Apologies and Civil Justice

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Introduction

An apology is a statement offered by a wrongdoer that expresses "acknowledgment of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done." Although more attention has been paid to the role of such expressions of apology and remorse in the context of criminal offenses, there is growing recognition that apologies are also relevant to many decisions that must be made in civil cases. Civil defendants or potential defendants must make decisions about whether to offer apologies and to what extent such apologies will conform to the definition above. In addition, apologies of various kinds may affect plaintiffs' interpretations of an injury-producing incident and their decisions about whether to seek legal advice, whether to file a lawsuit, and whether and for how much to settle that lawsuit, and for how much. Similarly, it is possible that jurors' decisions about liability and damages will be affected by whether and how defendants apologize.

In the context of existing or possible civil litigation, the potential that apologies have for contributing to the resolution of the dispute is complicated by the worry that an apology that includes an admission of fault will increase the risk of an adverse liability determination. Despite on-going concern about the possible negative legal implications of apologies, however, potential defendants, including physicians, business

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leaders, and others, are increasingly considering the relative merits of apologizing for having caused injury.

The notion that apologies may have a role to play in how civil disputes are resolved has caught the attention of state legislatures as well, with many states enacting statutes that provide evidentiary protection for some types of apologetic expressions in some cases. Some legislation has made inadmissible apologetic statements that include admissions of fault, while other provisions protect only statements expressing sympathy while preserving the admissibility
of any part of the statement that acknowledges fault.\textsuperscript{7} These statutes are based on assumptions about the decision making of each of the participants in civil litigation. At the most general level, the perceived need for such evidentiary protection is premised on assumptions about the legal risks of apologizing, including assumptions about how jurors and other factfinders will respond to apologies offered by defendants. In addition, such statutes assume that providing evidentiary protection will influence the settlement behavior of the parties. In particular, proponents argue that the effect of protecting apologetic expressions from legal admissibility will change the behavior of defendants so that they will offer apologies more frequently and that increased settlement will result.\textsuperscript{8} However, critics worry that providing apologies with a cloak of legal protection will alter the ways in which they are understood, morally diminishing their meaning and lessening their ability to resolve disputes.\textsuperscript{9}

Very little empirical research has examined the assumptions about whether, how, and under what circumstances apologies may influence decision making in civil litigation. There does, however, exist an established body of psychological research exploring the effects of apologies in human interaction generally. In addition, a body of studies has examined reactions to remorse expressed by criminal defendants and some recent studies have examined the role of apologies in civil litigation.

In this chapter, I attempt to explore the state of the research on the role of apologies in the context of civil litigation with an eye toward suggesting avenues

\textsuperscript{7} See, e.g., CAL. EVID. CODE \S 1160(a); FLA. STAT. \S 90.4026(2); LA. REV. STAT. ANN. \S 13:3715.5; MASS. GEN. LAWS ANN. CH. 233, \S 23D; ME. REV. STAT. ANN. tit. 24, \S 2907; MD. CODE ANN., CTS. & CRIM. PROC. \S 10-920; MO. REV. STAT. \S 538.299; N.H. REV. STAT. ANN. \S 507-E:4; TENN. R. EVID. \S 409.1; TEX. CIV. PRAC. & REM. \S 18.061; WASH. REV. CODE \S 5.66.010(1). Several states provide that "apologies" will be inadmissible without defining the term. See, e.g., 735 ILL. COMP. STAT. 5/8-1901; N.C. GEN. STAT. \S 8C-4, RULE 413; OHIO REV. CODE ANN. \S 2317.43; OKLA. STAT. ANN. tit. 63, \S 1-1708.1H; OR. REV. STAT. \S 677.082; UTAH CODE ANN. \S 78-14-3; VA. CODE ANN. \S 8.01-58.1:20:1; W. VA. CODE \S 55-7-11a(1); WYO. STAT. ANN. \S 1-1-130. For discussion of this legislation and the choice of what expressions to protect, see Cohen, Legislating Apology, supra note 4.

\textsuperscript{8} See, e.g., CAL. ASSEMBLY COMM. ON JUDICIARY, HISTORICAL NOTES TO CAL. EVID. CODE \S 1160 (characterizing the bill as "an attempt to reduce lawsuits and encourage settlement"); S.B. 1477, 21st Leg. (Haw. 2001) (describing provision as allowing defendants to "reach out to others in a humane way without fear of having such a communication used subsequently as an admission of liability"); Arthur Kane, GOP Pushes Tort Reform, DENVER POST, Apr. 6, 2003, at B4 (characterizing the Colorado apology legislation as part of a "flurry of bills to limit lawsuits and damage awards"); Peggy Lowe, "Sorry" Bill Advances, ROCKY MOUNTAIN NEWS, Apr. 2, 2003, at 22A (noting that the sponsor called the bill the "I'm sorry legislation," but that opponents called it "anti-patient rights"); SorryWorks! http://www.sorryworks.net/ WhatIs.html (arguing that apologies increase settlements, improve justice for victims, reduce settlement and defense costs, and reduce medical errors); TENN. ADVISORY COMM. COMMENT ON TENN. R. EVID. \S 409.1 (stating that rule is "designed to encourage the settlement of lawsuits"). See discussion infra notes 136–40.

\textsuperscript{9} See, e.g., Taft, supra note 4.
of future research. Part II explores some of the psychological theories that contribute to an understanding of how and why apologies influence judgments and decision making. Apologies may influence a range of legally related judgments as they provide assurance that the offender will not re-offend, express the proper relative moral positions of the parties, provide positive information about the injured party's social identity, influence emotional reactions, trigger social conventions, and change expectations about legal entitlements. Part III reviews studies that have specifically examined the role of apologies in civil litigation. Part IV explores a number of variables that may moderate the effects of apologies on legal decision making. Part V concludes with recommendations for future research.

The Psychology of Apologies

Psychological research has examined the ways in which apologies influence perceptions, emotions, and decisions. Overall, this literature has demonstrated that apologies can have a variety of favorable consequences for both apology providers and recipients. For example, studies have found that apologies or other expressions of remorse influence attributions of offender responsibility, assessments of the offender's character, estimates

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10 There are exceptions — see infra §IV.


12 See, e.g., Darby & Schlenker, Children's Reactions to Apologies, supra note 11; Darby & Schlenker, Children's Reactions to Transgressions, supra note 11; Gregg J. Gold & Bernard Weiner, Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression, 22 BASIC & APPLIED SOC. PSYCHOL. 291 (2000); Marti Hope Gonzales et al., Victims as "Narrative Critics": Factors Influencing Rejoinders and Evaluative Responses to Offenders' Accounts, 20 PERSONALITY & SOC. PSYCHOL. BULL. 691 (1994); Ken-ichi Ohbuchi et al., Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm, 56 J. PERSONALITY & SOC. PSYCHOL. 219, 221 (1989); Ohbuchi & Sato, supra note 11; Jennifer R. Orleans & Michael B. Gurtman, Effects of Physical Attractiveness and Remorse on Evaluations of Transgressions, 6 ACAD. PSYCHOL. BULL. 49 (1984); Weiner et al., supra note 11.
of the likelihood that similar behavior will recur,\(^{13}\) expectations about the parties' future relationship,\(^ {14}\) affective reactions such as anger and sympathy,\(^ {15}\) physiological responses,\(^ {16}\) and behaviors such as forgiveness,\(^ {17}\) aggression,\(^ {18}\) and recommendations for punishment.\(^ {19}\) There are a number of psychological mechanisms by which these effects might occur.

**Attribution Theory**

One way in which apologies may influence litigation decision making is by changing the attributions that people make about the causes of injury-producing behavior. Indeed, apologies may be "designed to convince an audience that although the actor accepts blame for the undesirable event, any attributions made on the basis of it would not be accurate."\(^ {20}\) When a wrongdoer apologizes for his or her conduct, "the offense and the intention that produced it are less likely to be perceived as corresponding to some

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\(^{13}\) See, e.g., Gold & Weiner, supra note 12; Ohbuchi et al., supra note 12; Orleans & Gurtman, supra note 12; Gary S. Schwartz et al., *The Effects of Post-Transgression Remorse on Perceived Aggression, Attributions of Intent, and Level of Punishment*, 17 BRITISH J. SOC. CLINICAL PSYCHOL. 293 (1978); Weiner et al., supra note 11.


\(^{17}\) See, e.g., Darby & Schlenker, *Children's Reactions to Apologies*, supra note 11; Gold & Weiner, supra note 12; Ohbuchi & Sato, supra note 11; Weiner et al., supra note 11. See also Alfred Allan, *Exploration of the Association between Apology and Forgiveness amongst Victims of Human Rights Violations*, 24 BEHAV. SCI. & L. 87 (2006).

\(^{18}\) See, e.g., Ohbuchi et al., supra note 12; Schwartz et al., supra note 13.

\(^{19}\) See, e.g., Darby & Schlenker, *Children's Reactions to Apologies*, supra note 11; Darby & Schlenker, *Children's Reactions to Transgressions*, supra note 11; Gold & Weiner, supra note 12; Schwartz et al., supra note 13; Weiner et al., supra note 11.

underlying trait of the offender. According to attribution theory, attributions about the causes of the offense may change such that those causes are perceived as being less internal to the offender, less controllable by the offender, and less stable.

In particular, ascriptions about the stability of the behavior in question are influenced by an apology from the wrongdoer. When a wrongdoer apologizes, observers may attribute the offense to less stable causes and may, therefore, conclude that such behavior is unlikely to be repeated. In one study of this phenomenon, Gregg Gold and Bernard Weiner asked participants to read a scenario in which an offender either expressed remorse or did not. Participants rated wrongdoers who expressed remorse as being of higher moral character and as less likely to repeat the wrongful behavior in the future. Studies in the legal context are consistent with these findings. Remorseful offenders in both civil and criminal cases are anticipated to be less likely to engage in similar wrongful conduct going forward. Gold and Weiner conclude that "[o]ne reason for the anticipation of positive future behavior may be that when an individual confesses with remorse, the moral character of the offender is recovered," and the wrongful behavior is no longer seen as representative of the offender's true character. Such attributions – i.e., the judged likelihood that the wrongful behavior will be repeated – are often central to legal judgments, including decisions about settlement and decisions about punishment.

