

# APOLOGIES AND PLEA BARGAINING

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*Theoretically, encouraging apologies early in the criminal process may be a laudable goal given the potential benefits of apologies to victims, offenders, and communities. But empirically, the growing literature on apologies in psychology and law raises important questions about whether apologies—when made prior to sentencing—would lead to more favorable results for the offender. Given the overwhelming portion of cases that are resolved through guilty pleas, we argue that most defendants are unlikely to participate in pre-sentencing remorse or apology rituals without regard to the effect of the apology on plea bargaining outcomes. Mindful of recent scholarship on apologies in both law and psychology, we consider the role of apologies in plea bargaining and theorize about the ways in which apologies might affect plea negotiations. We conclude that, contrary to the assertion that apologies would lead to more favorable plea bargained outcomes for defendants, the nature of plea negotiation renders this result unlikely.*

## I. INTRODUCTION: THE CASE FOR APOLOGIES IN PLEA BARGAINING

There is a growing psychological literature that has examined the effects of apologies on wrongdoers and their victims. As a general matter, apologies 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. In particular, apologies and expressions of remorse influence attributions of responsibility or blame for the incident—such that wrongdoers who apologize are thought to have acted less intentionally and are blamed less for their misdeeds.<sup>1</sup> When a

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1. See, e.g., Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742, 746, 749 (1982) [hereinafter Darby & Schlenker, *Children's Reactions to Apologies*]; Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Transgressions: Effects of the Actor's Apology, Reputation and Remorse*, 28 BRIT. J. SOC. PSYCHOL. 353, 358–60 (1989) [hereinafter Darby & Schlenker, *Children's Reactions to Transgressions*]; Ken-ichi Ohbuchi & Kobun Sato, *Children's Reactions to Mitigating Accounts: Apologies, Excuses, and Intentionality of Harm*, 134 J. SOC. PSYCHOL. 5, 11 (1994);

wrongdoer apologizes for his or her conduct, “the offense and the intention that produced it are less likely to be perceived as corresponding to some underlying trait of the offender.”<sup>2</sup> Accordingly, apologies 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<sup>3</sup> and as being less likely to engage in similar behavior in the future.<sup>4</sup> In addition, apologies tend to reduce negative emotions, such as anger, and to increase levels of more positive emotions, such as sympathy for the wrongdoer.<sup>5</sup> Given these changes in attributions and emotion, individuals who receive apologies when they are wronged expect to have better future relationships with the wrongdoer,<sup>6</sup> are more likely to forgive,<sup>7</sup> are less likely to respond aggressively,<sup>8</sup> and prefer

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Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127, 134–36 (1997); Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY 281, 291 (1991).

2. 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); see Edward E. Jones & Keith E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, in 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 219, 222–24 (Leonard Berkowitz ed., 1965) (describing correspondent inference theory).

3. See, e.g., Darby & Schlenker, *Children’s Reactions to Apologies*, *supra* note 1, at 749; Darby & Schlenker, *Children’s Reactions to Transgressions*, *supra* note 1, at 360; Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291, 291–92 (2000); Marti Hope Gonzales et al., *Victims as “Narrative Critics”: Factors Influencing Rejoinders and Evaluative Responses to Offenders’ Accounts*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 691, 698 (1994); Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219, 219–20 (1989); Ohbuchi & Sato, *supra* note 1, at 11; Jennifer F. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressors*, 6 ACAD. PSYCHOL. BULL. 49 (1984); Weiner et al., *supra* note 1, at 291.

4. See, e.g., Gold & Weiner, *supra* note 3, at 291–92; Ohbuchi et al., *supra* note 3, at 219–20; Orleans & Gurtman, *supra* note 3; Gary S. Schwartz et al., *The Effects of Post-Transgression Remorse on Perceived Aggression, Attributions of Intent, and Level of Punishment*, 17 BRIT. J. SOC. CLINICAL PSYCHOL. 293, 297 (1978); Weiner et al., *supra* note 1, at 285.

5. See, e.g., Mark Bennett & Deborah Earwaker, *Victims’ Responses to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. SOC. PSYCHOL. 457, 462 (1994); Gold & Weiner, *supra* note 3, at 291–92; Ohbuchi et al., *supra* note 3, at 219–20; Takaku, *supra* note 2, at 495; Weiner et al., *supra* note 1, at 286.

6. Holley S. Hodgins & Elizabeth Liebeskind, *Apology Versus Defense: Antecedents and Consequences*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 297, 312 (2003).

7. See, e.g., Darby & Schlenker, *Children’s Reactions to Apologies*, *supra* note 1, at 742, 749; Gold & Weiner, *supra* note 3, at 291–92; Ohbuchi & Sato, *supra* note 1, at 12; Weiner et

more lenient punishment for the wrongdoer.<sup>9</sup> All this suggests that apologies have significant utility in various social contexts in which a harm has occurred.

What we know about apologies generally tells us that apologies may have a particularly important role to play in the area of criminal law. Victims who receive apologies or believe that their offenders are remorseful are more likely to find emotional restoration, to feel a re-established sense of security, to view the moral relation between the parties as back in balance, and to forgive their offenders.<sup>10</sup> Indeed, a central tenet of the victims' rights movement has been to secure or enable encounters between victims and offenders that might lead to apologies or explanations for the harmful conduct.<sup>11</sup> Apologies offer the opportunity for reconciliation and healing, which is viewed by many victims as being as important as financial compensation.<sup>12</sup>

Similarly, apologies can be meaningful for criminal defendants. The opportunity to apologize to their victims and have some opportunity to be heard may be restorative. The restorative justice movement is premised in significant part on the notion that offenders benefit from the opportunity to make amends with both victims and communities.<sup>13</sup> Restorativists argue that offenders themselves benefit from a system that encourages apologies.<sup>14</sup> In particular, offenders who apologize may

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al., *supra* note 1, at 291.

8. See, e.g., Ohbuchi et al., *supra* note 3, at 219–20.

9. See, e.g., Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 1, at 749; Darby & Schlenker, *Children's Reactions to Transgressions*, *supra* note 1, at 360; Gold & Weiner, *supra* note 3, at 291–92; Weiner et al., *supra* note 1, at 286.

10. See, e.g., 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.”); Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 22–23; MARK S. UMBREIT ET AL., VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 95–96 (1994); Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151, 156 (1973) (describing motivations to restore equity).

11. Michael M. O’Hear, *Victims and Criminal Justice: What’s Next?*, 19 FED. SENT’G REP. 83, 84–85 (2006) (noting that advocates of expanding victims’ rights in criminal prosecutions are particularly in favor of participatory rights).

12. Strang & Sherman, *supra* note 10, at 22.

13. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 293–94.

14. See Strang & Sherman, *supra* note 10, at 36–37. *But cf.* JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 12 (2002) (recognizing that the restorative process might not necessarily aid defendants inasmuch as it might produce a harshly punitive result that does not reflect important restorative values “such as apology,

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.<sup>15</sup> The empirical evidence also shows that these offenders are less likely to recidivate and more likely to be forgiven by their victims.<sup>16</sup> To the extent that apologies or recognitions of wrongdoing reaffirm societal legal norms, they can play an important role in the legitimization of law.<sup>17</sup> Laws that are perceived as legitimate are more likely to be obeyed. This has obvious community benefits in the area of criminal justice.

Despite the promising role that apologies could play in the criminal context, until recently, virtually no criminal law scholars have seriously considered the role of remorse outside of the sentencing and dispositional phases of criminal adjudications. As Stephanos Bibas and Richard Bierschbach contend in their recent essay, *Integrating Remorse and Apology into Criminal Procedure*, criminal procedure neglects the power of remorse and apology by relegating it only to sentencing.<sup>18</sup> They criticize the limited use of apology throughout the criminal justice process and insist that the lack of focus on remorse and apology amounts to lost opportunities for victims, defendants, and their communities. As they put it, apology:

is a powerful ritual for offenders, victims, and communities, one that criminal procedure could facilitate by encouraging offenders to interact face to face with

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repairing of harm, forgiveness, and reconciliation"). See generally JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 252-53 (2002).

