of social norms, the customs officers are unconcerned whether the American professor is *really sorry* for what he did.¹⁰² What matters is that the professor has offered his apology, sincere or not, signaling an acceptance of the rules of social behavior and a willingness to conform to those rules in the future.¹⁰³ As the examples below show, however, concern with the sincerity of the apologizer on the part of the injured party may increase with the severity of the injury and with the extent to which the apologizer wishes to redefine, as opposed to reinforce, social norms.

B. Japanese Criminal Law

Although Japanese criminal law makes no explicit mention of apologies, it is widely recognized that the offering of an apology is an important aspect of criminal law enforcement by police, prosecutors, and judges.¹⁰⁴ The failure to apologize for a breach of criminal laws can lead to prosecution, whereas the offering of an apology can lead to lenient treatment.

Police often “request” letters of apology (*shimatsusho*) from Japanese citizens who commit minor infractions. It is unknown how frequently such letters are requested, but one commentator has noted that police keep sample letters on file for offenders to copy, suggesting a practice that is quite widespread.¹⁰⁵ An example of the use of *shimatsusho* can be seen in the case of a police officer who caught a 16-year-old high school student on a motorcycle he had stolen from a parking lot.¹⁰⁶ Although the student said he had borrowed the motorcycle from a friend, the officer doubted the story and further investigation revealed that the youth did not have a driver’s license.¹⁰⁷ Not wishing to treat the crime as a theft because of the seriousness of such a charge, the officer called the boy’s father to the station and asked both the boy and his father to sign *shimatsusho* admitting to driving without a license. The letter stated in part “I regret deeply what I have done and I pledge

¹⁰⁰See DOI, *supra* note 78.

¹⁰¹ See Wagatsuma & Rosett, *supra* note 18, at 472.

¹⁰²See *id.*

¹⁰³Conversely, Americans, who do not live daily with the dichotomy between *tatemae* and *honne*, are much more likely to be concerned with whether the apologizer is being sincere. This may account for the less frequent use of apologies in the United States. See discussion, *infra* notes 103-06 and accompanying text.

¹⁰⁴See John A. Haley, *Comment: The Implications of Apology*, 20 LAW AND SOCIETY REV. 500 (1986) [hereinafter, Haley, *The Implications of Apology*].

¹⁰⁵See DAVID BAYLEY, FORCES OF ORDER: POLICE BEHAVIOR IN JAPAN AND THE UNITED STATES 134-137 (1976).

¹⁰⁶See *id.*

¹⁰⁷See *id.*

myself never again to ride a motorcycle without obtaining a driver's license.¹⁰⁸ Please deal with me leniently this time."¹⁰⁹ The police officer noted that if the motorcycle was indeed stolen, the father would deal with his son, and if the boy had indeed borrowed the bike, he would know not to drive without a license.¹¹⁰ Either way, according to the police officer, the matter had been effectively disposed of.¹¹¹ In those cases where police do decide to press charges and thus hand the matter over to prosecutors, the offering of an apology is a factor in whether prosecutors, who have tremendous discretion on whether to prosecute,¹¹² decide to press charges.¹¹³ Those who express remorse for a crime, cooperate with authorities, and reach accommodation with the victim through the offering of an apology and restitution are much less likely to face prosecution.¹¹⁴

Assuming that a criminal act does end up being prosecuted in the courts, apologizing for the crime is likely to be a significant factor in determining how the defendant is treated. Japanese judges believe that if a defendant does not show remorse for having committed a crime, he is more likely to commit the crime again.¹¹⁵ In a system in which the main focus is deterrence and rehabilitation, the offering of an apology becomes a major issue in deciding how to deal with a guilty defendant.¹¹⁶ The lack of an apology is likely to result in a more severe punishment.¹¹⁷ One Japanese judge was known for refusing to allow the defendant to leave the courtroom even after conviction and sentencing until he expressed remorse for committing the crime.¹¹⁸

In the typical scenario, a criminal defendant who has confessed to a crime apologizes to the crime victim, asks for forgiveness, and seeks to make restitution.¹¹⁹ In return, the defendant usually asks for and often receives letters from the victim stating that restitution has been made and expressing the victim's wish that no further

¹⁰⁸*See id.*

¹⁰⁹Wagatsuma & Rosett, *supra* note 18, at 490.

¹¹⁰*See id.*

¹¹¹*See id.*

¹¹²*See* KEIHO, art. 248.

¹¹³*See* Haley, *The Implications of Apology*, *supra* note 104, at 500.

¹¹⁴*See id.* at 501.

¹¹⁵*See id.*

¹¹⁶This can be contrasted with the American approach which is typified by the comment of an American District Court Judge that "what concerns me most is that the defendant, whether convicted or not, leaves my courtroom feeling that he has had a fair trial." American judges are thus less interested in the individual circumstances of both the victim and the offender than are their Japanese counterparts. *See id.* at 502.

¹¹⁷*See* Wagatsuma & Rosett, *supra* note 18, at 483.

¹¹⁸*See* John O. Haley, *Confession, Repentance and Absolution*, in *MEDIATION AND CRIMINAL JUSTICE* 200 (1989) [hereinafter, Haley, *Confession*].

¹¹⁹This practice is not limited to non-violent property crimes. *See* discussion, *infra* notes 72-74 and accompanying text.

punishment be imposed.¹²⁰ In a case in which an American resident of Tokyo had his house burned down by a burglar in a bungled attempt to destroy evidence of the crime, the arsonist was arrested and charged, and intermediaries arranged for the owner of the house to meet with the suspect's father.¹²¹ The father first apologized and offered to pay the entire amount of the damage, but the American owner refused, noting that the house was insured.¹²² Only after the intermediary explained that accepting restitution is customary did the owner agree to accept payment for all the uninsured furnishings in the house.¹²³ In return, the owner wrote a letter to the authorities explaining that compensation had been made.¹²⁴

A Japanese attorney teaching in the United States has related the story of defending two American soldiers stationed in Japan who were accused of raping a Japanese woman.¹²⁵ The victim had charged the two by affidavit and then left the country with a third soldier.¹²⁶ The attorney advised his clients to pay the victim a sum of money and receive a letter from her stating that she had been fully compensated and that she absolved the soldiers completely.¹²⁷ The soldiers paid the woman \$1,000 and received the letter in return.¹²⁸ After listening to the lawyer's argument that it would be unconstitutional to convict on the basis of an affidavit, the judge asked the defendants if they wished to say anything.¹²⁹ The soldiers immediately replied "We are not guilty, your honor."¹³⁰ The lawyer cringed; it had not occurred to him that the soldiers might not offer apologies.¹³¹ The defendants received the maximum penalty without suspension, a rarity in Japan.¹³² Most notably, according to the attorney, Japanese students react immediately upon hearing what the American soldiers said. They know that the refusal to apologize in such a situation inevitably leads to severe sanctions.¹³³

¹²⁰See Haley, *Confession*, *supra* note 118, at 200.

¹²¹See *id.*

¹²²See *id.*

¹²³See *id.*

¹²⁴See *id.*

¹²⁵John Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUDIES 265, 272 (1982) [hereinafter Haley, *Sheathing the Sword of Justice*].

¹²⁶See *id.*

¹²⁷See *id.*

¹²⁸See *id.*

¹²⁹See *id.*

¹³⁰Haley, *Sheathing the Sword of Justice*, *supra* note 125, at 272.

¹³¹See *id.*

¹³²See Haley, *Confession*, *supra* note 118, at 198 (noting that the vast majority of criminal defendants apologize and receive extraordinary leniency).

