

5-17-2021

The Psychology of Apologies in the Legal System: Will Apologies Save Governors Snyder and Cuomo?

M. Katie Cunius

University of Nevada, Reno

Monica Miller

University of Nevada, Reno

Follow this and additional works at: <https://lawpublications.barry.edu/barrylrev>



Part of the [Jurisprudence Commons](#), and the [Other Law Commons](#)

Recommended Citation

M. K. Cunius & Monica Miller, *The Psychology of Apologies in the Legal System: Will Apologies Save Governors Snyder and Cuomo?*, 26 Barry L. Rev. 1 (2021).

Available at: <https://lawpublications.barry.edu/barrylrev/vol26/iss2/1>

This Article is brought to you for free and open access by Digital Commons @ Barry Law. It has been accepted for inclusion in Barry Law Review by an authorized editor of Digital Commons @ Barry Law.

THE PSYCHOLOGY OF APOLOGIES IN THE LEGAL SYSTEM: WILL APOLOGIES SAVE GOVERNORS SNYDER AND CUOMO?

M. Katie Cunius* & Monica K. Miller**

INTRODUCTION

“To you, the people of Flint, I say tonight as I’ve said before:
I am sorry and I will fix it. Government has failed you.”¹

Starting early in life, children are taught to apologize for their wrongdoings in an effort to progress their moral development;² this act becomes a way to repair damage throughout various areas of life,³ as demonstrated by the apology given by former Michigan Governor Rick Snyder, above. Snyder, and eight others, were charged in 2021 for their roles in the Flint water crisis that led to many people getting sick or dying.⁴ The indictments of the nine government officials allude to their efforts to protect their image, rather than protect the health of Flint’s residents.⁵ Snyder’s apology, which will be analyzed in detail in Section VI, was an attempt to prevent these indictments. Snyder apologized for his role in the Flint water scandal; this apology was ultimately rejected by the citizens of Flint, Michigan.⁶

* Research Associate, University of Nevada, Reno; M.A., California State University; B.A., San Diego State University.

** Foundation Professor, University of Nevada, Reno; Ph.D., University of Nebraska - Lincoln; J.D., University of Nebraska College of Law.

¹ See generally Phil Helsel, *Michigan Governor Snyder Apologizes for Flint Water Crisis, Says 'I Will Fix It'*, NBC NEWS (Jan. 19, 2016), <https://www.nbcnews.com/storyline/flint-water-crisis/michigan-governor-snyder-apologizes-flint-water-crisis-says-i-will-n499991> [*hereinafter* Helsel] (Rick Snyder apologized to citizens of Michigan for his role in Flint Water crisis).

² NICK SMITH, *I WAS WRONG: THE MEANINGS OF APOLOGIES* 12 (Cambridge University Press 2008) [*hereinafter* SMITH].

³ See e.g., Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, 57(2) DISPUTE RESOLUTION 32 (2002). [*hereinafter* Fuchs-Bennett]; SMITH, *supra* note 2, at 134; Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 14 PEPP. DISP. RESOL. L.J. 35, 39 (2013) [*hereinafter* Smith, *Just Apologies*]; Cohen, J. R., *Advising Clients to Apologize*, 72 S. CAL. L. REV., 1009, 1016 (1998) [*hereinafter* Cohen].

⁴ Sarah Childress & Abby Ellis, *Nine Former Michigan Officials, Including Ex-Gov. Rick Snyder, Charged In Flint Water Crisis*, PBS (Jan. 14, 2021), <https://www.pbs.org/wgbh/frontline/article/flint-water-crisis-nine-former-michigan-officials-including-ex-gov-rick-snyder-charged/>.

⁵ *Id.*

⁶ *Id.*

While the Flint water crisis was a major *public* disaster, other alleged wrongdoings are of a much more *personal* nature. In March 2021, New York Governor Andrew Cuomo was accused of sexual misconduct by three women.⁷ Cuomo apologized for his actions by saying, “It was unintentional and I truly and deeply apologize for it...”⁸ His apology fell flat with many, who perceived it as putting blame on the victims and refusing to take responsibility.⁹ He was asked to resign, but Cuomo refused to do so and asked New Yorkers to wait for the facts until they passed judgement.¹⁰ At the time of this writing, it is too soon to tell whether lawsuits will ensue—or if the apology will be accepted by the victims.

These two recent examples highlight the importance of apologies in a variety of social situations. Apologies typically include an acknowledgment of the wrongdoer’s offense, followed by an expression of remorse,¹¹ in an effort to reconcile and restore strained relationships.¹² An apology involves two parties; it is an action in which the *wrongdoer* acknowledges responsibility for a harmful act and expresses remorse or regret to the *victim*.¹³ Wrongdoers commonly offer an apology—even a simple “I’m sorry”—in order to rebuild trust¹⁴ and gain forgiveness after a harmful act.¹⁵ Although apologies are common in daily life, this is not necessarily true for wrongdoers who are involved in the legal system, for instance, because they committed a crime or acted negligently and caused harm. Many wrongdoers in the legal system hesitate to apologize, either before or during their trial, for fear people involved in the legal system (e.g., victim, jurors) would view an apology as equivalent to an admission of guilt.¹⁶

Although some legal actors (e.g., jurors, judges) perceive apologies as admissions of guilt, studies have found that apologies could be beneficial for both the victim¹⁷ and the

⁷ Gregory Krieg & Brian Vitagliano, *Cuomo Apologizes, Says He Didn’t Know He Was Making Women Feel Uncomfortable and Rejects Calls to Resign*, CNN (Mar. 3, 2021), <https://www.cnn.com/2021/03/03/politics/andrew-cuomo-harassment-press-conference/index.html> [*hereinafter* Krieg].

⁸ *Id.*

⁹ Chris Sommerfeldt, *Alleged Cuomo Victim Blasts Governor for Refusing to Admit ‘Predatory Behavior’ in Apology*, N.Y. DAILY NEWS (Mar. 1, 2021), <https://www.nydailynews.com/news/politics/ny-cuomo-apology-charlotte-bennett-20210301-6ozf4zfgcbsfmxutrpf3xfxm-story.html>.

¹⁰ Krieg, *supra* note 7.

¹¹ AARON LAZARE, *On apology* 1, 28 OXFORD UNIV. PRESS (2005) [*hereinafter* LAZARE].

¹² *Id.* at 10.

¹³ *Id.* at 21.

¹⁴ Fuchs-Bennett, *supra* note 3, at 32; SMITH, *supra* note 2, at 134.

¹⁵ Smith, *supra* note 2, at 94; LAZARE, *supra* note 11, at 21.

¹⁶ Jennifer K. Robbennolt, *Apology Help or Hindrance*, 10(3) DISP. RESOL. MAG. 33, 33—34 (2004) [*hereinafter* Robbennolt, *Apology Help*].

¹⁷ See generally SMITH, *supra* note 2 (discusses theories about the meaning of apologies); Robyn Carroll & Normann Witzleb, *It’s Not Just about the Money—Enhancing the Vindictory Effect of Private Law Remedies*, 37 MONASH U. L. REV., 216 (2011) [*hereinafter* Carroll] (importance of non-monetary awards for vindicating the victim); Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20(4) BEHAV. SCI. & L., 337 (2002), [*hereinafter* Petrucci] (importance of apologies in the criminal justice system supported through theories,

wrongdoer.¹⁸ Victims desire an apology to ensure the wrongdoer perceives the action as a mistake and will not reoffend, which is known as a categorical regret.¹⁹ Wrongdoers benefit from apologizing by gaining forgiveness,²⁰ which strategically changes the victim's perception of the wrongdoer in an attempt to maintain a positive relationship between the parties;²¹ this in turn can affect the wrongdoer's punishment.²²

In order for wrongdoers to apologize without fear their apology will be used against them in court, 37 states have enacted apology laws.²³ These laws exclude apologies from being admissible in court.²⁴ Similar apology laws also exist outside of the United States, in countries such as Canada,²⁵ the United Kingdom,²⁶ and Australia.²⁷ The specifics of what is protected under these laws differs between jurisdictions.

case law and social and empirical research); GijsVan Dijck, *The Ordered Apology*, 73(3) OXFORD J. LEGAL STUD., 562 (2017) [*hereinafter* Van Dijck] (an ordered apology can have a significant impact on the victim).

¹⁸ See generally Judy Eaton & Anna Theuer, *Apology and Remorse in the Last Statements of Death Row Prisoners*, 26(2) Justice Quarterly 327 (2009) (analyzed remorse-related content in death row inmates last statements); Kathleen Gill, *The Moral Functions of an Apology*, 31 In PHIL. FORUM 11 (2000); Petrucci *supra* note 17, at 341-342; Smith *supra* note 2, at 93.

¹⁹ SMITH, *supra* note 2, at 80.

²⁰ *Id.*

²¹ LAZARE, *supra* note 11, at 27.

²² David B. Wooten, *Say the Right Thing: Apologies, Reputability, and Punishment*, 19(2) J. of Consumer Psychology 225, 228 (2009) [*hereinafter* Wooten].

²³ Cayce Myers, *Apology, Sympathy, and Empathy: The Legal Ramifications of Admitting Fault in US Public Relations Practice*, 42 Public Relations Review 1, 4 (2015) [*hereinafter* Myers].

²⁴ Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43(2) J. of Risk and Uncertainty 141, 142 (2011) [*hereinafter* Ho, *Does sorry work*].

²⁵ See generally Stuart McLennan, et al., *Apologies in Medicine: Legal Protection is not Enough*, 187(5) CMAJ, 156 (2015) [*hereinafter* McLennan] (discusses Canada's apology laws in regard to medical malpractice cases).

²⁶ See generally Prue Vines, *Apologies and Civil Liability in England, Wales and Scotland: The View from Elsewhere*, 12 EDINBURGH L. REV. 2 (2008), [*hereinafter* Vines] (discusses the Compensation Act of 2006, an apology law for the United Kingdom).

²⁷ See generally Malcolm H. Parker, *A Fair Dinkum Duty of Open Disclosure Following Medical Error*, 20(1) J. L. & MED. 35 (2012) [*hereinafter* Parker] (discusses Australia's apology laws for medical malpractice cases).

To better understand apologies in the legal system, psychologists studied the effects of apologies in various criminal²⁸ and civil²⁹ settings with the majority of research conducted in civil issues. These studies, taken together, suggest that there are as many as ten basic elements of apologies.³⁰ Seven elements are most relevant to the literature on apologies used in the legal system. Elements related to the apology itself include: delivering the apology,³¹ deciding the timing,³² and determining the apology's sincerity.³³ The elements related to the wrongdoer include: acknowledging responsibility,³⁴ avoiding

²⁸ See generally Brian Bornstein, et al., *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20(4) BEHAV. SCI. & L. 393 (2002) [*hereinafter* Bornstein] (studies impact of remorse on monetary damages awarded in a malpractice case); Ho, *Does Sorry work, supra* note 23 (effect of apology laws on medical malpractice lawsuits and settlements); Jennifer Tallon, et al., *Defendant Remorse and Publicity in Capital Trials: Is Seeing Truly Believing?*, 42(12) CRIMINAL J. BEHAV. 1282 (2015) [*hereinafter* Tallon] (examined the difference between showing emotions pretrial and during trial on the wrongdoer's punishment); Alfred Allan, et al., *Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints*, 17(4) PSYCHIATRY, PSYCHOL. & L. 538 (2010) [*hereinafter* Allan, *Parties' perceptions*] (perceptions of apologies in equal opportunity complaints).

²⁹ See generally Kate Rossmannith, et al., *Courtroom Contrition: How do Judges Know?*, 27(3) GRIFFITH L. REV., 366 (2019) [*hereinafter* Rossmannith] (interviewed judges to determine their opinion of apologies in the courtroom); Victoria Estrada-Reynolds & Narina Nunez S. *Male and Female Parole Decisions: Is Paying Your Due or saying You're Sorry More Important?*, 23(6) PSYCH., PSYCHOL., & L., 893 (2016) [*hereinafter* Estrada-Reynolds] (read parole scenarios where remorse and time served were changes to determine parole outcome); Tracey Booth, *Victim Impact Statements and the Nature and Incidence of Offender Remorse: Findings From an Observation Study in a Superior Sentencing Court*, 22(2) GRIFFITH L. REV. 430 (2013) [*hereinafter* Booth] (observes victim impact statements and wrongdoer's response and display of remorse); Mandeep K. Dhami. *Apology in Victim-Offender Mediation*, 19(1) CONTEMP. JUST. REV. 31 (2016) [*hereinafter* Dhami, *Apology in victim*] (studies the prevalence of apologies in person mediations); Martin V. Day & Michael Ross, *The Value of Remorse: How Drivers' Responses to Police Predict Fines for Speeding*, 35(3) L. HUM. BEHAV. 221 (2011) [*hereinafter* Day] (studied the effect of apologies on other verbal responses on lowering speeding ticket responses).

³⁰ See generally Johanna Kirchoff, et al., *Apologies: Words of Magic? The Role of Verbal Components, Anger Reduction, and Offence Severity*, 18(2) Peace and Conflict: J. PEACE PSYCHOL. 109 (2012) [*hereinafter* Kirchoff] (studies the completeness of an apology on the likelihood to be forgiven).

³¹ See e.g., 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 RSCH. 127 (1997) [*hereinafter* Scher]; Day, *supra* note 29.

³² See e.g. Allan, *Parties' Perceptions, supra* note 28; Tessa Haesevoets, et al., *The Impact of Decision Timing on the Effectiveness of Leaders' Apologies to Repair Followers' Trust in the Aftermath of Leader Failure*, 31(4) J. BUS. & PSYCH. 533 (2016); Bornstein, *supra* note 28.

³³ See e.g., Alfred Allan, et al., *Apology in restorative and juvenile justice*, 21(2) PSYCHIATRY, PSYCH. & L. 176, 179 (2014) [*hereinafter* Allan, *Restorative and Juvenile*]; Amy S. Ebesu, et al., *Effects of timing and sincerity of an apology on satisfaction and changes in negative feelings during conflicts*, 77(3) W. J. COMM. 305, 317 (2013) [*hereinafter* Ebesu].

³⁴ See e.g., Alayna Jehle, A., et al., *The Influence of Accounts and Remorse on Mock Jurors' Judgments of Offenders* 33(5) L. & HUM. BEHAV. 393 (2009) [*hereinafter* Jehle, *Accounts and Remorse*]; Mankeep Dhami, *Offer and acceptance of Apology in Victim-Offender Mediation*, 20(1) CRITICAL CRIMINOLOGY, 45 (2012) [*hereinafter* Dhami, *Offer and Acceptance*]; Roy J. Lewicki, et al., *An Exploration of the Structure of Effective Apologies*, 9(2) NEGOT. & CONFLICT MGMT. RSCH. 177 (2016) [*hereinafter* Lewicki].

future wrongdoing,³⁵ displaying remorse,³⁶ and explaining the reasoning behind the offense.³⁷ These elements can be used by wrongdoers—and their attorneys—to craft a successful apology.

