Apology and Mediation: The Horse and Carriage of the Twenty-First Century

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I. INTRODUCTION

As students and practitioners of mediation, many believe strongly that mediation is almost always preferable to the traditional adjudicatory process in resolving disputes, especially disputes of an interpersonal nature. When trying to convince clients or colleagues that mediation is preferable to litigation, one of the more compelling arguments is that "[j]ustice is not usually something people get from the government."¹ Rather, the court system is "an alienating and estranging foray into a public forum that adjudicates but does not mediate [or reconcile], concludes but does not connect, and coerces but does not resolve the dispute or the pain of the disputants."²

Mediation, by contrast, can provide a private forum in which justice³ may be achieved. The parties can connect, face-to-face, to address the

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interests that underlie their dispute and to work to achieve resolution—to settle their differences. "Settlement is a process of reconciliation in which the anger of broken relationships is to be confronted rather than avoided... in which healing demands not a truce but confrontation... [and which] calls on substantive community values."^4

While reflecting on the mediation process and the ideals of settlement and reconciliation, two questions came to mind: (1) What is inherent in the mediation process that allows injured parties to resolve disputes and the pain or the anger that may accompany them?;^5 and (2) how do parties receive recognition for what they have gone through? The answer to both questions, in part, seems to be intuitive; one, or both parties can say, "I'm sorry." Apology seems to be the fundamental means for resolving disputes and addressing the anger or hurt feelings that attach to broken promises or unkind actions or words. Recognition for a victim's pain and suffering seems to lie at its very core.

Research in the legal literature reveals a small, but growing, body of work on apology. However, the literature tends to examine apology very narrowly, usually in legal or economic terms—"an item [commodity] to offer in a bargained-for exchange."^6 These writings do not address issues such as

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^4 McThenia & Schaffer, supra note 1, at 1664. Substantive community values appear to be those intrinsic principles, beliefs, or cultural traditions stemming from religion and the community of people living and working together; these are the values that lay at the core of human relationships—honesty, trust, and right and wrong. They are enduring, permanent, and essential to the individuals.

^5 The topic of this Article took shape after reading a legal case study of the Sabia family. BARRY WERTH, DAMAGES 359 (1998). It was striking that, throughout a protracted legal process, the family's simple need for recognition was totally overlooked. It seems that a simple apology could have met this need.

Here was Tony's final, consuming plaint: The world had no idea how he and Donna and Little Tony had suffered, and that ignorance itself was the larger crime, even more than whatever had been done to them in the first place.... He wanted Travelers to pay, dearly. But what he seemed to want even more was a formal recognition of what his family had been put through...

^6 Lee Taft, Apology Subverted: The Commodification of Apology, 109 YALE L.J. 1135, 1146 (2000). Taft acknowledges and opposes the use of apology as a commodity: "[A]pology is frequently commodified in the legal arena, where a moral process can become a market trade." Id. Taft cites a Missouri Supreme Court case, In re Coe, 903 S.W.2d 916 (Mo. 1995), in which a Missouri attorney, who was held in contempt and ordered into custody, had the contempt decree vacated after she apologized. The same
reconciliation or resolving feelings of anger or pain adequately. Thus, the key
to understanding how apology can resolve disputes, foster reconciliation, and
begin the healing process for the victim must be found in the social sciences’
literature. This Article draws from that body of literature and examines
apology as a moral\(^7\) force—a force that can help make injured parties whole
in a way that legal remedies and economics cannot. When coupled, apology
and mediation may be the horse and carriage of the twenty-first century—a
vehicle for change in the legal process.

Specifically, this Article explores the role that an authentic apology\(^8\) can
play in the dispute resolution process to help resolve the conflict, and lessen
or eliminate the associated pain to help make the victim whole. Section II,
dissecting the apology, examines the various components of the apology.
Through this process, the reader will gain a fundamental understanding of
apology and its dependence on cultural context, the evolution of its meaning,

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\(^7\) Taft, supra note 6, at 1142 ("Apology is [a] moral [act] because it acknowledges
the existence of right and wrong and confirms that a norm of right behavior has been
broken.").

\(^8\) "Apology," when used throughout this Article, refers to an authentic apology, in
which the giver of the apology’s effect is sincere, he accepts responsibility for his
wrongdoing, and the apology is heartfelt and accompanied by remorse. See Deborah L.
Professor Levi describes four variations/types of apology. Id. First, in a tactical apology,
the offender’s attorney acknowledges the victim’s suffering to gain credibility during
negotiations and to influence the victim’s bargaining behavior. Id. at 1172–73. The
attorney wants to create an atmosphere of trust and goodwill to encourage concessions by
the victim; there is no acceptance of wrongdoing. Id. Second, in an explanation apology,
the party excuses his or her behavior, again with no acceptance of wrongdoing; if the
offender is forgiven, it is only because the victim credits the offender’s explanation. Id. at
1173. Third, in a formalistic apology, the giver capitulates to the demand of an authority
figure and offers an apology to restore harmony; there is no remorse. Id. at 1174. Finally,
in a happy-ending apology, the giver accepts responsibility and expresses regret for his or
her act. Herein, this is described as an authentic apology. Id. at 1174–75. Only authentic
apologies can achieve the desired outcome of resolving disputes and the accompanying
pain.
and the process for giving an authentic apology. Section III discusses the inherent value of apology in dispute resolution—why and how apology works to provide the formal recognition that parties may be seeking. This Section explores the relationship between apology, culture, and psychology. The hypotheses are that: (1) the extent to which apology works depends upon whether it is valued by the culture of the victim and offender; and (2) if valued, the intrinsic potential of apology lies in its ability to restore the moral balance of power between victim and offender which is achieved through an exchange of shame and power. The offender "seeks to take the shame for the wrong and give the person wronged the power to forgive."\footnote{Daniel W. Shuman, The Role of Apology in Tort Law, 83 JUDICATURE, Jan.–Feb. 2000, at 180, 183.} This Section and the Article, as a whole, explore the impact of apology by focusing on the parties—the giver\footnote{"Giver" refers to the one who has committed the offense and is offering the apology.} and the receiver,\footnote{"Receiver" refers to the victim of the offense or the receiver of the apology.} their relationship, and the moral community in which they co-exist. Section IV provides an explanation of why, despite its tremendous potential for dispute resolution, apology is too infrequently utilized in the legal system. After examining the possible forums for the use of apology, Section V concludes that, if apology is to become part of the legal system, mediation is the appropriate forum for its use. However, the mediation process is not problem-free, and this Section closes with considerations and suggestions for attorneys and mediators that may minimize their concerns.

II. DISSECTING THE APOLOGY

A. Definition

To understand the value of the role that apology can play in dispute resolution, it is helpful to begin with an exploration of what apology is.

\footnote{Cf. Carley H. Dodd, DYNAMICS OF INTERCULTURAL COMMUNICATION 38 (1987). Dodd defines culture as "the total accumulation of many beliefs, customs, activities, institutions and communication patterns of an identifiable group of people. This definition moves through a continuum, from cognitions and beliefs about others and self, including values, to patterns of behavior." Id.}
"[A]pology is, first and foremost, a speech act" that is given "to someone... for something."

The definition of apology evolved subtly over time with subsequent definitions providing alternative meanings, all of which apply today. Apology was originally derived from the Greek word apologia—a speech or argument made in defense of one's actions. Initially, it was offered to vindicate oneself from an accusation. Another early definition stated that an apology was offered as an excuse or justification for a course of action. Neither definition contained the element of remorse, nor acknowledgement of offensive behavior toward another. Under these early definitions, the offender received the benefit from the apology. It cast him or her in a better light. Finally, apology has been defined as an acknowledgment intended as atonement for an injurious remark or act—an admission from one person to another of a wrong, accompanied by an expression of regret. This is the definition of an authentic apology, which is the focus of this Article.

Even if, by one definition, an apology defended, justified, or excused one's actions, "its modern meaning and usage have shifted so that now an apology begins where these former rhetorical and essentially self-serving forms leave off." When an authentic apology is offered, the giver declares that he or she has no defense, excuse, or justification for having wronged another. Nicholas Tavuchis, a sociologist who has written extensively on apology, notes that while apologies can be used to defend, justify, or excuse actions, "its modern meaning and usage have shifted so that now an apology begins where these former rhetorical and essentially self-serving forms leave off." He explains that apologies can be seen as an attempt to make amends by acknowledging the wrong done and expressing regret.