15. See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1015-23 (1999) (articulating benefits of apologizing in the civil context); Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1141-42 (2002); see also Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247, 253-54 (2005).

16. See William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 140, 162 (finding a reduction in reoffending); Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 190-91 tbl.7 & fig.7 (reviewing four studies of offenders' apologies and one study of victims' forgiveness to find that restorative justice procedures greatly increase the likelihood of forgiveness).

17. See PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 6-7 (1995); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997).

18. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 89 (2004).

their victims. The focus would broaden beyond the individual offender's badness to constructive measures to heal offenders, victims, and communities. Remorse and apology would teach offenders lessons, vindicate victims, and encourage communities to welcome wrongdoers back into the fold.<sup>19</sup>

Bibas and Bierschbach go beyond merely contemplating the benefits of incorporating remorse and apology into other areas of the criminal process. They also suggest a number of ways in which this can be put into practice.<sup>20</sup> Most notably, they argue that apologies and expressions of contrition could play a much larger role in prosecutorial decisions to dismiss charges or to divert cases for alternate resolutions,<sup>21</sup> and presumably in prosecutors' decisions to make other plea offers. Theoretically, encouraging apologies in earlier stages of the criminal law process may be a laudable goal given what we know about apologies and their potential benefits to victims, offenders, and communities. But empirically, the growing literature on apologies in psychology and law raises important questions about whether apologies—when made prior to a determination of guilt—would lead to more favorable results for the offender.

In this paper, we begin to explore the assumptions regarding the practicability of incorporating remorse and apology into criminal procedure at stages prior to sentencing. We are intrigued by the argument that apologies could play a significant role in prosecutorial charging and plea bargaining decisions. While there are many stages in the processing of criminal cases, charging and plea bargaining<sup>22</sup> are arguably the most important. Plea bargaining has emerged as the most ubiquitous<sup>23</sup> and outcome-determinative<sup>24</sup> phase of the criminal

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19. *Id.* at 90.

20. *Id.* at 127–45 (discussing in detail six areas in which remorse and apology could be better integrated in the criminal process).

21. *Id.* at 128–29 (explaining that “[r]emorse and apology could play a much larger role in” decisions to forego arrest, defer prosecutions, divert cases, or alter charges).

22. In using the term “plea bargaining,” we often mean to include charging decisions by prosecutors. While charging and plea bargaining can be different and distinct processes, there is commonly significant overlap. In many instances plea negotiations between prosecutors and defense attorneys occur well before charging decisions are made. This is particularly true, although not uniquely so, in white-collar offenses where the defendants are often made aware that they are being investigated well before they are formally charged or indicted. In other instances, plea bargaining may involve dismissing some offenses and recharging others.

23. See Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 718 (Supp. 2006) (describing plea bargaining as “well-

prosecution. As George Fisher put it, “plea bargaining has triumphed” as “it has swept across the penal landscape and driven our vanquished jury into small pockets of resistance.”<sup>25</sup> There are many reasons for this ascendance. Over the last several decades, prosecutorial power has been on the rise in state<sup>26</sup> and federal courts.<sup>27</sup> A prosecutor’s charging decisions, for instance, determine the outcome of a great many cases. Sentences are dictated by both charging and plea decisions. Because approximately ninety-five percent of state criminal convictions are obtained through guilty pleas,<sup>28</sup> prosecutors exercise enormous power over a staggering number of cases through plea bargains. Any significant change in the approach with which defendants and their attorneys handle criminal cases—such as the incorporation of apologies—will inevitably take into account the potential impact on plea bargaining.

Thus, while taking seriously the claim that apologies might have a beneficial role to play in criminal cases outside of sentencing, we find it unrealistic to expect that most defendants would participate in remorse or apology rituals without regard to the effect of the apology on the outcome of their criminal cases. Because most criminal cases are resolved with guilty pleas, one has to examine the impact of apologies on guilty pleas, and on plea bargaining in particular, if there is any hope

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entrenched” in the American system); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1123 (1998) (describing plea bargaining as “a given” and seeking reform rather than abolition); see also Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1039–45 (1984) (noting that a large number of criminal justice scholars and practitioners believe that plea bargaining is an inevitable aspect of the criminal system).

24. Plea agreements are valuable to prosecutors because they enable them to determine and predict the outcomes of cases. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 39 (2002).

25. GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 1 (2003).

26. Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1022 (2005) (explaining that state prosecutors “have significant political power”).

27. See Margaret Etienne, *Into the Briar Patch?: Power Shifts Between Prosecution and Defense After United States v. Booker*, 39 VAL. U. L. REV. 741, 750–51 (2005) (describing continued rise in prosecutorial power); Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 297–99 (2004); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1336–39 (2005) (describing how the Federal Sentencing Guidelines greatly enhanced prosecutorial power).

28. Matthew R. Durose & Patrick A. Langan, BUREAU OF JUSTICE STATISTICS., U.S. DEPT OF JUSTICE, *FELONY SENTENCES IN STATE COURTS, 2002* 1 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf>.

of encouraging apologies prior to sentencing.

Mindful of recent scholarship on apologies in both legal and psychological literature, we consider the role of apologies in plea bargaining and theorize about the ways in which apologies might affect plea negotiations. In Part II, we first discuss the role of apologies and remorse in criminal sentencing, noting that studies have consistently found that apologies are associated with more lenient sentencing. We then consider the role of apologies in the context of civil settlement negotiation. We note that the empirical research demonstrates that apologies affect claimants' perceptions of the harm they suffered, attributions about the offenders, emotions regarding the offenders, desire to pursue legal action, and settlement posture. In Part III, the crux of the paper, we turn to a consideration of apologies in the context of plea bargaining. We first examine the theory of plea bargaining so as to set the context for the discussion. An understanding of the goals of plea bargaining is useful in assessing the motivations and pressures of the parties and how these might be influenced by the presence or absence of apologies. In addition, we describe briefly the plea negotiation process itself in an effort to expose the logistical constraints the parties face in providing and evaluating apologies. We then compare and contrast criminal plea negotiations with civil settlement negotiations and discuss how several important differences might bear on the impact of apologies. We conclude that, contrary to the assertion that apologies might lead to more favorable plea bargained outcomes for defendants, the nature of plea negotiation renders this result unlikely. Certainly, further empirical research is needed to satisfactorily answer this question.

## II. APOLOGIES IN OTHER LEGAL CONTEXTS

Much attention has been paid in recent years to the role of apology and remorse in the law. In particular, this attention has focused on the influence of apology and remorse on criminal sentencing decisions and on the effects of apology on the settlement of civil cases. Research in both of these areas shows the potential benefits of apologies and other expressions of remorse for wrongdoers. However, while both of these contexts have features in common with plea bargaining, there are also important differences.

### *A. Apologies in Criminal Sentencing*

In contrast to the studies on settlements in civil cases, virtually no

work has been done regarding the impact of apologies on the plea negotiation process in criminal cases. Instead, in the criminal law context, scholars and practitioners have largely focused on the role of remorse in the sentencing phase of the criminal case. In particular, they have debated whether, as a positive matter, apologies or displays of remorse by defendants (and perhaps their lawyers) result in harsher or lighter sentences.<sup>29</sup> In addition, scholars have raised normative questions about what role, if any, remorse and apology should play in deriving a just sentence.<sup>30</sup> Finally, scholars have raised epistemological questions regarding a fact-finder's ability to know what truly lies in the hearts and minds of defendants who express remorse.<sup>31</sup>

Some scholars and practitioners reason that defendants who are remorseful are less likely to repeat their crimes and therefore need little deterrence.<sup>32</sup> Others justify lower sentences on the grounds that remorseful defendants are less morally blameworthy.<sup>33</sup> Perhaps for a combination of these reasons, studies of the impact of remorse on sentencing have consistently shown that remorse leads to more lenient treatment toward defendants at sentencing. Judges tend to use their discretion to impose lighter sentences on remorseful defendants,<sup>34</sup> and

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29. See Lisa F. Orenstein, *Sentencing Leniency May Be Denied to Criminal Offenders Who Fail to Express Remorse at Allocution*, 56 MD. L. REV. 780, 780 n.8, 785–86 (1997).