This article explores legal actors' attitudes toward apologies in the legal system and offers recommendations for attorneys who want to effectively compose an apology in order for their clients to receive a successful case outcome. This section, the introduction, has provided a concise overview of topics that will be covered throughout the paper. Section I will discuss the meaning of apologies and the current perceptions of apologies in the legal system. Section II will examine the laws concerning apologies in both the United States and other countries. Section III will explain two overarching psychological theories related to apologies. Section IV synthesizes apology research, including those that suggest the seven elements of an apology. Section V will examine case characteristics affecting an apology's acceptance. Section VI applies the scientific research to notable cases that have ineffectively or effectively used apologies. Each apology is analyzed using the seven elements of an apology discussed in Section IV. Section VII will use the research and analysis in the previous sections to offer recommendations for attorneys who want to successfully construct an apology that is maximally effective. Finally, Section VIII will give a concise summary of the important points discussed throughout the article.

I. APOLOGIES BEFORE AND DURING TRIAL

Legal apologies are a polarizing topic due to people's varying perceptions of them.³⁸ Wrongdoers sometimes avoid apologizing for fear it will be perceived as an admission of guilt,³⁹ despite the benefits of an apology for both the wrongdoer⁴⁰ and the victim.⁴¹ The purpose of this section is to discuss the varying views about apologies within the courtroom, while explaining whether the legal system is designed for apologies to be

³⁵ See e.g., Scher, *supra* note 31; Mankeep Dhama, *An Empirical Note on Perceptions of Partial Apologies*, 7(3) *Oñati Socio-Legal Series* (2017) [*hereinafter* Dhama, *partial apologies*].

³⁶ See e.g., Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22(4) *Basic and Applied Social PSYCHOL.* 291 (2000). [*hereinafter* Gold]; Tallon, *supra* note 28; Bornstein, *supra* note 28.

³⁷ See e.g., Chris L. Kleinke, et al., *Evaluation of a Rapist as a Function of Expressed Intent and Remorse*, 132(4) *J. SOC. PSYCH.* 525 (1992) [*hereinafter* Kleinke]; Lewicki, *supra* note 34; Mark Bennett & Deborah Earwaker, *Victims' responses to apologies: The effects of offender responsibility and offense severity*, 134(4) *J. of Social Psychology* 457 (1994) [*hereinafter* Bennett].

³⁸ See e.g., Robbennolt, *Apology Help*, *supra* note 16 at 33; Lewicki, *supra* note 34 at 465; Rocksheng Zhong, et al., *So You're Sorry? The Role of Remorse in Criminal Law*, 42 *J. AM. ACAD. Psychiatry & L.* 1, 16 (2014); Cohen, *supra* note 3, at 1030.

³⁹ Robbennolt, *Apology Help*, *supra* note 16 at 33; Lewicki, *supra* note 34, at 465.

⁴⁰ See e.g., SMITH, *supra* note 2, at 94, 134; Fuchs-Bennett, *supra* note 3, at 32; Eaton, *supra* note 18, at 399; Smith, *Just Apologies*, *supra* note 3, at 39.

⁴¹ SMITH, *supra* note 2, at 80,85; Carroll, *supra* note 17, at 216 (importance of non-monetary awards for vindicating the victim); Petrucci, *supra* note 17, at 337; Van Dijck, *supra* note 17, at 562.

used. The section will describe the different meanings apologies can have and attorneys' resistance to wrongdoer apologies. It will compare and contrast opinions of judges and attorneys on the use of apologies and discuss how apologies can be perceived as either a benefit or as an implication of guilt. It will also explain what the wrongdoer and victim desire from an apology.

A. Meaning of Apologies

Social norms dictate that wrongdoers should apologize after harming a victim; in exchange, the victim is expected to accept the wrongdoer's apology.⁴² Sincere apologies can restore relationships between the wrongdoer and the victim and diminish hard feelings the victim has toward the wrongdoer.⁴³ However, often an apology is given because it is expected, not because the wrongdoer is sincere. These empty apologies can cause more harm than if the wrongdoer did not apologize.⁴⁴ Some people apologize when they did not have a role in the victim's incident, offering compassion instead of admitting guilt through an apology.⁴⁵ Other wrongdoers apologize for instrumental purposes,⁴⁶ without taking responsibility for the incident or accepting that harm was caused.⁴⁷ This means the wrongdoer used an apology as a crucial tool in order to get a better outcome. Despite giving an apology, such wrongdoers are not making an effort to fix the harm caused.⁴⁸ These shallow or fake apologies can be given to manipulate the victim into forgiving the wrongdoer and improving the wrongdoer's well-being (e.g., relieving their guilt for the wrongdoing).⁴⁹ Although this article encourages wrongdoers to apologize in most circumstances, the apology should be honest and genuine, and the wrongdoer should be willing to take steps to rectify their actions to maximize the apology's effects.⁵⁰

B. Resistance to Wrongdoer Apologies

The criminal justice system attempts to efficiently plea bargain cases and maximize a wrongdoer's punishment while using limited resources.⁵¹ This structure does not easily allow for apologies because often judges do not allow the wrongdoer an opportunity to express a sincere apology during the guilt phase of their trial.⁵² If the wrongdoer is allowed to apologize, it is mostly used to demonstrate the wrongdoer is not a bad person and needs

⁴² LAZARE, *supra* note 11, at 12.

⁴³ *Id.* at 10.

⁴⁴ SMITH, *supra* note 2, at 17.

⁴⁵ LAZARE, *supra* note 11, at 22.

⁴⁶ SMITH, *supra* note 2, at 23.

⁴⁷ LAZARE, *supra* note 11, at 13.

⁴⁸ SMITH, *supra* note 2, at 23.

⁴⁹ LAZARE, *supra* note 11, at 14.

⁵⁰ *Id.*

⁵¹ Bibas, S., & Bierschbach, R. A., *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 88 (2004) [*hereinafter* Bibas].

⁵² *Id.*

less retribution or incapacitation.⁵³ This structure does not easily allow for apologies⁵⁴ because often judges do not allow the wrongdoer an opportunity to express a sincere apology during the guilt phase of their trial.⁵⁵

Prior to trial, wrongdoers might want to apologize but are advised by their attorneys not to do so; attorneys are often apprehensive of their clients' apologies, because apologies can be understood as an admission of responsibility⁵⁶ and can be interpreted as such even if the apology itself is not admissible at trial.⁵⁷ The wrongdoer might also want to take actions to help the victim, such as paying for the victim's bills, or pre-paying some damages.⁵⁸ But, these actions also could be perceived as admissions of fault—and such actions are admissible in many jurisdictions. Some insurance companies even advise their insured customers, through pre-provided instructions, to not assume liability by apologizing.⁵⁹ Even if wrongdoers want to apologize, the structure of the legal system hinders their ability to apologize.

C. Judges' and Attorneys' Perceptions of Apologies and Remorse

In part due to the legal system's design, judges have a variety of opinions about apologies in the legal system, as illustrated by Zhong and colleagues.⁶⁰ These researchers interviewed 23 sitting criminal judges about wrongdoers who expressed remorse during trial, which can be done through apologizing. Some judges believed remorse was the most important factor in a criminal case,⁶¹ while others stated it was not important at all.⁶² The judges also differed in their beliefs about what apologies indicate about a wrongdoer's characteristics—some believed a lack of remorse relates to sociopathy or criminality, while others believed a lack of remorse is expected (due to a wrongdoer's portrayal of innocence) and should only be a factor during the sentencing stage.⁶³ Some judges believed remorse is an indicator of the wrongdoer being able to transition back into society and deserving of a lesser sentence.⁶⁴

Similar to judges, attorneys also have a variety of views about apologies.⁶⁵ Attorneys perceived full apologies (i.e., accepting responsibility and expressing regret)⁶⁶

⁵³ *Id.* at 88.

⁵⁴ *Id.*; Booth *supra* note 28, at 445.

⁵⁵ Booth, *supra* note 28, at 446.

⁵⁶ Lewicki, *supra* note 34, at 465.

⁵⁷ Myers, *supra* note 23, at 6.

⁵⁸ *Id.* at 7.

⁵⁹ Cohen, *supra* note 3, at 1012.

⁶⁰ See generally Zhong, *supra* note 38 (interviewed judges' opinions on remorse).

⁶¹ Zhong, *supra* note 38 at 16.

⁶² *Id.* at 16—17.

⁶³ *Id.* at 18.

⁶⁴ *Id.* at 36.

⁶⁵ See e.g., Cohen, *supra* note 3 at 1030; Robbennolt, J. K., *Attorneys, Apologies, and Settlement Negotiation*, 13(2) HARV. NEGOT. L. REV. 349, 373 (2008). [*hereinafter* Robbennolt, *Attorneys, Apologies*].

⁶⁶ Cohen, *supra* note 3, at 1030.

with ambiguous fault as the most positive type of apology because they believed such apologies increased their chances of winning the case.⁶⁷ An attorney's assessment of the wrongdoer was based on the sufficiency of the apology, the wrongdoer's responsibility, the wrongdoer's regret, whether the wrongdoer would be careful in the future, whether the wrongdoer's conduct offended the attorney, the degree the wrongdoer respected the victim, and the wrongdoer's morality.⁶⁸ Attorneys whose clients are the victim favored apologies that accepted responsibility, rather than just expressed sympathy, because attorneys estimated their chances of winning the trial as higher.⁶⁹ Full apologies are used to increase settlement levers⁷⁰ (i.e., variables that are expected to influence settlement negotiation outcomes).⁷¹ Higher settlement levers mean a less favorable attorney evaluation of the offender.⁷² Attorneys can view apologies as desirable and useful in the legal system, but their perception of the apology is dependent on whether they are defending the victim or the wrongdoer.

While judges and attorneys have similarities, they are often studied in different settings. Judges' views on apologies are often researched in a criminal setting,⁷³ while attorneys' are often researched in a civil setting.⁷⁴ For more accurate comparisons, future research should examine judges' and attorneys' attitudes toward apologies in both settings. Despite this variability in opinions,⁷⁵ victims and wrongdoers both believe apologies can be beneficial, which will be examined in the next section.

D. Party's Desire for an Apology

Wrongdoers⁷⁶ and victims⁷⁷ both have various reasons for desiring an apology. Wrongdoers often offer an apology in hopes of personal gain⁷⁸ and for emotional reasons.⁷⁹ Victims desire an apology for closure after the incident.⁸⁰ Both the wrongdoer⁸¹ and

⁶⁷ Robbennolt, *Attorneys, Apologies*, *supra* note 65, at 375.

⁶⁸ *Id.* at 372.

⁶⁹ *Id.* at 375.

⁷⁰ *Id.* at 376.

⁷¹ Korobkin, R., *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 18 (2002).

⁷² Robbennolt, *Attorneys, Apologies*, *supra* note 65, at 378.

⁷³ See generally Zhong, *supra* note 38 (interviewed judges' opinions on remorse).

⁷⁴ See generally Robbennolt, *Attorneys, Apologies*, *supra* note 65 (discusses attorneys views of apologies during settlement negotiations).

⁷⁵ See e.g., Robbennolt, *Apology Help*, *supra* note 16 at 33; Lewicki, *supra* note 34, at 465; Zhong, *supra* note 38; Cohen, *supra* note 3 at 1030.

⁷⁶ See e.g., Smith, *Just Apologies*, *supra* note 3 at 39; Cohen, *supra* note 3, at 10124; Petrucci, *supra* note 17, at 352.

⁷⁷ See e.g., Petrucci, *supra* note 17, at 343, 352; SMITH, *supra* note 2 at 80, 85.

⁷⁸ Smith, *Just Apologies*, *supra* note 3, at 39.

⁷⁹ Cohen, *supra* note 3, at 1024.

⁸⁰ Petrucci, *supra* note 17, at 352.

⁸¹ Cohen, *supra* note 3, at 1024.

victim⁸² hope it will allow for personal growth after the incident. These groups will be discussed in turn.

Wrongdoers apologize because it is the most efficient way to gain forgiveness from the victim,⁸³ to regain trust,⁸⁴ and to express sincerity through an apology.⁸⁵ Apologies can also help the wrongdoer prevent litigation, reduce payments and jury awards, or decrease prison sentences.⁸⁶ This means that apologies can positively affect a victim's perception of the wrongdoer⁸⁷ and the wrongdoer's punishment.⁸⁸ This is especially true for voluntary apologies crafted for the victim's specific needs,⁸⁹ which can cause the victim to perceive the wrongdoer as being more sympathetic and remorseful.⁹⁰ These remorseful apologies can lead to more lenient punishments for the wrongdoer⁹¹ because victims perceive less need to punish a remorseful wrongdoer, compared to an unapologetic wrongdoer.⁹²

Wrongdoers also apologize for personal reasons, like restoring the relationship between the wrongdoer and victim⁹³ and helping themselves feel at peace⁹⁴ by separating the negative act from their self-identity.⁹⁵ Eaton and Theuer analyzed the last statements of 305 Texan inmates on death row and explored remorse-related content.⁹⁶ Of the 305 inmates, 26.6% offered an apology to the victim's family,⁹⁷ 21.3% asked for forgiveness,⁹⁸ and 8.5% expressed remorse for their actions.⁹⁹ Eaton and Theuer also found that 89.7% of the inmates felt at peace after issuing an apology,¹⁰⁰ while only 52% of the inmates who did not offer an apology felt at peace.¹⁰¹ Sincerity was the leading factor affecting whether the inmate would apologize. The wrongdoer often offers an apology to relieve guilt and grow both psychologically and spiritually.¹⁰² Wrongdoers desire to apologize both for personal gain and to fix their relationship with the person they harmed.

⁸² Carroll, *supra* note 17, at 225.

⁸³ SMITH, *supra* note 2, at 94.

⁸⁴ Fuchs-Bennett, *supra* note 3, at 32; Smith, *supra* note 2, at 134.

⁸⁵ Eaton, *supra* note 18, at 399.

⁸⁶ Smith, *Just Apologies*, *supra* note 3, at 39.

⁸⁷ See e.g., Gold, *supra* note 36 at 297; Bornstein, *supra* note 28, at 400, 404.

⁸⁸ See e.g., Wooten, *supra* note 22, at 228; Kirchoff, *supra* note 30, at 123.

⁸⁹ Van Dijck, *supra* note 17, at 573.

⁹⁰ Gold, *supra* note 36, at 297.

⁹¹ Kirchoff, *supra* note 30, at 123.

⁹² Wooten, *supra* note 22, at 228.

⁹³ Eaton, *supra* note 18; Cohen, *supra* note 3, at 1016; Petrucci, *supra* note 17, at 355.

⁹⁴ Eaton, *supra* note 18, at 340-41.

⁹⁵ Petrucci, *supra* note 17, at 358.

⁹⁶ See generally Eaton, *supra* note 18 (investigated death row inmates' last statements for remorse related content).

⁹⁷ Eaton, *supra* note 18, at 338.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 341.

¹⁰¹ *Id.*

¹⁰² Cohen, *supra* note 3, at 1021.

