I'M SORRY: EXPLORING THE REASONS BEHIND THE DIFFERING ROLES OF APOLOGY IN AMERICAN AND JAPANESE CIVIL CASES

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I. INTRODUCTION

Starting as early as the 1980s, scholars noted the prevalent and important role apology played in the Japanese legal system, especially as compared to the American system.[1] These articles were mostly comparative in their approach and provided few suggestions for changes to the American legal structure. Shortly after these comparative pieces, American scholars and practitioners began to take note of the potential benefits of apology.[2] This trend has continued with a number of excellent articles continuing to be published each year. These articles persuasively assert that an increased use of apology in the American legal system would have far-ranging effects, spanning from increased settlement rates[3] to decreased health care costs[4] to greater criminal deterrence.[5] Normally, after demonstrating the potential benefits of apology, the articles call for change. Indeed, many return to the nascent of the apology

1. For a more detailed discussion of the role of apology in Japan, *see generally* Max Bolstad, *Learning From Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545 (2000); John O. Haley, *The Implications of Apology*, 20 LAW & SOC'Y REV. 499 (1986) [hereinafter Haley, *Implications of Apology*]; John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 265 (1982) [hereinafter Haley, *Sheathing the Sword*]; Hilary K. Josephs, *The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation*, 18 EMORY INT'L L. REV. 53 (2004); Robert B. Leflar, *Personal Injury Compensation Systems in Japan: Values Advanced and Values Undermined*, 15 U. HAW. L. REV. 742 (1993); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986); Yoko Hosoi & Haruo Nishimura, *The Role of Apology in the Japanese Criminal Justice System* (1999), *available at* http://www.aic.gov.au/conferences/rvc/hosoi.pdf.

2. *See* Haley, *Sheathing the Sword*, *supra* note 1, at 269-73.

3. *See* Suzy Fox & Lamont E. Stallworth, *How Effective Is an Apology in Resolving Workplace Bullying Disputes?*, J. DISP. RESOL., May-July 2006, at 54, 61; Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 485-86 (2003) [hereinafter Robbennolt, *Apologies and Legal Settlement*].

4. *See* Ashley A. Davenport, *Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases*, 6 PEPP. DISP. RESOL. L.J. 81, 96-97, 102, 107 (2006); Steven Keeva, *Does Law Mean Never Having to Say You're Sorry*?, A.B.A. J., Dec. 1999, at 64, 65 (estimating that 30% of medical malpractice cases could be avoided with a simple apology); Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 LAW & SOC'Y REV. 105, 110, 119 (1990); Jennifer K. Robbennolt, *What We Know and Don't Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009, 1015-21 (2005) [hereinafter Robbennolt, *Apologies in Resolving Health Care Disputes*].

5. *See generally* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 638-41 (1996); *see also* Jay Mathews, *Freedom Means Having to Say You're Sorry*, WASH. POST, Nov. 9, 1986, at A3.

discussion by using the role of apology in Japan as the desired benchmark for the United States.[6]

However, as persuasive as these articles have been in calling for change, they fail to fully address a fundamental question—why isn't the United States already more like Japan? Some articles do not tackle this question at all. Instead, these articles focus on demonstrating that apology *could* play a larger role in the United States legal system. Other articles suggest any difference in the role of apology stems from cultural differences. Even more articles suggest that Federal Rule of Evidence 801 prevents an increased use of apology in the United States. Without more, however, all of these explanations leave questions unanswered. For example, are apologies admissible in Japan? Likewise, if an apology has so much potential in the United States, why does it matter that the apology might be admissible? Wouldn't the benefits of apologizing offset the chance that the apology would be used in court? Until these and other such questions are answered, the research supporting the untapped potential of apology and the arguments in favor of a more Japanese approach provide an impetus for change without any direction.

This article attempts to provide the roadmap for answering these and other such questions and to open the debate on the proper means of change. In so doing, this article takes several progressions. Assuming the reader to be generally familiar with the potential benefits of apology and its role in Japan and the United States, the article only briefly notes these topics. Next, some basic formulas are introduced to effectively analyze the ways law and culture impact apology. Using these formulas, the most cited reason for the apology dichotomy—Federal Rule of Evidence 801—is explored. Finally, the factors that differentiate Japan from the United States are discussed.

II. A REFRESHER ON THE DIFFERING ROLE OF APOLOGY IN JAPAN[7]

A. Introduction

The different roles of apology in the United States and Japan are illustrated by one of Aesop's Fables, which is commonly taught to children in both countries:

> In Aesop's Fables, as told in the West, a mouse boasts to his friends that he is not afraid of a lion, who is sleeping peacefully nearby. To prove his courage, the mouse jumps on the head of the sleeping lion, who awakes and

6. *See*, *e.g.*, Bolstad, *supra* note 1, at 545.

7. In an attempt to avoid discussing a topic that has already received significant attention, this section is not intended to fully explain the role of apology in Japan. Instead, its purpose is to simply provide the necessary groundwork for discussing why Japan and the United States seem to treat the role apology differently. For a more detailed discussion of the role of apology in Japan, see *supra* note 1 (noting articles that have discussed the role of apology in Japan).

> captures the insolent mouse. Desperate but undaunted, the mouse tries to negotiate his way out of this perilous situation. "Free me and someday I will save your life," he brashly promises. The lion thinks this self-aggrandizing mouse is ridiculous, but, because it happens that he is not hungry, he lets the mouse go. Time passes and one day the lion is trapped by a hunter's net. The mouse comes by and chews the net, releasing the lion and thereby keeping his promise. The lion thus learns the lesson that even a blowhard little mouse can rescue him and is not too small to be his friend.
>
> The version of the same tale that is told to Japanese children is somewhat different in that the mouse does not boast to his fellow mice (they do not appear in the story). Instead, the absent-minded mouse climbs onto the head of the sleeping lion by mistake. The lion awakes and captures the mouse. The mouse apologizes profusely in tears for his terrible mistake and unforgivably impolite behavior. The lion feels pity for the mouse and lets him go. The reader is never told whether the lion is hungry, for that is irrelevant to this version of the tale. The Japanese mouse is deeply grateful to the lion for his generosity and kindness. Later, when the lion is trapped, the mouse comes by and "pays back the indebtedness" (*on gaeshi*). Now the obligation has shifted, and the lion, grateful to the mouse, expresses regret that he had previously behaved arrogantly toward the mouse. The lion then apologizes to the mouse, and they become faithful friends.[8]

The key difference between the two fables is that "[t]he Japanese version of the tale transforms the story into a lesson on apologies, despite the fact that in the Western version of the fable a single apology does not appear."[9]

As one might deduce from the different versions of the fable, the Japanese culture has been described as having the behavioral pattern of "apology-forgiveness."[10] Several commentators have noted how frequently the Japanese apologize, even when the offense is nothing more than the most minor of social infractions.[11]

Moreover, Japan's tendency to apologize is not limited to social interactions. Instead, the frequent use of apology to solve social conflicts has carried over into the Japanese legal realm.[12] Indeed, it has been noted that "[i]n Japan the legal system reinforces the social use of the apology."[13] This is seen in both criminal and civil cases.

