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Apologies and Legal Settlement: An Empirical Examination

Jennifer K. Robbennolt
University of Missouri-Columbia School of Law

APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION

*Jennifer K. Robbennolt**

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* Associate Professor of Law & Senior Fellow at the Center for the Study of Dispute Resolution, University of Missouri-Columbia School of Law. B.S. 1991, Willamette University; J.D. 1996, Ph.D. 1998 (Psychology), University of Nebraska-Lincoln. I am indebted to Chris Guthrie, Monica Johnson, Phil Peters, Len Riskin, Grant Robbennolt, Jean Sternlight, and Christina Studebaker for their very helpful advice on earlier versions of this paper. Portions of these data were presented at the biannual meeting of the American Psychology-Law Society in March 2002 and at the annual meeting of the Law and Society Association in May 2002; I thank the participants at those conferences for their comments. Valuable research assistance was provided by Patrick Pinkston, Mitch Berry, Jay Hastings, Cecily Helms, Elizabeth McNichols, Jason Moore, Josie Pottebaum, and Tammy Stienle. Finally, my thanks go to the University of Missouri Law School Foundation and the Hewlett Foundation for financial support.

INTRODUCTION

It is often said that U.S. legal culture discourages apologies.[1] Defendants, defense counsel, and insurers worry that statements of apology will be admissible at trial and will be interpreted by jurors and judges as admissions of responsibility.[2] In recent years, however, several legal commentators have suggested that disputants in civil lawsuits should be encouraged to apologize to opposing parties.[3] They claim that apologies will avert lawsuits and promote settlement.[4]

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1. *See, e.g.*, Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986).

2. *See infra* Part I.A.

3. *See, e.g.*, Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999) [hereinafter Cohen, *Advising Clients to Apologize*]; Steven Keeva, *Does Law Mean Never Having to Say You're Sorry?* A.B.A. J., Dec. 1999, at 64; Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999); Daniel Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000) [hereinafter Shuman, *The Role of Apology in Tort Law*]; Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

4. Approximately fifteen million civil cases and hundreds of thousands of tort claims are filed in state courts each year. *See* COURT STATISTICS PROJECT STAFF, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2001 (2001), *available at* http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html; COURT STATISTICS PROJECT STAFF, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2001 194 tbl.16 (2001), *available at* http://www.ncsconline.org/D_Research/csp/2001_Files/2001_Tables_10-16.pdf. An untold number of additional disputes occur, but are resolved in some way prior to a formal legal filing. *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC'Y REV. 631 (1980-81). The majority of these cases are ultimately resolved through settlement in some way. *See id.*; Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Chris Guthrie, *Procedural Justice Research and the Paucity of Trials*, 2002 J. DISP. RESOL. 127; Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — and Why Not?* 140 U. PA. L. REV. 1147 (1992). In fact, the percentage of cases that are resolved by trial is declining. *See* Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 24. These settlements, however, are often not reached before the parties have been subjected to considerable expense — in terms of time, finances, and emotion. As Judge Learned Hand has said, "I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1921); *see also* Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 LAW & CONTEMP. PROBS. 43, 59 & n.54 (1991) (finding that many cases settle right before trial). At the same time there is continuing debate about the merits of settling civil cases. *See, e.g.*, Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Galanter & Cahill, *supra*; Andrew McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985) [hereinafter Menkel-Meadow, *For and Against Settlement*]; Carrie Menkel-Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) [hereinafter, Menkel-Meadow, *Whose Dispute*].

Consistent with this view, legislatures in several states have enacted statutes that are intended to encourage and protect apologies by making them inadmissible.[5] In addition, some commentators argue that defendants might offer expressions of sympathy, rather than apologies that explicitly accept responsibility for having caused injury, in order to reap the benefits of apologizing while minimizing the risks.[6] Critics of these so-called "safe" apologies argue, however, that apologies that avoid the legal consequences of apologizing — whether because the apology is merely an expression of sympathy or because it is protected by statute and is inadmissible — are devoid of moral content and likely ineffectual.[7]

Despite the recent surge of interest in, and debate over, the potential benefits of apologizing in legal cases, there has been very little empirical exploration[8] of the ways in which apologies actually affect settlement decisionmaking.[9] This Article seeks to fill the gap by providing much-needed data. The studies described here explore the proposition that apologies facilitate the settlement of civil disputes either by increasing potential plaintiffs' inclination to accept a particular settlement offer or by altering parties' perceptions and attributions in ways that might smooth the progress toward reaching a mutually satisfactory settlement agreement. More specifically, these studies explore the differing ways in which apologies are perceived and responded to when crafted to better insulate the offeror from legal liability (e.g., expressions of sympathy and statutorily protected apologies). This research suggests that an apology may favorably impact the prospects for settlement but that attention must be paid to both the nature of the apologetic expression and the circumstances of the individual case.

Part I describes the legal debate over the role of apologies in settlement decisionmaking. In particular, this Part describes the legal admissibility of apologies and the debate surrounding the offering of legally safe apologies. Part II details the previous empirical research that has examined the effects of apologies on perception and decisionmaking. Part III describes the empirical studies and presents

5. *See infra* Part I.C.

6. *See infra* Part I.B.

7. *See, e.g.*, Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000). For further discussion, see *infra* notes 56-59 and accompanying text.

8. For discussion of the role of empiricism in legal scholarship, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807 (1999).

9. Apologizing may influence a variety of legal decisions in civil cases, including effects on settlement decisions, decisions about liability, and decisions about compensatory or punitive damages. All of these decision points are in need of empirical examination. The focus here is limited to one of these decision points — decisions about settlement.

the results. Part IV examines the implications of these results for the debate over evidentiary protection for apologies, for parties to litigation, and for attorneys representing clients in such litigation.

I. LEGAL DEBATE OVER APOLOGIES

Recently, legal scholars have argued that apologizing has important benefits for both parties to a lawsuit, including increasing the possibilities for reaching settlements.[10] Accordingly, these scholars have suggested that lawyers should discuss apologies with their clients more often than they now do. They suggest that apologizing may avoid litigation altogether, and even where it does not it may reduce tension, antagonism, and anger so as to allow less protracted, more productive, more creative, and more satisfying negotiation.[11] Survey research suggests that claimants desire apologies and that some would not have filed suit had an apology been offered.[12] In addition, there is

10. *See* Cohen, *Advising Clients to Apologize*, *supra* note 3; Keeva, *supra* note 3; Levi, *supra* note 3; Orenstein, *supra* note 3; Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 J. DISP. RESOL. 115; Carl D. Schneider, *What It Means To Be Sorry: The Power of Apology in Mediation*, 17 MEDIATION Q. 265 (2000); Shuman, *The Role of Apology in Tort Law*, *supra* note 3; *see also* Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002).

11. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 138 (2d ed., 1992); Cohen, *Advising Clients to Apologize*, *supra* note 3; Levi, *supra* note 3; Orenstein, *supra* note 3; Shuman, *The Role of Apology in Tort Law*, *supra* note 3. In addition to the strategic benefits of apologies for settlement, which are the focus here, a number of nonstrategic benefits of apologies in civil cases are also posited. Apologies may reduce negative emotions, repair relationships, fulfill a need to make reparations and to restore equity, make forgiveness possible, and facilitate psychological growth. GOLDBERG ET AL., *supra*, at 138; *see also* Cohen, *Advising Clients to Apologize*, *supra* note 3; Michael E. McCullogh et al., *Interpersonal Forgiving in Close Relationships*, 73 J. PERSONALITY & SOC. PSYCHOL. 321 (1997); Orenstein, *supra* note 3, at 243-44; Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 1 (1973); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 53; Charlotte vanOyen Witvliet et al., *Please Forgive Me: Transgressors' Emotions and Physiology During Imagery of Seeking Forgiveness and Victim Responses*, 21 J. PSYCHOL. & CHRISTIANITY 219 (2002); Charlotte Witvliet et al., *Victims' Heart Rate and Facial EMG Responses to Receiving an Apology and Restitution*, PSYCHOPHYSIOLOGY 588 (2002).

12. *See* Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001 (2003) (finding that patients emphasized a desire to receive an apology following a medical error); Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Prenatal Injuries*, 267 JAMA 1359, 1361 (1992) (noting that 24% filed claims "when they realized that physicians had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them"); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (finding that 37% of respondents said that they would not have sued had there been a full explanation and an apology and 14% indicated that they would not have sued had there been an admission of negligence); Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES OF INTERNAL MED. 2565, 2566 (1996) (finding that 98% of respondents "desired or expected the physician's active acknowledgement of an error. This

anecdotal evidence of injured parties who would not have filed lawsuits had apologies been proffered,[13] of settlement negotiations coming to a standstill over the issue of apology even after agreement on an appropriate damage amount has been reached,[14] of plaintiffs who would have preferred an apology as part of a settlement,[15] and of occasions on which a failure to apologize promoted litigation by adding insult to injury.[16] In those few cases that go to trial, it is suggested that a defendant who has apologized will look better in front of a jury who is asked to award damages, particularly punitive damages.[17] Decisions by corporations such as Wal-Mart and Ford to

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ranged form a simple acknowledgement of the error to various forms of apology" and that "[p]atients were significantly more likely to either report or sue the physician when he or she failed to acknowledge the mistake.").

13. Bruce W. Neckers gives an example:

> In a case in which I represented the plaintiff, the wrongdoer himself tearfully acknowledged his role in the tragic accidental death of my client's son. It had a huge impact on the settlement of the case. There never would have been a lawsuit if the same person had made the same comments to the mother during the 30-day period in which her son lay dying in the hospital, or during the three days his young body was at the funeral home. The sad part in that case is that the defendant and his company wanted to express the same thought near the time of the accident, but claimed to have been prohibited from doing so by their insurance carrier.

The Art of the Apology, MICH. B.J., June 2002, at 10, 11.

14. *See* Schneider, *supra* note 10, at 274 (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).

15. *See, e.g.*, 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).

16. Cohen, *Advising Clients to Apologize*, *supra* note 3; Orenstein, *supra* note 3, at 243.

17. Cohen, *Advising Clients to Apologize*, *supra* note 3; Williams, *supra* note 11, at 52-53 n.147. A number of states specifically provide that an apology can be considered in mitigation of damages in defamation cases. *See, e.g.*, FLA. STAT. § 770.02 (2003); MISS CODE ANN. § 95-1-5 (1999); TENN. CODE ANN. § 29-24-103 (2000); TEX. CIV. PRAC. & REM. CODE ANN. § 73.003 (1997); VA. CODE ANN. § 8.01-48, 8.01-46 (2000); W. VA. CODE § 57-2-4 (1997). Some, however, worry that apologizing, "which implies knowledge of wrongdoing, will exacerbate damage awards by showing a level of intent beyond mere negligence." Levi, *supra* note 3, at 1187. It is likely that the effects of apologizing on damage-award decisionmaking will be complex. Bornstein conducted a set of empirical studies to examine the effects of remorse on damage-award decisionmaking. Brian H. Bornstein et al., *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20 BEHAV. SCI. & L. 393 (2002). In the first study, male participants awarded marginally less in damages against the physician who expressed remorse at the time of trial or who did nothing to indicate remorse or a lack thereof than they did against physicians who were remorseless or who expressed remorse early (at the time of the incident). *Id.* at 399-400. For female participants there was no effect of remorse. *Id.* In a second study, participants awarded more in compensatory damages against the physician who displayed remorse at the time of the event and then again at the time of trial than they did in the other three conditions. *Id.* at 403. Given potential spillover between liability and damages decisions, it is unclear how

issue apologies in recent cases presumably reflect this intuition about apologies.[18]

A. *Apologies and Admissibility*

Many are concerned, however, that fears of apologies being used to establish legal liability chill the offering of apologies. In the context of civil disputes, the conventional wisdom among legal actors has been that an apology will be viewed as an admission of responsibility and will lead to increased legal liability — and accordingly, that apologies ought to be avoided.[19] Consistent with this view, Hiroshi Wagatsuma

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these results might have been affected by telling jurors to assume that the defendant was liable. It is possible that jurors used the available decision to achieve goals that might otherwise have been achieved through the rendering of a liability verdict. *See generally* Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision-Makers as Goal Managers*, BROOK. L. REV. (forthcoming).

18. Patti Waldmeir, *Ford Goes Into the Business of Saying Sorry*, FIN. TIMES, Jan. 31, 2001, at 8; Wendy Zellner, *Wal-Mart: Why an Apology Made Sense*, BUS. WK., July 3, 2000, at 65. There are numerous recent examples of apologies in cases with possible legal implications. *See, e.g.*, WILLIAM J. CLINTON, *Remarks Prior to the House Judiciary Committee Vote on the First Article of Impeachment*, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 2158 (1999); Pam Belluck with Frank Bruni, *Law, Citing Abuse Scandal, Quits as Boston Archbishop and Asks for Forgiveness*, N.Y. TIMES, Dec. 14, 2002 at A1; Cathy Burke, *NJ.'s Top Cop Apologizes for Race Profiling*, N.Y. POST, Jan. 1, 2001, at 24; Richard Huff, *ABC Apology Snuffs Out Tobacco Firms' Lawsuits*, DAILY NEWS, Aug. 22, 1995, at 4; John McCormick, *At MIT, the Party's Over: A Tragic Alcohol Case Concludes With a Costly Apology*, NEWSWEEK, Sept. 25, 2000, at 45 (describing MIT's apology to the family of a student who was killed in a fraternity drinking incident); John Schmeltzer, *We're Sorry, United's CEO Says in TV Ad*, CHI. TRIB., Aug. 25, 2000, at 1; *Man Pleads Guilty to Diluting Drugs*, N.Y. TIMES, Feb. 27, 2002, at A16 (describing apology by pharmacist accused of diluting chemotherapy drugs). *See generally* Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000) [hereinafter Cohen, *Apology and Organizations*]; Laurent Belsie, *The Rise of the Corporate Apology*, CHRISTIAN SCI. MONITOR, Sept. 13, 2000, at 1; Mike France, *The Mea Culpa Defense*, BUS. WK., Aug. 26, 2002, at 76. Recently, even a group of jurors offered an apology to the defendant they convicted. Dean E. Murphy, *Jurors Who Convicted Marijuana Grower Seek New Trial*, N.Y. TIMES, Feb. 5, 2003, at A14 (describing public apologies by the jurors).

19. *See generally* Cohen, *Advising Clients to Apologize*, *supra* note 3; Levi, *supra* note 3. Empirically, it is not clear whether, under what circumstances, or to what degree an apology might alter the risk of an adverse liability determination. I am aware of no empirical studies that address whether apologies influence liability decisionmaking in civil cases. The single published study of the effects of apologies on juror decisionmaking in civil cases examined only the effect of apologizing on damage awards. Bornstein et al., *supra* note 17. 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. *See* Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742, 746, 749 (1982) [hereinafter Darby & Schlenker, *Children's Reactions to Apologies*]; Bruce W. Darby & Barry R. Schlenker, *Childrens' Reactions to Transgressions: Effects of the Actor's Apology, Reputation, and Remorse*, 28 BRIT. J. SOC. PSYCHOL. 353, 358-59 (1989) [hereinafter Darby & Schlenker, *Children's Reactions to Transgressions*]; Kenichi Ohbuchi & Kobun Sato, *Children's Reactions to Mitigating Accounts: Apologies, Excuses, and Intentionality of Harm*, 134 J. SOC. PSYCHOL. 5, 11 (1994); Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127, 134-36 (1997).

and Arthur Rosett note that "[a] crucial inhibition to a person making an apology in an American legal proceeding is the possibility that a sincere apology will be taken as an admission: evidence of the occurrence of the event and of the defendant's liability for it."[20]

An apology offered by an alleged offender to an injured party is admissible as a party's own statement, an exception to the hearsay rule.[21] Thus, in most jurisdictions, apologies may be admitted to prove liability, unless Rule 408 — protecting statements made in settlement discussions[22] — or a mediation statute — protecting statements made in mediation — reaches the apology.[23] Accordingly, apologies made

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Weiner and his colleagues found that offering a "confession" (that included an apology and acceptance of responsibility) reduced attributions of responsibility to internal causes and increased attributions to external causes. Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY 281, 291 (1991) ("This is in accord with a conceptualization linking confession to perceived lack of responsibility (in spite of an admission of responsibility!)."). This was true in particular when the cause or causes of the incident were less clear. *Id.* at 295. Some studies, however, have found that an apology increases attributions of responsibility to the offender. *See, e.g.*, 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).

20. Wagatsuma & Rosett, *supra* note 1, at 483. For comparative work on the role of apologies in different cultures, see, for example, Dean C. Barnlund & Miho Yoshioka, *Apologies: Japanese and American Style*, 14 INT'L J. INTERCULTURAL REL. 193 (1990); John O. Haley, *Apology and Pardon: Learning From Japan*, 41 AM. BEHAV. SCIENTIST 842 (1998); V. Lee Hamilton & Shigeru Hagiwara, *Roles, Responsibility, and Accounts Across Cultures*, 27 INT'L J. PSYCHOL. 157 (1992); Letitia Hickson, *The Social Contexts of Apology in Dispute Settlement: A Cross-Cultural Study*, 25 ETHNOLOGY 229 (1986); Janet Holmes, *Apologies in New Zealand English*, 19 LANGUAGE SOC'Y 155 (1990); Ritsu Itoi et al., *A Cross-Cultural Study of Preference of Accounts: Relationship Closeness, Harm Severity, and Motives of Account Making*, 26 J. APPLIED SOC. PSYCHOL. 913 (1996); Naomi Sugimoto, *A Japan-U.S. Comparison of Apology Styles*, 24 COMM. RES. 349 (1997); Wagatsuma & Rosett, *supra* note 1.

21. As a general matter, under the Federal Rules of Evidence or the corresponding state evidentiary rules, statements made out of court that are "offered in evidence to prove the truth of the matter asserted" are inadmissible as hearsay. FED. R. EVID. 801(c), 802. There is an exception, however, for statements made by a party to the litigation. *Id.* at 801(d)(2).