While wrongdoers have their reasons for offering an apology, victims also have their own reasons for wanting to receive an apology.¹⁰³ Victims want the wrongdoer to clearly articulate their emotions and offer a face to face and appropriately timed apology.¹⁰⁴ These apologies are important to prevent the victim from experiencing the corrosive effects related to storing anger; apologies also can help the victim move on from feeling negative emotions (i.e., closure).¹⁰⁵ Victims want to ensure the wrongdoer will not commit the act again, and want to hear wrongdoers take responsibility for their actions.¹⁰⁶ Victims also seek apologies because money does not always improve a situation and future precautions intended by the wrongdoer go beyond economic or legal damages.¹⁰⁷ While an apology does not replace victims' desired compensation, it acknowledges the value of what the victim lost.¹⁰⁸ Similar to the wrongdoers, victims desire an apology for personal reasons.¹⁰⁹ Apologies are crucial for victims' growth after the incident and ensuring that someone is held accountable.¹¹⁰

To reach these goals, victims often will accept an insincere apology over no apology;¹¹¹ however, some apologies are better than others. Robbennolt¹¹² studied settlement amounts and apology effectiveness in a personal injury case.¹¹³ In the study, the wrongdoer either gave no apology or gave an apology accepting responsibility offered by themselves, at the victim's request, at the mediator's suggestion, or through the wrongdoer's attorney.¹¹⁴ Participants agreed that any apology was better than no apology, but also believed an apology given by an attorney was the least effective type of an apology.¹¹⁵ This is because an apology offered by the wrongdoer's attorney was perceived as the wrongdoer's attempt to avoid a lawsuit; further, the wrongdoer was perceived to be more focused on themselves than on the victim.¹¹⁶ The apology given by the wrongdoer on their own behalf and the apology requested by the mediator or victim were equally effective.¹¹⁷ This finding was also supported by Jehle, Miller, Kimmelmeier, and

¹⁰³ Petrucci, *supra* note 17, at 343, 352.

¹⁰⁴ *Id.* at 343.

¹⁰⁵ *Id.* at 352.

¹⁰⁶ SMITH, *supra* note 2, at 80.

¹⁰⁷ *Id.* at 85.

¹⁰⁸ Gill, *supra* note 18, at 16.

¹⁰⁹ Petrucci, *supra* note 17, at 351-52.

¹¹⁰ SMITH, *supra* note 2, at 80.

¹¹¹ Jennifer K. Robbennolt, *The effects of Negotiated and Delegated Apologies in Settlement Negotiation*, 37 L. & HUM. BEHAV. 128, 131 (2013) [*hereinafter* Robbennolt, *Negotiated and Delegated*].

¹¹² *See generally Id.* (studied the effectiveness of apologies negotiated with or requested from the wrongdoer and apologies given by the attorney on behalf of the wrongdoer).

¹¹³ *Id.* at 130.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 130—131.

¹¹⁶ *Id.* at 132.

¹¹⁷ *Id.* at 131.

Maskaly¹¹⁸ who found that victims benefited the most from voluntary apologies, followed by implicitly coerced apologies and explicitly coerced apologies.¹¹⁹ However, similar to the studies mentioned above, victims preferred and benefitted from any type of apology over no apology.¹²⁰

In sum, both the wrongdoer and victim desire an apology. Wrongdoers apologize in hopes of improving their well-being.¹²¹ Victims hope to eliminate negative emotions related towards the incident¹²² and ensure the wrongdoer will not reoffend.¹²³ However, victims do desire specific types of apologies and view an apology offered by the wrongdoer's attorney as an attempt to improve the wrongdoer's well-being instead of the victim's well-being.¹²⁴ To encourage these apologies, "apology laws," discussed next, have been created in the United States and numerous other countries.

II. APOLOGY LAWS

Laws have been created to protect wrongdoers' apologies from being used as an admission of guilt.¹²⁵ These laws exist in a majority of states in the United States,¹²⁶ as well as in numerous countries.¹²⁷ While these laws encourage the use of apologies, the laws generally do not protect the wrongdoer during the sentencing phase of their trial.¹²⁸ This section will explain what apology laws are and how the laws vary in the United States. It will also include examples of laws in other countries.

A. Apology Laws in the United States

Despite the benefits apologies can have for both wrongdoers and victims, wrongdoers are hesitant to express remorse due to fear of the apology being interpreted as an admission of guilt.¹²⁹ Apology laws, as well as the Federal Rule of Evidence 408 (FRE

¹¹⁸ See generally Alayna Jehle, et al., *How voluntariness of apologies affects actual and hypothetical victims' perceptions of the offender*, 152 J. SOC. PSYCHOL. 727 (2012) [*hereinafter* Jehle, *Voluntariness of Apologies*] (studied apology's voluntariness of perceptions of wrongdoers).

¹¹⁹ *Id.* at 737.

¹²⁰ *Id.*

¹²¹ SMITH, *supra* note 2, at 94; Fuchs-Bennett, *supra* note 3, at 32; Smith, *Just Apologies*, *supra* note 3, at 39.

¹²² Petrucci, *supra* note 17, at 352.

¹²³ SMITH, *supra* note 2, at 80.

¹²⁴ Robbennolt, *Negotiated and Delegated*, *supra* note 111, at 135.

¹²⁵ Rebecca Dresser, *The Limits of Apology Laws*, 38 HASTINGS CTR. REP. 6, 6 (2008). [*hereinafter* Dresser]; Ho, *Does sorry work*, *supra* note 24, at 142.

¹²⁶ Myers, *supra* note 23, at 178.

¹²⁷ See e.g. McLennan, *supra* note 25; Parker, *supra* note 27; Vines, *supra* note 26.

¹²⁸ United States Sentencing Commission Guideline Manual, *Acceptance of Responsibility*, available at <https://guidelines.ussc.gov/gl/%C2%A73E1.1> [*hereinafter* United States].

¹²⁹ Lewicki, *supra* note 34, at 465; Robbennolt, *Apology Help*, *supra* note 111, at 33.

408),¹³⁰ protect a wrongdoer's apology from being entered as evidence. These apology laws are largely used in civil cases, but FRE 408 can also be used in criminal cases. In criminal cases, these laws do not protect judges from using apologies in the wrongdoer's sentencing phase.¹³¹

Many states have implemented apology laws that prohibit victims from using an apology against the wrongdoer in court.¹³² Such laws allow wrongdoers to apologize without worry about the effects of admitting their mistakes.¹³³ These laws exist in 37 states as of 2015,¹³⁴ with the first apology law established in Massachusetts in 1986.¹³⁵ However, the laws vary by jurisdiction and state. Twenty-eight jurisdictions have apology laws that only apply to medical professionals, while 10 jurisdictions' laws apply generally.¹³⁶ Regardless of who the laws apply to, all jurisdictions' laws indicate that statements and actions related to remorse expressed to the victim or victim's family cannot be admitted as evidence.¹³⁷ However, apology laws differ according to what is admissible and what actions convey remorse.¹³⁸ In California, statements, writing, or remorseful gestures that display sympathy are inadmissible.¹³⁹ In North Carolina or Illinois, even offering monetary compensation is inadmissible.¹⁴⁰ However, in 18 jurisdictions, the wrongdoer admitting fault *can* be admissible as evidence.¹⁴¹ Though all apology laws protect apologies from being entered as evidence, wrongdoers and their attorneys must investigate the specific state laws to ensure what elements of an apology are protected.

The Federal Rule of Evidence 408 protects evidence, including apologies, made in unsuccessful settlement negotiations from being used in civil cases¹⁴² or criminal cases.¹⁴³ FRE 408 indicates that statements made in an effort to avoid trial during settlement negotiations are inadmissible as evidence in court when used to prove a wrongdoer's liability or invalidate a claim.¹⁴⁴ However, apologies made during the settlement negotiation can be discovered before the trial occurs and can be relayed to a third party; this possibility affects the wrongdoer's likelihood of apologizing.¹⁴⁵

Apology laws and FRE 408 only protect apologies during the trial phase. Section 3E1.1¹⁴⁶ allows judges to decrease a wrongdoer's sentence by two levels if they accept

¹³⁰ FED. R. EVID. 408, <https://www.rulesofevidence.org/article-iv/rule-408/> [*hereinafter* FRE 408]

¹³¹ *Id.*

¹³² Myers, *supra* note 23, at 178.

¹³³ *Id.* at 180.

¹³⁴ *Id.* at 179.

¹³⁵ Ho, *Does sorry work*, *supra* note 24, at 142.

¹³⁶ Myers, *supra* note 23, at 180.

¹³⁷ *Id.* at 181.

¹³⁸ *Id.* at 180.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Cohen, *supra* note 3, at 1033—34.

¹⁴³ Stephen A. Saltzburg, Federal Rule of Evidence 408 and Criminal Cases, 26 CRIM. JUST. 1, 3-4 (2011).

¹⁴⁴ *Id.*; FRE 408, *supra* note 130.

¹⁴⁵ Cohen, *supra* note 3, at 1035.

¹⁴⁶ United States, *supra* note 128.

responsibility for the crime, which is also an important element of apologizing. This code applies specifically to criminal trials in which the wrongdoer pleads guilty.¹⁴⁷ It is the judge's discretion whether to use the wrongdoer's remorse or apology as a factor in deciding the wrongdoer's sentence.¹⁴⁸ The use of an apology during sentencing can be positive,¹⁴⁹ but it is important for attorneys to know apology laws do not protect wrongdoer's apologies at all stages of a trial.

In sum, apology laws are becoming more common in the United States, but vary greatly in what is admissible in court.¹⁵⁰ Thus, attorneys must carefully study the laws in their specific state. Along with apology laws, the Federal Rule of Evidence 408 also protects apologies made during settlement negotiations from being used as evidence.¹⁵¹ These laws only protect apologies when determining guilt, but apologies can be used when the wrongdoer is being sentenced.¹⁵²

B. Apologies Laws in Various Other Countries

The United States is not the only country to create apology laws to protect wrongdoers from providing an apology to their victims.¹⁵³ Many countries have implemented apology laws similar to those in the United States. These laws vary by states and territories within their respective country as well.¹⁵⁴

A majority of Canada's territories have apology acts for civil cases in an attempt to reduce litigation and resolve disagreements in an economical manner, encourage dialogue between parties, and encourage apologies.¹⁵⁵ The two main acts are the British Columbia Apology Act of 2006 and the Northwestern Territories Apology Act of 2013.¹⁵⁶ The British Columbia Apology Act (2006) states that an apology made by, or on behalf of, the wrongdoer is not admissible and cannot be used to decide the wrongdoer's liability or fault. There are similar acts in Canada's other territories, such as: Northwestern Territories Apology Act; Saskatchewan's amendment to the 2007 Evidence Act; Manitoba's Apology Act of 2007; Alberta's amendment to their Evidence Act of 2008; Nova Scotia's 2008 Apology Act; Ontario's Apology Act of 2009; Newfoundland and Labrador's Apology Act

¹⁴⁷ *Id.*

¹⁴⁸ Bibas, *supra* note 41, at 142; *see generally* Zhong, *supra* note 38.

¹⁴⁹ Wooten, *supra* note 22, at 228.

¹⁵⁰ Myers, *supra* note 23, at 5.

¹⁵¹ FRE 408, *supra* note 130.

¹⁵² United States, *supra* note 128.

¹⁵³ *See generally* McLennan, *supra* note 25 (describing Canada's apology laws); Parker, *supra* note 27 (describing Australia's apology laws); Vines, *supra* note 26 (describing the United Kingdom's apology laws).

¹⁵⁴ *Id.*

¹⁵⁵ McLennan, *supra* note 25, at 157.

¹⁵⁶ *Id.* at 156–77.

of 2009; Nunavut's 2010 Apology Act; and Prince Edward Island's amendment to Health Services Act of 2009.¹⁵⁷

Australia also has various apology laws protecting medical professionals in civil cases that differ depending on its states and territories. New South Wales and the Australian Capital Territory has the Civil Liability Act of 2002, which states that an apology or expression of regret is not admissible, even if it implies fault.¹⁵⁸ Victoria's Wrongs Act of 1958 states that apologies are not admissible and are not an expression (direct or implied) of: liability, unprofessional conduct, carelessness, incompetence, or admission of fault.¹⁵⁹ Queensland's Civil Liability Act of 2003 states that an apology is not admissible and an apology is not an expressed or implied admission of liability or fault.¹⁶⁰ South Australia's Civil Liability Act of 1937 states that no admission of liability or fault can be inferred from an expression of guilt.¹⁶¹

Finally, the United Kingdom has an apology which protects apologies from being entered as evidence in civil liability cases.¹⁶² However, this law only applies to England and Wales—not Scotland.¹⁶³ The Compensation Act of 2006 states an apology is not an admission of negligence or a breach of statutory duty.¹⁶⁴ This law differs from apology laws in other countries because it does not specifically define what an apology is and instead allows courts to refer to a dictionary for its definition.¹⁶⁵

In sum, apology laws are gaining popularity in the United States and various other countries.¹⁶⁶ While the laws have varying rules for what is or is not admissible, the laws should encourage apologies from the wrongdoer because these laws decrease the liability associated with apologizing.¹⁶⁷

¹⁵⁷ *Id.* at 157–58.

¹⁵⁸ Parker, *supra* note 27, at 42.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Vines, *supra* note 26, at 1.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 7.

¹⁶⁵ *Id.*

¹⁶⁶ See generally McLennan, *supra* note 25 (describing Canada's apology laws); Parker, *supra* note 27 (describing Australia's apology laws); Vines, *supra* note 26 (describing the United Kingdom's apology laws).

¹⁶⁷ See e.g., FRE 408, *supra* note 130; Myers, *supra* note 23, at 4; United States, *supra* note 128; McLennan, *supra* note 25; Parker, *supra* note 27; Vines, *supra* note 26.

III. PSYCHOLOGICAL THEORIES

As previously stated, wrongdoers apologize in an attempt to improve perceptions other people have about them.¹⁶⁸ This reasoning is supported through Image Restoration¹⁶⁹ and Face Theory.¹⁷⁰ Both theories imply that a person attempts to improve their public image when they feel threatened.¹⁷¹ This section further explains these two theories and how a person attempts to display a positive perception.

A. Image Restoration Theory

There are various theories related to the wrongdoer's desire to apologize. Benoit's Image Restoration theory suggests that, if a person perceives their image and credibility is being attacked, the person attempts to improve their image by offering: justifications, excuses, explanations, or apologies.¹⁷² If accused, a person faces an unfavorable image of themselves consisting of responsibility and offensiveness.¹⁷³ The person attempts to improve their image, although their image will never be fully restored.¹⁷⁴ The wrongdoer communicates to the victim with a central goal of maintaining a positive reputation.¹⁷⁵ This reputation is created through a combination of 14 image restoration strategies chosen with the wrongdoer's accusation, the target audience, and the facts of the case in mind.¹⁷⁶ The strategy chosen is likely based on one of five motives of the accused: denying responsibility, evading responsibility, minimizing damages, correcting damages, accepting responsibility, or asking for forgiveness.¹⁷⁷ Although a person's image can never fully be rebuilt, Image Restoration theory attempts to restore the wrongdoer's perception through various strategies.

¹⁶⁸ LAZARE, *supra* note 11, at 27.