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14 TAVUCHIS, supra note 13, at 13.
15 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 101 (unabr. ed. 1971). This is similar to Levi's explanation apology, which is given to excuse offensive behavior. Levi, supra note 8, at 1173.
17 Id.
18 TAVUCHIS, supra note 13, at 17 (emphasis added). It is this definition, accepting responsibility for one's actions and expressing regret, upon which this Author shall rely when referring to apology.
19 Compare Mark Bennett & Christopher Dewberry, "I've Said I'm Sorry, Haven't I?" A Study of the Identity Implications and Constraints That Apologies Create for Their Recipients, CURRENT PSYCHOL., Spring 1994, at 10, 11 ("An excuse seeks to deny responsibility for an undesirable event... A justification accepts responsibility but attempts to recast it in a positive light..."), with Barry R. Schlenker & Bruce W. Darby, The Use of Apologies in Social Predicaments, 44 SOC. PSYCHOL. Q. 271 (1981) (referring to justifications and excuses as accounts, which are remedial attempts to explain away undesirable events).
Apology and reconciliation, has synthesized the fundamental requirements of an authentic apology down to just two: (1) being sorry for some harm you have caused to another; and (2) saying so.\textsuperscript{20} Thus, an apology is an act of speech expressing sorrow to the victim for admitted wrongdoing.\textsuperscript{21}

**B. The Process of Apology**

Despite having only two basic requirements, apology appears to be a tripartite process for the giver. The giver must:

1. acknowledge that a legitimate rule, moral norm, or social relationship was broken;\textsuperscript{22}
2. accept responsibility for the violation, thereby conveying an understanding of the nature of the wrongdoing and the impact that it had on the receiver;\textsuperscript{23} and
3. express regret by communicating guilt, anxiety, shame,\textsuperscript{24} or sympathy\textsuperscript{25} for having done so.

Offers of repair or promises of reform often accompany apology. However, it may not be essential for the giver to verbalize such offers if, by culture, one who apologizes implicitly seeks forgiveness and redemption for his or her acts.\textsuperscript{26}

\textsuperscript{20} TAVUCHIS, supra note 13, at 31.
\textsuperscript{21} Taft, supra note 6, at 1154.
\textsuperscript{22} TAVUCHIS, supra note 13, at 13.
\textsuperscript{23} Peter Rehm & Denise R. Beatty, Legal Consequences of Apologizing, 1996 J. DISP. RESOL. 115, 116. The authors also state that it is necessary to communicate that the offense was not intentional. Id.; see also Aaron Lazare, Go Ahead, Say You're Sorry, PSYCHOL. TODAY, Jan.–Feb. 1995, at 40, 42.
\textsuperscript{24} Rehm & Beatty, supra note 23, at 116.
\textsuperscript{25} Compare Jonathan Cohen, Advising Clients to Apologize, 72 S. CAL. L. REV. 1009, 1015 (1999) (stating that an expression of sympathy for the other’s injury is also necessary), with TAVUCHIS, supra note 13, at 36 (asserting that such communications are not necessary).
\textsuperscript{26} TAVUCHIS, supra note 13, at 36. Tavuchis believes that promises of reform are redundant, as “they are implicit in the state of ‘being sorry.’” Id. He is at odds with Lazare, a psychiatrist, who states that words of apology are not enough and that an offer of some sort of reparation must be made. Compare Lazare, supra note 23, at 42, with John O. Haley, Apology and Pardon, Learning from Japan, AM. BEHAV. SCIENTIST, Mar. 1998, at 850 [Hereinafter Haley, Apology and Pardon] (In Japan, “the external act of apology becomes significant as an act of self-denigration and submission’ in which the ‘relational elements’ of Japanese culture are given expression as a ‘commitment to a positively harmonious relationship in the future in which the mutual obligations of the
Acknowledging the legitimacy of the rule or moral norm that was broken is, however, a critical component for the giver across cultures. Social order depends on individual and societal commitment to norms that establish standards of social behavior and cultural expectations. "An apologizable breach[, an action that challenges one’s membership in a moral community,] thus constitutes a threat to such an order," to the giver’s membership in and connection with the community, and to the individual’s identity. Therefore, through apology, the giver acknowledges the violation of the moral norm, seeks to re-affirm shared values with the receiver, and looks for re-certification of membership in the moral community. “Only when an individual ‘sincerely’ acknowledges his transgression against the standards of the community does the community take him back.” Thus, the act of apology can be significant in its own right “as an acknowledgment of the authority . . . upon which social harmony is based.”

C. The Cultural Context of Apology

Apologies deal with the reality of human interaction. Through apology, “we encounter broadly shared social behavior that is a mix of habit, expectations, and underlying values.” It “may be a crucial element in the social hierarchy will be observed.” (quoting Hiroshi Wagatsuma & Arthur Rosett, The Implications of Apology: Law and Culture in Japan and the United States, 20 LAW & SOC’Y REV. 461, 478 (1986)); see also John O. Haley, Victim-Offender Mediation: Japanese and American Comparisons, in RESTORATIVE JUSTICE ON TRIAL 119 (Heinz Messmer & Han-Uwe Otto eds., 1992). Victim restitution and compensation are so intrinsic and natural in Japan that most people take such responses for granted. Id. These patterns recur continuously in Japanese social life. Id. 

27 TAUVUCHIS, supra note 13, at 12.
28 Id. at 23.
29 Id. at 12–14.
30 Lazare, supra note 23, at 42.
31 See generally Letitia Hickson, The Social Context of Apology in Dispute Settlement: A Cross-Cultural Study, ETHNOLOGY, Oct. 1986, at 285–86; TAUVUCHIS, supra note 13, at 27; Bennett & Dewberry, supra note 19, at 11 (noting that an apology focuses not on the causes or reasons for violating a rule but on the actor). An apology indicates to the audience that a rule has been violated, that the actor regrets the violation, and that it is not a valid representation of his or her character. Lazare, supra note 23, at 42.
32 Wagatsuma & Rosett, supra note 26, at 472.
33 Id. at 473.
34 Haley, Apology and Pardon, supra note 26, at 843.
recognition and restoration of human relationship[s]." To more fully appreciate why apology is valued and how it can play into the dispute resolution process, it is helpful to explore its cultural basis briefly.

A group’s set of basic assumptions about methods of problem-solving are “taught to new members as the correct way to perceive, think, and feel in relation to those problems.” Apologies speak to the shared basic assumptions that cultures rely upon to establish moral boundaries. Thus, apology may be considered normative behavior, a cultural value.

Apologies, like so many other communication strategies, begin at home. They are one of a bevy of what some linguists call speech acts and are used to keep relationships on track [as they have little meaning independent of human interaction]. Each cultural group has its own customs with regard to conversational formalities, including conventionalized means of repairing disruptions.

1. The Acquisition of Apology

“Culture is generally accepted to be learned rather than inherited.” The evidence suggests that “culture is group-oriented—a social phenomenon with learning occurring through role models, usually teaching by example.” Thus, norms of behavior are not formally taught; children learn, in large part, as a by-product of participation in the adult environment. The characteristics of a group and its norms of social behavior are observed and can be presumed to influence the child’s subsequent behavior.

35 Wagatsuma & Rosett, supra note 26, at 461.
37 TAVUCHIS, supra note 13, at 13. Tavuchis asserts that “apologies register tensions and displacements in personal and public belief systems, that is . . . what calls for an apology and what does not—that either precede or follow changes in social behavior and cultural expectations.” Id.
39 DODD, supra note 9, at 38.
40 Id.
41 Hickson, supra note 31, at 289.
42 Id. (describing experiential learning, an informal process whereby learning takes place as a result of observation or participation in the environment).
By observing adult behavior, children learn what constitutes an appropriate form of apology, its effects, and when one should expect to give or receive an apology. Children also gain a sense of the value attached to apology based upon their observation of the role it plays in their culture. As a result of the observed adult behavior, a child may become more, or less, inclined to use apology.

The speed at which apology becomes incorporated into a child’s normative behavior can be explained by cognitive development theory. Cognitive capacity develops through the “reorganization and expansion of prior capacities by means of the assimilation of new experiences and skills.” A child continually will adapt to new experiences; however, he or she “cannot utilize experiences which his [or her] cognitive capacities are not yet ready to assimilate.” Thus, the acquisition of social, emotional, and intellectual knowledge is interdependent and constitutes a gradual and continual developmental process. It is a step-like growth process, resulting from the child’s interaction with the environment. “The sophistication of the child’s representation of the world is a function of his stage of development.”

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43 Theodore Lidz, The Person: His Development Throughout the Life Cycle, 84–85 (1968). This information is based on the work of Jean Piaget, who studied child development for more than forty-five years. Piaget divided cognitive development into four major periods. Id. at 84. The sensori-motor period (birth through eighteen months) covers pre-verbal intellectual development. Id. The child uses internalized visual and motor symbols to solve problems on a very simple level. Id. In the pre-operational period (eighteen months to school age), the child develops the ability to use symbols and language. Id. He or she does not have the ability to appreciate the role of another or adapt to the needs of the other. Id. He or she cannot appreciate contradictions or construct a chain of reasoning. Id. The period of concrete operations follows (school age to the onset of puberty). Id. at 84–85. The child acquires a coherent cognitive system. Id. He or she can understand the world, work in it, and incorporate new experiences. Id. at 85. The final stage is the period of formal operations; it begins in early adolescence. Id. The young person is capable of higher-level conceptual thinking and formal operations. Id. Egocentrism decreases as the child progresses through these stages, allowing him or her to form interpersonal relationships with peers and other people. Id.