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8. Wagatsuma & Rosett, *supra* note 1, at 467 (citations omitted); *accord* Bolstad, *supra* note 1, at 552 (noting same fable).

9. Bolstad, s*upra* note 1, at 552-53.

10. Hosoi & Nishimura, *supra* note 1, at 2-3.

11. *See id.* at 2 ("[W]e tend to apologize, even if we do not acknowledge any fault or any responsibility for the act."); *see also* Bolstad, *supra* note 1, at 561 ("Americans apologize much less frequently than do the Japanese. In addition, the less serious the injury, the more likely an American is to apologize. In fact, Americans reserve the most flowery apologetic language, words such as 'I'm terribly sorry' and 'I beg your pardon,' for those situations[] which are least serious, such as when one bumps into a stranger on the street.") (citations omitted).

12. *See* Haley, *Implications of Apology*, *supra* note 1, at 506.

13. *Id.*

B. Criminal Cases[14]

Article 248 of Japan's postwar Code of Criminal Procedure allows a prosecutor to suspend the prosecution of a suspect "after taking into consideration three factors: (1) the age, character, and environment of the offender, (2) the circumstances and gravity of the offense, and (3) the circumstances following the offense."[15] The first two circumstances do not seem too strange—after all, "[t]o treat leniently a case involving a minor first offense would not be unusual in any legal system."[16] However, in Japan the third factor is of equal, if not greater, importance.[17] For example, at one point, "approximately 33 per cent of all cases involving non-traffic offenses" were suspended by the prosecution.[18] "For the Japanese prosecutor, the accused's attitude—in other words his willingness to confess and apologize—is critical to the decision whether to prosecute or not."[19] Note that this factor is seemingly missing in the West.[20]

In addition, of the cases that are prosecuted in which the defendant is found guilty, more than two-thirds of jail sentences in Japan are suspended by the courts. "The determinative factor for the judge, as for the prosecutor, in deciding the sentence to impose or whether to suspend sentence is the attitude of the offender. Confession is demanded and repentance rewarded."[21] In fact, defendants typically go beyond a mere apology and actually seek to compensate the victims they harmed.[22] In return, the victims will then write letters acknowledging restitution and expressing the "sentiment that no further penalty need be imposed."[23] In fact, this practice of restitution is so common "that most Japanese attorneys have some sense of the amounts usually required."[24]

Because of the incentives and pervasiveness of confession and apology, "the overwhelming majority of offenders in Japan confess [and apologize] and are either not prosecuted or are penalized by a [minimal] fine."[25]

A poignant example of how this practice of confession and apology is different in the United States than in Japan is the case of *United States. v. Chee*.[26]

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14. This paper's main focus is the use of apology in civil cases. However, to the extent that the different roles of apology are exemplified through the criminal context, they will be discussed.

15. Haley, *Sheathing the Sword*, *supra* note 1, at 270.

16. *Id.*

17. *See id.*

18. *Id.*

19. *Id.*

20. JOHN O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 129 (1991) [hereinafter HALEY, AUTHORITY WITHOUT POWER].

21. Haley, *Sheathing the Sword*, *supra* note 1, at 271.

22. HALEY, AUTHORITY WITHOUT POWER, *supra* note 20, at 130.

23. *Id.*

24. *Id.*

25. Haley, *Sheathing the Sword, supra* note 1, at 271.

In that case, the defendant, Alden Chee, eventually confessed to raping a child and, based on the FBI investigator's suggestion, actually wrote a letter of apology to the victim's grandmother.[27] However, instead of being a mitigating factor like it would have been in Japan, this letter turned into a key piece of evidence for the prosecution.[28]

C. Civil Cases

The circumstances following the crash of an airplane in Japan perhaps best illustrate the role that apology plays in Japanese civil law:

> On the morning of Feb. 9, the skies were clear and the weather balmy when a Japan Air Lines DC-8 plunged into Tokyo Bay 300 yards short of the Haneda Airport runway, killing 24 people.
>
> A few days afterward, Yasumoto Takagi, president of Japan Air Lines, embarked on a sojourn of obligation that in Japan is the expected behavior of a top executive whose company is involved in such a tragedy.
>
> Mr. Takagi visited the families of most of the crash victims, apologizing profusely and paying homage on his knees before the Buddhist funeral altars in the homes of the bereaved.[29]

Following Mr. Takagi's sincere apology, not one lawsuit was filed despite the fact that the pilot had a known history of psychological problems.[30]

In contrast to Yasumoto Takagi's reaction to the Japan Air Lines disaster:

> American executives . . . are thought to be more likely to deny or evade charges of any responsibility and to avoid direct contact with the victims. They are less likely to acknowledge publicly any responsibility and remorse, and even less likely to call on the victims personally and apologize tearfully.[31]

Indeed, in the United States, many were surprised when Apple Computer CEO Steve Jobs personally contacted the family of a teenager who was killed

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26. United States v. Chee, No. 2:05 CR 773, 2006 WL 2355837 (D. Utah Aug. 15, 2006).

27. *Id.* at *2.

28. *Id.* By contrast, Japanese police officers who request letters of apology are *less* likely to pursue prosecution when those letters are received. *See* Bolstad, *supra* note 1, at 555-56. *See also id.* at 564 (noting situation similar to *Chee* in which a Japanese woman wrote a letter of apology to American Custom officials and faced prosecution because of that letter).