24 Gold & Weiner, supra note 12.
25 Id. Participants also expressed more sympathy for remorseful wrongdoers, were more likely to forgive them, and recommended less punishment. Id.
26 In the civil context, I found that participants rated wrongdoers who accepted responsibility for having caused a bicycle accident and apologized for it as being of higher moral character, are more likely to be careful in similar circumstances in the future, and as having engaged in less egregious conduct. Robbennolt, Apologies and Legal Settlement, supra note 4, at 487, 495. In the criminal context, studies that have explored how remorseful criminal defendants are evaluated have also found that defendants who exhibit more remorse are perceived as less likely to engage in similar behavior in the future. See, e.g., Randolph B. Pipes & Marci Alessi, Remorse and a Previously Punished Offense in Assignment of Punishment and Estimated Likelihood of a Repeated Offense, 85 Psychol. Rep. 246 (1999); Dawn T. Robinson et al., Heinous Crime or Unfortunate Accident? The Effects of Remorse on Responses to Mock Criminal Confessions, 73 Soc. Forces 175 (1994).
27 Gold & Weiner, supra note 12, at 292. Goffman suggests that the act of apologizing causes a "splitting of the self into a blameworthy part and a part that stands back and sympathizes with the blame giving, and, by implication, is worthy of being brought back into the fold." Goffman, supra note 20, at 113.
28 See review in Robbennolt, Apologies and Legal Settlement, supra note 4, at 479.
Equity Theory

Equity theory\textsuperscript{29} also suggests ways in which apologies may influence legal decision making. Equity theory proposes that inequity is created in a relationship when one member of the relationship engages in wrongdoing that harms another—that is, wrongdoing results in a moral imbalance in the relationship. Inequity in a relationship, furthermore, causes people—both participants in the relationship and observers of the relationship—to experience distress.\textsuperscript{30} This distress motivates attempts to restore equity to the relationship.\textsuperscript{31}

Equity theorists have suggested that an apology by the wrongdoer is one of the ways in which equity in the relationship might be re-established.\textsuperscript{32} Because to apologize is to engage in a social “ritual whereby the wrongdoer can symbolically bring himself low (or raise us up),”\textsuperscript{33} an apology may provide evidence of an equitable relationship, perhaps in part by demonstrating that the offender has suffered as a result.\textsuperscript{34} Consistent with this notion, empirical studies have shown that offenders who apologize or otherwise show remorse are perceived to have suffered more than offenders who have not apologized.\textsuperscript{35} Thus, an apology may accomplish the restoration of equity and moral balance between the parties.

\textsuperscript{29} See Jeffrie Murphy, Forgiveness and Resentment, in Forgiveness and Mercy 14, 28 (Jean Hampton & Jeffrie G. Murphy, eds., 1988); Tayuchis, supra note 1; Elaine Walster et al., New Directions in Equity Research, 25 J. Personality & Soc. Psychol. 1 (1973).

\textsuperscript{30} See Walster et al., supra note 29, at 153.

\textsuperscript{31} See id. at 154.

\textsuperscript{32} See id. at 163.

\textsuperscript{33} Murphy, supra note 29, at 28.


\textsuperscript{35} Brian H. Bornstein et al., The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case, 20 Behav. Sci. & L. 393 (2002) (finding that defendants who showed remorse were rated as having suffered more); Michael N. O'Malley & Jerald Greenberg, Sex Differences in Restoring Justice: The Down Payment Effect, 17 J. Res. in Personality 174 (1983) (wrongdoer who admits responsibility perceived to have suffered more); Michael G. Rumsey, Effects of Defendant Background and Remorse on Sentencing Judgments, 61 Applied Soc. Psychol. 64 (1976).
Emotion Theory

Strong emotions are often involved when an offender's conduct is thought to have caused injury to a victim. Importantly, anger and blame tend to result when people attribute an offender's injurious behavior to causes within that offender's control. Notably, the types of injurious actions that are often at issue in civil litigation - violations of the victim's autonomy - have been specifically linked to anger responses. Anger and other negative emotions have, in turn, been linked to increased blame, decreased trust, more punitive responses, and less productive bargaining behavior.

Apologies, and their effects on attributions and perceptions of justice, are likely to shape these emotional reactions. In particular, in a number of studies, apologies offered after injurious behavior have been shown to reduce anger and increase sympathy for the offender. To the extent that apologies reduce the anger that is likely to result from legally actionable conduct and increase the experience of sympathy toward the offender, apologies are likely to alter the

37 Paul Rozin et al., The CAD Triad Hypothesis: A Mapping Between Three Moral Emotions (Contempt, Anger, Disgust) and Three Moral Codes (Community, Autonomy, Divinity), 76 J. PERSONALITY & SOC. PSYCHOL. 574 (1999) (finding connections between violations of autonomy and anger, community and contempt, and divinity and disgust). See also R. A. Shweder et al., The "Big Three" of Morality (Autonomy, Community, Divinity) and the "Big Three" Explanations of Suffering, in MORALITY AND HEALTH 119 (A. Brandt & Paul Rozin, eds., 1997). A lack of either procedural or interactional justice also leads to increased anger. Laurie J. Barclay et al., Exploring the Role of Emotions in Injustice Perceptions and Retaliation, 90 J. APPLIED PSYCHOL. 429, 635–36, Tables 2 and 3 (2005). For discussion of procedural and interactional justice, see infra notes 44–62.
40 See, e.g., Lerner et al., supra note 36.
42 See, e.g., Bennett & Earwaker, supra note 15; Gold & Weiner, supra note 12; Ohbuchi et al., supra note 12; Robbennolt, Apologies and Legal Settlement, supra note 4; Takaku, supra note 15; Weiner et al., supra note 11.
negative attributions and punitive responses that are linked to those negative emotions.\textsuperscript{43}

\section*{Justice}

Similarly, apologies may shape perceptions of justice and fairness in ways that influence legal decision making. First, perceptions of \textit{procedural} justice relate to the processes, procedures, and rules by which a decision is reached.\textsuperscript{44} Research in organizational decision making has demonstrated that employee perceptions of the procedural fairness utilized by an organization in making decisions are strongly related to employee decisions about whether to sue the organization over these decisions.\textsuperscript{45}

Second, in addition to the procedures and policies utilized to resolve a dispute, the nature of the interpersonal treatment that parties experience during the course of an encounter influences their responses to the encounter.\textsuperscript{46} Individuals' attention to this less formal \textit{interpersonal} justice includes not only concern for the substantive content of their communication with others, but also concern for an "interpersonal sensitivity" that symbolizes

\textsuperscript{43} See generally \textsc{Bernard Weiner}, \textsc{Attribution Theory of Motivation and Emotion} (1986); Weiner, supra note 22.

\textsuperscript{44} See generally \textsc{E. Allan Lind & Tom R. Tyler}, \textsc{The Social Psychology of Procedural Justice} (1988).


respect and evidences dignity.\textsuperscript{47} In this vein, Dale Miller argues that people believe that they are entitled to be treated with interpersonal sensitivity and to be provided with accounts “for any actions that have personal consequences for them.”\textsuperscript{48} The lack of such sensitivity and accountability is experienced as disrespect.\textsuperscript{49} Miller concludes that “[d]isrespectful treatment . . . can both compound the injustice created by an undeserved outcome and constitute an injustice of its own.”\textsuperscript{50} Failure to apologize or otherwise to account to the injured party may contribute to such feelings of injustice, adding “insult to injury.” Conversely, to the extent that apology contributes to a feeling that one has been treated in a respectful and dignified manner, apologies can enhance perceptions of interational justice and decrease the experience of injustice.

A growing body of research in this area has demonstrated that the interpersonal treatment that parties experience influences their decision making in conflict situations. For example, in one experiment, Kwok Leung and his colleagues found that negotiators who treated each other fairly had smaller disparities in their notions of a fair outcome, reached impasse less frequently, and reached settlement more quickly than did negotiators who experienced unfair interpersonal treatment.\textsuperscript{51} In a study of the U.S. Postal Service’s mediation program for employment disputes, Tina Nabatchi and Lisa Bingham found that the ways in which disputants treated each other during mediation influenced their satisfaction with outcomes.\textsuperscript{52} Similarly, in a study of litigants, Allan Lind and his colleagues found that litigants’ perceptions of the dignity of their treatment were significantly related to outcome satisfaction.\textsuperscript{53}

\textsuperscript{47} Daniel P. Skarlicki et al., \textit{When Social Accounts Backfire: The Exacerbating Effects of a Polite Message or an Apology on Reactions to an Unfair Outcome}, 34 J. APPLIED SOC. PSYCHOL. 322 (2004).
\textsuperscript{49} Id. (describing disrespect as a violation of a “psychological contract”).
\textsuperscript{50} Id. See also Gerold Mikula, \textit{The Experience of Injustice: Toward a Better Understanding of Its Phenomenology}, in \textit{JUSTICE IN SOCIAL RELATIONS} 103 (H.W. Bierhoff et al., eds., 1986) (identifying “failure to admit an error” as an instance of injustice).
\textsuperscript{51} Kwok Leung et al., \textit{Effects of Interactional Justice on Egocentric Bias in Resource Allocation Decisions}, 89 J. APPLIED PSYCHOL. 405, 408–09 (2004). The opponents were trained in either “fair” (“display of openness and neutrality, willingness to provide explanations, showing understanding, willingness to listen, and appreciation for suggestions”) or “unfair” (“insistence on own point of view, frequent remarks that the other side was wrong, unwillingness to provide explanations, impatience in listening and frequent interruptions, and little appreciation of the other side’s position and suggestions”) tactics. \textit{Id.} at 407.
\textsuperscript{52} See Tina Nabatchi & Lisa B. Bingham, \textit{Expanding Our Models of Justice in Dispute Resolution: A Field Test of the Contribution of Interactional Justice}, SSRN (finding that an index comprised of questions about the interactions between the negotiators had a significant influence on outcome satisfaction).
\textsuperscript{53} E.A. Lind et al., \textit{In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System}, 59 L & SOC’Y REV. 953 (1998).
Consistent with these findings, research into the antecedents of claiming in the context of medical malpractice has found that interactional justice concerns are related to patients' decisions to pursue lawsuits. For example, Marlynn May and Daniel Stengel interviewed dissatisfied patients following adverse medical events. They found that dissatisfaction with the physician-patient interaction was related to whether the patient would seek the assistance of an attorney in response to the injury. Other studies have found, similarly, that communication problems between the patient and the physician are related to patients' decisions about whether to sue.