44 Id. at 82.
45 Id. at 82–83.
46 Id. at 82–85.
47 Guy R. Lefrancois, Psychological Theories and Human Learning 259 (1972).
48 Id.
Child development specialists Irwin and Moore researched the cognitive understanding of cultural standards and interpretation of rules in situations of moral conflict. When presented with several apology-restitution stories in which one character takes something belonging to another and then apologizes, returns the object, does both, or does neither, the child is asked to choose the character with whom he or she is most angry. The results showed that children were less angry with those who either apologized or made restitution than with those who did neither.

From age-group testing, Irwin and Moore concluded that children develop a conventional notion of social justice as early as age three, with restitution emerging in the child's moral repertoire before apology. By school age, children begin to recognize the superiority of the apology over no show of remorse. Clearly, the acquisition of apology as normative behavior is a gradual process for children.

2. The Use of Apology

"[C]ultures differ in the extent to which their members stress apology as a redressive technique." A key difference stems from the relationship of the

49 Irwin & Moore, supra note 13, at 406.
50 Id. at 407.
51 Id. at 409.
52 Id. at 406–10. Their conclusion was based on repeated testing of children of various ages. Id. at 410. In the earlier pre-operational stage, children responded that, if a dispute arose after one character took another's toy, the offender should give the toy back to resolve the dispute (restitution). Id. at 408–09. In the concrete operational stage, older children comprehended the need to apologize and make restitution by giving the toy back. Id.
53 Id. at 406.
54 See LIDZ, supra note 43, at 85. This can be explained in part by Piaget's developmental theory suggesting differences between the pre-operational and concrete operations developmental stages. Id. at 84–85. Restitution is largely a motor act. It is physical, observable, and something a child is capable of understanding in the earlier pre-operational stage. Apology is a moral judgment, a verbal act and not fully understood until later in the concrete operations stage. Thus, the ability of older children to understand and use apology is related to the acquisition of a coherent cognitive system. Id. at 85. The child's decreasing egocentrism and increasing ability to form reciprocal, peer relationships also influence the increasing use of apology with age. Id. The ability to form and value peer relationships is the basis of membership in a moral community. Id.
55 Hickson, supra note 31, at 283 (basing her conclusions on studies of the Fijian culture).
individual to the group. "The relationship between the individual and the collectivity in human society is not only a matter of ways of living together, but it is intimately linked with societal norms (in the sense of value systems of major groups of the population)." 56

In hierarchical cultures, relationships often involve kinsmen, or close-knit groups or networks, and the continuation of the relationship is vital for social and economic reasons. 57 The maintenance of the societal relationship "is too important to be tested by potentially alienating methods of dispute settlement such as litigation." 58

By contrast, individually-oriented cultures, such as that of the United States, value individual autonomy and choice. 59 "An emphasis on individual autonomy ... is likely to lead to the vigorous assertion of narrowly defined personal interests that will appear [to be] in polar conflict with the rights of others." 60 These cultures tend to place less emphasis on apology and are less inclined to use it for dispute resolution—choosing instead litigation. 61 Therefore, the natural developmental tendency toward greater understanding and use of apology is somewhat derailed in such individually-oriented cultures. "[Apology] is something every eight-year-old knows, yet somehow it tends to be swallowed up during adult... discussions of law and business." 62

After considering this nexus between apology and cultural values, it is reasonable to conclude that, in collectivistic cultures where relationships are a key part of the societal framework, apology has greater inherent value to its members. And, if apology is "a crucial element in the recognition and restoration of human relationship[s]," 63 it is more likely to be effective and more readily used to resolve disputes. However, it does not necessarily

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56 GEORGE HOFSTEDE, CULTURES CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES 213 (1980).
57 Hickson, supra note 31, at 285.
58 Id.
59 See generally HOFSTEDE, supra note 56 (Figure 5.1 reveals that the United States has the highest individualism index of all countries surveyed. Figure 5.5 lists the individual traits that are common in highly individualized societies. An examination of those traits reveals traits that are supportive of a cultural bias towards litigation).
60 Wagatsuma & Rosett, supra note 26, at 493.
61 Id. at 464 ("In the United States, the relative absence of recognition of apology may be related to the observed tendency of American society to overwork formal legal processes and rely too heavily on the adjudication of rights and liabilities by litigation.").
62 Id. at 493.
63 Id. at 461.
follow that an authentic apology cannot play an effective role in resolving disputes in individually-oriented cultures, where relationships play a lesser role in the societal framework and apology may have less value.

III. THE VALUE OF APOLOGY IN DISPUTE RESOLUTION

Having established a basic understanding of apology and its cultural context, it is necessary to explore the positive impact of apology on the dispute resolution process. This Section will focus on how apology impacts the various elements of the dispute resolution process.

A. How Apology Works: The Psychological Impact Can Restore the Moral Balance of Power Between the Parties

"Apologies only account for that which they do not alter."64 They do not and cannot undo damage that has been done;65 however, apologies address acts that cannot go unnoticed without compromising the legitimacy of the violated rule, the present or future relationship of the parties, and the giver’s membership in the moral community.66 While unable to change the past, apology can “transmute trespasses and prevent them from becoming permanent obstructions to social relations” through its regenerative power.67 “The past is not erased, but the present is changed.”68

Consider the following true story. After a particularly lengthy and ugly divorce, Pat and her ex-husband, Steve, severed all ties. They did not speak for more than ten years. Their daughter was not permitted to mention her father in her mother’s presence. At the daughter’s high school graduation, Steve complimented his “ex” on the fine job she had done in raising their daughter. During this conversation, he apologized for the pain he had caused by his unfaithful behavior during their marriage and for his actions at the time of the divorce. His apology had a profound impact on their relationship. While it did not alter past events, they were able to resume communication regarding their daughter, and both parents are now able to attend special

64 Benjamin Disraeli, speech (July 28, 1871), quoted in TAVUCHIS, supra note 13, at 5.
65 TAVUCHIS, supra note 13, at 5.
66 Id. at 13.
67 Id. at 6.
events together with her without the previous tension and hostility. Within two years of the apology, Pat was able to let go of her anger and bitterness. She was able to reach closure with her past and move forward.69 She met and married a wonderful man and appears to have resumed her life.

This type of transformation may occur for several reasons and is effected by both the giver and the receiver. To better understand the post-apology psychological transformation that occurs, the following discussion will be divided into three parts: (1) the psychological impact of apology on the giver and receiver; (2) apology’s impact on their relationship; and (3) its impact on social or cultural norms.

1. Apology’s Impact on the Giver and the Receiver

To understand how apology works, the impact on the giver and the receiver must be discussed jointly; there can be no discussion of the value to one party to the exclusion of the other.70 Furthermore, apology must be examined in the appropriate context—utilizing a social or moral model in which apology serves as a corrective ritual enveloping both parties, as opposed to a legal or economic model in which apology operates as a bargained-for exchange71 between the parties.

As stated earlier, an apologizable event challenges the giver’s membership in the moral community; it changes how the receiver and community view him or her. The event also adversely effects the receiver’s image of him or herself. If the moral balance of power that allows the giver and the receiver to deal with each other on an equal footing is disrupted, a power imbalance is created in favor of the giver. This accounts for the

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69 At an airport recently, a fellow traveler, a psychiatrist at a well-respected medical center, struck up a conversation with the Author. While discussing this Article, he stated that, after traumatic personal events, victims often tend to engage in self-blame, even if they believe that they did nothing wrong. As a result, they suffer great angst and loss of self-esteem, and adult behavior may either halt or regress. An apology allows the victim to assign blame correctly, release anxiety, and come to closure with the event. The victim can then move forward with his or her life. He cited criminal cases and divorce as the most common scenarios because of the personal nature of the offense.

70 TAVUCHIS, supra note 13, at 46.

71 Levi, supra note 8, at 1177. Levi states that the bargained-for exchange model depends on the offender taking responsibility and the victim offering forgiveness. The apology is regarded as the object of the exchange. Id. This type of model collapses apology into quantitative terms and is problematic because it is difficult to predict an apology’s influence on any dispute in monetary terms and whether it would have equal value in another case. Using a moral model avoids this problem.
receiver's lower self-esteem, loss of self-concept, anger, aggression, distrust, guilt, and pain. By viewing the receiver as a victim suffering from a loss of self-concept, "our story about ourselves," it is easy to perceive him or her as weak and powerless.

Apology, however, addresses the giver's "fall from social grace related to [the victim]—the only one—who has the power to restore the offender to that state." If the giver of the apology is dependent upon the receiver for forgiveness, the tables are turned; the giver is actually at the mercy of the receiver. Through the apology, the receiver is empowered, for he or she alone has the ability to accept or reject the apology and to forgive. In this way, the moral balance of power potentially can be restored.