22. Under Federal Rule of Evidence 408 statements that are made during such settlement negotiations are inadmissible:

> Rule 408. Compromise and Offers to Compromise. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408; *see also* FED. R. EVID. 409 ("Rule 409. Payment of Medical and Similar Expenses. Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.").

23. A number of states provide for the protection of statements made in mediation. *See* UNIF. MEDIATION ACT § 4, 7A U.L.A. 85 (2001) (listing state statues). *See generally*, Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or*

outside of settlement negotiations[24] or mediation, including those made before the dispute has been transformed into a more formal legal negotiation (e.g., apologies offered at the scene of the accident), may not be protected and will likely be admissible. This may be particularly problematic to the extent that earlier settlement of disputes is thought to be beneficial and to the extent that the timing of the apology is a factor in its effectiveness.[25] In addition, Rule 408 does not preclude admission of the apology for a purpose other than to prove liability, such as for purposes of impeachment.[26]

Thus, attorneys and others fear that any apology will be admitted into evidence as an admission of fault.[27] Consequently, some clients are hesitant to apologize. Likewise, lawyers and insurance companies may be unlikely to advise their clients to apologize or to make any statement that could be construed as an apology. In fact, they may actively discourage such statements.[28]

Crucial Predictability?, 85 MARQ. L. REV. 79 (2001); Alan Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 17-19. *But cf.* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986); Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9 (2001).

24. *See* FED. R. EVID. 408; *see also* Cohen, *Advising Clients to Apologize*, *supra* note 3.

25. Many believe that apologies are more effective if offered earlier, rather than later. *See, e.g.*, Cohen, *Advising Clients to Apologize*, *supra* note 3; Neckers, *supra* note 13, at 11 ("Expressing it promptly, not months or years after the fact, seems to offer the greatest hope for healing for the victims, but even a belated apology must be better than no apology at all."). This is an empirical question that is in need of additional research. *See generally* Sim B. Sitkin & Robert J. Bies, *Social Accounts in Conflict Situations: Using Explanations to Manage Conflict*, 46 HUM. REL. 349, 362 (1993) ("Research on the timing of account delivery in psychology has identified a simple main effect: the later the delivery of an explanation, the less effective it will be in ameliorating negative responses."). *But cf.* Bornstein et al., *supra* note 17.

26. FED. R. EVID. 408. This exposes an offender who denies responsibility at trial to the possibility that an apology offered in the context of settlement negotiation could be offered at trial, not to prove liability, but to impeach the offender. While impeachment may be damaging in itself, jurors may also have difficulty using such limited-use evidence only for the prescribed purposes (e.g., impeachment) but not for other purposes (e.g., determining fault). *See* Michele Cox & Sarah Tanford, *Effects of Evidence and Instructions in Civil Trials: An Experimental Investigation of Rules of Admissibility*, 4 SOC. BEHAV. 31 (1989); Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 LAW & HUM. BEHAV. 477 (1988); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985). See Cohen, *Advising Clients to Apologize*, *supra* note 3 at 1035, for a general discussion of the limits of Rule 408 ("F.R.E. 408 does not preclude such evidence from pre-trial discovery, nor does it prevent such evidence from being revealed to third parties.").

27. Cohen, *Advising Clients to Apologize*, *supra* note 3, at 1010 ("If a lawyer contemplates an apology, it may well be with a skeptical eye: Don't risk apology, it will just create liability."); Gallagher et al., *supra* note 12 (describing physicians' concern that offering an apology will lead to legal liability).

28. *See* GOLDBERG ET AL., *supra* note 11, at 138; Gallagher et al., *supra* note 12; Levi, *supra* note 3, at 1186.

B. *Expressions of Sympathy*

In response to these concerns, several commentators have suggested that attorneys and clients consider crafting safe apologies that minimize the risk that they will be used as evidence of liability.[29] Specifically, defendants might offer partial apologies that merely express sympathy, but do not admit responsibility.

As a general matter, in accounting for wrongful behavior, an offender can assert his or her innocence (e.g., by declaring he or she was not involved), offer an excuse that minimizes responsibility, or offer a justification for the act that legitimizes it. Alternatively, the offender can offer an apology that admits blame and expresses regret.[30] In defining apologies as remedial work, Erving Goffman writes:

> In its fullest form, the apology has several elements: expression of embarrassment and chagrin; clarification that one knows what conduct had been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution.[31]

Similarly, Nicholas Tavruchis suggests that, at a minimum, an apology must incorporate "acknowledgment of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the

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29. *See, e.g.*, Cohen, *Advising Clients to Apologize*, *supra* note 3.

30. Sociologists and psychologists distinguish apologies from other types of accounts or remedial exchanges, such as denial, excuse, or justification. *See* ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER (1971); NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION (1991); Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 ANN. REV. PSYCHOL. 133 (1992); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 AM. SOC. REV. 46 (1968); *see also* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 115 (1998) ("Full acceptance of responsibility by the wrongdoer is the hallmark of an apology.").

31. GOFFMAN, *supra* note 30, at 113. Other authors have defined the elements of a full apology in various ways. For example, Orenstein argues that:

> At their fullest, apologies should: (1) acknowledge the legitimacy of the grievance and express respect for the violated rule or moral norm; (2) indicate with specificity the nature of the violation; (3) demonstrate understanding of the harm done; (4) admit fault and responsibility for the violation; (5) express genuine regret and remorse for the injury; (6) express concern for future good relations; (7) give appropriate assurance that the act will not happen again; and, if possible, (8) compensate the injured party.

Orenstein, *supra* note 3, at 239. Wagatsuma and Rosett distinguish five components of a "meaningful" apology: the offender must acknowledge that "1. the hurtful act happened, caused injury, and was wrongful; 2. the apologizer was at fault and regrets participating in the act; 3. the apologizer will compensate the injured party; 4. the act will not happen again; and 5. the apologizer intends to work for good relations in the future." Wagatsuma & Rosett, *supra* note 1, at 469-70. Cohen identifies three elements: "(i) admitting one's fault, (ii) expressing regret for the injurious action, and (iii) expressing sympathy for the other's injury." Cohen, *Advising Clients to Apologize*, *supra* note 3, at 1014-15.

expression of genuine regret and remorse for the harm done."[32] In some sense, then, it is the admission of responsibility that distinguishes an apology from other forms of accounting for one's behavior.

Nonetheless, some legal commentators suggest that defendants might "safely" offer apologies that are incomplete according to the above definitions — specifically, apologies that express sympathy, but do not admit fault or responsibility for the incident. For example, Deborah Levi suggests that "lawyers protective of their clients' interests might serve those interests by encouraging clients to apologize short of admitting liability."[33] Similarly, Jonathan Cohen suggests that "[w]hile a full apology will usually be most powerful, 'merely' expressing sympathy can often be a large step."[34] Defendants, therefore, might offer an apology that conveys sympathy — "I am sorry that you have been injured" — but does not acknowledge responsibility for the injuries inflicted.[35]

Relying primarily on anecdotes, commentators assert that even these partial apologies[36] can avoid lawsuits and facilitate settlement.[37] While the intuition is that such apologies will not be as effective as more complete apologies that acknowledge responsibility, partial apologies are thought by some to be better than failing to apologize at all.[38] Some attorneys offer such expressions of sympathy, without admitting fault, in the belief that it is the right thing to do and that it helps to settle cases more quickly and favorably.[39]

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32. TAVUCHIS, *supra* note 30, at 3. Tavuchis argues that other features of an apology are implicit in "two fundamental requirements: the offender has to be sorry and has to say so." *Id.* at 36.

33. Levi, *supra* note 3, at 1188. *See also* Gallagher et al., *supra* note 12, at 1004 (describing physicians' tendencies to " 'choos[e] their words carefully' when talking with patients about errors.").

34. Cohen, *Advising Clients to Apologize*, *supra* note 3, at 1048.

35. This distinction was central to the disagreement over the U.S.-China surveillance plane incident as the United States offered only an expression of sympathy for the death of a Chinese pilot, while China demanded a full apology that took responsibility for the incident. *Careful Language Breaks Washington-Beijing Impasse, at* http://www.cnn.com/2001/WORLD/asiapcf/east/04/11/collision.letter.analysis.02/ (April 11, 2001). While this incident differs from civil litigation because it involved an apology in a public, political context, it illustrates the general tension at issue.

36. In the present Article, "partial apology" will be used to refer to a statement that expresses sympathy, but does not admit responsibility. These will be contrasted with "full apologies," in which the offender both expresses sympathy and accepts responsibility. These have been variously referred to as "effective" apologies, "authentic" apologies, "genuine" apologies, and "happy-ending" apologies.

37. *See* Cohen, *Advising Clients to Apologize*, *supra* note 3; Orenstein, *supra* note 3; Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001).

38. *See* Orenstein, *supra* note 3.

39. *See* Cohen, *Apology and Organizations*, *supra* note 18.

Moreover, many supporters of partial apologies believe that judges and jurors will be able to distinguish between expressions of sympathy for a plaintiff's injuries and apologies that accept responsibility for having caused those injuries. Accordingly, they argue that the risk that a partial apology will be misinterpreted as evidence of liability is minimal. Peter Rehm and Denise Beatty review the few published appellate opinions involving apologies and conclude that "[j]udges and juries understand that expression of sympathy, regret, remorse and apology are not necessarily admissions of responsibility or liability."[40] Similarly, Cohen argues that "most judges and juries are good at distinguishing between expressions of sympathy and expressions of fault or regret, and may even be favorably disposed toward defendants who express sympathy."[41] Others, however, "fear that a statement of sympathy will be mistaken for an assumption of culpability [and] do not issue" even these partial apologies.[42]

C. *Statutorily Protected Apologies*

Such concerns have led some to argue that apologies ought to be rendered safe by preventing them, through the rules of evidence, from being admissible in court as evidence of liability.[43] In recent years, several states have adopted rules of evidence that offer such protection to certain apologies[44] and a number of additional states have considered or are considering similar legislation.[45] Such safe

40. Rehm & Beatty, *supra* note 10. *See also* William K. Bartels, *The Stormy Seas of Apologies: California Evidence Code Section 1160 Provides a Safe Harbor for Apologies Made After Accidents*, 28 W. ST. U. L. REV. 141 (2000-01).

41. Cohen, *Advising Clients to Apologize*, *supra* note 3, at 1030.

42. *See* Orenstein, *supra* note 3, at 240. This is, of course, an empirical question that awaits further research. For cases in which the admissibility or sufficiency of particular apologetic expressions was at issue, see, for example, Denton v. Park Hotel, 180 N.E.2d 70 (Mass. 1962); Giangrasso v. Schimmel, 207 N.W.2d 517 (Neb. 1973); Phinney v. Vinson, 605 A.2d 849 (Vt. 1992); and Senesac v. Assocs. in Obstetrics & Gynecology, 449 A.2d 900 (Vt. 1982).

43. *See, e.g.*, Cohen, *Advising Clients to Apologize*, *supra* note 3, at 1062-63; Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002) [hereinafter Cohen, *Legislating Apology*]; Orenstein, *supra* note 3, at 247-48 (proposing to "except apologies and admissions of fault in civil cases."). *See generally* O'Hara & Yarn, *supra* note 10.

44. *See* CAL. EVID. CODE § 1160 (West Supp. 1995); COLO. REV. STAT. § 13-25-135 (2003); FLA. STAT. ch. 90.4026 (2003); MASS. GEN. LAWS ch. 233, § 23D (2002); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 2004); WASH. REV. CODE § 5.66.010(1) (2002).

45. *See e.g.*, S. 577, 2001 Gen. Assem., Reg. Sess. (Conn. 2001); S. 1477, 21st Leg., Reg. Sess. (Haw. 2001); S. 439, 92d Gen. Assem., Reg. Sess. (Ill. 2001); H.R. 1002, 112th Gen. Assem., 1st Reg. Sess. (Ind. 2001); S. 1071, 79th Gen. Assem., 1st Sess. (Iowa 2001); S. 467, 2001 Gen. Assem., 415th Sess. (Md. 2001); S. 528, 92d Leg., Reg. Sess. (Mich. 2003); S. 280, 92d Gen. Assem., 1st Reg. Sess. (Mo. 2003); Draft Bill 1000, 2003 Leg., 58th Sess. (Mont. 2003) (draft bill never formally introduced); S. 1262, 48th Leg., 2d Sess. (Okla. 2002); S. 339, 2003 Gen. Assem., Jan. Sess. (R.I. 2003); H.R. 6905, 2002 Gen. Assem., Jan. Sess. (R.I.

harbors have been said to encourage parties to apologize and, consequently, to promote the settlement of civil cases.[46]

In 1986, Massachusetts became the first state to adopt a rule of evidence designed to preclude admission of apologies. The Massachusetts statute provides that:

> Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.[47]

This provision renders inadmissible apologies that are expressions of sympathy (e.g., "I am sorry that you are hurt"), but does not clearly address the admissibility of more fully apologetic expressions that also take responsibility for the injury-causing incident (e.g., "I am sorry that I hurt you").

Subsequently, several other states, including Texas (1999), California (2000), Florida (2001), and Washington (2002), have enacted rules of evidence protecting apologies that are expressions of sympathy from being admissible at trial.[48] The Florida statute, for example, protects statements expressing sympathy from admissibility but makes it clear that statements acknowledging fault remain admissible:

> The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence in a civil action. A statement of fault, however, which is part of, or in

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2002); H.R. 5628, 2001 Gen. Assem., Jan. Sess. (R.I. 2001); H.R. 67, 103d Gen. Assem., 1st Reg. Sess. (Tenn. 2003); H.R. 2185, 102d Gen. Assem., 2d Reg. Sess. (Tenn. 2002); S. 587, 75th Leg., 1st Sess. (W. Va. 2001). A handful of cases also provide some implicit protection for certain apologetic expressions. *See, e.g.*, *Denton*, 180 N.E.2d 70 (Mass. 1962) (finding that defendant's apology was an expression of sympathy and should not have been admitted); *Giangrasso*, 207 N.W.2d at 518 ("The word 'sorry' in conjunction with other language or circumstances may constitute an admission, denoting apology. Standing alone, it is not an admission of negligence; it may mean regret, not apology. The statement was not an admission of negligence, and the evidence would have been insufficient to support a verdict for plaintiff."); *Phinney*, 605 A.2d 849 (Vt. 1992) (finding that a defendant's apology was insufficient to show a breach of the standard of care); *Senesac*, 449 A.2d 900 (Vt. 1982) (same).

46. See Cohen, *Advising Clients to Apologize*, *supra* note 3; Cohen, *Legislating Apology*, *supra* note 43; Latif, *supra* note 37; Orenstein, *supra* note 3; Shuman, *The Role of Apology in Tort Law*, *supra* note 3.

47. MASS. GEN. LAWS ch. 233, § 23D (2002).

48. CAL. EVID. CODE § 1160 (West Supp. 1995); FLA. STAT. ch. 90.4026 (Supp. 2004); MASS. GEN. LAWS ch. 233, § 23D (2002); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 2004); WASH. REV. CODE § 5.66.010(1) (1995).

addition to, any of the above shall be admissible pursuant to this section.[49]

While most of this legislation specifically protects expressions of sympathy and does not protect statements that admit fault,[50] some have argued that such protection ought to also be afforded to full apologies that accept responsibility.[51] Most recently, in 2003 Colorado adopted a rule that appears to take a step in this direction. The Colorado rule provides:

> In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence,

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49. FLA. STAT. ch. 90.4026(2) (Supp. 2004). The California, Washington, and Texas statutes are substantially similar to the Florida statute. The Washington statute closely tracks the Florida statute in providing:

> The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident, and made to that person or to the family of that person, shall be inadmissible as evidence in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be made inadmissible by this section.

WASH. REV. CODE § 5.66.010(1) (2002). Similarly, the California statute provides:

> The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

CAL. EVID. CODE § 1160(a) (West Supp. 1995). The Historical Notes to the California statute include hypothetical examples that make clear the intentions of the drafters that statements admitting fault will still be admissible:

> Hypothetical #1: An automobile accident occurs and one driver says to the other: "I'm sorry you were hurt."-or-"I'm sorry that your car was damaged." Under the bill, these statements would not be admissible in court.
>
> Hypothetical #2: The same accident occurs and one driver says to the other: "I'm sorry you were hurt, the accident was all my fault."-or-"I'm sorry you were hurt, I was using my cell phone and just didn't see you coming." Under the bill, only the portions of the statements containing the apology would be inadmissible; any other expression acknowledging or implying fault would continue to be admissible, consistent with present evidentiary standards.

CAL. ASSEMBLY COMM. ON JUDICIARY, HISTORICAL NOTES TO CAL. EVID. CODE § 1160 (West Supp. 1995). The Texas statute provides:

> (a) A court in a civil action may not admit a communication that: (1) expresses sympathy or a general sense of benevolence relating to the pain, suffering, or death of an individual involved in an accident; (2) is made to the individual or a person related to the individual . . . and (3) is offered to prove liability of the communicator in relation to the individual. . . . (c) Notwithstanding the provisions of Subsections (a) and (b), a communication . . . which also includes a statement or statements concerning negligence or culpable conduct pertaining to an accident or event, is admissible to prove liability of the communicator.

TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 2004).

50. *See* CAL. EVID. CODE § 1160 (West 1995); FLA. STAT. ch. 90.4026 (2002); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 2004); WASH. REV. CODE § 5.66.010(1) (1995).

