

NOTES

THE ROLE OF APOLOGY IN MEDIATION

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INTRODUCTION: APOLOGISTS FOR APOLOGY

An employer and former employee, hoping to avoid a costly legal battle over the employee's discharge, enter mediation. During the morning of the first day, the parties state their positions in joint session, and the mediator shuttles back and forth between them. By lunch time, despite tentative progress on nonmonetary issues, the parties are still \$200,000 apart in their settlement offers; the mediator is frustrated. Then, suddenly, the mediator thinks up a novel solution. He escorts the employer to lunch, takes him by the arm, and makes his proposal:

"You have the chance to wind up these negotiations and get the kind of settlement you want by performing one simple but difficult act. Nobody has so indicated from the other side, but I'd stake my mediator's fee on it. You do the right thing and this case might just fall in your lap."

"And the right thing is?" The employer and his lawyer look skeptical.

"Apologize for the way you fired her."

When the employer and his lawyer object, the mediator suggests that an apology could save the employer a great deal of money. He explains that the employee was hurt as deeply by the abrupt manner in which the employer discharged her as by the job loss itself. Slowly persuaded by the mediator's expert framing, the employer agrees to apologize and privately expresses his remorse to the employee. When the parties reconvene, the employee wipes away tears, and the parties cooperate to reach an integrative solution.¹

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¹ See Stephen B. Goldberg et al., *Dispute Resolution: Negotiation, Mediation and Other Processes* 116-37 (2d ed. 1992) (excerpting lengthy fictional mediation from Fletcher Knebel & Gerald S. Clay, *Before You Sue* 87-133 (1987)). Knebel and Clay created this

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It is easy to see how a story like this one, where an apology paves the way to resolution, could win adherents to the use of apology in mediation. This story, however, is far from typical. Because apology is a delicate interaction, it can only be effective when certain conditions are fulfilled. This Note explores those conditions.

In their dispute resolution casebook, Professors Stephen Goldberg, Frank Sander, and Nancy Rogers include an extended rendition of this fictional employment mediation as a model for how mediation promotes dispute resolution. According to the editors, aside from demonstrating the mechanics of mediation, this vignette recalls "[t]he first lesson of dispute resolution that many of us learn as children[:] . . . the importance of apologizing."² The magic of apology in this scenario is meant to teach that apology is a superior tool—simple, cheap, and effective—for resolving disputes and that mediation creates a climate in which apology and reconciliation are possible. In addition, the anecdote implies that: (a) apologizing is often a successful gambit likely to be accepted by the hearer if apparently sincere; (b) apologies are worth hundreds of thousands of dollars to plaintiffs with compensable claims; (c) mediators should suggest an apology even when no party has asked for one; and (d) mediators may broach the subject of apology in caucus with the putative offender without consulting the victim. Thus, the casebook editors seem to advocate unguarded use of apology in mediation.

Professors Goldberg, Sander, and Rogers are not alone in their advocacy of apology. Professors Hiroshi Wagatsuma and Arthur Rosett, writers of an oft-cited article comparing apologies in Japan and the United States, suggest that greater incorporation of apology into American legal culture would reduce court and jury awards currently bloated by punitive damages. Apologies, they contend, alleviate tensions that lie at the core of public disputes and eliminate the fiction of translating emotional pain to dollars.³ Aside from directly compensating specific emotional harm, Professors Goldberg, Sander, and Eric Green have argued that apology can transcend discrete disputes to "repair . . . frayed relationships."⁴

Other advocates invest apology with greater potential than mere resolution of discrete conflicts. For example, Professor Deborah Tan-

mediation scenario to duplicate "what transpires . . . many times over each week throughout the country." Knebel & Clay, *supra*, at 26.

² Goldberg et al., *supra* note 1, at 137.

³ See Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 *Law & Soc'y Rev.* 461, 487-88 (1986).

⁴ Stephen B. Goldberg et al., *Saying You're Sorry*, 3 *Negotiation J.* 221, 221 (1987).

nen has argued that if Americans, particularly men, were more willing to apologize, "we'd do better as a society."⁵ Drawing in more detail, Professors Robert Baruch Bush and Joseph Folger connect apology to social change through their advocacy of "transformative" mediation.⁶ In a transformative mediation, parties, in the course of resolving a particular dispute, become empowered to define and express their interests and learn to verbally recognize their opponent's point of view.⁷ Learning to apologize, one form of such verbal recognition,⁸ makes the parties more responsible, better socialized community members.⁹ Thus, Professors Bush and Folger imply that citizens who know how to apologize improve our society.

While the dispute resolution theorists speculate about apology's potential, they have not focused directly on the mechanics of apology or described how an apology could aid in the resolution of a particular dispute. Meanwhile, lawyers often ignore the potential for apology to contribute to conflict resolution. Plaintiffs' lawyers are likely to shrug off a client's desire for an apology as secondary and even contrary to the goal of more tangible monetary or injunctive relief. Defendants' lawyers steer clear of any expression that might be construed as an admission of liability.

This Note draws on socio-psychological sources, conversations with experienced mediators,¹⁰ and dispute resolution literature to articulate a measured theory of when, where, and how apologies may play a role in dispute resolution. Avoiding both conclusory idealization and complete dismissal of apology, this Note argues that, in some disputes, apology is a powerful means of moving parties closer to settlement. Though apology is probably not the direct substitute for monetary compensation depicted by the casebook employment scenario, it may facilitate agreements on compensation by alleviating the psychic injury that makes parties unable to settle. Because apology

⁵ Deborah Tannen, *I'm Sorry, I Won't Apologize*, N.Y. Times, July 21, 1996, § 6 (Magazine), at 34 (questioning widespread negative view of apologizing).

⁶ See generally Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994) (describing practice of mediation focused on transforming parties).

⁷ See *id.* at 12, 84 (defining empowerment and recognition as objectives of mediation).

⁸ See *id.* at 91 (defining recognition).

⁹ See *id.* at 29 (arguing that mediation can improve individuals and thus society).

¹⁰ This Note incorporates anecdotal information obtained in interviews with eight prominent mediators about their perceptions of the role of apology in mediation. The mediators were selected based on their extensive experience and range of expertise. This eight-person sample is not meant to provide conclusive empirical evidence on the prevalence of apology in mediation. Rather, the anecdotes and insights they provided enabled me to open a topic that merits broader research. See *infra* Appendix for more information on the mediators.

may improve the dispute resolution experience for both parties, lawyers concerned about client satisfaction should consider attending more carefully to demands for apology. Indeed, lawyers skilled in crafting language may aid parties to exchange sincere regrets without making specific admissions of liability¹¹ and thus pave the way for more fruitful dialogue.

Contrary to some apology advocates, this Note recognizes that a simple "sorry" will not always save parties time and money, or mend relationships. Mediators and lawyers who wish to capitalize on the power of apology in a particular case must be sensitive to factors that may undermine apology's potential. Most of this Note is devoted to creating a more precise vocabulary for discussing apology and to identifying factors that indicate whether an apology in a particular case will be likely to transform the parties' relationship and clarify why successful apology is so rare.

Part I.A. begins with a background discussion of mediation—the setting for my subsequent exploration of apology. Part I.B. distinguishes four types of apology: tactical apology, explanatory apology, formalistic apology, and happy-ending apology. Each begins with "I'm sorry" but carries a distinct intention and calls for different possible responses. While the tactical, explanatory, and formalistic types describe interactions that may occur in mediation, the happy-ending apology has the greatest likelihood of profoundly changing the relationship between parties and thus facilitating dispute resolution. By analyzing an actual apology that moved one mediation toward resolution, Part I.C. explores how exchange and ritual models might account for the power of apology to move parties from conflict to cooperation.

Part II considers a variety of factors that influence the likelihood of a happy-ending apology in particular cases. Among the multitude of possible factors, this Note emphasizes (a) the dispositions of individual disputants as determined by self-image, interpersonal orientation, and gender; (b) the influence of law and lawyers on mediation; (c) the timing and manner of apology, including the impact of a third-party mediator on a two-party communication; (d) the duration of disputes in which long-term side effects such as adversarial habits and irreversible harm inhibit communication; and (e) the extent to which litigating certain types of disputes seems to promise victims relief

¹¹ This is not to suggest that lawyers should tutor their clients in manipulating opponents' emotions—sincere regret is different from tactical apology. See *infra* text accompanying notes 32-36. Rather than promoting apology as tactic, this Note proposes that lawyers help their clients to make a happy-ending apology, see *infra* text accompanying notes 40-42, while avoiding specific communications that might subject their clients to increased liability.

through compensation, restitution, or retribution. By showing the different types of apology, the elusiveness of apology as an object of exchange, and the variety of factors that contribute to the effects of apology, this Note demonstrates that apology is not a simple solution but rather a delicate interaction that merits more consideration from its detractors and more care from its champions.

I

BACKGROUND

A. *The Goals of Mediation*

Mediation is an alternative to adjudication in which a neutral third party who has no final decisionmaking authority intervenes in negotiations to assist resolution of conflict.¹² While parties may be required to attend court mandated mediation¹³ or may obligate themselves contractually to attempt mediation, once the process begins, continued participation is voluntary.¹⁴

Lawyers' participation in mediation varies. Some are passive spectators; others are more active. Parties often attend without lawyers, though many mediators encourage them to consult a lawyer for the limited purpose of reviewing proposed settlement agreements. Whether or not lawyers participate, mediators view the parties' participation (or that of nonlawyer representatives of an entity) as important to moving beyond purely adversarial negotiation behavior.¹⁵

Mediators vary in style and technique as well as in their characterizations of mediation's purpose. They may take on numerous roles in facilitating communications between parties and in seeking solutions. For example, a mediator may act as a guardian of discipline or procedure in negotiations; as a confidential advisor to each party; as an objective observer reminding parties of the realistic alternatives to settlement; or as a consultant charged with generating creative, mutually beneficial solutions.¹⁶ Some mediators meet individually with

¹² See CDR Associates (Center for Dispute Resolution), *Mediation 1* (1989) (defining mediation in manual for mediators); Linda R. Singer, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System* 20 (2d ed. 1994) (defining mediation as one alternative dispute resolution mechanism).

¹³ See, e.g., Singer, *supra* note 12, at 165 (noting increase in mandatory mediation).

¹⁴ See CDR Associates, *supra* note 12, at 5 (including voluntariness as one characteristic defining mediation).

¹⁵ Lawyers' participation in mediation may be viewed as undesirable because lawyers often obstruct nonstrategic communications like apologies in order to protect parties against giving up rights. For a discussion of apology as legal admission, see *infra* notes 89-94 and accompanying text.

¹⁶ See Singer, *supra* note 12, at 19-20 (listing means by which third-party participants may assist in settling disputes); see also CDR Associates, *supra* note 12, at 4 (describing

each side or "caucus" frequently; others prefer to meet jointly with both parties as much as possible.¹⁷

Mediators often view the alternative process as serving a variety of objectives beyond merely facilitating settlement.¹⁸ Some see mediation as a problem-solving aid that helps parties to reach more satisfying resolutions through generating "win-win" solutions.¹⁹ Some claim mediation may work to achieve social justice by cultivating self-help skills, empowering communities, and reallocating power among groups.²⁰ Others view mediation's strength as its ability to transform relationships and foster communication skills by empowering individuals and encouraging mutual respect among parties.²¹

Typically, mediation takes into account expressions that might be considered irrelevant to adjudication of legal entitlements.²² Parties often speak for themselves, and mediators often encourage any dia-

mediators' varied roles as "opener of communications channels," "legitimizer," "process facilitator," "trainer," "resource expander," "problem explorer," "agent of reality," "scapegoat," and "leader").

¹⁷ See Singer, *supra* note 12, at 23 (listing purposes of each type of meeting). See generally CDR Associates, *supra* note 12, at 71-78 (providing guidance to mediators on when caucus might be appropriate).

¹⁸ See generally Bush & Folger, *supra* note 6, at 15-24 (summarizing four accounts of mediation: "Satisfaction Story," "Social Justice Story," "Transformation Story," and "Oppression Story").

¹⁹ See *id.* at 16-17 (describing "Satisfaction Story"). See generally Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 112-16 (Bruce Patton ed., 1991) (providing example of mediation technique for creating agreements that integrate and satisfy maximum of all parties' interests).

²⁰ See Bush & Folger, *supra* note 6, at 18-19 (describing "Social Justice Story").

²¹ See *id.* at 20-21 (describing "Transformation Story," Professors Bush and Folger's own view of mediation).

²² See generally Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harv. L. Rev.* 353 (1978) (comparing limited expressions relevant to adjudication with wide variety of expressions relevant to negotiation in pioneering work on dispute resolution theory). Professor Fuller described adjudication as a "device" that "gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. . . . [In adjudication,] the participation of litigants . . . is limited to making an appeal to the arbiter's reason" *Id.* at 366, 407. He contrasts adjudication with bargaining—social ordering by reciprocity—in which reasoned arguments are not essential and may fall on deaf ears. See *id.* at 357, 363, 366-67. Professor Fuller observes that demands made outside the courtroom may or may not be supported by principles—for example, one may appeal to generosity or offer to exchange some benefit for satisfaction of the demand. Once one enters the adjudicatory arena, however, a demand must become a claim of right supported by principles. See *id.* at 369. Given Professor Fuller's characterization of adjudication, it is no surprise that apologies are not part of the courtroom repertoire. Unless legally recognized (like public apologies or retractions in defamation claims), they do nothing to adjust the allocation of rights rationally between the parties. See Wagatsuma & Rosett, *supra* note 3, at 464 (discussing relative absence of apology in American law).

logue that they feel will lead toward potential settlement.²³ According to some advocates of mediation, the emphasis on communication and voluntariness renders mediation more likely to resolve disputes than adversarial-style litigation. For example, Professors Craig McEwen and Richard Maiman found that the consensual nature of mediated settlements resulted in a greater likelihood that parties to small claims disputes would abide by such agreements as compared with court judgments.²⁴ Mediation elicits consent by fostering discussions “of general moral and interpersonal obligations as well as legal obligations,” which in turn “activate[] [a] sense of responsibility” in the parties.²⁵ Mediation’s encouragement of forays into moral and emotional expression sets the stage for gestures like apology, which register with the apologizee as moral recompense.²⁶

Some commentators have critiqued the flexibility and nonadversarial style of mediation as inconsistent with just resolution of conflict. Detractors have argued that mediation is exploitative because the lack of an authoritative judge and binding rules of law and procedure make the process vulnerable to appropriation by the stronger party.²⁷ These criticisms apply equally to apology as a resolution tool. For instance, critics might ask, if a plaintiff settles because she’s emotionally fulfilled by an apology, isn’t she being duped out of her legal entitlement—an entitlement that the apology itself makes concrete?

