The #MeToo and #TimesUp movements have cast new light on the alarming prevalence of sexual violence. Despite this increased attention, the criminal justice system addresses sex crimes insufficiently. Conviction rates are low; incarceration rates are lower. Meanwhile, offenders hesitate to admit responsibility and engage in healing conversations with victims due to fears of liability. This reality undermines not only retribution and deterrence, but also restoration and rehabilitation.

In light of these issues, some theorists have suggested replacing criminal prosecutions of sexual assault with diversionary models grounded in restorative justice. While these proposals have some merit, this Comment argues that their implementation may be unwise at this time. The use of restorative programs for sexual assault is underexplored, may cause harm, and is unlikely to occur at scale.

Alternatively, this Comment suggests that criminal law can learn from and incorporate a key insight of restorative justice: the value of apologies. It argues that apologies for sexual assault are highly valuable. They provide psychological benefits to victims and offenders, may improve litigation outcomes, and facilitate the consequentialist goals of criminal punishment. They also have high retributive value, carrying significant moral weight and serving a punishing function.

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To encourage defendants to apologize for sexual assault, this Comment proffers and defends a narrowly tailored, exclusionary evidence rule justified by the high value of apologies. It suggests various parameters for the exclusion, including the type of apology, how it is conveyed, the way it may be used, and how publicity should be treated so as to make the exclusion only as broad as is necessary to accomplish its goals. This exclusion will facilitate restorative justice and the goals of criminal punishment, minimize the negative impact on the truth-seeking process of trials, and encourage private and public accountability for sexual violence.

INTRODUCTION

I. SEXUAL ASSAULT & RESTORATIVE JUSTICE

II. THE VALUE OF APOLOGIES FOR SEXUAL ASSAULT
   A. Instrumental Value of Apologies
      1. Psychological Benefits to Victims
      2. Psychological Benefits to Offenders
      3. Impact on Litigation
         a. Criminal Cases
         b. Civil Cases
   B. Apologies & Retributivism
      1. Retributive Value
      2. Addressing Objections
   C. The Danger of False Apologies

III. LEGAL STATUS OF APOLOGIES
   A. Current Status
      1. Federal
      2. State
   B. Proposed Solutions

IV. PROPOSED RULE
   A. Evidentiary Relevance of Apologies
   B. Text of the Rule
   C. Explanation of the Rule
      1. Criminal and Civil Cases
      2. Same Alleged Assault
      3. Made Directly by Defendant to Victim
      4. Non-Public
      5. Any Party
      6. Allowance for Impeachment and Rebuttal
      7. Rule of Completeness
      8. Exclusion of Apologies that Evince Fault

CONCLUSION
INTRODUCTION

The #MeToo and #TimesUp movements have ignited long-overdue conversations about the alarming prevalence and significant harm of sexual violence.¹ They have encouraged victims to share their stories and hold offenders accountable. They have resulted in the prosecutions and convictions of multiple high-profile, serial perpetrators, including Harvey Weinstein and Larry Nassar.² And research has shown that they may have even increased the number of arrests for sex crimes, both in the United States and internationally.³

Increasing focus on sexual violence is imperative. “Every 68 seconds[,] another American is sexually assaulted[,]” and one of every six women in the United States “has been the victim of an attempted or completed rape.”⁴ With

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¹ See Michelle Madden Dempsey, Coercion, Consent, and Time, 131 ETHICS 345, 345 (2021) (describing the #MeToo and #TimesUp movements as "the general social movement against sexual violence, abuse, and misconduct that has continued to develop since October 2017").


³ See Róee Levy & Martin Mattsson, The Effects of Social Movements: Evidence from #MeToo 31 (July 12, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3496903 [https://perma.cc/TV29-JEWA] (explaining that in the first fifteen months of the #MeToo movement, 69,738 sex crimes were reported across sixteen countries and 4,647 arrests were made in the United States). Because this research compiled data from multiple countries, the results rely on varying definitions of sex crimes. Id. at 44-51.