30. See, e.g., 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, 1511, 1515–16 (1997) (urging that considerations of remorse be eliminated from or minimized in application of "acceptance of responsibility" guideline); 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 "acceptance of responsibility" provision to include automatic reduction for guilty pleas without consideration of factors like remorse).

31. Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of the Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2162 (2003) (noting that "some of the problems with using remorse as a sentencing factor are epistemological" as it is nearly impossible to "tell what is in another's heart or mind"); see, e.g., O'Hear, *supra* note 30, at 1511 (noting that the Federal Sentencing Guidelines call for judges to inquire "into the defendant's state of mind" and weigh factors such as "whether the defendant fully and freely admits to committing the offense, whether the defendant accepts punishment as an appropriate consequence of the offense, whether the defendant regrets what was done, and whether the defendant is sincerely committed to avoiding future criminal activity").

32. Bibas & Bierschbach, *supra* note 18, at 93–95.

33. *Id.*

34. Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 131 (2006) (noting that "[m]any state courts have found remorse to be an appropriate mitigating factor" in sentencing); Etienne, *supra* note 31, at 2123 (explaining how judges use sentencing rules to reward defendants who show remorse); O'Hear, *supra* note 30, at 1511 (noting that judges

legislators tend to pass laws recognizing remorse or acceptance of responsibility as legitimate grounds for leniency.<sup>35</sup> Even capital juries seem to factor in the remorsefulness of the defendant in deciding between a life sentence or the death penalty.<sup>36</sup>

Given that expressions of remorse lead to more lenient sentences from judges and juries, one might reasonably assume that such expressions would lead to more lenient plea offers from prosecutors. However, the factors at play in plea negotiations are sufficiently distinct from those in sentencing that the role of remorse in the plea negotiation context warrants close and independent analysis.

### *B. Apologies in Civil Settlement*

While there has been little examination of the role of apologies in plea negotiations, recent empirical work has begun to explore how apologies by *civil* defendants might influence their prospects for settlement. This work uses a variety of different methodologies including studies that ask potential litigants about how they predict they would react to an injurious situation, studies that ask actual litigants about their motivations and reactions, and experimental studies that explore the ways in which people react to systematically varied situations. This body of work suggests that apologies influence claimant decision making in a variety of ways, including decisions to seek legal advice, decisions about whether to file suit, decisions about negotiation positions, and decisions about settlement.<sup>37</sup>

First, there is some evidence that claimants' initial decisions about whether to pursue lawsuits is influenced by whether the other party apologizes. For example, one experimental study found that health plan

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weigh remorsefulness in sentencing).

35. See, e.g., U.S. SENTENCING GUIDELINES MANUAL, § 3E1.1 (Acceptance of Responsibility) (2006) (determining the weight to be given to remorse in federal sentencing).

36. Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1614–15 & tbl.2 (1998); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1560–61 & tbl.1 (1998). Mock jury studies also find that jurors would impose lesser punishments on remorseful defendants. See, e.g., Chris L. Kleinke et al., *Evaluation of a Rapist as a Function of Expressed Intent and Remorse*, 132 J. SOC. PSYCHOL. 525, 533–34 (1992); 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 & tbl.1 (1999); Michael G. Rumsey, *Effects of Defendant Background and Remorse on Sentencing Judgments*, 6 J. APPLIED SOC. PSYCHOL. 64, 66 (1976).

37. For a review, see Jennifer K. Robbennolt, *Apologies and Civil Justice*, in CIVIL JUSTICE: EMPIRICAL PERSPECTIVES (Brian Bornstein ed., forthcoming 2007).

members were less likely to indicate that they would seek legal advice following medical error when the health care provider disclosed the error, took responsibility, apologized, and detailed steps that would be taken to prevent similar errors in the future.<sup>38</sup> This is consistent with studies finding that people anticipate that they would desire an apology if injured by another. A number of studies have found that medical patients report that they would want to receive an apology from their physician if the physician made a mistake.<sup>39</sup> In addition, studies that have asked litigants about their motives for bringing suit find that many of these plaintiffs believe that an apology from the other side might have prevented them from filing suit.<sup>40</sup>

Recent experimental studies have found that apologies can influence the ways in which injured parties construe an injury-producing event. In particular, apologies have been shown to favorably influence a variety of attributions made about the situation and the other party, including

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38. Kathleen M. Mazor et al., *Health Plan Members' Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409, 416 (2004) [hereinafter Mazor et al., *Health Plan Members' Views*]. Patients who were told that the physician had provided full disclosure also reported greater satisfaction, fewer negative emotions, more trust in the health care provider, and a lower inclination to change providers. *Id.*; see also Kathleen M. Mazor et al., *Disclosure of Medical Errors: What Factors Influence How Patients Respond?*, 21 J. GEN. INTERNAL MED. 704, 708 (2006).

39. See, e.g., Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1004 (2003) (finding that patients in focus groups expressed a desire to receive apologies, assurance that the health care provider regretted the error, information about what happened, and assurance that such errors would be prevented in the future); Mazor et al., *Health Plan Members' Views*, *supra* note 38, at 415 (finding that approximately eighty-eight percent of surveyed health plan members endorsed the notion that following a medical error they "would want the doctor to tell me that he or she was sincerely sorry"); Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES INTERNAL MED. 2565, 2566 (1996) (finding that ninety-eight percent of the patients in her study "desired or expected the physician's active acknowledgement of an error. This ranged from a simple acknowledgement of the error to various forms of apology.").

40. Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (finding that nearly forty percent of claimants who thought that something could have been done to prevent the litigation indicated that litigation would not have been necessary if the medical provider had offered an explanation and apologized); see also Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361 (1992) (finding that claimants in suits involving perinatal injuries were motivated to file suit when the physician was not forthright about what happened (24%), in order to find out what had happened to cause the injury (20%), or to deter and punish the provider, including preventing future injuries (19%)); John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 220 (1985) (reporting interviews with libel plaintiffs indicating that many of them attempted to first resolve their conflict with the media source and most of them ask for "retraction, correction, or apology").

perceptions of the character and the degree of regret experienced by the other party, expectations about the way in which the other party would behave in the future, and expectations about the relationship between the parties going forward.<sup>41</sup> Similarly, apologies have been shown to influence claimants' emotional reactions—increasing sympathy for the other party and decreasing anger.<sup>42</sup> Claimants, therefore, tend to be more willing to forgive and to desire less harsh punishment of offenders when they have received an apology.<sup>43</sup> In addition, apologies have been found to influence claimants' negotiating positions—lowering their aspirations and estimates of a fair value for settlement in some circumstances.<sup>44</sup> Research in other contexts has found that such settlement levers tend to influence ultimate settlement decisions.<sup>45</sup> Finally, recent research has found that claimants who receive an apology from the other party may be more likely to accept a given settlement offer than those claimants who do not receive an apology.<sup>46</sup>

A number of individual institutions and programs report a connection between apologies and the settlement of civil cases. For example, at the Veterans Affairs Medical Center in Lexington, Kentucky, patients are informed of adverse events, and, if the hospital determines there has been an error, an apology is given and a settlement

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41. Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 485–86 (2003) [hereinafter Robbennolt, *Apologies and Legal Settlement*]; Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 370 (2006) [hereinafter Robbennolt, *Apologies and Settlement Levers*]; see also Brian H. Bornstein et al., *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20 BEHAV. SCI. & L. 393, 397, 404 (2002) (finding that civil defendants who showed remorse were perceived more positively (study 1) and were rated as having suffered more (study 2) by mock jurors than were defendants who did not express remorse).