²³ See Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 Ky. L.J. 855, 870-72 (1993) (describing mediation as cathartic because it “may offer parties the first opportunity to express their point of view in the presence of others and be heard by the other party”).

²⁴ See Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes*, in *Mediation Research: The Process and Effectiveness of Third-Party Intervention* 53, 60 (Kenneth Kressel et al. eds., 1989) (exploring effectiveness of mediation in small claims court).

²⁵ *Id.*

²⁶ For a more complete view of the function of apology in a moral struggle between offending and offended parties, see *infra* Part I.C.

²⁷ See Bush & Folger, *supra* note 6, at 22-24 (describing “Oppression Story”). See generally Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 Tul. L. Rev. 1, 15-27 (1987) (arguing that dispute resolution systems are unjust insofar as they diverge from substantive law, employ mediators with no real authority, and fail to secure parties adequate representation); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv. L. Rev. 668 (1986) (expressing concern that alternatives to court adjudication compromise public values embodied in legal rules); Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1082-85 (1984) (expressing concern that mechanisms encouraging settlement short circuit judges’ duty to safeguard the interests of weaker parties and “to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes [as well as] to interpret those values and to bring reality into accord with them”); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 Ohio St. J. on Disp. Resol. 1 (1993) (attempting to demystify “harmony ideology” of Alternative Dispute Resolution (ADR) movement).

Because thoughtful consideration of whether apology undermines just resolution requires a clear understanding of how and when apology "works," I leave that subject for future investigation. Instead, the remainder of this Note will examine the circumstances that may or may not make apology an important part of a satisfying mediation experience without claiming a particular role for apology in maximizing justice.²⁸

B. *A Typology of Apology*

The words "I'm sorry" and similar expressions of regret signal apology in its generic form. Yet, in the context of a bona fide dispute, a mere "I'm sorry" seems inadequate to the task of curing emotional harm²⁹ or bettering society³⁰ as set forth by advocates of apology. Close analysis of the potential for apologies to further dispute resolution requires a more precise vocabulary for differentiating apologetic gestures. Taking "I'm sorry" for a common denominator, this section proposes four variations of apology that might occur in mediation: the tactical apology; the explanation apology; the formalistic apology; and the happy-ending apology.³¹ Each of these apologies is distinguishable by its content and the response it is likely to elicit from the apologizee.

1. *Tactical Apology*

Perhaps the most common use of apology in disputes is rhetorical and strategic. For example, a savvy lawyer looks the plaintiff in the eye and acknowledges the plaintiff's suffering on behalf of himself and his client in order to gain credibility during negotiations.³² Defendants' lawyers include similar apologies in their opening statements.³³

²⁸ While this Note stops short of linking apology to just results, it does suggest that apology fares well when measured by other criteria. These criteria, which have been applied to dispute resolution mechanisms generally, include the level of transaction costs ("the time, money, and emotional energy expended in disputing; the resources consumed and destroyed; and the opportunities lost"), the parties' satisfaction with the process and its outcome (which "depends largely on how much the resolution fulfills the interests that led [the party] to make or reject the claim in the first place"), the long-term effect on the parties' relationship, and the durability of the resolution. See William L. Ury et al., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* 11-12 (1988) (listing criteria).

²⁹ See *supra* text accompanying note 2.

³⁰ See *supra* text accompanying notes 5-9.

³¹ These labels are my own.

³² See Telephone Interview with David Hoffman, Mediator, Hill & Barlow (Nov. 13, 1996).

³³ See Telephone Interview with Judge Kathleen Roberts, Mediator, J.A.M.S./ENDISPUTE (Nov. 26, 1996) (stating that apart from opening statements, apologies had not been important to dispute resolution in her experience); see also Telephone Interview

In Professor Dean Pruitt's anatomy of negotiating behavior, this type of apology might be called an "attitudinal structuring tactic"—an attempt to build a relationship in order to influence an opponent's bargaining behavior.³⁴ While these tactics may soften the tone of negotiation interactions,³⁵ the goal of "attitudinal structuring tactics" is fundamentally competitive, not cooperative. A tactical apology attempts to create an atmosphere of trust and good feeling in which an opponent is likely to make concessions without time-consuming wrangling.³⁶ Thus, while the defense lawyer's expression of sympathy may get the attention of the other party, such expression is unlikely to elicit the plaintiff's forgiveness—particularly because "I'm sorry" is often followed by "but we did not do anything wrong."

2. *Explanation Apology*

The explanation apology employs mock regret to rebuff an accusation and then generates an account to defend past behavior. For example, a husband in a divorce mediation once apologized, "I'm sorry I've been slaving away, but I haven't been able to figure out how else to put food on the table."³⁷ In other words, "my unavailability to my family should be excused because working was not an effort to avoid home but to provide for the family's comfort." The sarcastic apologetic gesture may acknowledge the other party's feelings, but, like the tactical apology, it avoids implicating the speaker in wrongdoing. Forgiveness may follow not because the speaker expresses sincere regret, but because the hearer credits the speaker's explanation.³⁸

with John Sands, Mediator, private practice (Nov. 14, 1996) (noting that opening statements beginning with "I'm sorry" and ending with "but we never intended that consequence" were not "real" apologies).

³⁴ See Dean G. Pruitt, *Negotiation Behavior* 80 (1981). Pruitt provides the following examples of attitudinal structuring tactics:

[B]ehaving in a warm and friendly fashion, doing favors for the other so as to enhance the other's liking of and dependence on oneself, seconding the other's attitudes, behaving in accordance with the other's values, sending a representative who is similar to the other, encouraging the other to engage in role reversal, and choosing a pleasant setting . . . for the conduct of business.

Id.

³⁵ See *id.* at 81 (warning that one who uses attitudinal structuring tactics to soften up her opponent may be softened by them herself).

³⁶ See *id.* at 39 (suggesting that creating common bond with other parties, improving opponent's mood, and eliciting empathy may lead to concessions); see also Jeffrey Z. Rubin & Dean G. Pruitt, *Social Conflict: Escalation, Stalemate, and Settlement* 52 (1986) (pointing out that ingratiating tactics—use of charm and guile—can persuade opponents to make concessions more easily than imposition of will so long as opponents do not focus on ulterior motives).

³⁷ See Telephone Interview with David Hoffman, *supra* note 32.

³⁸ Because the acceptance of an explanatory apology depends on the force of the explanation rather than the sincerity of regret, the gesture need not come directly from the

3. *Formalistic Apology*

The formalistic apology occurs when an accused offender capitulates to the demand of an authority figure or offended party by pronouncing required words. Teacher admonishes student, "Johnny, say you're sorry for pulling Suzie's hair." Johnny groans, "I'm sorry," thus submitting to the school hierarchy and returning to the teacher's good graces without conveying heartfelt remorse. In settings where restoring social harmony is the most important goal of dispute resolution, well performed gestures of submission like the formalistic apology may result in absolution.³⁹ In contrast, where the primary goal is repairing the offended individual's injury, a purely formalistic apology that does not indicate underlying remorse will not heal the breach. An acceptable apology in such an individualistic context requires a combination, often rare, of soothing words and wholehearted remorse.

4. *Happy-Ending Apology*

When this rare state of wholehearted remorse is achieved, parties may engage in the sort of tearful reconciliation that signals the happy-ending apology. In order for an apology to prompt true reconciliation, the hearer should be convinced that the speaker (a) believes she was at least partially responsible (b) for an act (c) that harmed the hearer and (d) feels regret for the act.⁴⁰ The happy-ending apology

wrongdoer. Any persuasive speaker may offer an explanation. In contrast, happy-ending apologies depend on the hearer's perception that the speaker's delivery demonstrates adequate contrition. See, e.g., Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* 19 (1991) (noting that "apology . . . requires . . . painful embracement of our deeds, coupled with a declaration of regret" and that "'I am sorry'" should refer to "one's own condition"); see also *infra* notes 40-42.

³⁹ For example, in Japan formal apologies and letters of apology (*shimatsusho*) are often prerequisites to resolving disputes and sometimes suffice to deter criminal prosecutions. See John O. Haley, Comment: The Implications of Apology, 20 *Law & Soc'y Rev.* 499, 501-02 (1986) (noting Japanese prosecutors' willingness to suspend prosecution upon apology). See generally John O. Haley, *Victim-Offender Mediation: Japanese and American Comparisons*, in *Restorative Justice On Trial: Pitfalls and Potentials of Victim-Offender Mediation—International Research Perspectives* 105, 114-17 (Heinz Messmer & Hans-Uwe Otto eds., 1992) [hereinafter Haley, *Victim-Offender Mediation*] (claiming that forgiveness by Japanese authorities contributes to lower crime rates in Japan); Wagatsuma & Rosett, *supra* note 3, at 488-92 (discussing effectiveness of *shimatsusho* in resolving variety of difficulties).

⁴⁰ See Bruce Fraser, *On Apologizing*, in *Conversational Routine: Explorations in Standardized Communication Situations and Prepatterned Speech* 259, 261 (Florian Coulmas ed., 1981) (analyzing act of apologizing). Erving Goffman lists elements of "apology in its fullest form":

[E]xpression of embarrassment and chagrin; clarification that one knows what conduct has been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of be-

requires that the apologizer identify personally with the offensive conduct and the injury it caused.⁴¹ Acceptance of the apology depends not on the apologizer's uttering of specific words, but on the injured person's impression of the apologizer's state of mind.⁴² When the advocates of apology call for a more prominent role for apologies in dispute resolution on the grounds that apologies compensate emotional harm or that they transform relationships, they seem to envision a proliferation of happy endings. Responding to that call, the remainder of this Note analyzes the function of happy-ending apologies and explores why they are so rare in actual cases.

C. *The Power of Apology from Exchange to Ritual*

Central to this Note is the premise that a happy-ending apology may dramatically affect the parties' willingness to agree upon mutually beneficial solutions. Using a true apology success story as a basis for discussion, this section develops two accounts for how apology works—one based on an exchange model and another on a ritual model. While the exchange model is descriptively useful, it tends to collapse apology into quantitative terms. The ritual prism, on the other hand, refracts layers of qualitative complexity that explain why

having along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution.

Erving Goffman, *Relations in Public: Microstudies of the Public Order* 113 (1971). Sociolinguist Willis Edmondson notes that apologies must not beat around the bush: "I've gone and broken your record player" is not as acceptable as "I'm most terribly sorry, I really am." Willis J. Edmondson, *On Saying You're Sorry*, in *Conversational Routine*, supra, at 273, 279-80 (differentiating between complaints, which can be indirect, and apologies, which must be direct). And Professor Deborah Tannen focuses on the aesthetic: "[Y]our face should look dejected, your voice should sound apologetic, . . . the depth of remorse should be commensurate with the significance of the offense." Tannen, supra note 5, at 35.

⁴¹ Sociology Professor Nicholas Tavuchis expounds on the affective dimension of the apologizing:

[A]pology expresses itself as the exigency of a painful re-membering, literally of being mindful again, of what we were and had as members [of a social, moral community] and, at the same time, what we have jeopardized or lost by virtue of our offensive speech or action. . . . [Apologies] constitute—in their most responsible, authentic, and, hence, vulnerable expression—a form of self-punishment that cuts deeply because we are obliged to retell, relive, and seek forgiveness for sorrowful events that have rendered our claims to membership in a moral community suspect or defeasible.

Tavuchis, supra note 38, at 8. Despite this dramatic portrait of apology, injured parties may accept apologies absent the degree of groveling implied by Professor Tavuchis's "self-punishment." See *infra* text accompanying note 56 (analyzing doctor-nurse example).

⁴² See Wagatsuma & Rosett, supra note 3, at 477 ("The response of the injured person is crucial, for the success of the apology depends on that person being mollified, appeased, or calmed.").

apology is easily destabilized by the negative factors discussed in Part II.

A mediator recounted the following case as one of the "most touching" experiences in his mediation career:

A doctor and nurse had worked together in a sorely underfunded medical clinic for the homeless. One night, the nurse, bursting with frustration at the poor quality of equipment and lack of medications, left the job site in protest. She felt that offering medical treatment under those circumstances was unconscionable. The doctor felt that her walking off the job was equally unconscionable and subsequently fired her. The two parties entered mediation when the nurse claimed she had been wrongfully discharged: her action, she claimed, furthered public policy.

During the mediation, in which no lawyers participated, each party expressed appreciation for the other as a professional and as a principled person. The nurse took responsibility for leaving the doctor in the lurch. The doctor expressed sorrow at having fired the nurse, though he felt he had no other choice under the circumstances. After this communication, the doctor agreed to pay the nurse's lost wages for a period of time, and she, in turn, donated much of the settlement to the local mediation center to express her satisfaction with the process.⁴³

One means of accounting for this happy ending is to view the apologetic interaction as an implicitly bargained-for exchange. Like bargaining, apology requires the participation of two interdependent parties—an offender and an injured party.⁴⁴ The injured party depends on the offender's taking responsibility for the offensive act, and the offender depends on the injured party for absolution.⁴⁵ The apology itself may be regarded as an exchangeable good separate from the person of the apologizer.⁴⁶ The apology as object of exchange may have a value equal to the apologizer's savings of damage payments and/or transaction costs. Thus, the doctor's apology may have compensated the nurse's emotional distress (and maybe even a portion of her lost wages, as evidenced by her donation to the community mediation program). The nurse's apology may have compensated the doc-

⁴³ See Telephone Interview with David Hoffman, *supra* note 32.

⁴⁴ See generally Jeffrey Z. Rubin & Bert R. Brown, *The Social Psychology of Bargaining & Negotiation* 197-258 (1975) (exploring bargainers' interdependence).

⁴⁵ See Tavuchis, *supra* note 38, at 121 (describing forgiveness as closing discursive loop opened by offender's apology).

⁴⁶ Giving the apology shape, socio-psychologist Erving Goffman portrays apology as a rejected part of the apologizer herself. When she apologizes, the speaker splits herself into two parts: "the part that is guilty of an offense and the part that dissociates itself from the delict and affirms a belief in the offended rule." Goffman, *supra* note 40, at 113. The offending self becomes the apologizer's compensatory offering to the victim.

tor for the harm caused by her abandonment; thus, the lost wages he paid really represented the value of the apology to him. Alternatively, perhaps each side calculated that an apology would save transaction costs: the nurse and the doctor exchanged an apology to avoid additional days off work and higher mediation fees.