51. Orenstein, *supra* note 3; *see also* Cohen, *Legislating Apology*, *supra* note 43.

> compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim and which related to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.[52]

While the Colorado rule is limited in scope to expressions made by health-care providers, the provision is notable in that it appears to be the first statute that explicitly protects statements expressing fault.[53]

D. *Debate over Perceptions of Safe Apologies*

How these safe apologies — either those made safe through careful wording or those that are statutorily protected — will be perceived has been a subject of some controversy but little empirical examination. First, it is the intuition of many that a partial, or sympathy-only, apology is less satisfying and less effective at promoting settlement than a more complete apology in which the other party not only expresses sympathy, but also accepts responsibility for having caused injury.[54] Something seems to be lost when a wrongdoer fails to acknowledge wrongdoing. Thus, Steven Scher and John Darley comment that "[t]he admission of responsibility for the transgression is a necessary gesture of an apology because it conveys to the listener that the speaker is aware of the social norms that have been violated . . . , and therefore conveys that the speaker will be able to avoid the offense in future interactions."[55]

Similarly, while recognizing that allowing apologies to be introduced against the apologizer in a subsequent legal proceeding

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52. COLO. REV. STAT. § 13-25-135 (2003).

53. The Colorado legislation, widely viewed as being part of a "concerted effort" of tort reform in Colorado, was billed by its sponsors as the "I'm sorry legislation," while criticized by opponents as being anti-patient rights by insulating doctors from liability. Arthur Kane, *GOP Pushes Tort Reform*, DENVER POST, Apr. 6, 2003, at B4 (characterizing the bill as part of a "flurry of bills to limit lawsuits and damage awards"); Al Lewis, *Malpractice Measure is "Sorry" Protection*, DENVER POST, Apr. 13, 2003, at K1 (describing the bill as "among a dozen tort reform proposals"); Peggy Lowe, *"Sorry" Bill Advances*, ROCKY MOUNTAIN NEWS, Apr. 2, 2003, at 22A (describing the different characterizations of the bill by its sponsors and opponents). Also in 2003, the Texas legislature considered, as part of a larger tort reform package, a measure that would have repealed the provision in its statute that makes clear that statements that acknowledge fault remain admissible. H.R. 4, 78th Leg., Reg. Sess. (Tex. 2003) (March 28, 2003 version). This provision, however, did not make it into the final version of the bill that was signed by the governor. H.R. 4, 78th Leg., Reg. Sess. (Tex. 2003) (June 11, 2003, enacted version).

54. *See* Cohen, *Advising Clients to Apologize*, *supra* note 3; Levi, *supra* note 3.

55. Scher & Darley, *supra* note 19, at 130. *See also* O'Hara & Yarn, *supra* note 10, at 1137 ("The more unambiguously and emphatically a transgressor accepts blameworthiness, the more likely the apology will induce meaningful reconciliation.").

may have a chilling effect on such expressions of remorse, some commentators argue that avoiding the legal consequences of apologizing, either by offering a partial apology or because the apology is legally protected from admissibility, diminishes the apology's moral content.[56] Thus, Lee Taft 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.[57]

Accordingly, Taft argues that when an apology is inadmissible to show liability, "the moral dimension of apology is entirely eclipsed."[58] In other words, to protect an apology or to make it safe is to diminish it and to change its meaning. Moreover, Cohen argues that "[t]o many the message, 'I'm sorry, but I don't want anything I'm saying to be used against me to make me pay for it,' rings empty. Many may think that if you are unwilling to 'put your money where your mouth is' you are insincere."[59] Such interpretation could lead recipients to discount safe apologies, rendering them ineffective.

Others, however, make the case for carefully crafted apologies and increased evidentiary protection for apologies, arguing that even legally safe apologies are socially useful and can promote settlement, particularly where more complete apologies are unlikely to be forthcoming.[60] "While most people would prefer receiving an apology that involves financial exposure to one that does not, I think most people would prefer receiving an apology that does not involve financial exposure to receiving no apology at all."[61] Thus, proponents of protecting apologies argue that "[b]ecause apologies are so crucial to social interaction and personal peace, it is desirable that law facilitate or, at least, not hinder the possibility of this healing ritual."[62]

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56. *See* Taft, *supra* note 7. See also arguments articulated in Cohen, *Legislating Apology*, *supra* note 43.

57. Taft, *supra* note 7, at 1157.

58. *Id.* at 1150.

59. Cohen, *Advising Clients to Apologize*, *supra* note 3, at 1067.

60. *Id.*; Cohen, *Legislating Apology*, *supra* note 43; Latif, *supra* note 37; Orenstein, *supra* note 3.

61. Cohen, *Legislating Apology*, *supra* note 43, at 858.

62. Orenstein, *supra* note 3, at 247.

II. PRIOR PSYCHOLOGICAL RESEARCH ON APOLOGIES

Given recent calls for apologies in civil litigation and efforts to reform the law to protect them, it is important to know whether and in what ways apologies really do influence settlement decisionmaking. Such an understanding will better equip courts and legislatures to draft sensible and effective rules. In addition, such information will help parties to a dispute more clearly understand the utility of apologies for resolving disputes or, perhaps more importantly, for resolving disputes more quickly[63] or more satisfactorily.[64]

A. *Psychological Responses to Apologies*

A variety of perceptions and attributions are thought to underlie negotiation behavior and to influence the outcomes of settlement negotiations.[65] Experimental studies in primarily nonlegal contexts have demonstrated that an apology or an expression of remorse may influence a number of these perceptual and attributional judgments. Apologies or expressions of remorse have been found to influence attributions of responsibility or blame for the incident,[66] beliefs about the stability of the behavior (i.e., its likelihood of recurrence),[67] expectations about the future relationship between the parties,[68] perceptions of the character of the wrongdoer,[69] affective reactions

63. Heise found that the median disposition time for a civil case from the time of filing to a jury verdict was over two years. Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813 (2000). Given the tendency of many filed cases to settle late in the process, *see* Metzloff, *supra* note 4, at 59 & n.54, the settlement process may be protracted even for cases that will ultimately be resolved by settlement.

64. *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998); *infra* notes 237-242 and accompanying text. *But cf.* Galanter & Cahill, *supra* note 4; David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381 (1989).

65. *See generally* Leigh Thompson, *Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues*, 108 PSYCHOL. BULL. 515, 527 (1990).

66. *See, e.g.*, Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 19; Darby & Schlenker, *Children's Reactions to Transgressions*, *supra* note 19; Ohbuchi et al., *supra* note 19; Ohbuchi & Sato, *supra* note 19; Scher & Darley, *supra* note 19; Weiner et al., *supra* note 19.

67. *See, e.g.*, Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291 (2000); Ohbuchi et al., *supra* note 19; 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 19.

68. Holley S. Hodgins & Elizabeth Liebeskind, *Apology Versus Defense: Antecedents and Consequences*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 297 (2003).

69. *See, e.g.*, Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 19; Darby & Schlenker, *Children's Reactions to Transgressions*, *supra* note 19; Gold & Weiner, *supra* note 67; Marti Hope Gonzales et al., *Victims as "Narrative Critics": Factors Influencing Rejoinders and Evaluative Responses to Offenders' Accounts*, 20 PERSONALITY & SOC.

such as anger and sympathy,[70] and behaviors such as forgiveness,[71] aggression,[72] and recommendations for punishment.[73]

Experimental studies of reactions to criminal defendants have generally shown that remorseful defendants are perceived more positively and sentenced more leniently than are defendants who do not show remorse.[74] Similarly, Brian Bornstein found that defendants in civil trials who show remorse were perceived more positively by mock-jurors than those who did not.[75] Each of these psychological reactions may underlie any effect of apology on settlement decisionmaking.

PSYCHOL. BULL. 691 (1994); Ohbuchi et al., *supra* note 19; Ohbuchi & Sato, *supra* note 19; Orleans & Gurtman, *supra* note 67; Weiner et al., *supra* note 19.

70. *See, e.g.*, Mark Bennett & Deborah Earwaker, *Victims' Response to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. SOC. PSYCHOL. 457 (1994); Gold & Weiner, *supra* note 67; Ohbuchi et al., *supra* note 19; Weiner et al., *supra* note 19. For a discussion of research in emotion in negotiation generally, see Max H. Bazerman et al., *Negotiation*, 51 ANN. REV. PSYCHOL. 279, 285-86 (2000).

71. *See, e.g.*, Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 19; Gold & Weiner, *supra* note 67; Ohbuchi & Sato, *supra* note 19; Weiner et al., *supra* note 19.

72. *See, e.g.*, Ohbuchi et al., *supra* note 19.

73. *See, e.g.*, Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 19; Darby & Schlenker, *Children's Reactions to Transgressions*, *supra* note 19; Gold & Weiner, *supra* note 67; Weiner et al., *supra* note 19.

74. *See* Chris L. Kleinke et al., *Evaluation of a Rapist as a Function of Expressed Intent and Remorse*, 132 J. SOC. PSYCHOL. 525 (1992) (finding both that a convicted rapist was judged to have acted less intentionally, to be of less negative character, and to have more potential for rehabilitation if he demonstrated remorse than if he did not and that recommended sentences for the convicted rapist were predicted by perceived remorse); 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); Michael G. Rumsey, *Effects of Defendant Background and Remorse on Sentencing Judgments*, 6 J. APPLIED SOC. PSYCHOL. 64 (1976) (finding that participants gave a defendant in a drunk-driving case who was described as "extremely remorseful" a shorter sentence than they did a defendant who gave "no indication of remorse"); 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). See the review of the role of apologies in criminal cases in Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 337 (2002). For some boundary conditions on these types of effects, see Keith E. Neidermeier et al., *Exceptions to the Rule: The Effects of Remorse, Status, and Gender on Decision Making*, 31 J. APPLIED SOC. PSYCHOL. 604 (2001). Interviews with jurors in capital cases also provide evidence that the degree to which jurors perceive defendants to be remorseful influences their choice between a sentence of life in prison and death. *See* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998).

75. Bornstein et al., *supra* note 17. 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. But see Bornstein et al., *supra* note 17, for Bornstein's findings about damage awards.

More generally, research on the factors that lead injured parties to instigate and pursue legal claims suggests several avenues by which an apology might influence settlement behavior. Research investigating the claiming process suggests that the course of a dispute is in part determined by how the dispute is construed by the participants. Moreover, the research identifies a number of variables that affect the likelihood that injured persons will name their injury, blame a third party, and pursue a claim.[76] Whether or not a legal claim is made is influenced by factors such as whether the injured person identifies an injury, attributes causation and fault to a third party, perceives that he or she has been treated unfairly, and knows how to go about pursuing a claim.[77] Apologies may influence perceptions of fair versus unfair treatment, attributions of responsibility, and perceived dignity vis-à-vis the wrongdoer. In these ways, apologies may lead to greater willingness to settle claims and greater satisfaction with outcomes.

Equity theory also suggests that apologies may be useful in facilitating settlement. Equity theory posits that a transgression by an offender against an injured party results in an inequity in their relationship; that is, the wrong creates a moral imbalance between the parties. Moreover, "when individuals find themselves participating in inequitable relationships, they become distressed. The more inequitable the relationship, the more distress individuals feel."[78] Upon discovering that a relationship is inequitable, individuals are motivated to attempt to restore equity to the relationship.[79]

Equity theorists have suggested a number of ways in which equity might be restored to the relationship between the parties, including the offender offering an apology.[80] An apology may persuade the injured party that the relationship is, indeed, equitable,[81] perhaps in part because it demonstrates that the wrongdoer has suffered as a result.[82] To apologize is to engage in a social "ritual whereby the wrongdoer can symbolically bring himself low (or raise us up)."[83]

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76. *See* Felstiner et al., *supra* note 4; E. Allan Lind, *Litigating and Claiming in Organizations: Antisocial Behavior or Quest for Justice? in* ANTISOCIAL BEHAVIOR IN ORGANIZATIONS 150 (R.A. Giacalone & J. Greenberg eds., 1997) (reviewing research).

77. *See* DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991); Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 LAW & SOC'Y REV. 655 (1980-81); Felstiner et al., *supra* note 4; Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81).

78. *See* Walster et al., *supra* note 11, at 153.

79. *See id.* at 154.

80. *See id.* at 163.

81. *See id.* at 163.

82. *See* William Austin et al., *Equity and the Law: The Effect of a Harmdoer's "Suffering in the Act" on Liking and Assigned Punishment*, 9 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 163 (1976); Dana Bramel et al., *An Observer's Reaction to the Suffering of his*

Accordingly, as sociologist Tavuchis recognizes:

> Genuine apologies . . . may be taken as the symbolic foci of secular remedial rituals that serve to recall and reaffirm allegiance to codes of behavior and belief whose integrity has been tested and challenged by transgression, whether knowingly or unwittingly. An apology thus speaks to an act that cannot be undone but that cannot go unnoticed without compromising the current and future relationship of the parties, the legitimacy of the violated rule, and the wider social web in which the participants are enmeshed.[84]

Similarly, Jean Hampton argues that "by apologizing, we deny the diminishment of the victim, and our relative elevation, expressed by our wrongful action."[85] In this way, an apology offered by the transgressor to the victim may repair the breach created by the wrongful conduct and affirm the relative value of the parties.

One empirically supported reason that an apology may be an effective repair strategy is that observers may infer from an apology that the cause of the incident is less stable and, therefore, less likely to be repeated.[86] Gregg Gold and Bernard Weiner asked participants to read a scenario describing an incident that was followed by either an expression of remorse or no such expression.[87] They found that wrongdoers who expressed remorse were judged to be of higher moral character and as less likely to act similarly in the future.[88] Consistent with this notion, Randolph Pipes and Marci Alessi found that a criminal defendant who demonstrated remorse was perceived as less likely to reoffend than was a defendant who did not express remorse.[89] In addition, Dawn Robinson, Lynn Smith-Lovin, and Olga Tsoudis found that a criminal defendant who was perceived as more remorseful from his visible emotional reaction was rated as having engaged in the behavior at issue fewer times in the past and as less

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Enemy, 8 J. PERSONALITY & SOC. PSYCHOL. 384 (1968); Jerry I. Shaw & James A. McMartin, *Perpetrator or Victim? Effects of Who Suffers in an Automobile Accident on Judgmental Strictness*, 3 SOC. BEHAV. & PERSONALITY 5 (1975); Harry S. Upshaw & Daniel Romer, *Punishment For One's Misdeeds as a Function of Having Suffered From Them*, 2 PERSONALITY & SOC. PSYCHOL. BULL. 162 (1976).

83. Jeffrie Murphy, *Forgiveness and Resentment*, *in* FORGIVENESS AND MERCY 14, 28 (Jean Hampton & Jeffrie G. Murphy eds., 1988).

84. TAVUCHIS, *supra* note 30, at 13.

85. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1698 (1992).

86. *See, e.g.*, FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS (1958).

87. Gold & Weiner, *supra* note 67.

88. *Id.* Participants also expressed more sympathy for remorseful wrongdoers, were more likely to forgive them, and recommended less punishment. *Id.*

89. Pipes & Alessi, *supra* note 74.

likely to engage in the behavior in the future.[90] Gold and Weiner posit 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 not seen as representative of the offender's true character.[91] Many injured parties say that in pursuing lawsuits they are interested in effecting a change in the wrongdoer's future behavior and desire assurance that the wrongful behavior will not recur.[92] If these self-reports are accurate, then a recipient's interpretation of an apology as an indication that the behavior will not be repeated may predict willingness to settle.

B. *The Nature of the Apology*

Whether an apology is merely an expression of sympathy or also includes an acknowledgment of responsibility may affect its impact on its recipient. Several studies have demonstrated that more elaborate apologies result in improved attributions. Bruce Darby and Barry Schlenker evaluated children's responses to different apologies given following an incident.[93] The children judged wrongdoers who offered more elaborate apologies more favorably, as better persons who they liked more, blamed less, were more willing to forgive, and thought should be punished less.

More recently, Scher and Darley identified several potential components of an apology: the admission of responsibility, an expression of remorse, a promise of forbearance, and an offer of repair.[94] They found that each of these components independently contributed to the effectiveness of the apology.[95] Nevertheless, "the greatest improvement in perceptions came from the addition of one apology strategy — i.e., the offering of an apology, compared to no

90. 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). These judgments were found, in turn, to influence sentencing decisions. *Id.*

91. Gold & Weiner, *supra* note 67, 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 30, at 113.

92. *See* Gallagher et al., *supra* note 12; Hickson et al., *supra* note 12; Vincent et al., *supra* note 12; Witman et al., *supra* note 12.

93. Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 19. 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.

94. Scher & Darley, *supra* note 19, at 132.

95. *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.*

apology."[96] This is consistent with the intuition that an apology that affirmatively accepts responsibility is probably most effective, but any apology, even one that merely expresses sympathy, may be better than nothing.

C. *Apologies and Legal Settlement*

Thus, in addition to the anecdotal evidence of the importance of apologies in legal-settlement negotiation, there is a growing body of empirical evidence that apologies can have important effects on a variety of judgments that may underlie legal-settlement decisions. There has been very little systematic investigation, however, of the particular effects of apologies on legal-settlement decisionmaking. Moreover, apologies offered in the course of a legal dispute are likely to involve a different dynamic than apologies offered in other contexts, and the constraints and influences of the legal system may influence how apologies are understood.

Russell Korobkin and Chris Guthrie have conducted the only experimental study to examine the influence of apology on litigants' settlement decisions.[97] They asked undergraduates to assume the role of the tenant in a landlord-tenant dispute over a broken furnace and to indicate their willingness to accept a settlement offer from the landlord. Some participants were told that "the landlord apologized to you for his behavior. 'I know this is not an acceptable excuse,' he told you, 'but I have been under a great deal of pressure lately.' " Participants who were told that they had received this apology from the landlord were marginally more likely to accept the offer than were participants who had not received the apology.[98]

The Korobkin and Guthrie study provides an indication that apologies may have a role to play in settling legal disputes. Numerous questions, however, are left unanswered. First, as the authors noted, participants may not have considered the "apology" described in the study materials to be an actual apology, as it did not include the prototypical phrase "I'm sorry" and it included an excuse for the landlord's behavior.[99] Second, the effects of different types of apologies and the effects of different evidentiary rules remain

96. *Id.* at 137; *see also* Donald E. Conlon & Noel M. Murray, *Customer Perceptions of Corporate Responses to Product Complaints: The Role of Explanations*, 39 ACAD. MGMT. J. 1040, 1042 (1996) (discussing apologies in the consumer-complaint context).

97. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994) [hereinafter Korobkin & Guthrie, *Psychological Barriers to Litigation Settlement*].

98. *Id.* at 148 (describing a marginally statistically significant result at the $p < .1$ level).

99. *Id.* at 149 n.176. *See also supra* note 30 and accompanying text (distinguishing excuses and apologies).

unexplored. Finally, in addition to exploring participants' willingness to accept a particular offer of settlement, it would be useful to inquire into a broader range of the parties' underlying attributions and perceptions in order to more fully understand the role of apologies in legal settlement.

Cognitive approaches to understanding negotiation posit that a central aspect of negotiation is how the parties to the negotiation perceive, interpret, and understand the context of the negotiation, the other party, and themselves.[100] Importantly for present purposes, negotiator perceptions are not necessarily static — participation in the process and interaction between the parties to the negotiation can shape perceptions.[101] As Felstiner, Abel, and Sarat have noted, "disputes are not things: they are social constructs."[102] Thus, an apology might operate to influence settlement decisionmaking by altering the injured party's perceptions of the situation, the other party, or the offer itself.[103]

It is important to consider these reactions for two distinct reasons. First, because it is thought that apologies may lead to dispute resolution indirectly through the apologies' effects on the parties' construal of the situation, the mechanisms by which an apology might lead to greater willingness to settle ought to be explored. Thus,

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100. *See* Bazerman et al., *supra* note 70, at 281; Max H. Bazerman & John S. Carroll, *Negotiator Cognition*, 9 RES. ORGANIZATIONAL BEHAV. 247, 268 (1987); John S. Carroll & John W. Payne, *An Information Processing Approach to Two-Party Negotiations*, 3 RES. NEGOTIATION ORG. 3, 8 (1991); Margaret A. Neale & Gregory B. Northcraft, *Behavioral Negotiation Theory: A Framework for Conceptualizing Dyadic Bargaining*, 13 RES. ORGANIZATIONAL BEHAV. 147, 165 (1991); Thompson, *supra* note 65, at 527; Leigh Thompson & Reid Hastie, *Social Perception in Negotiation*, 47 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 98 (1990).

101. Carroll & Payne, *supra* note 100, at 8 ("During this process, preferences and aspirations may change, facts may be revealed or reinterpreted, and new issues arise."); Thompson, *supra* note 65, at 528.

102. Felstiner et al., *supra* note 4, at 631.

103. For example, an apology that changes a party's construal of the situation or the other party may also change the party's reactions, posturing, or communication. *See* Michael W. Morris et al., *Misperceiving Negotiation Counterparts: When Situationally Determined Bargaining Behaviors Are Attributed to Personality Traits*, 77 J. PERSONALITY & SOC. PSYCHOL. 52, 52 (1999) ("Conflict theorists have suggested that a negotiator's attributions for a counterpart's behavior exert a pivotal influence on the negotiator's strategic decisions." (citation omitted)); *see also* Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 830 (1987) (recognizing legal negotiation as a "cyclical process" during which perceptions and goals may evolve). Neale and Northcraft write:

> There is a more global sense in which negotiator's information processing strategies influence the processes and outcomes of negotiation. Negotiator cognition is the lens through which negotiation occurs.... Negotiators do more than just process (perhaps incorrectly) information about the context in which negotiations occur. Negotiators also *perceive* that context, and react to their perceptions in ways that validate or enact those perceptions. Thus, it is negotiators' cognitions which *contextualize* negotiations.

Neale & Northcraft, *supra* note 100, at 169.

participants' perceptions and attributions, affective reactions, and willingness to forgive are of interest as variables which may mediate any effects of apologies on decisions to accept or reject a particular settlement offer. Second, it is likely that apologies may not always (or even frequently) result in the settlement of a dispute through their effect on the acceptance of a particular settlement offer. Rather, an apology may favorably change the dynamics of the negotiation to smooth the way toward an eventual settlement — a settlement that may come more quickly or be more satisfactory as a result of the apology — even if the apology does not convince the victim to accept the immediate offer of settlement.[104]

III. THE PRESENT STUDIES

While many have become convinced of the value of an apology in the legal context, it can be seen from the above review that there is a paucity of empirical studies examining the legal effects of apologizing.[105] This Part reports several original experimental studies that were designed to begin systematic study of these effects.

In a typical experiment, a large number of participants evaluate the same simulated case. All aspects of the case (e.g., the factual situation and the settlement offer) are held constant, except the manipulated variable that is of interest in the study (e.g., the nature of the apology offered).[106] Then, all participants are asked the same set of questions (e.g., a question about how likely they would be to accept the offer).

Experimental simulation methods afford several benefits for studying the role of apologies in legal-settlement negotiation. First, there is often no record of the millions of settlement negotiations that occur in civil cases each year, some of which may involve apologies.[107] Using experimental simulations is a useful way to begin this systematic study of the effects of apologies on settlement decisionmaking.

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104. *See* Bazerman & Carroll, *supra* note 100, at 249 (describing "sequences of interaction over time during negotiation"); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 20 (1996) (arguing that "participants often must address the relational and emotional aspects of their interactions in order to pave the way for settlement of the narrower economic issues").

105. On the dearth of empirical studies examining legal-settlement negotiation generally or the legal effects of apologies in particular, see generally Cohen, *Legislating Apology*, *supra* note 43; Korobkin & Guthrie, *Psychological Barriers to Litigation Settlement*, *supra* note 97; Shuman, *The Role of Apology in Tort Law*, *supra* note 3; and John O. Haley, *Comment: The Implications of Apology*, 20 LAW & SOC'Y REV. 499, 506 (1986).

106. Thus, for example, participants might all be exposed to identical descriptions of an injury-causing incident and would receive the same offer of settlement. Different groups of participants, however, would be provided with different information about their communication with the offender.

107. *See* Waldmeir, *supra* note 18, at 8.

Second, experimental simulation allows the researcher to obtain the reactions of a large number of people to the same factual scenario. Third, because all factors except the variable of interest are controlled, any observed differences in the responses of participants who evaluated cases involving different levels of the manipulated variable can be attributed to that variable, unconfounded by other influences.[108]

In each study, participants were asked to visit a website and read a scenario describing an incident in which one party was injured.[109] Respondents were asked to take on the role of the injured person and to evaluate a settlement offer (covering out-of-pocket costs) from the other party. In addition to their willingness to accept the settlement offer, respondents were asked to indicate their assessment of the sufficiency of the apology; the motives they ascribed to the other party; their assessment of the nature of the injuries, the other party's conduct and character, and each party's responsibility for causing the incident; their degree of anger at, sympathy for, and willingness to forgive the other party; and their assessment of how the incident would likely affect the relationship and the other party's conduct in the future.[110]

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108. Ideally, the results reported here will converge with results from research examining reactions of litigants in actual cases if and when such research is conducted. Research using actual litigants in actual cases has the benefit of realism, but the researcher is unable to control the myriad factors that make cases differ from one another, making the isolation of the variable of interest impracticable. *See* Coates & Penrod, *supra* note 77, at 667 ("[T]hese studies [of actual cases] measure rather than manipulate variables, with the consequence that clear causal inferences are impossible to make."). For a discussion of simulation research, see generally Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75 (1999); Robert M. Bray & Norbert L. Kerr, *Use of the Simulation Method in the Study of Jury Behavior: Some Methodological Considerations*, 3 LAW & HUM. BEHAV. 107 (1979); Shari Seidman Diamond, *Illuminations and Shadows from Jury Simulations*, 21 LAW & HUM. BEHAV. 561 (1997); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137 (Robert E. Litan ed., 1993); Jennifer K. Robbennolt, *Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy*, 81 NEB. L. REV. 777 (2002); Wayne Weiten & Shari Seidman Diamond, *A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics*, 3 LAW & HUM. BEHAV. 71, 75-83 (1979). For examples of simulation research in legal settlement negotiation, see, for example, Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287 (1996); Korobkin & Guthrie, *Psychological Barriers to Litigation Settlement*, *supra* note 97; Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, L. & CONTEMP. PROBS., Autumn 1988, at 13.

109. In each of the studies described here, university staff members were randomly selected from a university directory and were recruited by direct e-mail solicitation to participate in the study. Thus, the resulting samples, which did not include students or faculty, included a wide range of participants who could potentially find themselves in the position of a person injured in an accident — participants included, for example, secretarial and administrative staff, maintenance and grounds staff, athletic staff, food service staff, library staff, and staff employed by the university-affiliated radio and television stations.

110. After they submitted their responses, participants were asked to provide identifying information so that they could receive payment; these responses were sent to a

A. *Effects of Apologies on Settlement Decisionmaking*

The first study examined recipients' interpretations of apologies and the effects of those apologies on willingness to accept a settlement offer in the dispute. The hypothetical scenario detailed a relatively simple personal-injury dispute: a pedestrian-bicycle accident.[111] All participants reviewed this scenario and evaluated the same settlement offer.

Control participants evaluated a version of the scenario in which no apology was offered. Additional participants evaluated versions of the scenario in which two variables, the nature of the apology offered and the nature of the applicable evidentiary rule, were varied. First, the nature of the apology offered was varied to compare the effects of a partial apology, in which the other party merely expressed sympathy for the potential claimant's injuries, with the effects of a full apology, in which he or she also took responsibility for causing the injuries.[112] Second, the evidentiary rule described to participants was varied to examine how different evidentiary rules influence the interpretation and effectiveness of an apology, comparing respondents' reactions to an apology where the evidentiary rules protected the apology, where the evidentiary rules did not protect the apology, and where no evidentiary rule was described.[113] Thus, there were seven different variations of the basic scenario.[114] One hundred forty-five people

separate data file and were not linked with participants' substantive responses. For the few individuals who wanted to participate in the study but were limited in their web access, hard copies of the study materials were sent and returned via campus mail.

111. The hypothetical included evidence that the offender, described as someone from the injured party's neighborhood with whom the injured party was acquainted, had been riding quite fast, had been reaching for a water bottle, and had almost hit another pedestrian shortly before the incident. The resulting injuries included a broken arm that required surgery and a pin to set the fracture, bruised ribs, and numerous bruises and scratches.

112. The offender who offered a partial apology stated, in relevant part: "I am so sorry that you were hurt. I really hope that you feel better soon." The offender who offered a full apology stated: "I am so sorry that you were hurt. The accident was all my fault. I was going too fast and not watching where I was going until it was too late." In both cases, the apology was offered shortly after the accident, prior to the filing of a lawsuit.

113. This variable was manipulated by describing an over-the-fence conversation with another neighbor who was an attorney. In the condition in which the apology was protected, the neighbor/attorney described "a new rule preventing apologies from being used against defendants in court," that the offender's statement "will not be admissible in court to prove that [the offender] was at fault for the accident," and that the attorney "had a conversation with [the offender] immediately after the accident and had mentioned to [the offender] that if she apologized it couldn't be used against her if there was a lawsuit." In the condition in which the apology was explicitly not protected, the neighbor/attorney explained that the offender's statement "could be introduced in court to prove [the offender] was at fault" and that the attorney "had a conversation with [the offender] immediately after the accident and had mentioned to [the offender] that if she apologized it could be used against her if there was a lawsuit."

114. Thus, the study used a 2 (apology) x 3 (evidentiary rule) factorial design with an additional no-apology control condition.

participated in the study and were randomly assigned to the experimental conditions.[115]

1. *Effects of Apology on Settlement*

The first set of analyses compared the two different types of apology (partial and full) to the no-apology control where no evidentiary rule was specified. It was predicted that the nature of the apology would influence participants' settlement decisions. Moreover, based on the previous research on the psychological effects of apologies, it was predicted that an apology would influence settlement decisionmaking through its effects on participants' perceptions and attributions. That is, participants' interpretations of the apology, their affective reactions, and their evaluations of the situation and the offender were expected to mediate the effects of an apology on their settlement decisions: the nature of the apology would influence these perceptions and attributions, which would in turn influence settlement decisions.[116]

a. Effect of Apology on Settlement Decisions. First, even though all participants were told that they had suffered the same injuries and received the same offer of settlement, the nature of the apology offered influenced recipients' willingness to accept the offer.[117] These results are presented in Figure 1. When no apology was offered 52%

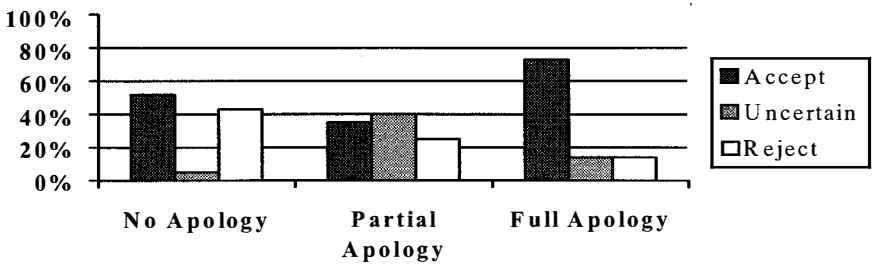
115. Participants ranged in age from twenty-one to seventy (*mean = 40*); thirty percent of the participants were male.

116. As Baron and Kenny describe, "In general, a given variable may be said to function as a mediator to the extent that it accounts for the relation between the predictor and the criterion. [M]ediators explain how external physical events take on internal psychological significance. . . . Mediators speak to how or why such effects occur." Reuben M. Baron & David A. Kenny, *The Moderator-Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and Statistical Considerations*, 51 J. PERSONALITY & SOC. PSYCHOL. 1173, 1176 (1986). In order to establish a mediating relationship, four requirements must be established. First, the initial variable (e.g., apology) must be correlated with the outcome variable (e.g., settlement decisions). Second, the initial variable must be correlated with the proposed mediator (e.g., perceptions and attributions). Third, the proposed mediator must be correlated with the outcome variable. And, finally, the direct effect of the initial variable on the outcome variable must be diminished upon controlling for the proposed mediator. *Id.* at 1176-77.

117. $\chi^2 (4) = 13.388$, $p = .01$. Regression analysis measures the relationships between a set of predictor variables and a dependent variable. Because the settlement rate variable consisted of three categories (settle, not settle, and unsure), this variable was analyzed using multinomial logistic regression. *See* VANI K. BOROOAH, LOGIT AND PROBIT: ORDERED AND MULTINOMIAL MODELS (2002); TIM FUTING LIAO, INTERPRETING PROBABILITY MODELS: LOGIT, PROBIT, AND OTHER GENERALIZED LINEAR MODELS (1994); SCOTT MENARD, APPLIED LOGISTIC REGRESSION ANALYSIS (1995). Throughout this Article differences are considered to be "statistically significant" if the statistical test used indicates that the likelihood that the difference would occur by chance is less than 5% (reported by the p-value as $p < .05$). Differences are reported as "marginally significant" if the likelihood of such a difference occurring by chance is greater than 5% but less than 10%. *See generally* BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS (2d ed. 1989).

of respondents indicated that they would definitely or probably accept the offer, while 43% would definitely or probably reject the offer and 5% were unsure. When a partial apology was offered, only 35% of respondents were inclined to accept the offer, 25% were inclined to reject it, and 40% indicated that they were unsure. In contrast, when a full apology was offered, 73% of respondents were inclined to accept the offer, with only 13-14% each inclined to reject it or remaining unsure.

Figure 1. Responses to Settlement Offer



Comparing each type of apology to the condition in which no apology was received, receiving a partial apology increased the likelihood that the respondent would be unsure about how to respond to the settlement offer,[118] and receiving a full apology increased the likelihood that the respondent would choose to accept the offer[119] and decreased the likelihood that the respondent would choose to reject the offer.[120]

b. The Role of Perceptions and Attributions. Next, the study examined the effects of the nature of the apology on a number of constructs thought to underlie the effect of apology on settlement decisionmaking. Where there were differences in participants' responses across conditions, the differences follow a strikingly similar pattern: offering no apology or a partial apology elicited equivalent responses that were both different from the responses elicited when a

118. As compared to no apology, a partial apology increased the likelihood that the respondent would be unsure rather than either accept ($p = .030$) or reject ($p = .026$) the offer.

119. As compared to no apology, a full apology increased the likelihood that the respondent would accept the offer rather than reject it ($p = .057$) or be unsure ($p = .553$).

120. As compared to no apology, a full apology marginally decreased the likelihood that the respondent would reject the offer rather than accept it ($p = .057$) or be unsure ($p = .099$).

full apology was offered.[121] The average ratings for variables on which an apology had a significant effect are displayed in Table 1.

TABLE 1
PARTICIPANTS' PERCEPTIONS AND ATTRIBUTIONS (STUDY 1)

	No Apology	Partial Apology	Full Apology
Sufficient apology	1.90[a]	2.30[a]	3.82[b]
Regret	2.86[a]	2.63[a]	4.14[b]
Moral character	2.65[a]	2.70[a]	3.86[b]
Careful in future	3.50[a]	3.30[a]	4.18[b]
Belief that responsible	2.86[a]	3.00[a]	4.68[b]
Bad Conduct	4.05[a]	3.85[a]	3.10[b]
Sympathy	1.57[a]	1.65[a]	2.60[b]
Anger	3.71[a]	3.74[a]	2.86[b]
Forgiveness	3.62[a]	3.85[a]	4.23[a]
Damage to Relationship	3.29[a]	3.50[a]	2.00[b]
Offer make up for injury	2.52[a]	2.35[a]	3.55[b]

Note: All constructs were measured on 5 point scales; higher numbers represent "more" of the construct. For each rating, means with different superscripts differ significantly ($p < .05$).