¹⁶⁹ See generally WILLIAM L. BENOIT, *Image Restoration Theory*, INTL. ENCYC. COMM. 1 (Wolfgang Donsbach ed., 2015). [*hereinafter* Benoit, *Image Restoration*] (explaining concept of Image Restoration Theory).

¹⁷⁰ SANDRA Metts & WILLIAM R. Cupach, Face Theory, *Engaging theories in interpersonal COMM.: MULTIPLE PERSPECTIVES* 203 (Leslie A. Baxter & Dawn O. Braithwaite eds., 2008) [*hereinafter* Metts] (describing purpose and components of Erving Goffman's Face Theory).

¹⁷¹ WILLIAM L. BENOIT, *Image Repair Theory in the Context of Strategic Communication*, Routledge Handbook of Strategic COMM. 303, 304 (Derina Holtzhausen & Ansgar Zerfass eds., 2015) [*hereinafter* Benoit, *Image Repair*]; Daena J. Goldsmith, *Brown and Levinson's Politeness Theory, Explaining COMM.: Contemporary Theories and Exemplars* (Bryan B. Whaley & Wendy Samter eds., 2007) [*hereinafter* GOLDSMITH].

¹⁷² Benoit, *Image Repair*, *supra* note 171, at 304.

¹⁷³ Benoit, *Image Restoration*, *supra* note 169, at 1; Benoit, *Image Repair*, *supra* note 171, at 305.

¹⁷⁴ Benoit, *Image Restoration*, *supra* note 169, at 1.

¹⁷⁵ Benoit, *Image Repair*, *supra* note 171, at 305.

¹⁷⁶ Benoit, *Image Restoration*, *supra* note 169, at 1–2.

¹⁷⁷ *Id.* at 1.

Brown¹⁷⁸ studied the effects of Image Restoration theory strategies on an athlete's image after being accused of either a criminal or noncriminal transgression. Participants of the study were college students who viewed news articles about an athlete's transgression and the athlete's response to the transgression.¹⁷⁹ The perceived image of the athlete was defined as the audience's perception of the athlete.¹⁸⁰ The athlete responded to the transgression with one of three image restoration strategies: attacking the accuser (evading responsibility), bolstering (reducing the offence), or using mortification.¹⁸¹ Mortification is the act of admitting the incident is their fault and requests forgiveness.¹⁸² Mortification is also known as the apology strategy.¹⁸³ Participants found the mortification strategy was more effective in repairing the athlete's image than attacking the accuser or bolstering; this effect held true for both transgression types.¹⁸⁴ When the athlete committed a criminal transgression, the mortification strategy and the attacking the accuser strategy were more effective in repairing his image than the bolstering strategy.¹⁸⁵ When the transgression was noncriminal, mortification was the most effective strategy in improving the athlete's image.¹⁸⁶

Mortification, which is similar to apologizing,¹⁸⁷ was the most effective Image Restoration strategy in Brown's study.¹⁸⁸ Regardless of the type of transgression, apologizing and asking for forgiveness can significantly improve the perception of the wrongdoer.¹⁸⁹ This supports the recommendation that apologies should be used in the legal system. Although other strategies can be effective, apologizing was deemed the most effective for multiple situations and can improve the perception of the wrongdoer. The outcomes of an improved perception of the wrongdoer are further discussed in Section IV and V.

B. Threats to a Person's "Face"

Another psychological theory that applies to apologies is Face Theory.¹⁹⁰ According to this theory, everyone has an image or identity they present when interacting

¹⁷⁸ Kennon A. Brown, *Is apology the best policy? An experimental examination of the effectiveness of image repair strategies during criminal and noncriminal athlete transgressions*, 4(1) COMM. & SPORT 23 (2016) [hereinafter Brown].

¹⁷⁹ *Id.* at 31.

¹⁸⁰ *Id.* at 32.

¹⁸¹ *Id.*

¹⁸² *Id.* at 27.

¹⁸³ *Id.* at 28.

¹⁸⁴ Brown, *supra* note 178, at 34.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 28.

¹⁸⁸ *Id.* at 34; Cerulo, *supra* note at 138.

¹⁸⁹ Brown, *supra* note 178, at 34.

¹⁹⁰ See e.g., Metts, *supra* note 170 (discussing Erving Goffman's Face Theory); Goldsmith, *supra* note 171 (extending Goffman's Face Theory to Brown and Levinson's politeness theory).

with others.¹⁹¹ This is called a person's "face."¹⁹² A person loses face when their actions do not align with the perceptions of those around them and the person feels their public perception is challenged.¹⁹³ Brown and Levinson used this concept of face to explain a person's politeness during social interactions.¹⁹⁴ Often, the image a person choose to present is positive, but can be either negatively or positively threatened. A face is threatened when the person is challenged by either violating a social norm or when the person's role is specifically challenged.¹⁹⁵ A role is threatened if the person presents themselves as an expert on a topic, but cannot answer questions related to that specific topic.¹⁹⁶ A negative face occurs when the person does not want to be consulted or bothered by someone;¹⁹⁷ threats to this negative face consists of: unwarranted orders, advice, requests, or warnings.¹⁹⁸ A positive face occurs when the person desires to be liked,¹⁹⁹ but the face is threatened by criticisms, complaints or disagreements.²⁰⁰ Goffman, the originator of the theory, compares a person's face to a play's performance. The front stage is the person's presented appearance and their manner; it is a rehearsed version of the person's real self.²⁰¹ The backstage is the person's authentic self.²⁰²

Oetzel and Ting-Toomey researched cultural influences on face and conflict behavior.²⁰³ Participants were university students studying in Germany, Japan, China, and the United States.²⁰⁴ Participants filled out a questionnaire inquiring about a time the participant dealt with conflict with a person of the same gender and culture as them.²⁰⁵ The questionnaire was organized into four parts: self-construal items, face concern items, conflict behavior items, and demographics.²⁰⁶ Self-construal is a person's image of themselves containing their independent and interdependent self.²⁰⁷ Self-construals influence a person's face concerns.²⁰⁸ Face concerns are composed of three facets: self-face (the person's own image), other-face (a person being concerned for another person's

¹⁹¹ Metts, *supra* note 170, at 203.

¹⁹² *Id.*; Goldsmith, *supra* note 171, at 256.

¹⁹³ Goldsmith, *supra* note 171, at 256–257.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Face*, OR. STATE UNIV.,

<http://oregonstate.edu/instruct/theory/face.html#:~:text=Social%20interaction%20is%20a%20process,of%20face%20to%20explain%20politeness.&text=Positive%20face%20is%20the%20desire,intruded%2C%20or%20otherwise%20put%20upon> [*hereinafter* *Face*].

¹⁹⁸ Goldsmith, *supra* note 171, at 256.

¹⁹⁹ *Face*, *supra* note 197, at 1.

²⁰⁰ *Id.*

²⁰¹ Metts, *supra* note 170, at 205.

²⁰² *Id.*

²⁰³ John G. Oetzel & Stella Ting-Toomey, *Face concerns in interpersonal conflict: A cross-cultural empirical test of the face negotiation theory*, 30(6) COMM. RESEARCH 599 (2003) [*hereinafter* Oetzel].

²⁰⁴ *Id.* at 606.

²⁰⁵ *Id.* at 606–07.

²⁰⁶ *Id.* at 608.

²⁰⁷ *Id.* at 603.

²⁰⁸ *Id.* at 604.

image), and mutual-face (concern for the image of both parties).²⁰⁹ Conflict behavior is the way a person communicates about a conflict.²¹⁰ Countries with independent self-construals, such as America, are associated with positive self-face.²¹¹ This self-face is also associated with dominant conflict styles.²¹² A person with a high dominant conflict style would try to argue until their position was accepted, or the other person agreed that their way was the best way.²¹³ Countries with interdependent self-construals are associated with other-face and have a avoiding and integrating conflict styles.²¹⁴ Individuals with interdependent self-construals are concerned with the other person's feelings and do not want to cause conflict.²¹⁵ They will often ignore the conflict, or try to resolve the conflict through a compromise.²¹⁶

People with a high self-face intend on keeping their image, or their face, intact.²¹⁷ A wrongdoer with a high self-face would likely want to apologize in order to defend their image instead of trying to sympathize with the other person and maintain a relationship with the victim.²¹⁸ Apologies often contain an acknowledgement of harm and a request for forgiveness,²¹⁹ which a person would not likely provide if they have a high self-face.

In sum, a person presents their best face to the public,²²⁰ but this face can be threatened when the person's role is challenged.²²¹ Image Restoration Theory comprises of several strategies which the wrongdoer can choose from in order to save their image.²²² This is similar to a wrongdoer composing an apology with several different elements. Face Theory relates to apologies because a wrongdoer apologizes to save their image. A person's face can be related to the country they are from, with independent countries having a self-face, and interdependent countries having an other-face.²²³ The type of face a person has can determine the person's conflict resolution style.²²⁴ This type of face and conflict style can determine the wrongdoer's willingness to apologize, and the content the apology is likely to contain.²²⁵

²⁰⁹ Oetzel, *supra* note 203, at 603.

²¹⁰ *Id.* at 601.

²¹¹ *Id.* at 611.

²¹² *Id.*

²¹³ *Id.* at 620.

²¹⁴ *Id.* at 611.

²¹⁵ Oetzel, *supra* note 203, at 620.

²¹⁶ *Id.*

²¹⁷ *Id.* at 603.

²¹⁸ *Id.* at 620.

²¹⁹ LAZARE, *supra* note 11, at 21.

²²⁰ Metts, *supra* note 170, at 203.

²²¹ Goldsmith, *supra* note 171, at 257.

²²² Benoit, *Image Restoration*, *supra* note 169, at 1–2.

²²³ Oetzel, *supra* note 203, at 611.

²²⁴ *Id.* at 619–20.

²²⁵ *Id.*

IV. PSYCHOLOGICAL RESEARCH ON APOLOGIES

Experiments,²²⁶ surveys,²²⁷ interviews,²²⁸ and databases²²⁹ are commonly used to investigate apologies in the courtroom. An experiment is a study in which variables are manipulated in carefully controlled environments (e.g., a laboratory) to create a “cause and effect” relationship.²³⁰ Participants in an experiment are randomly assigned to receive one or more of these manipulated variables (sometimes called a “treatment”), or a control (i.e., placebo).²³¹ A survey is given to selected people within a population in order to collect and analyze data.²³² An interview is a question and answer session that takes place between the interviewer and interviewee to gain answers to particular research questions.²³³ An interview can be in person, over the phone, or online.²³⁴ A database is a collection of data, usually electronic in form, that can include court records, past interviews, previously collected experimental data, and more.

All these methodologies have been used in a legal context, with cases pertaining to wrongful deaths,²³⁵ medical malpractice,²³⁶ criminal cases,²³⁷ and equal opportunity claims.²³⁸ Apologies have also been studied in non-jury context such as: judicial

²²⁶ See e.g., Scher, *supra* note 31 (investigated elements of illocutionary force indicating device, expression of responsibility, promise of forbearance, and offer of repair on perceptions of wrongdoer and apology); Jehle, *Accounts and Remorse*, *supra* note 34 (studied effects of accounts and remorse on mock jurors’ judgments); Bornstein, *supra* note 28 (studied the effects of remorse on wrongdoer’s punishment in a medical malpractice case).

²²⁷ See e.g., Day, *supra* note 29 (surveyed Canadian and American drivers who had been stopped for speeding and were asked to recount the experience).

²²⁸ See e.g., Zhong, *supra* note 38 (interviewed sitting criminal trial judges on their opinion of remorse during trial).

²²⁹ See e.g., Eaton, *supra* note 18 (examined the last statements of death row inmates for remorse related content).

²³⁰ *APA Dictionary of Psychology*, <https://dictionary.apa.org/experiment>, AM. PSYCH. ASS’N, <https://dictionary.apa.org/experiment> (last visited Mar. 28, 2021).

For instance, one group is exposed to an apology and another group is not. The two groups’ perceptions of the wrongdoer are compared to determine if the apology caused the groups’ perceptions to differ.

²³¹ *Id.*

²³² *APA Dictionary of Psychology*, AM. PSYCH. ASS’N, <https://dictionary.apa.org/surveys> (last visited Mar. 28, 2021).

²³³ *APA Dictionary of Psychology*, AM. PSYCH. ASS’N, <https://dictionary.apa.org/interview> (last visited Mar. 28, 2021).

²³⁴ *Id.*

²³⁵ See e.g., Bornstein, *supra* note 28 (studied the effects of remorse on wrongdoer’s punishment in a medical malpractice case, which included a wrongful death case).

²³⁶ See e.g., Ho, *Does sorry work*, *supra* note 24 (studies the effect of state level apology laws on malpractice lawsuits and settlements).

²³⁷ See e.g., Tallon, *supra* note 28 (studied the effects of remorse given in pre-trial publicity and during the wrongdoer’s criminal trial).

²³⁸ See e.g., Allan, *Parties’ perceptions*, *supra* note 28 (studied impact of apologies on equal opportunity claims).

sentencing,²³⁹ parole decisions,²⁴⁰ victim impact statements,²⁴¹ mediations,²⁴² and police interactions between an officer and the wrongdoer.²⁴³ Regardless of the context that the study used, participants were usually mock jurors,²⁴⁴ victims,²⁴⁵ or outside observers who judge the wrongdoer.²⁴⁶ Past apology literature has discussed a variety of the elements stated below. This article will discuss seven elements that comprise an apology. Elements related to the apology itself include: the apology's delivery,²⁴⁷ timing,²⁴⁸ and sincerity.²⁴⁹ The elements related to the wrongdoer include: acknowledging responsibility,²⁵⁰ avoiding future wrongdoing,²⁵¹ displaying remorse,²⁵² and explaining the offense.²⁵³ This section will further discuss these elements and their effectiveness.

A. Choosing the Delivery

The presence of an apology is important, but not all apologies are equal. At the most basic level, the delivery method used to provide the apology is perhaps the most important element.²⁵⁴ There are numerous ways for a wrongdoer to express their remorse,

²³⁹ See e.g., Rossmannith, *supra* note 29 (studied role of remorse on judges sentencing decisions).

²⁴⁰ See e.g., Estrada-Reynolds, *supra* note 29 (studied the effects of gender on deciding whether a wrongdoer is granted parole).

²⁴¹ See e.g., Booth, *supra* note 29 (studied the effect of victim impact statements on wrongdoer remorse).

²⁴² See e.g., Dhami, *Offer and acceptance*, *supra* note 34 (studies the apologies given during victim-offender mediation and the apology's effect on participants' satisfaction).

²⁴³ See e.g., Day, *supra* note 29 (surveyed Canadian and American drivers who had been stopped for speeding and were asked to recount the experience).

²⁴⁴ See generally Jehle, *Accounts and Remorse*, *supra* note 34 (studied the effects of wrongdoer's account of the incident and their remorse on mock jurors' judgments).

²⁴⁵ See generally Kirchoff, *supra* note 30, at 123.

²⁴⁶ See generally Dhami, *Partial Apologies*, *supra* note 35 (studied partial apologies and the extent one element of an apology implied another).