¹³³See *id.*

C. Japanese Civil Law

Although apology is rarely mentioned in most Japanese laws, it does play a part in actions for libel, where an apology can constitute a mitigating factor if offered by a defendant.¹³⁴ Courts can order the printing of a public apology (shazai kokoku) in a national newspaper where there is a finding that the defendant libeled the plaintiff.¹³⁵ In a study of 45 libel cases from 1980 to 1993, 27 of the cases involved claims for both damages and apologies, while the remainder involved claims for damages only.¹³⁶ Clearly, the offering of an apology is a desired remedy for plaintiffs even where both the plaintiff and the defendant are large corporations. In 1994, the East Japan Railway Company (JR) sued the publisher of one of the most widely distributed weekly news magazines in Japan.¹³⁷ JR claimed it had been libeled by a continuing series of articles claiming that rumors existed that the rail company was using some company funds to pay off extortionists.¹³⁸ JR halted all sales of the magazine at its train station kiosks, which accounted for 12% of the magazine's sales, prompting the magazine to file for an injunction to force the rail company to continue selling the weekly news magazine.¹³⁹ Before either matter could be settled, the publisher agreed to apologize for the series of articles and JR dropped its civil libel suit.¹⁴⁰ An English language newspaper in Japan noted that "now that the publisher has decided to apologize for damaging the reputation of JR East, both companies are likely to reach an amicable settlement."¹⁴¹ Thus, vindication through the issuing of a public apology can be at least as large a concern as monetary damages even for large corporations.

Public apologies are often sought after by individuals in claims of negligence against large corporations and the government. In several cases where corporations negligently polluted the environment, and a government ministry negligently allowed untested drugs to be distributed, resulting in serious injuries, the desire for an apology on the part of the plaintiffs became a major factor in resolving the cases. A large class action suit filed in 1964 on behalf of children injured by the drug Thalidomide, was instituted largely because the government agency responsible for¹⁴² allowing the drug to be distributed refused to apologize and make

¹³⁴See MINPO, art. 723.

¹³⁵See Masao Horibe, *Press Law in Japan*, PRESS LAW IN MODERN DEMOCRACIES 330 (1985).

¹³⁶See James J. Nelson, *Culture, Commerce and the Constitution: Legal and Extra-Legal Restraints on Freedom of Expression in the Japanese Publishing Industry*, 15 UCLA PAC. BASIN L.J. 45 (1996).

¹³⁷See *id.*

¹³⁸See *id.* at 46.

¹³⁹See *id.*

¹⁴⁰See *id.* at 71.

¹⁴¹See DAILY YOMIURI, Nov. 10, 1994, at 2.

¹⁴²See *Diary of a Plaintiffs' Attorneys Team in the Thalidomide Litigation*, 8 LAW IN JAPAN 136, 183 (1975).

compensation.¹⁴³ The plaintiffs and defendants entered settlement negotiations during which the ministry agreed to financially compensate the victims but refused to apologize.¹⁴⁴ The ministry agreed to issue a statement saying the government “regretted” the catastrophe rather than make a full apology acknowledging fault.¹⁴⁵ The plaintiffs refused to settle without a full apology, making repeated requests until the government gave in.¹⁴⁶ In the Minamata pollution cases, a Japanese chemical company released toxic substances into the water in southern Japan, poisoning all the fish in the area, and thereby causing horrifying human injuries.¹⁴⁷ The plaintiffs repeatedly insisted on an apology for the physical disfigurements caused by the polluters.¹⁴⁸ The victims successfully tied apology to economic compensation, refusing to accept the company’s offer to apologize until a company official prostrated himself before the victims and swore that compensation would be made in good faith.¹⁴⁹

Both the Thalidomide and Minamata cases show that apology is used in Japan not only to restore harmonious relationships to their previous smoothly functioning condition but to actually institute social change. The Minamata victims sought not only compensation, but a new order in which companies would be held accountable for negligent polluting in a nation which was at the time the most polluted in the world.¹⁵⁰ The Minamata litigation resulted in the creation of a special dispute resolution system for the investigation and resolution of environmental pollution cases as well as stricter laws, which transformed Japan into one of the cleanest industrialized countries in the world.¹⁵¹ The issuing of apologies by the defendants in both cases did not maintain the social order or the status quo. The apologies acknowledged the legitimacy of the plaintiffs’ protests, thereby paving the way for a revised social ordering.¹⁵²

One important factor accounting for the relatively frequent use of apologies by potential litigants in Japan, compared with the United States, is a relatively smaller concern with the liability that might be created by apologizing. First, Japan is a nation with a long history of various methods of alternative dispute resolution including mediation, conciliation (*chotei*) and compromise (*wakai*) as well as other dispute resolution methods, which are similar to hybrid processes such as Med-Arb,

¹⁴³*See id.*

¹⁴⁴*See id.* at 184.

¹⁴⁵*See id.*

¹⁴⁶*See id.*

¹⁴⁷*See* Frank Upham, *LAW AND SOCIAL CHANGE IN POST WAR JAPAN* 47 (1987).

¹⁴⁸*See id.*

¹⁴⁹*See id.*

¹⁵⁰*See id.* at 56.

¹⁵¹*See id.* at 56-57.

¹⁵²*See* Haley, *The Implications of Apology*, *supra* note 104, at 505. *See also* TAVUCHIS, *supra* note 6, at 135 (noting the successful use of apologies to shift the hierarchical order in Japan).

which has recently been developed in the United States.¹⁵³ The goal of these processes is to both avoid litigation, which is expensive and time consuming, and to reach mutual agreement which can be useful in preserving a long-term relationship between the parties.¹⁵⁴ Second, when cases do reach litigation, there is evidence that Japanese judges do not see the offering of an apology as an admission of liability.¹⁵⁵

The lack of concern with liability repercussions is found in several stories which would be almost unimaginable in the United States. One commentator has recounted the story of a Japanese doctor who misdiagnosed a patient's illness.¹⁵⁶ The misdiagnosis resulted in substantial inconvenience to the patient but no lasting injury. The physician went to the patient's house, apologized sincerely, and presented a payment of 50,000 yen to compensate for the inconvenience.¹⁵⁷ Such an act on the part of an American physician is unthinkable.

Similarly, the actions of Japan Air Lines executives after a fatal crash in 1982 reveal a total lack of concern for liability consequences. The crash was an act of suicide by a pilot who had been having problems with depression, and who flew his plane into Tokyo Bay, killing all on board.¹⁵⁸ The president of Japan Air Lines personally visited all the families of the crash victims, prostrating himself before them, apologizing, and offering economic compensation.¹⁵⁹ Most significantly, no lawsuits were ever filed by any of the victims in the case.¹⁶⁰ Thus, in Japan, the successful use of an earnest apology made in conjunction with economic reparations can be seen to reduce the potential for lawsuits.

Conversely, the lack of an apology may actually increase the likelihood of litigation in certain situations. American drivers are usually instructed by their insurance companies to say nothing after a fender-bender so as to avoid admitting fault. For American drivers, an apology is out of the question. Conversely, when a fender-bender occurs in Japan, *both* drivers typically emerge from their cars, bow to each other, claim responsibility and apologize. In one instance, when an American living in Japan was involved in a car accident with a Japanese driver, the American simply exchanged information with the Japanese driver but did not express regret or apologize, consistent with American social custom.¹⁶¹ The Japanese driver was so

¹⁵³See HIROSHI ODA, *Japanese Law* 83 (1992).

¹⁵⁴See *id.*

¹⁵⁵See Robert B. Leflar, *Personal Injury Compensation Systems in Japan: Values Advanced and Values Undermined*, 15 U. HAW. L. REV. 742, 758-62 (1993).

¹⁵⁶See *id.* at 749.

¹⁵⁷See *id.*

¹⁵⁸See Haley, *The Implications of Apology*, *supra* note 104, at 500.

¹⁵⁹See Goldberg, et al., *supra* note 13, at 222.

