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Contrition in the Courtroom: Do Apologies Affect Adjudication?

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CONTRITION IN THE COURTROOM: DO APOLOGIES AFFECT ADJUDICATION?

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Apologies usually help to repair social relationships and appease aggrieved parties. Previous research has demonstrated that in legal settings, apologies influence how litigants and juries evaluate both civil and criminal defendants. Judges, however, routinely encounter apologies offered for instrumental reasons, such as to reduce a civil damage award or fine, or to shorten a criminal sentence. Frequent exposure to insincere apologies might make judges suspicious of or impervious to apologies. In a series of experimental studies with judges as research participants, we find that in some criminal settings, apologies can induce judges to be more lenient, but overall, apologizing to a judge is often unhelpful and can even be harmful.

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INTRODUCTION

Should a defendant apologize to a judge? A sincere expression of remorse might mollify a judge who feels angry toward a defendant, thereby shortening that defendant's sentence or reducing a civil damage award.[1] In civil cases, plaintiffs sometimes say that they want an apology at least as much as they want compensation.[2] Crime victims also commonly want—or even demand—an apology from the defendant.[3] Judges contend that apologies are helpful for defendants[4] and

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1 *See* ARTHUR W. CAMPBELL, LAW OF SENTENCING § 13:21, at 553 (3d ed. 2004) ("[F]our words said sincerely can have a powerful impact: 'Your Honor, I'm sorry.'"); AARON LAZARE, ON APOLOGY 1 (2004) ("Apologies have the power to heal humiliations and grudges, remove the desire for vengeance, and generate forgiveness on the part of the offended parties."); Mark Bennett & Deborah Earwaker, *Victims' Responses to Apologies: The Effects of Offender Responsibility and Offense Severity,* 134 J. SOC. PSYCHOL. 457, 462 (1994); Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 302 (2007) ("Judges tend to use their discretion to impose lighter sentences on remorseful defendants . . . ."); Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291, 291–92 (2000); Ken-ichi Ohbuchi, Masuyo Kameda & Nariyuki Agarie, *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm,* 56 J. PERSONALITY & SOC. PSYCHOL. 219, 219–20 (1989); Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 746 (2012) ("A simple expression of apology from the offender to the victim of a crime is often thought to be worthy of consideration as a mitigating factor."); Bernard Weiner, Sandra Graham, Orli Peter & Mary Zmuidinas, *Public Confession and Forgiveness,* 59 J. PERSONALITY 281, 291 (1991).

2 *See infra* note 62 and accompanying text.

3 *See* State v. Neidlinger, 498 So. 2d 189, 192 (La. Ct. App. 1986) (noting that the prosecutor argued to the jury in rebuttal that "[t]hey don't even get up here and say they're sorry they did this" (emphasis omitted)); ALFRED L. BROPHY, REPARATIONS: PRO & CON 11 (2006) ("[A] sincere apology may be more valuable and meaningful to some victims than money."); Mandeep K. Dhami, *Offer and Acceptance of Apology in Victim-Offender Mediation*, 20 CRITICAL CRIMINOLOGY 45, 54 (2012) (reporting a study of victim-offender mediations in the United Kingdom in which 91.67% of the victims accepted apologies when offered); Etienne & Robbennolt, *supra* note 1, at 297 ("Victims who receive apologies or believe that their offenders are remorseful are more likely to find emotional restoration . . . ."); Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice,* 2003 UTAH L. REV. 15, 22–23 (observing that in the context of "interactions between victims and their offenders when they are unmediated by formal criminal justice processing . . . the offer and acceptance of a sincere apology seems the most natural thing imaginable and almost always vital to the successful resolution of the offence and the restoration of the participants").

4 *See* Riggins v. Nevada, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) ("In a capital sentencing proceeding, assessments of character and remorse may carry great

occasionally even insist that parties or their attorneys apologize.[5] The late Chief Justice Warren Burger asserted that the "[m]odification of contempt penalties is common where the contemnor apologizes."[6] But do apologies really benefit defendants?

Apologies can be helpful. They can facilitate the settlement of civil disputes.[7] They might also promote the rehabilitation of a criminal offender,[8] as well as restore a sense of control and status to injured parties.[9] The possibility that an apology will contribute to healing both wrongdoer and victim has led many to support statutes that facilitate apologies and to encourage judges to elicit apologies as part of settlement or sentencing.[10] "Remorse and apology would teach of-

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weight and, perhaps, be determinative of whether the offender lives or dies."); United States v. Landeros-Lopez, 615 F.3d 1260, 1267 n.7 (10th Cir. 2010) ("We note that there are additional benefits to defendant allocution. It gives the defendant an opportunity to apologize and express remorse . . . ."); United States v. Clark, 918 F.2d 843, 848 (9th Cir. 1990) (affirming imposition of a public apology as a condition of supervised release because "[t]he record supports the conclusion that the judge imposed the requirement of a public apology for rehabilitation"), *overruled on other grounds by* United States v. Keys, 133 F.3d 1282 (9th Cir. 1998) (en banc).

5 *See* Coleman v. Moore, 87 S.W.2d 300, 302 (Tex. Civ. App. 1935) ("The Court (interrupting [an attorney]): . . . . Now I want an apology from each of you and I want it now."); *see also* Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1268–69 (2006) ("Reports abound in the media of judges requiring defendants to apologize as a condition of receiving probation rather than incarceration. Examples range from judges ordering drunk drivers to take out newspaper ads with an apology to the community, to requiring batterers to apologize to their spouses before women's groups, to ordering corporate polluters to write letters of apology for their environmental crimes and pay for newspaper advertisements detailing their conduct." (footnotes omitted)).

6 Groppi v. Leslie, 404 U.S. 496, 506 n.11 (1972); *see also In re* Coe, 903 S.W.2d 916, 918–20 (Mo. 1995) (after two justices indicated that they would change their votes if a criminal defense lawyer apologized for her professional misconduct, she complied and her punishment was reduced to a public reprimand rather than a suspension). *But see* State v. Hudson, No. 10 MA 157, 2011 WL 6231215, at *2–3 (Ohio Ct. App. Dec. 9, 2011) (finding attorney in contempt despite apology).

7 *See infra* note 88 and accompanying text.

8 *See* W. Jonathan Cardi, *Damages as Reconciliation*, 42 LOY. L.A. L. REV. 5, 14 (2008) ("Apology also serves the wrongdoer by helping to assuage guilt and restore self-image, and by opening the door to social reacceptance."); Etienne & Robbennolt, *supra* note 1, at 297 ("The opportunity to apologize to their victims and have some opportunity to be heard may be restorative.").

9 *See infra* note 57 and accompanying text.

10 *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 138 (2004) ("When offenders accept responsibility, express remorse, and apologize, victims can more easily heal, reconcile, and forgive."); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 350 (2008) [hereinafter Robbennolt, *Attorneys*] ("Many have begun to argue that advising legal clients to apologize may reap important benefits – including increasing the possibility of reaching an out-of-court settlement."); Marshall H. Tanick & Teresa J. Ayling, *Alternative Dispute Resolution by Apology: Settlement by Saying "I'm Sorry,"* HENNEPIN LAWYER, July–Aug. 1996, at 22, 25 ("Lawyers, litigants, and prospective litigants all should be aware, however, of the utility of contrition. Apologies should be part of the arsenal of resources brought to bear in addressing and resolving legal disputes.").

fenders lessons, vindicate victims, and encourage communities to welcome wrongdoers back into the fold."[11] An apology might even avoid the need for a legal intervention of any kind, as those who receive an apology are less likely to sue or complain about misconduct.[12]

Apologies can backfire, however, because they commonly include an admission of fault.[13] Many lawyers advise their clients to refrain from apologizing until after liability has been assigned.[14] Apologies also can be counterproductive in another important way. Many apologies in the legal system are offered in the presence of (or even directed at) a trial judge in the context of a settlement conference, a civil or criminal bench trial, or a criminal sentencing hearing. Trial judges surely hear a great many feigned apologies.[15] A judge who feels that an apology is insincere can become angry, which can make matters far worse for a defendant.[16]

Consider the example of Edward Oberwise, who apologized after he was convicted of sexual misconduct with minors.[17] At his sentencing hearing, Oberwise stated, "I just need to say to the Court how

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11 Bibas & Bierschbach, *supra* note 10, at 90.

12 *See* Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1122 (2002) ("An apology can prevent litigation . . . ."); Kathleen M. Mazor et al., *Health Plan Members' Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409, 413 (2004) (reporting that patients who received apologies for medical errors were less likely to seek legal advice); John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 220 (1985) (reporting that many libel plaintiffs sought "retraction, correction, or apology" before filing suit); Charles Vincent, Magi Young & Angela Phillips, *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (reporting that approximately 20% of medical malpractice claimants believe that they would not have filed suit had the medical provider offered an explanation and apologized).

13 *See infra* note 60 and accompanying text.

14 *See* Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1010 (1999) ("If a lawyer contemplates an apology, it may well be with a skeptical eye: Don't risk apology, it will just create liability."); Robbennolt, *Attorneys*, *supra* note 10, at 353 ("[D]efense counsel, and insurance companies have traditionally worried that apologizing will . . . be viewed as an admission leading to more certain legal liability. Consequently, many defendants avoid apologizing and are so counseled by their attorneys and insurers. Concern over the possible adverse effects of apologies stems largely from the potential use of an apology as an admission of responsibility." (footnotes omitted)).

15 *See* United States v. Fonner, 920 F.2d 1330, 1335 (7th Cir. 1990) (describing a defendant's "last-minute apology" as a "deceitful little show"); Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 131 (2006) ("Prosecutors may confront a savvy criminal defendant who is not remorseful, but who claims remorse in order to obtain a reduced sentence and is proficient in saying the right things before a susceptible judge.").

16 *See* Albert Pepitone, *Social Psychological Perspectives on Crime and Punishment*, 31 J. SOC. ISSUES 197, 211 (1975) ("[W]hen a remorseful offender . . . is judged to be faking, he is likely to be punished more severely than if he were unrepentant or at least silent."); Ward, *supra* note 15, at 143–45 (collecting examples of apologies by criminal defendants that seem to backfire).

17 *See* Oberwise v. Sec'y, Dep't of Corr., No. 8:11–CV–1124–T–30TGW, 2012 WL 527173, at *5 (M.D. Fla. Feb. 17, 2012).

sorry I am."[18] The judge responded by angrily rebuking Oberwise, asserting (among other things), "I think you are sorry, but I think you are sorry you got caught."[19] The judge then sentenced Oberwise to a lengthy prison term, prompting an appeal in which Oberwise argued that the sentence was motivated by a vindictive failure to recognize his remorse.[20] Oberwise's apology illustrates the dilemma defendants face. Whether they are sincere or merely believe that an apology will help them in court as it does nearly everywhere else, apologizing might turn out to be detrimental instead. In particular, apologizing to judges, who are apt to be skeptical about the motives of parties who appear before them, might be unwise.[21]

The conventional wisdom seems to be that defendants benefit by apologizing to judges. In this Article, we challenge that assumption. Our concern with apologies is not that they harm defendants because they admit fault. Rather, we worry that apologies are often directed at unreceptive judges. Judges report being influenced by expressions of remorse,[22] but we have our doubts. Because judges so frequently hear apologies, judges might become inured to their influence and might even react cynically or negatively to apologies.[23] We suspect that cases like that of Mr. Oberwise, in which a defendant offered an apology that most people in most settings would accept as sincere but that the trial judge rejected, are not unusual.

Although numerous studies examine the effect apologies have on litigants, lawyers, and jurors, no studies to date systematically investigate the effect apologies have on trial judges. Because judges decide many civil cases based on pretrial motions, preside over many civil settlement conferences, resolve about half of all civil cases that pro-

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18 *Id.*

19 *Id.* The judge went on at some length in response to Oberwise's statement:

> Please, you are insulting my intelligence. I don't want to hear anything. I have heard enough. You can't rehabilitate yourself with me now. I sat here and gave you a chance to say everything you wanted to say and not once did I ever see you look at these people or look at me and say I reflected on this. I am so ashamed and sorry for what I did. I don't think I will ever get over it. I will never forgive myself. I didn't hear a word like that.

Id. at *6.

20 *See id.* at *5–6.

21 *See* Robinson et al., *supra* note 1, at 746–47 (collecting examples of judges who express skepticism about apologies).

22 *See infra* note 195 and accompanying text.

23 *See* D. Brock Hornby, *Speaking in Sentences*, 14 Green Bag 2d 147, 156 (2011) ("[D]efendants often apologize to their victims, present or not, sometimes turning to address them directly. Defendants apologize to parents, children, spouse, or siblings, seeking forgiveness. Occasionally, defendants apologize to the prosecutor, the community, or the United States for their destructive behavior.").

ceed to trial,[24] and impose virtually all criminal sentences,[25] trial judges are probably the most critical actor in the legal system with regards to the potential influence of apologies.

In this Article, we report the results of the first experimental investigation of the impact apologies have on trial judges. We conducted six studies involving a total of 996 judges serving in federal, state, and bankruptcy courts. In our experiments, we isolated the impact of a defendant's apology on judicial decision making by controlling for other variables that might influence judgment.

Should a defendant apologize to the judge? We find that a defendant's apology in court is generally ineffective, sometimes counterproductive, and only occasionally beneficial.

I
Previous Research on Apologies

A. How Apologies Work

Apologies are ubiquitous. The most mundane social transgressions, from accidentally stepping on someone's toes to accidentally sending an e-mail reply "to all," typically produce an apology.[26] Celebrities, politicians, and corporate executives apologize publicly for everything from individual misconduct to organizational disasters.[27] Spouses apologize to each other for everything from forgetting to buy

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24 *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 4 n.13 (2007) ("In addition to presiding over jury trials, trial judges facilitate settlements, resolve cases on motion, and decide more cases in bench trials than there are jury trials." (internal citations omitted)); Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. Empirical Legal Stud. 755, 773–74 (2004).

25 *See* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 Duke L.J. 951, 953 (2003) (stating that once a defendant "is tried and convicted of a noncapital crime, in all federal courts, and in almost all state courts, his jury will have no role in his sentencing").

26 *See* Robert Fulghum, All I Really Need to Know I Learned in Kindergarten 2 (2003) ("Say you're sorry when you hurt somebody."); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. 1135, 1135 (2000) (describing the level of apologizing as an "apology mania" (quoting Barbara Amiel, *Saying Sorry Is Fine, but Only to a Point*, Maclean's, May 25, 1998, at 11); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 Law & Soc'y Rev. 461, 461 (1986) ("People constantly utter words of apology in both Japan and the United States, most often to seek indulgence for a minor social breach, to ask for permission to violate conventional rules, or to express sympathetic regret for a mishap.").

27 *See* Erin O'Hara O'Connor, *Organizational Apologies: BP as a Case Study*, 64 Vand. L. Rev. 1959, 1977 (2011) ("There is ample evidence that organizations can use apologies to produce some of the same benefits that individual transgressors produce when they apologize."); White, *supra* note 5, at 1266 ("[P]ublic apologies are ubiquitous in American culture."); Ken Ritter, *O.J. Simpson Sentenced to at Least 15 Years*, Associated Press, Dec. 5, 2008 (quoting Simpson at his sentencing hearing on armed robbery charges as stating, "I didn't want to steal anything from anyone. . . . I'm sorry, sorry." (omission in original)); Paul Slansky, Arleen Sorkin & Helicopter, *Mistakes Were Made*, N.Y. Times, May 28, 2006, at C11 (collecting various apologies).

milk on the way home to marital infidelity.[28] Leaders of nations apologize for their predecessors' actions.[29] Even Olympic athletes apologize to their fans for failing to succeed or for violating the norms of their sport.[30]

Because they are so common and so critical to harmonious social life, apologies can serve many different social functions.[31] Generally speaking, apologies tend to play the role of a social palliative, mending relationships between the wrongdoer and the aggrieved party or the community.[32] Effective apologies convince the victim or victims that the wrongdoer's conduct should not be taken as evidence that the wrongdoer is as blameworthy as the conduct otherwise might imply.[33] Apologies are intended to convince the recipient that the transgressor's actions reflect a less malevolent mental state or that the transgressor's long-term proclivities are not as destructive as his or her exhibited behavior would suggest.[34] A successful apology restores at least some of a transgressor's status as a trustworthy individual.[35]

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28 *See* Gini Kopecky, *How to Say You're Sorry When You Don't Really Mean It and He Started It Anyway*, REDBOOK, Nov. 1991, at 52, 58.