Thus, a full apology was viewed as more sufficient than either a partial apology or no apology.[122] An offender who offered a full apology was seen as experiencing more regret,[123] as more moral,[124] and as more likely to be careful in the future[125] than one offering a partial or no apology. While an offender offering a full apology was seen as believing that he or she was more responsible for the incident than

121. A multivariate analysis of variance ("MANOVA") conducted on participants' assessments of the case and the other party revealed a significant multivariate effect of apology ($F(28,72) = 1.642$, $p = .048$). MANOVA measures the likelihood that observed differences between groups on a combination of measures are due to actual differences on those measures. *See generally* TABACHNICK & FIDELL, *supra* note 117, at 371-72. Follow-up analyses of variance ("ANOVA") were conducted for each variable separately; it is these univariate effects that are presented in Table 1. ANOVA measures the likelihood that observed differences among a set of means are due to actual differences among the groups as opposed to chance. *See* TABACHNICK & FIDELL, *supra* note 117, at 37. Except where otherwise noted, all post-hoc $ps < .05$.

122. $F(2,59) = 15.790, p < .001$.

123. $F(2,59) = 9.578, p < .001$.

124. $F(2,59) = 9.065, p < .001$.

125. $F(2,59) = 6.959, p = .002$.

one who offered a partial or no apology,[126] the conduct of the full apologizer was judged more favorably than that of offenders who offered either a partial or no apology.[127] Participants expressed greater sympathy and less anger at the offender who offered a full apology than they did at offenders who offered either a partial or no apology.[128] Participants also indicated more willingness to forgive an offender who gave a full apology than they did for offenders offering a partial or no apology[129] and expected that less damage to the parties' relationship would result following a full apology than they did following a partial or no apology.[130] Finally, participants indicated that the settlement offer would better make up for their injuries when they had received a full apology than when they had received either a partial or no apology.[131]

To facilitate further analysis, two scales were constructed from these measures[132] that represented participants' overall assessments of the apologies[133] and their evaluations of the offer.[134] Consistent with

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126. $F(2,59) = 15.578, p < .001$.

127. $F(2,58) = 4.645, p = .013$.

128. $F(2,58) = 7.317, p = .001$ and $F(2,59) = 3.858, p = .027$, respectively.

129. $F(2,60) = 4.150, p = .021$. Post-hoc tests for this variable showed only a marginally significant difference ($p = .086$) between offenders who offered full and partial apologies.

130. $F(2,58) = 9.840, p < .001$.

131. $F(2,60) = 5.865$, $p = .005$.

132. The groups of variables to be included in each scale were determined by a principal components factor analysis. Factor analysis is a procedure that is used to determine whether a larger number of variables cluster together into a smaller number of constructs. The procedure is "applied to a single set of variables where the researcher is interested in discovering which variables in the set form coherent subsets that are relatively independent of one another. Variables that are correlated with one another but largely independent of other subsets of variables are combined into factors." TABACHNICK & FIDELL, *supra* note 117, at 597. The factor analysis was conducted on fourteen questions (each measured on a five-point Likert scale); varimax rotation was utilized to enhance the interpretability of the factors. The analysis demonstrated that the items comprised three orthogonal factors (labeled Assessment of Apology, Evaluation of Offer, and Attribution of Responsibility) accounting for a total of sixty-one percent of the variance. Scales based on the first two factors (Assessment of Apology and Evaluation of Offer) are described more fully *infra* notes 133-134, and were used in subsequent analyses. Because a scale constructed with variables based on the third factor (ratings of the offender's responsibility, and the participant's own responsibility) ($alpha = .59$) was not influenced by whether an apology was offered ($F(2,59) = .052, p = .950$), nor was it related to settlement decisions ($\chi^2(2) = .870, p = .647$), this factor was not included in subsequent analyses.

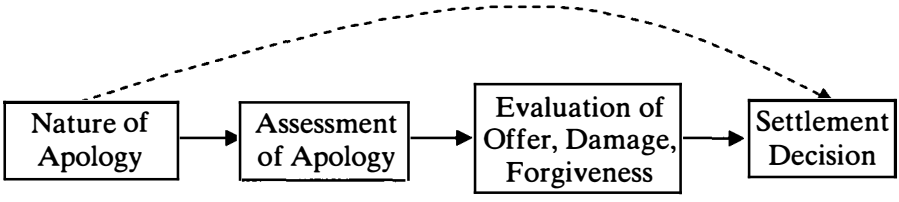
133. The first scale, labeled "Assessment of Apology," included participants' ratings of the sufficiency of the apology, the degree to which the offender thought he or she was responsible, the offender's regret, the degree to which the offender would be careful in the future, sympathy for the offender, and the offender's morality ($alpha = .87$).

134. The second scale, labeled "Evaluation of Offer," appeared to comprise an evaluation of the offer relative to the offense and included participants' ratings of the degree to which the offer would "make up for" their injuries (reverse coded), their willingness to forgive the offender (reverse coded), the severity of their injuries, the damage done to the relationship, their anger, and the conduct of the offender ($alpha = .81$).

the results reported above for the individual underlying questions,[135] the nature of the apology received influenced scores on both scales. Specifically, participants who received a full apology made more positive assessments of the apology and the information conveyed by the apology than did participants who were told they had received only a partial apology or no apology.[136] Moreover, participants who had received a full apology made more positive evaluations of the offer than did participants who were told that they had received only a partial apology or no apology.[137]

In addition, each of these scales influenced settlement decisionmaking. Participants who made more favorable assessments of the apology and the information that it communicated were more likely to agree to settle the case than they were to be unsure or to reject the offer.[138] Similarly, participants who made more favorable evaluations of the offer were more likely to agree to settle the case than they were to be unsure or to reject the offer.[139]

FIGURE 1: THE EFFECTS OF APOLOGIES ON SETTLEMENT DECISIONS



Note: Statistically significant effects are indicated by solid lines; marginally significant effects are indicated by dashed lines.

Figure 1 depicts the relationships among the nature of the apology, participants' attributions and perceptions, and settlement decisions.[140]

135. *See supra* notes 122-131 and accompanying text.

136. *No Apology mean = 2.56*; *Partial Apology mean = 2.59*; *Full Apology mean = 3.90*. $F(2,60) = 19.531$, $p < .001$.

137. *No Apology mean = 2.60*; *Partial Apology mean = 2.46*; *Full Apology mean = 3.37*. $F(2,60) = 9.050$, $p < .001$.

138. $\chi^2(2) = 8.747$, $p = .013$. More favorable assessments increased the likelihood that the respondent would accept the offer rather than reject it ($p = .016$) or be unsure ($p = .034$).

139. $\chi^2(2) = 20.150$, $p < .001$. More favorable evaluations increased the likelihood that the respondent would accept the offer rather than reject it ($p = .001$) or be unsure ($p = .004$).

140. Recall that in order to show that an apology operates to influence settlement decisionmaking through the ways in which it influences the injured party's perceptions and attributions about the situation, it must be shown not only that the apology affects both settlement decisions and individual perceptions and attributions, and that the perceptions and attributions directly influence settlement decisionmaking, but also that the effect of the apology on decisionmaking is lessened when perceptions and attributions are controlled. *See supra* note 116. Given the content of the two scales, it was hypothesized that these two sets

First, as noted above, the nature of the apology was found to influence assessments of the apology and of the information an apology is thought to convey.[141] Second, there was a significant relationship between the nature of the apology and participants' evaluations of the offer that was mediated by the participants' assessments of the apology.[142] Third, participants' assessments of the apology and their evaluations of the offer together partially mediated the relationship between the nature of the apology and participants' settlement decisions; apology, however, retained a marginally significant direct effect on settlement decisions.[143]

2. *Effects of Evidentiary Rules on Settlement*

The second set of analyses explored the effects of the different evidentiary rules on settlement decisionmaking.[144] Differences in evidentiary rules did not produce significant differences in settlement rates[145] nor did they produce differences in participants' perceptions and attributions.[146] Importantly, there were no effects of the

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of perceptions would work in tandem to mediate the effect of an apology on settlement decisionmaking. Thus, it was expected that the nature of the apology would influence assessments of the apology and perceptions of the information conveyed by the apology. It was expected that these assessments, in turn, would influence evaluations of the offer, and that this evaluation would influence decisionmaking. A series of additional regression analyses were conducted to test these propositions. *See infra* notes 141-143 and accompanying text.

141. *See supra* notes 136-137 and accompanying text.

142. As demonstrated above, the nature of the apology was correlated with both assessments of the apology and evaluations of the offer. *See supra* notes 136-137 and accompanying text. In addition, assessments of the apology and evaluations of the offer were significantly related ($F(1,61) = 28.789$, $p < .001$). Moreover, when evaluations of the offer were regressed on both the nature of the apology and assessments of the apology ($F(3,59) = 10.600$, $p < .001$), only assessments of the apology had a statistically significant influence on these evaluations ($t = -3.280$, $p = .002$). In this model, the nature of the apology did not significantly influence evaluations of the offer ($t = -1.055$, $p = .296$ and $t = -1.639$, $p = .107$).

143. The nature of the apology, participants' assessments of the apology, and participants' evaluation of the offer were examined as predictors of participants' settlement decisions. Analyses revealed that when settlement decisions were regressed on a set of predictors that included the nature of the apology and both perception scales ($\chi^2(8) = 28.967$, $p < .001$), participants' evaluation of the offer was the only statistically significant predictor of settlement decisions ($\chi^2(2) = 10.953$, $p = .004$), the effect of the apology on settlement decisionmaking became marginally statistically significant ($\chi^2(4) = 8.465$, $p = .076$), and the effect of assessments of the apology was not statistically significant ($\chi^2(2) = .547$, $p = .761$). In other words, these mediators partially explain the effect of apology on settlement decisions.

144. These analyses were conducted on the 2 (partial or full apology) x 3 (evidentiary rules) factorial.

145. $\chi^2(6) = 3.404$, $p = .757$. Neither the evidentiary rule ($\chi^2(4) = 1.551$, $p = .818$) nor the apology ($\chi^2(2) = 1.898$, $p = .387$) had a statistically significant influence on settlement rates. A model that included interaction effects was also not statistically significant ($\chi^2(10) = 8.786$, $p = .553$).

146. A 3 (evidentiary rule) x 2 (partial v. full apology) MANOVA conducted on participants' assessments of the case and the other party revealed no significant differences

evidentiary rules on ratings of the sufficiency[147] or sincerity[148] of the apology given. Participants were, however, aware of the differences in the rules as they assessed the scenario; analysis of participants' ratings of the likely motives for the apology revealed that apologies that were not protected by an evidentiary rule were seen as less likely to have been motivated by desire to avoid a lawsuit.[149] Thus, participants were aware of the content of the different evidentiary rules, but did not adjust their assessments of the apologies received in response to those rules.

3. *Summary*

Therefore, apologies influenced the inclination to accept or reject a settlement offer. The effect of an apology on settlement decisions was complex, however, and depended on the type of apology offered. Only the full, responsibility-accepting apology increased the likelihood that the offer would be accepted. The partial, sympathy-expressing, apology, in contrast, increased participants' uncertainty about whether or not to accept the offer.

Moreover, apologies were found to influence ratings of numerous variables that are thought to underlie the settlement decision. The effects of apologies on these underlying constructs, however, were limited to the full apology in which the offender accepted responsibility. Offering a partial apology was no different from offering no apology at all. These underlying judgments are likely to favorably change the dynamics of the negotiation and also provided the mechanism by which apologies influenced settlement decisions.

Importantly for the debate over evidentiary protection for apologies, while participants were aware of the different evidentiary rules governing the admissibility of the apology, the nature of the applicable rule did not influence the apologies' effect on settlement decisions, nor did these rules influence participants' perceptions of the situation or the offender.

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among the evidentiary rules ($F(28,184) = 1.057$, $p = .395$) and no significant interaction ($F(28,184) = 0.906$, $p = .605$). This analysis did reveal a statistically significant multivariate effect of the apology ($F(14,92) = 6.778$, $p < .001$). Since the follow-up analyses revealed differences between the partial and full apologies that were similar to those demonstrated by the planned comparisons of these conditions with no apology control, *see supra* notes 122-131 and accompanying text, details will not be presented here.

147. $F(2,118) = .646$, $p = .526$.

148. $F(2,116) = .870$, $p = .422$.

149. $F(2,116) = 5.987$, $p = .003$. This test was a follow-up to a 3 (evidentiary rule) x 2 (partial v. full apology) MANOVA conducted on participants' judgments about the offender's motives for apologizing, which revealed statistically significant effects of both the type of apology ($F(5,110) = 4.130$, $p = .002$) and the type of evidentiary rule ($F(10,220) = 2.039$, $p = .031$). No significant interaction was detected ($F(10,220) = 0.899$, $p = .534$).

B. *Factors Influencing the Effects of Apologies*

1. *Responsibility and Injury*

A second study was conducted to explore the boundaries of these findings. This study, again, examined recipients' interpretations of apologies and the effect of those apologies on willingness to accept a settlement offer in the dispute.[150] This time, however, in addition to the nature of the apology and the type of evidentiary rule, the strength of the evidence of the offender's fault and the severity of the resulting injury were manipulated.[151]

a. Evidence of Responsibility. Participants in the first study saw the alleged offender as clearly responsible for the accident.[152] The impact of an apology on decisionmaking, however, may vary depending on the strength of the evidence of the defendant's responsibility for the plaintiff's injuries. First, the evidentiary value of the apology is likely to differ in relation to other evidence of responsibility. Thus, strong evidence of the defendant's responsibility absent any apology reduces the additional evidentiary value of the apology itself; "[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."[153] Conversely, where responsibility is unclear, the risk that apologizing will result in an adverse liability judgment may be greater.

Second, independent evidence for the defendant's responsibility may influence the ways in which any apology is interpreted. Cohen posits that where there is clear responsibility for an incident, an expression of sympathy alone "can be worse than saying nothing at all. It's insulting to merely express sympathy or benevolence when you should be admitting your fault."[154] If this is true, a partial apology may be viewed as an inappropriate response from a clearly responsible defendant. On the other hand, a partial apology might be viewed as entirely appropriate when the proper allocation of responsibility is

150. The nature of the apology and the nature of the applicable evidentiary rule were varied as they were in the first study.

151. These additional variables were expected to moderate the effects of the apology and the evidentiary rules on settlement decisionmaking. "[A] moderator is a qualitative (e.g., sex, race, class) or quantitative (e.g., level of reward) variable that affects the direction and/or strength of the relation between an independent or predictor variable and a dependent or criterion variable." Baron & Kenny, *supra* note 116, at 1174.

152. On a scale of one to five, with higher numbers representing clear responsibility, participants rated the alleged offender as highly responsible in all apology conditions (*No Apology mean = 4.48*; *Partial Apology mean = 4.56*; *Full Apology mean = 4.50*).

153. Cohen, *Advising Clients to Apologize*, *supra* note 3, at 1028-29.

154. Cohen, *Legislating Apology*, *supra* note 43, at 838.

unclear, because the defendant may not be expected to acknowledge responsibility under such circumstances.[155]

To test these propositions, the available evidence regarding the offender's responsibility for the incident was varied — a second set of conditions, in which the fault evidence was less clear, was introduced.[156] It was hypothesized that more ambiguous fault might make the admissibility of the apology more important and, thus, that the evidentiary rules would be more likely to have an impact on settlement decisions or the underlying attributions. Moreover, it was expected that a partial apology would be more effective when fault was less clear.

b. Extent of Injury. In similar ways, many have speculated that the effectiveness of a partial apology may vary with the degree to which the victim is injured. While those suffering more severe harm may desire and require "more intense" apologies to mitigate their harm,[157] those suffering less severe consequences may be satisfied with a less complex apology.

> In some instances, a statement of remorse may be all the victim needs to get past the incident. This is particularly likely where the victim's injury is slight. . . . In such cases, the restoration of the relationship between the parties may be more important than the payment of any damage award.[158]

Indeed, Schlenker and Darby found that apologizers tended to make more complex apologies (including more components) as the severity of the consequences increased.[159]

Several studies suggest that the degree of harm suffered by the victim influences the degree to which an apology is accepted or effective. Ken-ichi Ohbuchi and his colleagues found that participants formed a better impression of and expected less verbal aggression to be directed toward a wrongdoer who apologized than one who did not. They found, however, that these beneficial effects of apologizing

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155. Cohen, *Advising Clients to Apologize*, *supra* note 3, 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."); *see also* Latif, *supra* note 37.

156. The scenario was modified so that in the condition in which responsibility was less clear, one witness said that she thought the rider was going a little bit too fast, there was no previous close call, and the injured pedestrian was described as not paying attention. This manipulation was successful: participants rated the offender as more responsible in the condition in which the offender's responsibility was more clear (*mean = 4.44*) than they did in the condition where responsibility was more ambiguous (*mean = 3.96*). $F(1,355) = 33.518$, $p < .001$. In addition, participants rated their own responsibility as greater in the ambiguous condition (*mean = 2.04*) than in the clear-evidence condition (*mean = 1.49*). $F(1,355) = 47.224$, $p < .001$.

157. *See* Ohbuchi et al., *supra* note 19.

158. Latif, *supra* note 37, at 315; *see also* Levi, *supra* note 3.

159. Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44 SOC. PSYCHOL. Q. 271 (1981).

were lessened when the harm was more severe, although they did not disappear entirely.[160] Similarly, in a vignette study, 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.[161] 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.[162]

Accordingly, the severity of the resulting injury was varied — a second set of injury conditions, involving more minor injuries, was included.[163] It was expected that partial apologies would be more likely to be effective if the injury were relatively minor. In all, there were seven different variations of the basic scenario.[164] Three hundred sixty-one people participated in the study and were randomly assigned to one of the sixteen experimental conditions.[165]

2. *Effects of the Nature of the Apology*

The first set of analyses explored the effects of the severity of the injury and evidence of the offender's responsibility on the influence of apologies on both settlement decisionmaking and participants' perceptions and attributions.[166] Although no significant effect of apology on ultimate settlement decisions was detected,[167] analyses of the effects of the nature of the apology on attributions and perceptions revealed several interesting patterns. First, the results obtained were similar to those in the first study; as a general matter, full apologies

160. Ohbuchi et al., *supra* note 19.

161. Bennett & Earwaker, *supra* note 70.

162. *Id.*

163. In the minor injury condition, the injuries were modified to consist solely of a slight concussion and several scratches and bruises. This manipulation was successful: participants rated the severity of the injury as more severe in the more severe condition (*mean = 3.84*) than in the less severe condition (*mean = 2.74*). $F(1,358) = 205.285, p < .001$.