"[T]he restoration of a harmonious relationship is attained by the denial of one's self-serving and self-preserving tendencies." Thus, to correct the power imbalance, the giver must begin by acknowledging and painfully embracing his or her deeds and admitting wrongdoing. By admitting wrongdoing, the giver of the apology begins to take responsibility for the results of his or her actions. As the giver's responsibility increases, shame increases, and the giver begins to experience some of the loss of self-esteem that the victim has experienced. Conversely, the victim's burden of responsibility decreases, and his or her self-esteem and identity begin to rebound. The balance of power slowly starts to shift. "Apology is a form of non-coercive power-balancing enacted by parties in which the powerful offer their vulnerability and through recognition, the injured/humiliated are empowered."

After accepting responsibility, the giver then must express sorrow or regret. The expression of sorrow for the violation is central to apology; it is

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72 Lazare, supra note 23, at 42.
73 TAVUCHIS, supra note 13, at 18.
74 Wagatsuma & Rosett, supra note 26, at 473.
75 TAVUCHIS, supra note 13, at 19.
76 Tannen, supra note 38, at 69.
78 Schneider, supra note 68.
79 Tannen, supra note 38, at 69; see Wagatsuma & Rosett, supra note 26, at 475 (suggesting that the expression of remorse for past hurt suggests a change in attitude on the part of the offender); see also Paul Lauritzen, Forgiveness: Moral Prerogative or Religious Duty?, 15 J. RELIGIOUS ETHICS 141, 145 (1987) (suggesting that, if the offender has experienced no change of heart, there is no reason to forgive).
apology's energizing force. The element of sorrow, often expressed as empathy for the victim, causes the giver to feel anxiety about the damaged relationship, guilt for having hurt the victim, shame for violating a moral rule, and loss of self-respect. Sorrow for having caused the victim to suffer helps to diminish or end the victim's pain; this occurs through the exchange of shame between the giver and the victim. This transfer of shame from the victim to the giver lies at the heart of forgiveness.

Through forgiveness, victims are able to release their feelings of corrosive anger toward givers. Forgiveness also allows victims to let go of their resentment that a moral harm has been done, or to at least contain it. Consuming resentment can cloud the victim's moral reasoning, effect behavior, and stifle personal growth. Forgiveness frees victims from the control and events of the past and allows them to move forward with life. Expressions of sorrow and forgiveness relieve givers of feelings of guilt and shame that they have harbored. When anger, guilt, and shame no longer act as a divide between the victim and offender, forgiveness can facilitate reconciliation.

Finally, apologies can help heal. Acknowledgment of the violation, coupled with an expression of regret or contrition, can have a profound effect on the victim. "If such expressions [in the form of apologies], are accompanied by a request for forgiveness, the healing process will be

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80 TAVUCHIS, supra note 13, at 122.
81 Lauritzen, supra note 79, at 143. Contrition on the part of the offender is of consequence because forgiveness is not merely the cancellation of a debt; it is also the restoration of a damaged relationship.
82 Lazare, supra note 23, at 42.
83 Id. at 42.
84 Id. at 41–42.
85 Cohen, supra note 25, at 1021.
86 Lauritzen, supra note 79, at 143.
88 Id.; see also Lauritzen, supra note 79, at 144. It is important to note that forgiveness, herein, is used in the psycho-social context. It refers to the cessation of resentment and not a release from liability.
89 McGary, supra note 87, at 343.
90 See Cohen, supra note 25, at 1021.
underway..."  

When we apologize... we stand naked. No excuses, appeals to circumstance, etc., can elicit that which alone can release, eradicate, and renew: forgiveness and, hence, redemption."

2. Apology's Impact on the Relationship

Apology sends a message of caring. It demonstrates caring for the victim simply by acknowledging that the violation has occurred. It removes the perception that the giver feels superior or is indifferent. Apology dispels the perception that the victim is being ignored. Thus, apology validates the victim. This causes the victim to have a more favorable impression of the giver and decreases negative feelings and feelings of anger or aggression toward him or her. "Apology mediates between frustration and aggression and can ameliorate an injured person's hostility toward the wrongdoer." A decrease in the victim's anger and hostility can prevent further deterioration of the relationship and escalation of the conflict. It also minimizes the desire for retaliation.

An authentic apology, coupled with the desire to make amends, "serves the crucial function of repairing relationships after injury" by restoring trust. Trust is essential for any continued or future relationship. Without an apology and an expressed desire to make amends, why should the victim...

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92 Id. This does not mean, however, that forgiveness and healing are instantaneous when an apology is given. As in the case of Pat and her ex-husband, this process may take years. Apology, however, starts the process. As noted by Tavuchis, specific requests for forgiveness need not always be made; they are implicit in apology. See TAVUCHIS, supra note 13, at 36.

93 TAVUCHIS, supra note 13, at 18; see also Wagatsuma & Rosett, supra note 26, at 473 ("[T]he restoration of a harmonious relationship is attained by the denial of one's self-serving and self-preserving tendencies.").

94 See Tannen, supra note 38, at 69.


97 Ohbuchi et al., supra note 77, at 222.

98 Wagatsuma & Rosett, supra note 26, at 477.


100 Wagatsuma & Rosett, supra note 26, at 462.

101 Schneider, supra note 68.
believe that the offender will not repeat the offensive behavior? Apology cements the relationship by reinforcing or repairing the damaged trust that is integral to interpersonal connections.\(^{102}\) Thus, repairing the frayed or severed relationship restores the balance of power between giver and receiver by helping the victim and the offender regain their internal needs for esteem and belonging (i.e., affiliation in the moral community).\(^{103}\) They are then capable of moving forward.

3. Apology’s Impact on Societal Norms

After an apologizable event has occurred, saying “I’m sorry” is important in and of itself. Not acknowledging that a rule, a norm, or an understanding of a social relationship was violated sends a message of not caring\(^{104}\) or apathy on the part of the offender. It is morally offensive.\(^{105}\) Apologies remove any doubt about apathy.\(^{106}\) A verbal demonstration of concern or caring for one’s fellow man emphasizes and reinforces the human values\(^{107}\) implicit to membership or “recertification” in any moral community. Without apology, recertification may not take place.\(^{108}\)

Apology is inextricably tied to human interaction and social behavior. It is morally right\(^{109}\) and a powerful social skill.\(^{110}\) Its effect on the human condition often can be magical. Through observation and experience,
members of any particular culture or moral community “learn” the value of this social skill, how to employ it, and when it is due.

When relationships are breached, feelings of anger, aggression, distrust, and pain—issues that cannot be adjudicated or fully compensated with monetary awards—must be resolved to restore the moral balance of power. Through apology—an interactive negotiation process which can help the parties reach a settlement that is mutually emotionally satisfying and which addresses the social or moral issues—the balance of moral power can be restored.

IV. UNDER-UTILIZATION OF APOLOGY IN DISPUTE RESOLUTION

If apology has the ability to restore the balance of moral power and is a tremendously powerful social skill, one may wonder why it is not routinely used in dispute resolution. Apology is not a “rational ordering of a complaint according to principle . . .” Instead, it “revolve[s] about the violation of an unstated, but consequential, moral rule whose binding force had relatively little to do with legal remedies or considerations.”

Thus, if apology does not appeal to reason and deals more with moral rather than legal roles, it is not surprising that it does not play a larger part in dispute resolution within a court-based legal system. However, because it deals with the reality of human interactions, apology could function like a “magic bullet” to help resolve legal disputes in forums other than the courtroom.

As discussed above, two of the factors that account for the value of apology, culture and psychology, may also cause apology to be underutilized in dispute resolution. Legal concerns may provide a third possible explanation for this under-utilization.

111 Schneider, supra note 68.
112 TAVUCHIS, supra note 13, at 3.
113 See Tannen, supra note 38, at 69. Tannen’s example of a magic bullet described a company manager who related that, after he expressed remorse for a mistake, his employees not only forgave him but also became more loyal. Id. The psychological dynamic of the victim may help to explain why apology often seems magical in its ability to transform disputes. An apology from the giver creates a thaw in an icy, intractable dispute and often triggers like conduct from the receiver. See Cohen, supra note 25, at 1044.
A. Cultural Aversion

Despite childhood experiences and the use of the various forms of apologies, many societies are apology-adverse as a routine matter of social discourse.\textsuperscript{114} The members of these societies disfavor apologies and are uncomfortable making them.\textsuperscript{115} This does not mean that apology is completely avoided but instead is not frequently utilized to resolve disputes. For example, even in an apology-adverse culture, apologies may be forthcoming in social settings (\textit{i.e.}, bumping into a stranger on the street)\textsuperscript{116} but avoided when legal issues arise (\textit{i.e.}, in a case of malpractice or breach of contract). The culture dictates the circumstances in which apologies are used.