42. Robbennolt, *Apologies and Legal Settlement*, *supra* note 41, at 475–76.

43. *Id.*

44. *Id.* at 485–86.

45. See Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in BARRIERS TO CONFLICT RESOLUTION 86, 106 (Kenneth J. Arrow et al. eds., 1995); Max H. Bazerman et al., *Perceptions of Fairness in Interpersonal and Individual Choice Situations*, 4 CURRENT DIRECTIONS IN PSYCHOL. SCI., Apr. 1995, at 39, 42; Sally Blount White et al., *Alternative Models of Price Behavior in Dyadic Negotiations: Market Prices, Reservation Prices, and Negotiator Aspirations*, 57 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 430 (1994); Sally Blount White & Margaret A. Neale, *The Role of Negotiator Aspirations and Settlement Expectancies in Bargaining Outcomes*, 57 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 303, 305 (1994).

46. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 148 (1994) (landlord-tenant dispute); Robbennolt, *Apologies and Legal Settlement*, *supra* note 41, at 484–86 (bicycle-pedestrian collision).

offer made.<sup>47</sup> Since implementing this policy, the hospital reports that patients are less angry following adverse events and are more likely to maintain a good relationship with the hospital. The hospital also reports that it has settled cases more quickly, self-reporting of errors by the medical professionals has increased, the hospital has received positive publicity, and litigation costs have declined.<sup>48</sup> Other institutions have adopted similar policies and report similarly positive results.<sup>49</sup>

Finally, the research on apologies in civil cases has demonstrated that the effects of apologies can be somewhat complex. The more complete an apology is—containing components such as acceptance of responsibility for having caused harm, a promise to refrain from similar conduct in the future, or an offer of repair in addition to an expression of remorse—the greater its effects tend to be.<sup>50</sup> In particular, broad apologies that include the acceptance of responsibility for having caused harm appear to have consistently positive effects on lay people's

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47. See Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447, 1452–53 (2000); Steve S. Kraman, *A Risk Management Program Based on Full Disclosure and Trust: Does Everyone Win?*, 27 COMPREHENSIVE THERAPY 253, 254 (2001); Steve S. Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May Be the Best Policy*, 131 ANNALS INTERNAL MED. 963, 964–65 (1999); Albert W. Wu, *Handling Hospital Errors: Is Disclosure the Best Defense?*, 131 ANNALS INTERNAL MED. 970, 971 (1999). If, however, the hospital determines that the care provided was adequate, no settlement offer is made. Kraman, *supra* note 47, at 256–57.

48. Kraman, *supra* note 47, at 255; Kraman & Hamm, *supra* note 47, at 964–65. The hospital reports that as compared to thirty-five comparable VA hospitals over the seven-year period following implementation of the policy, the Lexington hospital was in the top twenty percent of facilities in terms of the number of claims against it (possibly reflecting the fact that more patients learn of errors) but was among the lowest twenty-five percent of facilities in terms of the amount of total payments. Kraman & Hamm, *supra* note 47, at 965 & fig.; Wu, *supra* note 47, at 971.

49. E.g., University of Michigan Health System, John's Hopkins, Children's Healthcare of Atlanta, and Sturdy Memorial Hospital in Boston. See Rae M. Lamb et al., *Hospital Disclosure Practices: Results of a National Survey*, 22 HEALTH AFF. 73, 78 (2003); Virginia L. Morrison, Heyoka: *The Shifting Shape of Dispute Resolution in Health Care*, 21 GA. ST. U. L. REV. 931, 951–54 (2005); Lindsey Tanner, *Doctors Eye Apologies for Medical Mistakes*, ASSOCIATED PRESS, Nov. 8, 2004; Rachel Zimmerman, *Medical Contrition: Doctors' New Tool to Fight Lawsuits: Saying 'I'm Sorry,'* WALL ST. J., May 18, 2004, at A1; see also Rita Marie Barsella, *Sincere Apologies Are Priceless*, SORRYWORKS! COALITION, JULY 2, 2007, <http://www.sorryworks.net/article50.phtml>; Chris Stern Hyman & Clyde B. Schechter, *Mediating Medical Malpractice Lawsuits Against Hospitals: New York City's Pilot Project*, 25 HEALTH AFF. 1394, 1395 (2006) (describing pilot program with nineteen cases; 91% (ten of eleven cases) in which the defense offered an apology settled as compared to only 38% (three of eight cases) when no apology was offered).

50. Manfred Schmitt et al., *Effects of Objective and Subjective Account Components on Forgiving*, 144 J. SOC. PSYCHOL. 465, 480 (2004). See Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 1, at 742–43. See generally Scher & Darley, *supra* note 1.

perceptions and settlement decisions. The effects of partial apologies that express sympathy, but do not accept responsibility, are more context dependent, having effects that are similar to but smaller than those of full apologies in some circumstances—particularly when the injury to the victim is less severe or when responsibilities are less clear—and not in others.<sup>51</sup>

### III. APOLOGIES IN PLEA BARGAINING

As we have seen, studies examining the effects of remorse and apologies in both the context of criminal sentencing<sup>52</sup> and the context of civil negotiation<sup>53</sup> find that apologies produce generally favorable effects. Despite these findings, it is not necessarily the case that defendants will receive more favorable plea offers as a result of apologies or other remorseful conduct. There are many explanations for why apologies might not lead to greater lenience in the negotiation of criminal cases. We contend that the principal reason to expect a diluted impact of apologies is the near absence of victims<sup>54</sup> and (often) defendants from the negotiating table.<sup>55</sup> Put another way, the prosecutor's role as the negotiator for the state alters the negotiation dynamic in significant ways. Criminal prosecutors represent the state, not the crime victim, and are not required to follow the wishes of the victim in resolving the case. The degree to which a crime victim has control over the prosecutor varies from limited to non-existent.<sup>56</sup> Thus, while civil plaintiffs have significant input in directing their attorneys'

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51. Robbennolt, *Apologies and Legal Settlement*, *supra* note 41, at 497–99.

52. See Ward, *supra* note 34, at 131.

53. See *supra* notes 45–50 and accompanying text.

54. While it is true that victims are enjoying a more expansive role in criminal cases than in the past, their influence over important decisions in the processing of criminal cases remains small. O'Hear, *supra* note 11, at 86–87. As the role of victims continues to expand, the impact of apologies in plea negotiations may also change. For an analysis of possible ramifications of increased victim involvement in plea negotiations, see Simon N. Verdun-Jones & Adamira A. Tijerino, *Four Models of Victim Involvement During Plea Negotiations: Bridging the Gap Between Legal Reforms and Current Legal Practice*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUSTICE 471, 486–91 (2004). Still, it is unlikely in the foreseeable future that victims in criminal cases will have as large a role as victims or plaintiffs in civil cases.

55. Bibas & Bierschbach, *supra* note 18, at 97 (“Beginning with arrest, [the criminal defendant] enters an adversarial system in which two lawyers, not the defendant and the victim, are the main actors.”).

56. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 61–63 (2007).

conduct, at least theoretically,<sup>57</sup> crime victims have a much more attenuated role in the dispute resolution process.<sup>58</sup> While lay persons tend to respond to apologies and remorse in ways that might lead them to reduce their desire for and expectations regarding remedies,<sup>59</sup> recent research has indicated that their legally trained representatives respond in just the opposite way.<sup>60</sup> Thus, we argue more lenient resolutions may not accrue to criminal defendants during plea negotiations.

### A. *The Dynamics of Plea Negotiations*

Scholars and practitioners have long examined the various factors that influence the plea bargaining process. One factor that has not been adequately considered is the role of apologies in plea bargaining. Apologies might affect prosecutorial decision making in a number of ways. One possibility, suggested by Bibas and Bierschbach, is that prosecutors might be more likely to dismiss or reduce charges in cases where a defendant apologizes or otherwise appears remorseful.<sup>61</sup> Alternately, prosecutors might treat an apology like a confession—a statement of great evidentiary value that strengthens the prosecutor’s case and thereby renders a favorable plea offer less necessary. A third possibility is that an apology might have no significant effect on plea bargaining. In order to draw any conclusions about apologies and plea bargaining, we first outline the factual and theoretical assumptions we make regarding plea bargaining.