²⁴⁷ See e.g., Scher, *supra* note 31 (investigated elements of illocutionary force indicating device, expression of responsibility, promise of forbearance, and offer of repair on perceptions of wrongdoer and apology); Day, *supra* note 29 (surveyed Canadian and American drivers who had been stopped for speeding and were asked to recount the experience).

²⁴⁸ See e.g., Allan, *Restorative and Juvenile*, *supra* note 33, at 185; Haesevoets, *supra* note 32, at 540; Frantz, *infra* note 353, at 204-05.

²⁴⁹ See e.g., Allan, *Restorative and Juvenile*, *supra* note 33, at 179; Ebesu, *supra* note 33, at 317.

²⁵¹ See e.g., Gold, *supra* note 36 (remorse had biggest effect on wrongdoer forgiveness when compared with harm, personal relevance, and group status); Tallon, *supra* note 28 (studied the effects of remorse given in pre-trial publicity and during the wrongdoer's criminal trial); Bornstein, *supra* note 28 (studied the effects of remorse on wrongdoer's punishment in a medical malpractice case, which included a wrongful death case).

²⁵² See e.g., Kleinke, *supra* note 37 (studied express and denied intent, and remorse, on evaluation of a rapist); Lewicki, *supra* note 34 (studies the effectiveness of apologies with a variety of components); Bennett, *supra* note 37 (studied wrongdoer's responsibility and crime's severity on apology's acceptance).

²⁵³ *Id.*

²⁵⁴ Scher, *supra* note 31, at 137.

but the words “I am sorry” are often the most effective.²⁵⁵ The wrongdoer expressing the words “I am sorry” can improve both perceptions of the wrongdoer²⁵⁶ and the wrongdoer’s punishments.²⁵⁷

Day and Ross²⁵⁸ analyzed 512 responses from drivers in Canada and the United States who were stopped by the police for speeding. Participants’ responses were categorized as either giving a justification, an excuse, a denial, silence, or an apology. A justification was defined as a speeder stating a reason which allowed rules to be broken, minimizing the situation’s severity, or stating they were unfairly targeted.²⁵⁹ An excuse was defined as stating personal shortcomings, justifying the shortcoming, or blaming shortcomings on another person.²⁶⁰ Denials were defined as either denying the participant committed the crime or refusing to admit to the crime.²⁶¹ Silence was defined as either saying nothing or uttering something unintelligible.²⁶² An apology was defined as either displaying remorse, accepting responsibility, or promising not to speed again.²⁶³ An apology with remorse, expressed through saying “I’m sorry,” was the only significant predictor of reducing ticket cost.²⁶⁴ An apology which took responsibility only lowered ticket prices if the driver was only driving 10mph over the speed limit. If the driver was speeding 25mph or faster, accepting responsibility did not make a difference in ticket costs.²⁶⁵ Day and Ross support previous research finding that expressing remorse through the words “I’m sorry” is often the most effective way to apologize²⁶⁶ and can reduce the wrongdoer’s punishment.²⁶⁷

Scher and Darley²⁶⁸ found similar findings as Day and Ross.²⁶⁹ Scher and Darley investigated numerous components of an apology including: illocutionary force indicating device (IFID), expression of remorse, a promise of forbearance, and an offer of repair. The IFID expressed remorse or sadness about the wrongdoer’s actions and was represented in the study through the statement “I’m really sorry I didn’t call you the other day with the information.”²⁷⁰ Offering an apology through saying “I am sorry,” compared to not offering

²⁵⁵ Scher, *supra* note 31, at 132.

²⁵⁶ *Id.*

²⁵⁷ Day, *supra* note 29, at 228.

²⁵⁸ *Id.* at 229.

²⁵⁹ *Id.* at 225.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 228.

²⁶⁵ *Id.*

²⁶⁶ Scher, *supra* note 31, at 132; Day, *supra* note 29, at 228.

²⁶⁷ Day, *supra* note 29, at 228.

²⁶⁸ See generally Scher, *supra* note 31 (investigated elements of illocutionary force indicating device, expression of responsibility, promise of forbearance, and offer of repair on perceptions of wrongdoer and apology).

²⁶⁹ See generally Day, *supra* note 29 (surveyed Canadian and American drivers who had been stopped for speeding and were asked to recount the experience).

²⁷⁰ Scher, *supra* note 31, at 132.

an apology, significantly improved the perception of the wrongdoer²⁷¹ when compared to other statements.²⁷² The actual words of an apology are important in conveying the wrongdoer's remorse and improving the victim's perception of the wrongdoer.

Along with choosing the appropriate words, the apology's delivery also needs to be taken into consideration. Apologizing is most effective when it is directed toward the victim,²⁷³ originated from the wrongdoer with help from their attorney,²⁷⁴ delivered by a leader (e.g., manager of the company),²⁷⁵ and delivered in a mortification discursive style rather than an evasive style.²⁷⁶ A discursive style is a delivery style in which the person rambles and moves between topics without order.²⁷⁷ Mortification is a type of discursive style²⁷⁸ in which the wrongdoer admits shame and guilt as well as publicly asks for forgiveness.²⁷⁹ These apologies should preferably be face to face so a conversation can evolve from the apology.²⁸⁰ Despite in-person apologies being preferable, written apologies are easier, and can be successful.²⁸¹ If the apology is coming from a CEO or large business, then the apology should be directed to a larger group rather than a specific victim.²⁸²

There are various combinations of words a wrongdoer can use to apologize, but these apologies are not equally effective. Saying "I'm sorry" significantly improves the perception of the wrongdoer²⁸³ and lessens the wrongdoer's punishment²⁸⁴ as opposed to if the wrongdoer attempted to justify their actions or provide an explanation.²⁸⁵ Regardless of the words, the apology should be victim-directed²⁸⁶ and in a mortification discursive style.²⁸⁷ As detailed in Section VII below, attorneys should carefully word the wrongdoer's apology based on the specifics of the crime and the victim's needs in order to maximize its effectiveness.

²⁷¹ *Id.* at 137.

²⁷² *Id.*

²⁷³ Allan, *Restorative and Juvenile*, *supra* note 33, at 186.

²⁷⁴ *Id.*

²⁷⁵ Tamar Walfisch, Dina V. Dijk & Ronit Kark, *Do You Really Expect Me to Apologize? The Impact of Status and Gender on the Effectiveness of an Apology in the Workplace*, 43(7) J. APPLIED SOC. PSYCH. 1446, 1446 (2013) [*hereinafter* Walfisch].

²⁷⁶ Cerulo, *supra* note at 138.

²⁷⁷ Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/discursive>.

²⁷⁸ Cerulo, *supra* note at 138.

²⁷⁹ *Id.* at 131.

²⁸⁰ Debra Slocum, Alfred Allan, and Maria M. Allan, *An Emerging Theory of Apology*, 63(2) AUSTL. J. PSYCH., 83, 86 (2011) [*hereinafter* Slocum].

²⁸¹ *Id.*

²⁸² *Id.* at 138.

²⁸³ *Id.*

²⁸⁴ Day, *supra* note 29, at 229.

²⁸⁵ *Id.*

²⁸⁶ Allan, *Restorative and Juvenile*, *supra* note 33, at 186.

²⁸⁷ Cerulo, *supra* note at 138.

B. Acknowledgement of Responsibility or Harm

In addition to the wrongdoer stating they are sorry, the wrongdoer should acknowledge their responsibility and the harm they have caused; this is the second element of constructing an apology. Victims of incidents with minor consequences can be likely to accept a quick “I’m sorry,” but as the crime’s consequences and the wrongdoer’s responsibility increases, a more in-depth apology is needed.²⁸⁸ However, acknowledging harm can lead to varying outcomes for the wrongdoer. Victims often deem the transgression as more intentional than the wrongdoer perceives the transgression.²⁸⁹

Accepting responsibility is an important element of an apology, especially if it is the only element.²⁹⁰ Responsibility can be included in an apology by the wrongdoer clearly stating they are accepting responsibility, or can be implied when the wrongdoer acknowledges harm.²⁹¹ Accepting responsibility does not guarantee a lenient punishment, though. Jehle, Miller, and Kimmelmeier²⁹² studied college students to analyze the effects of defendant accounts and display of remorse on mock jurors’ decision-making. Participants deemed defendants as the most responsible when a justification was provided for their actions; this increased their likelihood for a guilty verdict.²⁹³ However, when the wrongdoer provided a justification²⁹⁴ for the incident, jurors recommended a less severe punishment than if the wrongdoer had provided an excuse,²⁹⁵ denied the wrongdoing,²⁹⁶ or provided no explanation.²⁹⁷ Apologies that accept full responsibility can lead to less favorable assessments than if the responsibility was ambiguous.²⁹⁸ When responsibility is clear, the wrongdoer is less likely to be forgiven²⁹⁹ and more likely to have their apology rejected.³⁰⁰

²⁸⁸ Gill, *supra* note 18, at 12; Schlenker, Barry R. Schlenker & Bruce W. Darby, The use of apologies in social predicaments, *SOC. PSYCH. Q.*, 271, 275 (1981) [*hereinafter* Schlenker].

²⁸⁹ Christopher P. Reinders Folmer & Peter Mascini, *Rethinking Apology in Tort Litigation Deficiencies in Comprehensiveness Undermine Remedial Effectiveness*, 15(1) *REV. L. & ECON. L.*, 16 (2019) [*hereinafter* Folmer].

²⁹⁰ Dhami, *Offer and Acceptance*, *supra* note 34, at 52; Lewicki, *supra* note, 34 at 185.

²⁹¹ Dhami, *Offer and Acceptance*, *supra* note 34, at 415.

²⁹² Jehle, *Accounts and Remorse*, *supra* note 34 (studied the effects of wrongdoer’s account of the incident and their remorse on mock jurors’ judgements).

²⁹³ *Id.* at 399.

²⁹⁴ A justification is defined as the wrongdoer accepting responsibility for the incident, but denying the incident’s negativity.

²⁹⁵ An excuse is defined as the wrongdoer admitting fault for the behavior, but the wrongdoer does not accept responsibility.

²⁹⁶ A denial was defined as the wrongdoer rejecting the incident occurred and the wrongdoer rejecting involvement in the incident.

²⁹⁷ *Id.*

²⁹⁸ Robbennolt, J. K., Apologies and Settlement Levers, 3(2), *J. EMPIRICAL L. STUD.*, 333, 359 (2006) [*hereinafter* Robbennolt, *Apologies and Settlement*].

²⁹⁹ Alfred Allan, Maria M. Allan, Debra Kaimer, & Dan J. Stein, *Exploration of the Association Between Apology and Forgiveness Amongst Victims of Human Rights Violations*, 24(1) *BEHAV. SCI. & L.*, 87, 94-95 (2006) [*hereinafter* Allan, *apology and forgiveness*].

³⁰⁰ Bennett, *supra* note 37, at 3

Robbennolt³⁰¹ studied the effects of a full, partial, or no apology on participants' likelihood of accepting the apology. In a full apology, the wrongdoer accepts responsibility and demonstrates remorse.³⁰² In a partial apology, the wrongdoer expresses sympathy, but does not accept responsibility or remorse for the incident.³⁰³ When no apology was offered, 52% of participants accepted the provided settlement;³⁰⁴ when a partial apology was offered, only 35% of participants accepted the settlement,³⁰⁵ and when a full apology was offered, 73% of participants accepted the settlement.³⁰⁶ These full apologies were favored by victims, because they portrayed the wrongdoer as providing a more sufficient apology, experiencing regret, being higher in morality, being likely to be careful in the future, being responsible, being more likely to repair the parties' relationship, and having behaved less badly.³⁰⁷

To many judges and victims, accepting responsibility is the most important element of an apology.³⁰⁸ Accepting responsibility can improve the victim's perception of the wrongdoer.³⁰⁹ However, as this review demonstrated, responsibility can also negatively influence the wrongdoer and increase the chances of the apology being rejected.³¹⁰

C. Promise to Avoid Future Wrongdoings

Victims want to ensure that the wrongdoer will not repeat their wrongdoing.³¹¹ This is accomplished by the wrongdoer including a promise to avoid future wrongdoing in their apology; this promise can significantly improve the wrongdoer's well-being.³¹² This third element is the least common element of an apology,³¹³ although it can significantly improve the perception of the wrongdoer.³¹⁴ Scherr and Darley³¹⁵ investigated the effect of four apology elements on perceptions of the wrongdoer. The four elements were: promising to avoid future wrongdoing, conveying remorse, expressing responsibility, and offering a repair. Student participants perceived that a promise to avoid future wrongdoing affected

³⁰¹ Robbennolt, *supra* note 298 (studied different types of apologies on victim's likelihood of accepting the wrongdoer's apology and settlement negotiation).

³⁰² Cohen, *supra* note 3, at 1048.

³⁰³ *Id.* at 1030.

³⁰⁴ Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102(3) MICH. L. REV., 460, 485 (2003) [*hereinafter* Robbennolt, *Apologies and Legal*].

³⁰⁵ *Id.* at 486.

³⁰⁶ *Id.*

³⁰⁷ Robbennolt, *Apology Help*, *supra* note 16, at 34; Robbennolt, *Negotiated and Delegated*, *supra* note 111, at 488.

³⁰⁸ Lewicki, *supra* note 34, at 185; Dhimi, *Offer and Acceptance*, *supra* note 34, at 52.

³⁰⁹ Jehle, *Accounts and Remorse*, *supra* note 34, at 399.

³¹⁰ *Id.*

³¹¹ Cohen, *supra* note 3, at 1017.

³¹² Dhimi, *Offer and Acceptance*, *supra* note 34, at 52.

³¹³ *Id.*

³¹⁴ Scher, *supra* note 31, at 134.

³¹⁵ *Id.*

their perceptions of the apology and rated the wrongdoer's response as more appropriate when this element was included.

Despite the substantial benefits, a promise to avoid future wrongdoing is not commonly included in an apology.³¹⁶ A promise to avoid future wrongdoing can imply the wrongdoer takes responsibility for the incident.³¹⁷ As stated above, this has various effects on the wrongdoer that are not always beneficial, but should still be considered by attorneys because it can improve the effectiveness of apologies.³¹⁸

D. Remorse

The fourth element of an apology is displaying remorse. Apologies and remorse are portrayed similarly, though there are key differences.³¹⁹ Apologies can exist without remorse, but remorseless apologies are more likely to fail and do not help the victim heal.³²⁰ An example of apologies without remorse are pseudo-apologies: shallow apologies that often do more harm than good by worsening the incident.³²¹ In a pseudo-apology, the wrongdoer might not acknowledge their role in the incident, the apology might lack sincerity, or the apology is conditional based on the victim's feelings.³²²

While remorse and an apology can consist of the same language or be presented in the same verbal way by saying "I am sorry," remorse emphasizes the emotions associated with the words. In comparison, an apology just requires the words to be produced.³²³ Remorse needs to be conveyed through nonverbal cues, such as: making eye contact, speaking with respect and humility, acknowledging the victims hurt, and making clear and sincere points.³²⁴ Apologies are also planned and thought out, while feeling remorseful cannot be forced and expresses the wrongdoer's true feelings.³²⁵

An apology with remorse often indicates that the wrongdoer is experiencing psychological pain or suffering.³²⁶ If a wrongdoer is remorseful, it is important for the him or her to apologize so both the victim and the wrongdoer can find peace.³²⁷ Along with finding peace, remorse can reduce the wrongdoer's punishment. Tallon, Daftary-Kapur and Penrod investigated the effects of wrongdoer remorse (both in pre-trial publicity and at the

³¹⁶ Dhami, *Offer and acceptance*, *supra* note 34, at 52.