¹⁶⁰See *id.*

¹⁶¹See Tannen, *I'm Sorry, I Won't Apologize*, *supra* note 83, at 35. See also Haley, *The Implications of Apology*, *supra* note 104, at 500 ("Failure to apologize in Japan increases the likelihood of litigation and other forms of legal sanction.").

enraged by the American's Failure to express regret over the accident that he actually sued him, an action rarely resorted to in Japan.¹⁶²

It is important to note that some readers may jump to the conclusion that apology plays a stronger role in the resolution of Japanese disputes because Japanese are naturally non-litigious people and thus seek an alternative means by which to resolve their disputes.¹⁶³ In fact, resort to litigation in Japan is much less frequent than it is in the United States.¹⁶⁴ Yet, it may be that it is the existence of apology in Japanese culture, and the ability of potential litigants to resort to apology, that accounts in part for the lower rate of litigation in Japan.¹⁶⁵ Potential litigants may be more likely to find their psychological as well as economic needs met before a case ever gets to trial.

IV. THE APOLOGY IN THE UNITED STATES

A. *The Cultural Context*

The apology as used in the United States differs in certain aspects from the apology that is commonly used in Japan. First, as many American visitors to Japan and Japanese visitors to the United States have noticed, Americans apologize much less frequently than do the Japanese.¹⁶⁶ In addition, the less serious the injury, the more likely an American is to apologize. In fact, Americans reserve the most flowery apologetic language, words such as "I'm terribly sorry" and "I beg your pardon," for those situations, which are least serious, such as when one bumps into a stranger on the street.¹⁶⁷

The American apology is much more likely to be accompanied by an explanation of why the behavior in question occurred.¹⁶⁸ Thus, upon arriving at work late, an American employee is likely to say to her superior "I'm sorry I'm late, the trains were backed up," or offer a similar excuse or justification for being late. Conversely, a Japanese employee arriving late at the office will most often apologize without offering an explanation for her tardiness. One explanation for the different approach to offering an apology in the United States may lie in the egalitarian nature of American society. An apology offered without an explanation places the apologizer in a lower position vis a vis the offended party.¹⁶⁹ The apologizer admits fault and

¹⁶²*See id.*

¹⁶³*See* Richard B. Parker, *Law, Language, and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179 (1988).

¹⁶⁴*See* Gino Dal Pont, *The Social Status of the Legal Professions in Japan and the United States: A Structural and Cultural Analysis*, 72 U. DET MERCY L. REV. 291, 314-15 (1995).

¹⁶⁵*See* Haley, *Sheathing the Sword of Justice*, *supra* note 125, at 275. Other factors such as the lack of juries, which has the effect of reducing the wild-card aspect of damages awards, and the availability of a well-developed system of methods of alternative dispute resolution likely also play a role in the lower rate of litigation.

¹⁶⁶*See* Wagatsuma & Rosett, *supra* note 18, at 462.

¹⁶⁷*See id.* at 469.

¹⁶⁸*See id.* at 472.

¹⁶⁹*See* discussion *supra* notes 20-23 and accompanying text.

asks for forgiveness from the offended party who has been placed in a morally superior position. Such an approach is in keeping with the hierarchical nature of Japanese society. Americans, for whom the notion of egalitarianism is fundamental to cultural identity, despite the realities of hierarchy that are a necessary element of almost any work environment, may be extremely uncomfortable with the strata created by an apology offered without an explanation. In the United States, an explanation or justification offered without an apology acknowledging fault is usually accepted as an apology, especially if it is accompanied by an expression of the intention not to let the same problem arise in the future.¹⁷⁰

A second explanation for the reduced role of apology in the United States may be the American emphasis on internal emotional consistency.¹⁷¹ Thus, the Japanese dichotomy between *tatemae* and *honne*, which is an acknowledged part of daily social interaction in Japan, has no place in American social interaction, or at least goes unrecognized in the United States. When Americans have conflicting emotions towards one object, they tend to repress one emotion so as to create internal mental consonance. While Americans have the same conflicting emotions as the Japanese, they tend to identify those emotions as hypocritical and not admit to ambivalent feelings.¹⁷² Thus, the customs officer's lack of concern for the *sincerity* of the professor's apology in the story recounted above would be an anomaly in the United States.¹⁷³ The American fixation on the sincerity of the regret expressed by the party offering the apology may well reduce the frequency of apologies in the United States.¹⁷⁴ It is difficult to determine whether an apologizer is sincere in many instances. Thus, the party offering the apology may fear that the apology will not be believed by the offended party and the offended party may in fact tend to doubt that the proffered apology expresses the internal state of mind of the apologizer.¹⁷⁵

In addition to the more infrequent use of apology in the United States, at least one commentator has pointed out the significant differences in the approach taken to apologies by the two genders.¹⁷⁶ Women tend to use apology much more frequently than men, and some women even apologize as a "conversational ritual." punctuating numerous statements every day with the words "I'm sorry."¹⁷⁷ Deborah Tannen gives the example of a woman who, discovering that someone is smoking a cigarette in a public area, asks the smoker to put out his cigarette. The woman says

¹⁷⁰See Wagatsuma & Rosett, *supra* note 18, at 473. Just as the Japanese cultivate norms of inter-personal dependence, Americans cultivate norms of independence. See Wagatsuma & Rosett, *supra* note 18, at 478. However, the American *honne* may be more dependent than is commonly acknowledged by American *tatemae*, just as the Japanese *honne* may be more independent than is commonly acknowledged by Japanese *tatemae*.

¹⁷¹See generally, LEON FESTINGER, *THEORY OF COGNITIVE DISSONANCE* (1957).

¹⁷²See Wagatsuma & Rosett, *supra* note 18, at 466.

¹⁷³See *supra* notes 89-95 and accompanying text.

¹⁷⁴See Wagatsuma & Rosett, *supra* note 18, at 473.

¹⁷⁵See *id.*

¹⁷⁶See TANNEN, *THE ARGUMENT CULTURE*, *supra* note 55, at 22-23.

¹⁷⁷*Id.*

“I’m terribly sorry but I have asthma, would you please put your cigarette out?”¹⁷⁸ A purely rational criticism of the woman’s statement might see the use of an apology as superfluous or at least unnecessarily demeaning, as the woman would seem to have the right to ask someone to put out a cigarette in a public area. The fact is that the woman in this case succeeded in getting what she wanted; the man put out his cigarette. It is possible that women in the United States understand the usefulness of apology better than men and that understanding may derive from the traditionally subservient position occupied by women relative to men in American culture.¹⁷⁹

Conversely, American men would seem to have an antipathy for apologizing, at least compared to American women. In another article, Tannen notes that it seems as if there is an unspoken rule that real men do not apologize.¹⁸⁰ Tannen recounts a story from the movie *Crimson Tide*, in which Gene Hackman plays a hardened and authoritarian Navy captain and Denzel Washington plays the lieutenant commander who bucks the captain’s order and refuses to launch a nuclear warhead, thereby averting nuclear war.¹⁸¹ In the end, the lieutenant is rewarded for his courage with a promotion. The captain turns to his lieutenant and says “You were right and I was wrong . . . about the lipizzaners,” referring to a dispute about lipizzaner horses the two characters had had earlier in the film.¹⁸² The message sent by the captain’s refusal to apologize is that those who hold real positions of power in society need not humiliate themselves by apologizing.

At times, American society seems to take a clearly hostile view of apology, perhaps because apology is viewed as a sign of weakness.¹⁸³ Hillary Clinton “apologized” for the failed health care reforms of the early years of the Clinton administration by saying “I regret very much that the efforts on health care were badly misunderstood, taken out of context and used politically against the administration. I take responsibility for that, and I’m very sorry for that.”¹⁸⁴ Although the quote indicates that her statement was not even a real apology since Clinton was not indicating that the fault lay with her actions,¹⁸⁵ her statement came under intense criticism. One political scientist said: “To apologize for substantive things you’ve done raises the white flag. There is a school of thought in politics that you never say you’re sorry. The best defense is a good offense.”¹⁸⁶ A woman in the

¹⁷⁸*Id.*

¹⁷⁹See discussion *supra* notes 20-23 and accompanying text stating that the offering of an apology creates an inferior-superior relationship between the two parties to the apology.