29. Steve Lohr, *Tokyo Air Crash: Why Japanese Do Not Sue*, N.Y. TIMES, Mar. 10, 1982, at A1, A1.

30. *Id.* at D5. An interesting contrast to this case is the crash of an Air Florida Boeing 737 in Washington, D.C. and the reaction to that tragedy, which included several lawsuits. *See id.*

31. Wagatsuma & Rosett, *supra* note 1, at 488.

during a fight over an iPod in New York, even though that incident posed little legal threat to the company.[32]

Further, the litigation rate in Japan is a mere fraction of the corresponding rate in America.[33] While this disparity can be attributed to a number of different reasons, the bottom line is that Japanese parties are more likely to "confer with each other and reach a point at which they can come to terms and restore or create harmonious relationships."[34]

D. Conclusion

Although anecdotal, an example effectively summarizes the general view of the different role of apology in Japan:

> A Japanese attorney recently related . . . his experience in defending two American servicemen accused of raping a Japanese woman. [The woman] had charged the two with the crime in an affidavit to the prosecutor, but then left Japan with a third U.S. soldier. The affidavit was the sole basis of prosecution. The attorney advised the two defendants first to obtain a letter from the woman stating that she had been fully compensated and had absolved them completely. As advised the accused paid her 1,000 dollars and obtained the letter. The lawyer then argued that to convict the accused solely on the basis of the affidavit constituted an unconstitutional denial of a fair trial since they had had no opportunity to cross-examine the witness. After listening attentively to the argument, the judge leaned forward and asked the soldiers if they had anything to say. "We are not guilty, your honor," was the immediate reply. The lawyer cringed. Although few Japanese attorneys are as knowledgeable as he about American law, it had not even occurred to him that the defendants might not offer apologies. The time and money spent on the letter were wasted. The judge sentenced the two soldiers to the maximum term of imprisonment, not suspended. More telling, Japanese students need only hear what the servicemen said to the judge to react. They know what happened next. Only Americans have to be told.[35]

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32. *Jobs Calls Family of Stabbing Victim*, CNNMONEY.COM, July 6, 2005, http://money.cnn.com/2005/07/06/news/newsmakers/stevejobs_ipod/.

33. Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31, 32, 41 (2006) (noting that despite increases in litigation in Japan during 1990s, litigation rates remain significantly lower than in the United States); Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan, in* JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 115, 115-117 (Curtis J. Milhaupt, J. Mark Ramseyer & Michael K. Young eds., 2001); s*ee also* Frank K. Upham, *Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits*, 10 LAW & SOC'Y REV. 579, 596 (1976) (suggesting that "Japanese seem to resort to violence more readily than litigation.").

34. Kawashima, *supra* note 33, at 117.

35. Haley, *Sheathing the Sword, supra* note 1, at 272.

In sum, Americans seem "less likely than Japanese to apologize formally to those they have injured."[36] Furthermore, the system of law in the United States seems to place less emphasis on the role of an apology by the wrongdoer. Indeed, "[u]nlike their Japanese counterparts, [generally] neither civil nor criminal defendants in the United States are called upon to express personal apology to those they have injured or to the society whose rules they have violated."[37]

III. UNDERSTANDING THE USE OF APOLOGY IN THE UNITED STATES

One may reason that one of two factors has created the dichotomy between the Japanese and American view of apology. Those factors are either an unwillingness on the part of American legal institutions to recognize apology as having a role, or an American public that places less emphasis on an apology than the Japanese do. Stated differently, one may posit that, for whatever reason, a defendant receives little to no benefit from apologizing in the United States. However, this is simply not the case. Even in the United States, there are several benefits available to a defendant who apologizes. [38]

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36. Wagatsuma & Rosett, *supra* note 1, at 462.

37. *Id.* at 462; s*ee also* KENNETH L. PORT & GERALD PAUL MCALINN, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 16 (2d ed. 2003) ("Apology is as big a part of Japanese law as any code or ruling.").

Indeed, the seemingly foreign notion of coerced apology in the United States is demonstrated by our fascination with cases where such an apology was required. Examples of such coerced apology include an "Illinois judge who ordered drunk drivers to take out ads in their local newspapers containing apologies and a photograph of themselves or a New Hampshire judge who ordered a man convicted of sexually assaulting a child to apologize in an advertisement in a local paper[.]" Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 187 (2000); *see also* Mathews, *supra* note 5, at A3 (noting convict who was required to apologize in local newspaper).

In Japan, however, it is not unheard of for a judge to keep a defendant in the courtroom until the defendant has offered a formal apology. *See* Haley, *Sheathing the Sword*, *supra* note 1, at 271.

38. *See* Shuman, *supra* note 37 (advocating for increased use of apology in tort law); *see also* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE LJ. 85 (2004) (advocating for increased use of apology in criminal law setting); Bolstad, *supra* note 1, at 545-46 (supporting increased use of apology in mediation); Jennifer G. Brown, *The Role of Apology in Negotiation*, 87 MARQ. L. REV. 665 (2003) (supporting increased use of apology in negotiation); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1013 (1999) (encouraging lawyers to advise clients of benefits of apology); Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 J. DISP. RESOL. 115 (calling for increased use of apology in general).

Some states have enacted statutory protection of apologies in certain cases. *See, e.g.*, UTAH CODE ANN. § 78-14-18 (2007) (making inadmissible statements of health care providers expressing "apology, sympathy, commiseration, condolence, or compassion" in malpractice cases); FLA. STAT. ANN. §90.4026 (West Supp. 2007) (protecting apologies that are expressions of sympathy from being admissible at trial in accident cases); WASH. REV. CODE § 5.66.010 (2007) (same); TEX. CIV. PRAC. & REM. CODE ANN. §18.061 (Vernon Supp. 2006) (same); MASS. GEN. LAWS ANN. ch. 233, § 23D (2002) (same); CAL. EVID. CODE § 1160 (West 2001) (same); *see generally* Robbennolt, *Apologies and Legal Settlement*, *supra* note 3, at 470-73.

First, infrequent as it may be to find instances of coerced apology in a United States courtroom,[39] it would be an error to believe that apology does not have any role or impact in court. On the contrary, the law is replete with examples in which an apology, or lack thereof, affected the proceedings of both civil and criminal cases.[40] Apology has played a role in the assessment of damages,[41] and has been specifically noted in cases of contempt and libel.[42] Likewise, "[j]udges, sentencing juries, the news media, and the public overwhelmingly weigh remorse heavily in disposing of criminal cases and in assessing offenders as persons."[43] This weighing of remorse was demonstrated when Dennis Rader, also known as the BTK murderer, confessed to ten counts of first-degree homicide. Although the details of the crimes were abhorrent, the part of the confession that was commented on the most was the complete lack of remorse Rader showed.[44]

Second, and more importantly, the potential role of apology has been noted in settling disputes. For example, "[i]n the infamous O.J. Simpson civil trial, the famous ex-football player was found liable to Ron Goldman's family for a substantial sum of money. Goldman's father said he would renounce the money if Simpson would admit the crime and apologize."[45] Likewise, in a suit brought against the Catholic Diocese of Dallas regarding the sexual abuse of eleven boys by a priest, "[t]he demand for an apology was one of the issues

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39. Although, as noted earlier, it is possible to find examples of coerced apology in American courtrooms. *See* Shuman, *supra* note 37, at 187 (providing examples of coerced apology in the United States).