³¹⁷ *Id.*

³¹⁸ Scher, *supra* note 31, at 134, 137.

³¹⁹ Weisman, R., *Being and Doing: The Judicial Use of Remorse to Construct Character and Community*, 18(1) SOC. & LEGAL STUD., 47, 51 (2009) [*hereinafter* Weisman].

³²⁰ Hershey H. Friedman, *The Power of Remorse and Apology*, 7(1) J. CHARACTER 1, 2 (2006) [*hereinafter* Friedman].

³²¹ LAZARE, *supra* note 11, at 13.

³²² *Id.*

³²³ Weisman, *supra* note 319, at 51.

³²⁴ Jung Jin Choi & Margaret Severson, "What! What Kind of Apology is This?": *The Nature of Victim Offender Mediation*, 31(7) CHILD. & YOUTH SERV. REV. 813, 819 (2009).

³²⁵ *Id.*

³²⁶ Friedman, *supra* note 320, at 2.

³²⁷ *Id.*

time of the trial) on capital punishment sentences.³²⁸ Remorse expressed in pretrial publicity did not affect the wrongdoer's sentence. However, a wrongdoer who expressed remorse at trial was perceived significantly more positively than a defendant who showed no emotion at trial.³²⁹ Those who showed remorse during trial were 87% less likely to be sentenced to death.³³⁰ A wrongdoer's remorse might make the victim believe that the wrongdoer is not bad,³³¹ has a high moral character, and is more sympathetic;³³² the victim might believe the wrongdoer is a decent person who simply made a mistake.³³³ Remorse can make the victim or judge believe the wrongdoer has a higher chance of rehabilitation.³³⁴ Jehle, Miller, and Kimmelmeier (2009) found that mock jurors who viewed a remorseful defendant more positively believed the defendant deserved a more lenient sentence.³³⁵ The study also found that the remorseful wrongdoer was more likely to receive a guilty verdict as compared to a non-remorseful wrongdoer.³³⁶ This is also supported by Bornstein, Rung, and Miller³³⁷ who found when the wrongdoer showed remorse at the time of the event and at the time of trial, the wrongdoer paid more in compensation than when the wrongdoer showed remorse only at the time of the event.³³⁸ Bornstein, Rung, and Miller's findings demonstrate that, although showing remorse can improve the perceptions of the wrongdoer, it does not always correlate with a lesser punishment.

Although the wrongdoer does not always have the opportunity to display remorse, it is an important element of the wrongdoer's apology. Displaying remorse does not always correlate to lesser punishments, however. Attorneys should consider integrating remorse into the wrongdoer's apology, but attorneys also need to consider the type of crime that the wrongdoer committed and at what time remorse should be vocalized. Related recommendations are offered in Section VII.

³²⁸ See generally Tallon, *supra* note 28 (studied the effects of remorse given in pre-trial publicity and during the wrongdoer's criminal trial).

³²⁸ Tallon, *supra* note 28, at 1292.

³²⁸ *Id.*

³²⁸ *Id.*

³²⁸ Gold, *supra* note 36, at 297.

³²⁸ *Id.* at 299.

³²⁸ Kleinke, *supra* note 37, at 528.

³²⁸ Jehle, *Accounts and remorse*, *supra* note 34, at 399.

³²⁸ *Id.* at 398.

³³⁷ Bornstein, *supra* note 28, at 399—400.

³³⁸ *Id.*

E. Wrongdoer's Explanation

Victims seek an explanation from wrongdoers to understand why the incident occurred.³³⁹ This is the fifth element of an apology and is an essential component.³⁴⁰ Although it is important to the victim,³⁴¹ it can have varying results for the wrongdoer.³⁴² Although the need for an explanation increases with the crime's severity.³⁴³ However, an explanation does not guarantee leniency. A wrongdoer who admits intent can receive a longer sentence depending on the severity of the crime.³⁴⁴ An explanation can also lead to a longer sentence than if the wrongdoer were to deny committing the offense.³⁴⁵ Victims want to understand why the wrongdoer committed the harmful act.³⁴⁶ However, providing this explanation can benefit the victim more than it benefits the wrongdoer.³⁴⁷ If the wrongdoer committed a crime, such as a rape, an explanation will rarely justify the act committed.³⁴⁸

F. Timing

Deciding the best time for the wrongdoer to apologize is the sixth element of an apology. Researchers have found differing results for the most effective time for the wrongdoer to apologize.³⁴⁹ An appropriately timed apology, though, can positively impact the wrongdoer's outcome.³⁵⁰ This is similar to the timing of remorse, as discussed in the "Remorse" section "D" just above.

Determining an apology's appropriate timing is essential, although an immediate apology could deter a lawsuit in general, it might not be protected under all laws.³⁵¹ Some researchers have found that wrongdoers were perceived more positively when they apologized immediately after the incident occurred,³⁵² other researchers found a delayed apology was more beneficial for the victim.³⁵³ A delayed apology makes the victim believe their point of view is understood and, in turn, the victim then views the wrongdoer more positively.³⁵⁴ In general, though, an immediate apology or a delayed apology were both

³³⁹ Petrucci, *supra* note 17, at 352.

³⁴⁰ Lewicki, *supra* note 34, at 189.

³⁴¹ See e.g., *id.*

³⁴² See e.g., Kleinke, *supra* note 37, at 528; Jehle, *Accounts and Remorse*, *supra* note 34, at 398.

³⁴³ Bennett, *supra* note 37, at 4.

³⁴⁴ Kleinke, *supra* note 37, at 528.

³⁴⁵ Jehle, *Accounts and Remorse*, *supra* note 34, at 398.

³⁴⁶ Lewicki, *supra* note 34, at 189.

³⁴⁷ See e.g., Kleinke, *supra* note 37, at 528; Jehle, *Accounts and Remorse*, *supra* note 34, at 398.

³⁴⁸ See, e.g., Kleinke, *supra* note 37, at 528; Jehle, *Accounts and Remorse*, *supra* note 34, at 398.

³⁴⁹ See e.g., Allan, A., *Restorative and Juvenile*, *supra* note #33, at 185; Haesevoets, *supra* note 32, at 540.

³⁵⁰ Allan, A., *Restorative and Juvenile*, *supra* note 33, at 185;

³⁵¹ Cohen, *supra* note 3, at 1035.

³⁵² Allan, A., *Restorative and Juvenile*, *supra* note 33, at 185.

³⁵³ Frantz, C., & Benningson, C., *Better Late than Early: The Influence of Timing on Apology Effectiveness*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201, 204—05 (2005) [*hereinafter* Frantz].

³⁵⁴ *Id.*

more beneficial than providing no apology.³⁵⁵ Although both apologies can be effective separately, Bornstein, Rung, and Miller found that apologizing at multiple points during trial was deemed as being less effective than at only one point of trial.³⁵⁶

The appropriate timing for an apology is hard to determine because of the contradictory findings in the research.³⁵⁷ Although it might be difficult to determine the best timing for an apology, either an immediate apology or a delayed apology is better than no apology.³⁵⁸ Further recommendations about how to determine an apology's timing are discussed in Section VII.

G. Wrongdoer's Sincerity

Regardless of how the wrongdoer genuinely feels, the wrongdoer should understand the harm their actions caused and attempt to portray sincerity.³⁵⁹ This sincerity is the seventh element of an apology. Sincerity is important, because it conveys to the victim that the incident will not reoccur³⁶⁰ or at least that the wrongdoer will attempt not to repeat the behavior, even though the wrongdoer might struggle to control their urges to act negligently in the future.³⁶¹ An apology's sincerity can be determined by the type of apology the wrongdoer provides as well as the content of the apology.³⁶² Thus, sincerity is dependent on an apology's elements previously discussed, such as elements one, two, and three. This sincerity can help alleviate negative emotions, such as guilt, felt by the victim.³⁶³

Whether an apology is satisfactory will change based on the individual person (e.g., victim) and circumstance.³⁶⁴ These apologies will also vary in their degree of sincerity. Allan, Beesley, Attwood, and McKillop³⁶⁵ conducted a study which investigated the effects of self-focused and self-other focused apologies by a wrongdoer. In self-focused apologies, the wrongdoer expresses regret for their actions; in self-other focused apologies, the wrongdoer expresses both regret and remorse.³⁶⁶ Self-other focused apologies containing affect, affirmations, and actions were perceived as more sincere than self-focused apologies.³⁶⁷ Regardless of an apology's sincerity, the apology was often accepted for

³⁵⁵ *Id.* at 205.

³⁵⁶ Bornstein, *supra* note 28, at 399-400.

³⁵⁷ See e.g., *id.* at 399; Allan, A., *Restorative and Juvenile*, *supra* note 33, at 185; Frantz, *supra* note 353, at 204—205.

³⁵⁸ Frantz, *supra* note 353, at 204.

³⁵⁹ Gill, *supra* note 18, at 13.

³⁶⁰ Cohen, *supra* note 3, at 1017.

³⁶¹ Gill, *supra* note 18, at 14.

³⁶² See e.g., Van Dijck, *supra* note 17, at 573; Robbennolt, *Negotiated and Delegated*, *supra* note 111, at 132; Allan, *Restorative and Juvenile*, *supra* note 33, at 179.

³⁶³ Ebesu, *supra* note 33, at 317.

³⁶⁴ Slocum, *supra* note 280, at 86.

³⁶⁵ Allan, *Restorative and Juvenile*, *supra* note 33.

³⁶⁶ *Id.* at 179.

³⁶⁷ *Id.* at 183.

instrumental³⁶⁸ purposes.³⁶⁹ Specifically, an apology's sincerity can decrease negative emotions, such as anger and irritation.³⁷⁰

Victims often accept any apology, because an apology of any kind is more beneficial than no apology.³⁷¹ However, a sincere apology is ideal to reduce the victim's negative emotions associated with the incident.³⁷² This sincerity is most evident when the wrongdoer apologizes with a voluntary (i.e. motivated by internal cues)³⁷³ or self-other focused apologies. These apologies are perceived by mock jurors to be the most effective and portrayed as the sincerest type of apology.³⁷⁴

In sum, there are seven common elements used to compose an apology. Elements related to the apology itself include delivering the apology,³⁷⁵ timing,³⁷⁶ and sincerity.³⁷⁷ The elements related to the wrongdoer include: acknowledging responsibility,³⁷⁸ avoiding future wrongdoing,³⁷⁹ displaying remorse,³⁸⁰ and explaining the offense.³⁸¹ The elements must be chosen based on the specific characteristics of the case, which increases the chance a wrongdoer will receive more positive perceptions and a more lenient punishment. This point is further explained in Section V.

³⁶⁸ An apology is used for an instrumental purpose when the apology is used as a crucial tool.

³⁶⁹ Allan, *Restorative and Juvenile*, *supra* note 33, at 185-86; Jehle, *Voluntariness of Apologies*, *supra* note 118, at 740.

³⁷⁰ Ebesu, *supra* note 33, at 317.

³⁷¹ Allan, *Restorative and Juvenile*, *supra* note 33, at 179.

³⁷² Ebesu, *supra* note 33, at 317.

³⁷³ Jehle, *Voluntariness of Apologies*, *supra* note 118, at 728.

³⁷⁴ Ebesu, *supra* note 33, at 317; Jehle, *Voluntariness of Apologies*, *supra* note 118, at 734.

³⁷⁵ See e.g., Scher, *supra* note 31 (investigated elements of illocutionary force indicating device, expression of responsibility, promise of forbearance, and offer of repair on perceptions of wrongdoer and apology); Day, *supra* note 29 (surveyed Canadian and American drivers who had been stopped for speeding and were asked to recount the experience).

³⁷⁶ See e.g., Allan, *Restorative and Juvenile*, *supra* note 33, at 185; Haesevoets, *supra* note 32, at 540; Frantz, *supra* note 353, at 204-05.

³⁷⁷ See e.g., Allan, *Restorative and Juvenile*, *supra* note 33, at 179; Ebesu, *supra* note 33, at 317.

³⁷⁸ See e.g., Jehle, *Accounts and Remorse*, *supra* note 34 (studied the effects of wrongdoer's account, including acknowledging responsibility, of the incident and their remorse on mock jurors' judgements); Dhimi, *Offer and Acceptance*, *supra* note 34 (studies the apologies given during victim-offender mediation and the apology's effect on the participant's satisfaction); Lewicki, *supra* note 34 (studies the effectiveness of apologies with a variety of components).

³⁷⁹ See e.g., Scher, *supra* note 31 (investigated elements of illocutionary force indicating device, expression of responsibility, promise of forbearance, and offer of repair on perceptions of wrongdoer and apology); Dhimi, *Partial Apology*, *supra* note 35 (studied partial apologies and the extent one element of an apology implied another).

³⁸⁰ See e.g., Gold, *supra* note 36 (remorse had biggest effect on wrongdoer forgiveness when compared with harm, personal relevance, and group status); Tallon, *supra* note 28 (studied the effects of remorse given in pre-trial publicity and during the wrongdoer's criminal trial); Bornstein, *supra* note 28 (studied the effects of remorse on wrongdoer's punishment in a medical malpractice case, which included a wrongful death case).

³⁸¹ See e.g., Kleinke, *supra* note 37; Lewicki, *supra* note 34; Bennett, *supra* note 37.

V. CHARACTERISTICS AFFECTING AN APOLOGY'S ACCEPTANCE

The acceptance of the wrongdoer's apology depends on a variety of elements, including: the wrongdoer's personal characteristics³⁸² and the jury's skepticism.³⁸³ These characteristics can determine the perception of the wrongdoer³⁸⁴ and the wrongdoer's punishment.³⁸⁵

A. Wrongdoer's Characteristics

Females tend to be perceived as guiltier than males when they show remorse.³⁸⁶ Additionally, females are expected to apologize more frequently.³⁸⁷ However, apologies from males are seen as more effective.³⁸⁸ Along with the wrongdoer's gender, the wrongdoer's occupation also plays a role in the acceptance of an apology.³⁸⁹ Apologies from higher ranking employees, such as a manager, are more effective than apologies from employees in subordinate positions.³⁹⁰ This is similar for physicians because physicians in high ranks are perceived as guiltier when they show remorse compared to how physicians in low ranks are perceived.³⁹¹ If no remorse is shown, low ranking physicians are perceived as guiltier by jurors.³⁹² Finally, the wrongdoer's criminal history affects whether their apology will be accepted. Apologies were perceived by mock jurors as more appropriate when it was the wrongdoer's first offense and punishments were seen as less necessary when it was their first offense.³⁹³ However, if the wrongdoer was a repeat offender, a punishment was seen as more necessary than if it was the wrongdoer's first crime.³⁹⁴ While attorneys do need to focus on extrinsic³⁹⁵ factors of the case, apologies also needed to be crafted based on the personal characteristics of the wrongdoer, because even characteristics like gender or criminal history affects an apology's effectiveness.