1. Political Orientation

Apology avoidance may be attributed, in part, to the culture’s political structure. As discussed more fully above, cultures that focus on relationships place greater value on apology. By contrast, egalitarian cultures, which include many English-speaking common law cultures,\textsuperscript{117} focus on the individual, rather than on the group. Politically, they tend to be rights-based cultures. Individualistic cultures, as compared to collectivistic cultures, do not place the same value on relationships or apology.\textsuperscript{118} As a result, they tend to shun apology, as a means of dispute resolution,\textsuperscript{119} and rely to a greater degree on courts and adjudication as a means of achieving retribution or

\textsuperscript{114} Hickson, \textit{supra} note 31, at 288.
\textsuperscript{115} The Author notes that the literature did not report that members of apology-adverse cultures are uncomfortable receiving apologies—just offering them.
\textsuperscript{116} This could be described as an “automatic” apology—one that is offered reflexively, without thought, remorse, or heartfelt meaning. Levi might refer to this as an explanation apology. See Levi, \textit{supra} note 8, at 1173.
\textsuperscript{117} HOFSTEDE, \textit{supra} note 56, at 219. This includes the United States, Australia, Great Britain, and Canada.
\textsuperscript{118} See Wagatsuma & Rosett, \textit{supra} note 26, at 493 (stating that “[a]pology may be given a lower legal priority in the United States [than in Japan] because American society does not place as high a value on group membership, conformity, and harmonious relationships among people as Japanese society does,” and concluding that Americans are therefore less likely than Japanese to apologize formally to those they have injured).
\textsuperscript{119} Hickson, \textit{supra} note 31, at 291.
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vengeance. Unfortunately, the court system is adversarial, as opposed to conciliatory, and adversarial proceedings often preclude repair of any damage to the relationship. This is reflected in “[t]he underdevelopment of American legal doctrine based on apology . . . [It] suggests the degree to which other, individualistic values—most notably compensation, declaration of right, punishment, professional self-interest, and administrative convenience—have been elevated at the expense of the restorative capacity of law and social ceremony.”121

A study to determine individual choice of strategies used to resolve interpersonal conflict was conducted at a New York university. Results showed that confrontational behavior was chosen significantly more often than was apology (sixty-one percent versus eighteen percent) and preceded most other strategies, such as apologizing or problem solving. When apology was offered, it was offered later, rather than sooner, in the interpersonal exchange—almost a last choice.

2. Childhood Experience and Behavior Acquisition

Apology aversion also may be attributed, in part, to childhood experiences. As discussed earlier, the environment, especially the human environment, has a strong influence on the young child’s acquisition of normative behavior regarding the use of apology. Through observation and experience, children learn to model the behavior they see and hear; however, “precious little thought [is given] to teaching our children how to apologize. Most of us never learned very well ourselves.”125 There is a tendency to avoid that which is not done well and that aversion is passed on

120 See Dean E. Peachy, Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire, in RESTORATIVE JUSTICE ON TRIAL 551, 551-52 (Heinz Messmer & Hans-Uwe Otto eds., 1992).
121 Wagatsuma & Rosett, supra note 26, at 494.
122 Mark E. Keating et al., Strategic Choice in Everyday Disputes, 5 INT’L. J. CONFLICT MGMT. 143, 149 (1994). The authors define confrontational behavior as “making complaints or demands in an effort to change the adversary’s behavior.” Id. at 143. Confrontational behavior is litigious behavior. See Wagatsuma & Rosett, supra note 26, at 462 (“When faced with a charge that they have seriously wronged another person, Americans typically will deny or challenge the claim or may try to explain and justify their actions.”).
123 Keating, supra note 122, at 149.
124 See Hickson, supra note 31, at 292.
125 Lazare, supra note 23, at 40.
to children. If adult models are averse to offering an apology, their avoidance behavior may be passed on to succeeding generations and can lead to under-utilization of apology from childhood forward.

3. Apology Ambiguity

Not surprisingly, research across cultures shows that the content of the apologies given often contradicts the requirement of accepting responsibility for the offense.126 In Western culture, as well as in Japanese culture, which emphasizes apology,127 apologies frequently express justifications, excuses, or explanations for the offense but not responsibility.128 To meet the requirements of an authentic apology, acceptance of responsibility for the offense is required. Excuses or explanations coupled with words of regret may qualify as tactical or explanatory apologies;129 however, these types of apologies usually do not lead to forgiveness and healing. A vivid example of an apology that failed to trigger forgiveness is President Nixon’s resignation speech. Nixon expressed regret to the American public but failed to acknowledge responsibility: “I deeply regret any injuries that may have been done in the course of events that led to this decision.”130

Apologies other than authentic apologies131 can create confusion for both the giver and the receiver in terms of individual expectations. For example, if the receiver expects an authentic apology, and the giver offers only an excuse or explanation for his or her behavior (the giver having observed this type of apology since childhood and believing it to be adequate), forgiveness is not likely to occur. In fact, the receiver, whose expectations are not met, may experience increased anger toward the giver. The receiver’s lack of forgiveness and increased anger may lead to confusion on the part of the giver. This confusion can lead to the perception, on both parts, that apologies fail in their essential purpose; the perception that apologies are not able to meet the community’s social or moral expectations. If apology is perceived as being ineffective, it becomes culturally devalued—commanding a “what-

126 See Hickson, supra note 31, at 291.
127 See Shuman, supra note 10, at 184 (noting that, “for the Japanese, apology is an important therapeutic balm;” however, even for the Japanese, apology alone may not be sufficient to compensate for damages).
128 Hickson, supra note 31, at 291.
129 See Levi, supra note 8, at 1173.
130 Shuman, supra note 10, at 185, quoting Richard Nixon, Resignation Speech (Aug. 8, 1974).
131 See supra text accompanying note 8.
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good-is-it-anyway?” type of response on the part of the giver. This results in a decreased desire to use apology as a means of resolving disputes, especially in apology-adverse cultures.

Cultural orientation (i.e., collectivistic versus individualistic) plays a large part in how members of a given society resolve disputes. In addition, cultural assumptions and aversions surrounding apology may be passed from one generation to the next. If the model from which children learn to apologize is flawed or ineffective, the apology that results is also likely to be flawed and ineffective. Due to weak or inappropriate cultural models, children may not learn to apologize well and thus, may find that apology does not produce the expected or desired effect.

B. Psychological Factors

Psychological factors also may explain why apology is not utilized more frequently in dispute resolution. These may include the following: (1) gender; (2) the interpersonal orientation of the individual; (3) perceptions of weakness and exposure to vulnerability; (4) pride and egocentricity; and (5) cognitive restructuring and the ambiguity of social obligation.

1. Gender

Gender may play a very important role in the use of apology. “While there are no absolute rules, women tend to apologize more easily than men. Women are also more likely to say ‘I’m sorry’ to express sympathy or concern.” 132 This may be due to relational and affiliational concepts of self, which research in the area of developmental psychology shows to be stronger in women than in men.133 Females tend to develop identity based on relationships with others, while males develop identity based on differentiating themselves from others.134 As a result, women focus on reinforcing interpersonal connections135 and may use apology as a method to do so.

132 Rehm & Beatty, supra note 23, at 118; see also Tannen, supra note 38, at 67 (“In the American context, there is ample evidence that women are more inclined to offer expressions of contrition than men.”).
133 Levi, supra note 8, at 1185.
134 See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY & WOMEN’S DEVELOPMENT (1982) (studying the relationship between judgment and action when there is moral conflict).
135 Tannen, supra note 38, at 69.
2. Interpersonal Orientation

Apology is also related to interpersonal orientation. Individuals with a high interpersonal orientation are sensitive to relationship issues. They take the other party's actions to heart and are more likely to appreciate intangible, interpersonal gestures like apology. Individuals with lower interpersonal orientation consider only how an apology can provide them with a strategic advantage. The idea of offering an authentic apology might seem nonsensical to them. If women have higher relational and affiliational concepts of self, and develop identity based on relationships with others, it is likely that women also might tend to have higher interpersonal orientations. Thus, apology may be more important to, and used more frequently by, women than men, especially to help repair damaged relationships. Conversely, men may believe that apologies are less important and therefore, offer them less frequently.

3. Apology as Weakness

Men are attuned to the symbolic power of apology, especially as a signal of weakness or an advertisement of defeat. Apology is viewed as a sign of weakness because the giver, if he is to be forgiven, must expose his vulnerabilities when he apologizes. There is psychological discomfort in this state of vulnerability because, after exposing his vulnerabilities, the giver's request for forgiveness could be rejected. Thus, apology is often viewed as the "one-down" position that males are socialized to avoid.

4. Pride and Egocentricity

Other psychological reasons that may lead to the avoidance of apology are individual pride and egocentricity. Pride is the more common cause. When making an apology, the giver must acknowledge that he or she made a mistake by failing to meet his or her own standards or by failing to live up to the values of the moral community. Worse than the acknowledgment of

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136 Levi, supra note 8, at 1183.
137 Id. at 1183–84.
138 Lazare, supra note 23, at 78.
139 Tannen, supra note 38, at 69 (describing the "one-down" position as being similar to when a dog rolls over and exposes itself as vulnerable).
140 Lazare, supra note 23, at 78.
failure is fear of the shame that accompanies the admission.\textsuperscript{141} Pride may keep many individuals from being able to apologize.