164. The study utilized a 3 (apology) x 2 (injury severity) x 2 (evidence of responsibility) factorial design with three types of evidentiary rules nested within the full apology conditions.

165. Participants ranged in age from twenty-one to sixty-nine (*mean = 38*); thirty-nine percent of participants were male.

166. This portion of the analysis was done on the 3 (apology) x 2 (injury severity) x 2 (evidence of responsibility) part of the design.

167. The overall significant effect of the model ($\chi^2(8) = 34.932, p < .001$) was due to the statistically significant effect of the severity of the injury on settlement rates ($\chi^2(2) = 27.953$, $p < .001$): when the injuries were less severe, the likelihood of settling increased versus either not settling or remaining unsure ($ps < .05$). There were no statistically significant effects of apology ($\chi^2(4) = 4.655$, $p = .325$) or evidence of responsibility ($\chi^2(2) = 3.037$, $p = .219$). Similarly, the only statistically significant effects in a model that included the two-way interactions ($\chi^2(18) = 46.467, p < .001$) were the effects of the severity of the injury.

improved the participants' perceptions of the situation and the offender, while partial apologies did little to alter such perceptions. Second, there were some indications that partial apologies could negatively impact perceptions where responsibility is relatively clear or where the injury is more severe. Finally there were some indications that partial apologies could positively impact perceptions where responsibility is relatively less clear or where the injury is relatively minor.

a. *Beneficial Effects of Full Apologies.* Consistent with the results of the first study, there was evidence suggesting that, overall, a full apology is better than a partial apology and that a partial apology is (often) not different than no apology. Where there were differences in participants' responses across conditions, the differences tended to follow the same pattern that was found in the first study: offering no apology or a partial apology elicited equivalent responses that were both different from the responses elicited when a full apology was offered.[168] The average ratings for variables on which apology had significant main effects are displayed in Table 2.

TABLE 2
PARTICIPANTS' PERCEPTIONS AND ATTRIBUTIONS (STUDY 2)

	No Apology	Partial Apology	Full Apology
Sufficient apology*	1.80[a]	2.66[b]	4.10[c]
Regret	2.76[a]	2.91[a]	4.12[b]
Moral character	2.65[a]	3.06[b]	3.86[c]
Careful in future*	3.82[a]	3.68[a]	4.25[b]
Belief that Responsible	2.55[a]	2.69[a]	4.82[b]
Bad Conduct*	3.49[a]	3.16[a]	2.77[b]
Sympathy*	2.20[ab]	1.91[a]	2.56[b]
Forgiveness	4.05[a]	4.05[a]	4.32[b]
Damage to Relationship	2.84[a]	2.58[a]	2.16[b]

Note: All constructs were measured on 5 point scales; higher numbers represent "more" of

168. A MANOVA conducted on participants' assessments of the case and the other party revealed significant multivariate effects of apology ($F(15,129) = 16.046$, $p < .001$), injury severity ($F(15,129) = 8.612$, $p < .001$), and evidence of responsibility ($F(15,129) = 4.912$, $p < .001$). Follow-up 3 x 2 x 2 ANOVA were conducted for each variable separately; it is these univariate effects that are presented in Table 3. Except where otherwise noted, all post-hoc $ps < .05$.

the construct. For each rating, means with different superscripts differ significantly ($p < .05$).
*These effects are qualified by statistically significant interactions. See *infra*.

Thus, a full apology was viewed as more sufficient than either a partial apology or no apology.[169] An offender who offered a full apology was seen as experiencing more regret,[170] as being more moral,[171] and as more likely to be careful in the future[172] than one offering a partial or no apology. While an offender offering a full apology was seen as believing that he or she was more responsible for the incident than one who offered a partial or no apology,[173] the conduct of the full apologizer was judged more favorably than that of offenders who offered either a partial or no apology.[174] Participants expressed greater sympathy toward the offender who offered a full apology than they did toward the offender who offered a partial apology.[175] Participants indicated more willingness to forgive an offender who gave a full apology than they did an offender offering a partial or no apology[176] and expected that less damage to the parties' relationship would result following a full apology than they did following a partial or no apology.[177]

Consistent with the results for the individual underlying questions, the nature of the apology received influenced scores on scales representing participants' assessments of the apology and evaluations of the offer.[178] Overall, participants who received a full apology made

169. $F(2,255) = 107.466$, $p < .001$. Here, a full apology was perceived as being more sufficient than was a partial apology which was, in turn, perceived as being more sufficient than no apology. This main effect, however, was qualified by statistically significant interactions between apology and evidence of responsibility and between apology and the severity of the injury. *See infra* notes 187-188 and accompanying text.

170. $F(2,256) = 36.511$, $p < .001$.

171. $F(2,247) = 35.602$, $p < .001$. Here, an offender who offered a full apology was perceived as being more moral than an offender who offered a partial apology who was, in turn, perceived as being more moral than an offender who failed to offer an apology.

172. $F(2,253) = 8.814$, $p < .001$. This main effect was qualified by a statistically significant interaction between apology and evidence of responsibility. *See infra* note 185 and accompanying text.

173. $F(2,256) = 110.688$, $p < .001$.

174. $F(2,255) = 11.129$, $p < .001$. This main effect was qualified by a statistically significant interaction between apology and evidence of responsibility. *See infra* note 189 and accompanying text.

175. $F(2,252) = 8.539$, $p < .001$. No difference between full and none (or between none and partial). This main effect was qualified by a statistically significant interaction between apology and evidence of responsibility. *See infra* note 186 and accompanying text.

176. $F(2,254) = 4.301$, $p = .015$.

177. $F(2,251) = 9.155$, $p < .001$.

178. Factor analysis was conducted for the entire sample on the same fourteen questions that were used in the first study (each measured on a five-point Likert scale); varimax rotation was utilized to enhance the interpretability of the factors. The analysis demonstrated that the items comprised the same three orthogonal factors as in the first

more positive assessments of the apology and the information conveyed by the apology than did participants who were told they had received only a partial apology or no apology.[179] In addition, participants who received a full apology made more positive evaluations of the offer than did participants who were told that they had received only a partial apology or no apology.[180]

b. Detrimental Effects of Partial Apologies. This time, however, there were several sets of results that suggest that a partial apology can be detrimental. Overall, one who offered a partial apology was judged to be more responsible than one offering no apology.[181] Similarly, participants who were offered a partial apology judged their resulting injury as being more severe than did those who were offered no apology.[182]

Notably, there is some evidence that a partial apology can be particularly detrimental when the resulting injury is severe or when there is strong evidence of the offender's responsibility. When the offender failed to take responsibility in the apology (i.e., offered a partial apology) for an incident that resulted in a severe injury the

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study, accounting for fifty-nine percent of the variance. Scales were created for each of these factors, Assessment of Apology (*alpha = .84*), Evaluation of Offer (*alpha = .77*), and Attribution of Responsibility (*alpha = .62*).

179. *F(2,257) = 86.406, p < .001. No Apology mean = 2.63*; *Partial Apology mean = 2.81*; *Full Apology mean = 3.96*. This effect was qualified by a significant interaction between the type of apology and the evidence of responsibility. *See infra* note 187 and accompanying text.

180. *F(2,258) = 5.816, p = .003. No Apology mean = 3.19*; *Partial Apology mean = 3.23*; *Full Apology mean = 3.48*. Offers were also evaluated more positively when the evidence was less clear (*F(1,258) = 12.725, p < .001*) and when the injury was less severe (*F(1,258) = 80.047, p < .001*).

Because there was not a significant relationship between the type of apology offered and settlement rates, *see supra* note 167, mediational analysis was not appropriate. Relationships among the variables, however, suggest a pattern similar to that found in the first study. Specifically, as already noted, the type of apology was related to assessments of the apology and to evaluations of the offer. *See supra* note 179. In addition, assessments of the apology were correlated with evaluations of the offer (*F(1,267) = 73.417, p < .001*) and evaluations of the offer were related to settlement rates ($\chi^2(2) = 28.433, p < .001$).

181. *F(2,255) = 5.169, p = .006*. This main effect was qualified by a statistically significant interaction between apology and injury severity. *See infra* note 183 and accompanying text.

182. *F(2,258) = 4.363, p = .014*.

degree of responsibility attributed to the offender was greater[183] and the offer was seen as less likely to make up for the injury.[184]

Moreover, an offender who failed to take responsibility in the apology (i.e., offered a partial apology) in the face of strong evidence of responsibility was seen as less likely to be careful in the future than those offering either a full or no apology.[185] This suggests that if relatively clear fault is explicitly not accepted, the careless behavior is seen as more stable, that is, as more likely to persist. In addition, where there was strong evidence of responsibility, participants reported less sympathy for the offender who offered a partial apology than for offenders who offered a full apology or no apology.[186]

c. Beneficial Effects of Partial Apologies. At the same time, however, there is some evidence that partial apologies can be more beneficial if the offender is less clearly at fault or where the resulting injury is less severe. Where there was strong evidence of offender responsibility, a partial apology was perceived as being no more sufficient than no apology. Where the evidence of the offender's responsibility was more ambiguous, however, a partial apology was perceived as more sufficient than no apology.[187] This suggests that where it is unclear that the offender was at fault, the offender is not (or is less) expected to accept responsibility. Similarly, where the injury was more severe, a partial apology was perceived as being no more sufficient than no apology. Where the injury was minor,

183. $F(2,255) = 3.182$, $p = .043$. In contrast, when the injury was minor, there were no differences in responsibility attributions among the apology conditions. Similarly, there was also a marginally significant effect of the type of apology on the third scale, Attribution of Responsibility, *see supra* note 178; when a partial apology was offered, respondents attributed more of the responsibility to the offender than when either a full apology or no apology was offered. $F(2,258) = 2.854$, $p = .059$. This marginal effect was qualified by a significant interaction between the type of apology offered and the degree of injury. $F(2,258) = 4.539$, $p = .012$. Where the injury was relatively minor, the type of apology had no effect on attributions of responsibility; where the injury was more severe, however, participants attributed more responsibility to the offender who offered a partial apology than to either the offender who offered no apology or who offered a full apology.

184. $F(2,258) = 6.059$, $p = .003$. In contrast, where the injury was minor, there were no significant differences among the apology conditions.

185. $F(2,253) = 5.174$, $p = .006$. In contrast, where the evidence of responsibility was more ambiguous, participants viewed the offender who offered a full apology as more likely to be careful than the offender who offered no apology.

186. $F(2,252) = 3.217$, $p = .042$. In contrast, where the evidence of responsibility was more ambiguous, participants reported more sympathy for the offender who offered a full apology than for offenders who offered partial or no apologies.

187. $F(2,225) = 4.990$, $p = .013$. In both cases, a full apology was still seen as more sufficient than either a partial or no apology. A statistically significant interaction for scores on the Assessment of Apology scale, $F(2,257) = 3.717$, $p = .026$, is consistent with these results. Where the evidence of the offender's responsibility was relatively clear, a full apology was assessed more positively than either a partial or no apology. Where the evidence was less clear, however, a partial apology was assessed more positively than no apology, though less positively than a full apology.

however, a partial apology was seen as more sufficient than no apology.[188]

In addition, where there was strong evidence of offender responsibility, the offender's conduct was rated more favorably only if the offender provided a full apology and not if the offender provided a partial apology. Where the evidence was relatively ambiguous, however, the offender's conduct was rated more favorably following either a full or a partial apology.[189]

3. *Effects of Evidentiary Rule*

The second set of analyses explored the effects of the different evidentiary rules and the evidence of the offender's responsibility for the incident when a full apology was offered.[190] Consistent with the results of the first study, differences among the evidentiary rules did not produce significant differences in settlement rates,[191] nor did they produce differences in participants' perceptions and attributions.[192]

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188. $F(2,255) = 3.919$, $p = .032$. In both cases, a full apology was still perceived as more sufficient than either a partial or no apology.

189. $F(2,225) = 10.715$, $p < .001$. There was a similar interaction between the apology and injury severity that was marginally significant. $F(2,255) = 2.333$, $p = .099$. When the resulting injury was more severe, the offender's conduct was rated more favorably if the offender provided a full apology than if the offender provided a partial or no apology. Where the injury was minor, however, the offender's conduct was rated more favorably following either a full or a partial apology.

In addition to the effects on the manipulation checks described above, *supra* notes 156 and 163, and the interactions with apology just described, there were several other main effects of the severity of the injury and the evidence of responsibility. When the injury was relatively minor, participants were less angry ($F(1,253) = 26.310$, $p < .001$), felt less responsible ($F(1,256) = 4.713$, $p = .031$), were more willing to forgive the offender ($F(1,254) = 10.768$, $p = .001$), expected less damage to the relationship ($F(1,258) = 30.624$, $p < .001$), and judged the offender to be of higher moral character ($F(1,247) = 5.040$, $p = .026$) than when the injuries were more severe. In addition, when the injury was relatively minor participants were more likely to accept the offer than to reject it ($p < .001$) or to be unsure ($p = .005$) than when the injury was more severe. *See supra* note 167. Similarly, where evidence of the offender's responsibility was less clear, participants were less angry ($F(1,253) = 6.520$, $p = .011$), judged the offender as experiencing more regret ($F(1,256) = 5.272$, $p = .022$) and as being of higher moral character ($F(1,247) = 9.499$, $p = .002$), rated the offender's conduct more favorably ($F(1,255) = 22.493$, $p < .001$), and were more willing to forgive the offender ($F(1,254) = 3.817$, $p = .052$) than when the evidence was more clear.

190. These analyses were conducted on the 2 (evidence of responsibility) x 3 (evidentiary rule) portion of the design.

191. $\chi^2(6) = 1.320$, $p = .971$. There were no statistically significant effects of evidentiary rule ($\chi^2(4) = .567$, $p = .967$) or evidence of responsibility ($\chi^2(2) = .805$, $p = .669$). The evidentiary rules did not produce differences in settlement rates either where the evidence of the offender's responsibility was relatively clear or where the offender's responsibility was less clear. A model that included the interaction effect was also not statistically significant. $\chi^2(10) = 3.434$, $p = .969$.

192. A 3 (evidentiary rule) x 2 (evidence of responsibility) MANOVA conducted on participants' assessments of the case and the other party revealed no significant differences among the evidentiary rules ($F(30,208) = .751$, $p = .823$) and no significant interaction ($F(30,208) = 1.044$, $p = .411$). This analysis also revealed no statistically significant

Again, however, participants did notice the differences in the rules as they assessed the scenario; analysis of participants' ratings of the likely motives for the apology revealed that apologies that were *not* protected by an evidentiary rule were seen as less likely to have been motivated by desire to avoid a lawsuit.[193] Thus, participants were aware of the content of the different evidentiary rules, but, again, did not adjust their assessments of the apologies received in response to those rules.

4. *Summary*

Consistent with the results of the first study, apologies influenced participants' attributions and perceptions of the situation and the offender. Overall, full apologies improved the participants' perceptions of the situation and the offender, while partial apologies did little to alter such perceptions. Exploration of the possible moderating influences of the severity of the injury and the evidence of the offender's responsibility revealed some interesting boundary conditions on these overall results. In particular, there were patterns in the data suggesting both that partial apologies may negatively impact perceptions where responsibility is relatively clear or where the injury is more severe and that partial apologies may positively impact perceptions where responsibility is relatively less clear or where the injury is relatively minor.

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multivariate effect of evidence of responsibility ($F(15,104) = 1.354$, $p = .185$). Importantly, there were no effects of the different evidentiary rules on ratings of the sufficiency ($F(2,128) = 1.118$, $p = .330$) or sincerity ($F(2,124) = .696$, $p = .500$) of the apology given. In addition, the full apology positively influenced perceptions, regardless of which evidentiary rule was described. Across the different evidentiary rules, when compared to the conditions in which no apology was offered, a full apology was generally seen as more sufficient, and as evidencing the offender's greater regret, greater belief that he or she was responsible, and higher moral character, regardless of which evidentiary rule was described. A 4 (no apology, full apology with no evidentiary rule specified, full apology — protected, full apology — unprotected) x 2 (evidence of responsibility) MANOVA was conducted on participants' perceptions. This analysis revealed a statistically significant effect of the apology condition ($F(45,446) = 5.350$, $p < .001$) as well as a marginally significant effect of evidence of responsibility ($F(15, 150) = 1.697$, $p = .057$). Univariate analyses of the apology conditions revealed that this effect was largely driven by differences between the no apology condition and each of the full apology conditions.

193. $F(2,126) = 7.291$, $p = .001$. This test was a follow-up to a 3 (evidentiary rule) x 2 (evidence of responsibility) MANOVA conducted on participants' judgments about the offender's motives for apologizing, which revealed a statistically significant effect of the type of evidentiary rule ($F(10,242) = 2.561$, $p = .006$). No significant effect of the evidence of responsibility ($F(5,121) = .466$, $p = .801$) and only a marginal interaction ($F(10,242) = 1.704$, $p = .081$) were detected. These results are consistent with those of the first study. *See supra* note 149. Follow-ups also revealed that the apology that was not protected by an evidentiary rule was thought to be more likely motivated by a desire to diminish suffering than was an apology that was not so protected ($F(2,126) = 3.879$, $p = .023$) (and marginally more than a protected apology ($p < .10$)).

In addition, consistent with the results of the first study, this study provided no evidence that the nature of the applicable evidentiary rule will influence participants' perceptions of the situation, the offender, or the apology.