Social identity theory provides some insight into why procedural and interactional justice may be important to injured parties. According to social identity theory, individuals construct their social identity using information they acquire as they interact with others. According to the group-value model of procedural justice, the manner in which an injured party is treated by a wrongdoer contributes information to the injured party's social identity about the degree to which he or she is valued by others. Therefore, "treatment with dignity and respect are important because they tell people that they have status within the group." In contrast, treatment that does not signal dignity and respect conveys a message of a lack of status among the community. In the context of understanding the information conveyed by responses to injury, "it

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55 Id. at 116-17.
59 Tyler, supra note 58, at 80. In the context of procedural justice, Tyler argues that "[p]eople may value this favorable identity-relevant information more than they value receiving fair or favorable outcomes." Id.
would seem that a person can learn a considerable amount about his or her status by viewing the way that others react to acts that diminish that status. The offender’s reaction to an injured person, in particular, can convey respect for the victim and affirm his or her status. The very fact that the perpetrator thinks that the victim is due an explanation signals respect for the victim and tends to diminish the victim’s anger. . . . When the offender’s response goes beyond mere explanation and includes apology, this action is likely to diminish the victim’s anger even more. . . . [T]he expression of remorse takes the sting out of an offense because it affirms the status of the victim and acknowledges that he or she has been treated unjustly.

In this way, an apology may signal to the injured party that despite the injurious behavior, he or she is still a valued member of the community. The norms of the community are also at play with regard to another form of justice – retributive justice. Retributive impulses are triggered by the outrage that is experienced when an offender violates a community norm and causes harm. Importantly, “[r]etribution is concerned primarily with the elimination of a sense of injustice” that results from the offense. Punishment, then, attempts to reassert the value of the violated norm and to provide the offender with his or her just deserts. The psychology of retributive justice suggests that an apology can mitigate outrage over a harm and reduce the desire to punish the offender. As noted above, an apology acknowledges the wrongfulness of the norm violation and signals that the offender is less responsible, has suffered, and will not recidivate. Moreover, as noted above, an apology diminishes the anger felt about the offense. Consequently, observers tend to recommend less

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60 Miller, supra note 48, at 538.
61 Id. at 537.
64 See supra note 11.
65 See supra note 35.
66 See supra notes 23-8.
67 See supra notes 36-44.
harsh punishment against offenders who have apologized or shown remorse.\textsuperscript{68}

\textbf{Reciprocity and Social Norms}

It is also possible that apologies may influence legal decision making through norms of reciprocity. The reciprocity norm requires "that we should try to repay, in kind, what another person has provided us."\textsuperscript{69} In the context of negotiations, people tend to make concessions in response to a concession that is offered to them.\textsuperscript{70} When wrongdoers offer the "concession" of an apology, victims and observers may respond favorably because they feel an obligation to respond with a reciprocal "concession" of their own.

Some evidence of this reciprocal obligation to accept an apology comes from a series of studies conduct by Mark Bennett and Christopher Dewberry.\textsuperscript{71} Bennett and Dewberry first examined how participants evaluated victims' responses to apologies, finding that participants rated victims most favorably when they accepted a wrongdoer's apology and least favorably when they rejected the apology.\textsuperscript{72} Moreover, victims who rejected "unconvincing" apologies were not rated any more favorably than those who rejected more convincing apologies.\textsuperscript{73} In a second study, Bennett and Dewberry asked participants to indicate how they would respond to an apology by an offender in a scenario. They found that participants were likely to accept even an apology judged to be unconvincing.\textsuperscript{74} Thus, there may be an apology "script" that indicates that

\textsuperscript{68} See supra note 19. For research examining criminal punishment, see, e.g., Chris L. Kleinke et al., Evaluation of a Rapist as a Function of Expressed Intent and Remorse, 132 J. SOC. PSYCHOL. 525 (1992) (finding that recommended sentences for a convicted rapist were predicted by perceived remorse); Pipes & Alessi, supra note 26; Rumsey, supra note 35 (finding that participants gave a defendant a shorter sentence than they did a defendant who gave "no indication of remorse"). But cf. Christy Taylor & Chris L. Kleinke, Effects of Severity of Accident, History of Drunk Driving, Intent, and Remorse on judgments of a Drunk Driver, 22 J. APPLIED SOC. PSYCHOL. 1641 (1992) (finding that a defendant who expressed remorse was rated as being a person of greater responsibility and sensitivity than a defendant who did not express remorse, but not finding significant differences in sentences).


\textsuperscript{71} See Mark Bennett & Christopher Dewberry, "I've said I'm sorry, haven't I?" A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients, 13 Current Psychol. 10 (1994) (finding a tendency for participants to accept even an unconvincing apology).

\textsuperscript{72} Bennett & Dewberry, supra note 71, at 14.

\textsuperscript{73} Id. at 16.

\textsuperscript{74} Id. at 18–19.
social norms call for acceptance of apologies when they are offered by offenders.\textsuperscript{75}

\textit{Expectations about Success of Claim}

In contrast to the positive effects of apologies reported above, the conventional wisdom among legal actors has been that apologies will adversely affect legal decision making. In particular, to the extent that apologies provide additional information about the offender’s responsibility for having caused an injury, apologies may change assessments of the offender’s legal liabilities. For example, an apology that provides evidence that an offender engaged in a particular behavior that caused an injury may alter the judgments of legal decision makers. Jurors or judges may be more likely to find civil liability (e.g., negligence).\textsuperscript{76} Predicting this, litigants bargaining in the shadow of the law might conclude that the plaintiff has a greater likelihood of obtaining a favorable outcome if the case were to go to trial than they had estimated prior to the apology. If claimants assess their chances of winning at trial as being greater, they may be less inclined to settle their case or more willing to hold out for a larger settlement. Consistent with these expectations, in an experimental study of apologies and settlement decision making, I found that when a wrongdoer admitted responsibility for having caused harm, participants estimated the injured party’s chances of winning at trial to be greater than when the wrongdoer simply expressed sympathy, and they adjusted their expectations about bargaining accordingly.\textsuperscript{77} However, these effects were outweighed by the other effects of apologies, described above, that tend to improve the prospects for reaching an agreement.\textsuperscript{78}

\textsuperscript{75} See also \textsc{William Ian Miller}, \textit{Faking It} 92 (2003) (arguing that “the victim is as often forced by social pressure to forgive no less than the wrongdoer is forced to apologize. Or he forgives because it is embarrassing not to once the wrongdoer has given a colorable apology”). In equity theory terms, the apology itself may trigger a change in the equities in the relationship that calls for a response. See supra notes 29–31.

\textsuperscript{76} See infra notes 104–13 for discussion of this assumption.

\textsuperscript{77} Robbennolt, \textit{Apologies and Settlement Levers}, supra note 4, at 362, 367 (finding that responsibility-accepting apology increased estimates of likelihood of winning and that these predictions were associated with increased reservation prices, aspirations, and estimates of fair settlement value).

\textsuperscript{78} \textit{Id.} at 370 (concluding that “the intangible value of an apology to participants was sufficiently large as to outweigh the value of the apology for furthering the participants’ monetary self-interest”). See generally \textsc{Dale T. Miller} & \textsc{Rebecca K. Ratner}, \textit{The Disparity Between the Actual and Assumed Power of Self-Interest}, 74 \textsc{J. Personality & Soc. Psychol.} 53 (1998) (finding that individuals overestimate the effects of self-interest on attitudes and behavior).
Apologies and Legal Decision Making

In the context of conflicts that could result in civil litigation, apologies may be viewed in the shadow of possible legal liability. That shadow may affect the influence of apologies on decision making in ways that differ from such judgments in other contexts and may color decisions by defendants to offer apologies, decisions by plaintiffs about how to respond to an apology that may be offered, and decisions by jurors when a defendant has apologized.

Plaintiffs

The effects of apologies on the decisions of injured parties have been the primary focus of research on apologies in the context of civil litigation. To the extent that apologies change attributions about both the situation and the wrongdoer and compensate for less tangible damage through their effects on perceptions of equity and justice, apologies are likely to affect a range of decisions that plaintiffs (or potential plaintiffs) must make. A growing body of studies suggests that apologies do influence claimant decision making in a number of ways, including decisions to consult attorneys for advice, decisions about whether or not to file suit, judgments about negotiating positions, and ultimate decisions about settlement.

As a general matter, people claim to want apologies when they are injured. In the context of medical error, a number of studies have explored how patients predict they would like medical professionals to respond following an error. Thomas Gallagher and his colleagues conducted focus groups of patients to explore patients' views on how medical errors should be handled. Patients expressed a desire to receive apologies, assurance that the health care provider regretted the error, information about what happened, and assurance that such errors would be prevented in the future. Similarly, Amy Witman and her colleagues asked patients to consider hypothetical descriptions of medical errors that resulted in injury. Across injuries of varying degrees of severity, 98% of the patients “desired or expected the physician’s active

81 Id. at 1004.
acknowledgement of an error. This ranged from a simple acknowledgement of the error to various forms of apology.\textsuperscript{83} In another study of patients’ responses to hypothetical medical errors, Kathleen Mazor and her colleagues found that most patients (88\%) endorsed the notion that following a medical error they “would want the doctor to tell me that he or she was sincerely sorry.”\textsuperscript{84}

Additional research has explored the claiming process more specifically, examining the decisions injured parties make in response to their injury. This research suggests that apologies can influence people’s initial decisions to become claimants. In particular, a number of studies have explored the motivations of litigants (primarily litigants in medical malpractice cases) in filing suit. These studies provide evidence that apologies have a role to play in preventing lawsuits and settling disputes. In one study of individuals who had brought legal claims against a health care provider, Vincent and his colleagues found that nearly 40\% of claimants who thought that something could have been done to prevent litigation indicated that litigation would not have been necessary if the medical provider had offered an explanation and apologized.\textsuperscript{85} In a similar study of claimants in cases involving perinatal injuries, Gerald Hickson and his colleagues found that claimants’ motives for filing suit included a variety of non-monetary goals related to explanations and apologies including the need to discover what had happened, the perception that the healthcare provider was not straightforward in providing information about what had happened, and a desire to deter or punish the provider in order to, in part, prevent similar injuries in the future.\textsuperscript{86} Similarly, interviews with libel plaintiffs indicate that many of them attempted to first resolve their conflict with the media source and most of them ask for “retraction, correction, or apology.”\textsuperscript{87}