Egocentricity also accounts for a failure to apologize. An egocentric personality is unable to appreciate the suffering of another person. The regret that an egocentric person suffers is often regret for the potential loss that the offense may cause him or her, not the victim, such as the loss of the relationship.\textsuperscript{142} The inability to acknowledge sorrow for the victim blocks the egocentric offender’s ability to apologize.

5. Cognitive Restructuring

Finally, cognitive restructuring of the offensive event may account for a decreased utilization of apology. Research has shown that an offender can reduce negative attitudes toward himself or herself quite effectively, without admitting guilt or giving an apology, by putting a different “spin” on the situation (\textit{i.e.}, conceptualizing the offense in a different framework)\textsuperscript{143} for the victim. For example, if the offender is late for a luncheon appointment, rather than offering an apology, he or she thanks the victim for waiting. Apology was determined to be superior to cognitive restructuring only if the offensive event was unambiguous. If the event is ambiguous—capable of being characterized in more than one way (\textit{i.e.}, the victim was only relatively certain that the luncheon was at 12:00 p.m. rather than 12:30 p.m.)—cognitive restructuring is as effective as apology.\textsuperscript{144} Thus, by taking an offensive posture and inserting ambiguity into the interpersonal relationship, an offender often can achieve the results of apology without having to do so.

C. Legal Factors

1. Fault and Liability

There are two primary legal arguments for not giving an apology: fault and liability. Attorneys often discourage apology “[to guard] against their client’s unwitting forfeiture of legal entitlements.”\textsuperscript{145} Apologies often are not

\begin{itemize}
\item[\textsuperscript{141}] \textit{Id.}
\item[\textsuperscript{142}] \textit{Id.}
\item[\textsuperscript{143}] Mehrabian, \textit{supra} note 96, at 688.
\item[\textsuperscript{144}] \textit{Id.} at 687–88; see also Wagatsuma & Rosett, \textit{supra} note 26, at 492. In Western cultures, ambiguity and ambivalence detract heavily from the value of an apology.
\item[\textsuperscript{145}] Schneider, \textit{supra} note 68.
\end{itemize}
given because of the assumption that an expression of sympathy will be misunderstood as an admission of fault\textsuperscript{146} and, subsequently, construed by the victim as an admission of liability.\textsuperscript{147} As a result, even if an apology is the morally right thing to do, attorneys often will counsel their clients not to apologize because a misunderstanding about liability can disrupt insurance negotiations and effect the amount of money the offender may have to pay.\textsuperscript{148}

2. Systemic Underpinning

In a rights-based, adversarial system, the moral and psychological interests of the parties are often overlooked. The victim's interests are routinely converted into a remedy or commodity\textsuperscript{149} with which the legal system is more familiar and better able to deal—namely money.\textsuperscript{150} If interests are overlooked and replaced by a demand for money, then apology, which has no dollar value and no predictable value with regard to future occurrences, is of very little use in litigation. Thus, despite its potential to restore the moral balance of power between victim and offender and the fact that it is in the giver's best interest to apologize in many cases,\textsuperscript{151} it is understandable that apology is not routinely used as a means of resolving legal disputes. However, considering the significant impact on the parties, these cultural, psychological, and legal reasons should not be used as justifications for an all-or-nothing approach to the use of apology. Instead, these reasons should serve only as considerations for the parties in

\textsuperscript{146} Rehm & Beatty, \textit{supra} note 23, at 115.

\textsuperscript{147} Cohen, \textit{supra} note 25, at 1028; Levi, \textit{supra} note 8, at 1167.

\textsuperscript{148} Wagatsuma & Rosett, \textit{supra} note 26, at 483.

\textsuperscript{149} Margaret Jane Radin, \textit{Compensation and Commensurability}, 43 DUKE L.J. 56, 56 (1993) (stating that “our legal practice reflects conflict in [terms of] how compensation for personal injury is understood . . . . A commodified conception of compensation, in which harm to persons can be equated with a dollar value, coexist[ing] with a noncommodified conception, in which harm cannot be equated with dollars.”).

\textsuperscript{150} See generally Wagatsuma & Rosett, \textit{supra} note 26 (stating that legal systems tend to reduce disputes to a type it is comfortable handling; the American lawsuit is designed to deal with claims of economic losses that can be awarded in a monetary judgment).

\textsuperscript{151} Cohen, \textit{supra} note 25, at 1013. Cohen includes a discussion of apology as it relates to liability and how apology may influence whether or not there is a lawsuit filed and the amount of settlement. \textit{Id.} at 1025–31.
determining when and how to use apology to resolve disputes. There may be a benefit to be gained from apology regardless of past practice.

V. AN APPROPRIATE FORUM FOR THE USE OF APOLOGY

Apology is a powerful tool for the effective resolution of disputes; however, it requires an appropriate forum in which to be applied. Perhaps, in the "right" forum, the magical qualities of apology can be realized, and disputes can be resolved more effectively for the parties. This final Section examines mediation as an appropriate forum for apology. It also addresses third-party considerations that may effect the use of apology in mediation.

A. Litigation: The Unlikely Forum for Apology

Because of the representative nature of the litigation process\textsuperscript{152} and "its lawyer-dominated, adversarial structure,"\textsuperscript{153} attorneys have become accustomed to speaking for their clients.\textsuperscript{154} The actual parties may never voice their interests or speak in their own defense. The parties may never directly confront each other to voice their feelings and interests.

An aggrieved party may have his or her day in court, without ever having had the opportunity to actually be heard, to voice his or her wants or needs. Instead, what the court hears is the attorney's representation of the legal position and a demand for a remedy, which, as noted by Radin, usually equates to money.\textsuperscript{155} The "adversarial structure is not suited to resolve other [non-monetary] kinds of issues."\textsuperscript{156}

\textsuperscript{152} Gerald R. Williams, \textit{Negotiation as a Healing Process}, 1996 J. DISP. RESOL. 1, 10. It is even more common for attorneys to speak on their client's behalf in negotiation. It is well established that negotiation is a principle activity of lawyers and the primary method for resolution of legal disputes. Negotiation often takes place on the telephone. The attorneys do not necessarily meet face-to-face, and the client is usually not present. It is the client's \textit{position} that is negotiated, not his or her \textit{interests}.

\textsuperscript{153} Wagatsuma \& Rosett, \textit{supra} note 26, at 494.

\textsuperscript{154} See generally Marcy Strauss, \textit{Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy}, 65 N.C. L. REV. 315 (1987). In her examination of the representative process, Strauss notes that, "[t]o manipulate human beings even though for their own good is to deny their human essence, to treat them as objects without wills of their own and therefore to degrade them." \textit{Id.} at 315. Strauss also observes that "[r]espect for client's autonomy truly ensures that the legal system is just, not only in its results, but also in its process." \textit{Id.} at 349.

\textsuperscript{155} See generally Radin, \textit{supra} note 149. Radin also submits that apology alone, or coupled with monetary compensation, may be one way to restore "a state of affairs
Unfortunately, economic remedies do not always produce morally right, or even just, results. Rarely are economic results emotionally satisfying to both parties. Courts, however, are not concerned with emotional harmony. In rights-based societies, “[t]he legal system focuses on adjudicating rights, rather than on repairing relationships,” or restoring the moral balance of power between the parties.

In contrast, however, “the bedrock structure of apology is binary . . . .” It is the product of a direct relationship between the social categories of the giver and the receiver. It calls the parties to the table and requires that they actively engage in the dispute resolution process. Because of this binary nature, it is understandable why apology is not used in the morass of the litigation process. The presence of attorneys, witnesses, judges, and juries cannot help but alter the product of the relationship between the giver and the receiver.

Furthermore, in the unlikely event that the court did order an apology as part of the remedy, the apology likely would be characterized as formalistic. Thus, it is probable that such an apology would fail its essential purpose because “[f]or an apology to be most effective, it must also be voluntary—made of a party’s own free will.” “[T]he more an apology is coerced, the less meaning it carries, for the less sincere is the regret it expresses.” It also is likely that the giver would make such an apology grudgingly because it would be perceived as punitive in nature.

equivalent in moral value to the status quo ante,” particularly when issues exist to which a dollar amount cannot be assigned. Id. at 60.

156 Wagatsuma & Rosett, supra note 26, at 494.

157 See id. at 464 (opining that the tendency in the American legal system is “not to compensate at all or to award extravagant damages for injuries that are not easily reducible to quantifiable economic losses”).

158 Cohen, supra note 25, at 1042.

159 TAVUCHIS, supra note 13, at 46.

160 Id. at 46–47.

161 See Cohen, supra note 25, at 1042. (“An apology is not a legal remedy one can seek in an American court.”); see also id. at 1018. Due to First Amendment free-speech concerns, court-ordered apologies are not legal in the United States.