29 *See* Connie Cass, *It's Not Easy for Presidents to Say 'I'm Sorry,'* ASSOCIATED PRESS, Feb. 25, 2012 (discussing presidential apologies).

30 *See* Chris Johnston, *Saying Sorry: Hollingsworth Comforts Findlay After Olympic Disappointment*, HUFFINGTON POST CAN. (Aug. 5, 2012, 4:00 AM), http://www.huffingtonpost.ca/2012/08/05/saying-sorry-hollingsworth-comforts-findlay_n_1743183.html (discussing some recent examples).

31 *See* LAZARE, *supra* note 1, at 44 (listing the following psychological needs of the offended party, one or more of which must be addressed for an apology to succeed: "restoration of self-respect and dignity," "assurance that both parties have shared values," "assurance that the offenses were not their fault," "assurance of safety in their relationships," "seeing the offender suffer," "reparation for the harm caused by the offense," and "having meaningful dialogues with the offenders").

32 *See* Wagatsuma & Rosett, *supra* note 26, at 461 ("Apology is a social lubricant used every day in ongoing human relationships.").

33 *See* Etienne & Robbennolt, *supra* note 1, at 296 ("[A]pologies and expressions of remorse influence beliefs about the general character of the wrongdoer and the entrenchment of the wrongful behavior—wrongdoers who apologize are viewed as being of better character and as being less likely to engage in similar behavior in the future." (footnote omitted)); Seiji Takaku, *The Effects of Apology and Perspective Taking on Interpersonal Forgiveness: A Dissonance–Attribution Model of Interpersonal Forgiveness*, 141 J. SOC. PSYCHOL. 494, 495 (2001) (stating that after an apology, "the offense and the intention that produced it are less likely to be perceived as corresponding to some underlying trait of the offender").

34 *See* Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, *in* REPENTANCE: A COMPARATIVE PERSPECTIVE 143, 157 (Amitai Etzioni & David E. Carney eds., 1997) ("The repentant person has a better character than the unrepentant person . . . ."); Etienne & Robbennolt, *supra* note 1, at 295 ("[W]rongdoers who apologize are thought to have acted less intentionally and are blamed less for their misdeeds."); 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, 137–38 (1997) (reporting results of a study showing that "[w]hen expression of speaker responsibility, offer of repair, and promise of forbearance were all absent, subjects indicated that the apology was least appropriate . . . and that they blamed the speaker more and wanted to sanction him more").

35 *See* Cohen, *supra* note 14, at 1015–23 (describing the benefits of apologies in civil litigation); Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247, 253–54

The power of an apology to restore status makes it tempting for wrongdoers to offer insincere apologies.[36] Appreciating the potential power of an apology, a wrongdoer might apologize disingenuously to gain some advantage.[37] Apologies often consist of what economists call "cheap talk."[38] That is, apologies can be costless utterances for the transgressor that hold out the promise of restored status. An apology might need to be costly to transgressors in order to show that they are willing to pay a price to prove they are worthy of trust, particularly if the underlying conduct is egregious.[39] Some conduct is so severe that a meaningful apology is simply impossible.[40] In many circumstances, however, merely stating an apology can benefit the wrongdoer, making it tempting to offer a feigned apology. People understand this well and react negatively to apologies that they perceive as insincere.[41] An insincere apology can suggest that the wrongdoer is willing to attempt to deceive the victim, thereby adding insult to injury.[42] Alternatively, an insincere apology suggests that the

(2005); Etienne & Robbennolt, *supra* note 1, at 297–98 ("[O]ffenders who apologize may be able to . . . begin to repair their relationships with their victims and society, improve their reputations, and begin a process of reintegrating into society."); O'Hara & Yarn, *supra* note 12, at 1141–43 (2002) ("Apology is one of several types of remedial actions 'designed to convince the audience that an undesirable event should not be considered a fair representation of what the actor is "really like" as a person.'" (quoting BARRY R. SCHLENKER, IMPRESSION MANAGEMENT: THE SELF-CONCEPT, SOCIAL IDENTITY, AND INTERPERSONAL RELATIONS 154 (1980))).

36 *See* LAZARE, *supra* note 1, at 145–56 (providing examples of strategic apologies calculated "to avoid abandonment, stigmatization, damage to reputation, retaliation, or punishment of any kind").

37 *See id.* at 9 ("With a pseudo-apology, the offender is trying to reap the benefits of apologizing without having actually earned them.").

38 *See id.* at 8 (noting the increase in apologies and commenting that "many of these apologies have been described as empty, shallow, hollow, cheap, insincere, fraudulent, or 'just talk'").

39 *See* Benjamin Ho, *Apologies as Signals: With Evidence from a Trust Game*, 58 MGMT. SCI. 141, 143–47 (2012) (describing an effective apology as a communication that sends a costly signal).

40 For example, in describing his role in the Holocaust, Albert Speer reportedly stated, "[t]here is no apology or excuse I can ever make. The blood is on my hands. I have not tried to wash it off—only to see it." Tim Page, *'World Walk,' Albert Speer at Spandau*, N.Y. TIMES, Aug. 5, 1986, at C14.

41 *See* Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527, 538 (2001) ("When victims perceive apologies to be insincere and designed simply to 'cool them out,' they often react with more rather than less indignation."); Jennifer K. Robbennolt, *Apologies and Settlement*, 45 CT. REV. 90, 93 (2008) ("[I]nsincere apologies may actually cause people to react negatively."); Daniel P. Skarlicki, Robert Folger & Julie Gee, *When Social Accounts Backfire: The Exacerbating Effects of a Polite Message or an Apology on Reactions to an Unfair Outcome*, 34 J. APPLIED SOC. PSYCHOL. 322, 336 (2004) ("Manipulative intention mediated the effect of the apology and the polite message on both fairness perceptions and the extent to which participants reacted in a spiteful way toward the alleged offerer.").

42 *See* LAZARE, *supra* note 1, at 117 ("[B]y giving the victim additional reasons for distrust, insincerity can subvert even the most carefully articulated apology."). *But see id.* ("In some cases, however, insincere apologies can partially succeed, because they may address one or more of the victim's psychological needs.").

wrongdoer does not truly understand what it is that he or she did wrong.[43] Statements like, "I am sorry you feel that way," hardly even qualify as apologies and might suggest that the speaker is affirmatively stating that he or she is *not* remorseful, especially if said in a sarcastic tone.[44] Either way, an insincere apology makes the wrongdoer and the misconduct seem worse.[45] In effect, attempting to apologize raises the stakes for the wrongdoer, making both redemption and reprobation more likely.

Offering a convincing apology, however, can be difficult, even for a sincerely remorseful wrongdoer. Effective apologies do not have a precise formula.[46] Many people who are truly sorry struggle to find the right words. Furthermore, words alone are sometimes insufficient. The target of an apology usually wants to see that the transgressor is experiencing heartfelt remorse for his or her actions. Anxiety and genuine remorse, however, can interfere with the transgressor's ability to appropriately or convincingly display remorse. Deviating from what the target expects or wants to hear and see from the transgressor can lead the target to reject the apology as insincere.[47] Atonement of some sort beyond mere words might also be necessary to make the apology credible.

Although they vary widely in form, apologies have four basic components: accepting responsibility, expressing remorse, offering recompense, and promising forbearance.[48] While not all of these elements

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43 *See id.* at 8 ("When an acquaintance says to you, 'I apologize for whatever I may have done,' he or she has failed to apologize adequately, because he or she has not acknowledged the offense and may not even believe an offense was committed.").

44 *See id.* at 8–9; Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 498 (2003) [hereinafter Robbennolt, *Legal Settlement*] (reporting research indicating that "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").

45 *See* LAZARE, *supra* note 1, at 9 ("People who offer a pseudo-apology are unwilling to take the steps necessary for a genuine apology; that is, they do not acknowledge the offense adequately, or express genuine remorse, or offer appropriate reparations, including a commitment to make changes in the future.").

46 *See* O'Hara & Yarn, *supra* note 12, at 1131 (stating that a meaningful apology is a "somewhat amorphous phenomenon" that can be "difficult to capture in words").

47 *See* Robinson et al., *supra* note 1, at 746 ("Often, courts will closely parse the language of an offender's statement of apology in order to determine whether true remorse is present.").

48 *See* ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 113 (1971) (stating that a full apology includes "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"); LAZARE, *supra* note 1, at 107 (identifying four elements of an apology: "acknowledgment of the offense"; "communicating remorse and the related attitudes

are always essential, the core of most successful apologies is the acceptance of responsibility and expression of remorse for some wrongdoing.[49] A successful apology must convince the recipient that the wrongdoer's conduct did not reflect his or her true nature. To accomplish that, wrongdoers must convince the recipient that they understand that their actions were wrong and that the recipient can trust them not to engage in such conduct in the future. When a wrongdoer apologizes successfully, the recipient (or an observer to the apology) is likely to perceive the wrongdoer to be less blameworthy,[50] to take a more positive view of the wrongdoer's character,[51] to experience more positive (and fewer negative) emotions towards the wrongdoer,[52] to believe the wrongdoer less likely to recidivate,[53] and to forgive the wrongdoer.[54] In short, apologies that are accepted as sin-

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of forbearance, sincerity, and honesty"; "explanations"; and "reparations"); NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 3 (1991) (identifying three elements of an apology: "acknowledgement of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done"); Dhami, *supra* note 3, at 52 tbl.2 (identifying five elements of an apology: admit wrongdoing; acknowledge harm; express remorse; offer forbearance; offer reparation); O'Hara & Yarn, *supra* note 12, at 1133 (identifying four elements of a full apology: identification of the wrongful act, remorse, promise to forbear, and offer to repair).

49 *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 115 (1998) ("Full acceptance of responsibility by the wrongdoer is the hallmark of an apology."); TAVUCHIS, *supra* note 48, at 23 (defining an apology as "an expression of sorrow and regret"); Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742, 742 (1982) ("Apologies are admissions of blameworthiness and regret for an undesirable event, for example, a transgression, a harmful act, an embarrassing incident."); Robbennolt, *Attorneys*, *supra* note 10, at 352 n.7 (identifying acceptance of responsibility as key component of an apology).

50 *See* Darby & Schlenker, *supra* note 49, at 746, 749 (finding in two studies that child subjects attributed less responsibility or blame to wrongdoers when the wrongdoers apologized).

51 *See id.* at 749 (finding more positive views of wrongdoer who apologized); Gold & Weiner, *supra* note 1, at 291–92; Ohbuchi et al., *supra* note 1, at 222 (finding that subjects "generally had more favorable impressions" of a wrongdoer who apologized than one who did not); Gary S. Schwartz, Thomas R. Kane, Joanne M. Joseph & James T. Tedeschi, *The Effects of Post-Transgression Remorse on Perceived Aggression, Attributions of Intent, and Level of Punishment,* 17 BRIT. J. SOC. CLINICAL PSYCHOL. 293, 296–97 (1978); Weiner et al., *supra* note 1, at 285.

52 *See* Bennett & Earwaker, *supra* note 1, at 462; Gold & Weiner, *supra* note 1, at 291 (noting that remorse indicates that a wrongdoer has already "suffered," reducing the victim's negative emotions and desire for punishment); Ohbuchi et al., *supra* note 1, at 222 (finding that subjects "felt more pleasant" to a wrongdoer who apologized); Jennifer F. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressors,* ACAD. PSYCHOL. BULL., Mar. 1984, at 49, 54; Takaku, *supra* note 33, at 495; Weiner et al., *supra* note 1, at 286.

53 *See* Etienne & Robbennolt, *supra* note 1, at 296; Gold & Weiner, *supra* note 1, at 291–92; Schwartz et al., *supra* note 51, at 293.

54 *See* Darby & Schlenker, *supra* note 49, at 749; Gold & Weiner, *supra* note 1, at 291–92; Ken-ichi Ohbuchi & Kobun Sato, *Children's Reactions to Mitigating Accounts: Apologies, Excuses, and Intentionality of Harm*, 134 J. SOC. PSYCHOL. 5, 12 (1994); Weiner et al., *supra* note 1, at 291.

cere can reduce anger towards wrongdoers and restore their status as trustworthy individuals, thereby convincing recipients that the wrongdoer might not need to be punished as severely as an unrepentant wrongdoer.[55]

B. Apologies in the Legal System

Apologies in legal settings might be particularly valuable. The power of an apology to reconcile a wrongdoer and a victim might facilitate a more satisfactory resolution of a legal dispute than litigation can produce.[56] An apology can help restore a victim's sense of status and control.[57] Because an apology requires acceptance of responsibility, offering a sincere apology can constitute an important early step for an offender as well.[58]

The power of apologies to promote reconciliation has led many to advocate for reforms to the legal system that would encourage wrongdoers to apologize.[59] The most commonly expressed concern

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55 *See* Etienne & Robbennolt, *supra* note 1, at 296–97; Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, *in* THE PASSIONS OF LAW 168, 169 (Susan A. Bandes ed., 1999) ("[R]emorse at least seems to call for mitigation of punishment.").

56 *See* Cardi, *supra* note 8, at 10 ("Even if damages were available for social harm, money is particularly unsuited for such repair. Reconciliation is a way of repairing such injury, a means of making the tort victim whole." (footnote omitted)); Etienne & Robbennolt, *supra* note 1, at 295 ("[A]pologies and other expressions of remorse have been found to produce a range of effects that tend to be positive for both apologizers and recipients of apologies."); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 293–94 (2003) (arguing that an offender's expression of remorse demonstrates respect for his or her victim).

57 *See* Etienne & Robbennolt, *supra* note 1, at 297 ("Victims who receive apologies . . . are more likely to find emotional restoration [and] to feel a reestablished sense of security . . . ."); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution,* 39 UCLA L. REV. 1659, 1698 (1992) ("[B]y apologizing, we deny the diminishment of the victim, and our relative elevation, expressed by our wrongful action."); White, *supra* note 5, at 1274 ("[A]pologies heal [by] . . . restoring self-respect and dignity, assuring victims that the offense wasn't their fault, allowing victims to feel secure that the offense won't happen again, validating the victims' experience, and evening the score." (internal quotes omitted)).

58 *See* Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545, 548 (2000) ("Studies conducted on criminal-victim mediation programs in the United States reveal that offering an apology to the victim is an important issue for 90% of the offenders who voluntarily choose to participate in such a program. Thus, there may be an innate desire on the part of some offenders to apologize for their injurious acts even in the absence of forgiveness." (footnote omitted)); Etienne & Robbennolt, *supra* note 1, at 297–98 ("[O]ffenders who apologize may be able to relieve their guilt and assuage other negative emotions, begin to repair their relationships with their victims and society, improve their reputations, and begin a process of reintegrating into society."); Strang & Sherman, *supra* note 3, at 37 ("Offenders derive an increased sense of respect from restorative justice processes.").

59 *See* Robbennolt, *Legal Settlement*, *supra* note 44, at 462 (reviewing efforts by states to promote apologies); Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions,* 81 B.U. L. REV. 289, 311–20 (2001) (arguing for reforms that facilitate

about apologies is that they require admitting to culpability.[60] A defendant who apologizes for harming a victim cannot credibly argue that he or she is not responsible for that harm. Not surprisingly, many lawyers advise their clients not to apologize.[61] In civil cases however, the failure to apologize before trial can impede settlement because some victims might find a settlement that includes an apology more attractive than one that does not.[62] In criminal cases, failing to apologize before trial arguably undermines the goals of rehabilitation and reconciliation.[63]

To facilitate apologies, legislatures in many states have adopted reforms intended to provide some protection for defendants who apologize.[64] Though these reforms vary, they all tend to make pretrial

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apologies, such as court-ordered apologies and apologies insulated from legal liability, in order to promote the resolution of legal disputes).

60 *See* Latif, *supra* note 59, at 308 ("The current legal system treats apologies as admissions of guilt that can be used against an apologizer."); O'Hara & Yarn, *supra* note 12, at 1170 ("[A]pologies include admissions of fault . . . ."); Pepitone, *supra* note 16, at 210 ("An offender who expresses remorse verbally . . . or otherwise at least implicitly confesses to the crime."); Robbennolt, *Legal Settlement*, *supra* note 44, at 465 ("[T]he conventional wisdom among legal actors has been that an apology will be viewed as an admission of responsibility . . . .").