Admittedly, attempts such as this to pinpoint an apology's influence on a dispute in monetary terms mystify more than they elucidate. While the nurse-doctor scenario suggests that apologies are worth something, their precise value remains unclear. First, it is not clear that either party could predict in advance how the other would react to and value an apology. Second, the *ex post* sense that apology made a difference without a method for measuring the costs of the alternative (i.e., mediation and perhaps impasse, followed by litigation with uncertain outcome), makes it difficult to evaluate savings. Third, even if it were possible to evaluate the precise worth of apology in this particular case, the exchange model fails to explain why the apologies had value in this instance or predict whether apologies would have equal value in another case.⁴⁷

An alternative to applying an exchange model is to view apology as a corrective ritual performed by two subjects in order to redress a moral power imbalance between them.⁴⁸ Like other important rituals,

⁴⁷ See Tavuchis, *supra* note 38, at 34 (arguing that commercial metaphors, while useful, can only approximate intricacies of apology).

⁴⁸ See Goffman, *supra* note 40, at 116 (distinguishing ritualistic from restitutive "corrective behavior"); Tavuchis, *supra* note 38, at 34 (suggesting that thinking about apology as speech-act rather than exchange takes account of "morally asymmetrical positions of the protagonists, the essentially symbolic character of the transaction, and the unpredictability of the outcome"); see also John R. Gehm, *The Function of Forgiveness in the Criminal Justice System*, in *Restorative Justice on Trial*, *supra* note 39, at 541, 541-43 (describing forgiveness as reestablishment of moral equilibrium through victim's cancellation of moral debt).

"Ritual" itself is a somewhat elusive term. As it is used in this context, however, it is not meant to connote "boring, empty routine" or pure form with debatable substance. See Ronald L. Grimes, *Beginnings in Ritual Studies* 55 (1982) (distinguishing popular usage, which gives ritual "bad reputation," from scholarly definitions). Dissatisfied with even the scholarly "hard" definitions, Professor Grimes develops a "soft" definition for "the process whereby ritual creativity is exercised: Ritualizing transpires as animated persons enact formative gestures in the face of receptivity during crucial time in founded places." *Id.* This definition conveys both the importance of reception (here by the apologizee) and the possibility that the gesture infused with meaning will become transformative in the right circumstances. Because this definition deemphasizes adherence to form, which may be enough to render effective more programmed, less spontaneous rituals like weddings, Professor Grimes's definition is particularly suited to apology. Professor Grimes's anthology, *Readings in Ritual Studies*, contains at least five essays that define ritual variously with more or less emphasis on either form or substance. See Robbie E. Davis-Floyd, *Ritual in the Hospital: Giving Birth the American Way*, in *Readings in Ritual Studies* 146, 148 (Ronald L. Grimes ed., 1996) (defining ritual as "a patterned, repetitive, and symbolic enactment of a cultural belief or value"); Richard F. Hardin, "Ritual" in *Recent Literary*

an apology is worthless unless the required gestures are filled with meaning.⁴⁹ Apologies are speech-acts,⁵⁰ and their effectiveness in reconciliation depends not only on the speaker but also on the participation of an injured party. Absent the eventual complicity of the injured party, the apologizer's words are just talk.

When an offender apologizes, she neither repairs the substantive injury nor restores the injured party to her pre-injury status. Moreover, the apologizer does not extricate herself from her offending role in the disputing relationship as she could by offering an acceptable excuse or justification.⁵¹ These limits on apology may explain the failure of apologies to terminate most disputes conclusively.⁵² By apologizing, the offender acknowledges her diminutive moral stature and asks for restorative forgiveness. She also acknowledges the existence and importance (to both parties) of the moral register itself.⁵³ When the apologizee gestures to acknowledge that meaning, he closes the circle of performance, thus establishing a new moral equilibrium.⁵⁴

Criticism: The Elusive Sense of Community, in *Readings in Ritual Studies*, supra, at 308, 313-15 (surveying definitions of ritual used by literary critics with emphasis on substance); Roy A. Rappaport, *The Obvious Aspects of Ritual*, in *Readings in Ritual Studies*, supra, at 427, 428 (defining ritual as structure of activity); Jonathan Z. Smith, *The Bare Facts of Ritual*, in *Readings in Ritual Studies*, supra, at 473, 476 (defining ritual as "struggling with matters of incongruity"); Stanley Tambiah, *A Performative Approach to Ritual*, in *Readings in Ritual Studies*, supra, at 495, 497 (defining ritual as "a culturally constructed system of symbolic communication").

⁴⁹ See generally Ronald L. Grimes, *Ritual Criticism and Infelicitous Performances*, in *Readings in Ritual Studies*, supra note 48, at 279, 285-88 (including hollow gesture among categories of "infelicitous performance" that may cause rituals to fail to accomplish what they were meant to accomplish).

⁵⁰ On "speech-acts," see *id.* at 284 (summarizing J.L. Austin's distinction between "words that say something" and "words that do something").

⁵¹ See Tavuchis, supra note 38, at 33 ("[T]o apologize is to bear free witness to the fact that one had no excuse, defense, or justification and that something more than credibility or understanding is at stake."); see also Goffman, supra note 40, at 113-14 (distinguishing account in which speaker discards blameworthy version of actions to secure her membership in community, from apology in which speaker discards part of herself that committed bad act and embraces community values to gain readmission to community).

⁵² See, e.g., Telephone Interview with Margaret Shaw, Mediator, Wittenberg, MacKenzie & Shaw, Adjunct Professor, New York University School of Law (Nov. 14, 1996) (discussing need to satisfy substantive as well as psychological and procedural interests); cf. Bush & Folger, supra note 6, at 9 (arguing that actual agreement and promises made in assault case were superfluous once mediation taught parties to "see each other differently" and thus eliminated likelihood that offensive incident would recur).

⁵³ See, e.g., Tavuchis, supra note 38, at 13 ("An apology . . . speaks to an act that cannot be undone but cannot go unnoticed without compromising the current and future relationship of the parties, the legitimacy of the violated rule, and the wider social web in which the participants are enmeshed.").

⁵⁴ Professor Tavuchis describes this performance as a rite of moral reconciliation between an outcast offender and the injured party qua moral gatekeeper. See Tavuchis, supra note 38, at 31 (noting similarity between apology and rite of passage but arguing that

Thus, in the nurse-doctor happy ending, two parties, each with a complaint largely based on principle, performed the rite of apology to abandon the moral hierarchy that lay at the heart of their conflict. The doctor had viewed himself as morally superior: he was wronged by the nurse's leaving him alone to treat patients in need. The reaction—firing her—was his attempt to punish her moral violation. The nurse's apologetic gesture did not erase the original offense, but separated the otherwise laudable nurse from the injury inflicted on the doctor. Once the nurse was thus recast as a valuable individual, the doctor could regard her as worthy of compensation.⁵⁵

The nurse had staked out her own moral high ground: she had sacrificed herself to uphold principles concerning the minimum standard of care necessary to operate a clinic. Dismissing the nurse amplified her moral indignation. Only when the doctor conceded the validity of the nurse's principles could she begin to accord him moral esteem. As a result of the moral reconciliation, the conflict over tangibles (money and perhaps benefits) was relegated to a disagreement about means rather than ends.⁵⁶

Here, as in many cases, in order to resolve the dispute, the parties had to remedy intangible injuries. Absent the moral reconciliation, the parties might have been unable to achieve a satisfactory settlement.⁵⁷ “[E]vidence . . . suggests that when intangible issues exist, they are likely to arouse motives and induce behavior designed to prevent or repair [intangible] damage, even if heavy penalties are in-

apology is more akin to rehabilitation—reestablishing lost rights—than passage—creating new rights and obligations).

⁵⁵ Cf. Goffman, *supra* note 40, at 109 (“The function of remedial work is to change the meaning that otherwise might be given to an act, transforming what could be seen as offensive into what can be seen as acceptable.”).

⁵⁶ Note that the parties expressed regret only for personal impact on the other combined with regard for the other's principles, not full remorse for their actions. The regret and understanding were wholehearted, but *submission* to alien norms was not required in this instance. Full formal apology was not necessary to this happy-ending apology.

⁵⁷ The following story from a divorce mediation further illustrates the capacity of apology to facilitate resolution when parties reach impasse due to intangible injuries:

A husband and wife, within \$50,000 of settling, could not reach agreement due to their dispute over a piece of jewelry that the husband had bought for his mistress. Neither party really wanted the object, but they had invested the jewelry with symbolic importance. Finally, the mediator asked the husband if he had considered apologizing. Once the husband expressed remorse for his wife's suffering, the couple was able to agree to put the jewelry in trust for their eight-year-old daughter. While the apology was not written into the settlement agreement, according to the mediator who arranged the agreement, it was essential to the settlement.

See Telephone Interview with John Sands, *supra* note 33 (retelling experience related to him by fellow mediator).

curred for doing so.”⁵⁸ After the apology and forgiveness, the parties were no longer committed to their stances as accuser and accused; the attribution of blame was a closed topic.⁵⁹ Once the ritual settled the moral score, the parties were satisfied with compensation calibrated to the nurse’s tangible loss.

The relation between intangibles and tangibles explains the difficulty of fitting the exchange model to a specific instance of apology. Part of the trouble in assigning a discrete value to apology is that the moral issues resolvable through apology are so intertwined with tangible issues that evaluation of one absent the other seems conceptually impossible. Thinking of apology as a ritual disentangles the tangible from the intangible and thus avoids this conceptual morass.

Aside from explaining the power of apology in the doctor-nurse scenario, viewing apology as a reconciliatory rite fits with the perception that a happy-ending apology requires the convergence of certain circumstances. Like other important rituals, apology requires not only the right symbolic act but also the right people, the right time, and the right place. While lawyers involved in mediation might add the possibility of apology to their client’s options in recognition of apology’s potency, neither they nor mediators should expect apology to work magic in all (or even most) cases. Apology is a delicate interchange, not a mere trade. In the next section, this Note explores how a happy-ending apology may be contingent upon the identity of the parties, the influence of law and lawyers, the timing and manner in which apology is introduced, the longevity of the dispute, and the character of the dispute.

II

THE RARITY AND VULNERABILITY OF THE APOLOGY SOLUTION

Despite the satisfaction engendered by the happy-ending apology sequence, memorable stories like the doctor-nurse example and the casebook employment scenario are extremely rare.⁶⁰ This rarity is not

⁵⁸ Rubin & Brown, *supra* note 44, at 130. The authors elaborate: “[I]ntangible payoffs may dramatically alter the importance[-]rankings of issues having otherwise small scales of value. . . . [C]oncerns with principle, precedent, and national survival may increase the importance ranking of an issue far beyond that which it might have if only its concrete or tangible scale of value were considered.” *Id.* at 136.

⁵⁹ See Edmondson, *supra* note 40, at 280 (stating that forgiveness after apology closes conversation by eliminating complaint as “valid focus for talk”).

⁶⁰ See Telephone Interview with David Hoffman, *supra* note 32 (suggesting that apologies may occur in 10-15% of cases but that doctor-nurse case was special); Telephone Interview with Judge Kathleen Roberts, *supra* note 33 (finding that apology comes up rarely, if ever, except when lawyer expresses sympathy for plaintiff in opening statement); Tele-

surprising, for the power of apologetic ritual depends on the parties' investing the apology itself with appropriate symbolic meaning:

As with any human endeavor whose realization is constrained by dialectical reciprocity—the temporary unity of an intricate *pas de deux* comes immediately to mind—each phase is acutely susceptible to miscalculation, impasse, uncertainty, and failure to achieve desired ends. Hence, the process may be stillborn if the original transgression is considered to be beyond redemption; the speech act itself may be defective, ill-timed, or disqualified on other grounds; sorrow may give way to pride, or guilt to anger; forgiveness may be withheld, conditional, or granted without subsequent reconciliation, thus marking the end of the relationship; some kind of rapprochement may be established but without forgiveness, and so on.⁶¹

The following subsections highlight obstacles that either make it unlikely that the offender will apologize or that minimize the probability that apology will present itself to either party as a viable component of resolution. Part II.A. shows how disputants' affinity for apology depends on their individual characters. Part II.B. comments on how the intervention of lawyers and legal concerns discourages apology. Part II.C. examines the role of timing and manner in interpretation of apologetic gestures. Part II.D. suggests that the adversarial climate and escalated stage of disputes further inhibit happy-ending apology. Part II.E., which compares apology in criminal and civil matters, argues that apology plays a more significant role in criminal disputes where parties and lawyers perceive apology as consistent with other remedial goals.

A. Where Apologizing Would Be Out of Character

1. The Role of Self-Image

The role of apology in mediation is closely intertwined with the parties' self-images. In their research on the social psychology of bargaining, Professors Jeffrey Rubin and Bert Brown found that some parties' desire to appear strong (to themselves and to others) affected

phone Interview with Margaret Shaw, *supra* note 52 (stating that she could only think of three examples of apologies over years of mediation). But see Telephone Interview with Tom Christian, State Coordinator, New York Community Dispute Resolution Program (Nov. 13, 1996) (stating that there is some apology in almost all minor criminal and victim-offender mediations); Telephone Interview with Rita Anita Linger, Program Coordinator, Community Dispute Resolution Center, Ithaca, New York (Nov. 26, 1996) (vaunting importance of apology in criminal cases but noting less importance in small claims mediations).

⁶¹ Tavuchis, *supra* note 38, at 45.

their behavior in negotiations.⁶² Since both receiving an apology and offering one may be associated with strength or weakness, a party's investment in self-image will influence her propensity to demand or to offer an apology.

An injured party who has lost self-esteem as a result of the injury may demand an apology in order to reverse the pattern of victimization set by the offense.⁶³ Angry about the loss of strength she experienced due to the offense, she may channel her anger to a desire for revenge in order to protect against feeling the loss. Through an apology, the offender would return the victim to a position of higher self-regard from which she could contemplate forgiveness.⁶⁴ Thus, the injured party who has suffered a loss of self-esteem may require apology to move from a focus on punishment to readiness for resolution.