IV. IMPLICATIONS OF RESULTS

Legal actors in the United States have traditionally assumed that apologies would be viewed by judges and juries as admissions of responsibility that will lead to increased legal liability. This perception is thought to be largely responsible for a perceived reluctance on the part of potential defendants in civil lawsuits to apologize to those that they have, or may have, injured.[194]

Recently, scholars have debated the utility of safe apologies in civil litigation. Despite concern that apologies will increase the risk of liability, many are now promoting apologies as beneficial in settling lawsuits. There is increasing interest in the possibility that an apology can serve to resolve a dispute so as to avoid or bring an end to litigation or, where it cannot do so directly, the possibility that an apology may set the stage for the parties to engage in more productive settlement discussions. In particular, safe apologies have been promoted in an attempt to balance aspirations for the beneficial effects of apologies on settlement with the potentially increased risk of adverse liability findings.[195] Legal reform efforts have begun to follow this path — moving to provide legal protection for apologies.[196] At the same time, however, other commentators have criticized safe apologies as diminished in meaning, moral value, and effectiveness.[197]

The data reported here comprise an initial empirical examination of the effects of apologies on settlement decisionmaking. Importantly, these studies provide evidence that offering an apology can facilitate conflict resolution. These studies also make clear, however, that the effects of apologies on settlement decisionmaking are influenced by a variety of factors. These complex effects present policymakers and litigants or potential litigants with some difficult decisions about the appropriate evidentiary protection for apologies, whether to offer an apology to an opposing party in civil litigation, and how to respond to an apology so offered.

194. *See supra* Part I.A.

195. *See supra* Parts I.B-C.

196. *See supra* Part I.C.

197. *See supra* Part I.D.

A. *Evidentiary Protection for Apologies*

One mechanism by which several states have attempted to make apologies safe is to provide them with statutory protection that prevents the admissibility of some apologies as evidence of liability. The results of the present study inform decisions to be made by policymakers considering safe-harbor statutes to protect apologetic expressions. The data reported here provide no support for the intuition that evidentiary protection for apologies will affect the ways in which apologies are perceived. Instead, these results are consistent with the contrary intuition that even statutorily protected apologies have a role to play in defusing conflict. Across two studies, the different evidentiary rules did not produce significant differences in settlement rates or in participants' perceptions of the negotiation situation or the other party.[198]

What might explain the apparent lack of effects of safe-harbor statutes on assessments of apologies and on settlement behavior?

One psychologically based account for these results relies on a psychological heuristic known as the fundamental attribution error,[199] or correspondence bias.[200] As a general matter, observers have a tendency to attribute people's attitudes and behavior to dispositional factors rather than situational factors.[201] Thus, in understanding the behavior of another person, we tend to explain their behavior with reference to their character more than to their circumstances.

This phenomenon has been demonstrated empirically in a wide variety of situations, including negotiation.[202] For example, Michael

198. This was true even though it was made clear that both parties were aware of the rules. In the real world, where parties to a dispute like this one are less likely to know about the rules of evidence as they apply to apologies, this might be even more so.

199. RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION 4 (1991); Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 173 (1977) ("People's inflated belief in the importance of personality traits and dispositions, together with their failure to recognize the importance of situational factors in affecting behavior, has been termed the 'fundamental attribution error.' ").

200. EDWARD E. JONES, INTERPERSONAL PERCEPTION 138-66 (1990).

201. *See* NISBETT & ROSS, *supra* note 199; ROSS & NISBETT, *supra* note 199; Ross, *supra* note 199; *see also* John M. Darley & C. Daniel Batson, *From Jerusalem to Jericho: A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERSONALITY & SOC. PSYCHOL. 100 (1973); Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1 (1967); Paula R. Pietromonaco & Richard E. Nisbett, *Swimming Upstream Against the Fundamental Attribution Error: Subjects' Weak Generalizations from the Darley and Batson Study*, 10 SOC. BEHAV. & PERSONALITY 1 (1982).

202. Morris et al., *supra* note 103, at 53. Morris and his colleagues also describe unpublished data by Dorris et al. in which:

> [They] created a bidding game in which a buyer and a seller were each given a limit on the price on which they could settle and still make a profit. When sellers had a high limit, deals

Morris, Richard Larrick, and Steven Su asked pairs of participants to negotiate the salary in a job offer. Participants in the role of the job candidates were provided with information about their alternative to reaching an agreement with the employer — the alternative job offer differed among participants in its certainty and value. Candidates' negotiation behavior was primarily determined by the value of their alternative.[203] While participants in the role of the employer were able to discern differences in the value of their counterpart's alternative,[204] they nonetheless appraised candidates with low-value alternatives as having more agreeable characters,[205] appraised candidates with more risky alternatives as more emotionally unstable,[206] and expressed preferences for the candidates' subsequent job assignments that were consistent with these appraisals.[207]

Thus, even when people grasp the nature of the situation, they may discount the influence of those situational factors on the other's behavior. Consequently, when an injured party receives an apology from an offender, particularly a full apology, he or she may be likely to attribute that apology to the disposition of the offender (e.g., he or she is genuinely sorry, is not the kind of person who will do this again, etc.) rather than to aspects of the situation (e.g., the law makes this apology safe and, therefore, it is offered at little legal cost).

A related possibility is that respondents explicitly discounted these implications in forming their understandings of the situation. Participants might have recognized that an offender's motivation to offer an apology may be independent of whether or not it is legally

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were less likely. Interestingly, although participants knew their counterparts were constrained by an externally imposed limit, they nonetheless attributed their counterparts' behavior to personal intent: sellers in the high-limit condition were perceived by counterparts to have a competitive intent.

Id.; *see also* Harold H. Kelley et al., *A Comparative Experimental Study of Negotiation Behavior*, 16 J. PERSONALITY & SOC. PSYCHOL. 411 (1970); Dean G. Pruitt & Julie L. Drews, *The Effect of Time Pressure, Time Elapsed, and the Opponent's Concession Rate on Behavior in Negotiation*, 5 J. EXPERIMENTAL SOC. PSYCHOL. 43 (1969). More generally, Morris et al. write:

> The attribution of negotiation behavior to personality traits rather than situational constraints (although familiar to those who have been privy to the thoughts of disputants in a contentious strike or divorce) has been the subject of relatively few experimental studies. . . . Nonetheless, studies have found that an opponent's situational constraints are often misunderstood.

Morris et al., *supra* note 103, at 53.

203. Morris et al., *supra* note 103, at 60.

204. *Id.* at 57, 60. In two different studies, participants in the employer role were able to estimate the candidates' alternatives as being higher in the high-value conditions than in the low-value conditions. *Id.* at 57, 60.

205. *Id.* at 57, 60.

206. *Id.* at 57.

207. *Id.* at 62.

protected by the state. As Cohen notes, "when a law is passed saying that the apology is inadmissible in court, it is not the injurer who says, 'I'm apologizing, but you can't use my apology against me.' Rather, it is the state that says, 'he's apologizing, and you cannot use his apology against him.' "[208]

Finally, participants may have discounted the influence of the statutory protection given the specific facts of the situation with which they were faced. In particular, in the studies described here, the apology at issue was offered very soon after the accident (before a lawsuit was filed) in the context of an interpersonal dispute between neighbors, where the offender's responsibility was judged to be relatively clear,[209] and the offer was fairly reasonable.[210] On these facts, then, the evidentiary value of the apology may have been thought to be minimal and, accordingly, recipients may not have attributed the apology or the lack of an apology to the various legal rules. Thus, it is possible that respondents would be more skeptical of protected apologies offered in conjunction with less generous offers, apologies offered outside the interpersonal context (e.g., by a corporation), or apologies offered later in the process. Clearly, additional research is needed to explore these boundaries.

There is, then, at present, no evidence to suggest that protected apologies will be less effective or less valued by claimants than unprotected apologies. Accordingly, providing evidentiary protection for apologies may serve to encourage the offering of apologies,[211] or at least to signal that apologies are a desired response to an injury-producing event,[212] without diminishing the value and effectiveness of apologies so offered.[213]

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208. Cohen, *Legislating Apology*, *supra* note 43, at 855.

209. *See supra* note 152. Thus, even in the conditions in which the offender's responsibility was less clear, participants judged the offender to be highly responsible overall, though less responsible than in the conditions in which the offender's responsibility was more clear.

210. The offer in the present studies was designed to cover out-of-pocket costs.

211. Note that whether and the degree to which more apologies might be offered under evidentiary protection is a separate empirical question. The data presented here address only the responses of injured parties to apologies that are offered by offenders under various legal protections. The data do not address whether the types of statutory protections that have been enacted, or are being considered, will in fact encourage apologies.

212. Safe-harbor statutes might serve this expressive purpose even if there were no instrumental consequences for the offering of apologies or for settlement. *See generally*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

213. While the fact that participants did not devalue apologies that were protected by statute bodes well for the ability of these statutes to promote the useful exchange of apologies, it does raise the concern that plaintiffs may have difficulty distinguishing between sincere and strategic apologies. *See infra* notes 231-234 and accompanying text.

To the extent that the goals of such provisions are to encourage apologies in order to facilitate settlement,[214] however, the current statutes may be protecting the wrong apologetic expressions. The current and proposed statutes predominantly protect partial apologies and those portions of full apologies that constitute expressions of sympathy, not admissions of responsibility.[215] The results presented here suggest that it is full, responsibility-accepting, apologies that have a positive impact on settlement decisionmaking, rather than the partial apologies that are typically protected by the statutes. Moreover, full apologies, because they are admissions, are more likely to raise defendants' concerns about adverse liability rulings and are more likely deterred by potential admissibility. At the same time, however, offering protection to full apologies may result in the exclusion of probative evidence and may limit a plaintiff's ability to bring a successful lawsuit.[216]

Accordingly, these data suggest that policy discussion ought to focus on the appropriateness of statutory protection for *full* apologies. Such policy discussion must consider the present findings regarding the beneficial effects of full apologies on settlement decisionmaking in light of other relevant considerations such as how best to encourage apologies, concerns about undue limits on the ability to bring lawsuits, the probative value of full apologies, and so on.[217]

B. *Defendants*

In the absence of statutory protection, defendants or potential defendants who desire to apologize are faced with balancing the effects of apologies on different types of judgments — settlement decisionmaking, liability decisions, and decisions about appropriate damage awards — as well as weighing the less strategic aspects of apologizing. The results of the instant studies inform one important component of these interrelated decisions — the impact of apology on settlement decisions. An important lesson for defendants to draw from these data is that apologies can have beneficial effects on settlement, altering the injured parties' perceptions of the situation and the

214. *See, e.g.*, CAL. ASSEMBLY COMM. ON JUDICIARY, COMMENT TO CAL. EVID. CODE § 1160 ("The author introduced this bill in an attempt to reduce lawsuits and encourage settlements by fostering the use of apologies in connection with accident-related injuries or death.").

215. *See supra* Part I.C.

216. *See* Cohen, *Legislating Apology*, *supra* note 43, at 856-63; *see also supra* note 53 (describing objections to the Colorado statute).

217. Evaluating the overall merits of evidentiary protection for full apologetic expressions is beyond the scope of this Article. *See* Cohen, *Legislating Apology*, *supra* note 43, at 841-66 (describing the pros and cons of such protection); Orenstein, *supra* note 3 (proposing evidentiary protection for full apologies).

offender so as to make them more amenable to settlement discussions and ultimately more likely to accept an offer.

As a general matter, the results of the present study provide evidence that a full apology that both expresses sympathy for the victim's injuries and accepts responsibility for those injuries influences a variety of perceptions and attributions about the situation and the other party that might lead to a settlement or allow the parties to begin discussions.[218] Full apologies were seen as more sufficient apologies, as evidencing more regret and a greater likelihood of care in the future, and as offered by people of higher moral character. Full apologies favorably altered assessments of the conduct leading to the injuries and changed the emotions of the injured party so as to reduce anger and increase sympathy for the offender. Full apologies were seen as mitigating potential damage to the relationship, were more likely to lead to forgiveness, and inclined injured parties to look more favorably on the settlement offer. In addition, the results of the first study demonstrated that full apologies, through these effects on perceptions and attributions, increased the likelihood that the settlement offer would be accepted.[219]

Accordingly, full apologies that include accepting responsibility for the incident may facilitate the settling of lawsuits. These "responsibility-accepting" apologies, however, are precisely the type of apologies that most clearly raise concerns about the effects of apologizing on liability decisionmaking and are not likely to be protected by evidentiary rules protecting apologies. Making a statement that admits fault and that might be admissible at trial, while improving the prospects for settling the case, is thought to increase the risk that the offender will be found liable.[220]

For this reason, there is growing interest in ways in which offenders can apologize without exposing themselves to the same risks attendant to a full, responsibility-accepting apology. The present research suggests that the effects of such partial apologies are complex and identifies several aspects of the case that defendants ought to take into account when considering a partial apology. First, the effects of partial apologies on settlement decisionmaking appear to be much more complicated than the effects of full apologies. On the whole, partial apologies did not appear to facilitate settlement in the ways

218. *See supra* Part III.A.1.

219. *See supra* Part III.A.1.

220. It is not clear what risk an apology entails for liability determinations. *See supra* note 19. The present study did not address this issue directly, as the participants were not asked to take on the role of third-party decision makers and were not asked to make liability determinations. Participants, however, were asked to judge the responsibility of the alleged offender. In the first study, apologies had no effect on judged responsibility for the incident. In the second study, offenders offering a partial apology were judged to be more responsible than those who offered no apology. *See supra* note 181 and accompanying text.

hoped by proponents. The most consistent finding was that partial apologies tended to be no better (or worse) than not offering an apology. Across both studies, regardless of the level of responsibility and the level of injury, there were no differences between those receiving partial apologies and no apology in their evaluations of the offender's conduct, the offender's regret, the offender's belief that he or she was responsible, damage to the relationship, anger, the degree to which the offer would make up for the injuries, or forgiveness.[221]

More troubling for the efficacy of partial apologies, however, were some indications that a partial apology has the potential to influence attributions in ways that are unlikely to facilitate negotiation, particularly when the offender's responsibility for the incident was more clear or when the resulting injury was more severe. Where the offender's responsibility was more clear, participants reported less sympathy toward the offender and predicted that the offender was less likely to be careful in the future when a partial apology was offered. Where the resulting injury was more severe, offering a partial apology increased attributions of responsibility to the offender and resulted in the offer being perceived as less likely to make up for the injuries received.[222] Moreover, the results of the first study demonstrated that partial apologies may increase injured parties' uncertainty about whether or not they are inclined to accept or reject a particular settlement offer.[223] These results suggest that not only do partial apologies not facilitate settlement in the ways that full apologies do, but that offering a partial apology may change perceptions in ways that could impede the discussion.

On the other hand, there were some indications that, under the right circumstances, even a partial apology might be somewhat beneficial. Both when the responsibility for the incident was more ambiguous and when the injury was less severe, a partial apology was viewed as more sufficient than no apology.[224] In addition, when the responsibility for the incident was more ambiguous, the offender's conduct was rated more favorably when a partial apology was offered than when the offender failed to offer an apology.[225] Particularly where the offender's responsibility was less clear, participants were somewhat more open to apologies that did not accept responsibility. This suggests that there may be circumstances under which a partial apology is beneficial and (at least somewhat) better than failing to offer any expression of sympathy at all.

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221. *See supra* Parts III.A.1, III.B.2.

222. *See supra* notes 183-186 and accompanying text.

223. *See supra* Part III.A.1.a.

224. In neither case, however, was the partial apology viewed as being as sufficient as a full apology that accepted responsibility. *See supra* notes 187-188 and accompanying text.

225. *See supra* note 189 and accompanying text.

Overall, then, it appears that a partial apology, while perhaps minimizing the risk that the apology will be considered an admission and result in an adverse liability decision,[226] may not be terribly effective at improving the prospects for settlement. This may be because partial apologies do not communicate the same messages to recipients that full apologies do. In these studies, the partial apology, unlike the full apology, did not consistently convey to the recipient that the offender had accepted responsibility for his or her behavior, that he or she regretted the behavior, and, accordingly, that the offender would not repeat the conduct. Consistent with the fundamental attribution error,[227] injured parties may attribute this failure to completely apologize to the character of the person, rather than to any constraints attendant to the legal system. Perhaps there is also a sense that the offender who offers only a partial apology has not sufficiently owned up to the consequences of his or her behavior.[228] It is also possible that there are other sets of circumstances, not reflected in the vignettes used here, in which partial apologies are either particularly helpful or particularly detrimental.[229]

Thus, a defendant or potential defendant who wants to fully apologize may face the uncertain effects of the apology on liability and damage-award decisions if settlement negotiations fail, but may benefit from an improved settlement climate and an improved chance of avoiding litigation altogether. Defendants contemplating a partial, sympathy-expressing apology may not face the same liability risks. The beneficial effects of such apologies are not clear, however, and there is evidence of some risk that perceptions will be negatively impacted. Thus, defendants must be carefully attuned to the types of factors identified here, in particular the severity of the plaintiff's injury and the degree to which the offender appears to be responsible,[230] in evaluating these rules.

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226. As noted above, this is still an open empirical question. *See supra* note 19.

227. *See supra* notes 199-207 and accompanying text.

228. Taft, *supra* note 7.

229. In particular, even under conditions in which the offender was less clearly responsible, the offender was judged to be relatively responsible. *See supra* note 156 and accompanying text. It is possible that when the level of the offender's responsibility is even less clear, a partial apology would be more effective.

230. For example, a full apology might be considered (in particular) when the offender's responsibility is relatively clear. Under such conditions, there is evidence that a partial apology may impede settlement, there is much to be gained from a full apology in terms of the possibilities for settlement, and the marginal risk of increased liability due to accepting responsibility may be minimal given the independent evidence of fault.