#### 1. Theories of Plea Bargaining

A determination of what factors will influence plea bargaining will depend largely on the goals and justifications of plea bargaining.

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57. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2007) (“A lawyer shall abide by a client’s decision whether to settle a matter.”).

58. Samuel R. Gross & Daniel J. Matheson, *What They Say at the End: Capital Victims’ Families and the Press*, 88 CORNELL L. REV. 486, 486 (2003) (“Perhaps the most common complaint by American crime victims and their families is that they are ignored.”); Strang & Sherman, *supra* note 10, at 16 (“Victims are widely recognized to be the neglected party in the criminal justice process. Neither their needs nor their preferences are usually taken into account in the prosecution and sentencing of offenders.”). If it is, indeed, the case that victims are more likely to value apologies than are prosecutors, the effect of apologies on plea bargaining may vary depending on how involved the victim is in the process. See generally Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987).

59. Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. (forthcoming 2008).

60. *Id.*

61. Bibas & Bierschbach, *supra* note 18, at 129.

Theories abound for why plea bargaining takes place at all and why it has emerged as the predominant method of resolving criminal cases. Plea bargaining has long overtaken trial as the primary means of resolving cases in the American criminal justice system, and the number of trials is now miniscule compared to the number of guilty pleas.<sup>62</sup> While a brief examination of some theories is worthwhile, we decline to undertake here a thorough analysis of the various justifications for plea bargaining or to select among proffered theories. Indeed, we suspect that each of the explanations for why defendants and prosecutors negotiate away a trial might apply *some* of the time and that the reason for entering a plea agreement in one case may be completely inapplicable in another. That said, it makes sense that the impact of an apology or showing of remorse would vary based on the driving justification for the agreement.

The conventional wisdom is that plea bargaining is motivated predominantly by the state's need for efficiency in managing monumental caseloads.<sup>63</sup> While defendants' desire for reduced sentences makes such agreements feasible, many scholars have theorized that it is caseload pressure that drives the plea bargaining regime.<sup>64</sup> If true, apologies would have little effect on the likelihood of a plea agreement because they would not alter the caseload pressure. However, under this theory, apologies might affect the terms of plea agreements. Prosecutors could encourage clear and early apologies and could use them as an easy way to distinguish between otherwise similar cases. That is, a case in which a defendant has rendered an apology to the victim might yield a lower sentence recommendation than one in which the victim suffered a similar harm but received no apology or other indication of remorse. Defendants and their attorneys would be careful to craft apologies that were responsive to known prosecutorial preferences in order to generate more favorable plea offers.

A second common theory of plea bargaining is that parties seek to enter plea agreements when the evidence in their favor is weak in order

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62. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) (describing significant pressures brought to bear on defendants to plead guilty).

63. See Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 483 (1976) (explaining that plea bargaining is needed to allow prosecutors and judges to manage the system and process the maximum number of offenders); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 297 (1983) (noting that plea bargaining allows the prosecution of more offenders despite the limited resources of the state).

64. Schulhofer, *supra* note 23, at 1040.

to hedge their bets against the possibility of a total loss.<sup>65</sup> Under this theory, apologies would likely reduce the frequency of plea bargaining or lead to less favorable terms for defendants to the extent that they provided the prosecution with fairly strong evidence of guilt. And of course, a defendant who has admitted both guilt and regret is not likely to want to proceed to trial even in the face of an unattractive plea offer.

A third popular explanation for the prevalence of plea bargaining arises from social science research examining the criminal justice system as an institution and the social dynamics between the institutional stakeholders.<sup>66</sup> Under this theory, defense attorneys, prosecuting attorneys, judges, and other decision makers in the criminal justice setting strive to avoid conflict and maintain their working relationships in order to further their individual and collective goals.<sup>67</sup> The ability to reach agreements regarding pleas, then, is personally satisfying and is both an indicator and a symptom of positive professional ties and relationships.<sup>68</sup> It is unclear what effect apologies might have in a criminal justice system where this rationale for plea bargaining prevails. It would be awkward, though perhaps still possible, to give *no* weight to a genuine apology issued through a friend or colleague and still foster a positive relationship. On the other hand, if the parties are already being as cooperative as they can reasonably be in negotiating pleas, apologies might have no significant procedural effect on plea agreements. They might nonetheless result in other collateral societal benefits.

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65. The ability of prosecutors to bargain away, rather than dismiss, weak cases has been a central criticism of the plea bargaining system. See Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2295 (2006) (“When plea bargaining is available, prosecutors can extract a guilty plea in nearly every case, including very weak cases.”); see also Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1065, 1127 (1976) (advocating reforms to the plea system in order to ensure that weak cases would result in a trial).

66. Schulhofer, *supra* note 23, at 1041–43.

67. *Id.* at 1042 (citing JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 24–28 (1977); PETER F. NARDULLI, *THE COURTROOM ELITE: AN ORGANIZATIONAL PERSPECTIVE ON CRIMINAL JUSTICE* 66–81 (1978); George F. Cole, *The Decision to Prosecute*, 4 LAW & SOC’Y REV. 331 (1970); Malcolm M. Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC’Y REV. 407, 413–16 (1973); Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 53–55 (1967)); see also SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990* 87 (1993) (discussing the “informal norms” established by prosecutors, defense attorneys, and judges that encourage plea bargaining).

68. See Schulhofer, *supra* note 23, at 1042 n.14 and accompanying text.

## 2. Empirics of Plea Bargaining

Beyond theories of plea bargaining, it is also worth examining, factually, what is meant by plea bargaining. While it is true that there are overwhelmingly more guilty pleas than there are trials, not all cases that result in pleas are the result of real bargaining. Schulhofer has defined plea bargaining generally as “any process in which inducements are offered in exchange for a defendant’s cooperation in not fully contesting the charges against him.”<sup>69</sup> While this definition provides an excellent starting point, a definition which involves *any* process may be too broad for our purposes here.

Many defendants plead guilty without the benefit (or perhaps burden) of an agreement. At times the prosecutor is unwilling to make an agreement of any kind and yet the defendant may have no desire to exercise her right to a trial. Particularly in less serious cases—most notably those that might not involve incarceration—the financial, emotional, and time costs of going to trial are enough to induce many defendants to plead guilty even without concessions by the prosecution.<sup>70</sup> In addition, there are occasions in which the agreement proposed by the prosecution is viewed as no “bargain” at all by the defense. Either the defendant is unwilling to accept constraints imposed by the agreement such as the waiver of appeal rights,<sup>71</sup> or she is confident that she can obtain a satisfactory result from the judge without the prosecutor’s help.<sup>72</sup>

There are also important procedural differences in how plea bargaining occurs. The process of plea bargaining is as varied as the contexts in which it occurs. On one end of the plea bargaining spectrum, agreements are struck with little or no negotiation. In the context of large numbers of misdemeanors or low-level felony cases, plea agreements are often the result of an assembly line model of case processing in which prosecutors—based largely on police reports—assign a preliminary plea offer to each case.<sup>73</sup> This preliminary offer is

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69. *Id.* at 1037.

70. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 186–87 (1979).

71. For instance, it has become increasingly common to ask defendants to waive their rights to appeal a contested sentence. Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 *DUKE L.J.* 209, 220–21 (2005); Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 *J. CRIM. L. & CRIMINOLOGY* 1195, 1237–38 (2005).