If the party at the mediation is the representative of an injured group or entity, her personal self-image may depend on that group's evaluation of her representation. To protect against negative evaluation, she must appear to have "won" in negotiations.⁶⁵ Her demand for apology becomes important insofar as an apology may constitute the winning trophy she needs to demonstrate her competency and loyalty to her constituency.⁶⁶

When an accused offender's self-esteem is invested in the negotiations, he will find apologizing "difficult and potentially humiliating."⁶⁷ Professor Tavuchis describes the costs of apologizing:

Responding to the call for an apology and the process this sets in motion can be as painful and devastating as, if not worse than, any form of physical retribution

. . . .

. . . [W]hen we . . . respond to a call and apologize, we proclaim our defenselessness and thus are literally at the mercy of the other.⁶⁸

⁶² See Rubin & Brown, *supra* note 44, at 136; cf. Telephone Interview with John Sands, *supra* note 33 (stating that 80-90% of behavior in conflict is nonrational).

⁶³ See Telephone Interview with John Sands, *supra* note 33 (stating that where apology is nonnegotiable demand, injured party is usually very hurt and wants to return hurt).

⁶⁴ See Gehm, *supra* note 48, at 544-45 (discussing relationship between victim's feelings of powerlessness and anger, and potential for forgiveness).

⁶⁵ See Joseph P. Folger & Marshall Scott Poole, *Working Through Conflict: A Communication Perspective* 133, 165 (1984) (noting that conduct in group conflict is affected by perception that there will be winners and losers).

⁶⁶ See Rubin & Brown, *supra* note 44, at 54 ("[S]alient dependent audiences are likely to generate pressures of considerable strength toward loyalty, commitment, and advocacy of their preferred positions.").

⁶⁷ Tavuchis, *supra* note 38, at 9; see also Goldberg et al., *supra* note 4, at 222 (noting that, in American culture, apologizing may be regarded as demeaning).

⁶⁸ Tavuchis, *supra* note 38, at 35, 41.

Ironically, a party who is least capable of apologizing—one who experiences apologizing as humiliating self-effacement—may be best qualified to engage in the ritual of moral rehabilitation and reconciliation. For such an offender, apologizing is difficult precisely because it entails transfer of power to the injured party and sets up the possibility that the injured party will withhold forgiveness. Because the stakes are high for both the invested apologizer—as opposed to a purely tactical apologizer—and the attentive apologizee, for whom forgiving would mean relinquishing moral superiority, an apologetic ritual in these circumstances is likely to be emotionally intense for all participants.⁶⁹ In American culture, where autonomy is an important component of self-image, the dependency and emotionality implicit in apology are risks to self-image that few parties are likely to take.

2. *Interpersonal Orientation and Effective Apology*

One factor that may have contributed to the success of the apologies in the doctor-nurse reconciliation was their engagement in the “caring professions” and thus their heightened sensitivity to relationship issues.⁷⁰ The observation that such people are more likely to appreciate intangible, interpersonal gestures is confirmed by Professors Rubin and Brown’s research on the psychology of negotiation behavior. Professors Rubin and Brown differentiate bargainers according to their levels of interpersonal orientation (IO). On one end of their spectrum, they identify “high IO” bargainers who are attentive to relationship issues, are sensitive to variations in the other party’s behavior, and take the other party’s actions personally.⁷¹ At the other end of the spectrum, they find “low IO” bargainers who are unresponsive to fluctuations in the relationship and who attempt to maximize their own gain regardless of the consequences for the other party.⁷²

Identifying the interpersonal orientation of parties may help predict whether an apology will play a role in mediation. If the injured party has a high IO, he is more likely to desire and appreciate an apology. Indeed, a refusal to apologize to such a party may under-

⁶⁹ See Interview with Gerry Roberts, Victim Services, Brooklyn Criminal Court (Nov. 22, 1996) (remembering his own tears when contentious mediation between 20-year neighbors ended with apology and reconciliation that rendered irrelevant a pre-apology, mediated settlement agreement stipulating that parties would avoid each other).

⁷⁰ See Telephone Interview with David Hoffman, *supra* note 32.

⁷¹ See Rubin & Brown, *supra* note 44, at 158. They go on to describe the high IO bargainer as either “cooperatively disposed,” such that he “enters into the bargaining relationship with a posture that is both trusting and trustworthy,” or “competitively oriented,” such that he enters into the bargaining relationship “with an eye to taking advantage of the other.” *Id.* at 159.

⁷² See *id.*

mine the chances of reconciliation. In contrast, a low IO plaintiff would look only for how the apology affords him strategic advantage. Similarly, a high IO offender may be more sensitive to settings in which an apology is appropriate, while, to a low IO offender, the idea of apology might seem nonsensical.

One mediator recounted the following illustrative example:

The plaintiff, a closely-held warehouse company, had alleged fraudulent conduct on the part of the defendant company. At the mediation, the owner of the warehouse company insisted that the defendant include an apology in the settlement agreement. As a matter of principle, he would not sign without the apology. The defendant's representative, while he did not want to admit fraud in the agreement, "could have cared less" about apologizing. While he did genuinely feel sorry, he "did not have any ego invested" in the apology he agreed to make. The case settled with apology as part of the settlement agreement but without emotional reconciliation.⁷³

To the mediator, this story was different from the doctor-nurse mediation; here, the apology was forced. The high IO plaintiff initiated an exchange in which the low IO defendant only pretended to participate. In order to avoid the cost of continued conflict, the defendant gave the plaintiff the words he asked for without investing himself in the act. Furthermore, the "forgiveness" of the plaintiff—his signature on the settlement agreement—did not close the moral gap between the parties. Rather, the apology served as a token of the defendant's submission to the plaintiff's self-proclaimed moral superiority. And, because the defendant was indifferent to the moral dimension of the relationship, the "reconciliation" had none of the symbolic resonance of the doctor-nurse resolution.

The low IO defendant could give only a tactical or formalistic apology. He capitulated to the plaintiff's demand, thus resolving only one of many contentious issues. Because the underlying relationship between the parties did not change as a result of the apology, this particular apology would not be a reliable indicator of either the parties' satisfaction with the process or restored mutual respect. A happy ending seems to require two high IO parties, each of whom has enough self-esteem to abandon face in favor of reconciliation.

3. Gender

A relationship between the parties' genders and the likelihood of apology is thus far undemonstrated. On one hand, certain theories and anecdotal evidence suggest that women both desire apologies and

⁷³ See Telephone Interview with David Hoffman, *supra* note 32.

apologize more often than do men. On the other hand, the scant empirical evidence fails to prove this proposition.

Given the preceding discussion of interpersonal orientation, theories of developmental psychology that suggest that women prioritize maintenance of relationships over individual achievement give rise to the expectation that women will be particularly apology-philic. In her article, *Portia In A Different Voice: Speculations on a Women's Lawyering Process*,⁷⁴ Professor Carrie Menkel-Meadow uses psychological research on gender differences to suggest that women feel more natural affinity for mediation than for litigation.⁷⁵ Research postulates, she writes, that "women grow up in the world with a more relational and affiliational concept of self than do men."⁷⁶ As a result of this developmental difference, male lawyers and litigants naturally differentiate themselves from opponents while, in the typical adversarial setting, women lawyers and litigants suppress their natural urges to empathize with the other side.⁷⁷ Because of their female "ethic of care" and "ethic of inclusion," Professor Menkel-Meadow argues, relationally self-defined women would prefer mediation to litigation, would promote direct communication between parties rather than communication through lawyer-intermediaries, would seek broader equitable solutions, and would attempt to forge relationships of trust with factfinders.⁷⁸ Similarly, under the rubric of self-image, Professor Deborah Tannen has suggested that while men resist apology as a sign of weakness and concession, women embrace apology as a step toward reconstituting broken relationships.⁷⁹

⁷⁴ Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L.J. 39 (1985).

⁷⁵ See *id.* at 53.

⁷⁶ *Id.* at 40. See generally Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982) (describing differences between male and female development, particularly how girls develop identity based on relationship with others while boys develop identity based on differentiating themselves from others).

⁷⁷ See Menkel-Meadow, *supra* note 74, at 52 (describing one woman lawyer's feeling of tension between the "male adversary system" and her "female ethic of care").

⁷⁸ See *id.* at 53.

⁷⁹ Based on her experiences, Professor Tannen contends that while women (with some exceptions) "easily say they're sorry and can't understand why it's such a big deal for others, . . . [i]t's as if there's a tenet that real men don't say they're sorry." Tannen, *supra* note 5, at 35. She reasons:

[A]pologizing is seen as a sign of weakness. This explains why more men than women might resist apologizing, since most boys learn early on that their peers will take advantage of them if they appear weak. Girls, in contrast, tend to reward other girls who talk in ways that show they don't think they're better than their peers.

Id.

Despite this speculation, there is little data to support the proposition that women are more likely to apologize. One study of apologetic strategies found that, “[c]ontrary to popular stereotype,” women do not apologize more frequently than men.⁸⁰ In addition, Professors Rubin and Brown, in their research on the interpersonal orientation of bargainers, hypothesized that women would be sensitive to interpersonal aspects of their relationships with other parties and that men would act strategically to maximize earnings.⁸¹ They then retreated from this conclusion by citing “many experiments finding no relationship between sex and bargaining behavior.”⁸² Thus, the relationship between gender and apology is uncertain absent further empirical study.⁸³

This difficulty in drawing conclusions about gender typifies a basic weakness of any attempt to generalize about the potential for apologies because, in each case, multiple variables thwart regularity. Despite this problem, there is some support for the general proposition that a party who worries about image and remains insensitive to interpersonal aspects of bargaining may not be expected to apologize spontaneously, though he may be coaxed to do so by a mediator.

B. The Law, Lawyers, and Lawyerly Habits

Even when individual parties are suited to the apology ritual, the possibility for apology may never arise if their lawyers are present. In their study of lawyer-client relations in Maine’s mandatory divorce mediations, Professors Craig McEwen, Lynn Mather, and Richard Maiman found that when nonlegal issues were addressed in mediation sessions, lawyers acted as “watchdog[s]” guarding against their client’s unwitting forfeiture of legal entitlements.⁸⁴ Because apologies are beyond the ambit of traditional adversarial behavior, lawyers may dismiss apology as irrelevant or treat any mention of it with suspicion.⁸⁵ If a party asks for an apology, the opposing lawyer is likely to regard that party as intransigent and to protect her client from the risk that

⁸⁰ See Fraser, *supra* note 40, at 269.

⁸¹ See Rubin & Brown, *supra* note 44, at 173 (comparing women to high IO bargainers and men to low IO bargainers).

⁸² *Id.* at 174.

⁸³ See *id.* (suggesting that Rubin and Brown’s own hypothesis about gender and interpersonal orientation “requires careful experimental test”).

⁸⁴ See Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & Soc’y Rev. 149, 171-72 (1994).

⁸⁵ See *infra* notes 95-97 and accompanying text.

evidence of apology could become a basis for assigning liability in a subsequent legal proceeding.⁸⁶

While evidentiary rules forbid the use of compromise proposals made in settlement negotiations (mediation included) to prove liability,⁸⁷ evidence of an apology may be admissible on other grounds (e.g., to impeach a witness).⁸⁸ Furthermore, insofar as an apology can be characterized as an admission, it falls outside the hearsay exclusion.⁸⁹ In cases where damages are indeterminate, lawyers may worry that an apology, which implies knowledge of wrongdoing, will exacerbate damage awards by showing a level of intent beyond mere negligence.⁹⁰

The admissibility of apologies, however, hardly renders either liability or exacerbated damages a foregone conclusion. Indeed, a recent article on the legal consequences of apologizing suggests that evidence of prior apology may be insufficient as a matter of law to prove liability.⁹¹ In cases where the language of the apology fell short of clear admission of negligence, apologetic expressions of sympathy, empathy, and remorse had no dire consequences.⁹² Furthermore, at least in

⁸⁶ See Bush & Folger, *supra* note 6, at 124 (recounting mediation where defendant, accused of firing gun to threaten neighbor, would "not admit [that he fired gun] for fear that mediation will break down and he would be confronted with an admission in court"); Goldberg et al., *supra* note 4, at 222 (recounting commonplace advice from insurance companies to policyholders not to express sympathy to parties injured by policyholders so as to avoid potential liability); Wagatsuma & Rosett, *supra* note 3, at 486-87 (recounting prosecution initiated on basis of Japanese woman's apology for inaccurately reporting on customs form amount of U.S. currency she was carrying).

⁸⁷ See, e.g., Fed. R. Evid. 408. Massachusetts goes a step further and makes all communications by a participant in the presence of the mediator as well as the mediator's files confidential and not subject to disclosure. See Mass. Gen. Laws Ann., ch. 233, § 23C (West 1986).

⁸⁸ See Stipanowich, *supra* note 23, at 893-94 (noting possibility that statements made in mediation could be used to prove contentions other than liability); see also Wagatsuma & Rosett, *supra* note 3, at 485 (stating that lawyers are unlikely to rely on privilege); Telephone Interview with David Hoffman, *supra* note 32 (same).

⁸⁹ See, e.g., Fed. R. Evid. 801(d)(2) (excluding admissions of party-opponents from the definition of inadmissible hearsay).

⁹⁰ See Wagatsuma & Rosett, *supra* note 3, at 495-96 (blaming indeterminacy of damages for American reluctance to apologize).

⁹¹ See Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 J. Disp. Resol. 115, 119-22 (1996) (discussing *Senesac v. Associates in Obstetrics and Gynecology*, 449 A.2d 900 (Vt. 1982), where gynecologist's apology was not sufficient to establish negligence, and *Phinney v. Vinson*, 605 A.2d 849 (Vt. 1992), where urologist's apology was not sufficient even to raise negligence issue before jury).

⁹² See *id.* at 121-22 (concluding that "an apology for the inadequacy of an operation does not mean the doctor is liable for negligence").

attorney disciplinary proceedings, failure to apologize could aggravate punishment.⁹³

Thus, rather than discouraging apology altogether, lawyers protective of their clients' interests might serve those interests by encouraging clients to apologize short of admitting liability. For example, lawyers might allow their clients to express empathy and regret while avoiding formulations that would make liability undeniable, such as "I neglected my duty," "my actions caused your injury," or "if only I hadn't done X, you would never have been injured."⁹⁴

While fear of admission drives lawyers' objections to apologizing, litigation culture creates additional pressure antithetical to apology. The legalization of disputes shifts the parties' focus away from private moral concerns to strategic maneuvers and legal consequences.⁹⁵ Absent lawyers' intervention, one mediator observed, parties in conflict behave nonrationally eighty to ninety percent of the time.⁹⁶ Once lawyers get involved, however, they impose a certain rational calculation on every subsequent move. As Professor Tavuchis writes, such an atmosphere is not conducive to apology:

[A]pology cannot come about and do its work under conditions where the primary function of speech is defensive or purely instrumental and where legalities take precedence over moral imperatives. Once apology is defined as merely a pawn or gambit in a power game, it becomes part of another moral economy in which individuals or nations find little to be gained by apologizing for their transgressions as opposed to remaining silent, counterattacking, or trying to cut their losses to a minimum.⁹⁷

Where strategic, litigious behavior combines with an exaggerated wariness about admitting wrongdoing, happy-ending apologies may become impossible.