40. *See, e.g.,* Groppi v. Leslie, 404 U.S. 496, 506 n.11 (1972) (finding an apology to be mitigating factor in the assessment of penalties for contempt); United States v. Fagan, 162 F.3d 1280, 1284 (10th Cir. 1998) ("Several circuits have specifically held that a moral element is implicit in acceptance of responsibility and is satisfied by the defendant's expression of contrition and remorse."); Shafer v. Time, Inc., 142 F.3d 1361, 1370 (11th Cir. 1998) (noting that a jury "could consider the timing, content, and prominence" of a newspaper's retraction for purposes of a libel suit); Johnson v. Smith, 890 F. Supp. 726, 729 n.6 (N.D. Ill. 1995) (viewing an apology as a mitigating factor in the assessment of punitive damages). *See also* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2007) (providing for two or three level reduction in sentencing for defendants who express contrition or remorse); Bibas & Bierschbach, *supra* note 38, at 92.

41. *See, e.g., Johnson*, 890 F. Supp. at 729 n.6.

42. *See supra* note 38.

43. Bibas & Bierschbach, *supra* note 38, at 92.

44. *See* Patrick O'Driscoll, *'BTK' Suspect Pleads Guilty, Describes Killings*, USA TODAY, June 28, 2005, *available at* http://www.usatoday.com/news/nation/2005-06-27-btk_x.htm (noting lack of remorse during Rader's confession); *Ten Life Sentences for BTK Killer*, BBC NEWS, Aug. 18, 2005, http://news.bbc.co.uk/2/hi/americas/4163896.stm (quoting victim's brother and surviving victim as stating, "No remorse, no compassion - he had no mercy").

For video clips of Rader's confession, see *BTK Killer's Confession*, CBSNEWS.COM, http://www.cbsnews.com/elements/2005/06/28/national/videoarchive704887.shtml (last visited Sept. 25, 2007); For a transcript of Rader's confession, see *BTK's Chilling Confession,* THE SMOKING GUN, June 28, 2005, http://www.thesmokinggun.com/archive/0628053rader1.html.

45. Bolstad, *supra* note 1, at 567.

that had stalled settlement talks, even when the sides had agreed on the damages to be paid."[46]

Examples like this are anecdotal, but there is additional evidence supporting the fact that Americans are not as uninterested in receiving apologies as it may appear at first glance. In fact, it has been noted that "there is evidence that the impact of apology in preventing litigation is similar in the United States and Japan."[47]

With regard to settlement offers at the time of an accident, a recent study has indicated that "[w]hen no apology was offered 52% of respondents indicated that they would definitely or probably accept the [settlement] offer, while 43% would definitely or probably reject the offer. . . . In contrast, when a full apology was offered, 73% of respondents were inclined to accept the offer, with only 13-14%" inclined to reject the offer.[48] In other words, this study demonstrates that defendants could substantially reduce the risk of being sued by apologizing to the plaintiff and settling the case before it was even initiated.[49]

Moreover, this study was not alone in its conclusion. Other scholars have noted that "[h]ow physicians respond to their patients after they are injured plays a significant role in whether patients sue."[50] Risk managers emphasize the importance of an early intervention strategy that involves "going to the patient, apologizing, explaining what happened and why, and compensating for the costs."[51] Likewise, "[m]ediators report that apologies often help to

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46. Shuman, *supra* note 37, at 183 (internal citation omitted). For other similar examples, see Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1122-25 (2002) (providing anecdotal examples of the expectation of apology).

47. Haley, *Implications of Apology*, *supra* note 1, at 504.

48. Robbennolt, *Apologies and Legal Settlement*, *supra* note 3, at 485-86.

49. For a similar result, see Fox & Stallworth, *supra* note 3, at 61.

50. Shuman, *supra* note 37, at 184 (citing Ann J. Kellett, *Healing Angry Wounds: The Role of Apology and Mediation in Disputes Between Physicians and Patients*, 1987 MO. J. DISP. RESOL. 111, 122-23); *accord* Davenport, *supra* note 4; s*ee also* MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING, 41-43 (2005) ("[I]n the end [malpractice] comes down to a matter of respect."); N. Berlinger & A.W. Wu, *Subtracting Insult from Injury: Addressing Cultural Expectations in the Disclosure of Medical Error*, 31 J. MED. ETHICS 106 (2005); A. Cleopas et al., *Patient Assessments of Hypothetical Medical Error: Effects of Health Outcome, Disclosure, and Staff Responsiveness*, 15 QUALITY & SAFETY IN HEALTH CARE 136, 140 (2006); Christine W. Duclos et al., *Patient Perspectives of Patient-Provider Communication After Adverse Events*, 17 INT'L J. FOR QUALITY IN HEALTH CARE 479, 483-85 (2005); Steve S. Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May Be the Best Policy*, 131 ANNALS INTERNAL MED. 963 (1999); R. Lamb, *Open Disclosure: The Only Approach to Medical Error*, 13 QUALITY & SAFETY IN HEALTH CARE 3 (2004); David L.B. Schwappach & Christian M. Koeck, *What Makes an Error Unacceptable? A Factorial Survey on the Disclosure of Medical Errors*, 16 INT'L J. FOR QUALITY IN HEALTH CARE 317, 322 (2004).

One experienced litigator noted: "I have never seen a malpractice case where the doctor said he was sorry or made an effort to show concern for the feelings of the patient and the family." Haley, *Implications of Apology*, *supra* note 1, at 504-05.

51. Shuman, *supra* note 37, at 184 (quoting Haley, *supra* note 1, at 505) (citation omitted).

resolve disputes; parties who receive apologies are often more willing to settle than those who do not."[52]

In summary, there is reason for a defendant to apologize in the United States. The United States judiciary seems to support the use of apology, and the American attitude seems to encourage, expect, or even demand an apology depending on the situation. But if the use of apology is encouraged in the United States, why doesn't the role of apology in American jurisprudence more closely match that of Japan? The next section provides the framework for discussing possible answers to that question.