72. Etienne, *supra* note 71, at 1238–39.

73. FEELEY, *supra* note 70, at 187–88 (describing a “supermarket” model of plea

often the final offer. In many of these cases, the prosecutor has had no prior contact with the defendant, victim, law enforcement officer, or defense attorney before the opening negotiation offer is made. Unrepresented defendants often accept the plea offer without discussion.<sup>74</sup> In cases with represented defendants, prosecutors and defense attorneys have a general sense of the “value” of a typical case and usually settle quickly on a sentence with little or no discussion.<sup>75</sup>

On the other end of the negotiation spectrum, plea deals are the result of lengthy and drawn out bargaining processes. Negotiations in white collar crime cases provide a typical example of this protracted bargaining model. In white collar and large criminal conspiracy cases, much of the plea bargaining occurs prior to indictment. Defendants typically know well before they are charged that they are a target of a criminal investigation. Defense attorneys advocate on behalf of their clients early in the process and play a central role in framing the charges to be indicted. It is not unusual in such cases for defendants to express remorse.

Many plea agreements fall somewhere on the spectrum that runs from supermarket bargaining to protracted bargaining. In our examination about the effects of apologies on plea bargaining, we unabashedly assume that *some* actual bargaining occurs, although we recognize that this assumption does not necessarily mirror reality. We do so for two reasons. First, our analysis focuses largely on the psychosocial dynamics that occur between negotiating parties during the process of criminal bargaining. Second, it is likely that the preliminary sentence rates set during supermarket bargaining are established in the shadow of, and as a result of, the explicitly negotiated sentences. That is, prosecutors use their experiences to predict the going rate for an offense and, for the sake of efficiency in the face of huge caseloads, set the supermarket rate at what they believe would be the final negotiated outcome. If apologies are a factor in heavily negotiated agreements, we would predict that over time, prosecutors would account for apologies in

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negotiations in which prices are pre-set and even unhappy customers “rarely ‘bargain’”).

74. Indeed, prosecutors are wary of the ethical pitfalls of discussing a case with an unrepresented party. Model Rule 3.8(c) provides, “The prosecutor in a criminal case shall . . . (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.” MODEL RULES OF PROF’L CONDUCT R. 3.8(c) (2007). This language is often interpreted to prohibit any type of plea negotiation with an unrepresented defendant. For a general discussion of these ethical concerns, see Ben Kempinen, *The Ethics of Prosecutor Contact with the Unrepresented Defendant*, 19 GEO. J. LEGAL ETHICS 1147 (2006).

75. See Kempinen, *supra* note 74, at 1149–53.

determining the initial price of the crime under a supermarket bargaining system. Consequently, in this initial examination of the impact of apologies on plea bargaining, we limit our inquiry to explicitly negotiated cases based on the belief that the weight given to apologies in those cases will eventually be felt in less explicitly negotiated agreements as well.

### *B. Victims and Apologies*

As with civil plaintiffs, there is evidence that many victims of crime want to receive apologies from their offenders. For example, in one study, approximately ninety percent of victims interviewed expressed a desire for an apology.<sup>76</sup> But victims may not simply want just any apologies from offenders—it seems that the perceived sincerity of the apologies offered also matters to victims. Sincere apologies are more likely to be accepted and to have the positive effects described above than are apologies that are perceived to be insincerely offered.<sup>77</sup> As Dale Miller has argued, “When victims perceive apologies to be insincere and designed simply to ‘cool them out,’ they often react with more rather than less indignation.”<sup>78</sup> How, when, and to whom

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76. Strang & Sherman, *supra* note 10, at 39 & fig.11 (describing empirical study); see also Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL’Y & L. 433, 442 (1998).

77. See, e.g., Daniel P. Skarlicki et al., *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) (finding that ultimatum offers accompanied by apologies that were perceived as manipulative were more likely to be rejected); Edward C. Tomlinson et al., *The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following a Broken Promise*, 30 J. MGMT. 165, 171 (2004) (finding that apologies described as “sincere” resulted in greater willingness to reconcile than those that were not). See also studies finding the importance of sincerity of excuses: Jerald Greenberg, *Looking Fair vs. Being Fair: Managing Impressions of Organizational Justice*, in 12 RESEARCH IN ORGANIZATIONAL BEHAVIOR 111, 128–31 (Barry M. Staw & L.L. Cummings eds., 1990) (reviewing studies); Sim B. Sitkin & Robert J. Bies, *Social Accounts in Conflict Situations: Using Explanations to Manage Conflict*, 46 HUM. REL. 349, 359 (1993). But see evidence that even insincere apologies are accepted and valued by recipients: Mark Bennett & Christopher Dewberry, *‘I’ve Said I’m Sorry, Haven’t I?’ A Study of the Identity Implications and Constraints That Apologies Create for Their Recipients*, 13 CURRENT PSYCHOL. 10, 19 (1994) (finding a tendency for participants to accept even an unconvincing apology); Gross & Matheson, *supra* note 58, at 502 (quoting crime victim’s response to offender’s apology: “The words helped, whether he meant them or not.”); Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 J. PERSONALITY & SOC. PSYCHOL. 418 (2007).

78. Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527, 538 (2001); see also Robert A. Baron, *Attributions and Organizational Conflict: The*

apologies are offered may influence how sincere the apologies are perceived to be.

For example, apologies that accept responsibility for having caused harm are perceived as being more sincere and are more consistently effective than statements that merely express sympathy for the harm.<sup>79</sup> Accepting responsibility, by acknowledging and reaffirming the rule violation that has occurred, distinguishes apologies from other ways of accounting for one's behavior, such as justifications and excuses.<sup>80</sup> Similarly, apologies that are appropriately timed, coming soon after a period of introspection and opportunity to reflect, tend to be more effective.<sup>81</sup>

In addition, apologies are thought to be most sincere when they are offered directly by the offender to the victim. As one scholar of apologies has noted: "[T]he bedrock structure of apology is binary, a product of a relationship between the Offender and the Offended that can neither be reduced nor augmented without undergoing a radical metamorphosis."<sup>82</sup> In particular, apologies given and received through

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*Mediating Role of Apparent Sincerity*, 41 *ORG. BEHAV. HUM. DECISION PROCESSES* 111 (1988); Erving Goffman, *On Cooling the Mark Out*, 15 *PSYCHIATRY* 451, 451-53 (1952).

79. See, e.g., Robbennolt, *Apologies and Settlement Levers*, *supra* note 41, at 359 (finding that apologies that accept responsibility for having caused the harm are perceived to be more sincere than are apologies that only express sympathy); Robbennolt, *Apologies and Legal Settlement*, *supra* note 41 (unpublished portion of the data) (same); Scher & Darley, *supra* note 1, at 134 (finding that additional components, such as accepting responsibility, improve the effectiveness of apologies).

80. See, e.g., ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* 113-16 (1971); Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44 *SOC. PSYCHOL. Q.* 271, 271 (1981); Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 *ANN. REV. PSYCHOL.* 133, 162 (1992); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 *AM. SOC. REV.* 46, 46-47 (1968); see also MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 115 (1998) ("Full acceptance of responsibility by the wrongdoer is the hallmark of an apology.").

81. See, e.g., Cynthia McPherson Frantz & Courtney Bennigson, *Better Late Than Early: The Influence of Timing on Apology Effectiveness*, 41 *J. EXPERIMENTAL SOC. PSYCHOL.* 201, 205-06 (2005); see also Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 *JUDICATURE* 180, 186-87 (2000) ("Apologies offered in settlements differ from ones offered spontaneously. Negotiated apologies are a bargained for exchange that seem inherently less sincere than spontaneous apologies."); Weiner et al., *supra* note 1, at 299-300 (finding improved perceptions of wrongdoers who confessed and apologized spontaneously and for wrongdoers who did so only following an accusation, but finding greater improvement for spontaneous confessors; finding that accused confessors were more likely to be perceived as motivated by impression management than were spontaneous confessors).

82. NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 46-47 (1991). "As the offender, for example, I cannot have someone apologize on my behalf any more than I, as the offended, can forgive by proxy or have

intermediaries—defense attorneys and prosecutors—may not have the same effects as apologies offered directly by defendants to victims. Importantly, victims do not typically participate in the plea bargaining process. Instead, prosecutors negotiate on behalf of the state.<sup>83</sup> Similarly, defense attorneys tend to do the negotiating on the defense side.<sup>84</sup> Thus, even if victims had some influence over prosecutors' plea bargaining decisions, there is little opportunity during the plea bargaining process for offenders and victims to communicate directly with each other to give and receive apologies in this way.<sup>85</sup> While attorneys may successfully offer apologies on behalf of their clients in some instances,<sup>86</sup> it would not be surprising if the effect of such mediated apologies was attenuated.<sup>87</sup> Accordingly, given the absence of direct victim and offender participation, apologies in the context of plea bargaining may be less effective than in other contexts.

### C. Prosecutors and Apologies

As this all suggests, a particularly important feature of the system is that the defense conducts the plea negotiation with the prosecutor—not the crime victim. This aspect of the structure of this negotiation may have additional important implications for the effect of apologies on plea bargaining outcomes.

In particular, prosecutors may respond differently to apologies than do victims. Indeed, there is evidence in the civil context that lawyers respond differently to apologies in some respects than do lay people. This research shows that attorneys' and claimants' overall assessments of apologies and the information communicated by apologies are

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another bestow this gift without my knowledge or consent." *Id.* at 49.

83. DAVIS, *supra* note 56, at 61.

84. *See id.* at 44–47.

85. "It is important to acknowledge that offenders are highly restricted, both procedurally and interpersonally, while attempting to express remorse in the traditional criminal justice system." Susan J. Szmania & Daniel E. Mangis, *Finding the Right Time and Place: A Case Study Comparison of the Expression of Offender Remorse in Traditional Justice and Restorative Justice Contexts*, 89 MARQ. L. REV. 335, 356 (2005).

86. Hyman & Schechter, *supra* note 49, at 1397.

87. *See* Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 30 (2001) (reviewing studies finding relatively high rates of victim satisfaction with victim-offender mediation programs, but that participants in such programs who met face-to-face with their offenders were more satisfied than participants who did not meet face-to-face but instead engaged in a process of "shuttle" mediation); *see also* Szmania & Mangis, *supra* note 85, at 356 (explaining that "even if an offender attempts to communicate remorse, the effort will likely be incomplete or inadequate" in the eyes of the court, the community and the victims).

similar—with both groups making similar assessments of the sufficiency of a defendant's apology and making similar attributions about the offender's character, regret, future behavior, respect for the claimant, and so on.<sup>88</sup> Interestingly, however, attorneys' legal responses to apologies differ from those of individual claimants. Specifically, as noted above, claimants respond to apologies in ways that are favorable to the defendant—i.e., they felt less anger and more sympathy, were inclined to forgive, thought less harsh punishment was warranted, aspired to receive lower monetary amounts in settlement of their claim, and named lower monetary amounts as fair settlement values. In contrast, attorneys' evaluations of their clients' emotions and likely inclination to forgive and their own views of appropriate punishment have been shown to be unaffected by defendant apologies. In addition, their aspirations for settlement and their judgments of a fair settlement value have been shown to increase when an apology is offered.<sup>89</sup>

Prosecutors are, of course, lawyers acting in a representative capacity and might be thought to respond differently to apologies than crime victims. Prosecutors, in their representational role and as repeat players in the system,<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> Indeed, recent experimental research in non-legal contexts has shown that third parties generally respond differently to apologies than do apology recipients, with observers

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88. Robbennolt, *supra* note 59.

89. *Id.*

90. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006) (describing prosecutors as one group of a set of "insiders" who are the "professional repeat players who dominate criminal justice"); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974) (discussing repeat players).

91. See Cohen, *supra* note 15, at 1052; Jeffrey Z. Rubin & Frank E. A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, 4 NEGOT. J. 395, 397 (1988); Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 662 (1976) (arguing that an agent or "affiliate normally brings to the dispute a degree of objectivity which the actor-disputant cannot attain").

92. See Rubin & Sander, *supra* note 91, at 397 (describing the "detachment" of agents in negotiation).

paying more attention to distinctions between sincere and insincere apologies than do recipients.<sup>93</sup>

Moreover, there is evidence that attorneys tend to be more analytical,<sup>94</sup> more focused on legal rights and evidence,<sup>95</sup> and less emotional than are non-lawyers.<sup>96</sup> Lawyers are selected and trained to be focused on dispassionate analysis. As Professors Korobkin and Guthrie have noted, to be accepted into law school, “an applicant must demonstrate a higher-than-average ability to think analytically.”<sup>97</sup> Law schools then tend to emphasize the ability “to analyze legal conflicts carefully and unemotionally.”<sup>98</sup> Specifically, “[m]any law schools train future judges and prosecutors to use cost-benefit, net-present-value analysis when assessing outcomes.”<sup>99</sup> In addition, attorneys are trained

93. Risen & Gilovich, *supra* note 77.

94. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1426 (1997); Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 156 (2001); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 45 (1982).

95. See Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 171 (1994).

96. See Daicoff, *supra* note 94, at 1352; Guthrie, *supra* note 94, at 155; Riskin, *supra* note 94, at 45.

97. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 87 (1997).

98. *Id.*; see also Eisenberg, *supra* note 91, at 663 (“If, as is frequently the case, the affiliate is a professional, objectivity may itself be a norm in which he is schooled.”).

99. Bibas, *supra* note 90, at 922–23; Riskin, *supra* note 94, at 45 (“Lawyers are trained to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules, to focus on acts more than persons. This view requires a strong development of cognitive capabilities, which is often attended by the under-cultivation of emotional faculties.”). Riskin cites the following example:

A law school classroom incident shows how quickly this deafness afflicts students—usually without anyones [sic] noticing. Professor Kenney Hegland writes:

In my first year Contracts class, I wished to review various doctrines we had recently studied. I put the following:

In a long term installment contract, Seller promises Buyer to deliver widgets at the rate of 1000 a month. The first two deliveries are perfect. However, in the third month Seller delivers only 999 widgets. Buyer becomes so incensed with this that he rejects the delivery, cancels the remaining deliveries and refuses to pay for the widgets already delivered. After stating the problem, I asked “If you were Seller, what would you say?” What I was looking for was a discussion of the various common law theories which would force the buyer to pay for the widgets delivered and those which would throw buyer into breach for cancelling the remaining deliveries. In

to focus on legal rules, legally relevant facts, and the probative value of evidence, and it is this expertise that is expected of them.<sup>100</sup> Consistent with this focus, a number of studies have identified the strength of the evidence as one of the primary influences on prosecutors' plea bargaining decisions.<sup>101</sup>

Thus, to the extent that an apology by a criminal defendant provides evidence of the defendant's responsibility for having committed a crime, the apology may serve to bolster the prosecutor's case.<sup>102</sup> Indeed, there is evidence from the civil context that when an offender admits

short, I wanted the class to come up with the legal doctrines which would allow Seller to crush Buyer.

After asking the question, I looked around the room for a volunteer. As is so often the case with the first year students, I found that they were all either writing in their notebooks or inspecting their shoes. There was, however, one eager face, that of an eight year old son of one of my students. It seems that he was suffering through Contracts due to his mother's sin of failing to find a sitter. Suddenly he raised his hand. Such behavior, even from an eight year old, must be rewarded.

"OK," I said, "What would you say if you were the seller?"

"I'd say 'I'm sorry'."

*Id.* at 45–46 (quoting Hegland, *Why Teach Trial Advocacy? An Essay on "Never Ask Why,"* in HUMANISTIC EDUCATION IN LAW, Monograph III, 68–69 (1982)).

100. See William K. Bartels, Recent Developments, *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); McEwen et al., *supra* note 95, at 171; Rubin & Sander, *supra* note 91, at 397.

101. Kenneth Adams, *The Effect of Evidentiary Factors on Charge Reduction*, 11 J. CRIM. JUST. 525, 525 (1983); Alschuler, *supra* note 62, at 58 ("The overwhelming majority of prosecutors view the strength or weakness of the state's case as the most important factor in the task of bargaining."); Stephen P. Lagoy et al., *An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Negotiations*, 13 AM. CRIM. L. REV. 435, 439–40 (1976); William F. McDonald et al., *Prosecutorial Bluffing and the Case Against Plea-Bargaining*, in PLEA BARGAINING 1, 22 (William F. McDonald & James A. Cramer eds., 1980); H.S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES (1978).