⁹³ See *id.* at 122 n.66 (discussing *In re Coe*, 903 S.W.2d 916, 918 (Mo. 1995), in which failure to apologize spontaneously was aggravating factor); *id.* at 123 n.7 (citing ABA Standards for Imposing Lawyer Sanctions, Stds. 9.22(g) & 9.32(l), which make refusal to express regret aggravating factor and remorse mitigating factor in disciplinary proceedings).

⁹⁴ See *id.* at 121-22 ("When apologizing, expressing sympathy or delivering bad news, words should be chosen to convey sympathy and empathy in a way that cannot be misconstrued as an admission of negligence or fault.").

⁹⁵ See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 Fla. St. U. L. Rev. 1, 38 (1991) (stating that lawyers and clients in alternative dispute resolution may infect each other "with a desire for adversarial advantage").

⁹⁶ See Telephone Interview with John Sands, *supra* note 33.

⁹⁷ Tavuchis, *supra* note 38, at 62.

Even the mediation format may not supplant the legalized atmosphere.⁹⁸ Indeed, once all options are evaluated in terms of monetary loss or gain, apology cannot occur unless clients and lawyers perceive it as a money-saving device. In other words, as in the casebook employer-employee example,⁹⁹ the defendant must be convinced that if he apologizes, he may elicit a monetary concession from the employee. In itself, the fact that the apology is perceived to have economic advantages does not render it insincere; the offender may feel the opportunity to express his heartfelt remorse as an added bonus. Ironically, though, if the money motive is revealed or suspected by the injured person, she is likely to rebuff an apology however sincere in fact. Thus, once lawyers become involved, a tactical apology may be the only available way to say "I'm sorry."¹⁰⁰

In spite of this seemingly hopeless incompatibility between lawyers and apology, lawyers sometimes change.¹⁰¹ As more lawyers become familiar with the nonadversarial style of mediation, they may perceive that dealing in intangibles has benefits beyond saving clients

⁹⁸ See Telephone Interview with David Hoffman, *supra* note 32 (stating that lawyers would not have permitted clients to apologize in nurse-doctor case); cf. Telephone Interview with Rita Anita Linger, *supra* note 60 (stating that in mediations she conducts lawyers must either keep quiet or wait in hall). Professor Carrie Menkel-Meadow has argued that alternative dispute resolution's "attempts to innovate have been partly, if not totally, 'captured' and co-opted by the uses to which advocates have put these new procedures." Professor Menkel-Meadow, *supra* note 95, at 16. She warns that lawyers advocating for parties may convert mediation and other alternative dispute resolution procedures to "just another stop in the [adversarial] 'litigotiation game.'" *Id.* at 17. For example, lawyers may use an alternative dispute resolution procedure as an alternative discovery mechanism—i.e., to get early insights into the opponent's case at trial. See *id.* at 32; see also McEwen et al., *supra* note 84, at 161-62 (noting some lawyers' treatment of mediation as means of getting "cheap depositions").

⁹⁹ See *supra* text accompanying note 1.

¹⁰⁰ Additionally, because apologetic ritual typically requires the participation of parties themselves, apologetic ritual performed by lawyer-proxies seems nonsensical. Even without other factors hampering apology in court proceedings, the fact that lawyers speak for their clients in the courtroom and that parties speak for themselves only in response to lawyers' questions would render apology improbable in traditional litigation. It is, in part, because mediators often ask parties to speak for themselves that mediation seems a hospitable forum for apology. For a contrary example where a third party was able to make a happy-ending apology, see *infra* note 174; cf. *supra* note 38 (describing ability of nonparty to offer explanation apology).

The inability of lawyers to apologize for their clients has ramifications for apology by corporations and other collective entities in which an individual agent necessarily speaks for the whole: "Somehow or other, references to corporate sorrow or remorse ring hollow, sound disingenuous and self-serving, strain credibility, and are strikingly discordant ascriptions and terms that seem to push personification beyond its limits and functions." Tavuchis, *supra* note 38, at 97.

¹⁰¹ See McEwen et al., *supra* note 84, at 176-80 (describing authors' finding that eight years of mandatory divorce mediation had effected modest shift in lawyering styles from predominantly adversarial to more problem-solving lawyering).

money. Because parties who not only settle but also reconcile differences (particularly in ongoing relationships) are likely to feel satisfaction with the dispute resolution process, enabling clients to ask for and accept apologies may generate profits in a competitive legal market. A lawyer who develops risk-free apologetic language and/or lobbies to revise evidentiary standards to facilitate apology will render a valuable service to otherwise interpersonally oriented clients.¹⁰²

C. *The Rhythm and Dynamics of the Apology Ritual*

1. *Timing*

An important element that can distinguish a transparent tactical apology from an apology with happy-ending potential is the use of timing. One mediator who practices primarily in the employment area recalled only rare instances in which apology made a difference in mediation. In one such unusual case, she was hired by a bank to investigate an internal allegation of sexual harassment. During the investigation, the alleged harasser made a statement apologizing for offending the complainant. The dispute went no further. When asked why apology worked in that case, the mediator suggested that early intervention made all the difference.¹⁰³

Apologizing before a complaint is formalized may derail conflict before it starts.¹⁰⁴ During this key period, the apologizer's conduct is still a "virtual offense."¹⁰⁵ In other words, the conduct has yet to be interpreted as offensive or benign, and blame has not yet been assigned. If an apology is accepted in this period, the offense will never be realized—the apologizer's act will be viewed as innocent. One commentator has suggested that if doctors were to apologize for their patients' misfortunes early on, they might avoid much malpractice litigation because their treatment would never be evaluated as injuri-

¹⁰² One precedent for risk-free apology may be the language adopted by Volkswagen in an effort to satisfy General Motors' demand for an apology for theft of trade secrets. See Edmund L. Andrews, *None Prove So Stubborn as a Giant Spurned; G.M. Never Wavered in Its 4-Year Fight Over Executive Who Defected to VW*, N.Y. Times, Jan. 11, 1997, at 37 (describing VW's statement expressing concern about its possible wrongdoing and regret for disparaging G.M.'s complaints as less explicit than G.M. wanted and quoting satisfied G.M. general counsel as saying, "An apology is in the eye of the beholder."). Of course, the risk of using carefully crafted, formulaic language is that it will appear too contrived to be sincere. If so, a happy ending will elude the parties once again.

¹⁰³ See Telephone Interview with Margaret Shaw, *supra* note 52; see also Goldberg et al., *supra* note 4, at 223 (characterizing timing as critical element).

¹⁰⁴ See, e.g., Tannen, *supra* note 5, at 34 ("One business manager told me . . . subordinates so appreciate his admitting fault that they not only forgive his errors but also become ever more loyal employees.").

¹⁰⁵ See Goffman, *supra* note 40, at 108-09 (using term "virtual offense" to refer to "ugliest imaginable significance" of "virtual offender's" conduct).

ous.¹⁰⁶ However, once the injured person articulates her complaint and the offender denies responsibility, apology becomes both harder to elicit and less likely, even if given, to be accepted.¹⁰⁷

Despite the potential merit of early apology, injured parties may question the motives of an offender who apologizes immediately after a verbal complaint.¹⁰⁸ When the defendant enters a mediation ready to apologize, she may be rebuffed as inauthentic even if she is perfectly sincere. The same words that might move the other party if offered at a later moment, if offered too soon, at best will gain the listener's attention without transforming the relationship. To apologize effectively, the offender must allow the injured party to tell her story so that the apology reflects understanding of the injured party's loss.¹⁰⁹

On the other hand, if the injured party explicitly requests an apology, too much deliberation on the part of the offender may render an eventual apology suspect.¹¹⁰ The proper apologetic words pronounced too late may project ambivalence or even calculation—tactical or formalistic apology, but not happy-ending material. Thus, if apology in mediation is to facilitate resolution, it must seem thoughtful but not forced.¹¹¹

¹⁰⁶ See Ann J. Kellett, Comment: Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients, 1987 J. Disp. Resol. 111, 122-23 (suggesting that while patient injury is precipitating factor behind lawsuit, anger and other social and emotional factors predispose patients to sue).

¹⁰⁷ See Goldberg et al., *supra* note 4, at 223 (noting that, by the time mediator becomes involved, proper moment for apology may have passed).

¹⁰⁸ See Tavuchis, *supra* note 38, at 88 ("If [an apology] precedes or follows too closely upon the heels of a call, it may easily or reasonably be construed as self-serving, a hollow courtesy, or merely a sign of patronizing indifference.").

¹⁰⁹ See Telephone Interview with Jacqueline Nolan-Haley, Director, Fordham Law School Mediation Center, Associate Professor, Fordham Law School (Dec. 4, 1996) (discussing necessity of allowing plaintiffs to experience proxy for their "day in court" before apologies become appropriate).

¹¹⁰ Cf. Tavuchis, *supra* note 38, at 88 ("[T]he longer one waits following a call, the more difficult it is to apologize, the more carefully one's words must be chosen, and the less the apology is worth."). On the connection between timing and interpretation, see Folger & Poole, *supra* note 65, at 133 (discussing function of threat as either "signal for escalation" or "bargaining tactic designed to motivate the other to nail down a final agreement," depending on stage of negotiations).

¹¹¹ See Tavuchis, *supra* note 38, at 88 ("[T]here is . . . a tender moment following an offense which, if hastily foreshortened or heedlessly prolonged, is likely to harden hearts rather than allow for a salutary stirring of sorrow and forgiveness.").

2. *Third Party Intervention: Pas de Deux*¹¹² à Trois

Related to the effect of timing on the apologetic ritual is the impact of the mediator's presence on the intimate connection between parties necessary for a happy-ending apology.¹¹³ One problem may arise when the neutral party consciously or subconsciously superimposes her own standards on the apologetic gesture.¹¹⁴ For example, in a search for concrete solutions, she may devalue the intangible elements of conflict and thus reject (or simply fail to notice) an offer of or request for apology.¹¹⁵ Or, in an effort to focus on the future rather than the past, she may try to draw attention away from apologetic moves.¹¹⁶ A highly rights-conscious mediator, worried that a less powerful party will trade away legal rights, may dismiss the suggestion of an apology from either side. Alternatively, guided by the legal knowledge that a plaintiff is not entitled to any compensation, the mediator may dismiss the injured party's desire/demand for apology as unrealistic.¹¹⁷ In any of these cases,¹¹⁸ apologetic ritual might be squelched at its inception.

¹¹² For the use of the "*pas de deux*" metaphor for apologetic ritual, see *supra* note 61 and accompanying text.

¹¹³ Professor Nicholas Tavuchis elaborates this potential problem:

[The focus of apology] is upon interaction between the primordial social categories of Offender and Offended. . . . [W]hile third parties may enter into the proceedings at one point or another, have a stake in the outcome, and so on, they remain, even in their most influential capacities, peripheral to the critical field of interaction. To put it yet another way, the bedrock structure of apology is binary, a product of a relationship between the Offender and the Offended that can neither be reduced nor augmented without undergoing a radical metamorphosis.

Tavuchis, *supra* note 38, at 46-47.

¹¹⁴ See *id.* at 51 (suggesting that third parties necessarily bring to bear their own assumptions resulting in fundamental alteration of dynamic and substance of apology).

¹¹⁵ See Bush & Folger, *supra* note 6, at 68 (critiquing "problem-solving" mediators for dropping intangible issues when they cannot be recast as problems with tangible solutions).

¹¹⁶ Such a mediator might be applying a standard mediating technique as exemplified by Joseph Stulberg's instruction:

Focus on the future, not the past. . . . A mediator must not let the parties' competing visions of their past paralyze them so they cannot chart their future.

. . . .

. . . A mediator does not want parties to ignore their past; she just wants to be certain they do not become prisoners of it.

Joseph B. Stulberg, *Taking Charge/Managing Conflict* 101 (1987).

¹¹⁷ See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice through Law*, 74 Wash. U. L.Q. 47, 73 (1996) (recounting small claims matter where student-mediator's evaluation of legal merits led her to reject possibility of settling without exploring benefits to parties of doing so).

¹¹⁸ These variations reflect three distinct styles of mediation: "rights-based mediation" focuses on the parties' legal rights; "interest-based mediation" focuses on the "compelling issue of the dispute"; and "therapeutic mediation" focuses on the parties, their problem-solving skills, and the "emotional dimension of the dispute." See Craig A. McEwen,

If the mediator feels that an effective apology would usefully realign the relationships between the parties, she may try to encourage apology. Professors Robert Baruch Bush and Joseph Folger instruct mediators that, although apology can only originate with the parties, a mediator may “focus parties on the possibility or opportunity of giving recognition.”¹¹⁹ Where a party makes an admission or suggests willingness to apologize, the mediator might frame the event by noticing the apologetic gesture and suggesting that the injured party could feel empowered by the gesture.¹²⁰ If a party expresses regret in caucus, the mediator may suggest that the party voice that regret to the other side in the next joint session.¹²¹ Thus, the transformative mediator adopts a responsive posture. Rather than eliciting apology, she captures or marks an apology as a turning point—a point of recognition—of progress made by the apologizer.¹²²

On the other hand, a mediator may foreclose the potential for a happy ending by taking too prominent a role in advocating apology. As Professors Bush and Folger warn, the mediator should not push “to evoke recognition between parties without any concern for empowerment, by forcefully telling them how they should see and treat each other, and then lecturing them about the need for empathy and consideration.”¹²³ Dubbing such heavy-handed attempts to promote recognition a “pitfall” of transformative mediation, they comment: “This approach loses sight of the crucial difference between the parties’ choosing to give recognition and being shamed or pressured into it.”¹²⁴ Moreover, if a mediator foists the idea of apology on unexpect-

Pursuing Problem-Solving or Predictive Settlement, 19 Fla. St. U. L. Rev. 77, 79 n.17 (1991) (quoting Standing Comm. on Dispute Resolution, American Bar Ass’n, *Alternative Dispute Resolution: An ADR Primer 2* (3d ed. 1989)). Within this categorical framework, apology seems possible only in “therapeutic mediation.”