IV. A FRAMEWORK FOR EXPLORING THE DIFFERENCES—SOME BASIC FORMULAS[53]

A. Introduction

Apologies differ. Some scholars have categorized the different forms of apology as "full" or "partial."[54] Other scholars have referred to the different forms of apology with other names.[55] Nevertheless, regardless of what the specific category is named, the research indicates that the most effective apologies include "acknowledgment of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done."[56] Because these "full" apologies have the most to offer, this paper focuses only on the barriers to apologies of this nature. Additionally, because the most recent and relevant research has teamed apology with settlement,[57] this section assumes that a "full apology" would normally be accompanied by some offer of settlement.[58]

B. Plaintiff's Determination of When to Litigate and When to Settle

Even in the United States, not everyone sues after suffering an injury. Instead, other factors must be weighed to determine whether litigation is the best route. Litigation costs ("L"), both monetary and otherwise, must be

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52. Shuman, *supra* note 37, at 183 (citing STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 116-37 (2d ed. 1992)).

53. For a more complete formulaic analysis, see O'Hara & Yarn, *supra* note 46, at 1173-83.

54. *See*, *e.g.*, *id.* at 1132-39.

55. *See*, *e.g.*, Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1141 (2000).

56. Robbennolt, *Apologies and Legal Settlement*, *supra* note 3, at 468-69 (quoting NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 3 (1991)). This paper will refer to such an apology as a "full" apology.

57. *See id.* at 482-90, 494-99.

58. For discussion on the effectiveness of an apology without an offer of payment, see *infra* notes 70-71 and accompanying text.

evaluated. If pursuing every litigation resulted in the plaintiff destroying all immediate family relationships and paying several million dollars, few lawsuits would be filed. One would reason that the only lawsuits filed under such conditions would be the few suits in which the potential reward ("R") was higher than the litigation costs (L). Like costs, the potential rewards from litigation are not limited to monetary gain. Instead, other factors such as acknowledgement, establishment of credibility, determination of fault, or desire for revenge can have important roles.[59]

Finally, the relationship between litigation costs (L) and potential rewards (R) is the probability of obtaining the desired potential rewards ("P"). Even when the potential rewards of a lawsuit are higher than the litigation costs, a rational plaintiff must still consider the chances of obtaining that reward. Applying these concepts, a rational plaintiff files a lawsuit when the litigation costs (L) are less than the probability of winning (P) multiplied by the potential reward (R). Stated differently, the equation for determining whether or not to file suit is: $L < \text{or} > P \times R$. For example, if costs equaled five[60] and the potential rewards equaled ten, a rational plaintiff would only file a lawsuit if she had more than a 50% chance of winning. Additionally, a plaintiff's determination of whether to settle is tied directly to the same equation. A rational plaintiff settles when the net reward (monetary and otherwise) from settling ("S") is greater than the net rewards from litigating, such that $S > (P \times R) - L$.

Some may suggest these equations are overly simplistic because they fail to address desires that cannot be met through legal action. However, such a suggestion ignores exactly what the formulas measure. Plaintiffs may have interests that are unobtainable through formal legal action. Indeed, the reason settlement rates increase after an apology is due in part to the plaintiff's satisfied desire for a wrongdoer to formally admit his error—a desire that is not readily achievable through legal action. However, assuming a potential plaintiff recognizes that certain interests are not obtainable through legal action, the formulas remain accurate predictors.

For example, if a defendant voluntarily apologizes and, therefore, presents a non-judiciable remedy, the plaintiff will still have to determine whether to commence or continue legal action. To do so, the plaintiff will weigh the litigation costs (L) against the probability (P) of obtaining the potential rewards (R). Likewise, if a defendant refuses to apologize and none of the non-judiciable remedies are offered, the plaintiff will again determine whether to commence or continue action by considering the potential rewards of

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59. *Lawrence v. Texas*, 539 U.S. 558 (2003), provides an example of a case involving non-monetary rewards. In that case, the defendants appealed a misdemeanor conviction and $200 fine all the way to the United States Supreme Court. *Id.* at 563. Although technically not the plaintiffs, John Lawrence and Tyron Garner still had to make a determination as to whether to appeal the decision. Presumably, it was not the return of the $200 fine that motivated their decision.

60. This number, like all the other numbers in this section, is an arbitrary number used only for the purpose of demonstration. As a practical matter, it is difficult to quantify all of the factors in these equations.

litigation. In short, the fact that some rewards are not available through legal action affects the value of the potential rewards (R) in the plaintiff's equation.

Finally, some plaintiffs may bring action fully hoping the case is settled out of court. In these cases, the rational plaintiff will still utilize the above formulas. If the final goal is settlement, the costs of obtaining a settlement (L) will be weighed against the probability of obtaining a settlement (P_{Settle}) multiplied by the potential rewards (R) available through settling: $L < \text{or} > P_{Settle} \times R$. Thus, these equations are useful regardless of whether the plaintiff seeks a final reward to be obtained through mediation, litigation, negotiation, or any other means.

C. Defendant's Determination of When to Litigate and When to Offer an Apology or Settlement

A defendant has essentially three options after a plaintiff has initiated suit: The defendant can fulfill the claim, fight the claim, or attempt to settle.[61] For a rational defendant, this decision is made using equations already familiar to the plaintiff.

Like the plaintiff, a rational defendant is concerned with three separate factors: the costs of litigating, the probability of losing, and the potential damages. But, there is an additional factor involved, because the defendant can simply fulfill the claim. For example, a plaintiff may simply pay a $25 claim instead of spending the money necessary to litigate or settle the issue. Thus, a rational defendant will pay the claim requested in a lawsuit when the litigation cost (L) added to the probability of losing (P) multiplied by the potential damages (R) is greater than the total cost of fulfilling the claim ("Z"). The equation is: $Z < \text{or} > L + P \times R$.