While it is possible that these predictions will not precisely match people’s litigation behavior, experimental research has found that apologies influence litigation decision-making in ways that are consistent with these self-reported desires for apologies. First, in a series of studies, Kathleen Mazor and her colleagues have found that how physicians handle the aftermath of a medical injury influences patients’ decisions about whether to seek out legal advice.\textsuperscript{88} Members of a health-care plan took the perspective of a patient who had been injured by a medical error. Patients assessing medication errors that resulted in minor injuries were less likely to report that they would seek legal advice following the injury when the physician had provided “full disclosure”

\textsuperscript{83} Id.
\textsuperscript{84} Kathleen M. Mazor et al., \textit{Health Plan Members’ Views about Disclosure of Medical Errors}, 140 ANNALS OF INTERNAL MED. 409, 415 (2004).
\textsuperscript{86} Hickson et al., supra note 56.
\textsuperscript{88} Mazor et al., supra note 84.
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(i.e., provided information about the error, took responsibility, and outlined how similar errors would be prevented going forward) than when the physician failed to disclose the error and did not take responsibility. Thus, people say that they want apologies and indicate that apologies influence their decisions about whether to become claimants.

Second, there is evidence that apologies can alter claimant perceptions and attributions about the injury, the wrongdoer, and the events that led to the injury. For example, experimental studies have found that apologies influence the degree to which claimants believe that the wrongdoer feels remorse, is of good moral character, and will act carefully in the future. Similarly, apologies influence claimants’ evaluations of the egregiousness of the conduct and the damage to the relationship, and the degree to which they feel anger at and sympathy toward the other party. All of these emotions and perceptions are likely to have an influence on bargaining behavior.

Third, there is evidence that apologies can influence the settlement posture of claimants as they approach settlement negotiations. A recent study examined the effects of apologies on settlement levers—claimants’ reservation prices (or bottom-line), aspirations, and judgments of fair settlement value. At least when offender fault was relatively clear, apologies offered by wrongdoers lowered the values of claimants’ settlement levers. There are at least two reasons why settlement is more likely or may occur more quickly when claimants’ settlement levers are lower. First, a lower reservation price increases the chance that a bargaining range will exist and increases the size of any existing bargaining range. Second, claimants are likely to have more favorable subjective assessments of settlement offers when comparing them to lower reservation prices, aspirations, or estimates of fair settlement value.

Finally, there is evidence that apologies can influence claimants’ willingness to accept a settlement offer from the wrongdoer. In one experimental study, Russell Korobkin and Chris Guthrie examined the effects of an apology on litigants’ settlement decisions in a landlord-tenant dispute. Participants assumed the

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89 Id. at 413. Respondents in the full disclosure conditions were also less likely to indicate that they would change physicians, were more satisfied, reported more trust in the physician, and reported fewer negative emotions than did those in the nondisclosure conditions. Id. at 414. See also Kathleen M. Mazor et al., Disclosure of Medical Errors: What Factors Influence How Patients Respond? 21 J. GEN. INTERNAL MED. 704 (2006) (reporting similar findings).

90 Robbenolt, Apologies and Legal Settlement, supra note 4; Robbenolt, Apologies and Settlement Levers, supra note 4.

91 Id.


93 Robbenolt, Apologies and Settlement Levers, supra note 4.

94 Id.

role of the tenant and evaluated an offer of settlement from the landlord.96 Participants who were told that the landlord had "apologized" to them, saying "I know this is not an acceptable excuse . . . but I have been under a great deal of pressure lately," were marginally more likely to accept the landlord's offer than were participants who had not received this "apology."97 Similarly, apologies have been found to influence willingness to accept a settlement offer in other types of cases as well.98 In particular, comparisons of the effects of no apology, sympathy expressions, and full, responsibility-accepting apologies on settlement acceptance have found that full, responsibility-accepting apologies altered respondents' assessments of how well the offer "made-up-for" the injury and increased their tendency to accept the offer.99

Thus, there is growing evidence that apologies can play a role in facilitating the settlement of legal disputes. Apologies appear to be able to influence a variety of perceptions and attributions relevant to settlement decision making, alter settlement levers in ways that make settlement more likely, and make claimants more willing to accept particular offers of settlement. Some possible boundary conditions on these effects will be described below.100

Jurors

While they have been the primary focus of recent empirical research, plaintiffs are not the only legal actors whose decisions are impacted by apologies offered in the legal context. Impartial observers such as jurors or other legal fact finders may also be influenced by the offer of an apology by an offender. Just like the direct participants in the injurious relationship, observers are motivated to restore equity to an imbalanced relationship. Moreover, the rule violation that led to the injury may be seen as a violation against the community that

96 Id.
97 Id. at 148.
98 Robbennolt, Apologies and Legal Settlement, supra note 4.
99 Id. at 487. The effects of an apology that simply expressed sympathy and did not accept responsibility did not have these effects. Id. However, the effects of such apologies appear to be more variable and context dependent. Id.; Robbennolt, Apologies and Settlement Levers, supra note 4. For examples of instances in which apologies were important to settlement discussions, see Piper Fogg, Minnesota System Agrees to Pay $500,000 to Settle Pay-Bias Dispute, Chron. HIGHER EDUC., Feb. 14, 2003, at A12 (describing class-action plaintiff's disappointed reaction to the settlement: "I want an apology," she said, "and I am never going to get it") (internal quotes omitted); Editorial, The Paula Jones Settlement, WASH. POST, Nov. 15, 1998, at C6; Nathalie Des Rosiers et al., Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System, 4 PSYCHOL. PUB. POL'Y & L. 433, 442 (1998); Bruce W. Neckers, The Art of the Apology, MICH. B.J., June 2002, at 10, 11; Carl D. Schneider, What It Means To Be Sorry: The Power of Apology in Mediation, 17 MEDIATION Q. 265, 274 (2000) (describing negotiations stalling "over the plaintiff's demand for an apology, even after the sides had agreed on the damages to be paid") (emphasis omitted).
100 See infra § IV.
has established the rule. As legal decision makers who represent that community, jurors may attempt to express their valuing of the victim of the wrongdoing, to establish their support for the violated rule, or to exact expressive defeat of the wrongdoer through their verdicts.101

Most studies of jurors' reactions to apologies have been conducted in the criminal context. Experimental studies of responses to criminal defendants who apologize have generally shown that remorseful defendants are perceived more positively,102 thought to have acted less intentionally,103 thought to be less likely to re-offend,104 and sentenced less harshly105 than are defendants who do not show remorse. Interviews with jurors in capital cases also suggest that jurors' perceptions of defendants' remorse influence their decisions about whether to sentence defendants to death or to life in prison.106 The limited evidence with respect to criminal guilt determinations is more mixed.107

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101 See Jennifer K. Robbennolt et al., Symbolism and Incommensurability in Civil Sanctioning: Decision-Makers as Goal Managers, 68 Brook. L. Rev. 112 (2003). See also Bies, Predicament of Injustice, supra note 46, at 294 ("a violation of justice norms represents an attack on the social group that endorses and supports those moral guidelines. As an expression of moral outrage, the group may impose sanctions and punishments on the harmdoer for violation of the justice norms or rules").

102 See, e.g., Kleineke et al., supra note 68 (finding that a convicted rapist was judged to be of less negative character if he demonstrated remorse than if he did not); Taylor & Kleineke, supra note 68 (finding that a defendant who expressed remorse was rated as being a person of greater responsibility and sensitivity than a defendant who did not express remorse).

103 See, e.g., Kleineke et al., supra note 68 (finding that a convicted rapist was judged to have acted with less intent if he demonstrated remorse than if he did not).

104 See, e.g., Kleineke et al., supra note 68 (finding that a convicted rapist was judged to have more potential for rehabilitation if he demonstrated remorse than if he did not); Pipes & Alessi, supra note 26.


107 In one study, Christian Meissner and his colleagues found that mock juries were less likely to find a defendant charged with first-degree murder (euthanasia) guilty when he was highly remorseful than when he was not. Christian A. Meissner et al., Jury Nullification: The Influence of Judicial Instruction on the Relationship Between Attitudes and Juridic Decision
In the context of civil litigation, there is evidence that, as a general matter, civil defendants who express remorse are perceived more favorably by mock jurors than are defendants who do not express remorse. Civil jurors, however, have a variety of decisions to make—liability, compensatory damages, and, occasionally, punitive damages—and apologies may influence each of these decisions differently.

Liability

The primary concern potential civil defendants have about offering an apology is that the apology may be interpreted as evidence tending to prove liability. Indeed, in the criminal context, confession evidence has been shown to be quite powerful. Statutes providing evidentiary protection for some apologies have been implemented in response to these concerns. However, it is not clear whether, under what circumstances, or to what degree an apology might alter the risk of an adverse liability determination.

Given the concern over and the attention paid to the risks posed by apologies in this context, there is a striking lack of empirical research examining the ways in which apologies influence juror liability determinations. This is particularly true given that studies examining attributions of responsibility in nonlegal contexts have found that offenders who apologize are seen as having acted less intentionally and are blamed less. Similarly, Weiner and his colleagues found that offering an apology and accepting responsibility reduced

Making, 25 BASIC & APPLIED SOC. PSYCHOL. 243, 251 (2003). See also Kristin A. Seidner & Wendy P. Heath, Effects of Defendant Remorse Level and Type of Excuse Defense on Mock Jurors' Decision Making, paper presented at 2002 AP-LS meeting (finding that mock jurors rated a remorseful defendant as less guilty than a non-remorseful defendant). In contrast, Keith Niedermeier and colleagues found that some remorseful defendants were found to be more guilty when they expressed remorse. Keith E. Niedermeier et al., Exceptions to the Rule: The Effects of Remorse, Status, and Gender on Decision Making, 31 J. APP. SOC. PSYCHOL. 604 (2001). They found that high status, male defendants were rated as more guilty when the expressed remorse than when they did not; this pattern was not true for female defendants or low status defendants. Id. They posit that this effect might have resulted because remorse was "counternormative" or less expected from the male, high status defendant. Id.