¹¹⁹ Bush & Folger, *supra* note 6, at 94.

¹²⁰ See *id.* at 122-23.

¹²¹ See *id.* at 127 (noting that such approach could help to elicit recognition from both parties).

¹²² See *id.* at 123, 198-99 (illustrating how mediation focuses on importance of apology and uses it to foster recognition). Note that Professors Bush and Folger’s view takes apology to be as important to the apologizer as to the apologizee. This view points to another way in which apology fits uncomfortably into a pure apology-as-exchange model. In the exchange model, the apology’s worth to its recipient should coincide with some cost to the apologizer. The ritual model allows both parties to leave richer.

For a different overview of possible mediator participation in apology, see Tavuchis, *supra* note 38, at 50-51 (“[D]epending on their relations with the protagonists, their own interests and values, or broader moral questions arising from the infraction, [third-party] actors may serve to certify an offense as apologizable, add their voices in the call for apology, urge its acceptance or rejection, appraise matters of form and timing, and judge the sincerity of remorse and forgiveness.”).

¹²³ Bush & Folger, *supra* note 6, at 217.

¹²⁴ *Id.*

ing parties (especially in a joint session),¹²⁵ the mediator herself may lose credibility.

Where mistiming or inartful suggestion undermines an apologetic gesture, the consequences for the mediation can be serious. If apologetic words are perceived as self-serving or exploitative, they may be seen as merely “lay[ing] the foundation for a future offense.”¹²⁶ If they seem grudging and thus insincere or sarcastic, apologetic words signal the absence of full remorse rather than the presence of at least some regret.

One mediator offered an illustration of the potential for proposing intangible solutions to backfire: in a constructive discharge/age discrimination case, the parties had gained some ground toward settlement when, after discussion with the mediator, the employer suggested that the company could throw a retirement party for the employee. When the plaintiff heard the proposal, she took it as an insult. Ultimately, the mediator felt it necessary to take the blame for the suggestion in order to prevent the parties from losing all the progress they had already made.¹²⁷

A retirement party proposed spontaneously at a different moment would have honored the employee's service to the company. Because misrepresented or mistimed, however, the symbol of respect was perversely transformed into a symbol of mockery. Proposing the intangible solution in this case risked destroying the fragile new trust and ability to problem-solve that the parties had begun to develop.

¹²⁵ Somewhat in contravention of Professors Bush and Folger's advice, one mediator stated that, when small claims disputes seem to reach impasse, her mediation students bring up the possibility of apology in caucus almost routinely. See Telephone Interview with Jacqueline Nolan-Haley, *supra* note 109. Using this systematic approach in caucus is less likely to alienate a party than a similar tactic used in joint sessions because, in caucus, the party feels free to explain her rejection of apology. Without admitting her discomfort or unwillingness, she can argue that apology won't make a difference to her opponent. In joint session, if the mediator validates an injured party's need for apology, the offender may feel overwhelming pressure to comply and a competing desire to resist in order to save face, but she has no reasonable excuse available to explain her refusal.

¹²⁶ Tavuchis, *supra* note 38, at 7 (quoting Ambrose Bierce, *The Devil's Dictionary* 12 (1958)); see also Rubin & Pruitt, *supra* note 36, at 31 (describing difference between genuine and instrumental (self-serving) concern for welfare of other party and suggesting that instrumental concern is likely to arise “whenever one sees oneself as dependent on the other—when the other is seen as able to provide rewards and penalties”). An example of how self-serving conciliatory gestures may pave the way for future betrayals, Professors Rubin and Pruitt write, “is the expectation of further negotiation in the future. Dependence leads to the conclusion that it is desirable to build a relationship with the other now. Hence one tries to impress the other with one's concern about his or her welfare.” *Id.* If conflict creates the dependency that prompts instrumental concern, then injured parties may be right to reject offenders' apologies as insincere.

¹²⁷ See Telephone Interview with Judge Kathleen Roberts, *supra* note 33.

Thus, even where happy-ending apology seems possible, the mediator may restrain her impulse to propose apology rather than risk jeopardizing the mediation process more generally. The mediator's best options are: (1) to avoid projecting personal judgments that may interfere with the parties' needs, (2) to remain alert and sensitive to parties' tentative requests for apology or expressions of remorse, and (3) to refrain from insinuating demands for apology absent party initiative.

In sum, there are no formulas for either timing an apology or suggesting one. Only attentive listening will signal how and when an apologetic gesture is appropriate.

D. *Long-Term Conflict as Apology's Foil*

Outside the mediation itself, the history of conflict between the parties before they enter mediation may have substantial ramifications for the likelihood of apology. By the time the parties enter mediation, they may have established patterns of interaction that preclude a happy-ending apology. In addition, as hurt accumulates on both sides, parties arrive at the mediation more intent on establishing entitlements than on apology and reconciliation. This section explores each of these obstacles.

1. *Adversarial Habits or "Stormy Weather"*

First, in longstanding conflict, the parties establish an adversarial pattern of interaction that may be hard to break.¹²⁸ Professors Joseph Folger and Marshall Scott Poole describe such adversarial patterns in terms of hostile "climate."¹²⁹ In studying group dynamics, they found that an established climate may change if a participant jars the interaction by acting outside the group's normal pattern of behavior.¹³⁰ Apologetic gestures resemble these "bids for change" as they attempt

¹²⁸ In one study of conflicts, Professors Joseph Folger and Marshall Scott Poole described the following characteristics of conflict interaction:

1. Patterns of behavior in conflicts tend to perpetuate themselves.
2. As senseless and chaotic as conflict interaction may appear, it has a general direction that can be understood.
3. Conflict interaction is sustained by the moves and countermoves of participants; moves and countermoves are based on the power participants exert.
4. Conflict interaction affects the relationships between participants.

Folger & Poole, *supra* note 65, at 44.

¹²⁹ See *id.* at 99 (describing "[m]oves that depart from the patterns implied in the prevailing climate . . . as 'bids' for change in the group" that may become "institutionalized").

¹³⁰ See *id.* at 47-48 (describing shift in tone of group interaction from open question-answer climate to defensiveness and discomfort brought on by one participant's incongruous, critical intervention).

to alter an adversarial climate that characterizes the parties' relationship.

If an apology is accepted, it will temper the climate of interaction between the parties.¹³¹ This climactic shift may explain how delivery of a long desired and withheld apology effects a change in the demeanor of the parties: relaxation as the result of a warmer climate.¹³² Unfortunately, long-term adversarial conduct is likely to undermine the attempt to use an apology as a bid for change.¹³³ For example, "[i]f a party has clearly adopted a competitive orientation, even potentially conciliatory tactics may be construed as attempts to manipulate the situation. If a party has clearly adopted an accommodative stance, his or her tactics are likely to be discounted by opponents who assume that the party will eventually give in."¹³⁴ Thus, apologetic gestures coopted by an adversarial environment may cloud over any happy-ending apologies on the horizon.

2. "Water Under the Bridge"

A second attribute of lengthy conflict that thwarts apology is escalation. Disputes escalate as they progress from "naming" to "blaming" to "claiming."¹³⁵ As conflict passes from one stage to the next,

¹³¹ See Telephone Interview with John Sands, *supra* note 33 ("An apology out of nowhere can be a powerful and useful tool to change the negotiating environment.").

¹³² See, e.g., *infra* text accompanying note 139 (discussing chief of staff/department head example).

¹³³ See Folger & Poole, *supra* note 65, at 99 (observing that bids for change in group climate are often rejected when, for example, members "simply fail to support an action which departs from accepted patterns" or "dominant members actively suppress a bid for change").

¹³⁴ Folger & Poole, *supra* note 65, at 133; see also *id.* at 99 ("Between enemies even conciliatory tactics may arouse mistrust or be taken as opportunities for manipulation.").

¹³⁵ See generally William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *L. & Soc'y Rev.* 631 (1980-81). First, an individual "say[s] to [her]self that a particular experience has been injurious": she names the experience, which may heretofore have seemed innocuous, an injury. *Id.* at 635. Second, she "attributes [the] injury to the fault of another individual or social entity," *id.*, or blames the person or entity perceived to be responsible. Next, she "voices [the grievance] to the person or entity believed to be responsible and asks for some remedy," *id.* at 636, or claims entitlement to a remedy from the offender. Finally, "[a] claim is transformed into a dispute when it is rejected in whole or in part." *Id.* The authors argue that, because each stage depends on a shift in the grievant's perceptions, disputes are unstable and contingent on the relationship between the individual, the individual's community, the other actors involved in the experience, and the experience itself. See *id.* at 638-39. For example, an individual's need to "save face" within her community may drive her to perceive as insulting an action that otherwise might pass without notice. Or a person might see her employer's failure to apologize for an offensive comment as a provocation which moves her from "claiming" to filing a lawsuit. Or again, after an apology, she may press her suit when her lawyer advises her to vindicate her rights, though she had felt ready to forgive when the defendant demonstrated remorse.

the parties' behavior is likely to become more adversarial; parties count more instances of their opponent's conduct as offensive; matters of general principle develop; outsiders are drawn into the dispute; and, as repair seems more and more implausible, parties desire vindication and retribution.¹³⁶ At each stage, each party develops an increased sense of entitlement, and, as more tangible remedies become attractive and constituencies begin to urge victory rather than reconciliation, apology becomes more remote.

By the time a mediator becomes involved, the fact that the parties have sought the intervention of an outsider indicates that the conflict has escalated beyond the "claiming" phase and that face-to-face attempts at resolution have been to no avail.¹³⁷ By the time the parties seek a neutral intervenor, they are likely to be focused on establishing rights against each other rather than on reconciling.¹³⁸

Mediation, however, may be the first occasion in which the parties are able to hear an apology. For example, one mediator told of the following case:

The son of a hospital chief of staff enrolled in the infectious diseases residency at the hospital. The head of the department felt that the son was performing so poorly that she recommended the student be tested for drug use and referred him to counseling. When this information spread to other members of the school community, the chief of staff became furious. Over time, grievances accumulated on both sides and the hospital staff became polarized. During a mediation session, the chief of staff said to the department head, "I want you to understand that I made a mistake and I'm sorry." The department head, however, did not apologize in kind, and the chief of staff said he could not move forward unless the department head recognized how she had hurt his son. After some discussion in the joint session, the department head did apologize for hurting the chief and his son. Suddenly the chief's whole demeanor changed; he relaxed. The department head expressed surprise—she must have said she

¹³⁶ See Rubin & Pruitt, *supra* note 36, at 69-72 (describing transformations that accompany escalation).

¹³⁷ See Tavuchis, *supra* note 38, at 51 ("[W]hatever the initial stance of external moral invigilators, be it conciliatory or admonitory, their very mobilization signals impasse, intransigence, and antagonism on the part of one or both principals."); see also Goldberg et al., *supra* note 4, at 223 (noting that by time mediator becomes involved, it may be too late for apologies).

¹³⁸ Cf. Nolan-Haley, *supra* note 117, at 65 ("[C]ourt mediation carries with it higher expectations of legal protection. Court-bound individuals are generally a rights-conscious group. The claim or assertion of legal rights is usually what brings them to court in the first instance.").

was sorry a year before. But, the chief responded, he could not hear it before.¹³⁹

As in many long, ongoing conflicts, the chief and the department head had been so outraged by each other's behavior that, prior to the mediation, they had not been able to communicate.¹⁴⁰ Indeed, one of mediation's principal virtues is its facilitation of listening and responsiveness.

Sometimes, disputing parties have not really listened to each other before mediation. If they have spoken, their minds were busy planning their own next argument instead of listening. When [the mediator] require[s] each participant to avoid interruption while the other explains their [sic] views to [her], things frequently start to sink in for the first time.¹⁴¹

Mediation allows minor insults that preceded and/or aggravated the current conflict, and that the parties had either forgotten or never recognized, to surface and to heal.¹⁴²

In sum, where conflict has escalated to a level requiring a neutral third party's intervention, the propitious time for apology may be long past. While the mediator may be able to work with parties to recover some lost opportunities, mediation rarely can return conflict to the "naming" or "blaming" stages when apologetic ritual has the greatest chance to flourish. As the chief of staff/department head example makes clear, however, neither long-standing dispute nor accumulated war wounds precludes happy-ending apology. A mediator should assist the parties to develop new channels of communication and to peel

¹³⁹ See Telephone Interview with Mediator (Nov. 16, 1996) (facts have been slightly altered and mediator's name omitted to protect parties' confidentiality). Subsequent to the described interaction, the department head told the mediator she felt that her apology had been coerced. The next mediation session, however, did end in settlement, and the mediator concluded that, in spite of the department head's ambivalence, her apology was probably heartfelt at the time it was offered. See Telephone Interview with Mediator (Dec. 17, 1996).

¹⁴⁰ See Sam Kagel & Kathy Kelly, *The Anatomy of Mediation: What Makes It Work* 115 (1989) (describing impairment of adversaries' hearing "because they are preoccupied with the merits of their own position and/or what they will say next").

¹⁴¹ *Id.* at 24 (presenting scripted conversation between mediator and observer of labor-management contract mediation).

¹⁴² See Folger & Poole, *supra* note 65, at 192 (stating that walking through conflict chronologically "often provides important breakthroughs" by permitting discovery of "important facts or events that played a significant role in shaping the problem" but were lost from view during the fight); see also Craig A. McEwen & Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 *Negotiation J.* 23, 28 (1993) (describing how initial tangible goals of compensation, changed behavior, and apology become lost when emerging metadisputes—disputes about the dispute—"increasingly highlight[] goals of victory, vindication, or retribution").

back layers of hurt before she can expect apology to produce dramatic results.

E. The Character of the Dispute

While intuition suggests that apology is inappropriate in certain disputes, determining in which disputes apology may be effective proves more complex than one might expect. One approach might rank offenses as more or less severe: the more severe the offense, the less appropriate for apology. For example, Professor Nicholas Tavuchis categorizes some offenses as so minor that apology becomes superfluous and others as so heinous that they are unforgivable.¹⁴³ Another approach divides physical or financial injury from psychological injury and considers only the latter category appropriate for apology. For example, Professors Wagatsuma and Rosett classify "defamation, insult, degradation, loss of status, and the emotional distress and dislocation that accompany conflict" as the kinds of injuries that can only be repaired by apology.¹⁴⁴

In practice, neither of these approaches is fully satisfactory. Professor Tavuchis's severity theory does not explain why apology has proven much more effective in major criminal mediations, where the injury was horribly severe,¹⁴⁵ than in commercial contract cases, where the injury may be regarded as less serious.¹⁴⁶ Professors Wagatsuma and Rosett's categorization of injuries as emotional or economic ignores the fact that most injuries involve both components.