Beyond the options of fulfilling a claim and litigating, a rational defendant must also determine whether or not to offer an apology or settlement. Again, this decision is based on a formula similar to that which the plaintiff uses. Essentially, a defendant must weigh the costs of apologizing ("C") against the costs of pursuing litigation. However, sometimes there will be settlement costs even without an agreement because not every settlement offer is accepted. For example, attorney's fees may have been incurred during settlement negotiations. Therefore, the net costs of an apology must include the probability of success ("S"). Thus, the defendant will only apologize when the net costs of attempted settlement (C/S) are less than both the net costs of

61. The difference between paying the claim and settling can be minimal, but there is a difference. When a defendant fulfills a claim, he is performing the action requested in the plaintiff's complaint. In a settlement, the defendant seeks to end the controversy for something less than demanded. Additionally, when the defendant fulfills the claim, presumably, there is no chance that the litigation will continue. However, a settlement offer can be rejected, forcing the continuation of litigation.

litigation and the costs of simply fulfilling the claim. Stated differently, a defendant will settle if: $C/S < L+(P \times R)$ and $C/S < Z$.

Finally, it is important to note that even though the defendant's equation shares common factors with the plaintiff's equation, the actual inputs will be different. This is true because the parties' interests (monetary and otherwise) will vary. Additionally, in the real world, probability is a difficult variant to measure and may vary according to each side's own estimates.

D. Conclusion

Having set forth the variants that affect both parties' decisions to litigate or settle, predicting items that will reduce the likelihood of an apology is made easier. In short, because the plaintiff's determination of when to accept a settlement is whether the settlement offer is greater than the net benefits of litigation (PR-L), any factor that increases the net benefits of litigation decreases the chance that the plaintiff will accept the apology and settle. Conversely, any factor that decreases the plaintiff's net benefits of litigation or increases the reward from settling[62] increases the chance that the plaintiff will accept the apology.

Likewise, because the defendant offers an apology when the net costs of settling (C/S) are less than the net costs of litigating (L+PR), any factor that increases the net costs of offering an apology decreases the chances that the defendant will offer an apology. Conversely, any factor that decreases the net costs of settling increases the chances the defendant will offer an apology.

V. IMPACTING THE EQUATIONS: RULE OF EVIDENCE 801

A. Admissibility of Apologies and Refusal to Apologize

Often times we are counseled to not admit fault after an incident.[63] Such counsel is premised upon the notion that an apology and admission of fault will later be used in a subsequent legal proceeding. Indeed, Federal Rule of Evidence 801 provides: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement."[64] Because a full apology "not only expresses sympathy, but also accepts responsibility for

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62. For an example of how an apology can increase the net reward of settling, see Shuman, *supra* note 37, at 183 (discussing settlement of claim against Catholic Diocese).

63. *See, e.g.*, *What to Do if You Are In an Accident*, Geico.com, http://www.geico.com/auto/safety/whatToDoAccident.htm (last visited Sept. 25, 2007); *see also* Wagatsuma & Rosett, *supra* note 1, at 483-84. Interestingly, Japanese corporations preparing executives for work in the United States have actually warned the Japanese executives not to apologize in certain situations. "This advice is considered necessary because, in a parallel situation in Japan, the cultural assumption would be that both sides would immediately apologize to each other." *Id.* at 484.

64. FED. R. EVID. 801(d)(2).

having caused injury,"[65] it is probably admissible under Rule 801.[66] For this reason, Rule 801 is most often cited as the key reason why the role of apology is so different in Japan and the United States.[67]

However, as the introduction to this article noted, resting at that point seems to leave a door open. After all, if defendants in the United States experience so many of the same benefits that defendants in Japan receive from apologizing, wouldn't it make sense to just apologize and risk future admissibility? In other words, wouldn't the benefits outweigh the costs? The answer depends upon the circumstances. However, using the above formulas, this article presents at least two examples in which the benefits of an apology are clearly outweighed by the costs.

1. Increased Net Benefits of Litigation: The Litigation of Uncollectible Debts

First, one must consider whether an immediate apology and offer to settle will force a defendant to pay an otherwise uncollectible debt. Not every potential claim is worth pursuing. For instance, imagine a circumstance in which a baseball flies through the window of a car at the park. Further, imagine that a new car window will cost $150, and the plaintiff has a 50% chance of winning in small claims court, but the cost of the suit would be $100.[68] Because the cost of the litigation ($100) is greater than the desired reward ($150 × 0.50 = $75), the plaintiff will not bring suit.[69] But, if the baseball player immediately offers the car owner $40, the owner will take the money. After all, the net reward from settling ($40) is greater than the net reward from filing suit (-$25).

In other words, if the baseball player refuses to apologize or settle, the reality is that he will probably walk away without having to pay a dime. However, if the bad actor attempts to resolve the issue, he will be forced to pay. For this reason, a bad actor only has an incentive to apologize and settle if he determines that in the plaintiff's equation the probability of the desired award is greater than the cost of litigation (PR > L).

Of course, the baseball player can always apologize without presenting a settlement. However, this too creates problems for the potential defendant. To begin with, an apology "seems less than full and acceptable if a person

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65. Robbennolt, *Apologies and Legal Settlement*, *supra* note 3, at 473; *see also* O'Hara & Yarn, *supra* note 46, at 1132-39 (discussing essential components of apology).

66. Rehm & Beatty, *supra* note 38, at 118 ("Usually, apologies are admissible into evidence.").

67. *See* Haley, *Sheathing the Sword*, *supra* note 1, at 272.

68. This scenario assumes that only monetary rewards are at issue. If this same baseball player had repeatedly broken defendant's windshield in the past, if the two were bitter rivals, or if there was some other factor, the analysis might be different.

69. Again, this is assuming there are no other non-monetary benefits at issue.

expresses regret without agreeing to pay what is 'owed.'"[70] Therefore, an apology without any offer of settlement would, presumably, be less effective in stemming litigation. Indeed, the apology may actually "change perceptions in ways that could impede the discussion"[71] of a later settlement.

More importantly, the apology alters the plaintiff's equation. With regard to the costs of litigation, an admissible apology accepting fault could reduce the cost of pursuing a lawsuit. For example, with an admissible apology from the defendant, the plaintiff may be relieved from the costs of hiring an expert to testify about the baseball's direction or from the costs of deposing other players. Imagine the litigation costs (L) drop from $100 to $50. Likewise, the same admission when presented to the court "may be the trial equivalent of a deadly weapon" in the hands of the plaintiff.[72] Therefore, assume the probability of winning (P) increases to 75%. Now, merely by apologizing, the defendant has secured his chances of being sued by a rational litigant ($50 < [$150 × 0.75] − $50, or $62.50). Therefore, despite the urge to do so, the baseball player may say nothing.