108 See Bornstein, supra note 35. In his first study, Bornstein found that remorse had a significant positive effect on jurors' overall perceptions of the defendant. Id. at 400. In a second study, Bornstein found that physicians who expressed remorse were perceived as having suffered more than defendants who did not express remorse. Id. at 404.

109 See generally Cohen, Advising Clients to Apologize, supra note 4; Robbennolt, Apologies and Legal Settlement, supra note 4. See also Gallagher et al., supra note 80, at 1003.


111 See supra notes 5-9.

112 See Darby & Schlenker, Children's Reactions to Apologies, supra note 11, at 746, 749; Darby & Schlenker, Children's Reactions to Transgressions, supra note 11, at 358–59;
attributions of responsibility to internal causes and increased attributions to external causes. This was true in particular when the cause or causes of the incident were less clear. Clearly, there is much additional work to be done to explore the dynamics of how wrongdoer apologies may influence juror liability determinations in civil cases.

Compensatory Damages

In contrast to the adverse effect predicted with regard to liability determinations, it is often suggested that a civil defendant who has apologized will be advantaged when the jury turns its attention to the awarding of damages. In fact, many state statutes specifically provide that apologies are one factor to consider in mitigation of damages in defamation cases. In the context of apologies following medical error, Dr. Lucian Leape has argued that

The long, painful, shameful spectacle of the plaintiff lawyer trying to prove in public that the physician is negligent, a bad person, will not take place. The court's role will be limited to establishing just compensation. What is a jury likely to do with a physician who has been honest and also apologized? Judgments will most likely be far less costly.

Some, however, worry that apologizing, "which implies knowledge of wrongdoing, will exacerbate damage awards by showing a level of intent beyond mere negligence."

It is likely that the effects of apologizing on damage-award decision making will be complex. Brian Bornstein conducted a set of experimental studies to examine the effects of an expression of "remorse" (but not fault) on damage-award decision making - comparing the damages awarded against a physician-offender who was either explicitly remorseless, expressed remorse at the time of the trial, expressed remorse both at the time of the incident and at the time of trial, or did nothing to indicate either remorse or a lack thereof. In one study,

Obhuchi & Sato, supra note 11, at 11; Scher & Darley, supra note 11, at 134–36. See also Seidner & Heath, supra note 107.

Weiner et al., supra note 11, at 291 ("This is in accord with a conceptualization linking confession to perceived lack of responsibility (in spite of an admission of responsibility).”).

Id. at 295.

See, e.g., Cohen, Advising Clients to Apologize, supra note 4; Gerald R. Williams, Negotiation as a Healing Process, 1996 J. Disp. Resol. 1, 52–3 n. 147.


Levi, supra note 4, at 1187.

Bornstein et al., supra note 35.
male (but not female) participants awarded marginally more in damages against the explicitly remorseless physician and against the physician who expressed remorse both at the time of the incident and at the time of trial than against the other two physicians.\textsuperscript{120} In a second study, participants awarded more in compensatory damages against the physician who displayed remorse both at the time of the incident and at the time of trial than against the others.\textsuperscript{121} These results suggest that there may be some risk attendant to an early expression of remorse or sympathy; it is unclear whether this is related to the timing of the expression or because the expression was unaccompanied by acceptance of responsibility or some offer of compensation.\textsuperscript{122}

The importance of the presence or absence of acceptance of responsibility in this context is also suggested by a study in which Michael O’Malley and Jerald Greenberg examined people’s reactions to a car accident that resulted in damage.\textsuperscript{123} In one study, they found that female (but not male) participants indicated that lower amounts of compensation were appropriate when the wrongdoer had admitted responsibility than when the wrongdoer had not admitted responsibility.\textsuperscript{124} In another study, they found that female (but not male) participants indicated that lower fines were appropriate when a negligent driver was “moderately remorseful,” but not when the driver was “very remorseful.”\textsuperscript{125} They suggest that the participants “may have perceived the excessively apologetic overtures of a negligent driver to be manipulative gestures designed to reduce his or her penalty rather than as spontaneous shows of remorse.”\textsuperscript{126}

\textbf{Punitive Damages}

It is perhaps most likely that apologies will have a favorable influence on the awarding of punitive damages, damages intended to punish a civil defendant and to deter misconduct. Indeed, courts have explicitly taken defendants’

\begin{itemize}
\item \textsuperscript{120} Id. at 399–400.
\item \textsuperscript{121} Id. at 403.
\item \textsuperscript{122} It is worth thinking about these results in the context of findings about how apologies are interpreted in the absence of offers of repair. Perhaps jurors doubt the sincerity of the defendant who apologizes early, but fails to accomplish a fair settlement of the case. Jurors might have questioned why the defendant did not “put his money where his mouth is.” See infra notes 147–54 (for discussion of the importance of accepting responsibility), notes 159–74 (for discussion of the importance of offers of compensation), and notes 212–21 (for discussion of the importance of sincerity).
\item \textsuperscript{123} O’Malley & Greenberg, supra note 35.
\item \textsuperscript{124} Id. at 177. See infra notes 146–53 (for discussion of the importance of taking responsibility).
\item \textsuperscript{125} Id. at 182.
\item \textsuperscript{126} Id. See infra notes 208–17 (for discussion of the importance of sincerity).
\end{itemize}
remorse into account in awarding punitive damages. However, to my knowledge there are no empirical studies that specifically examine the effects of apologies on jurors’ decision making about punitive damages. As a general matter, O’Malley and Greenberg found that participants were “more motivated to deter and punish” wrongdoers who did not apologize as compared to wrongdoers who offered apologies. In addition, this task of civil jurors is the most closely analogous to criminal sentencing. As noted above, a number of studies have shown that criminal defendants who apologize or express remorse are sentenced more leniently than are unremorseful defendants. To the extent that we can generalize from these studies in the criminal context, apologies would be expected to reduce jurors’ punitive damage awards.

**Defendants**

While much of the attention surrounding apologies in litigation has focused on the effects of apologies on plaintiffs, several authors have articulated the potential costs and benefits of apologies to civil defendants. Apologizing may benefit wrongdoers by helping to relieve guilt and other negative emotions, repair their relationships, improve their reputations, inhibit aggressive responses—such as litigation—on the part of injured parties, and minimize the costs of litigation (i.e., improve settlement opportunities, decrease costs, decrease exposure). On the other hand, apologizing may also present risks to the wrongdoer, including the experience of emotions such as humiliation and shame, increased exposure to liability, and loss of insurance coverage.

There is evidence that civil defendants, such as physicians in medical malpractice cases, desire to offer apologies. For example, in focus groups with physicians to discuss the handling of medical errors, physicians reported a desire to apologize but also reported concern that disclosure would increase

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127 See, e.g., *Johnson v. Smith*, 890 F. Supp. 726, 727 n. 6 (1995) (finding that the defendant’s “testimony (and the nature of his immediately-post-offense behavior, including his prompt apology after he had sobered up) disclosed him to be less culpable in the offense and suggested that it was really an aberration on his part (totally out of character with his responsible conduct since then). Although punitive damages are in order against him, the much more moderate awards reflected in this opinion have taken those mitigating factors into account.”). See also *Patane v. Broadmoor Hotel, Inc.*, 708 P.2d 473 (Colo. App., 1985) (finding that defendant’s “failure to apologize . . . is relevant to the issue of exemplary damages).


129 See *supra* note 105.


the possibility for legal liability.132 Thus, defendants or potential defendants who contemplate apologies must anticipate how an apology might influence a variety of decisions to be made by plaintiffs, judges, and jurors—including decisions about settlement, liability determinations, and decisions about appropriate damage awards—as well as weighing the less strategic aspects of apologizing. Despite defendants' central role in the apology conversation, there has been even less research on how civil defendants make these decisions than on civil plaintiffs or jurors.

Not surprisingly, therefore, many unanswered questions remain. We know very little about the circumstances under which defendants choose to offer apologies and what those apologies look like. In a recent study examining how physicians say they would respond to medical errors, Gallagher and his colleagues asked physicians to consider a particular medical error and to indicate whether they would disclose the error and apologize.133 Across several different error scenarios, they found that 6% of their physician respondents indicated that they would not offer any apology, 61% indicated that they would only express sympathy, and 33% claimed that they would give an explicit apology acknowledging the error.134 Thus, the researchers found evidence that physicians varied in their inclinations to apologize following a medical error. Additional studies exploring these tendencies in other populations, extending this research to actual defendant behavior, and examining the factors underlying these tendencies would be extremely useful.

In addition, we know very little about the factors that inhibit defendants from apologizing. As noted above, many potential defendants cite fear of litigation or liability as preventing them from apologizing.135 Steve Landsman explores “juryphobia” as a source of these fears,136 and Jonathan Cohen catalogues a host of reasons—including pride, denial, concern that the time for apology has passed, and loss aversion—why defendants and defense counsel may fail to consider apologies.137 Recent research examining physicians' concerns about disclosing medical errors found that a variety of “factors beyond the malpractice environment influence physicians' willingness to disclose serious errors”—including attitudes about litigation, attitudes about patient safety, the culture of medicine, and the difficulty of apologizing.138 Research

132 Gallagher et al., supra note 80, at 1003, 1004 and table 2.
133 Thomas H. Gallagher et al., Choosing Your Words Carefully: How Physicians Would Disclose Harmful Medical Errors to Patients, 166 ARCHIVES INTERNAL MED. 1585 (2006).
134 Id. at 1590, table 6.
135 See Gallagher et al., supra note 80; Rae M. Lamb et al., Hospital Disclosure Practices: Results of a National Study, 22 HEALTH AFF. 73 (2003).
136 See chapter by Stephan Landsman, this volume.
137 Cohen, Advising Clients to Apologize, supra note 4, at 1023–24, 1042–46.
138 Thomas H. Gallagher et al., U.S. and Canadian Physicians' Attitudes and Experiences Regarding Disclosing Errors to Patients, 166 ARCHIVES INTERNAL MED. 1603 (2006). See also Lauris C. Kaldjian et al., An Empirically Derived Taxonomy of Factors Affecting Physicians'
on how these various possibilities play out in the decision-making processes of
defendants and their counsel would provide welcome insight into how apologies
operate in litigation contexts.