¹⁸⁰See Tannen, *I’m Sorry, I Won’t Apologize*, *supra* note 83, at 35.

¹⁸¹*Id.*

¹⁸²*Id.*

¹⁸³This provides an interesting contrast with Japan, where the filing of a lawsuit is seen as a weakness and the offering of an apology is not. The reverse seems to be true in the United States. See Goldberg, et al. *supra* note 13, at 222. Deborah Levi suggests that apologizing is viewed as “demeaning” in the United States. See Levi, *supra* note 7, at 1182.

¹⁸⁴See Tannen, *I’m Sorry, I Won’t Apologize*, *supra* note 83, at 36.

¹⁸⁵See discussion *supra* notes 17-19 and accompanying text.

¹⁸⁶Tannen, *I’m Sorry, I Won’t Apologize*, *supra* note 83, at 36.

Florida state cabinet stated: "I've seen women who overapologize, but I don't do that. I believe you negotiate through strength."¹⁸⁷

In contrast to Japanese authorities who are often persuaded to forgive transgressors through the use of apology, American authorities have the opposite reaction to the offering of apologies. The story of a Japanese woman entering the United States illustrates the different approach taken in this country. Customs officials found the Japanese woman to be in possession of a large amount of American currency which she had not correctly reported on the customs entry form.¹⁸⁸ Because the officials did not suspect that the possession of cash was related to the illegal activities the regulation was intended to discourage, the customs officials released the woman.¹⁸⁹ She sought advice from a Japanese bank official living in California.¹⁹⁰ Rather than advising the woman to see a lawyer, the bank official, in typical Japanese fashion, advised her to write a letter to the Customs officials, acknowledging her breaking of the law, apologizing profusely, and begging forgiveness.¹⁹¹ The letter became the basis for the insistence on the part of the Department of Justice that the woman be prosecuted.¹⁹²

The American legal system makes virtually no accommodation for apology. Neither criminal nor civil defendants are asked to apologize to those they injured or to the society whose rules they have broken. An American defendant who is found guilty or liable is likely to believe that either accepting punishment or paying damages will end further responsibility for the violation. The expression of personal contrition directly to the injured party is almost unheard of in both criminal and civil litigation. It has been suggested that were an American judge or other authority to try to force an apology as part of a settlement of a dispute, the apology would most likely be perceived as "insincere, personally degrading, or obsequious."¹⁹³

Despite the apparent absence of apology in almost all areas of the law, apology does have a limited legal history in Western culture. Martin Wright points out that in 18th Century England, criminal law was essentially carried out by crime victims, who decided whether to bring prosecutions and what the charges would be.¹⁹⁴ This left criminal prosecution in the hands of those wealthy enough to pursue prosecution.¹⁹⁵ It was seen almost as a failure to go to trial, however.¹⁹⁶ Wealthy victims of crime utilized the threat of prosecution which would be withdrawn in return for restitution and an apology, often in the form of a letter in a local

¹⁸⁷*Id.*

¹⁸⁸*See* Wagatsuma & Rosett, *supra* note 18, at 487.

¹⁸⁹*See id.*

¹⁹⁰*See id.*

¹⁹¹*See id.*

¹⁹²*See id.*

¹⁹³*See* Wagatsuma & Rosett, *supra* note 18, at 462.

¹⁹⁴*See* WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS, *supra* note 30, at 7.

¹⁹⁵*See id.*

¹⁹⁶*See id.*

newspaper.¹⁹⁷ With the advent of professional prosecutors and the disappearance of the victim from the process, the role of apology in English criminal law came to an end.¹⁹⁸ Apology survives today in modern American criminal law only to the extent that an apology could be viewed by a judge as a mitigating factor at a sentencing hearing.¹⁹⁹

Apology does, however, continue to exist as an element in libel and defamation suits in the English-speaking world. In England, Church courts retained primary jurisdiction over defamation suits.²⁰⁰ Ecclesiastical courts imposed spiritual penalties on guilty defendants which involved public penance and public apology to the defamed party.²⁰¹ A defendant typically had to march in a church procession garbed in penitential robes and state in a loud voice that he had erred in his statement and asked pardon of the victim of defamation.²⁰² The Church's use of apology was passed on to the Common Law when secular courts took jurisdiction of libel and defamation cases. Today, an apology can still be offered by a defendant in a libel suit as evidence in mitigating compensatory and punitive damages.²⁰³ Some thirty states have incorporated the mitigating force of corrections and retractions into libel statutes, and seven of those states explicitly mention apology as a factor.²⁰⁴ The very limited presence of apology in criminal and libel suits provides the only example of apology in modern American law.²⁰⁵

Perhaps nothing discourages the use of apology in the United States today more than the fear of liability. The American Medical Association (AMA) discourages doctors from apologizing for their mistakes for fear that a statement regarding an injury will come back to haunt a physician in a malpractice lawsuit.²⁰⁶ The AMA takes this approach despite evidence that a patient is more likely to sue if a physician

¹⁹⁷*See id.*

¹⁹⁸*See id.*

¹⁹⁹*See* Wagatsuma & Rosett, *supra* note 18, at 482. *See, e.g.*, Cal R. Ct. § 414(d)(9) (stating that a defendant's remorse is a factor to be considered in a judge's decision whether to grant probation).

²⁰⁰*See* RICHARD HELMHOLZ, *SELECTED DEFAMATION CASES* 21 (1986).

²⁰¹*See id.*

²⁰²*See id.*

²⁰³*See* ROBERT SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 371 (1980).

²⁰⁴*See* FLA. STAT. ANN. § 770.02 (West 2000); MISS. CODE ANN. § 95-1-5 (1999); N.C. GEN. STAT. § 99-2 (1999); TENN. CODE ANN. § 29-24-103 (1999); TEX. CIV. PRAC. CODE ANN. § 73.003(a)(3) (2000); VA. CODE § 8.01-46 (1999); W. VA. CODE § 57-2-4 (1999).

²⁰⁵*But cf.* Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 52-53 n. 147 ([H]uman nature being what it is, we can probably assume that judges and juries, if they were influenced by [an apology], would be inclined to award lesser damages against a remorseful defendant and greater damages against a defendant who refuses to acknowledge, much less to apologize for, the harm caused to the plaintiff.).

²⁰⁶*See* Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 109, 1027 n. 60 (1999). The American Medical Association advises physicians to avoid all impulses to discuss an injury with a patient or the patient's family when a malpractice suit arises, noting "anything you say can and will be held against you." *Id.*

fails to acknowledge her mistake.²⁰⁷ Similarly, American drivers are instructed by their insurance companies to avoid admitting fault when they are in a car accident.²⁰⁸ However, at least one commentator has noted that it is highly unlikely that an insurer would succeed in voiding coverage where a negligent driver has apologized.²⁰⁹ Thus, whether or not the fear of the creation of liability stemming from apology is justified, substantial pressure exists for potential parties to lawsuits to refrain from apologizing.

B. *The Underlying Desire for Apology*

Despite the American disdain for apology on a formal level, a substantial interest in both getting other parties to apologize and apologizing oneself can be discerned among Americans. As Haley has suggested, it is almost as if the American *tatemaie* says that apology is unacceptable, while the American *honno* is that Americans have a deep-seated and repressed desire to give and receive apologies.²¹⁰

In the criminal arena, victim-offender mediation programs have begun to proliferate in North America. More than 120 such programs currently exist in the United States and Canada.²¹¹ Advocates for victim-offender mediation believe that the process can be beneficial for both the victim and offender.²¹² The mediation can counter resentment on the part of the victim that he is left out of the legal process and also can help victims deal with stereotypes, fears and phobias.²¹³ While victim-offender mediators do not necessarily promote the use of an apology during mediations, apology often plays a large part in the process. As noted above, studies of victim-offender mediation programs in the United States reveal that offering an apology to the victim is an important issue for 90% of offenders who voluntarily decide to participate in such a program.²¹⁴ Receiving an apology from the offender is an important issue for 78% of victims who decide to participate.²¹⁵

In the area of medical malpractice, substantial interest in apology can be discerned on the part of patients who have been the victim of a physician's mistake. Studies of medical malpractice claims data reveal that when a physician is forthright

²⁰⁷See discussion, *infra* notes 216-20 and accompanying text.