61 *See* Cohen, *supra* note 14, at 1010 ("Parents, or at least good parents, teach children to take responsibility when they have wronged another: *Apologize and make amends.* In contrast, lawyers typically counsel the opposite."); Robbennolt, *Attorneys*, *supra* note 10, at 353 ("[M]any defendants avoid apologizing and are so counseled by their attorneys and insurers."); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1186 (1997) ("Even when individual parties are suited to the apology ritual, the possibility for apology may never arise if their lawyers are present.").

62 *See* Cardi, *supra* note 8, at 13 ("[A]pology is often a tort plaintiff's chief aim, with legal action serving only as a backstop to the wrongdoer's failure to apologize."); Thomas H. Gallagher, Amy D. Waterman, Alison G. Ebers, Victoria J. Fraser & Wendy Levinson, *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors,* 289 J. AM. MED. ASS'N 1001, 1004 (2003) (finding that patients want to receive apologies for medical errors); Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 180 (2000) ("Tort plaintiffs often claim that what they really wanted was an apology and brought suit only when it was not forthcoming or, that when they received an apology it 'was the most valuable part of the settlement.'"); White, *supra* note 5, at 1262 ("Many civil rights plaintiffs want apologies."); Amy B. Witman, Deric M. Park & Steven B. Hardin, *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES INTERNAL MED. 2565, 2566 (1996) (reporting a survey of patients evaluating hypothetical cases of injury and finding that "[n]early all respondents (98%) desired or expected the physician's active acknowledgement of an error" which could "range[ ] from a simple acknowledgement of the error to various forms of apology").

63 *See* Etienne & Robbennolt, *supra* note 1, at 297–98 (discussing the restorative benefits that criminal defendants experience when they apologize to their victims and noting that recidivism rates are lower for offenders who apologize); Strang & Sherman, *supra* note 3, at 28 ("[I]t appears that the expression of remorse and a genuine desire for reconciliation on the part of the offender is a significant predictor of offenders' desistance from future offending."); Ward, *supra* note 15, at 154 (identifying courts that have concluded that "expressing remorse at the time of sentencing was too late to be considered sincere").

64 *See* Jeffrey S. Helmreich, *Does 'Sorry' Incriminate? Evidence, Harm and the Protection of Apology*, 21 CORNELL J.L. & PUB. POL'Y 567, 569 (2012) ("Beginning in 1986, a growing number of states have adopted what have been called 'apology laws'—protective measures

apologies inadmissible as evidence of culpability.[65] To some extent, such protection already exists because statements made during settlement negotiations usually are inadmissible.[66] But the reforms are meant to go further by ensuring that apologies, whether part of settlement talks or not, cannot be used against the defendant in court. The goal is to allow defendants the opportunity to express remorse while retaining the opportunity to defend themselves from liability should the case proceed to trial.[67] Some research suggests that such laws are effective at promoting settlement.[68]

The problem with reforms that are meant to shield apologies is that they can undermine the value of an apology to a victim and can induce defendants to offer insincere apologies. Because an effective apology might reduce the amount of damages a civil defendant pays or the length of the sentence a criminal defendant must serve, an apology is potentially valuable.[69] The stakes are high in many legal proceedings, making the incentives for effective apologies—sincere or otherwise—high as well. Statutes that shield apologies can eliminate any real cost to the defendant of offering an apology.[70] Part of the value of an apology lies in the wrongdoers making themselves vulnera-

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designed to encourage injurers to apologize by expressly ensuring that at least some types of apologies cannot be used against them in litigation."); Robbennolt, *Attorneys*, *supra* note 10, at 350 ("Over the past decade more than 35 states have passed legislation to amend the rules of evidence to make inadmissible some forms of apology."); Robbennolt, *Legal Settlement*, *supra* note 44, at 462; William K. Bartels, Note, *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, 151 (2001).

65 *See* Robbennolt, *Legal Settlement*, *supra* note 44, at 462 ("[L]egislatures in several states have enacted statutes that are intended to encourage and protect apologies by making them inadmissible.").

66 *See* FED. R. EVID. 408 (making settlement discussions inadmissible for many purposes).

67 *See* FED. R. EVID. 408 advisory committee's note (justifying the inadmissibility of settlement or compromise offers because "the offer may be motivated by a desire for peace rather than from any concession of weakness of position").

68 *See, e.g.*, Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141, 162 (2011) ("We see that the apology laws reduce the total number of the insignificant injury cases that tend to settle quickly as well as reducing the payment size and increasing the settlement speed of cases involving major injuries/death.").

69 *See* Richard Weisman, *Being and Doing: The Judicial Use of Remorse to Construct Character and Community*, 18 SOC. & LEGAL STUD. 47, 51 (2009) ("Moral performances in law are affected by their proximity to law's own coerciveness, that is, the power of the court to confer benefits or to impose punishments. . . . [T]here is always the possibility that expressions of self-condemnation will be more strategic than authentic, more calculated and ulterior than spontaneous.").

70 *See* Robbennolt, *supra* note 41, at 91 ("[R]emoving the legal consequences of apologizing would diminish the moral content of the apology.").

ble.[71] Statutes that undermine the risks associated with an apology dramatically reduce the cost of apologizing, thereby cheapening it.[72] Such statutes might also encourage feigned apologies.

Apologies offered after the court has determined culpability are also potentially troublesome. Having lost the case, the wrongdoer now has little left to lose and possibly much to gain by apologizing. Knowing this, the judge or jury might be skeptical of the apology's sincerity. It is often too late to offer an effective apology after liability has been established.[73] Vigorously maintaining one's innocence also makes it hard to own up to wrongdoing in a way that a victim, a judge, or a jury will find meaningful, even though some apologies offered in such circumstances might be heartfelt.

The rewards associated with apologizing in criminal cases make sorting sincere apologies from feigned ones a difficult task for many judges. The federal sentencing guidelines offer a two-step reduction in the offense level for criminal defendants who accept responsibility for their crimes, which can be demonstrated by an apology.[74] Many states have similar systems.[75] Rewarding an apology, however, undermines its value and risks turning the contrition process into an empty ritual. Moreover, defendants who apologize face a dilemma as to how to deliver it.[76] Rehearsing an apology can drain it of emotion, making it seem manufactured.[77] But an extemporaneous apology is also risky. Much is at stake and an anxious defendant might stumble, inadvertently using words or exhibiting behavior that might anger the

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71 *See* White, *supra* note 5, at 1274–75 ("[T]he offender, having originally abused his or her power in hurting the victim, is placed in the vulnerable position of giving the victim the power to absolve the wrongdoing or not to do so.").

72 *See* Taft, *supra* note 26, at 1153–54 (criticizing such statutes as draining apologies of moral worth).

73 *See* Robinson et al., *supra* note 1, at 743 ("But a defendant who acknowledges his guilt only after he is convicted cannot expect much leniency."); Ward, *supra* note 15, at 154 (noting that some trial courts believe that expressions of remorse during sentencing cannot be considered sincere).

74 *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2012) (providing for a two-level reduction in offense level for an offender who "clearly demonstrates acceptance of responsibility for his offense"); *see also* Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1515–21 (1997) (asserting that the system actually functions to reward guilty pleas rather than true expressions of remorse).

75 *See* Robinson et al., *supra* note 1, at 745–46 (reviewing state statutes that require consideration of acceptance of remorse in sentencing); Ward, *supra* note 15, at 131 ("Many state courts have found remorse to be an appropriate mitigating factor to consider when assigning criminal punishment.").

76 *See* O'Hear, *supra* note 74, at 1555 ("To convey humility and sincere regret under such circumstances cannot be a simple matter. Performance in the formal setting of the courtroom may be particularly problematic.").

77 *See* Scott v. United States, 419 F.2d 264, 271 n.33 (D.C. Cir. 1969) ("[A] glib willingness to admit guilt in order to 'secure something in return' may indicate quite the opposite of repentance . . . .").

judge.[78] In an environment like this, where scripted apologies might be genuine and emotional outpourings might look awkward, it can be difficult for judges to identify which defendants are sincerely remorseful.[79]

Incorporating apologies into the legal system presents other difficulties as well. Judges might assess apologies unevenly and erratically.[80] In criminal cases, innocent defendants understandably might be reluctant to apologize.[81] Race or other invidious factors might also play a role in how judges evaluate apologies because judges might be more willing to view apologies from defendants with certain characteristics as sincere.[82]

C. Previous Research on Apologies in Legal Settings

Whether genuine or feigned, many believe that apologies help defendants. Numerous legal scholars have asserted that defendants who apologize receive better treatment than defendants who do not.[83] Judges have stated that the presence or absence of remorse has influenced their judgments.[84] Some research suggests that a truly remorse-

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78 *See* Ward, *supra* note 15, at 143–45 (describing examples of awkwardly worded apologies that draw negative reactions from judges).

79 *See id.* at 167 ("No one really knows what remorse is—and courts certainly don't seem to know it when they see it."); *see also* Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423, 446–47 (2007) (suggesting that some apologies offered in public settings are more likely to be viewed merely as a "public linguistic performance" that raises suspicion about the apologizer's remorse or repentance).

80 *See* Ward, *supra* note 15, at 164–66 (discussing the many difficulties with rewarding criminal defendants for apologizing).

81 *See id.* at 157 ("Frequently, a criminal defendant chooses to exercise his Fifth Amendment right against self-incrimination . . . by either remaining silent or continuing to profess innocence. The reasoning is clear: in order to maintain a viable appeal, a defendant must not render his claims moot by acknowledging guilt and expressing remorse . . . .").

82 *See* O'Hear, *supra* note 74, at 1556 ("[A] particular focus on the problems of truly knowing a defendant's state of mind adds new dimensions to the concerns over disparity, discrimination, and dishonesty . . . .").

83 *See* Bibas & Bierschbach, *supra* note 10, at 92 ("Judges, sentencing juries, the news media, and the public overwhelmingly weigh remorse heavily in disposing of criminal cases and in assessing offenders as persons."); *id.* at 93 ("[T]he presence or absence of remorse, contrition, or apology can greatly help or hurt defendants."); Mitchell A. Stephens, *I'm Sorry: Exploring the Reasons Behind the Differing Roles of Apology in American and Japanese Civil Cases*, 14 WIDENER L. REV. 185, 192 (2008) ("[T]he law is replete with examples in which an apology, or lack thereof, affected the proceedings of both civil and criminal cases. Apology has played a role in the assessment of damages, and has been specifically noted in cases of contempt and libel." (footnotes omitted)); Weisman, *supra* note 69, at 48 ("That expressions of remorse – when believed – mitigate punishment in law and diminish the social disapproval of transgressors in more informal settings is by now a commonplace observation amply documented both in legal and criminological scholarship and in experiments in social psychology . . . .").

84 *See, e.g.*, Riggins v. Nevada, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) ("In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies."); State v.

ful criminal defendant will be treated more leniently than an unrepentant one.[85] When judges accept a defendant's apology, they often take it into account in imposing a criminal sentence.[86] As noted above, in many jurisdictions, judges must recognize a defendant's acceptance of responsibility for his or her actions and explicitly factor this into their sentencing decisions.[87]

Apologies affect outcomes in civil cases as well. Scholars, lawyers, and judges claim that many plaintiffs want an apology and will be more apt to settle if they receive one.[88] Victims who receive apologies might not even sue.[89] The effect of apologies on fact finding in civil cases seems less certain, but those scholars who have addressed the issue suggest that apologies can reduce damage awards.[90]

Empirical research supports this conventional wisdom as well. Experiments concerning civil settlements indicate that apologies benefit litigants.[91] Jennifer Robbennolt has conducted the most systematic work on this subject.[92] In her studies, Robbennolt presented

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Harrison, No. 10-1545, 2011 WL 2149761, at *1 (La. Ct. App. June 1, 2011) (noting that the sentencing judge had accepted defendant's "sincere apology" for his crime); People v. Sanchez, No. 284987, 2009 WL 3103831, at *5 (Mich. Ct. App. Sept. 29, 2009) (same).

85 *See* Robinson et al., *supra* note 1, at 805 n.253 (reporting results of an extensive survey of the factors that affect intuitions of punishment and concluding that "[t]rue [r]emorse, [p]ublic [a]cknowledgment of [g]uilt, and [a]pology [i]mmediately [a]fter [o]ffense . . . turned out to be the most intuitively popular [factor affecting intuitions about punishment]").

86 *See* Ward, *supra* note 15, at 131 ("Over time, through either statutory pronouncement or precedent, state courts have considered a distinct group of factors in determining the proper punishment for a convicted criminal defendant. One of these factors is remorse.").

87 *See supra* notes 74–75 and accompanying text.

88 *See* Cardi, *supra* note 8, at 13 ("The causal association of apology with settlement and reconciliation is well documented."); Robbennolt, *Legal Settlement*, *supra* note 44, at 461 ("[A]pologies will avert lawsuits and promote settlement."); Robbennolt, *Attorneys*, *supra* note 10, at 355 ("[A]pologies have the potential to facilitate the settlement of legal disputes . . . .").

89 *See* O'Hara & Yarn, *supra* note 12, at 1124 ("[R]ecent literature provides ample anecdotal evidence that plaintiffs are more likely to sue when they do not get an apology, and more likely to forgo compensation when they receive one.").

90 *See* Brian H. Bornstein, Lahna M. Rung & Monica K. Miller, *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20 BEHAV. SCI. & L. 393, 399–400 (2002) (reporting results of mock jury studies in which jurors assigned lower demands to defendants who expressed remorse than to defendants who did not express remorse).

91 *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 148 (1994) (reporting that in an experiment where research participants evaluated a settlement offer, "[a]pology subjects were more inclined to accept the settlement offer . . ."); *see also id.* at 148–49 (finding that small claims court claimants who received an apology were marginally more likely to accept a settlement offer than those who did not).

92 *See* Robbennolt, *Legal Settlement*, *supra* note 44, at 480–91 (finding in an experimental study that a "full" apology induced participants to accept settlement offers at higher rates than when no apology was offered); Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 358–67 (2006) [hereinafter Robbennolt, *Settlement*

hypothetical cases to her research participants and told them to imagine that they were an injured party in a civil dispute.[93] She asked them to identify the minimum amount that they would accept to settle the dispute. Half of her participants read a version of the facts in which the defendant apologized for the harm he had done, while the other half read a version in which the defendant either did not apologize or merely offered a partial apology. Participants who received an apology expressed a willingness to accept a lower settlement than those who did not receive an apology.[94] Other variations show that when the settlement offer was fixed, more plaintiffs accepted the offer when they learned that the defendant had apologized than when they learned that the defendant had not apologized.[95]

Robbennolt also identified two notable variations on the basic finding that apologies facilitate settlement in civil cases. First, incomplete or partial apologies can make matters worse. Statements such as "I am sorry you were hurt" produce more negative attributions and less inclination to settle among plaintiffs than if the defendant had offered no apology at all.[96] Offering a "partial apology" angers the recipient because the wrongdoer fails to express any real remorse or accept responsibility for her role in the harm. Second, apologies do not seem to affect lawyers the same way they affect non-lawyers; apologies that moved non-lawyer adults to accept smaller settlements had no effect on lawyers.[97] Robbennolt explains that because the lawyers are not the aggrieved party, an apology has less effect on them.[98] She also argues that lawyers might factor in the possibility that the apology will make liability easier to prove at trial, which should increase the settlement value of the case.[99]

Mock jury studies in civil and criminal settings also support the anecdotal observations about the impact that apologies have inside the courtroom. For example, mock jurors develop more favorable impressions of criminal defendants who express remorse, which in turn

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Levers] (finding in an experimental study that both "full" and "partial" apologies influenced settlement behavior).

93 *See* Robbennolt, *Legal Settlement*, *supra* note 44, at 484, 493–94; Robbennolt, *Settlement Levers*, *supra* note 92, at 356.

94 *See* Robbennolt, *Settlement Levers*, *supra* note 92, at 363–64.

95 *See* Robbennolt, *Legal Settlement*, *supra* note 44, at 486; Robbennolt, *Settlement Levers*, *supra* note 92, at 364 (noting that when fault was clear, recipients of either full or partial apologies accepted lower settlement offers than participants who did not receive apologies).

96 *See* Robbennolt, *Settlement Levers*, *supra* note 92, at 362–64.

97 *See* Robbennolt, *Attorneys*, *supra* note 10, at 376 (reporting that "attorneys tended to set higher values for the settlement levers when full responsibility-accepting apologies were offered than they did when no apology was offered").

98 *See id.* at 380.