Similarly, we know very little about how the evidentiary rules passed in
recent years affect defendant decision making about whether to offer an
apology and how such an apology is worded. Proponents often argue that
providing evidentiary protection will allow defendants to apologize safely,
concluding that more apologies will be offered as a consequence. But, as
Nancy Berlinger has noted, "merely protecting apologies is not the same as
encouraging them. Genuine apologies are never fun to make."

It remains to be seen how evidentiary protection for apologies will play out as one factor in
the complex and emotional decisions defendants make about apologizing.

Moderators – Context Matters

While it is clear that apologies have the potential to increase the possibilities for
settlement of a dispute, it is also clear that there are a number of variables that
may moderate the effects of apologies. The nature and timing of the apology
itself, the circumstances and conduct that led to the injury, the resulting harm,
and other factors may all play a role in how an apology is understood and how it
affects decision making. Many of these factors have particular import in the
context of civil litigation.

Components of Apology

At a minimum, apologies are thought to include “acknowledgement of the legiti-
macy of the violated rule, admission of fault and responsibility for its violation,
and the expression of genuine regret and remorse for the harm done.”

Certainly, not all statements that might commonly be termed “apologies” include all or only
these elements. For example, as noted, many “apology” statutes focus on protecting
statements expressing sympathy and not statements that accept responsibility.

Conversely, some apologies may go beyond these minimum requirements to
include assurance that the offender will forbear from similar conduct in the future
or an offer to repair the harm caused by compensating the injured party.

139 NANCY BERLINGER, AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS 62
(2005).

140 See supra note 1.

141 See supra note 7.

142 See, e.g., GOFFMAN, supra note 20, at 113.
Steven Scher and John Darley examined the effects of including several different components of an apology. In addition to an expression of remorse, they examined the effects of admitting responsibility, promising future forbearance, and making an offer of repair. Scher and Darley found that while offering some apology rather than none had the greatest impact, each of the additional components independently contributed to the effectiveness of the apology. Similarly, Bruce Darby and Barry Schlenker found that children judged wrongdoers who offered more elaborate apologies more favorably, as better persons whom they liked more, blamed less, were more willing to forgive, and thought should be punished less.

Responsibility

In particular, whether an apology consists simply of an expression of sympathy or also comprises an acknowledgment of responsibility for having caused harm may influence its effects. Consistent with this intuition, courts have sometimes made a distinction between these two types of statements.

The empirical research also finds a distinction in the reactions to full, responsibility-accepting apologies and sympathy expressions. In a series of studies that I conducted, apologies that admitted responsibility for having caused the harm were judged more favorably than were mere expressions of sympathy. Wrongdoers who offered apologies that accepted responsibility were viewed as having experienced greater regret, as being of higher moral character, as more likely to engage in careful conduct in the future, and as having behaved less badly. Respondents also reported feeling greater sympathy and less anger toward wrongdoers who took responsibility for having caused the injuries. Apologies that were merely expressions of sympathy had

143 Scher & Darley, supra note 11, at 132.
144 Id. at 133. The effectiveness of the apology was measured by adults' judgments about the appropriateness of the wrongdoer's response, how bad he felt, the degree to which he was to blame and would be condemned, and how reliable and conscientious he was. Id. See also Darby & Schlenker, Children's Reactions to Apologies, supra note 11 (finding more positive reaction to more elaborate apologies than to more perfunctory apologies).
145 Darby & Schlenker, Children's Reactions to Apologies, supra note 11. The authors compared reactions to no apology, a perfunctory "excuse me," an expression of remorse, and an apology with an offer of repair. Id. at 744.
146 See, e.g., Denton v. Park Hotel, 180 N.E.2d 70 (Mass. 1962) (finding that the statement that the defendant was "sorry" the accident happened . . . was no more than an expression of sympathy by the defendant's manager . . . and had no probative value as an admission of responsibility or liability.
147 Robbenolt, Apologies and Legal Settlement, supra note 4; Robbenolt, Apologies and Settlement Levers, supra note 4.
148 Id. See also O'Malley & Greenberg, supra note 35, at 177 (wrongdoer who admitted responsibility perceived more positively).
149 Id.
effects that were much more variable. Depending on the circumstances, these sympathy expressions had positive effects that were similar to (but smaller than) the effects of full apologies, did not produce different reactions than failure to apologize, or had negative effects on perceptions.

Manfred Schmitt and his colleagues also examined several different apology components, including whether the apology included the admission of responsibility. They found that the more respondents believed that the wrongdoer had admitted fault, the more favorably they evaluated the wrongdoer’s character. Similarly, the more respondents believed that the offender had acknowledged the harm, the more favorably they evaluated the wrongdoer’s character and the less negatively they responded to the wrong. Admitting responsibility also influenced the ways in which the respondents interpreted other aspects of the apology—when the wrongdoer accepted responsibility for having caused the harm, respondents were more likely to believe that the wrongdoer had expressed remorse, acknowledged the harm, asked for pardon, or offered compensation.

Forbearance

Whether or not the wrongdoer promises to refrain from engaging in similar behavior in the future may also influence the effectiveness of an apologetic expression. Many definitions of a complete apology include a commitment to improved behavior in the future. Indeed, many claimants assert that one of the goals of pursuing litigation is to effectuate a change in the wrongdoer’s future behavior.

As noted above, Scher and Darley found that including an explicit promise to refrain from committing future offenses improves the perceived sufficiency of an apology. But it seems that such a commitment may also be implicit in a

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150 Robbenol, Apologies and Legal Settlement, supra note 4; Robbenol, Apologies and Settlement Levers, supra note 4.
152 Id. at 478–80.
153 Id. at 477.
154 See, e.g., Goffman, supra note 20, at 113 (“espousal of the right way and an avowal henceforth to pursue that course”); Orenstein, supra note 4, at 239 (“give appropriate assurance that the act will not happen again”); Hiroshi Wagatsuma & Arthur Rosett, The Implications of Apology: Law and Culture in Japan and the United States, 20 Law & Soc’y Rev. 461, 469–70 (1986) (that “the act will not happen again”).
155 See Gallacher et al., supra note 80; Hickson et al., supra note 56; Vincent et al., supra note 85; Witman et al., supra note 82. See also Mazor et al., supra note 84 (finding that 99% of respondents would want to know that something was being done to make sure the error did not happen again).
156 Scher & Darley, supra note 11.
sincerely offered apology, even in the absence of an explicit promise. Recall that a number of studies have found that a wrongdoer who apologizes is viewed as being less likely to reoffend.\textsuperscript{157}

Compensation

It is also likely that whether the apology is accompanied by an offer of compensation or restitution will have an influence on how the apology is received. As with assurances of forbearance, many observers define complete apologies as including offers of repair.\textsuperscript{158} The notion that offering to compensate the injured for the harm suffered is central to apology has been articulated by Bishop Desmond Tutu with this example: "If you take my pen and say you are sorry, but don't give me the pen back, nothing has happened."\textsuperscript{159} Nancy Berlinger adapts this notion to the context of medical error: "If a physician apologizes to an injured patient, if a physician genuinely feels remorse for having injured the patient, if a physician acknowledges that the mistake was her fault, but there are no provisions for fairly compensating the patient for the cost of medical care and lost wages resulting from the injury and no provisions for helping this physician to avoid injuring other patients, nothing has happened."\textsuperscript{160}

Empirical research supports the importance of offers of repair to the effectiveness of apologies. As noted above, Scher and Darley found that the effectiveness of an apology was improved when the apology included an offer of repair.\textsuperscript{161} Similarly, Schmitt and his colleagues found that when respondents believed that the wrongdoer had offered compensation, they experienced less negative emotion, made more favorable assessments of the wrongdoer's

\textsuperscript{157} See supra notes 23–27.

\textsuperscript{158} Goffman, supra note 20, at 113 (apology in "its fullest form" includes "the volunteering of restitution"); Orenstein, supra note 4, at 239 ("At their fullest, apologies should . . . compensate the injured party"); Wagatsuma & Rosett, supra note 154, at 469–70 ("the apologizer will compensate the injured party").

\textsuperscript{159} Cited in Berlinger, supra note 139, at 61–62.

\textsuperscript{160} Id. Berlinger concludes that in the context of medical error, "apology after medical harm is rarely, if ever, the only right thing to do: If physicians and hospitals want to say they're sorry, they must also find ways to give the pen back." Id. at 62.

\textsuperscript{161} Scher & Darley, supra note 11, at 133. See also Darby & Schlenker, Children's Reactions to Apologies, supra note 11 (finding more positive reaction to more elaborate apologies than to more perfunctory apologies).
character, and were more likely to believe that the wrongdoer had admitted responsibility and harm, expressed remorse, and asked for pardon.\textsuperscript{162}

Several recent studies provide additional evidence of the importance of restitution to the assessment of apologies. In one study, Jeanne Zechmeister and her colleagues manipulated both the presence or absence of an apology from the offender and whether or not the harm was removed.\textsuperscript{163} They found that even when an apology was offered, failure also to remove the offense resulted in less conciliatory behavior and less forgiveness.\textsuperscript{164} The researchers linked these negative impacts to a perceived lack of sincerity on the part of the offender: “These findings may indicate the effect of a ‘false’ or insincere apology, in which the experimenter apologized but did nothing to ameliorate the consequences of the offense.”\textsuperscript{165} In a similar study, William Bottom and his colleagues explored the effects of apologies and offers of compensation (“penance”) on cooperation in a repeated play prisoners’ dilemma game.\textsuperscript{166} They found that while apologies improved cooperation, apologies accompanied by offers to sacrifice to allow greater payoff for the partner improved cooperation to a greater degree.\textsuperscript{167}

Using a slightly different approach, Daniel Skarlicki and his colleagues conducted an experiment using the ultimatum game\textsuperscript{168} to explore the effects of apologies.\textsuperscript{169} Participants received an unfair proposal from their negotiation partner that was accompanied by either an apology, a polite message, or no message.\textsuperscript{170} Unfair offers that were accompanied by these ex ante apologies and polite messages were perceived to be less fair and more manipulative, the offers were rejected more often, and the offerers were punished

\textsuperscript{162} Schmitt et al., \textit{supra} note 151, at 477–80. Schmitt and his colleagues conclude that “negative emotion is most likely when the victim feels that a harm-doer wants to be forgiven without naming the damage that he or she has caused and without offering compensation for it.” \textit{Id.} at 483. See also \textit{Martha Minow, Between Vengeance and Forgiveness}, 117 (1998) (concluding that “[i]f unaccompanied by direct and immediate action, such as monetary reparations, official apologies risk seeming meaningless”).