²⁰⁸See Tannen, *I'm Sorry, I Won't Apologize*, *supra* note 83, at 34. Japanese executives who are moving to the United States for business reasons are generally instructed by their corporate employers not to apologize if they are involved in an accident. The advice is considered necessary because in a similar situation in Japan the natural impulse would be to apologize, whether or not the driver is at fault. See Wagatsuma & Rosett, *supra* note 18, at 484.

²⁰⁹See Cohen, *supra* note 206, at 1025-26. Cohen notes that the insurer would have to show that the insured party acted in bad faith and that his action materially or substantially prejudiced the insurer. See *id.*

²¹⁰See Haley, *The Implications of Apology*, *supra* note 83, at 505.

²¹¹See UMBREIT, *supra* note 28, at 2.

²¹²See WRIGHT, *supra* note 30, at 25.

²¹³See *id.*

²¹⁴See discussion, *supra* notes 28-33 and accompanying text.

²¹⁵See discussion, *supra* notes 28-33 and accompanying text.

about what has occurred, apologizing and taking responsibility for the injury, patients are less likely to sue.²¹⁶ A likely explanation for the reduced desire to litigate is that an apology can provide patients with the restorative benefits sought by others through litigation.²¹⁷ One study of victims of medical malpractice revealed that 98% of respondents expected or desired the doctor's acknowledgment of the error, ranging from simple acknowledgment to several forms of apology.²¹⁸ Evidence from Great Britain suggests that victims of medical malpractice are more interested in apologies than in monetary compensation.²¹⁹ One medical malpractice lawyer has stated: "I have never seen a malpractice case where the doctor said he was sorry or made an effort to show concern for the feelings of the patient and the family."²²⁰ The approach of the American medical community to avoid apologizing at all costs may therefore be inflicting not only psychological costs on victims of malpractice, but also monetary costs on the profession.

American plaintiffs in civil suits sometimes pursue apology as a remedy for injuries incurred. In a 1980's lawsuit brought by Nazi concentration camp survivors against right wing groups who had claimed that the Holocaust had never occurred, apology played a major part.²²¹ The plaintiffs and defendants reached a settlement in which the defendants consented to a cash payment and the offering of a public apology printed in a local newspaper.²²² The statement said:

The Legion for Survival of Freedom, Institute for Historical Review, . . . 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."²²³

In civil suits between individuals, an apology is often the goal pursued by the plaintiff. In the infamous O.J. Simpson civil trial, the famous ex-football player was found liable to Ron Goldman's family for a substantial sum of money. Goldman's father said he would renounce the money if Simpson would admit the crime and apologize.²²⁴ Similarly, Paula Jones, in her sexual harassment suit against President

²¹⁶See Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39 (1994).

²¹⁷See *id.*

²¹⁸See Amy B. Witman, et al., *How Do Patients Want Physicians to Handle Mistakes?*, 156 ARCHIVES OF INTERNAL MEDICINE 2565, 2566 (1996).

²¹⁹See Frances H. Miller, *Medical Malpractice Litigation: Do the British Have a Better Remedy?*, 11 AM. J.L. & MED. 433, 434-35 (1986).

²²⁰See Haley, *The Implications of Apology*, *supra* note 104, at 504-05.

²²¹Myra Oliver, *Holocaust Doubters Settle Auschwitz Survivor's Suit*, L.A. TIMES, July 25, 1985, at A1.

²²²*Id.*

²²³*Id.*

²²⁴See TANNEN, *THE ARGUMENT CULTURE*, *supra* note 55, at 149.

Clinton, unsuccessfully sought an apology from Clinton as part of a settlement agreement.²²⁵ Apology can even be a goal of litigation in suits between two corporations. In a suit brought by General Motors against Volkswagen, the demand by GM for an apology for theft of trade secrets by VW became a central factor in crafting a settlement agreement.²²⁶

Even outside the arena of the courts, substantial interest in the offering of apologies can be found in contemporary treatments of many socio-political issues. Recent curiosity over whether the Pope would apologize for the Catholic Church's actions during the Holocaust and just how strong the apology would be is one example.²²⁷ The issue of whether President Clinton should apologize for slavery in the United States is another.²²⁸ A recent Washington Post op-ed piece bemoaned the increasing tendency of American politicians to "apologize" for their actions while simultaneously trying to shirk responsibility for the deed in question.²²⁹ The article objected to the increasing use of apologies made only after the discovery of a transgression and as a preface to an attack on another party.²³⁰ It focuses on a letter from George W. Bush to Cardinal O'Connor apologizing for neglecting to criticize the anti-Catholicism of Bob Jones University, which then goes on at greater length to complain about how unfairly the candidate had been treated by the press over the matter. In a reflection of the American concern with sincerity in apologies,²³¹ the article also notes President Clinton's "not really apologizing" for his relationship with Monica Lewinsky and the seemingly endless discussions in Congress over whether Clinton had apologized sincerely enough.²³² The article ends with a plea to spare the voters the "theater of sham regrets."²³³

Not only are apologies sought after by many Americans and complained about when they are perceived to be insufficient or insincere, but it is also true that in the United States an apology correctly offered can be highly effective. After the invasion of the Bay of Pigs, President Kennedy not only took responsibility for the fiasco but also took the blame.²³⁴ At the time, an admission of fault by someone in such a high

²²⁵See Scot Lehigh, *Doing the Smart Thing; A Clinton Apology-of Sorts Would Be a Good Way to End Paula Jones Suit*, BOSTON GLOBE, Jan. 19, 1997, at E1.

²²⁶See Edmund L. Andrews, *None Prove So Stubborn as a Giant Spurned; G.M. Never Wavered in Its 4-Year Fight Over Executive Who Defected to VW*, N.Y. TIMES, Jan. 11, 1997, at 37.

²²⁷See *supra* note 58.

²²⁸See DeWayne Wickham, *Why Clinton Must Stop Dodging Slavery Apology*, USA TODAY, Dec. 16, 1997, at A15.

²²⁹See Marjorie Williams, *Mea-Not-Really Culpa*, WASH. POST, Mar. 17, 2000, at A27.

²³⁰See *id.*

²³¹See discussion, *supra* notes 171-75 and accompanying text.

²³²Williams, *supra* note 229.

²³³*Id.*

²³⁴See Tannen, *I'm Sorry, I Won't Apologize*, *supra* note 83, at 34.

position of power was unheard of.²³⁵ The apology worked, however. Americans forgave Kennedy and his administration for the colossal mistake.

Thus, it seems clear that despite the American formal disdain for apology, there is a strong interest on the part of many Americans to have apology play a part in the resolution of their disputes. Despite the tendency to characterize the Japanese implementation of apology in its dispute resolution mechanisms, both public and private, as an interesting aspect of a unique culture, it may in fact be Western culture that is unique in not providing a larger place for apology in social and legal contexts. After all, the moral imperative of forgiveness is a fundamental part of the Judeo-Christian heritage.²³⁶ Thus it is remarkable that Western cultures do not accommodate this moral imperative which stands at the root of their religious heritage.

The existence of a gap between the apparent desire for apology and the societal pressures which discourage apology suggests that there is potential for an increased role for the apology in the resolution of disputes between Americans both on the personal and collective levels.²³⁷ Despite certain cultural difference between Japan and the United States, American can certainly learn something of worth from the Japanese experience and may be able to put the mechanism of apology to use in more effective means of dispute resolution. In fact, given the sublimated position it occupies in American culture, if the apology can be successfully used as an integral part of dispute resolution, its power to restore and rehabilitate frayed relationships may be that much more potent.