³⁸² See e.g., 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. SOC. PSYCHOL. 604, 616 (2021) [*hereinafter* Niedermeier]; Walfisch, *supra* note 275, at 1453.

³⁸³ Gold, *supra* note 36, at 297.

³⁸⁴ See e.g., Niedermeier, *supra* note 382, at 616; Bornstein, *supra* note 28, at 401.

³⁸⁵ See e.g., Wooten, *supra* note 22, at 230; Gold, *supra* note 36, at 297.

³⁸⁶ Niedermeier, *supra* note 382, at 616.

³⁸⁷ Walfisch, *supra* note 275, at 1453-54.

³⁸⁸ *Id.* at 1451.

³⁸⁹ *Id.* at 1452.

³⁹⁰ *Id.*

³⁹¹ Niedermeier, *supra* note 382, at 616.

³⁹² *Id.*

³⁹³ Wooten, *supra* note 22, at 230.

³⁹⁴ *Id.*

³⁹⁵ Extrinsic is an external factor. *Extrinsic*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/extrinsic> (last visited Mar. 27, 2021).

B. Jury Characteristics

The characteristics of the person judging the apology (i.e., victim³⁹⁶ or jury³⁹⁷) also affect the acceptance of the apology. Females (as compared to males) perceive the wrongdoer to have suffered less, to be less honest, and to be less competent.³⁹⁸ Many people are skeptical of apologies, and victims can perceive an apology as a way to either manipulate them or as an attempt by the wrongdoer to alleviate guilt.³⁹⁹ Gold and Weiner studied whether a wrongdoer's punishment and confession were related to whether the wrongdoer was a member of the juror's ingroup (e.g., same race or gender as the juror) or outgroup (e.g., different race or gender as the juror). Gold and Weiner found that an ingroup member was less forgiven than an outgroup member, if the wrongdoer did not express remorse.⁴⁰⁰ This implies that there is a higher expectation for a person in their own group to apologize; apologizing could be considered normative behavior for their group. Jurors had harsher opinions toward ingroup members than outgroup members—perhaps because the person violated the group norms and is seen as a threat to the juror's reputation.⁴⁰¹ If the wrongdoer had apologized and shown remorse for the incident, the juror might have been more likely to forgive, because the wrongdoer would have been seen as still valuing and obeying the ingroup's rules.⁴⁰²

In sum, characteristics such as the wrongdoer's gender,⁴⁰³ the juror's gender,⁴⁰⁴ or the wrongdoer's criminality⁴⁰⁵ and ingroup status⁴⁰⁶ can affect whether the apology is accepted. The influence of these characteristics on an apology affects the perception of the wrongdoer⁴⁰⁷ and the wrongdoer's punishment.⁴⁰⁸

VI. APPLICATION OF THE ELEMENTS OF APOLOGIES TO NOTABLE CASES

The importance of the above-mentioned elements can be illustrated in cases that are notable for their broad reach and high-publicity wrongdoings. While a scientific analysis of each apology is beyond the scope of this article, these anecdotes provide examples of the elements discussed above. Some wrongdoers have been able to successfully integrate these elements into an apology and were able to protect their

³⁹⁶ Bornstein, *supra* note 28, at 401.

³⁹⁷ *Id.*; Gold, *supra* note 36, at 297.

³⁹⁸ Bornstein, *supra* note 28, at 401.

³⁹⁹ LAZARE, *supra* note 11, at 14.

⁴⁰⁰ Gold, *supra* note 36, at 297.

⁴⁰¹ *Id.* at 299.

⁴⁰² *Id.*

⁴⁰³ Niedermeier, *supra* note 382, at 616.

⁴⁰⁴ Bornstein, *supra* note 28, at 401.

⁴⁰⁵ Wooten, *supra* note 22, at 230.

⁴⁰⁶ *See generally*, Gold, *supra* note 36.

⁴⁰⁷ *See e.g.*, Niedermeier, *supra* note 382, at 616; Bornstein, *supra* note 28, at 401.

⁴⁰⁸ *See e.g.*, Wooten, *supra* note 22, at 230; Gold, *supra* note 36, at 297.

reputation.⁴⁰⁹ Other wrongdoers were not able to effectively use these elements in their apology and could not improve their reputation or mitigate punishment.⁴¹⁰

This section will present brief case studies of companies who chose to apologize for their actions. The section will discuss the case of Firestone's CEO, who apologized for an incident that involved faulty tires, and former Michigan governor Rick Snyder, who was charged in 2021 with criminal willful neglect for his role in the Flint water crisis.⁴¹¹ It will then discuss Johnson and Johnson's successful apology for its role in the "Tylenol murders." Finally, the section will present a case in which the wrongdoer did not offer an apology, but an apology could have been beneficial.

A. Ineffective Apologies

The use of the elements mentioned above does not guarantee a successful outcome for the wrongdoer. This can often be evident when the victim believes that the apology was given too late⁴¹² or that the crime was too severe.⁴¹³ This section will analyze two failed apologies and offer possible reasons why the apology was rejected, despite the wrongdoer using some elements of a successful apology.

In September 2000, Firestone's CEO Masatoshi Ono apologized before the U.S. Congress for Firestone's faulty tires that caused 88 fatalities.⁴¹⁴ Firestone and the car company Ford were accused of withholding valuable information which could have prevented many drivers' deaths.⁴¹⁵

In Ono's appeal to Congress, he clearly stated that he was apologizing for the incident by saying "I come before you to apologize to you, the American people and especially to the families who have lost loved ones in these terrible rollover accidents...".⁴¹⁶ This phrase "to apologize" clearly describes the purpose of the statement and implies the *content/delivery* (one of the elements of an apology) the statement will contain. Ono also took full *responsibility* (another of the elements of an apology) for the incident, "I also come to accept full and personal responsibility...".⁴¹⁷ This is important to relieve blame from the victim.⁴¹⁸ While Ono's statements contain elements of an apology,

⁴⁰⁹ Richard S. Tedlow & Wendy K. Smith, James Burke: a *Career in American Business*, HARV. BUS. SCH. 1, 13 (1989) [*hereinafter* Tedlow].

⁴¹⁰ See generally, Fuchs-Burnett, *supra* note 3 (Firestone CEO apologizes to public for faulty tires); Helsel, *supra* note 1.

⁴¹¹ Brakkon Booker, *Former Michigan Gov. Rick Snyder Charged in Flint Water Crisis*, NPR (Jan. 13, 2021), [*hereinafter* Booker].

⁴¹² Haesevoets, *supra* note 32, at 540.

⁴¹³ Zhong, *supra* note 38, at 20-21.

⁴¹⁴ Fuchs-Burnett, *supra* note 3, at 31.

⁴¹⁵ Ricardo Alonso-Zaldivar & Robert L. Jackson, *Firestone CEO Apologizes for Tire Failures*, L.A. Times (Sept. 7, 2000), <https://www.latimes.com/archives/la-xpm-2000-sep-07-mn-16935-story.html>.

⁴¹⁶ *Id.*

⁴¹⁷ Fuchs-Burnett, *supra* note 3, at 31.

⁴¹⁸ Petrucci, *supra* note 17, at 352.

this apology was not accepted by the victims' families.⁴¹⁹ One of the reasons was because of the apology's delayed timing. While Firestone took responsibility, this occurred years after the incident occurred; it also came only after Firestone debated with its partner Bridgestone Tires as to which company should claim responsibility. This suggests the apology was not given in a *timely manner*. Firestone's delayed timing led to customers losing trust in the company and made the company appear less credible.⁴²⁰ This is supported by Haesevoets and colleagues, who found that a delayed apology is less effective in rebuilding trust.⁴²¹ Also, the company provided no *explanation* for why the tires were faulty and caused the deaths. Adding these elements (quicker timing and an explanation) to the apology would strengthen the statement and encourage the victims to accept the statement as a *sincere* apology.

Similar to Masatoshi Ono, former Governor of Michigan Rick Snyder also provided an apology that suffered because of the apology's timing. In 2014, government officials in Flint, Michigan changed Flint's drinking water supply from Detroit's water system to the Flint River in an effort to save money.⁴²² The water from the Flint River was visibly unsafe to drink and caused physical illnesses, including doubling children's blood-lead levels.⁴²³ All complaints from residents were ignored by the government.⁴²⁴ In 2016, numerous government officials were charged as criminally responsible for contributing to the crisis.⁴²⁵ In 2021, former Michigan Governor Rick Snyder was charged with willful neglect.⁴²⁶ By that time, at least 12 Flint residents had died and over 80 residents had become sick due to the contaminated water.⁴²⁷

Snyder apologized for his role in the incident back in 2016, but the apology was not well received by Michigan's citizens.⁴²⁸ Despite the apology being rejected by many citizens, the apology did contain several elements of a successful apology. Snyder opened his apology by taking *responsibility* and acknowledged the harm caused, "I say tonight as I've said before, I am sorry and I will fix it. No citizen of this great state should endure this kind of catastrophe. The government failed you..."⁴²⁹ Snyder took responsibility for the incident, although he also acknowledged there are many other people (i.e., the government) who "failed" the citizens (the victim). Snyder also clearly stated he is sorry (*delivery of the apology*), instead of insinuating the apology through a different combination of words. He also delivered it in person, which should be more effective than a written apology.⁴³⁰

⁴¹⁹ Fuchs-Burnett, *supra* note 3, at 32.

⁴²⁰ *Id.*

⁴²¹ Haesevoets, *supra* note 1, at 540.

⁴²² Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NRDC (Nov. 08, 2018), <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know> [*hereinafter* Denchak].

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ Booker, *supra* note 411.

⁴²⁷ *Id.*

⁴²⁸ Helsel, *supra* note 1.

⁴²⁹ *Id.*

⁴³⁰ Slocum, *supra* note 280, at 86.

Snyder *explained* the incident and what actions the government had taken to fix the situation. Snyder promised to release his emails regarding Flint’s water and described a comprehensive timeline of the extent the government knew of the issue and the steps taken, and intended to take, to mend the issue.⁴³¹ He also *promised to avoid future wrongdoing* by saying, “...We will not stop working for the people of Flint until every single person has clean water every single day no matter what”.⁴³² Although this apology contained several important elements, it was rejected, possibly because of the apology’s timing and the severity of the issue. Additionally, there was no *explanation*—leading to the assumption that the government had intentionally chosen a risky water source simply to save money. The Flint water crisis began in 2013 and Snyder had emails about the situation dating back to 2014, but an apology was not given until 2016.⁴³³ In 2016, the other government officials had been charged with responsibility in the incident, but Snyder was not charged.⁴³⁴ The citizens demanded government officials to be charged for their participation in the incident because residents needed the government to be held responsible for letting them drink contaminated water.⁴³⁵ Melissa Mays, a resident of Flint said, “They pumped poison into our homes, we fed it to our children, we were promised it was safe...”⁴³⁶

In sum, Masatoshi Ono and Rick Snyder offered apologies to make amends for their wrongdoings, but the apologies were largely rejected by their respective victims. They contained some positive elements—including accepting responsibility and delivering the apology in-person by a high ranking official. Despite the apologies containing multiple elements of an apology, both apologies were given too late, did not offer explanations, and were not equate given the crime’s severity. It is also possible that the apology was not perceived as *sincere* and the wrongdoer was not perceived as *remorseful* (two other elements of apologies; though this is difficult to assess without measuring perceived remorse and sincerity). The following section will demonstrate a company successfully apologizing.

B. Effective Apologies

A company that successfully provided an apology was Johnson and Johnson. On September 29, 1982, four individuals fell ill and eventually died in the Chicago area.⁴³⁷ They had taken Extra-Strength Tylenol laced with cyanide. The news of the “Tylenol murders” spread fast and Johnson and Johnson’s chairman, James Burke, quickly created task forces to save Johnson and Johnson’s image.⁴³⁸ The company responded quickly by:

⁴³¹ Helsel, *supra* note 1.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ Denchak, *supra* note 422.

⁴³⁵ Helsel, *supra* note 1.

⁴³⁶ *Id.*

⁴³⁷ Tedlow, *supra* note 410, at 13.

⁴³⁸ *Id.*

halting advertisements, pulling Tylenol off the shelves, contacting the FDA, contacting doctors and distributors, sending personnel to Chicago, and redistributing employees.⁴³⁹ Burke also focused his attention on news outlets and found a solution to the problem, instead of focusing on how to rebrand and save the “Tylenol name.”⁴⁴⁰ Because the ultimate cause of the wrongdoing was a person who had tampered with the product, this incident caused widespread change in the food and drug industry.⁴⁴¹ The Joint Committee of Product Safety was formed and created 11 packaging options manufacturers could choose from to prevent tampering of their products.⁴⁴² Through this response, the public saw the company as a victim too, and trust was rebuilt quickly.

Johnson and Johnson’s apology, delivered by CEO James Burke, was successful because they conducted an investigation that provided an *explanation* for the harm, responded in a *timely manner* and steps were quickly taken to reassure the public a similar *act would not reoccur*. For instance, Burke said “Johnson and Johnson will no longer manufacture or sell any capsule product... While this decision is a financial burden to us, it does not begin to compare to the loss suffered by the (victim’s) family and friends.” Responding in a timely manner is important because it is an essential step in rebuilding the relationship between the victim and the wrongdoer.⁴⁴³ When wrongdoers promise the incident will not reoccur, victims view the apology as more appropriate.⁴⁴⁴ The apology might also have been successful because it was *delivered* by a CEO,⁴⁴⁵ additionally, might have been perceived as *sincere* and the apologizer as being *remorseful* (though it is difficult to say with certainty without taking measurements of these elements). Although some people might have perceived them as responsible (i.e., for not making it more difficult for someone to tamper with their product), their apology did not directly use *responsibility* as an element of the apology. Perhaps it was not needed, because the ultimate wrongdoing was the person who tampered with the product. Although they might be perceived as not responsible for the wrongdoing, they did *promise to avoid future harm*, at their own detriment (i.e., cost) which likely made the apology more effective. This response set the standard for corporations’ apologies and demonstrates how a specially crafted apology can be successful. This apology can be used as a guide for individual apologies too.

C. Missed Opportunity to Apologize

Many wrongdoers have used apologies, but others have missed opportunities. A recent example is the case of Thomas Murphy who in 2019 was charged with killing a 12-

⁴³⁹ Berg, et al., *Crisis Management and the “Paradigm” Case*, RHETORICAL & CRITICAL APPROACHES PUB. REL. II, 93, 98-99 (2013) [*hereinafter* Berg].

⁴⁴⁰ *Id.* at 99.

⁴⁴¹ *Id.* at 102.

⁴⁴² *Id.*

⁴⁴³ Haesevoets, *supra* note 1, at 540.

⁴⁴⁴ Scher, *supra* note 31, at 134.