162 For various definitions of apology, see Levi, supra note 8.

163 Cohen, supra note 25, at 1018.

164 Id.

165 See TAVUCHIS, supra note 13, at 52 (“This is not necessarily punishment in the conventional sense . . . [but the offender is humiliated by] being pressed to admit a moral
The introduction of the courtroom cast of characters into the binary process of apology indelibly alters it. "In sum, once others take part, there is some loss of personal sovereignty and flexibility on the part of one or both contestants."\textsuperscript{166} Thus, the true benefits of apology, forgiveness, and reconciliation may be lost to both the giver and receiver.

B. Mediation: The Likely Forum for Apology

Mediation occurs in private, and once the process begins, whether court ordered or by contract, continued participation is voluntary.\textsuperscript{167} The private and confidential nature of the proceedings enhances open communication between the parties.

"The purpose of mediation is not to help the lawyers move toward agreement, but rather to help the parties do so."\textsuperscript{168} The focus of mediation is on the parties' interests rather than on their legal position or rights. Parties have the opportunity to tell their story, to explain their needs, and to vent their feelings. They can express anger and disappointment. Dialogue is encouraged and "foster[s] discussions 'of general moral and interpersonal obligations as well as legal obligations.'"\textsuperscript{169} The parties gain a greater perception of each other, "including past and present actions, attitudes, motivations and positions . . . .\textsuperscript{170}

In mediation, the parties have the opportunity to connect face-to-face and engage in interactive negotiation that is beyond purely adversarial behavior.\textsuperscript{171} They are able to confront the substantive community values at the core of their relationship. After venting their feelings and gaining an increased understanding of one another, there is an opportunity for the giver to apologize and for the victim to forgive.\textsuperscript{172} The parties often can settle their failing and show remorse for something that should have been settled voluntarily and without public intervention in the first place.").

\textsuperscript{166} Id.; see also Strauss, \textit{supra} note 154, at 315.
\textsuperscript{167} Levi, \textit{supra} note 8, at 1169.
\textsuperscript{168} Williams, \textit{supra} note 152, at 10.
\textsuperscript{169} Levi, \textit{supra} note 8, at 1171 (quoting Craig A. McEwan & Richard J. Maiman, \textit{Mediation in Small Claims Court: Consensual Processes and Outcomes}, in MEDIATION RESEARCH 53, 60 (Kenneth Kressel et al. eds., 1989)).
\textsuperscript{170} Robert A. Baruch Bush, "What Do We Need Mediators For?": Mediation's "Value-Added" for Negotiators, 12 \textit{Ohio St. J. on Disp. Resol.} 1, 13 (1996).
\textsuperscript{171} Levi, \textit{supra} note 8, at 1169.
\textsuperscript{172} Kenneth Cloke, Revenge Forgiveness, and the Magic of Mediation, 11 \textit{Mediation Q.} 67, 71 (1993).
differences and effectively resolve the dispute. They can restore the moral balance of power.

Unlike the litigation process, satisfaction levels with mediation are reported to be high because of this opportunity for full self-expression and having one’s view heard and considered. The attorney does not have to speak for the client, and the mediator does not impose a decision on the parties; the parties discuss their issues and determine the outcome based upon their needs. Apologies can be exchanged.

Due to the binary nature of both apology and the mediation process, the use of apology in mediation seems to be a “natural fit.” On the surface, mediation seems to be the appropriate forum in which apology can work its “magic,” but is it?

C. Possible Problems with Mediation as the Forum for Apology

Before declaring mediation to be the ideal forum for the unfettered use of apology, possible concerns should be examined. A binary interaction means that the very presence of third parties can impact the process. Third-parties represent or introduce an additional set of interests when they enter the proceedings “in any capacity.” This is likely to subject the apology to a different standard than the giver and receiver otherwise would have applied.

1. Third-Party Considerations: Attorneys

As a result of their legal training and the focus on adjudicating rights within an adversarial system, attorneys are often uncomfortable with a request for apology. They are not trained to think of repairing relationships and rarely even consider discussing apology with their clients. The attorney is expected to have the client’s legal interests (i.e., position and remedies) at heart, and the attorney’s purpose and ethical duty is to advocate on behalf of his or her client. Considering this adversarial bias, the attorney’s presence in the mediation process clearly brings a third set of interests to the table. Given

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174 Levi, supra note 8, at 1169. The mediator is not a decision-making authority who coerces an apology.
175 TAVUCHIS, supra note 13, at 51.
176 Id.
this potential conflict of interest between the client’s desire for an apology and the attorney’s interest in the legal position and economic remedy, which interest prevails?

“Because apologies are beyond the ambit of traditional adversarial behavior, lawyers may dismiss apology as irrelevant or treat any mention of it with suspicion.”177 Plaintiffs’ lawyers often ignore a client’s desire for an apology, focusing instead on monetary or injunctive relief,178 especially when the client has incurred pecuniary damages, and words alone cannot repair the damage or fully settle the debt.179 On the other hand, defendants’ lawyers reject apology because apology can be characterized as acknowledgement of wrongdoing and an admission of fault. It also might be considered an admission of liability.180

Therefore, even if the attorney’s interest does not ultimately prevail, it is very possible that his or her attitude could influence the interaction between the parties, altering the course of the mediation and the essence of the apology—perhaps, changing it from an authentic apology to only an explanation apology.181 As a result, even when parties are ideally situated to apologize, lawyers have the potential to totally derail the process.182

2. Third-Party Considerations: Mediators

Whether or not the parties are represented, the presence of the mediator must be considered. He or she, too, has the potential to impact the process. “Mediators vary in style and technique as well as in their characterizations of mediation’s purpose.”183 In his comparison of traditional problem-solving and humanistic-transformative mediation, Umbreit characterizes classic or traditional mediation as settlement driven and problem focused; the mediator has a low tolerance for expressions of feelings and the parties’ storytelling related to the context and history of the conflict.184 The mediator is directive

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177 Levi, supra note 8, at 1186.
178 Id. at 1167.
179 See Lazare, supra note 23, at 43.
180 Levi, supra note 8, at 1167.
181 See Cohen, supra note 25, at 1034–38 (discussing safe apologies).
182 Levi, supra note 8, at 1186.
183 Id. at 1169.
and guides the communication toward a mutually acceptable settlement of the conflict.\textsuperscript{185}

By contrast, Umbreit describes humanistic-transformative mediation as dialogue driven and relationship focused.\textsuperscript{186} The "[mediator encourages [the] open expression of feelings and discussion of the context and history of the conflict. [He or she] recognizes the intrinsic healing quality of storytelling when speaking and listening from the heart."\textsuperscript{187} The mediator is very non-directive and, after the opening statement, fades into the background, intervening only if the parties indicate a need.\textsuperscript{188}

Recognizing that some mediators may disagree with Umbreit's descriptions, it seems obvious that a directive mediator, with a strong desire to achieve settlement, could potentially disrupt the intimate dyadic pattern of apologetic discourse\textsuperscript{189} by imposing his or her style and interests on the process. Apology could be completely overlooked by a mediator whose eyes are focused only on the bottom-line. Conversely, such a mediator forcing an apology, while thinking it will foster an agreement, could derail the mediation by making the apology "formalistic."\textsuperscript{190}

Ideally, the actions of the mediator should help the lawyers and parties get over hurdles to authentic apology.

3. Confidentiality

Confidentiality is always a concern for attorneys whose clients want to apologize.

The central legal tension in seeking to apologize "safely" is an evidentiary one. The law has two competing goals. On the one hand, courts want to admit all probative evidence, . . . [like] a party's own admission of fault[].

\textsuperscript{185}Id.; see also Leonard L. Riskin, \textit{Understanding Mediator's Orientations, Strategies, and Techniques: A Grid for the Perplexed}, I \textit{HARV. NEG. L. REV.} 7, 35-36 (1996). In his discussion, Professor Riskin states that a mediator's orientation "is grounded in [his or her] personality . . . training, and experience. For example, most retired judges tend toward an extremely evaluative-narrow orientation . . . [m]any divorce mediators with backgrounds . . . in psychology or counseling—and who serve affluent or well-educated couples—lean toward a facilitative broad approach." \textit{Id}.

\textsuperscript{186}Umbreit, \textit{supra} note 184, at 210 (see table 1).

\textsuperscript{187}Id.

\textsuperscript{188}Id. at 210.

\textsuperscript{189}TAVUCHIS, \textit{supra} note 13, at 46.

\textsuperscript{190}Levi, \textit{supra} note 8, at 1174.
On the other hand, courts want to encourage private settlement, and what could be a greater impediment to private settlement than the fear that if one offers words of apology they will be turned against one to prove one's guilt?\footnote{Cohen, \textit{supra} note 25, at 1031.}

In the event of a failed mediation, attorneys do not want to risk compromising their litigation position. They do not want to risk having an apology used as evidence and construed as an admission of liability.