99 *See id.* ("[A]ttorneys are more attendant to the legal effects of the evidentiary rules than are litigants.").

translate into shorter sentences.[100] Mock jurors also see expressions of remorse as admissions, however, which can produce higher conviction rates.[101] Although there is less research in civil settings, the pattern appears to be similar.[102] Collectively, the results support the intuition that an apology harms defendants to the extent that they admit fault but helps defendants by softening the jury's view of their blameworthiness.

In capital murder cases, apologies seem particularly critical. In studies in which researchers interviewed jurors who had served in the penalty phase of capital cases, Eisenberg, Garvey, and Wells found that capital jurors treat remorse as one of the most important factors in deciding whether to sentence a defendant to death.[103] Jurors who believed that a defendant was remorseful were less likely to sentence a defendant to death than those who felt that a defendant was not remorseful.[104] The jurors' perception of remorse was second only to

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100 *See* Gold & Weiner, *supra* note 1, at 291; Alayna Jehle, Monica K. Miller & Markus Kemmelmeier, *The Influence of Accounts and Remorse on Mock Jurors' Judgments of Offenders*, 33 LAW & HUM. BEHAV. 393, 398–99 (2009) (finding that expressing remorse reduced recommended punishments in a mock jury study); Chris L. Kleinke, Robert Wallis & Kevin Stalder, *Evaluation of a Rapist as a Function of Expressed Intent and Remorse*, 132 J. SOC. PSYCHOL. 525, 528–29 (1992) (reporting a mock jury experiment in which expression of remorse reduced sentence recommendations); Michael N. O'Malley & Jerald Greenberg, *Sex Differences in Restoring Justice: The Down Payment Effect*, 17 J. RES. PERSONALITY 174, 183–84 (1983) (finding that female, but not male, study participants are influenced by the remorsefulness of the defendant when it comes to sentencing); Robinson et al., *supra* note 1, at 815–17 (reporting that lay people reduced hypothetical sentences for six different offenses by between 30% and 61% where the defendant apologized, with the level of the reduction depending on what else the defendant did to exhibit remorse); Michael G. Rumsey, *Effects of Defendant Background and Remorse on Sentencing Judgments*, 6 J. APPLIED SOC. PSYCHOL. 64, 67 (1976) (reporting a mock jury experiment in which expression of remorse reduced juror sentences). *But see* 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, 1648–49 (1992) (finding that an expression of remorse produced more favorable ratings but did not alter the recommended sentence).

101 *See* Jehle et al., *supra* note 100, at 400 ("Additionally, the remorseful defendants were more likely to be found guilty, particularly when they provided no explanation or provided an excuse . . . ."); Keith E. Niedermeier, Irwin A. Horowitz & Norbert L. Kerr, *Exceptions to the Rule: The Effects of Remorse, Status, and Gender on Decision Making*, 31 J. APPLIED SOC. PSYCHOL. 604, 617 (2001) (reporting that mock jurors were more likely to convict remorseless defendants than remorseful defendants); 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, 248 (1999); Michael J. Proeve & Kevin Howells, *Effects of Remorse and Shame and Criminal Justice Experience on Judgements* [sic] *About a Sex Offender*, 12 PSYCHOL., CRIME & L. 145, 157–58 (2006).

102 *See, e.g.*, Bornstein et al., *supra* note 90, at 397–400 (reporting findings from a mock jury experiment in a civil case).

103 *See* Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1633–36 (1998); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1560–61 (1998).

104 *See* Eisenberg et al., *supra* note 103, at 1600 ("Does a defendant's remorse or lack of remorse affect the sentence he receives? The general answer is yes.").

their assessment of the danger that the defendant posed in predicting whether the ultimate sentence was life in prison or death.[105] Remorse, in fact, played a larger role in the ultimate sentence than the perceived heinousness of the crime.[106]

At least one other study provides evidence that apologies influence outcomes in other legal settings. In a study of labor arbitration decisions, Kaspar and Stallworth found that greivants who had apologized appeared to have more success than those who did not.[107] Although the analysis consists of a series of case studies than a systematic assessment of the role of apologies, the study suggests that non-judges serving in a neutral, dispassionate role are affected positively by apologies.

Other than the research we present in this Article, we have found only one other empirical study concerning the effect apologies have on judges. Robbennolt and Lawless found that apologies have a small effect on bankruptcy judges.[108] They presented a detailed hypothetical scenario to bankruptcy judges that asked the judges to approve or disapprove a Chapter 13 plan filed by a married couple.[109] They found that judges in their study were somewhat more likely (41% versus 34%) to approve the plan when the couple had offered an apology for their financial circumstances than when the couple had not (although the effect was not statistically significant).[110]

Taken together, the anecdotes and the research support the conclusion that apologies matter in the legal system. Apologies affect how people feel about defendants and influence their behavior toward them. With the single exception of the study by Robbennolt and Lawless, however, the research does not include studies of how judges react to apologies. We fill that gap in the existing research.

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105 *See* Garvey, *supra* note 103, at 1560–61 (describing the role that jurors' perceptions of remorse play in capital sentencing relative to other factors).

106 *See id.* at 1561 (reporting that when assessing aggravating and mitigating factors that jurors weigh in capital cases, "only the defendant's prior history of violent crime and future dangerousness were more aggravating than lack of remorse").

107 Daniel J. Kaspar & Lamont E. Stallworth, *The Impact of a Greivant's Offer of Apology and the Decision-Making Process of Labor Arbitrators: A Case Analysis*, 17 HARV. NEGOT. L. REV. 1, 53–55 (2012) (reporting that greivants offered apologies in 30 of 69 cases retrieved from the BNA arbitration database, and concluding that "a grievants' [sic] offer of an apology had a mitigating impact on the decision-making process of the labor arbitrator" more often than not).

108 *See* Jennifer K. Robbennolt & Robert M. Lawless, *Bankrupt Apologies*, 10 J. EMPIRICAL LEGAL STUD. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208811.

109 *See id.* at 7.

110 *See id.* at 11.

II
Our Experiments: The Effect of Apologies on Judges

To test whether apologies influence trial judges, we conducted six separate studies: two involving judges' assessments of settlement values in civil cases, one involving bankruptcy judges' willingness to absolve debtors of their liability to creditors, two involving judges' sentencing decisions in criminal cases, and one involving administrative law judges' impositions of fines in traffic court cases.

The methodology we employed to study judges' reactions to apologies is the same methodology we have used to study judicial decision making for over a decade.[111] We collect our data at continuing education programs for judges, at which we are invited to present research on judicial decision making. Before presenting any research, we ask the attendees to complete a questionnaire containing three to five hypothetical cases. After the judges respond to the scenarios individually and anonymously, we collect the completed questionnaires, score them, and present the results to them. We typically title our sessions "Judicial Decision Making" or something equally nondescript, so as not to suggest anything about what our research involves before judges respond to the questionnaire. In none of the following experiments did the judges receive any indication that we were studying the effect of apologies beforehand. Judges were allowed to refrain from participating or to respond but withdraw their results from our research by indicating as much on the questionnaires. Response rates among the attendees in our sessions exceed 95%.[112]

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111 *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 816–19 (2001) (describing our methodological approach). We have previously reported research on judges in a series of papers: Guthrie et al., *supra* note 24; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 Duke L.J. 1477 (2009); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195 (2009); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. Rev. 1227 (2006) [hereinafter Rachlinski et al., *Bankruptcy Judges*]; Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Probable Cause, Probability, and Hindsight*, 8 J. Empirical Legal Stud. 72 (2011); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information?: The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251 (2005) [hereinafter Wistrich et al., *Deliberately Disregarding*].

112 We cannot provide an exact percentage of the response rate because we do not have precise counts of the number of judges in the room. Rough counts reveal that at least 95% of the judges return surveys we can use in our analysis. Typically only one or two judges in each session indicate that they would prefer that we do not use their surveys in our analysis, and we always honor such requests. We report the number of judges who failed to respond to a particular scenario in the description of the result of each experiment below.

The experiments reported in this Article all use a between-subjects experimental design.[113] Each judge reviews only one version of each scenario. Half of the judges review a version in which the defendant (or the debtor, in the bankruptcy scenario) apologized, and the other half review a version in which the defendant did not. Three of the experiments varied another factor and hence were somewhat more complicated, as described below. We assign judges to each condition at random. Differences between the aggregated decisions made by the two groups are thus attributable to presence or absence of the apology. We also usually ask the participants to provide demographic information at the end of the questionnaires.[114]

A. Study 1: Apologies and Civil Settlement

In our first study, we asked 125 federal district judges and federal magistrate judges to review a hypothetical case involving a personal injury lawsuit.[115] We informed the judges that the plaintiff had been injured by a handsaw manufactured by the defendant corporation. The plaintiff suffered severe injuries, including the loss of some fingers on his dominant hand. The defendant admitted liability due to a manufacturing defect in the handsaw, but contested the amount of compensatory damages sought by the plaintiff.

We asked the judges to imagine that they were presiding over a settlement conference and that the parties had each privately asked them to identify a fair settlement amount.[116] We told the judges whom we randomly assigned to a control group that the CEO of the company attended the settlement conference, but we made no mention of any apology. We told the judges whom we randomly assigned to the apology group that the CEO of the company attended the settlement conference and made the following apology to the plaintiff:

> I am terribly sorry that you were hurt. On behalf of the company, I want you to know that I accept full responsibility for your injuries. Our quality control process obviously failed to produce a safe handsaw in this instance.[117]

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113 *See* ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 104 (2010) (describing "between-subjects" experimental designs).

114 These include gender, political affiliation, and years of experience on the bench. None of the demographic differences influenced the effect of apologies except as noted in the analysis below. When we do not discuss demographic effects, it is because we did not observe any significant effects.

115 *See infra* Appendix A. Three federal district judges did not respond to the problem. We administered this problem at four different conferences organized by the Federal Judicial Center in 2004. In each case, our presentation was a parallel session, meaning that judges had to choose to attend our session instead of others.

116 Litigants frequently ask judges presiding over settlement conferences to identify a fair settlement valuation for a case.

117 *See infra* Appendix A.

The apology had no effect on the judges. As Table 1 shows, the judges who learned of the apology recommended an average settlement value of $474,100, while those in the no apology condition recommended an average of $343,400. Because the distribution of the judges' estimates were positively skewed (that is, most estimates were smaller than the average, but a few were extremely high), the median and quartiles better reflect how judges reacted to this scenario. The judges tended to make higher estimates of the claim's fair settlement value if they were exposed to the apology. This trend, however, was not statistically significant.[118]

TABLE 1: FAIR SETTLEMENT BY CONDITION (IN $1000S): AVERAGE, FIRST QUARTILE, MEDIAN, AND THIRD QUARTILE

Condition (N)	Average	1st Quartile	Median	3rd Quartile
No Apology (64)	343.4	100.0	212.5	500.0
Apology (58)	474.1	118.7	300.0	525.0
Total (122)	405.5	100.0	250.0	500.0

These results were a surprise. If anything, the apology induced judges to raise, rather than lower, their estimates of the claim's fair settlement value. Using similar materials and a nearly identical apology script, Robbennolt found that offering an apology reduced the amount that litigants demanded to settle.[119] The apology thus had different effects on judges versus non-judges. Robbennolt also found that the apology did not affect lawyers in the same way that it did lay adults.[120] Judges and lawyers, it seems, react to apologies differently than ordinary adults.

To determine whether lawyers would anticipate these results, and thus would be able to advise their clients correctly, we asked a group of lawyers to predict the effect an apology would have on judges' settlement valuations. We presented the same handsaw problem to all 108 Oregon lawyers attending a continuing legal education conference in 2010 and a group of 41 lawyers attending a breakout session on judicial decision making at the annual Texas Bar Association Meeting in 2010. Half of them read a version with the apology, and the other half read a version without the apology. We asked the lawyers the following: "Based on the facts presented, what is your best esti-

118 $t(109) = 1.51$, $p = 0.13$. Because the data are skewed, we also employed a nonparametric analysis of rank (that is, the Mann-Whitney test), which is also not significant. $z = 1.51$, $p = 0.13$. Throughout this Article, we reserve the term "significance" to denote reliable statistical relationship in which we can reject the null hypothesis at a 5% level.

119 *See* Robbennolt, *Legal Settlement*, *supra* note 44, at 484–91.

120 *See* Robbennolt, *Attorneys*, *supra* note 10, at 379.

mate of what the judge will think constitutes a fair settlement of the claim for pain and suffering damages?" Table 1a displays the results.

TABLE 1A: LAWYERS' PREDICTIONS OF JUDGE'S ESTIMATES OF FAIR SETTLEMENT VALUE BY CONDITION (IN $1000S): AVERAGE, FIRST QUARTILE, MEDIAN, AND THIRD QUARTILE

Condition (N)	Average	1st Quartile	Median	3rd Quartile
No Apology (54)	361.9	100.0	300.0	500.0
Apology (54)	296.4	150.0	250.0	350.0
Total (108)	329.2	150.0	250.0	450.0

As was the case with the judges, the fair settlement values in the apology were not statistically significantly different than the awards in the no apology condition among the lawyers.[121] Notable differences between the lawyers and judges emerged, however. The lawyers' average estimate of what a judge would think was a fair settlement without the apology was, in fact, close to what judges actually specified. The lawyers, however, seemed to misapprehend the effect of the apology. They believed that the apology would reduce the judges' assessment of the claim's settlement value, even though it actually increased it. Combining the data from the judges with that of the lawyers revealed that the role of the subject—lawyer or judge—interacted with the effect of the apology.[122] In effect, lawyers mistakenly predicted that apologies would reduce awards that judges assigned.

It is possible that the judges treated the apology as an admission that made the case more valuable. If so, then even if the judges found the apology to be sincere, they might have increased their estimates of the fair settlement value. We cannot rule this out, but it would be strange for the judges to have behaved in this way. We used a manufacturing defect in a product precisely because liability is strict for injuries caused by manufacturing defects.[123] The materials also stated that the defendant had conceded liability. Furthermore, lawyers predicted that judges would have the opposite reaction. Thus, the more likely explanation is that the judges were simply not affected by the apology, even though a similar apology in a similar setting would likely have affected ordinary adults standing in the shoes of the plaintiff.

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121 $t(106) = 0.76$, $p = 0.4$. Because the data are skewed, we also employed a nonparametric analysis of rank (the Mann-Whitney test), which is also not significant. $z = 0.46$, $p = 0.64$.

122 To assess this, we used the square root of the award as the dependent variable in an ANOVA with main effects of apology and subject type (lawyer/judge). The interaction term was marginally significant. $F(1, 226) = 2.86$, $p = 0.09$.

123 *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (1998).

B. Study 2: Apologies, Civil Settlement, and Intent

Because our first study involved a legal context in which liability does not depend upon fault, we wondered whether a setting in which liability required fault might produce a different result. Effective apologies mollify people who feel angry about conduct that otherwise might seem culpable. In Study 1, however, liability did not depend on any inference about the defendant's mental state, so perhaps an apology could not have made any difference. When fault is at issue, however, an apology might work differently depending on whether the defendant engaged in negligent or intentional misconduct.[124]

To address this concern, we created a second scenario involving civil liability in which we sought to assess the interaction between the defendant's mental state and the impact of an apology. We presented this scenario, which involved a lawsuit arising from a backyard barbeque, to 101 Florida State Superior Court judges.[125] We informed them that as the plaintiff attempted to sit in a lawn chair, the defendant knocked the chair out from under her, causing the plaintiff to fall and suffer serious injuries. The defendant subsequently admitted liability for the accident but disputed the appropriate amount of damages. We told the judges to imagine that they were presiding over a settlement conference and that each of the parties had privately asked them what they thought would be a fair settlement.

We varied two factors in this study. First, we told some of the judges that the defendant had knocked the chair out of the way carelessly (attributable to the defendant's excessive consumption of alcohol), while we told others that the defendant had intentionally moved the chair as a prank. Second, we varied whether the defendant apologized to the plaintiff. Thus, we randomly assigned each judge to one of four conditions: (1) negligent wrong, no apology; (2) negligent wrong, apology; (3) intentional wrong, no apology; and (4) intentional wrong, apology. In the negligent condition, the defendant's apology read as follows: "I just want you to know that I am very sorry you were hurt. It was all my fault. I was drunk and not watching where I was going until it was too late." In the intentional condition, the apology was the same except that we replaced the last sentence with the following: "I thought it would be funny to pull your chair out from under you. I didn't think that you would get hurt." We asked all

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124 *See* C. Ward Struthers et al., *The Effects of Attributions of Intent and Apology on Forgiveness: When Saying Sorry May Not Help the Story*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 983, 990 (2008) ("Across three studies we showed that an apology hindered forgiveness when there was an attribution of intent . . . .").