While severity of injury and type of harm are important factors in evaluating whether an apology will be forthcoming and effective, the likelihood of an apology also will depend on whether the mediated agreement, other legal processes, or the surrounding community will otherwise satisfy the injured parties' needs for retribution, restitution, compensation, and/or reconciliation.¹⁴⁷ In retribution, the wrongdoer

¹⁴³ See Tavuchis, *supra* note 38, at 21.

¹⁴⁴ Wagatsuma & Rosett, *supra* note 3, at 487.

¹⁴⁵ See Telephone Interview with Tom Christian, *supra* note 60 (reporting many apologies in both serious and minor criminal mediations and recounting effects of apology in mediation between drunk driver convicted of murder and victim's mother). Professor Deborah Tannen recalls another instance of severe injury ameliorated by apology: when John F. Kennedy took responsibility and blame for the Bay of Pigs invasion, the apology "was shocking—and effective. People forgave the President, and his Administration, for the colossal error." Tannen, *supra* note 5, at 35.

¹⁴⁶ See, e.g., Telephone Interview with David Hoffman, *supra* note 32 (finding apology rare in commercial cases); Telephone Interview with Judge Kathleen Roberts, *supra* note 33 (stating that apology never played role in commercial mediation).

¹⁴⁷ See Dean E. Peachey, *What People Want from Mediation*, in *Mediation Research*, *supra* note 24, at 300, 303 [hereinafter Peachey, *What People Want from Mediation*] (using concept of restorative justice to evaluate fairness of mediation). For a concise overview of

suffers for transgression; in restitution, the wrongdoer repairs or replaces the damage she has caused; in compensation, although the damage cannot be repaired, the victim's needs are addressed through payment in money, goods or services; in forgiveness/reconciliation, the victim cancels the wrongdoer's debt with or without an apology.¹⁴⁸ The following sections consider how parties' focus on particular means of restoration in light of relief available through litigation affects the role of apology in criminal matters and in civil employment, torts, and commercial matters.

1. Criminal Matters

Mediation of criminal matters¹⁴⁹ has a peculiar relationship to criminal litigation. While criminal litigation treats illegal acts as an affront to public order where the victim is relevant only as a witness,¹⁵⁰ mediation treats the victim as a party with a personal right to vindication. If the criminal matter remains in litigation, the prosecu-

Professor Peachey's approach, see Dean E. Peachey, *Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire*, in *Restorative Justice on Trial*, supra note 39, at 551, 551.

¹⁴⁸ See Peachey, *What People Want from Mediation*, supra note 147, at 304-05.

¹⁴⁹ Programs for mediation of criminal matters may be called Victim/Offender Reconciliation Programs (VORPs). Cases are usually referred by the police, a prosecutor, a judge, or a probation officer. See Katherine L. Joseph, *Victim-Offender Mediation: What Social & Political Factors Will Affect Its Development?*, 11 *Ohio St. J. on Disp. Resol.* 207, 209 (1996). Some mediations, though, are initiated by victims. See Telephone Interview with Tom Christian, supra note 60. Following the referral, most programs screen victims and offenders to determine whether the parties will be able to participate constructively in mediation—i.e., whether the victim merely plans to take verbal revenge on the offender and whether the offender feels some remorse. See Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 *SMU L. Rev.* 2191, 2197 (1993) (stating that second stage in VORP process involves contacting victim and offender to determine whether they agree to participate and removing "inappropriate cases"); Sheila D. Porter & David B. Ells, *Mediation Meets the Criminal Justice System*, 23 *Colo. Law.* 2521, 2522 (1994), available in Westlaw, 23 COLAW 2521 ("The purposes and goals of victim-offender mediation are best served when . . . both the offender and the victim are willing to work toward a constructive resolution."); Telephone Interview with Tom Christian, supra note 60. For a critique of VORPs as disserving victims, offenders, and the state, see generally Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 *Emory L.J.* 1247 (1994).

¹⁵⁰ See Heinz Messmer & Hans-Uwe Otto, *Restorative Justice: Steps on the Way Toward a Good Idea*, in *Restorative Justice on Trial*, supra note 39, at 1, 1-2 (observing that, before victim support movement, "[v]ictims' rights of participation in proceedings had been withdrawn as a result of continuing concentration on the punishment of offenders"); Haley, *Victim-Offender Mediation*, supra note 39, at 118-19 (describing American criminal justice system's insensitivity to victims' needs and failure to tailor corrective measures to particular offenders); Mark William Bakker, *Comment, Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 *N.C. L. Rev.* 1479, 1494-95 (1994) ("Many victims allege that criminal justice officials neglect their plight—that their suffering is secondary to the threat to social order.").

tor may drop the case (especially in minor matters) or may seek punishment—mostly imprisonment or fines. While this system may deliver retribution, it will rarely restore the victim through restitution, compensation, or forgiveness.¹⁵¹ Mediation, on the other hand, may not fulfill public desire for retribution,¹⁵² but it does offer the possibility of forgiveness as well as restitution or compensation. Leaving aside the possible conflict between public goals and individual victims' needs¹⁵³ and the well tread arguments for the superiority of one or the other goal,¹⁵⁴ the difference between likely outcomes of litigation and mediation contributes to the prevalence of apology in criminal mediations.

The possibility of apology arises in two types of criminal matters:¹⁵⁵ in minor criminal matters, where settling means giving up court ordered penalties in favor of alternatives, and after felonies or violent crimes, where the offenders have been convicted and either have not yet been sentenced or already have served sentences for serious crimes. In the first instance, there may be no publicly imposed punishment; in the second instance, at least some minimum of punishment is guaranteed.

¹⁵¹ See, e.g., Tony F. Marshall, *Restorative Justice on Trial in Britain*, in *Restorative Justice on Trial*, supra note 39, at 15, 19 (calling reconciliation an "aim . . . quite unrepresented in modern criminal justice practice"); Elmar Weitekamp, *Can Restitution Serve as a Reasonable Alternative to Imprisonment? An Assessment of the Situation in the USA*, in *Restorative Justice on Trial*, supra note 39, at 81, 81-82, 99-100 (finding that, despite superiority of restitution over imprisonment, American jurisdictions have so far failed to implement effective restitution programs).

¹⁵² See Bakker, supra note 150, at 1506 ("[M]ediation programs may not accommodate a public desire for retribution and punishment. Prisons instill public confidence; mediation may not." (footnote omitted)).

¹⁵³ Compare Tavuchis, supra note 38, at 52 (stating that demands for punishment come to fore once wrongdoing receives public notice), with Bakker, supra note 150, at 1516 (listing variety of victims' needs under general rubrics including not only vindication and equity but also reassurance ("support, 'suffering with,' safety, clarification of responsibility, and prevention") and meaning ("information, fairness, answers, and a sense of proportion" (quoting Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* 182-84 (1990)))).

¹⁵⁴ For example, restorative justice advocates have claimed that alternatives to imprisonment, such as restitution, benefit communities, rehabilitate more effectively, cost less, and are more humane than imprisonment. See Weitekamp, supra note 151, at 82-83; see also Haley, *Victim-Offender Mediation*, supra note 39, at 122 (tentatively asserting that victim-offender mediation "has a significant effect in correcting deviant behavior"); Bakker, supra note 150, at 1514-16 (describing restorative justice vision of crime as violation of relationships, which harms victim and community and creates obligation to repair wrong).

¹⁵⁵ See Telephone Interview with Tom Christian, supra note 60; see also Telephone Interview with Rita Anita Linger, supra note 60 (noting that apologies frequently transform relationships in mediation of criminal matters).

a. *Minor Criminal Matters.* In minor criminal cases, the possibility of an apology usually surfaces after the injured party has had a chance to vent his or her anger. When the defendant has listened to the victim's story, his subsequent apology "breaks down the wall" of emotional harm that caused the injured party to seek punishment.¹⁵⁶ In addition to apologizing, the offender usually agrees to perform a service to the injured party or the community in order to satisfy the public's and the victim's need for restitution or compensation. The apology signals a change in attitude that in turn may contribute to the offender's fulfillment of terms in mediated agreements.¹⁵⁷

For example, in one case of neighborhood vandalism, nine families became involved in restoring damage done to the victim's home. Each child involved apologized to the homeowner and explained the details of the damage he had caused. Then each child paid twenty-eight dollars that he, not his parents, earned in order to pay for repairs.¹⁵⁸ Lastly, each child promised not to retaliate against the homeowner's son.

In a case like this one, combining forgiveness with restitution was preferable to a court ordered punishment. The payments reimbursed the victim for the damage to his home; the promises restored the homeowner's sense of security in the neighborhood; and the apology vindicated the homeowner's sense of moral indignation while his forgiveness reconciled the neighbors.¹⁵⁹ None of the possible outcomes in litigation would have accomplished these goals. A juvenile sentence would have punished the children and perhaps exacerbated the hostility in the neighborhood; a fine would likely have been paid by the parents, not the perpetrators; and assigning fault to the parents would have encouraged them to deny their children's actions and thus deprive the homeowner of the apology that satisfied his moral indignation. Apology and restitution could be calibrated to the victim's harm in a way that pure retribution as designed by legal institutions could not be.¹⁶⁰

¹⁵⁶ See Telephone Interview with Tom Christian, *supra* note 60; see also Telephone Interview with Rita Anita Linger, *supra* note 60 (stating that victims often state desire for apology in caucus, mediators advise them to tell defendants how injury affected them, and defendants naturally want to apologize).

¹⁵⁷ See Bakker, *supra* note 150, at 1502-03 (reporting restorative justice view that mediation affects attitudes of offenders and increases probability that they will fulfill restitution obligation).

¹⁵⁸ See Telephone Interview with Tom Christian, *supra* note 60.

¹⁵⁹ Cf. Bakker, *supra* note 150, at 1500-01 (arguing that opportunity for apology and forgiveness aids victims to regain wholeness, and "empowers both parties to deal with each other on a personal level, thereby breaking down stereotypes and reducing fear").

¹⁶⁰ In researching crime victims' desire for retribution, Professor Dean Peachey found that victims often felt justice had been done when the offender was rehabilitated (i.e., ac-

In another case, two friends came into conflict when the defendant heard that the victim had spread a rumor about her. After hearing the rumor, the defendant physically attacked the victim in her office. Neither party wanted to talk, but the court referred the case to mediation. Each party individually discussed her anger and embarrassment with the mediator. At the culmination of a two-and-a-half hour mediation, the victim apologized for spreading the rumors, and the defendant apologized for the attack. Both parties felt that "a weight had fallen off their shoulders." In the end, they agreed to restitution.¹⁶¹

In a case like this one, where a future relationship is possible, the apology-restitution formula makes more sense than does pure retribution, which focuses entirely on the past. When apology and forgiveness represent a chance to turn away from the painful past without sacrificing beneficial remedies such as restitution and compensation,¹⁶² apology is frequently an important part of mediation.¹⁶³

b. Serious Crimes. Where mediation follows a felony conviction, the victim's desire for retribution is already addressed, because the offender will or already has received a prison sentence. While restitution is a possible outcome, the focus of the mediation is on apology; that is, on offering the victim an opportunity to express her suffering to the offender and to accept the offender's remorse.¹⁶⁴ Indeed, before any mediation may take place, the offenders are screened to assure that they are sincerely remorseful.¹⁶⁵ The apologetic ritual, if successful, will bring a sense of closure to the victim.¹⁶⁶

knowledgeable responsibility for wrongdoing and took steps to prevent repetition). See Peachey, *What People Want from Mediation*, supra note 147, at 315. Where there was no acknowledgment by the offender, however, and where the offenders' acts could not be explained by external circumstances, victims preferred retribution. See *id.* at 311-14; see also Haley, *Victim-Offender Mediation*, supra note 39, at 124 (reporting evidence that victim-offender mediation facilitates offender correction, victim satisfaction, and community benefit).

¹⁶¹ See Telephone Interview with Rita Anita Linger, supra note 60.

¹⁶² In this criminal matter, compensation would not be an option in court. Note that apology is not compensation. See Goffman, supra note 40, at 118 (distinguishing between demonstrating "pious attitude" through apology and compensating loss).

¹⁶³ See, e.g., Telephone Interview with Tom Christian, supra note 60 (stating that some kind of apology came up in most criminal mediations he performed).

¹⁶⁴ See Bakker, supra note 150, at 1484 (describing focus of victim-offender mediations on "the need for reconciliation of the conflict (i.e., expression of feelings; greater understanding of the event and each other; closure)").

¹⁶⁵ See Telephone Interview with Tom Christian, supra note 60.

¹⁶⁶ See Bakker, supra note 150, at 1482 (noting VORP proponents' claim that "empowering victims in their search for closure through direct involvement in the justice process" is one way in which VORP "offers a fresh approach to the problem of crime in the United

In one example, a mother had lost her daughter in a drunk driving accident. Years after the accident, though the driver was serving his sentence, the mother still was unable to feel emotional closure regarding the daughter's death. On her request, she was able to meet with the offender, to show him a picture of her daughter, and to express her anger and grief. Moved by her story, he apologized. After he asked for her forgiveness, and she accepted his apology, she said she felt she would be able to move forward with her life.¹⁶⁷ In another example, a woman who had been raped by her stepfather, who was close to release from prison, requested a meeting with him. Though many years had passed since the rape, she felt that, in order to heal, she needed in-person evidence of his remorse.¹⁶⁸

These examples of victim-offender mediation demonstrate that apology permits healing of emotional injury even in cases of serious offense. After retribution, when the wound is not fully healed, forgiveness may be more satisfying than other forms of restorative justice. Furthermore, the apology and forgiveness ritual itself does not conflict with restitution, compensation, or retribution: restitution agreements usually follow apology, and apologizing to the victim plays only a limited role in sentences.¹⁶⁹ Thus, happy-ending apology is an important component of criminal mediations.