In his or her opening statement, the mediator routinely states that the mediation process is confidential. Nevertheless, confidentiality may have different meanings in different jurisdictions. Questions remain regarding "who holds the privilege, against whom can it be asserted, and what is its scope."\footnote{\textit{Id.} at 1032.} There is discussion about whether both the parties and the mediator are prohibited from revealing the contents of the mediation, or just the mediator. Generally, courts also have held contractual clauses with "confidentiality agreements that purport to preclude a court from hearing evidence as being contrary to public policy."\footnote{\textit{Id.} at 1039.}

State statutes and court rules create mediation confidentiality provisions. Still, not all states have equally strong confidentiality provisions; in fact, "they vary widely."\footnote{\textit{Id.} at 1039.} As a result, party protection against the admissibility of mediation communications, such as apology, will depend upon the jurisdiction in which they mediate. Attorneys must therefore consider the specifics of the case and the applicable legal rules of each jurisdiction; they continually must address each of these issues.\footnote{\textit{Id.} at 1037.} This uncertainty of answers and unpredictability of outcomes results in a lack of confidence and causes attorneys to avoid apology.\footnote{\textit{Id.}}

\footnote{The passage of the Uniform Mediation Act can alleviate this uncertainty and unpredictability as it is adopted across the states by providing a privilege for mediation communications that would permit parties, mediators, and non-party participants in a mediation to block the introduction of a mediation communication as evidence in a legal proceeding.}
D. Suggestions for the Successful Use of Apology

Despite these legitimate concerns, with adequate preparation and planning on the part of the attorney, the use of apology can enhance the dispute resolution process. Mediation, despite perceived limitations, seems to be the correct forum for the use of apology.

1. Third-Party Considerations: Attorneys

Potentially divergent interests between client and attorney can be avoided by fully discussing the client’s goals at the outset of the representation. If a client has an interest in giving an apology, the attorney must fully discuss the risks and benefits of such an act, but it is the client who must ultimately decide. When making his or her recommendations, the attorney must remember that:

[given that there rarely is a “right or wrong” answer [as to whether an apology should be given], and that even the “best” decision often is impossible to determine, the “rational” choice need not be the one the lawyer would have made. The fact the lawyer believes that the client is making the wrong decision is, therefore, irrelevant. The attorney’s duty is to explain the various legal issues adequately and to accept the client’s resolution.197

Attorneys also must consider that parties often mediate to avoid litigation. Clients may want to address the moral components, such as fairness or what is right, that underlie their substantive legal claim, and seek non-legal remedies. Clients also may want to forgo the cost, time, and risk of litigation. To that end, attorneys must not let a bias for the adversarial process derail the mediation process or cause it to fail.

Furthermore, “[t]he practice of never apologizing is not in the public interest because it leads to litigation rather than reconciliation.”198 Thus, if a client wants to give an apology, rather than discouraging it, the attorney might best protect the client’s interest by controlling the dispute resolution process.

To control the process, the attorney should choose an appropriate forum. Apology is an interest-based remedy, and reconciliation is an interest-based

197 Strauss, supra note 154, at 340.
outcome. Both require intimate, interpersonal dialogue between victim and offender. Hence, when an interest-based, rather than a rights-based, outcome is desired, mediation is the most appropriate forum.

Next, having chosen mediation as the method of dispute resolution, the attorney should ensure the correct choice of mediator. The style and orientation of the mediator should match the needs of the parties. If apology is a goal, the mediator must be comfortable letting the parties discuss their feelings and interests.

Finally, encouraging the client to wait until mediation to apologize often can minimize the risk of admitting liability. In mediation, the client can accept responsibility and apologize for his or her actions, and the confidentiality of the process will offer some protection. For additional protection, however, clients should be counseled not to make an admission of fault, especially since such an admission is not a requirement of an authentic apology.

If the client agrees to delay his or her apology, the attorney should encourage early mediation. While it is rare for delayed apologies to be rejected, encouraging early mediation, prior to the completion of all discovery, may be of benefit to the offender who is anxious to apologize. Early mediation can act to decrease the offender’s feelings of guilt and keep the victim from suffering the increased anger that can occur with the passage of time. Decreasing anger and guilt may improve the opportunity to reach settlement and lead to more successful terms.

Attorneys must also be cognizant of their actions as they advocate on a client’s behalf. In mediation, especially when seeking an apology, attorneys cannot speak for their clients. Because apology is binary, it “cannot be delegated . . . without totally altering its meaning and vitiating its moral force.” To apologize or forgive by proxy “violates both the logic and spirit of apology.” Only the parties can utter the words: “I am sorry” and “I forgive you.”

There also is a caveat for attorneys whose clients desire an apology. Attorneys cannot abrogate their responsibility to be zealous advocates for

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199 Riskin, supra note 185, at 41 (“Mediation programs may wish to select mediators with diverse backgrounds so as to make available mediators with varying approaches to match with appropriate cases.”).


201 Id. at 1044.

202 TAVUCHIS, supra note 13, at 49.

203 Id.
their clients. Apology should not be allowed to supplant all pecuniary
damages. "[T]here are some injuries that cannot be repaired just by saying
you are sorry, there are others that can only be repaired by an apology." 204
Attorneys must recognize those instances and work to make their clients
whole. "A process built around apology and compensation would fit well
into a justice system that increasingly seeks to resolve conflicts by
settlement, mediation, or alternative methods of dispute resolution, rather
than trial." 205

2. Third-Party Considerations: Mediators

Mediators must recognize the power that they have to impact the process.
The style and orientation of the mediator must be congruent with the needs of
the parties. The mediator must be able to consider the appropriateness of an
apology. He or she cannot avoid or demean apology when it is desired. "[I]n
many cases, an apology is needed before other aspects of the dispute, such as
monetary compensation, can be settled." 206 Nevertheless, the mediator
should not take a prominent role in advocating for it. A party must choose to
apologize, not be shamed or pressured into it. 207

A disconnect between the mediator and the parties can cause the process
to fail. If, because of the mediator’s style or orientation, the mediation fails
after an authentic apology has been made, subsequent litigation could be
more difficult for the offender. Conversely, if the process concludes without
the victim receiving the necessary apology, the settlement agreement could
fail. In either case, the hope of repairing the relationship and resolving the
victim’s pain or anger is significantly diminished.

To avoid a mismatch, the mediator and the parties should discuss the
mediator’s orientation and style fully, as well as the needs and expectations
of the parties prior to, or at the outset of, the mediation. If the mediator
knows in advance that he or she is not able to meet the needs of the parties,
the mediation should not be undertaken. Once the mediation commences, the

204 Wagatsuma & Rosett, supra note 26, at 487.
205 Id. at 495.
206 Cohen, supra note 25, at 1020.
207 See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF
MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION
(1994) (explaining that an apology should be heartfelt, authentic, and arise from the
offender, not the mediator, if it is to help restore the moral balance between the victim
and offender).
mediator must be ever vigilant to ensure that only two sets of interests are at the table.

If apology is crucial to an unrepresented party, the mediator must be cognizant of the moral imbalance of power that exists between the giver and receiver. The receiver must be encouraged to seek legal advice to review the settlement agreement, especially if the agreement reflects that imbalance.

3. Confidentiality

In the absence of a uniform mediation statute that provides adequate confidentiality provisions, attorneys must be aware of the extent of the protection provided in the jurisdiction in which they are located. Attorneys also must be aware of the various methods that can be utilized to make a "safe apology" and advise their clients accordingly.

Even if the mediation fails after an apology is made and the apology is admissible at trial, all is not lost. Attorneys must remember that apologies are indicative of good moral character and are in the public interest. As such, even if the apology is admissible, it may not be treated as an admission of liability and still may act to minimize monetary damages.

VI. CONCLUSION

Apology has played a role in dispute resolution dating back at least as far as 1533. Perhaps the time has come to formalize its role in the legal system.

Incorporating the use of apology into the legal system, especially when a moral rule is violated, could make a significant, positive change in the resolution of disputes. It could help to avoid lengthy, expensive courtroom battles that protract disputes and embitter the disputants. Apology "helps to subtract the insult from the injury, thereby minimizing the injured party's

208 See Cohen, supra note 25, at 1031–42 (discussing how apology can be made "safe" by utilizing rules of evidence, mediation, contract or judicial order).

209 Martin Kasindorf, Accident Can Mean Saying You're Sorry. USA TODAY, Feb. 5, 2001, at 1A (observing that, through statute (Massachusetts, Texas, and California) and state supreme court opinions (Vermont and Georgia), various jurisdictions allow apologies at the scene of an accident without fear of having the words exploited as a confession of liability).

210 TAVUCHIS, supra note 13, at 16.
anger toward the offender. Without an apology, what might have been a minor offense may escalate into a major dispute.\textsuperscript{211}

While not perfect, mediation is the appropriate forum for apology. The private, non-adversarial setting permits the parties to confront one another to resolve their dispute, and allows for forgiveness and reconciliation to occur. Apology is the key to forgiveness and reconciliation. Through apology, formal recognition of the victim occurs, and the balance of moral power is restored. With recognition, the healing process can begin, and the victim can be made whole.

\textsuperscript{211} Cohen, supra note 25, at 1068.