125 Of the 101 judges, 16 did not respond to the problem. This session was a breakout session at the annual meeting of state trial judges in Florida in 2004.

of the judges to indicate what they thought "would be a fair settlement of the claim for pain and suffering damages."[126]

As Table 2 shows, the apology mattered little to the judges. Across both mental states, the average fair settlement value was $247,700 without an apology and $230,900 with an apology. The median amounts were both $100,000. The results suggest that the apology interacted with the mental state. Among the judges who learned that the defendant was negligent, the apology seems to have reduced the average settlement value (although not the median). Among the judges who learned that the defendant knocked the chair away intentionally, the apology appears to have increased the average settlement value. Statistical analysis, however, revealed neither any significant main effects, nor a significant interaction.[127] Thus, it appears that the apology had no real effect on the judges.

TABLE 2: FAIR SETTLEMENT BY CONDITION (IN $1000S): AVERAGE (AND SAMPLE SIZE), FIRST QUARTILE, MEDIAN, AND THIRD QUARTILE

Mental State	Apology?	Average (N)	1st Quartile	Median	3rd Quartile
Negligent	No Apology	184.5 (19)	25.0	250.0	300.0
	Apology	233.4 (23)	50.0	100.0	250.0
All Negligent		211.3 (42)	40.0	100.0	250.0
Intentional	No Apology	302.3 (22)	100.0	100.0	250.0
	Apology	228.2 (21)	75.0	100.0	300.0
All Intentional		266.1 (43)	100.0	100.0	300.0
All No Apology		247.7 (41)	50.0	100.0	250.0
All Apology		230.9 (44)	50.0	100.0	250.0
Total		239.0 (85)	50.0	100.0	250.0

These results extend the results of Study 1 by broadening the circumstances in which an apology does not affect judges. The underlying cause of the accident, whether non-negligent (as in Study 1), negligent, or intentional had no effect on the judges' sense of what the plaintiff's claim was worth for settlement purposes. While apologies may sway ordinary adults in civil cases, they do not seem to affect judges.

126 *See infra* Appendix B.

127 We analyzed the awards with ANOVA using the factors of apology/no apology, mental state (negligent/intentional), and an interaction term. $F(1, 84) = 0.02$, $p = 0.88$ for apology; $F(1, 84) = 0.45$, $p = 0.50$ for mental state; $F(1, 84) = 0.55$, $p = 0.46$ for the interaction. Because the data are highly positively skewed, we conducted the same analysis on the square root of the awards, which was approximately a normal distribution. ANOVA revealed, however, that the apology, intentionality, and the interaction did not have a significant effect on the square root. $F(1, 84) = 0.09$, $p = 0.77$ for apology; $F(1, 84) = 1.22$, $p = 0.27$ for mental state; $F(1, 84) = 0.03$, $p = 0.85$ for the interaction.

C. Study 3: Apologies and Bankruptcy

In our third study, we sought to extend our analysis to another legal context in which an apology might be more effective. In civil cases, the judge is not actually the target of the apology, the victim is. Perhaps apologies influence victims more than they influence observers or bystanders. Before assessing the impact of apologies in criminal settings, we wanted to see whether we could find a civil context in which the judge might feel a greater sense of stewardship over the injury and hence be more moved by an apology. Although the judge is not truly the victim in a bankruptcy proceeding—the unsecured creditors are—bankruptcy judges are supposed to be concerned about the interests of unsecured creditors.

In this study, we gave a scenario, which we called "Cancun Vacation," to a group of 113 federal bankruptcy judges.[128] We informed all of the judges that a debtor named Jared was a single, twenty-nine-year-old who had been plagued with debt problems his entire adult life. We told the judges that Jared, who had never held a job that paid more than the minimum wage, had recently landed a new position. Unfortunately, this coincided with his annual vacation to Cancun during spring break. Jared's new employer told him that he could not have time off for the trip and that he would lose his job if he went. Jared took the vacation to Cancun anyway and charged $2,976 on a newly acquired credit card (which carried a $3,000 limit) during the trip. Upon his return, his new employer fired him. Jared remained unemployed for two months and ultimately filed for bankruptcy.

In the bankruptcy proceeding, Jared sought to have his credit card debt discharged under Chapter 7 of the Bankruptcy Code. The bank holding the debt opposed the discharge, arguing that Jared had incurred the debt knowing that he could not pay it back and that a discharge would therefore facilitate the commission of a fraud.

To measure the impact of the debtor's apology on the judges' assessment of this case, we gave half of the judges the facts described above. The other half read the same facts along with the following account of Jared's apology in court:

> Jared has taken the unusual step of appearing personally in front of you. He requested that he be allowed to speak. He said, "Judge, I am truly sorry for my reckless spending. I know that what I have

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128 *See infra* Appendix C. Of these judges, 2 did not respond to the problem, leaving 111 judges in the data set. This was a plenary presentation at an annual meeting of bankruptcy judges organized by the Federal Judicial Center in Seattle in 2004. We have reported the results of this study in a previous article on bankruptcy judges. *See* Rachlinski et al., *Bankruptcy Judges*, *supra* note 111, at 1253–56. We also manipulated one other aspect of this scenario, which we do not report here because it had no effect and did not address apologies.

> done is wrong, but I have no way of repaying this money. It'll take everything I can do to pay rent and buy food."[129]

We asked the judges in both groups if they would discharge Jared's debt by asking them to select one of the following six options: very likely to discharge, likely to discharge, somewhat likely to discharge, somewhat unlikely to discharge, unlikely to discharge, and very unlikely to discharge.

The apology had no effect on the bankruptcy judges, as Table 3 reveals. We converted the judges' responses to a six-point scale, with 1 being "very likely to discharge" and 6 being "very unlikely to discharge." The judges who did not see an apology provided an average response of 4.50—that is, they indicated that they were somewhere between "somewhat unlikely" and "unlikely" to discharge. The judges who saw an apology provided a statistically indistinguishable average response of 4.46, revealing that they evaluated the vignette in essentially the same way.[130]

TABLE 3: PERCENT OF BANKRUPTCY JUDGES CHOOSING EACH OPTION

	Very likely	Likely	Somewhat likely	Somewhat unlikely	Unlikely	Very unlikely
No Apology (n = 54)	13.0	5.6	5.6	11.1	24.1	40.7
Apology (n = 57)	7.0	8.8	8.8	15.8	26.3	33.3

Our relatively modest sample size limited our ability to detect a meaningful effect. A rough calculation of statistical power indicates that we had only a 74% chance of detecting an effect that was equivalent to one-half of a standard deviation.[131]

Of course, a debtor's apology might produce an effect under different circumstances. In the study by Robbennolt and Lawless, for example, the judges exhibited a trend toward an effect and evaluated the characteristics of debtors more favorably when the debtor apologized.[132] Notably, the apology offered in our study expressed remorse and arguably accepted responsibility, but unlike the apology used in the Robbennolt and Lawless study, it lacked the other elements of an apology. The debtor in our scenario did not clearly accept responsi-

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129 *See infra* Appendix C.

130 We assessed the difference with an ordered logistic regression of the judges' responses on the six-point scale as the dependent variable and the condition (apology/no apology) as the predictor variable. The coefficient for the condition is not significant. $z = 0.50$, $p = 0.62$.

131 For purposes of clarity in calculating statistical power, we assumed that the data are normally distributed and amenable to analysis using a *t*-test rather than the ordered logistic regression that we actually used to assess the data.

132 *See* Robbennolt & Lawless, *supra* note 108, at 6–7.

bility, explain the conduct, offer atonement, or promise forbearance. Therefore, the judges in our study might have felt that the apology was insincere, especially given the frivolous nature of the spending involved. Furthermore, the judges might have felt that the spending fits into a bankruptcy provision dealing with luxury spending that would render it per se fraudulent.[133] We note that even in Robbennolt and Lawless's study, the apology had, at best, a small effect on the judges; indeed, the effect was not statistically significant.[134] Taken together, the results of our study and theirs suggest that bankruptcy judges are largely unmoved by apologies.

D. Study 4: Apologies in Traffic Court

For our fourth study, we wanted to identify a context that was not necessarily criminal but nevertheless still involved punishment. Apologies are thought to soften the desire to punish. In most civil cases, judges know that a damage award is not intended as a punishment. Litigants, however, might see a compensatory award as a form of punishment against the defendant, which could explain why litigants react differently to apologies than do lawyers and judges. A fine is meant to be a punishment, however, so the amount imposed might be more affected by an apology.

To explore the effect of apologies on fines, we tested whether apologies influence judges who impose fines in traffic court. Many people wonder whether apologizing to a traffic court judge is a good idea or not.[135] Experienced traffic court judges probably hear apologies every day and suspect that most who offer them likely have broken the traffic laws before and likely will do so again. But perhaps a thorough apology that shows contrition and accepts responsibility nevertheless has an effect.

We conducted this study with the participation of 103 judges who attended the National Association of Administrative Law Judiciary Annual Conference in New York City in October 2008.[136] Many of these judges had experience in traffic court and virtually all had experience imposing civil and quasi-criminal fines in a variety of contexts.

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133 *See* 11 U.S.C. § 523(a)(2)(C) (2006).

134 *See* Robbennolt & Lawless, *supra* note 108, at 15 (noting that the statistical significance of remorse in the decision to confirm a debtor's plan was relatively low).

135 Apologizing to police officers who issue tickets appears to reduce the severity of the citation issued. *See* Martin V. Day & Michael Ross, *The Value of Remorse: How Drivers' Response to Police Predict Fines for Speeding*, 35 L. & HUM. BEHAV. 221, 227–28, 231 (2010) (reporting that in a survey conducted in Canada, "apologies were associated with a reduction in fines" by police officers who issued the ticket and reporting that similar results occurred in the United States).

136 One judge did not respond.

In addition to testing the influence of an apology, we also explored whether the attractiveness of the traffic court defendant would influence the judges. The research on the impact of attractiveness is too large to present here, but a wide variety of studies has demonstrated that attractiveness creates a kind of "halo effect" that gives attractive people the benefit of the doubt in ambiguous contexts.[137] In the legal context, for example, some mock jury studies show that attractive defendants are less likely to be found guilty and more likely to draw shorter sentence recommendations.[138] One study even indicates that when judges set bail, they are more lenient toward attractive defendants.[139] An exception to the halo effect, however, is that attractive defendants charged with crimes involving fraud or deception draw harsher judgment.[140] In short, mock jurors tend to cut attractive defendants some slack unless those defendants seem to be using their good looks to con others.

To test the effects apologies and attractiveness have on traffic court fines, we gave the judges a scenario in which they were asked to assume that they were presiding over a hearing concerning a traffic violation allegedly committed by a defendant named Debbie.[141] She was ticketed for traveling 52 miles per hour (mph) in a 35 mph section of the highway, which was designated as a work zone. The ticketing officer testified that Debbie was speeding but admitted that the highway work zone signs "seem confusing, and could be better marked."[142] Debbie conceded that she was speeding, but she explained that she seldom drives, assumed that the speed limit was 55 mph, and did not notice any work zone signs. She also pointed out

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137 *See* ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 146–48 (5th ed. 2009) (discussing "the halo of physical attractiveness"); Sidney Katz, *The Importance of Being Beautiful*, *in* DOWN TO EARTH SOCIOLOGY: INTRODUCTORY READINGS 307, 308 (James M. Henslin ed., 9th ed., 1996) (asserting that beauty creates a "halo effect" that positively influences ratings on traits other than physical attractiveness). *See generally* Judith H. Langlois et al., *Maxims or Myths of Beauty? A Meta-Analytic and Theoretical Review*, 126 PSYCHOL. BULL. 390, 390–92 (2000) (reviewing the literature on attractiveness).

138 *See* Joel D. Lieberman, *Head over the Heart or Heart over the Head? Cognitive Experiential Self-Theory and Extralegal Heuristics in Juror Decision Making*, 32 J. APPLIED SOC. PSYCHOL. 2526, 2538–39 (2002) (finding that mock jurors award less in a civil case when the defendant is attractive); John E. Stewart, II, *Defendant's Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 J. APPLIED SOC. PSYCHOL. 348, 358 (1980) (finding correlation between the defendant's attractiveness and his or her sentence).

139 *See* A. Chris Downs & Phillip M. Lyons, *Natural Observations of the Links Between Attractiveness and Initial Legal Judgments*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 541, 545–46 (1991) (reporting a study of misdemeanor cases in which attractive defendants received lower bail and fines than unattractive defendants received).

140 *See* Harold Sigall & Nancy Ostrove, *Beautiful but Dangerous: Effects of Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSONALITY & SOC. PSYCHOL. 410, 412–13 (1975).

141 *See infra* Appendix D.

142 *See infra* Appendix D.

that she had not received any traffic tickets during the past three years.

The judges learned that the schedule of traffic fines in the jurisdiction called for a fine of between $50 and $400 for speeding between 10 and 30 mph over the limit. They also learned that fines may be doubled in a work zone. This meant that the judges could have fined Debbie between $50 and $800. Traffic school was not an option because Debbie planned to be out of the state for many months.

We varied two factors in this study. First, we varied Debbie's looks by including with the scenario a photo of either a relatively unattractive or a relatively attractive woman.[143] Second, we varied whether Debbie apologized. Thus, we randomly assigned each judge to one of four conditions: (1) unattractive, no apology; (2) unattractive, apology; (3) attractive, no apology; and (4) attractive, apology. Debbie's apology read as follows: "Your honor, I want you to know that I am very sorry for speeding. I am entirely to blame, and I won't do it again." We asked all the judges, regardless of the group to which we assigned them, "[w]hat fine would you impose?"[144]

Table 4 presents the results.[145] The apology appears to have made matters *worse* for the speeder, increasing the average fine from $173 to $246. This difference is statistically significant.[146] Although the attractive speeder drew more sizeable fines than the unattractive speeder did, neither this difference[147] nor the interaction is significant.[148]

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143 We used the before and after face shot of a woman appearing on an "extreme makeover" website; thus, the attractive and unattractive versions of Debbie are the same person.

144 *See infra* Appendix D.

145 The distribution of the fines followed a pattern that roughly approximated a normal distribution, so we report the average alone and do not include the medians or quartiles.

146 $F(1, 98) = 4.24$, $p < 0.05$.

147 $F(1, 98) = 1.46$, $p > 0.20$.

148 $F(1, 98) = 0.54$, $p > 0.40$. We add demographic variables here, owing to the potential for an influence of gender on the results. Neither the judges' gender nor years of judicial experience had any impact on the results. An ANOVA that added the gender of the judges and all interaction terms produced no main effect for gender ($F(1, 88) = 0.28$, $p > 0.5$) and no significant interactions with gender and the other main effects ($F(1, 88) = 0.14$, $p > 0.70$ for the gender by apology interaction and $F(1, 88) = 0.24$, $p > 0.60$ for the gender by attractiveness interaction). The three-way interaction is also insignificant ($F(1, 88) = 1.02$, $p > 0.30$). Similarly, an ANOVA that added the years of experience of the judges as a continuous measure and all interaction terms produced no main effect for experience ($F(1, 87) = 0.00$, $p > 0.95$) and no significant interactions with experience and the other main effects ($F(1, 87) = 0.65$, $p > 0.40$ for the experience by apology interaction and $F(1, 87) = 0.17$, $p > 0.60$ for the experience by attractiveness interaction). The three-way interaction is also insignificant ($F(1, 87) = 0.80$, $p > 0.30$).

TABLE 4: AVERAGE FINE (IN DOLLARS) BY CONDITION (AND SAMPLE SIZE)

Apology Condition	Attractiveness Condition		Total
	Attractive	Unattractive	
No Apology	180 (32)	164 (23)	173 (55)
Apology	273 (27)	208 (20)	246 (47)
Total	223 (59)	185 (43)	207 (102)

Apologizing to a traffic court judge was not helpful for the defendant in our study. Judges might be particularly jaded and cynical about apologies in traffic court because they are often insincere. Not only did the apology here fail to create any sympathy, it convinced the judge that the offender merited a larger fine. This tendency seemed to be stronger for the attractive defendant (although the interaction term was not significant). This result is consistent with evidence that attractive defendants can fare worse than unattractive defendants when suspected of fraud or deception.[149] It seems that the judges regarded the apology as insincere, and when offered an insincere apology by an attractive speeder, they felt manipulated and responded by imposing a larger fine.