102. As a general matter, confession evidence is quite powerful. See, e.g., Saul M. Kassir & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 481 (1997); Saul M. Kassir & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 56–57 (2004). In assessing the role of apologies in plea bargaining, we must be mindful of the various alternatives. Most cases do not present a binary choice between "an apology" and "no apology." Cases fall into various categories. In some cases, the defendant makes no admission of guilt or expression of remorse whatsoever. In other instances, the defendant may confess or make a partial admission of guilt without expressing remorse. A third possibility is that a defendant may make an apology that expresses both guilt and remorse. It is certainly possible that a prosecutor would respond to each of these alternatives differently.

responsibility for having caused harm, claimants and attorneys estimate the injured party's chances of winning at trial to be greater than when the offender does not admit responsibility (but merely expresses sympathy).<sup>103</sup> For claimants, this tendency is outweighed by other effects that incline them to settle.<sup>104</sup> However, for attorneys, the evidentiary value of the apology may be the focus. There is no reason to assume that the differing impact of apologies on lawyers as compared to lay persons would not apply equally to civil as well as criminal cases.

Another reason that apologies might impact prosecuting attorneys differently than victims of crime is that prosecutors may also have a particularly difficult time disengaging from prosecution once the process has begun and resources have been invested. In the civil context, we know that plaintiffs can become invested in continuing the litigation and may be more reluctant to settle or walk away after having "spent a great deal of money on pretrial motions and discovery."<sup>105</sup> The psychological effects of these sunk costs, which make it difficult for civil claimants to abandon their efforts, may make it difficult for victims and prosecutors to do so as well.<sup>106</sup> In criminal cases, however, it is the prosecutor and law enforcement agents, not the victims, who invest time and resources into the pretrial process and who face the costs of prosecution. Thus, it may be easier for victims in criminal cases to walk away from litigation than plaintiffs in civil cases. Yet criminal victims are not empowered to walk away. That authority is in the hands of the prosecutor who, like the civil claimant, has actually borne the sunk costs of pretrial litigation.

In addition, crime victims and other injured parties may "care about a much wider array of justice concerns than do lawyers, including their own status, the other side's blameworthiness, and apologies."<sup>107</sup> In the civil context, these differences between the perspectives of claimants and attorneys may get negotiated between attorney and client.<sup>108</sup> However, as noted above, criminal prosecutors have vastly more

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103. Robbennolt, *Apologies and Settlement Levers*, *supra* note 41, at 362, 367 (claimants); Robbennolt, *supra* note 59 (attorneys).

104. Robbennolt, *Apologies and Settlement Levers*, *supra* note 41, at 370–71.

105. See Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 24 (1999).

106. Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORG. BEHAV. & HUM. DECISION PROCESSES 124, 124–25 (1985); Richard H. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980).

107. Bibas, *supra* note 90, at 931.

108. See William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1450 (1992).

decision-making authority and discretion than do civil plaintiffs' attorneys, and they have no obligation to follow the wishes of crime victims.<sup>109</sup> Thus, prosecutors' reactions to defendant apologies are likely to hold more sway than the reactions of victims.

#### *D. Additional Considerations*

There are additional reasons why apologies could result in harsher plea agreements. An apology may show the prosecuting attorney that she has the upper hand. It may also serve as a signal that the defendant lacks the appetite for a legal battle and would prefer a quick resolution.<sup>110</sup> A defendant who desperately wants to plead is more likely to accept the plea offer presented. Following an admission of guilt, her attorney will have little leverage to obtain a more favorable plea offer. The primary leverage that defendants have is the threat of trial, and this threat may become far less credible after an apology.

A defendant's apology may provide an important signal to the prosecutor but it may also serve as a signal for her own defense attorney. This adds an important complication. Criminal defense attorneys, particularly public defenders and those appointed to represent the indigent, commonly labor under heavy caseloads.<sup>111</sup> They manage these caseloads by triage—focusing on the cases most likely to go to trial or that are the most winnable.<sup>112</sup> A case in which a defendant apologizes early is unlikely to be either triable or winnable. A defense attorney who is engaging in triage is likely to spend fewer resources investigating and researching a case with a statement by the defendant expressing responsibility or remorse. Thus, even absent the impact of an apology on the prosecution of the case, an apology may affect the defense of the case, likely resulting in a less favorable plea agreement for the defendant.

Finally, the importance of contextual factors have been largely overlooked among theorists arguing in favor of encouraging offender apologies pervasively throughout every stage of the criminal process, rather than just during and after sentencing. Apologies can be highly

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109. DAVIS, *supra* note 56, 61–63.

110. Bibas & Bierschbach, *supra* note 18, at 97 (“Defense attorneys and prosecutors usually view these expressions [of remorse] as relevant only to the defendant’s willingness to fight, plead, or perhaps cooperate.”).

111. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1730–48 (1993) (discussing the heavy caseloads of criminal defense attorneys among other disadvantages faced by criminal defendants).

112. Etienne, *supra* note 71, at 1228.

contextual. The content and presentation of apologies vary based on the context and medium. Similarly, the context of the apology may determine the way in which it is perceived by victims and observers. In a recent case study, Szmania and Mangis provide a close analysis of three apologies proffered by a man convicted of vehicular manslaughter.<sup>113</sup> They conclude that the context of each apology—a courtroom, a newspaper article, a face-to-face mediated encounter with the victim's family—was a key determinant of the substantive expression of remorse, the delivery, the rhetoric, and the effectiveness of each apology.<sup>114</sup> Without overstating the generalizability of their findings, Szmania and Mangis's work serves as an important reminder that even sincere apologies are not fungible and cannot be divorced from their context. An apology issued during the course of negotiations may not be formulated or understood in the same way as an apology issued at the time of the offense, during a plea colloquy, at sentencing, or post-conviction. Even assuming that victims, defendants, and communities benefit from apologies, it stands to reason that the extent of the societal benefit will vary from one context to another.

#### IV. CONCLUSION

To date, few have examined the role that remorse or apology might play in plea bargaining. To the extent that scholars and practitioners have considered apology in the criminal justice context at all, they have focused predominantly on its role in sentencing. In this paper, we have considered the impact that apologies or other remorseful conduct might have on plea bargaining.

We began by accepting the premise that crime victims, offenders, and communities might all benefit from a criminal system that encourages apologies. The most beneficial apologies are clear, unequivocal, sincere, timed appropriately, and come directly from the wrongdoer.<sup>115</sup> It has been argued that the most obvious way to encourage such apologies early in the criminal justice process would be for prosecutors to reward contrite defendants with dismissals or favorable plea offers. This proposal is not without merit because in the criminal law context, remorse and apologies are often said to result in more lenient sentences. Yet we argue that the dynamics of negotiations

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113. Szmania & Mangis, *supra* note 85, at 337.

114. *Id.* at 340–43.

115. TAVUCHIS, *supra* note 82, at 46–47; Frantz & Bennigson, *supra* note 81, at 201; Shuman, *supra* note 81, at 186–87; Weiner et al., *supra* note 1, at 291.

in criminal cases—plea bargaining by attorneys on behalf of victims and offenders who are otherwise silenced by the norms and strictures of the criminal justice system—may limit the impact of apologies in this context. We also question the prediction that prosecutors would be more favorably disposed toward defendants who apologize and raise questions about how apologies rendered in the plea negotiation context would be received by victims. Extrapolating from the increasingly sophisticated research in the distinct fields of apology and plea bargaining suggests that injecting apologies into plea bargaining may not inexorably lead to the beneficial results predicted by some. Clearly, more empirical research is needed that focuses squarely on apology and remorse in the unique context of plea negotiations.