C. *Plaintiffs*

In contrast to defendants, plaintiffs or potential plaintiffs must determine how to respond to an apology from someone they believe has wronged them. Many observers have expressed concern that plaintiffs may be induced by an apology to agree to a settlement that does not provide them with the monetary recovery to which they are entitled.[231] Importantly, this concern is sometimes dismissed by assuming that plaintiffs are capable of evaluating an apology for its sincerity and strategic motivation and can assess apologies and settlement offers accordingly.[232]

The results of the present studies suggest that plaintiffs may, in fact, be able to critically evaluate the content of an apology and to distinguish those that they find credible and that communicate the necessary information from those that do not. Participants in the studies evaluated partial apologies very differently from full apologies. Participants did not interpret partial apologies as conveying the same evidence of regret, acceptance of responsibility, or likelihood of greater care in the future as full apologies.[233] On the other hand, participants consistently did not distinguish among apologies that potentially exposed the offender to an increased risk of legal liability (no statutory protection) and those that did not (statutorily protected). Across both studies, the different evidentiary rules had no

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231. Cohen, *Advising Clients to Apologize*, *supra* note 3; Cohen, *Legislating Apology*, *supra* note 43; Levi, *supra* note 3, at 1171 ("For instance, critics might ask, if a plaintiff settles because she's emotionally fulfilled by an apology, isn't she being duped out of her legal entitlement — an entitlement that the apology itself makes concrete?"); O'Hara & Yarn, *supra* note 10, at 1186 ("[A]pology can be used as a tool for organizations to strategically take advantage of individual victims' instincts to forgive in the face of apology."). There is also some empirical evidence that an apology "script" dictates that an apology by an offender is to be followed by forgiveness by the recipient. *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). This concern is part of a larger debate concerning the appropriateness of private settlement and issues of self-determination in settlement and mediation. *See* Fiss, *supra* note 4; Galanter & Cahill, *supra* note 4; Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767 (1996); McThenia & Shaffer, *supra* note 4; Menkel-Meadow, *For and Against Settlement*, *supra* note 4; Menkel-Meadow, *Whose Dispute*, *supra* note 4; Ellen Waldman, *Substituting Needs for Rights in Mediation: Therapeutic or Disabling?*, 5 PSYCHOL. PUB. POL'Y & L. 1103 (1999); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

232. *See, e.g.*, Cohen, *Advising Clients to Apologize*, *supra* note 3, at 1067 ("If, as the recipient of an apology, you know that the apologizer has apologized in such a way as to ensure insulation from legal liability, you may attach less worth to that apology than otherwise, and a plaintiff's lawyer should be sure to point this out to her client."); *see also* Rehm & Beatty, *supra* note 10 (claiming that judges and jurors can distinguish apologies that admit fault from those that do not).

233. *See supra* Parts III.A.1, III.B.2.

influence on participants' perceptions and attributions nor on settlement decisions.[234] To the extent that participants did not distinguish these apologies, there is some risk that plaintiffs will be convinced by insincere or purely strategic apologies to settle for less than they might otherwise.

The results of the present studies, however, do not clearly indicate whether or not an apology will induce a plaintiff to accept a smaller financial settlement.[235] Specifically, these studies only assessed participants' propensities to accept or reject a particular settlement offer. In addition, while a full apology did result in an increase in the settlement rate in the first study, the more consistent result was that apologies influenced perceptions and attributions. Improvements in perceptions may not directly induce plaintiffs to accept inadequate offers that they might not otherwise be inclined to accept, but they may make it possible to begin or continue settlement discussions. Similar settlement terms may have ultimately been reached, but via a more difficult and time-consuming process. While it might be reasonable to infer that improved perceptions or a greater propensity to accept a particular offer might result in acceptance of a smaller amount than might otherwise have been agreed to, further empirical study ought to explore the extent to which potential litigants are willing to trade-off apologies and financial compensation.[236]

With that caveat in mind, however, it is plausible that some plaintiffs would be willing to accept a smaller financial settlement if they receive an apology. If this is true, one explanation may be that they have been unfairly induced to forego their rightful compensation. An alternative explanation may be that they are more satisfied by a combination of financial compensation and the apology than they would have been with a larger monetary amount and no apology. Plaintiffs may value the apology more than or differently from financial compensation. Indeed, motivations other than legal entitlement and monetary recovery may be important to plaintiffs.[237]

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234. See *supra* Parts III.A.2, III.B.3.

235. Given that most cases settle, settlements reached when an apology has been offered are most appropriately compared to what the plaintiffs would have gotten in bilateral settlement absent the apology rather than to what the plaintiffs could have or would have gotten at trial.

236. For a general discussion of incommensurability in law, see Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993), and Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

237. Menkel-Meadow, *Whose Dispute*, *supra* note 4, at 2677 ("[P]eople and entities in disputes may have a wide variety of interests (of which legal principles may be one class) and may decide that, in any given case, social, psychological, economic, political, moral, or religious principles should govern the resolution of their dispute."); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 302-06 (1999) (detailing a number of nonmonetary goals that parties may have — "may reflect a

While a monetary settlement may adequately restore financial losses resulting from an injury, an apology may be a better mechanism for restoring less tangible damage,[238] expressing the proper relative moral positions of the parties,[239] assuring the injured party that the offender will not reoffend,[240] or achieving restorative justice.[241] As Cohen notes, "[p]aying monetary damages may help take care of the financial consequences of an injury, but it may take an apology to 'wipe the moral ledger' clean and construct an understanding of the injury and the relationship which both parties can accept."[242] As described in the next Part, appropriate legal counseling may help to ensure that these preferences are respected while limiting the chances that an inappropriate settlement is reached.

D. *The Role of the Lawyer*

Defendants, then, face difficult decisions about whether or not to offer an apology and plaintiffs face difficult decisions about how to respond to offers of settlement that include or are accompanied by an

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rationality that is broader than the mere maximization of wealth"); Vincent et al., *supra* note 12 (identifying four primary reasons plaintiffs pursued litigation: "accountability — wish to see staff disciplined and called to account; explanation — a combination of wanting an explanation and feeling ignored or neglected after the incident; standards of care — wishing to ensure that a similar incident did not happen again; and compensation — wanting compensation and an admission of negligence"); *see also* Robbennolt et al., *supra* note 17 (arguing that legal decision makers simultaneously pursue numerous instrumental and symbolic goals). The extent to which negotiation and settlement, more broadly, track legal principles is unclear. *See, e.g.*, HERBERT KRITZER, LET'S MAKE A DEAL 30-56 (1991) [hereinafter KRITZER, LET'S MAKE A DEAL]; Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Robert J. Condlin, *"Cases on Both Sides": Patterns of Argument in Legal Dispute Negotiation*, 44 MD. L. REV. 65 (1985); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

238. *See* Shuman, *The Role of Apology in Tort Law*, *supra* note 3, at 181 ("Practically, tort damages for these intangible losses [pain and suffering, loss of consortium, indignity, and grief] defy the formulation of an empirically grounded metric . . ."); *see also* Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 71 (1994). Note also that apologies may mitigate damages in defamation cases. *See supra* note 17.

239. *See supra* notes 78-85 and accompanying text.

240. See *supra* notes 86-92 and accompanying text.

241. *See generally* JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2001); G. Bazemore, *Restorative Justice and Earned Redemption*, 41 AM. BEHAV. SCIENTIST 768 (1998); K. Daly & Russ Immarigeon, *The Past, Present, and Future of Restorative Justice: Some Critical Reflections*, 1 CONTEMP. JUST. REV. 21 (1998).

242. Cohen, *Advising Clients to Apologize*, *supra* note 3, at 1020; *see also* Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971) (describing mediation as having the capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another).

apology.[243] For those parties who are represented by counsel, their attorneys may help them make these decisions. Indeed, there is empirical evidence that lawyers can have a notable influence on their clients' settlement decisions.[244]

Through a process of counseling and deliberation, attorneys and clients together should attempt to evaluate the strategic and nonstrategic considerations surrounding apologies. David Binder, Paul Bergman, and Susan Price suggest that the attorney should engage in a process of counseling that assists the client in identifying the client's objectives, the possible options, and the likely consequences of those options, and in weighing the options given their probable consequences.[245] Importantly, the attorney ought to facilitate the client's consideration of both the legal and nonlegal (e.g., economic, psychological, social, moral, political, and religious) consequences of the decision[246] and recognize that objectives may change during the course of the representation.[247]

Attorneys, as a consequence, must pay attention to what Len Riskin describes as the "problem definition" of the matter in dispute.[248] Attorneys are trained to focus on settling a dispute in the

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243. Ethical rules reserve these decisions for the clients. *Model Rules of Professional Conduct* Rule 1.2(a) provides that a "lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2004).

244. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEXAS L. REV. 77 (1997) [hereinafter Korobkin & Guthrie, *Psychology, Economics, and Settlement*] (finding attorney influence on clients through education or explicit recommendations). *See also* DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING 186-87 (1977) (suggesting ways to minimize this influence); Sternlight, *supra* note 237, at 318-19 (describing dependence of client on attorney). *See generally* William L.F. Felstiner & Ben Pettit, *Paternalism, Power, and Respect in Lawyer-Client Relations*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 135 (Joseph Sanders & V. Lee Hamilton eds., 2000). For an empirical description of lawyer-client relations see HERBERT M. KRITZER, THE JUSTICE BROKER 55-67 (1990).

245. DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS 287-308 (1991); *see also* Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990); Gifford, *supra* note 103; Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1381-82 (1998) ("Prudential discussions between lawyer and client about the relative merits of particular courses of action help to achieve participatory and educated client decisionmaking.").

246. BINDER ET AL, *supra* note 245, at 2-15 (emphasizing the importance of nonlegal aspects of clients' problems); *see also* Nolan-Haley, *supra* note 245, at 1384 (arguing that the "content of attorney-client deliberation takes into account the totality of the clients' circumstances and may include the economic, social, psychological, moral, political, and religious consequences of actions.").

247. BINDER ET AL, *supra* note 245, at 29; *see also* Gifford, *supra* note 103, at 838-39 (emphasizing that information gained during the course of the representation or negotiation "often lead[s] the client to change his expectations concerning the negotiation or his preferences as to concessions").

248. Riskin, *supra* note 104 (describing problem definition in the context of mediation).

shadow of the law, with attention to the rights and responsibilities of the parties and to the likely outcome of a trial process. This focus defines the problem in its most narrow, legal sense.[249] As a general matter, attorneys are likely to be more attuned to the legal implications of the apology than are the parties. It is important for attorneys to educate their clients about these legal implications. As Jacqueline Nolan-Haley argues, "clients must have a general knowledge about the relevant law governing their case, so that during deliberation they may meaningfully evaluate alternative courses of actions."[250] In addition, attorneys may be more likely to evaluate the situation analytically rather than emotionally,[251] and to be less influenced by concerns for equity in responding to settlement offers than are litigants.[252] Accordingly, attorneys are likely to be well suited to assist the client in identifying the available alternatives and to identify and predict the probable legal consequences of the contemplated options.[253]

At the other end of the spectrum, a broader conception of the problem would include interests that are less likely to be the focus of a legal proceeding.[254] For example, a broad problem definition might include considerations of repairing and maintaining ongoing relationships, restoring equity, handling emotional reactions, achieving forgiveness — or the need for an apology. Attorneys are

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249. *Id.* at 19.

250. Nolan-Haley, *supra* note 245, at 1385.

251. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997); Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145 (2001); Korobkin & Guthrie, *Psychology, Economics, and Settlement*, *supra* note 244, at 87 ("[L]egal training teaches lawyers to analyze legal conflicts carefully and unemotionally rather than react to them viscerally."); *see also* Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 J. DISP. RESOL. 25 [hereinafter Menkel-Meadow, *Dispute Paradigm*]. Riskin writes:

> Lawyers are trained to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules, to focus on acts more than persons. This view requires a strong development of cognitive capabilities, which is often attended by the under-cultivation of emotional faculties.

Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 45 (1982).

252. Korobkin & Guthrie, *Psychological Barriers to Litigation Settlement*, *supra* note 97 (finding that attorneys were marginally less influenced by a concern for equity than were students in the role of litigants). *But cf.* Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999) (detailing a variety of ways that psychological heuristics may affect legal negotiations by attorneys); Sternlight, *supra* note 237 (detailing the same); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (demonstrating a variety of ways that psychological heuristics may affect the legal decisionmaking of judges).

253. *See* BINDER ET AL., *supra* note 245, at 273-74.

254. Riskin, *supra* note 104, at 20-21.

correspondingly likely to be less well suited to identify and weigh these nonlegal psychological and social considerations of the parties[255] — including the valuation of either giving or receiving an apology.

Therefore, attorneys should remain mindful of the nonlegal significance of apologies while guiding clients through a process of considering and weighing the options given both their legal and nonlegal consequences. In the process, attorneys must provide information to allow the client to understand the legal consequences of the options, while taking care to avoid monetizing the dispute when the client could gain more utility from a settlement that combines monetary and nonmonetary elements.[256]

In this way, defense attorneys have a key role to play in assisting their clients to critically evaluate the legal risks and benefits of an apology.[257] The traditional view has been to conceive of the defense attorney's role as "to protect their clients from having to admit wrongdoing or having to make legal compensation for the harms they cause."[258] A more nuanced advisory role, however, may be appropriate. Defense attorneys can help their clients identify the potential legal and nonlegal consequences of offering an apology. The attorney may be best positioned to evaluate the merits of the case, the probable outcomes of negotiation or trial, and the legal implications of the apology for those outcomes — legal implications for the possibilities for settlement, for liability judgments, and for damage awards. The defendant may be best positioned to evaluate the importance to her of offering the apology and of the other non-

255. *See* BINDER ET AL., *supra* note 245, at 272-73. Williams studied a sample of cases that were scheduled for trial. He found that in fifty-three percent of the cases that did proceed to trial, "the reason they went to trial was not a failure of the two attorneys to work out a framework for agreement. Rather, it was the failure of one lawyer or the other to 'bring his client along.' " Williams, *supra* note 11, at 24. Williams notes that one way to characterize this finding is as "a failure of one lawyer or the other to adequately communicate with his or her own client, by which I mean a failure to adequately understand the underlying interests and needs of one's own client." Williams, *supra* note 11, at 25 n.74.

256. *See* Korobkin & Guthrie, *Psychology, Economics, and Settlement*, *supra* note 244, at 134 (observing that clients may act in ways that maximize their utility, though not their wealth); Menkel-Meadow, *Dispute Paradigm*, *supra* note 251; Riskin, *supra* note 251, at 44 (noting that on the lawyer's "standard philosophical map" the "victory is reduced to a money judgment"); Sternlight, *supra* note 237, at 321-22 ("[The attorney] may regard these [nonmonetary] interests as having little or no value."); *id.* at 324 ("Lawyers will also tend to dismiss, as fluff, offers or requests for apology."). Moreover, lawyers may have to address their own disincentives to settle cases for less cash and an apology. *See* ROBERT H. MNOOKIN ET AL., BEYOND WINNING 118 (2000) ("As one plaintiff's attorney told us, 'You can't pay the rent with one-third of an apology.' "); *see also* Sternlight, *supra* note 237, at 322 ("[T]hese nonmonetary goals likely have little appeal for the attorney, who, after all, cannot take a one-third contingency of an apology."). *See generally* KRITZER, LET'S MAKE A DEAL, *supra* note 237, at 100-10.

257. *See generally* Cohen, *Advising Clients to Apologize*, *supra* note 3 (describing the role of the attorney in advising a client to apologize).

258. Williams, *supra* note 11, at 53 (describing this role).

tangible benefits of offering an apology.[259] In addition, particularly if a partial apology is contemplated, the defendant, assisted by counsel, must also consider aspects of the case that are likely to make such an apology more or less effective.[260] The defendant, then, in consultation with defense counsel, can determine whether or not to offer an apology given the way in which the defendant weighs these considerations.

Similarly, plaintiffs' attorneys may play a key role in assisting their clients in evaluating the credibility of an apology and any corresponding settlement offer.[261] Plaintiffs' attorneys can help their clients identify the potential legal and nonlegal consequences of accepting a settlement offer following or accompanied by an apology. Plaintiffs' attorneys may be best positioned to evaluate the merits of the case, the legal consequences for the plaintiff of the defendant's apology, and the effects of any applicable evidentiary rules. Moreover, plaintiffs' attorneys may be able to help their clients avoid an unjust financial settlement by explaining the client's legal entitlements and predicting the outcomes of accepting the offer, continuing to negotiate, or proceeding to trial.[262] In contrast, the client can provide an assessment of the importance and meaning that receiving the apology has for her. The plaintiff, then, in consultation with her attorney, can assess the degree to which she is satisfied with the settlement offer.

CONCLUSION

The findings reported here support the conclusion that apologies can be beneficial in facilitating settlement of disputes. The results also suggest, however, that apologies influence settlement in relatively complex ways. Several factors, such as the nature of the apology, the severity of the injury, and the other evidence of responsibility, affect the capacity of an apology to facilitate settlement. Full, responsibility-accepting apologies positively impacted participants' perceptions of the situation and the prospects for settlement. Conversely, partial sympathy-expressing apologies had fewer effects, had both positive

259. *See supra* note 11 (describing nonstrategic benefits of apologizing).

260. For example, the nature of the plaintiff's injuries, the degree to which the defendant appears responsible, etc.

261. *See, e.g.*, Cohen, *Advising Clients to Apologize*, *supra* note 3, at 1067 ("If, as the recipient of an apology, you know that the apologizer has apologized in such a way as to ensure insulation from legal liability, you may attach less worth to that apology than otherwise, and a plaintiff's lawyer should be sure to point this out to her client."). Conversely, plaintiffs' attorneys can raise the possibility with their clients that the other party's failure to apologize stems from the situational constraints of the legal system.

262. *See* Sternlight, *supra* note 11, at 274 (arguing that even in mediation "the attorney must be active and assertive to ensure that her client is not coerced by the opposing party").

and negative effects, and were more dependent on context. Policymakers, litigants, and lawyers must take into account these complex effects when making decisions about the appropriate role of apologies in settling civil disputes.