Furthermore, the change in the plaintiff's equation can dramatically alter the settlement negotiations—and not in the defendant's favor. After all, a plaintiff would no longer even accept the $40 settlement ([$150 × 0.75] − $50 > $40). Instead, the defendant would now have to offer at least $62.50—the new net benefit of litigation. Thus, an apology and settlement can actually be worse than a simple settlement offer because the increased net benefit from litigation necessitates a corresponding increased cost of settlement.

In short, assuming a full apology decreases litigations costs (L) while it increases the probability of winning (P), the only other variable in the plaintiff's formula is the potential reward (R). Thus, there are three potential outcomes. First, the plaintiff may have serious apology-related interests (admission/finding of fault, etc). In these cases, an apology would satisfy a portion of the plaintiff's desires (R) and therefore may level or even decrease the net benefits of litigation (PR − L). Second, the plaintiff may be only minimally interested in an apology. In these cases, potential reward (R) is only slightly decreased, and it is quite possible the plaintiff experiences an overall increase in the net benefit of litigation. Third, the plaintiff has no interest in an apology. In these cases, an apology would increase the net benefit of litigation by decreasing the litigation costs (L), increasing the probability of winning (P), and leaving the desired reward (R) steady.

Under scenarios two and three, a defendant is directly discouraged from apologizing and would be wise to either do nothing or attempt to settle without an apology.[73] Because of the difficulty of ascertaining a plaintiff's true

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70. Wagatsuma & Rosett, *supra* note 1, at 483-84.

71. Robbennolt, *Apologies and Legal Settlement*, *supra* note 3, at 507.

72. United States v. McKeon, 738 F.2d 26, 32 (2d Cir. 1984); *accord* Robbennolt, *Apologies in Resolving Health Care Disputes*, *supra* note 4, at 1024 ("There are risks to apologizing–the patient may sue anyway, and an apology (particularly one that accepts responsibility) may make the patient's case easier to prove.").

73. For a similar result in the criminal context, see United States v. Chee, No. 2:05 CR 773, 2006 WL 2355837 (D. Utah Aug. 15, 2006). In *Chee*, the defendant wrote a letter of

interest, this refusal to apologize has become the default course of action for a defendant.

2. Increased Net Costs of Apologizing: The Litigation of Future Cases

Increasing the net costs of an apology makes a defendant more likely to take his chances in litigation.[74] Some costs of apologizing exist without regard to Federal Rule of Evidence 801. Injury to public reputation and ego are examples of such costs.[75] Other costs associated with apologizing come from raising the net benefit the plaintiff receives through litigation. However, there is an additional cost associated with apologizing under the current rules of evidence—future liability. Rule 801 allows for the admission of a third-party admission without regards to when that admission was made.[76] Thus, one apology could increase the net benefit of hundreds of other potential litigants.

One clear instance of this would be the airline example referenced earlier. If the airline were to openly apologize and acknowledge the negligence of employing an unstable pilot to the first victim, the remaining victims' cases would be significantly altered. Of course, the airline could seek to limit the admissibility of the apology in future cases by contract or other means. However, this limited or secret apology would no longer be a "full" apology and may lose many of the benefits associated with an apology.

VI. SEPARATING JAPAN FROM THE UNITED STATES

Now that the formula to determine when a defendant will offer an apology has been discussed and applied to the United States, we are finally able to contrast the United States with Japan. Such a contrast discloses the fact that the net benefits of litigation and the net costs of settling are lower in Japan. Most important, however, is that when an apology is offered in Japan, the defendant is not penalized. Interestingly, this outcome is obtained in spite of the fact that Japan does not have a rule preventing the admission of evidence related to an apology.

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apology to the grandmother of a child rape victim. *Id.* at *2. As a result, this letter became a key piece of evidence in what otherwise might have been a questionable case. *Id.*

74. *See supra* Section V.

75. S*ee* O'Hara & Yarn, *supra* note 46, at 1169-83 (providing a more complete list of the benefits and potential burdens of apologizing); Cohen, *supra* note 38, at 1015-1030 (same).

76. *See* FED. R. EVID. 801; United States v. Gonzalez, 748 F.2d 74, 78 (2d Cir. 1984) (holding defendant's offer to compromise in civil suit admissible against defendant in criminal case); Smith v. Smith, 720 S.W.2d 586, 599 (Tex. App. 1986) (allowing deposition from a prior case to be admitted as admission of a party opponent under the state's Rule 801).

A. Initially Lower Net Benefits for the Plaintiff

Japan has three distinct factors, which decrease the potential rewards (R) available to a plaintiff. First, civil remedies are generally lower in Japan than in the United States.[77] Second, the Japanese legal system does not award punitive damages.[78] Without such punitive damages, the potential monetary reward is drastically reduced (or at least more likely to yield proper calculations of potential rewards).[79] Third, the absence of a jury system increases the stability of compensation rates in Japan.[80] These factors combine to create a potential monetary reward (R) that is lower and less subject to wishful calculation by the plaintiff.[81] As discussed earlier, decreasing the potential reward (R) also decreases the plaintiff's net benefit of litigation. Because this is done without decreasing the net benefit of settlement, the plaintiff is more prone to accept an initial settlement offer.

In addition, the initial costs of filing a lawsuit in Japan are much higher.[82] In the United States, even a *pro se* litigant can easily and cheaply file a complaint. In Japan, however, there are barriers in the form of fees and bonds that must be paid before initiating a lawsuit.[83] Additionally, lawyers in Japan rarely take cases on a contingent fee basis,[84] which increases costs for the plaintiff.

Finally, the third factor associated with the net benefit of litigation—probability of winning—is more precise in Japan. As two scholars noted, "Japanese disputants . . . find it relatively easy to agree on how courts would adjudicate their disputes."[85] This increased understanding of the probability of success also affects the plaintiff's determination of the net benefit of litigation. Presumably, a plaintiff relies upon his attorney's determination as to the probability of winning any given claim. When the probability range is wide, attorneys for both sides may have a tendency to engage in "wishful" predictions. Replacing these predictions with more accurate measurements would decrease the probability of winning (P) and again result in decreased net benefit of litigation estimates.

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77. *See* Carl F. Goodman, *The Somewhat Less Reluctant Litigant: Japan's Changing View Towards Civil Litigation*, 32 LAW & POL'Y INT'L BUS. 769, 794 (2001).