⁴⁴⁵ Walfisch, *supra* note 275, at 1446.

year-old boy after he drove drunk in Long Island, New York.⁴⁴⁶ Murphy originally expressed *remorse* (an element of an apology) and indicated a willingness to accept *responsibility*, in an attempt to get a beneficial plea bargain. He later decided to go to trial, in which he argued he was not responsible.⁴⁴⁷ His attorney stated it was hard to express remorse for an incident Murphy was not guilty of, implying Murphy was not drunk when he struck the group of boys.⁴⁴⁸ Murphy appeared remorseless on the stand and never addressed the victim's family directly, upsetting both the victim's family and the judge with his lack of emotion.⁴⁴⁹ The victim's family stated they wanted Murphy "to serve a 'life sentence' of grief."⁴⁵⁰ Thomas Murphy was given the maximum sentence of 8.33-25 years in jail.⁴⁵¹ While not guaranteed, it is possible that, had Murphy displayed more emotion (specifically remorse), both the judge and the victim's family would have a more positive perception of Murphy. Murphy and his attorney refused to accept responsibility, meaning the family received no closure and no explanation for the incident. In addition, the show of remorse might not have been explicit enough, hence the *delivery* was weak and not *sincere*. Much of their frustrations with Murphy came from Murphy's lack of ability to take responsibility, unwillingness to prevent future actions, and his lack of remorse (all elements of an apology).⁴⁵² Although a specific apology that expressed responsibility, sincerity, explanation, and a promise to prevent future actions might have changed perceptions of him, he refused to offer an apology because of fear that it would make him appear guilty (as discussed above—and as indicated by his attorney).

In sum, apologies are not a guarantee of a more lenient punishment or better perceptions of the wrongdoer, as seen in the Firestone incident. Nevertheless, apologies are still important because they are sought by victims⁴⁵³ and have the possibility to benefit the wrongdoer,⁴⁵⁴ an opportunity which was missed in the Thomas Murphy case. A properly composed and appropriately timed apology can have extremely successful results.

VII. RECOMMENDATIONS

Based on the review of the legal literature on apology laws and the psychological literature on apologies, a few recommendations can be made. The first recommendation is

⁴⁴⁶ See generally Robert Brodsky & Michael O'Keeffe, *Thomas Murphy sentenced to the maximum 8 1/3 to 25 years in Boy Scout death*, *NEWSDAY* (Sept. 30, 2020), <https://www.newsday.com/long-island/crime/boy-scout-death-murphy-li-1.49918943> (Thomas Murphy allegedly killed a group of boy scouts after driving drunk).

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ See e.g., Folmer, *supra* note 289, at 17; Smith, *supra* note 2, at 80; Petrucci, *supra* note 17, at 352.

⁴⁵⁴ See e.g., Jehle, *Accounts and remorse*, *supra* note 34, at 399; Tallon, *supra* note 28, at 1292; Allan, *Apology and Forgiveness*, *supra* note 299.

that attorneys should consider the laws that apply to their cases. Specifically, they should know what types of apologies can be used against their clients and in what circumstances. This can be determined by looking into the apology laws specific to the state the trial is occurring in, which was discussed previously in Section II. In some instances, it might be legally risky to apologize.

Along with the specific apology laws that will affect the wrongdoer, leniency might be given if laws appear to be ambiguous or do not exist to protect apologies.⁴⁵⁵ When the law is clear and fair, a remorseful wrongdoer was seen as guiltier by mock jurors compared to when the law was ambiguous.⁴⁵⁶ A non-remorseful wrongdoer was seen as equally guilty by mock jurors regardless of whether the law was fair or unfair.⁴⁵⁷ An attorney could make the argument that the apology law is unfair, hoping to sway the jury to be more lenient toward the apologetic client. These considerations might help the lawyer prepare an apology—especially if the law is ambiguous.

In a recent example of the importance of knowing the law in one's jurisdiction, New York Governor Andrew Cuomo's apology for the sexual assault allegation might not be protected due to the legal standards he signed into law in 2019.⁴⁵⁸ New York's sexual assault laws expanded the statute of limitations of victims to three years, eliminated the need for internal reports, and expanded the scope of harassment to include anything a normal person would consider more than a petty slight or trivial inconvenience.⁴⁵⁹ In Cuomo's statement from March 3, 2021, he apologized for his actions and admitted he now realizes his actions had the capability to make people uncomfortable—actions which relate closely to New York's sexual harassment laws.⁴⁶⁰ This is an example of the need for the wrongdoer and their attorney to research laws in the wrongdoer's specific case. Although the victims needed to hear an apology from Governor Cuomo, due to the specific crime, his apology might now be used as a confession if he goes to trial. As this case illustrates, the attorney has difficult decisions to make in advising their clients whether to apologize.

If the attorney determines that an apology will be legally beneficial in their jurisdiction, they should consider the construction of that apology. Because apologies are case-specific, there is not a single formula for an apology. However, our second recommendation is that an apology should contain multiple elements. While a wrongdoer could use a single element effectively, often more complete apologies lead to more successful outcomes.⁴⁶¹ Despite there being as many as ten elements of an apology (seven of which are most relevant to legal system apologies), four elements (i.e., showing remorse, taking responsibility, delivery, and explanation) tend to be most essential.⁴⁶² Some of these

⁴⁵⁵ *Id.* at 361.

⁴⁵⁶ Niedermeier, *supra* note 382, at 610.

⁴⁵⁷ *Id.*

⁴⁵⁸ Cara Eisenpress, *Cuomo's Apology Could Be a Confession Under New York Sexual Harassment Laws*, Crain's N.Y. BUS. (Mar. 8, 2021), <https://www.crainnewyork.com/politics/cuomos-apology-could-be-confession-under-new-york-sexual-harassment-laws>.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ Kirchoff, *supra* note 30, at 123.

⁴⁶² *Id.* at 120.

elements were illustrated in the Johnson and Johnson case, which was well received, as mentioned in Section VII. Johnson and Johnson’s apology, delivered by CEO James Burke, explained how the wrongdoing occurred, expressed his remorse, and detailed the company’s intentions to make the situation better.⁴⁶³

The third recommendation relates to perhaps the most important apology element—timing. The timing of the apology is important in a wrongdoer’s apology, as seen in the Firestone and Flint water scandal cases described in Section VI. Both of these wrongdoers offered an apology, but the apologies were rejected partly due to their delay. Johnson and Johnson’s apology for the “Tylenol murders” was accepted in part due to the CEO’s swift timing. Judges have varying views on the time remorse is shown and an apology is given. Some judges believe a guilty plea is the ultimate testament of remorse, while others think it has no effect.⁴⁶⁴ If a wrongdoer does not enter a guilty plea, but shows remorse at the time of arraignment, some judges perceive it as the wrongdoer’s ability to follow court order procedures.⁴⁶⁵ Other judges do not think it is an accurate representation of guilt.⁴⁶⁶ The apology’s timing, while an essential aspect, must be carefully decided based on laws and what the attorney believes will appeal to the judge.

The fourth recommendation relates to “testing” of the apology. As noted above in Section IV, there are various methodologies (e.g., experiments, surveys) that could be used to determine if an apology is effective. Most studies have tested hypothetical apologies, however attorneys and consultants could also use these methodologies to test one or more potential apologies. For instance, a group of jury-eligible participants could watch a video of an apology and determine if the apology is sincere and the apologizer is remorseful (recall that sincerity and remorse are two elements of an apology). While this takes time (and thus makes it more difficult to meet the element of timeliness of the apology), such testing could be a useful practice run before the wrongdoer apologizes to the actual victim. Other aspects of the delivery (e.g., written versus in-person), apologizer (e.g., CEO or attorney), timing, explanation, and responsibility could also be tested to determine the likelihood that the apology will be effective. Research could ultimately help attorneys construct an effective, science-based apology.

The final recommendation is to consider the characteristics of the wrongdoing when constructing an apology. Some characteristics of the wrongdoing might make even the best-planned apology fall flat. The wrongdoing’s severity is an important factor for consideration because the more severe the crime, the more elements of an apology are necessary.⁴⁶⁷ This is seen in the Flint water scandal case. Despite Governor Rick Snyder’s apology, the actions that led to contamination of residents’ water might have been too severe for the residents to forgive.⁴⁶⁸

⁴⁶³ See generally Berg, *supra* note 439 (accounts Johnson and Johnson’s “Tylenol Murders” and James Burke’s apology following the incident).

⁴⁶⁴ Zhong, *supra* note 38, at 23.

⁴⁶⁵ *Id.* at 18.

⁴⁶⁶ *Id.*

⁴⁶⁷ Kirchoff, *supra* note 30, at 122.

⁴⁶⁸ Helsel, *supra* note 1.

There is also a distinction between a mistake and a misdeed.⁴⁶⁹ A mistake can successfully be apologized for, but a misdeed might not be as easily forgiven.⁴⁷⁰ Apologies can be extremely beneficial if created properly, but there are instances in which an apology will never offset the wrongdoing committed. In such cases, the recommendation is to avoid an apology because there is little chance of it succeeding.

In sum, there are a multitude of factors both the attorney and wrongdoer must take into consideration if they want a personalized apology that will maximize the apology's effectiveness. These recommendations are intended to help wrongdoers receive more lenient punishments and help victims gain the apologies they seek; but an apology is not guaranteed to help. A positive perception of a wrongdoer does not necessarily correlate with a more lenient punishment as shown by Bornstein, Rung, and Miller,⁴⁷¹ which was discussed previously in the article.

VIII. CONCLUSION

The intent of this article was to help legal wrongdoers protect themselves—and promote the well-being of their victims—through carefully crafted, science-based apologies. Doing so is a balancing act. For instance, it is important to give an apology quickly, yet an attorney might want to “test” an apology to make sure it will be effective (e.g., is remorseful and sincere) before the client gives the apology—this takes time. In addition, there is no “one size fits all” apology and research has not fully explored all types of apologies in all types of cases. Despite the complexities of crafting an apology, many wrongdoers and their attorneys should consider an apology because an apology might mitigate punishment, promote positive perceptions of the wrongdoer, and help both parties heal. This article is the foundation to do so.

Governors Cuomo and Snyder are among the latest wrongdoers to issue apologies in order to try to save their reputations and prevent punishment—and hopefully benefit their victims. It is too soon to tell if Cuomo's apology will prevent litigation and, if not, whether the apology will be effective—or even harm him at trial. Snyder's apology did not work well and now he is facing litigation. Both wrongdoers are in need of advice to tailor their past (and likely future) apologies. The literature review here, and the resulting recommendations, could be useful to these and other wrongdoers.

Apologies and displays of remorse are controversial due to fear of them being perceived as an admission of guilt.⁴⁷² However, with the help of apology laws, apologies in many states can no longer be used to prove guilt,⁴⁷³ and instead focus can be put on the wrongdoer expressing remorse and victims receiving the apology. Although victims want

⁴⁶⁹ Wooten, *supra* note 22, at 228.

⁴⁷⁰ *Id.*

⁴⁷¹ See generally Bornstein, *supra* note 28.

⁴⁷² Robbennolt, *Apology Help*, *supra* note 16, at 33-34.

⁴⁷³ Myers, *supra* note 23, at 181; FRE 408, *supra* note 130; E.g. McLennan, *supra* note 25; Parker, *supra* note 27; Vines, *supra* note 26.

to achieve closure and hear ensure the crime will not occur again,⁴⁷⁴ wrongdoers also benefit from providing an apology because it could positively affect their well-being.⁴⁷⁵ Though both the wrongdoer⁴⁷⁶ and the victim⁴⁷⁷ benefit from the apology, they vary in what they deem to be a good apology. Victims desire a fuller apology containing multiple elements, while wrongdoers often are not willing to provide such a detailed response.⁴⁷⁸ Whether or not the apology contains one or multiple elements, there are seven key elements an attorney should look at when crafting their client's apology. Elements related to the apology itself include: the apology's delivery,⁴⁷⁹ timing,⁴⁸⁰ and sincerity.⁴⁸¹ The elements related to the wrongdoer include: acknowledging responsibility,⁴⁸² avoiding future wrongdoing,⁴⁸³ displaying remorse,⁴⁸⁴ and explaining the reasoning behind the offense.⁴⁸⁵ While apologies, if carefully crafted, can have beneficial effects on both parties, an apology is not fool-proof. As such, attorneys should carefully consider the research, case studies, and recommendations presented in this article. This article can assist in the construction of an apology that might benefit wrongdoers such as Governor Snyder and Governor Cuomo—and those they harmed.

⁴⁷⁴ Cohen, *supra* note 32, at 1017.

⁴⁷⁵ LAZARE, *supra* note 11, at 14.

⁴⁷⁶ See e.g., Smith, *supra* note 2, at 94; Fuchs-Bennett, *supra* note 3, at 32; Smith, *supra* note 2, at 134; Eaton, *supra* note 18, at 399; Smith, *Just Apologies*, *supra* note 3, at 39.

⁴⁷⁷ See generally Smith, *supra* note 2, at 80,85; Carroll, *supra* note 17, at 216; Petrucci, *supra* note 17, at 337; Van Dijck, *supra* note 17, at 562.

⁴⁷⁸ Folmer, *supra* note 289, at 17.

⁴⁷⁹ See e.g., Scher, *supra* note 31 (investigated elements of illocutionary force indicating device, expression of responsibility, promise of forbearance, and offer of repair on perceptions of wrongdoer and apology); Day, *supra* note 29 (surveyed Canadian and American drivers who had been stopped for speeding and were asked to recount the experience).

⁴⁸⁰ See e.g., Allan, A., *Restorative and Juvenile*, *supra* note 33, at 185; Haesevoets, *supra* note 1, at 540; Frantz, *supra* note 353, at 204-205.

⁴⁸¹ See e.g., Allan, *Restorative and Juvenile*, *supra* note 33, at 179; Ebsesu, *supra* note 33, at 317.

⁴⁸² See e.g., Jehle, *Accounts and Remorse*, *supra* note 34 (studied the effects of wrongdoer's account, including acknowledging responsibility, of the incident and their remorse on mock jurors' judgements); Dhimi, *Offer and Acceptance*, *supra* note 35 (studies the apologies given during victim-offender mediation and the apology's effect on participants satisfaction); Lewicki, *supra* note 34 (studies the effectiveness of apologies with a variety of components).

⁴⁸³ See e.g., Scher, *supra* note 31 (investigated elements of illocutionary force indicating device, expression of responsibility, promise of forbearance, and offer of repair on perceptions of wrongdoer and apology); Dhimi, *Partial Apology*, *supra* note 35 (studied partial apologies and the extent one element of an apology implied another).

⁴⁸⁴ See e.g., Gold, *supra* note 36 (remorse had biggest effect on wronged over forgiveness when compared with harm, personal relevance, and group status); Tallon, *supra* note 28 (studied the effects of remorse given in pretrial publicity and during the wrongdoer's criminal trial); Bornstein, *supra* note 28 (studied the effects of remorse on wrongdoer's punishment in a medical malpractice case, which included a wrongful death case).

⁴⁸⁵ See e.g., Kleinke, *supra* note 36 (studied express and denied intent, and remorse, on evaluation of a rapist); Lewicki, *supra* note 34 (studies the effectiveness of apologies with a variety of components); Bennett, *supra* note 3 (studied wrongdoer's responsibility and crime's severity on apology's acceptance).