V. THE APOLOGY IN MEDIATION

A. *The Benefits of Using Apology in Mediation*

Mediation is the method of dispute resolution most suited to use of apology. In fact, apology already plays a role in some mediations, since many mediators can tell at least one story of a mediation in which, having reached an impasse, one party decides to apologize to the other and the two parties quickly reach a settlement.²³⁸ Whether the apology was initiated by the mediator or by the party apologizing, the existence of such stories shows the powerful impact an apology can have in mediation. Lawyers engaging in mediation should be aware of the possibility of introducing the concept of apology to the parties to mediation and in certain cases may be justified in gently pushing one or both parties to apologize.²³⁹

The apology is well suited to mediation because mediation offers a creative alternative to adjudication. Whether adjudication takes place in the courts or outside the courts in arbitration (where rules similar to court rules are often followed), the apology cannot be used.²⁴⁰ Mediation, which is outside the strictures of more

²³⁵See *id.*

²³⁶See Haley, *Confession supra* note 118, at 204.

²³⁷See TAVUCHIS, *supra* note 6, at 5.

²³⁸See Levi, *supra* note 7, at 1165. See also, Cohen, *supra* note 206, at 1044.

²³⁹See Cohen, *supra* note 206, at 1013.

²⁴⁰See discussion, *supra* notes 188-93 and accompanying text.

traditional court-like settings, is well-suited to the introduction of novel methods of dispute resolution. If one of the goals of mediation is to break from the traditional norms of dispute resolution and come up with solutions that are outside the box, the increased use of apology appears to be tailor-made for such a process.²⁴¹ Another goal of mediation is to avoid the time and expense of litigation while allowing the parties to sculpt their own solution to a problem.²⁴² As noted above, there is substantial evidence that the offering of an apology can help dissuade a party from bringing suit.²⁴³ It is therefore not unlikely that an apology, in conjunction with some form of compensation for an injury, offered in a mediation could successfully move the parties towards settlement.

Mediation is also well-suited as a venue for apologizing because one of the goals of mediation is to preserve and restore existing relationships.²⁴⁴ By creating an opportunity for parties to a dispute to examine their underlying relationship, mediation opens up the possibility of creating “win-win” solutions in which both parties emerge as winners and manage to preserve a pre-existing relationship.²⁴⁵ The effective use of apology, with its joint benefits to both the apologizer and the offended party,²⁴⁶ as well as its ability to restore relationships to their pre-injury condition,²⁴⁷ is particularly well suited to this beneficial aspect of mediation.

The private nature of mediation is also conducive to apologizing. Mediation, because it takes place outside the courts and because it does not involve a third party who will judge the parties, opens up the opportunity for the disputants to justify their arguments and humanize themselves directly to each other.²⁴⁸ Mediation often encourages the exploration of moral and emotional expression by activating a sense of responsibility in the parties.²⁴⁹ Due to the non-threatening atmosphere of mediation, parties often find themselves expressing some degree of concern and understanding for each other in spite of their disagreement.²⁵⁰ Because one party is more likely to come to understand the other and express sympathy for the other party’s situation, the informal and private environment of mediation is conducive to the making of a sincere apology. Because the sincerity of apology is one factor that

²⁴¹See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 486 (1985).

²⁴²See Cohen, *supra* note 206, at 1039.

²⁴³See discussion, *supra* notes 216-20 and accompanying text. See also Cohen, *supra* note 206 and accompanying text.

²⁴⁴See BENNETT G. PICKER, *MEDIATION PRACTICE GUIDE* 3 (1998); See also Cohen, *supra* note 206, at 1039.

²⁴⁵See *id.*

²⁴⁶See discussion, *supra* notes 7-16 and accompanying text.

²⁴⁷See discussion, *supra* notes 7-16 and accompanying text.

²⁴⁸See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 17-18 (1994).

²⁴⁹See Levi, *supra* note 7, at 1171.

²⁵⁰See *id.* (discussing the recognition dimension of mediation).

determines whether an apology will be accepted by the offended party,²⁵¹ mediation offers the most conducive atmosphere for the making of a successful apology.

Of course, the use of apology in mediation is subject to criticism on several fronts. Commentators on mediation and other methods of alternative dispute resolution have noted that the lack of an authoritative third party and the absence of binding rules of procedure and law encourage the appropriation of the process by the stronger party.²⁵² Critics might wonder if a party is not being ill-served by mediation if he settles for an apology instead of pursuing substantial monetary damages which could have been obtained in court. Encouraging the use of apology could be seen as exploitative of an emotionally weaker or more dependent party to mediation. Such criticisms cut to the core nature of mediation as a method of dispute resolution. As a party-driven process in which the disputants retain control of both procedure and outcome, weaker parties may be subject to exploitation and mediators may have an ethical duty to ensure that apology is not used to the detriment of one party. However, it should be noted that merely because a disputant opts for an apology over monetary damages that almost definitely could be obtained in court does not mean that the disputant has been taken advantage of. Different parties have different goals and needs and the role of a good mediator is to ascertain those goals and work towards facilitating their realization.²⁵³

B. Hurdles to the Use of Apology in Mediation

Even if it is understood that apology can help facilitate the goals of mediation, increased use of the apology in mediation is still subject to significant hurdles. Lawyers engaged in mediating a dispute or in representing a party in mediation are simply unlikely to think of the possibility of apologizing.²⁵⁴ American legal education, focused as it is on individual rights and the adversarial system, rarely if ever takes note of mediation, much less apology. Most lawyers are therefore unaware that the possibility of apologizing even exists. Lawyers engaged in representation of clients in mediation are likely to see their roles in adversarial terms and may hesitate to suggest making an apology because it does not appear to be consonant with notions of maximizing benefits to the client at the “adversary’s” expense.²⁵⁵ Even those lawyers educated about the potential benefits of apologizing may hesitate to suggest apologizing for fear of being viewed as disloyal, or simply not aggressive enough, by the lawyer’s own client.²⁵⁶ Clients often hire their lawyers

²⁵¹See discussion *supra* notes 34-39 and accompanying text.

²⁵²See, e.g., Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

²⁵³See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 760-61 (1984).

²⁵⁴See Cohen, *supra* note 206, at 1042-43.

²⁵⁵See *id.*

²⁵⁶See *id.*

to take a strongly adversarial stance for them and suggesting making an apology could be seen as a breach of the client's duty of loyalty.

An even larger hurdle which stands in the way of increased use of the apology in mediation is the fear of liabilities which might arise if one party apologizes to another during the course of mediation, the mediation eventually breaks down, and the parties proceed to trial. Can the party on the receiving end of the apology use the apology as an admission of liability in a later court proceeding? The answer is "it depends." Specifically, it depends on just how confidential information revealed during a mediation is. Confidentiality varies from jurisdiction to jurisdiction and will also depend on different judges' interpretations of various rules and laws.

1. Federal Rule of Evidence 408

Rule 408 of the Federal Rules of Evidence²⁵⁷ was enacted to correct inadequacies in the Common Law rules which the statute succeeded. Under the Common Law, statements made during settlement negotiations were admissible in court unless posed as hypotheticals. Use of the words "without prejudice" preceding a statement helped ensure that a statement would be deemed hypothetical.²⁵⁸ The purpose of Rule 408²⁵⁹ was to expand the confidentiality of private statements made during settlement negotiations²⁶⁰ and to promote settlements by getting rid of the Common Law reliance on legal formalisms.²⁶¹

Rule 408, however, has significant limitations which make it inadequate protection for an apology offered by one party during mediation. First, Rule 408 bars statements made during settlement negotiations from introduction at trial.²⁶² It does not cover pre-trial discovery, when any apology made during mediation would be admissible, nor does it cover administrative or legislative hearings.²⁶³ Perhaps even more significantly, because Rule 408 focuses on admission at trial, it does not

²⁵⁷See FED. R. EVID. 408.