\textsuperscript{164} \textit{Id.} at 548, 551.

\textsuperscript{165} \textit{Id.} at 548. See infra notes 211–20 (for discussion of importance of sincerity).

\textsuperscript{166} William P. Bottom et al., \textit{When Talk is Not Cheap: Substantive Penance and Expressions of Intent in Rebuilding Cooperation}, 13 ORG. SCI. 497 (2002).

\textsuperscript{167} \textit{Id.} at 506–07.

\textsuperscript{168} In the ultimatum game, one player is provided with a sum of money to divide between herself and a second player. The first player is to propose a division of the money that the second player is to accept or decline. If the proposed division is accepted, the players receive the amounts indicated in the proposal. On the other hand, if the proposed division is rejected, neither player receives anything. See Alvin E. Roth, \textit{Bargaining Experiments}, in \textit{The Handbook of Experimental Economics} 253, 282–302 (John H. Kagel & Alvin E. Roth, eds., 1995); Richard H. Thaler, \textit{The Winner’s Curse: Paradoxes and Anomalies of Economic Life} 21–35 (1992).

\textsuperscript{169} Skarlicki et al., \textit{supra} note 47, at 336.

\textsuperscript{170} \textit{Id.}
more than those offers that were made with no comment.\textsuperscript{171} The authors posit that these negative effects may have resulted from "inconsistencies between outcomes (what is offered) and processes (interpersonal treatment)."\textsuperscript{172} In other words, the apology didn't ring true given the unfair substantive outcome with which it was paired.\textsuperscript{173}

**Severity of Injury**

In addition to the components of the apology itself, features of the injury situation may also influence the impact of an apology.\textsuperscript{174} For instance, several studies suggest that the degree of harm suffered by the victim influences the degree to which a given apology is accepted or effective. Ken-ichi Ohbuchi and his colleagues found that the impact of the same apology differed depending on the severity of the harm suffered. While participants formed a better impression of and expected less verbal aggression to be directed toward an offender who apologized than one who did not, these effects were smaller when the injury was more severe.\textsuperscript{175} Similarly, Mark Bennett and Deborah Earwaker found that participants were more likely to reject an apology that was offered following severe property damage than they were to reject the same apology following less severe damage.\textsuperscript{176} In addition, the apology was more successful in reducing participants' anger when the injury was minor than it was when the injury was more severe.\textsuperscript{177}

In a series of studies of apologies and legal settlement, I found that apologies that express sympathy, but not responsibility, are particularly affected by the severity of the injury at issue. Specifically, an expression of sympathy was viewed as more sufficient than no apology when the injury to the victim was relatively minor than when the injury was more severe.\textsuperscript{178} In addition, when a wrongdoer merely expressed sympathy, but not responsibility, for an incident that resulted in a severe injury, the wrongdoer was viewed as more responsible

\textsuperscript{171} Id. at 336

\textsuperscript{172} Id. "For those who would try to con someone with honey-sweet words to offset potential harm, the message is clear: Sweet talking while providing unfavorable outcomes might not only fail to achieve perceived fairness, but also motivate more unfairness and hostility than if such a sugar-coating attempt had been absent." Id. at 338.

\textsuperscript{173} The timing of the apologies (i.e., at the time of the offer) is also relevant. See infra § IV D.


\textsuperscript{175} Ohbuchi et al., *supra* note 12.

\textsuperscript{176} Bennett & Earwaker, *supra* note 15.

\textsuperscript{177} Id.

\textsuperscript{178} Robbennolt, *Apologies and Legal Settlement*, *supra* note 4, at 498–99.
for having caused the harm\textsuperscript{179} and a monetary offer from the wrongdoer was seen as less likely to make up for the injury.\textsuperscript{180} Perhaps intuited these types of effects, wrongdoers may adjust their apologies in light of the severity of the injury caused. Schlenker and Darby have found that offenders tend to offer more complex and elaborate apologies—apologies that include more components—following more severe injuries to the victim than when the victim’s injuries are relatively minor.\textsuperscript{181}

**Evidence of Responsibility**

The impact of an apology on decision making may vary depending on the degree to which it is already apparent from other evidence that the apologizer has caused the harm. Where it is clear that an actor is responsible for causing harm, an apology that accepts responsibility may be particularly necessary and may pose relatively little additional risk. As Cohen notes: “[w]here one’s culpability can readily be proved by independent evidence other than an apology, admitting one’s fault when making an apology will also have little impact on the plaintiff’s ability to prove his case, for he already can.”\textsuperscript{182} But failing to accept responsibility in similar circumstances “can be worse than saying nothing at all. It’s insulting to merely express sympathy or benevolence when you should be admitting your fault.”\textsuperscript{183} On the other hand, where culpability is not clear, an apology that takes responsibility may remove any ambiguity and change interpretations of the incident in the direction of more blame directed at the apologizer. When circumstances are such that it is not clear what has happened, an expression of sympathy, without acceptance of fault, may be more acceptable.\textsuperscript{184}

Peter Kim and his colleagues compared the effects of apologies under circumstances in which either evidence of wrongdoing or evidence of innocence later became available.\textsuperscript{185} They found that when evidence of wrongdoing became available, the accused who had apologized was evaluated more favorably than

\textsuperscript{179} Id. (compared to either a wrongdoer who offered no apology or a wrongdoer who offered a responsibility-accepting apology).

\textsuperscript{180} Id. (compared to offers from wrongdoers who offered no apology or who offered responsibility-accepting apologies).


\textsuperscript{182} Cohen, *Advising Clients to Apologize*, supra note 4, at 1028–29.

\textsuperscript{183} Cohen, *Legislating Apology*, supra note 4, at 838.

\textsuperscript{184} Cohen, *Advising Clients to Apologize*, supra note 4, at 1048 (“Expressing one’s sympathy without expressing fault or remorse can be a very useful step in those many cases where the extent of each party’s fault is unclear.”).

\textsuperscript{185} Peter H. Kim et al., *Removing the Shadow of Suspicion: The Effects of Apology Versus Denial for Repairing Competence-Versus Integrity-Based Trust Violations*, 89 J. APPLIED PSYCHOL. 104 (2004).
the accused who had denied responsibility.\(^{186}\) Conversely, they found that when evidence of innocence became available, the accused who had apologized was evaluated less favorably than the accused who denied responsibility.\(^{187}\)

In several studies of reactions to apologies in civil cases, I examined the effects of varying the independent evidence of wrongdoer fault.\(^{188}\) In one study, I found that when it was clear that the wrongdoer was at fault, but the wrongdoer only offered sympathy but no acceptance of responsibility, participants reported less sympathy for the wrongdoer, predicted less care in the future, and found the apology to be no more sufficient than no apology.\(^{189}\) In contrast, where the wrongdoer was less clearly responsible, an expression of sympathy was perceived as more sufficient than no apology and the wrongdoer’s conduct was viewed as being less negative.\(^{190}\) In a second, similar study, I found that participants assessed apologies more favorably when the offender’s fault was more ambiguous than when it was relatively clear.\(^{191}\) When offender fault was relatively clear, participants who received a full apology made more positive evaluations than did participants who were told they had received only a partial apology, who, in turn, made more positive evaluations than did participants who received no apology.\(^{192}\) Similarly, the degree of the offender’s fault also moderated the influence of the type of apology on participants’ evaluations.\(^{193}\) When offender fault was more ambiguous,\(^{194}\) participants who received a partial apology made more positive evaluations than did participants who received no apology.\(^{195}\) It seems that accepting responsibility is less necessary when fault is uncertain.

**Timing**

The timing of an apology is also thought to be important to its effectiveness.\(^{196}\) However, the effects of timing on the interpretation of apologies may be

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\(^{186}\) *Id.* at 113.

\(^{187}\) *Id.*

\(^{188}\) Robbennolt, *Apologies and Legal Settlement,* supra note 4; Robbennolt, *Apologies and Settlement Levers,* supra note 4.

\(^{189}\) Robbennolt, *Apologies and Legal Settlement,* supra note 4.

\(^{190}\) *Id.*

\(^{191}\) Robbennolt, *Apologies and Settlement Levers,* supra note 4.

\(^{192}\) *Id.*

\(^{193}\) *Id.*

\(^{194}\) *Id.*

\(^{195}\) *Id.* Participants who received a full apology also made evaluations that were somewhat more positive than those who received no apology, but this difference did not reach traditional levels of statistical significance. *Id.*

\(^{196}\) See Aaron Lazare, *On Apology* 170–79 (2004); Shuman, supra note 4, at 186 (noting that “the more time that passes after the conduct at issue, the more reason to doubt the sincerity of an apology”). See also Mazor et al., supra note 84 (finding that 99% of patients wanted to be told about a medical error as soon as it was discovered).
complex. On one hand, an apology offered quickly after an injury has occurred may prevent an injury from developing into a grievance or conflict.\textsuperscript{197} The sociologist Nicholas Tavuchis argues that there is "a critical, if variable, period following a transgression after which the potential efficacy of an apology diminishes or is nullified."\textsuperscript{198} Consistent with these predictions, Edward Tomlinson and his colleagues found that willingness to reconcile was greater when an offender's "restorative action" came quickly after the breach than when it was delayed.\textsuperscript{199}

On the other hand, there is also a sense that apologies may ring hollow if they are offered too quickly and without reflection.\textsuperscript{200} Accordingly to Tavuchis, "[i]f . . . one of the essential functions of an apology is to retrace the offense and convert it into an occasion for sorrow, expiation, and forgiveness, then it cannot fully accomplish its work if it is offered too early or too late."\textsuperscript{201} In the legal context, Jonathan Cohen notes the tension between the sense that it might be beneficial to apologize soon after an injury occurs in order to "subtract the insult from the injury" and the legal "safety" of apologizing later once negotiations have begun.\textsuperscript{202}

Cynthia McPherson Frantz and Courtney Bennigson argue that one of the keys to an effective apology is to allow sufficient time for an exchange in which the injured person expresses his or her concerns and the offender expresses an understanding of those concerns.\textsuperscript{203} In one of the few empirical studies that has explored the effects of the timing of an apology, Frantz and Bennigson asked participants to recall a recent conflict, to indicate whether and in what order several events had occurred in their conflict, to indicate whether they had been able to voice their concerns and felt understood by the other party to the conflict, and to report how satisfied they were with the ultimate resolution of the conflict. Frantz and Bennigson found that there was greater satisfaction with the resolution of conflicts when apologies came later in the process than when apologies were offered earlier. Importantly, disputants who received an apology later in the process tended to experience a greater opportunity for voice

\textsuperscript{197} See Felstiner et al., supra note 45

\textsuperscript{198} Tavuchis, supra note 1, at 87.