E. Study 5: Apologies and Crime

In our fifth study, we explored whether an apology would influence the sentencing of a criminal defendant.[150] A criminal sentence might be different than a civil damage award in that at the sentencing phase, the judge takes on the role of the representative of the community that has been wronged by the defendant's conduct. Although the prosecutor represents the people, many judges seek to impose a sentence that reflects the community's values.[151] If an apology helps to heal the victim and the community, it might influence the judge.

In our previous studies, the judges were neither the victims nor closely associated with the victims. Of course, this is normal. Judges rarely have connections to the cases over which they preside and usu-

149 *See* Sigall & Ostrove, *supra* note 140, at 412–13.

150 *See infra* Appendix E.

151 *See* ROBERT SATTER, DOING JUSTICE: A TRIAL JUDGE AT WORK 185 (2005) ("For me, the act of sentencing is an interpersonal experience between the convicted and me. He looks up at me, awaiting my judgment. I look down at him, conscious of my responsibility to be just to him as well as to the society I represent."); TOM BINGHAM, *Judicial Ethics*, *in* THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES 69, 69–82 (2000) ("In passing sentence in a difficult case, a criminal judge is often wise to take account, among many other considerations, of how a proposed sentence will be perceived by the public at large, or the community to which the defendant belongs, or the victim. This is not a surrender to the clamour of the mob; it is realistic recognition that a sentence widely seen as unjustifiably lenient may ultimately be damaging to the defendant himself and even, unless and until corrected, to the administration of criminal justice.").

ally must recuse themselves if they do. But given that none of our previous studies suggested that apologies affect judges, we wanted to craft a problem in which the apology would have the best possible chance of influencing them. To increase the likelihood that the judges to whom we gave the problem would identify with the victim, we created a scenario describing a defendant who was convicted of threatening a judge who was both a colleague and a friend of the participating judges. In effect, this time, it was personal.

We explained to the judges that the defendant in this criminal case had lost a summary judgment motion in a wrongful termination lawsuit that he had filed against a former employer. Following this decision, the defendant sent a threatening letter to the judge who had ruled against him and included a photo of the judge and his family taken at the beach. The defendant had written on the photo, "I'm going to hunt you down, beat you, and kill you for what you've done to me."[152] The defendant was arrested and convicted of threatening the judge.

We asked the judges to sentence the defendant. We assigned some of the judges to a control group. These judges learned that the defendant was provided "the opportunity to speak on his own behalf," but chose not to do so.[153] We assigned the other judges to an apology group. These judges learned that the defendant had offered the following apology:

> Your honor, I am deeply sorry for threatening the judge. At the time, I just wasn't myself because I was devastated by my job loss and by losing my case in court. I bear full responsibility for what I did, and I promise I won't do anything like it again.[154]

We presented this scenario to four different groups of judges: federal magistrate judges attending a sentencing conference in 2004; judges (mostly trial court judges) attending an annual educational conference for state judges in Ohio in 2009; Canadian trial court judges attending a conference for mid-career judges in Victoria, British Columbia in 2009; and newly appointed judges in a fourth jurisdiction that asked not to be identified in 2009. The scenario differed slightly in each jurisdiction to match their respective laws. Notably, the maximum sentence varied among the jurisdictions. The federal judges were subject to the U.S. Sentencing Guidelines, as described below, and we analyzed their results separately before combining them with the results of the other three groups. In Ohio,[155] Ca-

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152 *See infra* Appendix E.

153 *See infra* Appendix E.

154 *See infra* Appendix E.

155 In Ohio, this crime would be charged as retaliation against a public official. OHIO REV. CODE ANN. § 2921.05(A) (LexisNexis 2010). "Retaliation" is a "felony of the third

nada,[156] and the unidentified jurisdiction, the maximum sentence was five years, five years, and three years,[157] respectively. These three jurisdictions did not have sentencing guidelines that further constrained the judges.

We asked the thirty-four federal judges to sentence the defendant according to the U.S. Sentencing Guidelines. For them, the underlying charge consisted of violating 18 U.S.C. § 876(c), which makes it unlawful to mail a threatening communication to a federal judge.[158] We provided the base offense level for the crime, which was 12, as well as the defendant's criminal history level, which was I. Based on these factors, the appropriate sentencing range under the guidelines was ten to sixteen months. We also asked the judges to decide whether the offense "involved any conduct evidencing an intent to carry out such threat,"[159] which would increase the offense level to 18,[160] thereby producing a sentencing range of twenty-seven to thirty-three months.[161] After the judges made this determination we asked them, "Based on the facts of this case, what sentence would you impose?"[162]

The apology had no effect on the federal judges.[163] Among the control group judges, 23.5% (4) raised the offense level and among the apology group judges, 29.4% (5) of the judges raised the offense level. This difference was not significant.[164] Among the judges who chose the lower offense level, the control group judges imposed an average sentence of 13.8 months while judges in the apology group imposed an average sentence of 14.2 months. Again, this difference was not statistically significant.[165] Among the judges who chose the higher offense level, the control group judges imposed an average sentence of 27 months as compared to 28.2 months for those judges

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degree." § 2921.05(C). For a felony of the third degree, the Ohio Revised Code provides for a prison term of "one, two, three, four, or five" years and a fine of up to $10,000. §§ 2929.14(A)(3), 2929.18(A)(3)(c).

156 Under the Canadian Criminal Code, the appropriate crime is threatening death, which carries a maximum sentence of five years. Canada Criminal Code, R.S.C. 1985, c. C-46, §§ C-264.1(1)(a), C-264.1(2). Unlike the other three jurisdictions, Canada does not have a separate crime for threatening a public official or a judge (unless the threat is made so as to induce the judge to make a favorable ruling).

157 We cannot identify the statute without also identifying the jurisdiction.

158 18 U.S.C. § 876(c) (2006) (doubling the maximum sentence for mailed threats to "United States judge[s]" or "[f]ederal law enforcement officer[s]").

159 *See infra* Appendix E.

160 *See* U.S. Sentencing Guidelines Manual § 2A6.1 (2012).

161 *See* U.S. Sentencing Guidelines Manual § 5A (2012) (USSG Sentencing Table).

162 *See infra* Appendix E.

163 However, there were some irregularities. Of the thirty-four judges, one judge in the "no apology" condition did not check an offense level but sentenced in the lower range and was thus scored as checking the lower range. Also, one judge in the apology condition checked an offense level but did not provide a sentence.

164 Fisher's exact $z = 1.00$, $p = 0.50$.

165 $t(22) = 0.28$, $p = 0.78$.

in the apology group. This difference was also not statistically significant.[166]

Overall, however, the apology influenced the judges. Combining all four groups of judges, we found that the average sentence judges imposed on the offender who did not apologize was 1.92 years, whereas judges imposed an average of 1.53 years on the offender who offered the apology. This difference was significant.[167] Table 5 below summarizes the results across all four groups.

TABLE 5: AVERAGE SENTENCE BY APOLOGY CONDITION AND JURISDICTION IN YEARS (AND SAMPLE SIZE)

	Judge				
Condition	Federal	Ohio	Canada	New Judges	Total
No Apology	1.33 (17)	2.89 (55)	1.43 (38)	1.27 (36)	1.92
Apology	1.52 (17)	2.16 (65)	1.04 (43)	1.03 (39)	1.53
Total	1.43 (34)	2.49 (120)	1.22 (81)	1.15 (75)	1.72

The four groups of judges imposed different average sentence lengths in part due to the differences in their jurisdictions' respective sentencing schemes. To account for this variation we ran an ANOVA on the sentence length with the apology condition, the type of judge, and the interaction between the two as factors. The result was that the main effect of the apology was significant,[168] as was the effect of the jurisdiction.[169] Even though the federal magistrate judges were unaffected by the apology and even expressed a slight reversal, the interaction term was not significant.[170] This is likely due to the small sample of federal magistrate judges in the study. Nevertheless, the analysis confirms that the apology had an overall effect on the judges.

Although the Ohio judges seemed to be the most punitive and the new judges the least punitive, our results do not suggest that Ohio judges (the only judges among the four groups who face elections) generally sentence more harshly because each jurisdiction charges and sentences the crime differently. The sentencing scheme in Ohio is comparable to that of Canada, with both jurisdictions having no recommended range and a maximum sentence of five years. The primary difference between Ohio and Canada with respect to this scenario is that Ohio treats a threat against a public official as a different crime than it does a threat against an ordinary citizen, whereas in Canada, a threat is treated the same regardless of whether or not it is

166 $t(7) = 1.44$, $p = 0.19$. Our ability to detect any real differences with a sample this small is obviously limited.

167 $t(308) = 2.88$, $p < 0.005$.

168 $F(1, 302) = 5.01$, $p < 0.05$.

169 $F(3, 302) = 37.90$, $p < 0.001$.

170 $F(3, 302) = 2.01$, $p = 0.11$.

directed at a public official. Furthermore, in Canada, judges are obliged by statute to treat acceptance of responsibility and acknowledgement of harm as factors in sentencing.[171]

Analysis of the other demographic variables showed some meaningful variation by gender and political party. Male judges imposed slightly longer sentences on average than female judges (1.81 years, as opposed to 1.51 years), although this trend was only marginally significant.[172] The effect of the apology did not interact with gender.[173] Judges who identified themselves as Republicans imposed an average sentence of 2.21 years, while judges who identified themselves as Democrats imposed an average sentence of 1.47 years.[174] This difference was significant,[175] although the effect of the apology did not interact with the effect of political party significantly.[176] Experienced judges tended to impose longer sentences than inexperienced judges.[177] The interaction of experience and apology, however, was not significant.[178]

To determine whether appellate judges accurately understand the impact of apologies on trial judges, we gave a group of 33 appellate judges in the unidentified jurisdiction a similar version of this scenario. Instead of asking these judges to identify an appropriate sentence, however, we gave all of these judges the scenario that included the apology, but indicated that the trial judge inappropriately failed to allow the defendant to make a statement during his sentencing hearing. We stated that the defendant had planned to offer an apology, and gave the text of the apology, as above. We then asked these judges to check a box next to their belief concerning the probable effect of the apology on the trial judge, ranging from: "the judge certainly would have imposed a shorter sentence"; "the judge might have imposed a shorter sentence"; "no effect on the sentence the judge imposed"; "the judge might have imposed a longer sentence"; and "the judge would certainly have imposed a longer sentence." Of the judges who responded (1 did not), 81% (26) believed that the judge might have imposed a shorter sentence, 19% (6) believed that

171 *See* Canada Criminal Code, R.S.C. 1985, c. C-46, § C-718(f).

172 $F(1, 303) = 5.00$, $p = 0.07$. This ANOVA included the main effects of gender and condition.

173 $F(1, 303) = 2.07$, $p = 0.15$.

174 We only asked the federal magistrate judges and the Ohio judges to provide political affiliations, so only these judges are included in this particular analysis.

175 This ANOVA included the main effects of party and condition. Party is significant. $F(1, 138) = 4.00$, $p < 0.05$.

176 $F(1, 138) = 1.53$, $p = 0.22$.

177 The correlation between years of experience as a judge and sentence was 0.14. Using an ANOVA with condition, experience, and an interaction term, we found that experience is significant. $F(1, 226) = 3.99$, $p < 0.05$.

178 $F(1, 226) = 1.26$, $p = 0.38$. New judges were not included in this analysis.

the apology would have no effect, and one did not respond. We then asked whether the defendant should be resentenced. Of the 29 judges who responded, 55% (16) indicated that the defendant should not be resentenced and 45% (13) indicated that the defendant should be resentenced. These appellate judges were roughly accurate. The apology had a small effect on the trial judges in this jurisdiction, which the appellate judges essentially predicted.

To summarize our results, the apology had a small but noticeable effect on the judges. This is the first of our studies in which we found that an apology benefitted the defendant. We would, however, be reluctant to generalize these results beyond this somewhat unusual criminal case in which a judicial colleague was the target of the crime. The study shows that apologies can make a difference in the right criminal setting, but this does not necessarily mean that judges will be influenced by apologies in more ordinary criminal cases.

F. Study 6: Demanding an Apology

In some settings, an apology is expected. If you accidentally jostle someone at a party and cause them to spill their drink, you would instinctively offer an apology. A lawyer who shows up late for court is nearly certain to apologize to the judge for his tardiness. In such settings, the absence of an apology is much more notable than its presence. The apology itself would not necessarily indicate that the person who offers it is truly remorseful. The absence of an apology in such a setting, however, would suggest either that the wrongdoer views the situation in an idiosyncratic way or is unusually hostile.

In the context of criminal sentencing, a defendant might feel pressure to apologize in response to a victim impact statement. Although judges sometimes demand that defendants offer apologies, crime victims themselves can insist that the defendant apologize.[179] Victim impact statements have become increasingly common in sentencing hearings since the 1980s.[180] Empirical studies demonstrate that victim impact statements can influence sentencing recommendations of non-judges,[181] but evidence that victim impact statements influence judges is lacking.

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179 *See supra* notes 3–5 and accompanying text.

180 *See* Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247, 1247 (2012) ("Ever since the victims' rights movement swept the country in the 1970s, leading to the addition of victims' rights amendments to the constitutions of thirty-two states starting in the 1980s, the victim's 'voice' has been a source of great anxiety in debates about criminal sentencing.").

181 *See id.* at 1255 (noting that some simulated juror studies have indicated that victim impact statements may influence jurors but that the scarcity of information regarding real cases makes a more thorough qualitative study difficult).

A full analysis of the effect of victim impact statements lies beyond the scope of our inquiry, but we suspect that victim impact statements might raise the stakes for a criminal defendant facing sentencing. A defendant who fails to comply with a victim's request for an apology risks appearing to the judge to be much more hostile and unrepentant than a defendant who fails to apologize when a victim has not made such a request. It also is unclear how a victim impact statement interacts with an apology. An apology offered in response to a demand for one might seem more calculated and less sincere than an unprompted apology. Alternatively, the apology might vitiate the force of the victim impact statement. Finally, the two could act synergistically, allowing the defendant to appear to connect with the victim by responding to the victim's request with an apology.

To assess the interaction between a victim impact statement and an apology, and to study apologies in a more typical criminal setting, we presented a hypothetical sentencing decision to 244 judges in Minnesota.[182] The materials indicated that the defendant, Todd Nyquist, had been found guilty in a jury trial of the robbery of Kate Bell. Nyquist attacked Bell while she was "walking home late at night from her job as an accounts manager at an insurance company." He grabbed Bell's purse; she resisted unsuccessfully and injured herself when she fell on the sidewalk. A bystander called the police who quickly apprehended Nyquist and later found his fingerprints on Bell's purse. Nyquist was twenty-six years old, unemployed, had not completed high school, and had previous convictions for possession of heroin. The jury convicted Nyquist of "[s]imple [r]obbery,"[183] which produced a presumptive sentence of thirty-three months, with a range of twenty-nine to thirty-nine months, under Minnesota law.[184]

Each judge reviewed one of six versions of this case, which varied on two factors. Half of the judges reviewed a version in which Nyquist was afforded a chance to apologize but said nothing, while the other half reviewed a version in which Nyquist offered an apology.[185] We also took into account the right of victims to address the court before sentencing under Minnesota law.[186] One-third of the judges reviewed a version in which the victim made no statement to the court; one-third reviewed a version in which the victim described what had hap-

182 *See infra* Appendix F. These judges were attending an annual meeting for state judges in Minnesota in 2010. Three judges did not respond to this question.

183 *See* MINN. STAT. ANN. § 609.24 (West 2009) (defining simple robbery).

184 This would produce a severity level of five. MINN. SENTENCING GUIDELINES & COMMENTARY § 4.A (2012).

185 "Ms. Bell, I am deeply sorry for what I did to you. At the time, I was using drugs and I did a stupid thing to get some quick cash. I bear full responsibility for what I did, and I promise I won't do anything like it again." *See infra* Appendix F.

186 *See* MINN. STAT. ANN. § 611A.038(a) (West 2009).

pened to her, but did not demand an apology;[187] and one-third reviewed a version in which the victim described what had happened to her and demanded an apology.[188] In effect, we relied on a 2 x 3 "between-subjects" design with the main effects of apology (present or absent) crossed with the victim impact statement (no statement; statement but no demand for apology; or statement with a demand for apology). The materials then asked all of the judges, "What sentence would you impose?" and provided a blank space labeled "months."