²⁵⁸See Cohen, *supra* note 206, at 1033.

²⁵⁹Rule 408 states:

Evidence of (1) a furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed R. Evid. 408.

²⁶⁰See FED. R. EVID. 408 advisory committee's note.

²⁶¹See Kenneth R. Feinberg, *Mediation - A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S32 (1989).

²⁶²See *supra* note 259.

²⁶³See James M. Massey, Jr., *Mum's The Word On Mediation: Confidentiality and Snyder-Falkinham v. Stockburger*, 9 GEO. J. LEG. ETHICS 991 (1996).

protect a party from revealing an apology to the public at large. Second, Rule 408 bars only evidence introduced at trial “to prove liability for or the invalidity of the claim or its amount.”²⁶⁴ The rule specifically allows for introduction of statements for the purpose of proving bias or prejudice of a witness and others.²⁶⁵ The loophole created by the rule may be so large as to negate the rule’s effectiveness. For example, a defendant who admitted guilt while apologizing during a mediation session might find the statement being used to impeach him if he were later to deny guilt at trial.²⁶⁶ Third, Rule 408 can only be relied upon by parties to litigation. Thus there is no bar to admitting an apology made during a mediation where the apologizing party is not a party to the litigation.²⁶⁷ This could create serious problems for the apologizer, with the possible result of being forced to defend numerous other suits inspired by revelation of the apology. Thus, Rule 408 offers scant protection for apologies made during the course of mediation.

2. Private Contractual Agreements

Parties to mediation can and often do enter into pre-mediation confidentiality agreements.²⁶⁸ Contractual agreements have the benefit of being able to address a broad variety of matters.²⁶⁹ Thus a confidentiality agreement can be created which not only makes statements made during mediation inadmissible in court, but also provides penalties for revealing statements to the public or to other potential plaintiffs.²⁷⁰ But private confidentiality agreements have several weaknesses. First, there is always the risk that a court will find the contract unenforceable as void against public policy.²⁷¹ Courts often disregard private contracts which bar a court from hearing evidence as contrary to the court’s right to hear every man’s evidence.²⁷² Second, even if a contract is enforceable, the inclusion of penalties for revealing statements to third parties may not remedy the problem.²⁷³ Finally, contractual agreements are not binding on third parties and therefore provide no protection from claims and revelations made by those not party to the mediation.²⁷⁴

²⁶⁴*Id.*

²⁶⁵*See id.*

²⁶⁶*See* Cohen, *supra* note 206, at 1034-35.

²⁶⁷*See* Massey, *supra* note 263, at 995.

²⁶⁸*See* Cohen, *supra* note 206, at 1039.

²⁶⁹*See id.*

²⁷⁰*See id.*

²⁷¹*See Note, Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 451 (1984).

²⁷²*But see* Garstang v. Superior Court, 39 Cal App. 4th 526 (Cal. Ct. App.2d 19995) (holding that statements made during a mediation conducted by Caltech’s ombuds office were privileged because the relationship between the ombuds office and the University’s employees and management is worthy of societal support).

²⁷³*See Note, supra* note 271, at 451.

²⁷⁴*See id.*

3. Confidentiality Statutes

Confidentiality statutes creating privileges for parties engaged in mediation offer the best hope for protecting the confidentiality of an apology made during a mediation session. However, mediation statutes vary significantly from state to state in several ways. First, significant differences exist regarding the scope of information which is protected. Typically, statutes cover all communications during mediation between the mediators and the parties as well as between the parties themselves.²⁷⁵ Some states limit the scope of information covered by making the privilege applicable only to statements which are relevant to the issue being mediated, while others create specific subject-matter exceptions.²⁷⁶ Second, statutes vary according to whose statements are covered. In many states the privilege applies to all participants, but in several states only information originating with the mediator or mediation program is privileged.²⁷⁷

Some state legislatures have opted against absolute privileges and have specifically signaled that the courts should develop the extent of the privilege through a case-by-case analysis.²⁷⁸ Courts engaging in a balancing of the costs and benefits of a mediation privilege typically apply the Wigmore four-part test.²⁷⁹ Courts have historically been loathe to expand privileges,²⁸⁰ so attempting to shield apology from exposure may be an uphill battle where confidentiality statutes leave the privilege open to judicial review. Protecting an apology from exposure is easiest in those few states which create an absolute privilege for statements made during mediation.²⁸¹ Thus, key to an understanding of whether an apology should be

²⁷⁵See NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 120 (1989).

²⁷⁶See, e.g., WASH. REV. CODE § 5.60.070 (1999) (enumerating several exceptions); VA. CODE ANN. § 8.01.581.22 (Michie 1999).

²⁷⁷See ROGERS & MCEWEN, *supra* note 275, at 122-23.

²⁷⁸See Massey, *supra* note 263, at 998.

²⁷⁹ 1) the communications must originate in a confidence that they will not be disclosed.
2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

4) The injury that would inure to the relation by the disclosure of communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

J. WIGMORE, 8 EVIDENCE § 2285 (1961).

²⁸⁰See, e.g., *United States v. Nixon*, 418 U.S. 683, 712 (1974) (noting that President Nixon's assertion of a confidentiality privilege cut against due process guarantees and gravel impaired the functioning of courts). See also *In re Grand Jury Proceedings*, 148 F.3d 487 (5th Cir. 1998) (holding that there is no federal mediation privilege because Congress has not clearly manifested an intent to create one).

²⁸¹See, e.g., NY JUD'L LAW § 849-b(6) (McKinney 1993) ("Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person at the dispute resolution shall be a confidential communication."); OKLA. STAT. ANN., tit. 12 § 1805(c) (West 1993) ("No mediator, initiating party, or responding party in a mediation proceeding shall be subject to administrative or

encouraged by either a mediator or counsel to a party engaging in mediation is an understanding of the local confidentiality statute.

Conflicts of laws issues remain a problem, however, even where a state statutorily provides absolute immunity. According to the approach taken by the Restatement on Conflict of Laws,²⁸² the local law of the forum will determine the admissibility of evidence. This could create problems if a mediator or a party to mediation in a state with an absolute mediation privilege were subpoenaed by a party in a state with no mediation confidentiality statute.²⁸³ Where the forum state recognizes a privilege, cases have thus far barred the introduction of statements made in a jurisdiction which does not recognize that same privilege.²⁸⁴ Federal diversity cases present another troublesome area where mediation privileges vary in the two states. Federal courts in diversity cases usually have applied the privilege rule of the forum state, once again opening up the possibility of the release of information originally thought to be privileged.²⁸⁵

At least one Federal District Court has barred evidence from an ADR proceeding conducted in a state with a strong confidentiality statute from being introduced in a federal proceeding. In *United States v. Gullo*²⁸⁶ the defendant had made statements during the mediation of an arbitration proceeding in New York State. The court looked to Federal Rule of Evidence 501²⁸⁷ which allows courts to recognize privileges by balancing several factors.²⁸⁸ The court found a strong policy in favor of full disclosure of the facts in criminal cases as well as a policy in favor of participation in ADR proceedings.²⁸⁹ Because the privilege served to promote participation and because the United States had not shown particularized need for the evidence, the court recognized the privilege and suppressed the statements made during the mediation proceeding.²⁹⁰ *Gullo* is the only example of a court applying

judicial process requiring disclosure of any matters discussed or shall disclose any information obtained during any part of the mediation proceedings.”).

²⁸²See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138-39 (1971).

²⁸³See Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO J. ON DISPUTE RES. 1 (1994).

²⁸⁴See, e.g., *Wexler v. Metropolitan Life Ins. Co.*, 38 N.Y.S.2d 889, 890 (N.Y. City Ct. 1942).

²⁸⁵See Rosenberg, *supra* note 283, at 172.