\textsuperscript{199} Edward C. Tomlinson et al., The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following a Broken Promise, 30 J. MANAGEMENT 165 179–80 (2004).

\textsuperscript{200} See O'Hara & Yarn, supra note 4; Shuman, supra note 4, at 186 (noting that "[a]n apology before the investigation is completed may seem hollow and ritualistic, trivializing the wrong").

\textsuperscript{201} Tavuchis, supra note 1, at 88. Note also the likely ineffectiveness of apologies that are offered prior to the injurious behavior. See Lazare, supra note 196, at 171–72; Skarlicki et al., supra note 47 (experimental study using the ultimatum game finding that ex ante apologies were not effective).

\textsuperscript{202} Cohen, Advising Clients to Apologize, supra note 4, at 1049.

\textsuperscript{203} Cynthia McPherson Frantz & Courtney Bennigson, Better Late Than Early: The Influence of Timing on Apology Effectiveness, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201 (2005).
and understanding. In other words, victims valued the chance to tell their stories and then receive apologies more highly than they valued obtaining immediate contrition from the offender.

In a second study, Frantz and Bennigson explored this phenomenon experimentally. They asked participants to assume the role of an injured party in a hypothetical conflict and to indicate to what degree they would experience several emotions both before and after a conversation with the offender. Participants who received an apology later in this conversation experienced more positive emotional change than did those who received an apology at the beginning of the conversation or those who did not receive an apology in the conversation at all. Frantz and Bennigson conclude that “[a]pologies that are offered too quickly may not be effective, in part because the victim still feels unheard, and is not convinced that the offender knows what he or she did wrong, or why it was hurtful, or how hurtful it was.”

**Evidentiary Statutes**

Several commentators have argued that protecting apologies through the rules of evidence will drain apologies of their moral value. Lee Taft, articulating this view, argues that

> The law recognizes that an apology, when authentically and freely made, is an admission; it is an unequivocal statement of wrongdoing. The law permits such an acknowledgement to enter the legal process as a way to allow the performer of apology to experience the full consequences of the wrongful act. An apology made in this context, with full knowledge of the legal ramifications, is much more freighted than an apology made in a purely social context.

In contrast, to disconnect the apology from its consequences is, in this view, to diminish its strength.

Several studies have, thus far, failed to find that recipients discount apologies made in the context of legal rules protecting the apologies from admissibility. There is, however, some evidence that drawing attention to or explaining a lack of evidentiary protection – that is, making the legal risks of an apology salient – may provide a situational explanation for a failure to apologize completely. In one study, claimants who were told that the legal rules did not protect a party’s apology made more positive assessments of offenders who did not apologize or who offered only a partial apology. Thus, the effects of such statutes on how

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204 *Id.* at 204.
205 *Id.* at 205.
206 *Id.* at 202.
207 Taft, *supra* note 4, at 1157.
apologies will be interpreted by claimants may be complex. Moreover, as noted earlier, there has been no research on how such statutes might affect the decision making of defendants or potential defendants.  

Sincerity

To the extent that an apology is perceived to be offered sincerely, it is more likely to be accepted and more likely to be effective. With regard to excuses, studies have found that the sincerity of the excuse is an important determinant of how satisfying the excuse is.  

Similarly, despite an apology script that endorses apology acceptance, the perceived sincerity of an apology is likely to be a key factor in determining reactions to apologies. As Dale Miller has argued, "[w]hen victims perceive apologies to be insincere and designed simply to "cool them out," they often react with more rather than less indignation."  

In one study examining responses to a business dispute, Tomlinson and colleagues found that an apology that was described as "sincere" resulted in a greater willingness to reconcile than did an apology that was not. In addition, in the study of apologies in the context of the ultimatum game described above, unfair offers that were accompanied by apologies were perceived as more manipulative and were more likely to be rejected than were the same offers made unapologetically. The authors suggest that when apologies and other social accounts are thought to be manipulative—i.e., insincere—they will not have the same beneficial effects as sincere accounts: “Manipulative intention conveys a lack of respect as its interpersonal message, whereas polite or apologetic accounts deemed sincere would have a greater chance of implying the transmitter’s concern about the account receiver’s feelings.”

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210 See supra note 139.
212 See supra note 75.
213 Miller, supra note 48, at 538. See also Robert A. Baron, Attributions and Organizational Conflict: The Mediating Role of Apparent Sincerity, 69 ORG. BEHAV. HUM. DECISION PROCESSES 272 (1988); Erving Goffman, On Cooling the Mark Out, 15 PSYCHIATRY 451 (1952). “It also should be added that people may strive to attain the benefits of being recognized as fair, but without actually behaving fairly. Such self-promotions of fairness lacking in substance may be referred to as hollow justice. Any mere “veneer of fairness” may function as effectively as any more deeply rooted concern for moral righteousness as long as it is not perceived to be manipulative. A perceived intentional “using” of fairness as a tool of manipulation is likely to backfire when such insincerity is suspected.” Greenberg, supra note 20, at 139.
214 Tomlinson et al., supra note 199, at 179–80. See also Allan, supra note 17 (finding that belief that offender was “truly sorry” predicted forgiveness).
215 Skarlicki et al., supra note 47, at 336.
216 Id. at 336–37 (2004) (“social accounts were not effective in reducing the unfairness of a low offer when they were seen as manipulative”).
It may be the case that many of the factors that moderate an apology's effectiveness function, at least in part, by altering the perceived sincerity (or lack thereof) of the apology. Many of the variables that influence reactions to apologies described so far—e.g., promises to forbear, acceptance of responsibility, offers to compensate, timing, and so on—likely operate as signals as to an apology's sincerity. For example, apologies that accept responsibility for having caused the harm are perceived to be more sincere than are apologies that only express sympathy.\(^ {217}\)

The importance of sincerity to the effectiveness of apology has significant implications for apologies offered in the legal context. As Jonathan Cohen notes, "[a]pology should be rooted in responsibility and remorse rather than in economics and strategy. It is the ethical response to injuring another, irrespective of the economic consequences."\(^ {218}\) However, many are concerned that injurers will offer carefully-worded apologies as calculated legal strategies, divorced from a feeling of responsibility and remorse.\(^ {219}\) About these strategic apologies, Ed Dauer remarks, "[o]n the one hand, if practiced apologizing is effective, it will be so only because it satisfies some need the recipients of the apologies actually have. On the other hand, there is the nagging thought that insincerity camouflaged as contrition is, well, insincere."\(^ {220}\) Additional research into the abilities of injured parties to detect insincere apologies and into the ways in which injured parties respond to apologies of differing levels of sincerity may shed some light on this tension.

Conclusion

It is clear from the empirical research that has been done so far that apologies have some role to play in the resolution of civil disputes. Apologies appear to be able to influence parties' construal of the events at issue and their perceptions of the offender in ways that are likely to facilitate settlement. In addition, there appear to be circumstances under which apologies influence plaintiffs' decisions about whether to seek counsel and how to approach and respond to offers of settlement. However, it is also clear that the effects of apologies on litigation decisions are complex—involving a series of disparate, but connected, decisions made by a range of legal actors, and depending on a host of contextual factors. Under some conditions the effects of apologies on plaintiffs' decision making

\(^ {217}\) Robbennolt, Apologies and Settlement Levers, supra note 4, at 359; Robbennolt, Apologies and Legal Settlement, supra note 4 (unpublished data).


\(^ {219}\) See, e.g., Taft, supra note 4.

seem less likely to influence settlement. Moreover, the decisions of defendants about whether and how to apologize and effects of apologies on juror decision making are even less well understood. Therefore, there is much additional research still to be done to untangle the conditions under which apologies have effects on litigation decisions and the nature of those effects.

The existing research has identified a variety of factors that moderate the effects of apologies on decision making. More research is needed to understand the nuances and boundary conditions under which these factors operate and there are surely additional factors that ought to be examined. In addition, much, though not all, of the research that has been done in the legal context has focused on cases involving medical error. Understanding the role of apologies in medical cases may have particular import given the intimate nature of the relationship between physician and patient, the trust involved in that relationship, and medicine’s ethic of care. However, it would also be valuable to understand the similarities and differences in how apologies function across diverse types of cases, facts, and relationships. For example, what are the distinctions among different types of cases—such as those involving medical error, automobile accidents, contracts, corporate law, or civil rights—that might alter the ways in which apologies operate within those cases?

The existing research has revealed much useful information about the ways in which apologies influence litigation decision making. It should be clear that there are many more promising avenues of inquiry to be pursued.

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221 See review in Robbennolt, supra note 2.
222 See May & Stengel, supra note 54, at 110 ("[T]he patient/doctor connection is unique in the ‘personal’ bond that links the parties. The doctor is dealing with the patient’s body and health and may literally hold the life of the patient in his/her hands."); C.A. Vincent & A. Coulter, Patient Safety: What About the Patient? 11 QUALITY SAFE HEALTH CARE 76, 78 (2002) (noting that “patients have been harmed, unintentionally, by people in whom they placed considerable trust” and that then “they are often cared for by the same professions, and perhaps the same people, as those involved in the original injury”).