2. *Civil Cases: Commercial, Employment, and Tort Cases*

Unlike criminal mediations, mediations of civil cases, in which valuable compensation is available, rarely involve apology. Particularly when viewed through the lens of the rules of evidence and lawyerly caution, forgiveness may appear antithetical to compensation.¹⁷⁰ While apology might perform important healing work in some cases, the risk of losing compensation often overwhelms interest in emotional healing. Even a truly remorseful defendant is unlikely to brave

States" (quoting Mark S. Umbreit & Robert B. Coates, *Victim Offender Mediation: An Analysis of Programs in Four States of the U.S.* 1 (1992)).

¹⁶⁷ See Telephone Interview with Tom Christian, *supra* note 60. This incident was also reproduced on an episode of the television program *48 Hours* (CBS television broadcast, Jan. 11, 1996).

¹⁶⁸ See Telephone Interview with Tom Christian, *supra* note 60.

¹⁶⁹ Critics may object that the offenders manipulate VORPs to reduce their prison sentences. Despite this popular perception, Tom Christian argues that the screening of offenders for participation in the program insures that those who meet with victims are sincerely remorseful. Furthermore, he argues, remorse will not necessarily guarantee a lighter sentence. For example, Christian recounted, Reverend Al Sharpton was so impressed by the remorse of the man who had stabbed him in New York City that he pleaded with the parole board for leniency. The board nevertheless denied parole. See *id.*

¹⁷⁰ See *supra* text accompanying notes 95-102.

the perceived risk of increased liability. The focus of these civil mediations therefore remains on compensation.

Commercial matters are rarely if ever resolved by apology.¹⁷¹ The factors that account for this result include the minimal emphasis on emotional harm¹⁷² and the impersonal nature of relationships between parties at the mediation, as well as lawyers' involvement and the focus on financial compensation. Even if a happy-ending apology could reconcile parties, the possibility is beyond the scope of commercially legitimate goals of maximizing profit (or maximizing business development in order to maximize profit). Apologetic ritual thus seems out of place in commercial mediation.

In contrast, apology seems to be well suited to employment disputes.¹⁷³ The mistreatment or discharge of an employee from work likely entails emotional harm; and, at least from the employee's perspective, the alleged offender is an individual, probably a co-worker or supervisor, who either harassed or undervalued the employee. Indeed, apologies may go a long way to resolving such disputes at an early stage.¹⁷⁴ As these disputes escalate, however, the injured employee's focus shifts from the past or ongoing insult to coping with the future. Particularly in cases of discharge, long-term loss of wages and benefits and inability to find substitute employment become more pressing concerns than dignitary injury. Thus, over time, compensation takes priority over forgiveness.

¹⁷¹ See Telephone Interview with David Hoffman, *supra* note 32; Gabriella Stern, *GM-VW Dispute Is Still Far From Over*, *Wall St. J.*, Dec. 2, 1996, at A3 (discussing importance to GM of obtaining apology in its corporate espionage dispute with VW); Telephone Interview with Judge Kathleen Roberts, *supra* note 33. But see Telephone Interview with Jacqueline Nolan-Haley, *supra* note 109 (stating that apology may move discussions forward in some commercial small claims mediations depending on parties' culture and experience of dignitary offense).

¹⁷² Even if breach of contract or other business disputes involve feelings of betrayal and disappointment, these feelings are likely to be repressed or regarded as less important than the money-making or other entrepreneurial goals that seem more legitimate in a business context.

¹⁷³ See, e.g., Telephone Interview with David Hoffman, *supra* note 32 (stating that desire for apology occurs most commonly in employment disputes).

¹⁷⁴ See *supra* notes 104-07 and accompanying text (discussing timing of apologies). Mediator Rita Anita Linger recalled one discrimination case brought to mediation before any lawsuit was filed in which apology led to resolution. Though the offending supervisor did not participate, the director of the agency where the employee worked apologized for the supervisor's behavior and promised to set up a system to prevent future discrimination. The employee felt she was made to feel she was truly wanted at the job. Linger said the employee continues to work at that workplace though her supervisor has since left. See Telephone Interview with Rita Anita Linger, *supra* note 60. Notably, this was a rare instance in which a third party who was only indirectly implicated in wrongdoing was able to apologize effectively.

Tort claims such as personal injury and medical malpractice seem even better suited to apology than employment claims insofar as the focus of the parties is on past loss more than on future opportunity.¹⁷⁵ While tort plaintiffs, like employment plaintiffs, are entitled to compensation, the relationship between monetary compensation and the injury may be much more attenuated in tort cases.¹⁷⁶ Though money compensation may ease the day to day lives of tort victims, it may fail to resolve feelings of anger and helplessness.

In a products liability case, for instance, an apology might have a particularly salutary effect on an injured person or her family.¹⁷⁷ Imagining an effective corporate apology, Professor Tavuchis writes:

[A]n apology from the Many to the One as a sign of genuine remorse may be likened to a sweet dream come true. . . . [I]s there anyone among us who has not suffered some scarring indignity or unforgettable harm at the hands of an unresponsive, callous, or hubristic collectivity? . . . [W]hen voluntarily given, collective acknowledgment of an injustice to an individual in the form of an apology is a singular and humane achievement. It is rendered all the more so, since, historically, its negative manifestations—coercion, evasion, insensitivity, or just plain indifference—have been the hallmarks of corporate dealings with aggrieved individuals.¹⁷⁸

Thus, in a products liability action, where the plaintiff feels victimized by a much more powerful entity, apology would show unprecedented respect.

In professional malpractice, as in products liability, a more powerful actor injures a helpless victim. For example, in a doctor-patient

¹⁷⁵ In a study of insurance claim adjustment, H. Laurence Ross observed:

Bodily injury negotiation is almost entirely concerned with the past, thus ruling out many types of threats and promises as effective negotiating tools. For example, although employees can threaten to change their work patterns, it is difficult to threaten the opponent in bodily negotiation with a possible change in the manner of occurrence of the accident.

H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustments* 143 (1970).

¹⁷⁶ See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. Rev.* 754, 795-96 (1984) (identifying attenuated relationship between damages and injured person's unfulfillable goal "to be returned to the same physical, psychological, social and economic state she was in before the accident occurred").

¹⁷⁷ The Massachusetts Legislature may have recognized victims' needs for emotional validation when it passed the following evidentiary rule: "Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action." *Mass. Gen. Laws Ann.*, ch. 233, § 23D (West Supp. 1997).

¹⁷⁸ Tavuchis, *supra* note 38, at 91. But see *supra* note 100 (discussing impracticability of corporate apology).

relationship, the doctor is empowered by knowledge and specialized skills, while the patient is rendered doubly vulnerable by illness itself and by the need for the doctor's intervention. Moreover, the patient sacrifices physical and emotional privacy in order to receive the benefit of professional expertise.¹⁷⁹ The patient's dependence puts pressure on the doctor-patient relationship that requires more than mere medical proficiency from the doctor. If the doctor fails to fulfill the needs or expectations of the patient, the patient is likely to feel hurt by the doctor.¹⁸⁰ Ann J. Kellett, a registered nurse, argues that while "patient injury is the precipitating factor that motivates patients to seek a malpractice claim, . . . anger and other factors predispose patients to bring suit."¹⁸¹ Indeed, she continues, "[t]o patients, how a physician 'treats' them on an interpersonal level is often more important than the medical treatment received."¹⁸² If doctors and other professionals apologized for their patients' (or clients') suffering, they might be able to avoid malpractice claims.

In spite of the perception that an apology early on could appease malpractice claimants and that an apology for injury might reduce the intangible pain and suffering that elevates other tort awards, as in the employment setting, apology is unlikely by the time the dispute reaches mediation.¹⁸³ Once lawyers become involved, the client's need for emotional recompense is likely to be diverted towards a focus on monetary relief.¹⁸⁴ Moreover, even though the party representative at the table may have settlement authority, the defendant's lawyer or insurance adjuster does not bear the personal responsibility for wrongdoing and thus her apology would not be poignant enough

¹⁷⁹ See generally Kellett, *supra* note 106, at 112-22 (describing doctor and patient perspectives in greater detail to demonstrate psychological sources of conflict).

¹⁸⁰ These observations apply equally to the lawyer-client relationship as well as to other fiduciary relationships. See, e.g., *id.* at 128 (comparing lawyer-client and physician-patient relationships).

¹⁸¹ *Id.* at 123.

¹⁸² *Id.*

¹⁸³ See Telephone Interview with David Hoffman, *supra* note 32 (citing no cases where tort defendant apologized); Telephone Interview with Judge Kathleen Roberts, *supra* note 33 (same).

¹⁸⁴ See Wagatsuma & Rosett, *supra* note 3, at 464:

The relative absence of apology in American law may . . . be connected to the legal system's historic preoccupation with reducing all losses to economic terms that can be awarded in a money judgment and its related tendency either not to compensate at all or to award extravagant damages for injuries that are not easily reducible to quantifiable economic losses.

See also Kellett, *supra* note 106, at 124 ("Lawyers . . . transform physician-patient disputes into lawsuits by focusing on the precipitating injury, rather than the underlying emotions and needs.").

to move the injured party to forgiveness.¹⁸⁵ Thus, as in employment disputes, by the time parties reach the tort mediation, any impetus toward apology is likely to give way to interests in tangible compensation. Finally, then, in mediations of commercial, employment, and tort cases, compensation trumps forgiveness, and happy-ending apologies remain rare.

Nevertheless, lawyers sensitive to a client's desire for apology or reconciliation in a particular case might rethink the seeming mutual exclusivity of apology and optimal damages. By finding a way to accommodate expressions of sincere regret, lawyers may increase party satisfaction without monetary loss. As the nurse-doctor example showed, happy-ending apology and reasonable damages need not be mutually exclusive.

CONCLUSION

In recent news, such prominent litigants as General Motors, in its trade secret dispute with Volkswagen,¹⁸⁶ and Paula Jones, in her sexual harassment action against President Clinton,¹⁸⁷ have made public their demands for apology. Legalistic habits and skepticism about "soft" solutions to hard conflicts condition lawyers to ignore such demands. Meanwhile, prominent scholars in the dispute resolution world have waved the banner of apology¹⁸⁸ without developing a sustained theory about the mechanisms and limits of the apology/forgiveness ritual.¹⁸⁹ This Note is a first attempt to launch a vocabulary that can serve in future discussions and research on the potential of apology.

This Note began with a parable on the virtues of apology in mediation and set forth several rationales for enlarging the role of apology in American dispute resolution ranging from the ability of apology to reconcile parties to the claim that more frequent apologies would improve society. Recognizing that apologies may facilitate satisfying conflict resolution in certain cases but cautioning against generalizations about the power of a simple "I'm sorry," Part I.B. sought to identify a particular category of expression that would justify the apologists' hopes. Certain sincere expressions of regret and responsibility

¹⁸⁵ See Telephone Interview with David Hoffman, *supra* note 32; see also *supra* note 100 and accompanying text (discussing inability of representatives to apologize for parties).

¹⁸⁶ See Andrews, *supra* note 102; Stern, *supra* note 171.

¹⁸⁷ See Scot Lehigh, *Doing the Smart Thing; A Clinton Apology-of-Sorts Would Be a Good Way to End Paula Jones Suit*, *Boston Globe*, Jan. 19, 1997, at E1 (discussing statement desired by Jones and urging President to apologize and settle sexual harassment suit).

¹⁸⁸ See *supra* notes 2-9 and accompanying text.

¹⁸⁹ See *supra* notes 48-54 and accompanying text.

for injury, one of four proposed categories of apologetic gesture, may lead to happy endings. Part I.C. illustrated the power of apology with the doctor-nurse example. Using this example as a springboard, this Note explored how thinking about apology as exchange, and particularly as ritual, helps to account for apology's role in transforming relationships. Given the importance of apology in some cases, lawyers and mediators should not overlook apology.

However, sincerity of expression is not an easy formula for a happy ending. Part II catalogues a number of factors that contribute to the rarity of happy-ending apology in real cases and that render misguided blanket prescriptions to pursue apology. Apologetic ritual is a delicate process that requires the participation of suitable parties, the absence of obstructive lawyering, well timed gestures and sensitive intervention, a climate that permits honest, vulnerable communication, efforts to reconstruct past events rather than letting wounds fester over time, and a belief that apology will not preclude satisfaction of stronger desires for compensation, restitution, or retribution.

Mediators and lawyers may help create conditions favorable for apology. They may raise parties' self-esteem and cultivate sensitivity to interpersonal interaction in bargaining situations. They may craft apologetic language that conveys the sincere regret that may heal relationships while avoiding full admission of liability. They may intervene in disputes before adversarial habits become fixed or they may teach alternatives to purely strategic communication. They may reexamine the necessity of portraying compensation and forgiveness as mutually exclusive. Most importantly, they may spurn the extremes of blind optimism and harsh skepticism in continuing to study the role of apology in mediation.

APPENDIX: THE MEDIATORS

Tom Christian recently retired from his position as state coordinator of the New York Community Dispute Resolutions Program in Albany, New York. Over his last sixteen years with the program, he specialized in mediating minor criminal matters and screening for and conducting victim-offender mediations.

David Hoffman mediates employment, family, and other civil disputes at Hill & Barlow, a Boston law firm. A former chair of the Alternative Dispute Resolution (ADR) Committee of the Boston Bar Association, he co-authored the two-volume book, *Massachusetts Alternative Dispute Resolution*, and acts as an arbitrator for the American Arbitration Association and for J.A.M.S./ENDISPUTE.

Rita Anita Linger is program coordinator at the Community Dispute Resolution Center in Ithaca, New York, where she screens cases for mediation and mediates minor criminal matters and neighborhood and other community disputes.

Jacqueline Nolan-Haley, an associate professor at Fordham Law School, directs the Fordham Law School Mediation Center and runs a student mediation clinic that handles small claims disputes.

Gerry Roberts spent ten years mediating neighborhood disputes, landlord-tenant disputes, and some minor criminal matters with the Brooklyn Mediation Center. He currently works as a counselor with Victim Services in the Brooklyn Criminal Court.

Judge Kathleen Roberts mediates tort and commercial disputes with J.A.M.S./ENDISPUTE. A former federal magistrate, Judge Roberts is responsible for panel development, training, and evaluation as Director of Professional Services for J.A.M.S./ENDISPUTE and teaches as an adjunct professor at Brooklyn Law School.

John Sands, currently in solo practice in Montclair, New Jersey, specializes in mediating and arbitrating employment disputes. A lawyer by training, he has practiced mediation since 1972.

Margaret Shaw conducts employment mediations with the firm Wittenberg, MacKenzie & Shaw in New York City and teaches classes in Alternative Dispute Resolution as an adjunct professor at New York University School of Law.