As Table 6 shows, both the apology and the victim impact statement affected the average sentence that the judges imposed on the defendant. Across all victim impact statement conditions, the sentence was nearly two months lower among judges who read the defendant's apology than among those who did not. This result was statistically significant.[189] The average sentences also vary significantly across the three victim impact statement conditions.[190] The existence of a demand for an apology, however, had no additional effect on the judges. Although the results suggest that the apology reduced the sentence more when judges did not see a victim impact statement (roughly three months in the no-victim-impact-statement condition, as compared to roughly one month in the other two conditions), the effect of the apology and the effect of the victim impact statement did not interact significantly.[191]

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187 I want the court, and the defendant, to understand how this incident has affected me. Ever since this happened, I have been afraid to go outside. Also, when I fell and hit my head, I suffered a concussion. I have had really bad headaches ever since and sometimes I can't remember what I just did. Because I can't concentrate and remember things, I lost my job. I have been trying to find work, but in this economy, it isn't easy. . . . Look at me Mr. Nyquist. You ruined my life. . . . Your Honor, I hope you send him to prison for a long time.

See infra Appendix F.

188 This version included the same opening paragraph and the last sentence but also included the following statement:

> Perhaps the worst thing is that the defendant never apologized to me for what he did and how he hurt me. Even now that he has been convicted, he doesn't have the guts to say he is sorry. Look at me Mr. Nyquist. You ruined my life. The least you can do is apologize to me.

See infra Appendix F.

189 We analyzed the results using an ANOVA, with the main effect of apology by victim impact statement. The main effect of apology is significant. $F(1, 235) = 7.55$, $p < 0.01$.

190 $F(2, 235) = 6.17$, $p < 0.005$.

191 $F(2, 235) = 0.95$, $p > 0.25$. Three separate ANOVAs that added experience, gender, and political party (Republican/Democratic, excluding those who did not identify their party or stated that they were independent) produced no additional main effects or interactions with these three variables.

TABLE 6: AVERAGE SENTENCE IN MONTHS (AND SAMPLE SIZE) BY APOLOGY AND VICTIM IMPACT STATEMENT CONDITIONS

Apology Condition	Victim Impact Statement ("VIS")			
	No VIS	VIS, no demand for apology	VIS with demand for apology	Total
No Apology	32.4 (36)	34.0 (42)	33.7 (43)	33.4 (121)
Apology	29.5 (40)	32.9 (41)	32.6 (39)	31.7 (120)
Total	30.8 (76)	33.4 (83)	33.2 (82)	32.5 (241)

Minnesota's presumptive sentencing system had a large effect on the judges, as a majority of the judges simply chose the presumptive sentence. As Table 6 shows, however, judges departed from the presumptive sentence in a pattern that is consistent with the conclusions we have drawn from the analysis of the average sentence. Table 6a shows the percentage of judges in each condition who departed upwards or downwards from the presumptive thirty-three month sentence.

TABLE 6A: PERCENTAGE OF JUDGES WHO ASSIGNED SENTENCES LOWER OR HIGHER THAN THE PRESUMPTIVE 33-MONTH SENTENCE BY APOLOGY AND VICTIM IMPACT STATEMENT CONDITIONS (COLUMNS NUMBERED FOR CLARITY)

Apology Condition	Victim Impact Statement ("VIS")							
	No VIS		VIS, no demand for apology		VIS with demand for apology		Total	
	Less (1)	More (2)	Less (3)	More (4)	Less (5)	More (6)	Less (7)	More (8)
No Apology	17	8	5	26	14	32	12	23
Apology	38	3	15	22	15	18	23	14
Total	27	5	10	24	15	26	17	19

Table 6a reflects the consistent effect of the apology across the three conditions of the victim impact statement. In the condition without a victim impact statement, 38% of the judges who read the apology assigned a sentence that was shorter than the presumptive sentence, as compared to only 17% of the judges in the condition where the defendant remained silent (reflected in column 1 of Table 6a). We observed a similar increase in the condition where the victim made a statement but did not demand an apology (reflected in column 3). The victim's demand for an apology created some additional variability in the judges' reactions. The request for an apology increased both the number of judges who assigned sentences shorter than the presumptive sentence (reflected in column 5, "no apology" row and column 3, "no apology" row) and the number of judges who gave sentences longer than the presumptive sentence (reflected in

column 6, "no apology" row and column 4, "no apology" row). Furthermore, when the victim demanded an apology, the apology still shortened the sentence but only by reducing the percentage of judges who insisted upon a longer sentence than the presumptive thirty-three months (as seen in column 6), as opposed to increasing the number of judges who assigned sentences shorter than the presumptive sentence.

The judges thus responded in different ways to the demand for an apology. As compared to judges who read only the victim impact statement without the demand, the judges who were exposed to the demand for an apology were more inclined to depart from the recommended sentence in both directions; specifically, more imposed either shorter or longer sentences. For judges who read the demand for an apology, offering the apology reduced the percentage of judges who provided longer sentences, although it did not increase the number of judges who provided shorter sentences. Although the apology did not increase sympathy for the defendant overall, it mitigated the anger that some judges might have felt toward a defendant who did not offer an apology in response to the victim's demand for one.

In effect, both the victim impact statement and the apology affected the judges. The effects were largely additive. That is, the apology consistently reduced the average sentence and the victim's statement consistently increased the average sentence. The victim's demand for an apology did not tend to lengthen the sentence, although it seemed to increase the variability of the sentence. The apology also seemed to dampen the judges' inclination to impose a longer sentence when the victim actually demanded an apology.

III
DISCUSSION

A. Summary and Caveats

Is it helpful to apologize to a judge? It depends. In six separate studies involving varying contexts and several different types of trial judges, we found that apologizing did not benefit defendants in cases involving civil damage awards and fines. In fact, it was harmful in at least some instances. By contrast, offering an apology helped defendants in criminal cases. The effect in criminal cases was small, however, and some groups of judges did not notably react to the apology. Overall, apologies seem to exert far less influence on trial judges than they do on ordinary adults.

We must acknowledge some limitations of our research methods. Unlike studies of decisions in actual cases, the experimental design we used allowed us to isolate the impact of specific factors—in this in-

stance, an apology—on damage awards, fines, and sentences.[192] Obviously, that is advantageous. A corresponding disadvantage of this approach is that the judges obviously know that the scenarios do not involve real defendants. Furthermore, an in-person apology might influence judges more than a written one[193] because they could examine facial expressions and other nonverbal cues that they might feel allow them to assess the sincerity of the apologies more accurately.[194]

The fact that we did not use the same apology throughout the six studies complicates interpretation of our results. All six of our studies included apologies that expressed remorse, but other elements of the apologies varied. In Studies 1 and 2 (the civil damage cases), the apologies included acceptance of responsibility and offered a brief explanation for the adverse event in addition to the expression of remorse. The apology in Study 3 (the bankruptcy case) was limited to an expression of remorse and an acceptance of responsibility. Study 4 (the traffic court case) included an apology that expressed remorse, accepted responsibility, and promised forbearance. Studies 5 and 6 included apologies that expressed remorse, accepted responsibility, offered an explanation, and promised forbearance. Although we suspect that the differences in the effectiveness of these apologies did not depend upon the variations in these elements, we cannot rule out the possibility that the apologies in the criminal cases worked best because they included four of the elements of a full apology rather than only three.

Judges claim to be influenced by apologies,[195] and we do not lightly dismiss this observation. We suspect, however, that when

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192 *See* LAWLESS ET AL., *supra* note 113, at 104 (describing the "between-subjects" experimental design methodology used in these studies).

193 *See* O'Hara & Yarn, *supra* note 12, at 1139 (observing that for an apology to be effective, "often face-to-face communications are necessary"); Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 241 (1999) (asserting that in-person apologies are more effective and suggesting that this is due to nonverbal cues).

194 *Cf.* O'Hara & Yarn, *supra* note 12, at 1140 ("[T]he victim typically pays careful attention to nonverbal cues. Consciously or unconsciously, victims pay attention to just about everything: eye contact, breath, body posture, facial expressions, tone of voice, pace of speech, and even order of words.").

195 *See* Etienne & Robbennolt, *supra* note 1, at 302 ("Judges tend to use their discretion to impose lighter sentences on remorseful defendants . . . ."); Pepitone, *supra* note 16, at 210 ("Well-known trial judges freely admit to the importance of showing remorse on sentencing . . . ."); Ward, *supra* note 15, at 131 (noting that "[m]any state courts have found remorse to be an appropriate mitigating factor" in sentencing). Courts assume that an apology will influence a judge. *See, e.g.*, People v. Loftis, 370 N.E.2d 1160, 1170 (Ill. App. Ct. 1977) (reversing a criminal conviction in a bench trial where "the prosecutor guided the sole occurrence witness to the judge's chambers for the purpose of allowing her to apologize for disgraceful courtroom behavior" on an ex parte basis because "only a naif could conclude that her apology did not have a favorable impact upon the State's case").

judges report being affected by apologies, they are not providing an assessment of how they react in the aggregate. Rather, they are thinking of specific instances in which they received a particularly moving apology. We have little doubt that in the right setting with the right words, the right defendant can draw sympathy from a judge by offering an apology. Our research suggests, however, that the circumstances and the articulation of the apology have to be much more compelling to have an effect on a judge than lawyers and defendants might suppose.

B. Why Do Judges Resist Apologies?

Despite the limitations of our study, our results reveal that judges are hardened against apologies relative to ordinary adults. The apologies that we found to have no effect on judges in civil cases are similar to those that have affected ordinary adults in other studies.[196] Furthermore, the judges' negative reactions to the apology offered in Study 4 (the traffic court case) is something that researchers have not demonstrated in previous studies. Although an apology can signify an admission of fault, no previous study has shown that once fault has been established, a complete apology provokes greater compensation or more severe punishment. The effect of an apology on trial judges in Study 1 was also not what lawyers predicted. Finally, the benefit of apologizing in the criminal cases was small. The defendant who apologized for threatening a judge—which was probably the context in which an apology was most likely to be effective—received a discount of roughly five months off of a two-year sentence. In Study 6, which involved a more typical case for an apology, the benefit to the defendant was only a two-month reduction out of a nearly three-year sentence. Thus, judges seem to resist apologies overall.

These results raise the question of why judges are so insensitive to apologies. We offer several possibilities. First, the judges in our studies were not injured by a careless prank, a destructive handsaw, or a reckless credit card user. When the apology was offered, it was not offered to the judges themselves. Instead, they were merely witnesses to an apology directed to someone else. This is not unique to our research, however. Other than instances in which a litigant disrupts courtroom proceedings or a lawyer arrives late,[197] judges are not the aggrieved individual to whom the apology is directed. The judge thus might not feel the need to reciprocate the apology with a smaller damage award. The fact that judges are not normally the victim of the

196 *See* Robbennolt, *Legal Settlement*, *supra* note 44, at 475–76.

197 Apologies are apt to be common in such settings and might well be effective. *See supra* note 6 and accompanying text.

harm for which the apology is being offered might make at least some of them indifferent to the apology.[198]

In Studies 1 and 2 (the civil cases), as well as in Study 3 (the bankruptcy case), the judges might not have experienced any anger towards the defendant. To the extent that apologies work by diminishing and deflecting anger, they might not have been effective. In criminal cases, the judge is supposed to represent the conscience of the community and express community outrage toward the defendant. Therefore, it makes sense that apologies might be more effective in criminal cases than civil ones. Furthermore, our civil cases involved a mediated outcome in which the judge was asked to estimate a fair settlement value rather than to decide a case. Perhaps the mediation context renders apologies less relevant to the judge.

A second possibility is that the apologies might not have been effective because the judges, like the lawyers who participated in Robbennolt's studies, so clearly understood the implications of an apology for assessing liability.[199] That is, the judges, like the lawyers, understood that someone who apologizes was also admitting liability. In all of our studies, the defendant either had admitted liability or had already been found guilty, which limited the judges' task to assessing the amount of harm done. But perhaps the admission of liability or culpability still had some influence on judges, even though it should not have. In other contexts, we have found that inadmissible information can affect judges' decisions.[200] Furthermore, the fact that the defendant apologized might have suggested that the harm was more serious than the judges might otherwise have believed. The apology might also have simply drawn more attention to the harm. Perhaps these factors counteracted any benefit that the apology might otherwise have yielded for the wrongdoer, at least in the civil settings. In

198 Researchers have found that some people believe the concept of third-party forgiveness to be nonsensical. *See* Etienne Mullet, Michelle Girard & Parul Bakhshi, *Conceptualizations of Forgiveness*, 9 EUR. PSYCHOLOGIST 78, 84 ("One person out of four in our sample seems to believe that forgiving is only possible between a known offender and a known offended. These people would experience trouble considering as a credible option forgiving an institution, or third-party forgiving."); *see also* Etienne & Robbennolt, *supra* note 1, at 316 (noting that prosecutors might suffer from a similar detachment). *But see* Jeffrey D. Green, Jeni L. Burnette & Jody L. Davis, *Third-Party Forgiveness: (Not) Forgiving Your Close Other's Betrayer*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 407, 408, 415 (2008) (observing that "forgiveness often takes place in a broader social milieu that involves third parties" and finding in their research that "apologies to the victim had a greater impact on third-party forgiveness relative to first-party forgiveness" where the third parties were close to the first parties).

199 *See* Robbennolt, *Attorneys*, *supra* note 10, at 380 ("[A]ttorneys are more attendant to the legal effects of the evidentiary rules [governing apologies] than are litigants.").

200 *See* Wistrich et al., *Deliberately Disregarding*, *supra* note 111, at 1259 (reporting results of a series of studies showing "that some types of highly relevant, but inadmissible, evidence influenced the judges' decisions").

contrast, both of the criminal cases involved a sentencing in which guilt was not at issue and the harm was perhaps more salient.

A third possibility is that judges are unable to empathize sufficiently with the typical defendants who appear in front of them, either because judges are more analytical than most adults[201] or because the people who appear before them are so different from themselves. Researchers have found that people are more likely to forgive wrongdoers who are similar to them or who have committed wrongs that they themselves can imagine committing.[202] Just as similarity can induce affection,[203] dissimilarity can impede forgiveness.[204] If true, this raises the possibility that judges might be more swayed by the apologies of white-collar defendants than by ordinary defendants because of a greater sense of familiarity and similarity.

A fourth possibility is that judges are appropriately skeptical of apologies offered in court because of the nature of those apologies.[205] As noted above, apologies offered in legal proceedings are suspect because defendants generally think that they have something to gain by apologizing.[206] Perhaps judges, as neutral, third-party observers, are able to accurately detect the insincerity of these apologies.[207] In other

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201 Others have suggested this might be true for lawyers. *See* Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 87 (1997) (arguing that applicants to law schools "must demonstrate a higher-than-average ability to think analytically"); Robbennolt, *Attorneys*, *supra* note 10, at 367 ("[T]here is evidence that attorneys are inclined to be more analytical and less emotional in their general approach to settlement. . . .").

202 *See* Julie Juola Exline et al., *Not So Innocent: Does Seeing One's Own Capability for Wrongdoing Predict Forgiveness?*, 94 J. PERSONALITY & SOC. PSYCHOL. 495, 512 (2008) (finding that "[i]f people see themselves as capable of a similar wrongdoing, this belief is linked with greater empathic understanding and a sense of being similar to the offender" and that "[b]oth of these perceptions, in turn, predict greater forgiveness").

203 *See* CIALDINI, *supra* note 137, at 148 ("We like people who are similar to us." (emphasis omitted)).

204 *See* Exline et al., *supra* note 202, at 512.

205 Prosecutors may be similar. *Cf.* Etienne & Robbennolt, *supra* note 1, at 316 ("Prosecutors, in their representational role and as repeat players in the system, are more likely to be detached from the interpersonal aspects of the dispute. They have neither been injured nor alleged to have committed an offense, the relationships at issue are not theirs, and they have seen a range of similar and different cases that permit them to put the instant incident in a broader perspective. The detachment inherent in this representational role may cause prosecutors to respond differently to an apology or expression of remorse than might a victim of the crime." (footnotes omitted)).

206 *See supra* notes 38–44 and accompanying text.