78. *Id.*

79. *See* Campbell v. State Farm Mut. Auto Ins., 2004 UT 34, ¶ 1, 98 P.3d 409, 410 (Utah 2004) (reducing award of punitive damages to $9 million in punitive damages on remand after United States Supreme Court determined $145 million dollors in punitive damages was excessive). Expectations of these kind of rewards would greatly skew the plaintiff's equations.

80. Goodman, *supra* note 77, at 796-97; J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 269 (1989).

81. *See* Ramseyer & Nakazato, *supra* note 80, at 264, 268 (noting more predictable court rewards that encourage settlement as one reason for low litigation rates in Japan).

82. Goodman, *supra* note 77, at 791-793.

83. *Id.* at 791-92.

84. *See id.* at 792 ("In Japan, contingent fees, while not illegal, are not widely employed. Japanese lawyers do get a success fee in litigation, but this fee is in addition to the normal fee for handling the case.").

85. Ramseyer & Nakazato, *supra* note 80, at 268.

In summary, increased costs, decreased probability, and decreased rewards in Japan mean a potential plaintiff is less likely to run to court. (Remember C < (PR) or C > (PR).) Likewise, settlement is encouraged because the net benefit of litigation (PR − C) is decreased.

B. Decreased Settlement Costs

A related effect of decreasing the plaintiff's net benefit from litigation is that the defendant's net costs of apologizing decrease. Remembering that the defendant's net costs of apologizing are C/S (where C is the cost of apologizing and S is the probability of settling), there are two ways of decreasing the costs of a proposed settlement: (1) decreasing the actual costs or (2) increasing the probability of acceptance. The decreased net benefit of litigation in Japan accomplishes both of these factors.

Returning to the plaintiff's determination of when to accept a settlement (S < PR − C or S > PR − C), it is easy to see how settlement costs decrease when net benefits of litigation decrease. For example, imagine in the United States that a plaintiff's net benefit from litigation is $50, and in Japan that same benefit is $40. In Japan, an acceptable settlement would cost $10 less than what it would in the United States. Likewise, a plaintiff is more likely to accept a settlement when his alternative of litigating is of lesser value. Thus, the net cost of settling has been decreased by increasing probability of acceptance and decreasing the actual costs.

C. Stable Settlement Costs and Benefits of Litigation

Of course, the fact that litigation is discouraged and settlement is encouraged does not necessarily mean a prudent defendant will apologize. Indeed, in the case of the American baseball player, we saw how an apology could actually turn the tables and encourage litigation while discouraging a settlement.[86] What that example taught us is that even when the plaintiff's net benefits of litigation are less than the plaintiff's costs, a defendant will only apologize if he is certain that *after* the apology, the result of the plaintiff's equation will remain the same. Essentially, the defendant does not want to be penalized for apologizing.

What separates Japan's approach on apology from that of the United States is that in Japan defendants who apologize are not penalized to nearly the same degree as their counterpart defendants in the United States. Interestingly enough, Japan has reached this result without preventing the admission of a defendant's apology. Contrary to common belief, the reason Japan is so different from the United States is not because Japan lacks a corollary to

86. *See supra* Section VI.

Federal Rule of Evidence 801. In fact, apologies are admissible in Japanese courts.[87]

Instead, the differentiating aspect of the use of apology in Japan is not its inadmissibility, but rather its unimportance. Because of the commonness of offering an apology and the accompanying lack of the kind of formal evidentiary rules used in United States jury trials, the fact that an apology was offered in a particular case is of little importance in Japan.[88] Unlike the United States, "when cases do reach litigation, . . . Japanese judges do not see the offering of an apology as an admission of liability."[89]

The offering of an apology in Japan is not penalized in the same way it is in the United States. The admission of an apology does not present the same increase in the plaintiff's probability of winning (P), nor does the apology present the same decrease in litigation costs (L). Thus, the apology and the settlement offer presents all of the benefits (decreased R), with none of the potential drawbacks.

D. Conclusion

Through Japan, we see various factors encouraging apology that are missing from the United States framework. First, Japanese plaintiffs are less likely to sue because of the decreased net benefits of litigation. Second, Japanese defendants are more likely to settle because of the decreased settlement costs. Third, and most important, Japanese defendants receive all of the available benefits of apologizing (decreased potential monetary awards) without the possible drawbacks (increased probability of winning for plaintiffs and increased litigation costs).

VII. CONCLUSION

A An Observation on Culture

The most interesting aspect of the apology dichotomy between the United States and Japan is not the rules of evidence each country has chosen to adopt—after all, both countries allow the introduction of evidence regarding apologies. Instead, the most interesting facet of the dichotomy is that, in a sense, it can be traced back to the previously discussed Aesop's fable. That is, an individual in Japan is simply taught and expected to apologize. As such, the apology is so common that it has little importance when determining a defendant's liability.

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87. *See, e.g.*, Haley, *Sheathing the Sword, supra* note 1, at 270-72.

88. Wagatsuma & Rosett, *supra* note 1, at 479 ("Such rules of evidence do not play a role in the judge-centered Japanese trial."). Additionally, the relative unimportance of an apology is emphasized by Japananse courts encouraging or even requiring many cases to be resolved by attempts at conciliation and compromise, in which apology plays an important role. *Id.*

89. Bolstad, *supra* note 1, at 560.

On the other hand, Americans do not place nearly the same cultural emphasis on an apology. When an American does apologize, the apology acts as a signal to the court that this particular defendant actually has something for which to apologize. Thus, in a very real sense, those who suggest the apology dichotomy is a product of culture are absolutely correct.

B. An Observation on Evidence

On the other hand, those who suggest the dichotomy is a product of Rule 801 are also correct. After all, there is very little difference between admissible evidence that is disregarded and evidence that is never admitted. Either way, the evidence does not play a role in the judicial resolution of the case. Thus, in a very real sense, the way to end the dichotomy is to remove the barrier to apology in the United States—Rule 801 of the Federal Rules of Evidence.

C. Roadmap for Change

Regardless of whether one views the dichotomy as a product of culture or law, this article has offered an explanation for why the United States has not reached the Japanese benchmark. The United States has fallen short of this benchmark because, although the benefits are nearly the same, the potential consequences of an apology are felt more drastically by defendants in the United States than defendants in Japan. Thus, the way to reach the Japanese benchmark is to remove or at least lessen the consequences of an unaccepted apology in the American legal system.