²⁸⁶See *United States v. Gullo*, 672 F. Supp. 99 (W.D.N.Y. 1987).

²⁸⁷See FED. R. EVID. 501.

²⁸⁸ 1) the government's need for the information being sought in enforcing its substantive and procedural policies;

2) the importance of the relationship or policy sought to be furthered by the state rule of privilege and the probability that the privilege will advance that relationship or policy;

3) the special need for information to be protected; and

4) the adverse impact on the local policy that would result from non-recognition of the privilege.

Gullo, 762 F.Supp. at 104.

²⁸⁹See *id.*

²⁹⁰See *id.*

another jurisdiction's mediation privilege. The decision does not create a bright-line rule, however, even for federal courts in New York State. The court left open the possibility that a more particularized need shown by the United States would have justified disallowing the privilege, leaving some uncertainty as to how the privilege will hold up in future cases.²⁹¹

In conclusion, while one can be reasonably sure that an apology offered during a mediation session will not be introduced as evidence in a later trial in states with the strictest confidentiality statutes, the situation in many states remains unclear and potentially risky. The promotion of an increased emphasis on apology in legal education as well as the promotion of increasingly broad confidentiality statutes on both the state and federal levels offer the best hope for an increased use of apology in mediation.

C. Using Apology in Mediation

Because there is ample room for increased use of the apology in American culture, and particularly in mediation, mediators and lawyers representing clients in mediation should be open to the idea of suggesting an apology as a means of progressing towards a mutually beneficial settlement. Facilitating a meaningful apology which leads to forgiveness, or at least some sense of satisfaction on the part of the apologizer, should be a goal for lawyers engaged in mediation once a party decides she would like to apologize.

Lawyers engaging in mediation should be sure to encourage apology in those situations which are appropriate for the medium. However, deciding which types of injuries lend themselves to an apology is admittedly not easy. Clearly, extremely violent injuries such as those inflicted by rape or murder may not lend themselves to apology. While it has been suggested that apology is best suited to repairing psychic harm,²⁹² the examples cited above of the woman injured by the Dalkon shield and victim-offender mediations suggest that there may be broader uses for apology than one might at first imagine. Perhaps the best a lawyer/mediator or lawyer/representative can do is keep her mind open to exploring the possibility of using an apology as an effective tool.

Given the American interest in the underlying emotion of the party offering the apology, lawyers must be sure to facilitate only those apologies which are authentically desired by the apologizer. Thus, advising a party to apologize purely for strategic reasons, while not problematic for strict consequentialists, is unlikely to have positive ramifications.²⁹³ First, it may not be easy for an insincere party to successfully fake the emotions necessary to make a convincing apology.²⁹⁴ If the apology is perceived as insincere, there is a substantial risk of further alienating the other party. Second, advising clients to apologize purely for strategic reasons has

²⁹¹672 F. Supp. 99 (W.D.N.Y.).

²⁹²See Wagatsuma & Rosett, *supra* note 18, at 487.

²⁹³See Cohen, *supra* note 206, at 1055.

²⁹⁴See *id.*

ethical implications.²⁹⁵ It is no different from advising a client to dissemble about other matters.²⁹⁶

The method by which the apology is offered may also play a role in how sincere the apology is perceived to be. Although many lawyers may instinctively want to speak for their clients and many clients may wish to use their attorneys as spokesmen, there is no doubt that an apology offered directly by the offending party is much more effective. The apologizer is in a better position to judge the underlying emotions of the apologizer. Similarly, a spoken apology is generally more effective in conveying sincerity than a written apology, especially in disputes between two individuals. Of course, there may be times when a written apology is most appropriate, such as in cases where one or both parties wish to publicize the apology for vindication or in the case of injuries involving large groups of people.

Simply because sincerity is a major factor to be considered does not mean that a lawyer should not broach the subject of apology even where the client has not expressed any sincere remorse. A lawyer/representative or lawyer/mediator should feel free to at least raise the possibility with a party to mediation. It is possible that the mere suggestion may cause a party to recognize the fact that she does feel some remorse for the plight of the other party. There are probably few offenders who feel absolutely no sympathy for the other party's injury.²⁹⁷ A lawyer/mediator or lawyer/representative may even point out that strategic benefits may be reaped from the offering of an apology. After all, people can gain financial benefits from doing what is morally right and the two are not mutually exclusive.²⁹⁸

Jonathan Cohen has advocated the use of "safe apologies," which can also be used in mediation. By "safe apology," Cohen means accompanying an apology with a statement that the speaker does not want the apology to be used against her to create liability.²⁹⁹ While such an apology might lack the power of a naked apology offered without any attempt at insulation from liability, it may still have some positive impact on the other party. There is nothing ethically wrong or duplicitous with an expression of some regret accompanied by an attempt to shield oneself from the possibility of future needless conflict. Such an approach may be a particularly wise one in jurisdictions where the confidentiality of statements made during mediation is less secure.³⁰⁰

Finally, envisioning the apology as a constructive ritual as opposed to a bargained-for exchange may be helpful in promoting the use of apology in mediation.³⁰¹ While it may be natural to depict the offer and acceptance in terms of a bargain, especially for those trained in the adversarial system, apology does not lend itself to categorization as an exchangeable good. It is impossible to gauge the

²⁹⁵*See id.*

²⁹⁶*See id.*

²⁹⁷*See id.*

²⁹⁸*See Cohen, supra note 206, at 1066.*

²⁹⁹*See id.* at 1067.

³⁰⁰*See discussion, supra notes 185-200 and accompanying text.*

³⁰¹*See Levi, supra note 7, at 1176-77.*

precise value of an apology.³⁰² First, it is difficult at best to predict how the other party will react to the offering of an apology.³⁰³ Second, the sense that an apology has made a difference in situations where parties have settled and not gone on to litigation is difficult to evaluate without measuring the costs of the alternative.³⁰⁴ An exchange model also fails to explain why an apology may work in one case and not in another similar situation.³⁰⁵

Instead, apology should be viewed as a corrective ritual which restores a moral power imbalance between two parties.³⁰⁶ The effectiveness of an apology is therefore dependent not only on the speaker, but also on the injured party. It is through acknowledging the apology and perhaps forgiving, that the apologizer closes the circle and restores the moral equilibrium between the two parties.³⁰⁷ This view of apology is in keeping with the core nature of mediation, which is outside the traditional and artificial boundaries created by litigation and open to the possibility of non-traditional solutions. Apology as ritual also separates the intangible nature of apology from the more tangible issues and offers that are also present in most mediations and which may accompany an apology.³⁰⁸ As a delicate interchange, as opposed to an exchange, a successful apology is dependent on the right timing, the right environment, and the right parties.

VI. CONCLUSION

The benefits of apologizing are largely ignored in American society, in which apology is often denigrated and ignored as a means of dispute resolution. As we increasingly turn towards methods of alternative dispute resolution to resolve our problems it is not unlikely that we can learn something of worth from Japan, a society in which both alternative dispute mechanisms and apology have long been put to use, often in tandem. Because of its party-driven character and its status outside of traditional norms, mediation offers an ideal venue for the increased use of apology. The use of apology, with its power to restore relationships, offers hope for more successful mediations, where the goal is often to preserve existing relationships. Lawyers engaging in mediation, whether as lawyer/mediators or as lawyer/representatives, should therefore be aware of the potential of this under-utilized means for resolving disputes and seek to use it as a means towards the end of mutually beneficial settlements.

³⁰² *See id.*

³⁰³ *See id.*

³⁰⁴ *See id.*

³⁰⁵ *See id.* at 1177.

³⁰⁶ *See* TAVUCHIS, *supra* note 6, at 38.

³⁰⁷ *See* discussion, *supra* notes 7-33 and accompanying text.

³⁰⁸ *See* discussion *supra* notes 301-08 and accompanying text (noting that a meaningful apology is usually accompanied by an offer for compensation).