207 Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 J. PERSONALITY & SOC. PSYCHOL. 418, 432 (2007). Risen and Gilovich find that observers or third parties are better able to differentiate between sincere and insincere apologies. *See id.* at 421–24. They identify both motivational and cognitive explanations for this finding. *See id.* at 432. *But see* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2162 (2003) (arguing that it is nearly impossible to "tell what is in another's heart or mind").

words, judges may be less likely than victims, who are targets of the apology, to commit the so-called "fundamental attribution error."[208] As Jane Risen and Thomas Gilovich explain, "[b]oth targets and observers may start with the dispositional inference that a harmdoer who apologizes is truly sorry, but observers may also engage in situational correction when the apology is coerced: 'He may only be apologizing because he was told to apologize.'"[209]

The flip side, of course, is that judges might overcompensate for the situation and mistakenly think that every apology given in court is insincere. This brings us to our final potential explanation for the apparent judicial indifference to apologies on judicial decision making: judges might be jaded. Judges are constantly exposed to wrongdoers, so they might gradually become cynical about the world—at least the world they see in their courtrooms. Maybe they see so many wrongdoers apologize for their actions in hope of reducing the sentence they must serve or the damages they must pay that only the most heartfelt apologies have any impact on them. As one commentator put it:

> [T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.
>
> Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place.[210]

CONCLUSION

Whatever the explanation—or, more likely, explanations—the nearly 1,000 judges who participated in our studies were largely unmoved by acts of contrition in court. Judicial resistance to apologies has an important upside. A system in which uttering a few choice words produces lenience is likely undesirable. Many of the wrongdoers who apologize in court are probably motivated by a desire to improve their outcome rather than by true contrition. If so, judges should not be influenced by these apologies. Thus, the fact that

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208 *See* LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 4 (1991) ("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.'").

209 Risen & Gilovich, *supra* note 207, at 432.

210 G.K. CHESTERTON, *The Twelve Men*, *in* TREMENDOUS TRIFLES 54, 57–58 (Sheed & Ward eds., 1955).

judges in our studies appear largely impervious to wrongdoers' apologies may be reassuring.[211]

On the other hand, some wrongdoers genuinely regret the harms they have caused and offer heartfelt apologies. If they do, and if the victims of their wrongdoing are moved by their apologies, perhaps judges should be moved too. Indeed, both state and federal sentencing guidelines suggest as much by explicitly giving defendants reduced sentences for acceptance of responsibility through an apology.[212] Judicial resistance to apologies might make it difficult for a truly remorseful defendant to apologize to a judge. A remorseful defendant faces a real dilemma when facing cynical judge. A poor choice of words might induce a punitive response from the judge, but carefully scripting an apology in advance might make it seem insincere. Thus, the fact that judges in our studies appear impervious to wrongdoers' apologies is perhaps disturbing.

We cannot resolve the normative implications here. Whether it is good or bad that judges seem less susceptible than others to the healing power of apologies is debatable, but is not our principal concern. Our focus is not on whether apologies *should* influence judges, but rather whether they *do*. Although we have found that apologies have little effect on judges, our results do not suggest it is inadvisable for wrongdoers to apologize. Indeed, assuming they can do so without compromising their legal position (and perhaps even if they cannot), wrongdoers should consider apologizing to those they have harmed. Such apologies, in contrast to those made to judges, are more likely to benefit all concerned. Our results do suggest, however, that the decision whether to apologize to a judge must be made with care. Such apologies are apt to be less helpful than defendants and their counsel expect, and they might even backfire.

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211 Some have argued remorse should not play a role in sentencing. *See, e.g.*, Ellen M. Bryant, Comment, *Section 3E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty*, 44 CATH. U. L. REV. 1269, 1296–97 (1995) (proposing to amend the "acceptance of responsibility" provision to include automatic reduction for guilty pleas without consideration of factors like remorse); O'Hear, *supra* note 74, at 1511, 1564–65 (urging that considerations of remorse be eliminated from, or at least minimized in, the application of the "acceptance of responsibility" guideline); Ward, *supra* note 15, at 164–67.

212 *See supra* notes 74–75 and accompanying text.

APPENDIX A: HANDSAW ACCIDENT[213]

You are presiding over a settlement conference involving a diversity case between Bob Carpenter, a 30-year-old advertising account representative, and Hardcore Handsaws Inc., a national manufacturer and retailer of handsaws and other machine tools.

While doing some woodworking, Bob, who is right-handed, lost his right forefinger and index finger in an accident caused by a defective guard on a handsaw manufactured and sold by Hardcore Handsaws Inc. Bob incurred some medical expenses and missed two weeks of work, but he has since returned to his job. He has difficulty with some work tasks because it is much harder for him to write and type on the keyboard than it used to be, and he suffers through stares and occasional teasing. More significantly, he is no longer able to pursue his only three hobbies: golf (which he used to play twice a week in the summer), guitar (which he used to play every day on his own and even performed with a band every couple of months), and woodworking (which used to consume him on weekends during the winter months). Because he now has this deformity and can no longer pursue any of his hobbies, he has been quite depressed since the accident.

Hardcore Handsaws Inc. conceded liability because the particular handsaw Bob purchased clearly had a manufacturing defect. The parties have agreed upon a sum to cover Bob's lost wages and medical expenses, but have not agreed upon an appropriate amount for pain and suffering. You have scheduled a settlement conference to attempt to resolve this issue. If the case does not settle, it will be tried before a jury.

At the settlement conference, you met with Bob, the company CEO, and their respective attorneys. *The company CEO asked to begin by addressing Bob directly. He then said to Bob, "I am terribly sorry that you were hurt. On behalf of the company, I want you to know that I accept full responsibility for your injuries. Our quality control process obviously failed to produce a safe handsaw in this instance."* You discussed the appropriate measure of damages with the parties together in the room. Then, in private sessions, the lawyer for each party asked what you thought would be a fair settlement.

Based on these facts, what do you think would be a fair settlement of the claim for pain and suffering damages? Please indicate the dollar amount below (even if you would choose not to disclose this figure to the parties):

$_____

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213 The text of the apology is italicized in this and all subsequent scenarios. Judges who did not see the apology did not see this text.

Appendix B: The Barbeque

You are presiding over a settlement conference in a tort case between Paula Prather, a 45-year-old accountant, and Damon Dawes, an acquaintance from her neighborhood.

Paula invited Damon and several other neighbors to her home for a backyard barbecue on a Sunday afternoon and evening. Throughout the party, Paula and her guests drank beer, ate barbecued ribs, smoked cigarettes, tossed a Frisbee around, played cards, and chatted about their lives. After darkness fell, Damon, who was drunk, [intentionally/inadvertently] kicked a chair out from under Paula at the exact moment she was attempting to sit down. Unfortunately, Paula landed hard on the cement patio, hitting her tailbone and then the back of her head. As a result, she fractured her tailbone and suffered a serious concussion. Her tailbone eventually healed, but the concussion has caused her significant problems ever since, including double vision, persistent migraines, and frequent bouts of nausea, dizziness, and vomiting. She has had difficulty concentrating at work and has been unable to maintain a normal social life since the accident. A psychiatrist is prepared to testify at trial that she is clinically depressed and that he has prescribed anti-depressive medication for her.

Damon conceded that he is liable for Paula's fall and has agreed to pay Paula's medical expenses and lost wages. However, the parties have been unable to agree on an appropriate amount for Paula's pain and suffering. You have scheduled a settlement conference to attempt to resolve this issue. If the case does not settle, it will be tried by a jury.

You convened the settlement conference by meeting with Paula, Damon, and their respective attorneys. *Damon asked if he could begin the conference by addressing Paula directly. You agreed to this, so Damon then said to Paula, "I just want you to know that I am very sorry you were hurt. It was all my fault. [I was drunk and not watching where I was going until it was too late./ I thought it would be funny to pull your chair out from under you. I didn't think that you would get hurt.]"* You then discussed the appropriate measure of damages with the parties and their lawyers together in the room. Later, in separate private sessions, the lawyer for each party asked what you thought would be a fair settlement.

Based on these facts, what do you think would be a fair settlement of the claim for pain and suffering damages? Please indicate the dollar amount below (even if you would choose not to disclose this figure to the parties):

$_____

Appendix C: Cancun Vacation

Jared has filed for relief under Chapter 7. Jared is single, 29 years old, and has had debt problems for much of his adult life. He has never held a job that paid more than minimum wage. He has never filed for bankruptcy before, but has defaulted on a prior loan and is sometimes delinquent in making credit card payments. He was also once evicted from an apartment for non payment of rent.

Nevertheless, every year, Jared finds the money to fly to Cancun during "spring break." This past year, he has been particularly short of cash because of a ten-month period of unemployment. When it came time to plan his annual trip, Jared had just begun working as a driver and grave digger for Gino's Funeral Home, a local mortuary. He had just enrolled in a program to learn embalming techniques in hopes of training himself for a more lucrative position at Gino's.

Despite his financial problems, Jared was able to obtain a new credit card with a credit limit of $3,000. Jared used the card to book his trip. When he asked for time off, his employer informed him that he would be fired if he took a week off so early in his new job. Jared went anyway. While there, he generously charged drinks and meals for friends on his new credit card, maxing the card out at total of $2,976, all of which was related to the trip.

Gino's Funeral Home fired Jared upon his return. After sinking deeper in debt while unemployed for another two months afterwards, Jared saw an advertisement on TV for a credit counselor. The counselor suggested the he might consider filing for bankruptcy, which he did shortly thereafter.

Jared is seeking to have all of his debt discharged, including the $2,976 on his new credit card. The bank that issued him the credit card is opposing the discharge, arguing that Jared never had any intention of repaying this debt and that it was therefore not dischargeable under 11 U.S.C. § 523(a)(2)(A) (which excepts from discharge a debt for "false pretenses, a false representation, or actual fraud"). Jared argues that although he knew he was deeply in debt, he believed that his new job would enable him to repay the debt, as he had in the past. He asserts that he had never considered bankruptcy before discussing his situation with the credit counselor.

Jared has taken the unusual step of appearing personally in front of you. He requested that he be allowed to speak. He said, "Judge, I am truly sorry for my reckless spending. I know that what I have done is wrong, but I have no way of repaying this money. It'll take everything I can do to pay rent and buy food."

Would you discharge Jared's debt for his Cancun vacation?

___ Very likely to discharge

___ Likely to discharge

___ Somewhat likely to discharge
___ Somewhat unlikely to discharge
___ Unlikely to discharge
___ Very unlikely to discharge

Appendix D: Speeding Ticket

Imagine that you are presiding over traffic court. Debbie (pictured below) was ticketed for traveling at 52 mph in a 35 mph section of a highway, which was also designated as a work zone. The ticketing officer has also appeared and testifies that he used a radar gun to assess her speed. He noted that the speed limits are clearly posted in this busy part of the highway, but admits that the highway work zone signs "seem confusing, and could be better marked."

Debbie does not dispute that she was speeding. She argues that although she has lived in the area for many years, she does not own a car and does not normally drive. She claims she was driving back from dropping her friend off at the airport. She is also not used to driving on that particular stretch of highway, she thought the speed limit was 55 mph, and she did not see the work zone signs. She also claims she was very tired because she had to get up early to help her friend pack. She has not received any other traffic tickets in the last three years.

The schedule of traffic fines in your jurisdiction calls for a fine of between $50 and $400 for speeding between 10 and 30 mph over the limit. Fines may be doubled in a work zone and hence could be as high as $800 for Debbie (and as little as $50 if the fine is not doubled). She will also incur 4 points on her license (and traffic school is not an option, as she plans to be out of the State for many months).

At the close of the hearing Debbie said, "Your honor, I want you to know that I am very sorry for speeding. I am entirely to blame, and I won't do it again."

What fine would you impose? $_____

Appendix E: United States v. Ford[214]

You are presiding over a criminal trial involving a defendant named Frank Ford. The facts of the case are as follows:

Several months ago, Frank filed a wrongful termination lawsuit against his former employer. The case was assigned to one of your colleagues on the bench, who also happens to be a friend of yours. Your colleague ultimately granted summary judgment for the employer on all of Frank's claims.

Shortly thereafter, your colleague received an anonymous letter at his home. The letter included a photo of your colleague and his family on the beach. The person who had taken the photo included a note on which he wrote, "I'm going to hunt you down, beat you, and kill you for what you've done to me." The FBI investigated the case and determined that Frank was the person who took the photo and sent the letter to your colleague. Frank was arrested and charged with violating 18 U.S.C. § 876(c), which makes it unlawful to mail a threatening communication to a federal judge. A search of his home after the arrest revealed that he had taken photos of your colleague and his family on other occasions.

Although the evidence against him was strong, Frank elected to plead not guilty. At his trial, the jury that you impaneled found Frank guilty of violating the statute after less than an hour of deliberation.

Frank is now appearing before you for sentencing. The pre-sentence report states that Frank is 31 years old, unmarried, and lives by himself. He has no criminal history. He is in good health, does not abuse drugs or alcohol, and was earning $40,000 per year, but is now unemployed.

As required, you offered Frank the opportunity to speak on his own behalf, and Frank apologized for his conduct. "Your honor, I am deeply sorry for threatening the judge. At the time, I just wasn't myself because I was devastated by my job loss and by losing my case in court. I bear full responsibility for what I did, and I promise I won't do anything like it again."

The statute provides for up to 120 months in prison. Section 2A6.1 of the Federal Sentencing Guidelines assigns a base offense level of 12 to this crime and states that "if the offense involved any conduct evidencing an intent to carry out such threat, increase by 6 levels."

In sentencing Frank, which of the following would you assign as his total offense level:

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214 We present here only the "apology" version of this scenario that we gave to federal magistrate judges, which was the most intricate version of the variations.

_____Offense level 12: A base of 12 for the offense (which yields a sentencing range of 10 to 16 months)

_____Offense level 18: A base of 12 for the offense, plus 6 for conduct evidencing an intent to carry out the threat (which yields a sentencing range of 27 to 33 months)

Based on the facts of this case, what sentence would you impose?
___ months

APPENDIX F: STATE V. NYQUIST

Imagine that you are sentencing a defendant convicted of Simple Robbery under Minn. Stat. § 609.24. The facts at trial were as follows:

On May 17, 2010, in downtown Minneapolis, 43-year-old Kate Bell was mugged while walking home late at night from her job as an accounts manager at an insurance company. The assailant tried to grab her purse, but she resisted because she had recently withdrawn $200 from an ATM, which was a lot of money to her. When the assailant shoved Bell away she fell on the sidewalk and hit her head. The assailant then fled with her purse. A bystander called police on his cell phone and described the assailant in detail. Using this description, police apprehended Todd Nyquist six blocks from the scene of the incident. Nyquist had $223 in his pocket and police found Bell's purse in a nearby trash bin. Nyquist's fingerprints were found on the purse.

Nyquist was convicted of robbery following a jury trial and the case is now before you for sentencing. Nyquist is 26 and is unemployed. He did not complete high school. He has two prior convictions: one for possessing a small quantity of heroin and one for possessing a small quantity of heroin in a public housing area. Under Minnesota's Sentencing Guidelines, the presumptive sentencing for this offense (offense level 5) with this history (criminal history score of 3) is 33 months, with a presumptive range of 29 to 39 months.

[Victim Impact Statement:

Before you pronounce sentence, you asked Bell if she wanted to address the court concerning the appropriate sentence, as is her right under Minn. Stat. § 611A.038(a). She stated the following in open court:

"I want the court, and the defendant, to understand how this incident has affected me. Ever since this happened, I have been afraid to go outside. Also, when I fell and hit my head, I suffered a concussion. I have had really bad headaches ever since and sometimes I can't remember what I just did. Because I can't concentrate and remember things, I lost my job. I have been trying to find work, but in this economy, it isn't easy.

Perhaps the worst thing is that the defendant never apologized to me for what he did and how he hurt me. Even now that he has been convicted, he doesn't have the guts to say he is sorry.[215]

Look at me Mr. Nyquist. You ruined my life. *The least you can do is apologize to me.*

Your Honor, I hope you send him to prison for a long time."]

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215 The underlined material here was included in the version in which the victim demanded an apology.

After Bell addressed the court, you also allowed Nyquist an opportunity to address the court, [No Apology conditions: but he declined to say anything.] *and he stated:*

"Ms. Bell, I am deeply sorry for what I did to you. At the time, I was using drugs and I did a stupid thing to get some quick cash. I bear full responsibility for what I did, and I promise I won't do anything like it again."

What sentence would you impose? _____ months