⁴ See Scope of the Problem: Statistics, RAINN (2022) (emphasis added), https://rainn.org/statistics/scope-problem [https://perma.cc/ZA5D-368T] (summarizing data from the Department of Justice, the National Institute of Justice, and the Centers for Disease Control & Prevention). According to data from the Department of Justice, nine of every ten rape victims are female, so I will refer to victims as such. Id. Conversely, I will refer to offenders as male because, in cases of both male and female victims, perpetrators are predominantly male. See SHARON G. SMITH, JIERU CHEN, KATHLEEN C. BASILE, LEAH K. GILBERT, MELISSA T. MERRICK, NIMESH PATEL, MARGIE WALLING & ANURAG JAIN, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010-2012 STATE REPORT, at 25 tbl.3-4, 32 tbl.3-8 (2017), https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf [https://perma.cc/L2DK-SXL8] (finding that over ninety-seven percent of rapes with female victims and over eighty-six percent of rapes with male victims involved male perpetrators). Although these statistics depend on varying definitions of rape, reporting rates, and the research methodologies employed, they nonetheless provide a foundation for understanding the current landscape.

While the use of gendered pronouns risks obscuring certain classes of cases, using gender neutral language fails to capture the reality of how gendered this offense is. For detailed discussion about cases other than those with male offenders and female victims, see generally Bennett Capers, Real Rape Too, 99 CALIF. L. REV. 1259 (2011), which describes the prevalence of male rape victimization; Donna M. Vandiver & Jeffrey T. Walker, Female Sex Offenders: An Overview and Analysis of 40 Cases, 27 CRIM. J. REV. 184 (2002), which describes the prevalence of female sex offenders; and Adam M. Messinger & Sarah Koon-Magnin, Sexual Violence in LGBTQ Communities, in HANDBOOK OF SEXUAL ASSAULT AND SEXUAL ASSAULT PREVENTION 661-74 (William T. O’Donohue & Paul A. Schewe eds., 2019), which describes the prevalence of sexual victimization in LGBTQ communities.
this increased public attention on sexual violence, eyes are turned to the
criminal justice system’s role in holding perpetrators accountable and seeking
justice for victims and communities.\textsuperscript{5} Despite reform efforts, considerable
problems remain in the system’s ability to facilitate restoration, retribution,
and deterrence for sexual violence.\textsuperscript{6}

To address these inadequacies, some theorists have proposed shifting
from the criminal prosecution of sexual assault to the use of restorative justice
programs.\textsuperscript{7} While these proposals have some merit, substituting these
restorative programs for prosecutions may hinder deterrence, undermine just
outcomes, and result in additional harm to victims.

As an alternative solution, this Comment suggests that criminal law may
learn from restorative justice by incorporating its focus on apologies and
acceptance of responsibility. It argues that in order to encourage apologies, a
limited evidentiary exclusion should be created. These apologies are highly
valuable because they help all parties heal from sexual violence, may improve
litigation outcomes, and further the goals of criminal punishment.\textsuperscript{8}

An apology exclusion is necessary in part because defendants are often
discouraged from apologizing due to liability concerns,\textsuperscript{9} as neither federal nor
state rules exclude apologies for sexual assault from evidence.\textsuperscript{10} These legal
concerns may “make it even harder to admit wrongdoing for [sexual
offenders] who may already be hesitant to own up to their behavior,” and they
may deter “those who do want to apologize.”\textsuperscript{11} Considering the long

\textsuperscript{5} See, e.g., Leigh Goodmark, #MeToo and the Failure of Law, GENDER POL’Y REP., May 22, 2018
(“Many people still don’t see the legal system as a viable option for addressing violence. The rise of
#MeToo is about the failure of the law.”); Leah Asmelash, In 5 Years of #MeToo, Here’s What’s Changed—
years-later-ccc/index.html [https://perma.cc/ZN59-LRQF] (describing the effects of the #MeToo
movement on the legal landscape).

\textsuperscript{6} See, e.g., Meghna Sridhar, #MeToo: How a Broken Criminal Justice System Led to Bill Cosby’s
acquittal-sexual-assault-metoo [https://perma.cc/FD9Y-TPVV] (characterizing the overturning of
Bill Cosby’s conviction as a failure of the criminal justice system); Goodmark, supra note 5
(describing advocates’ efforts to improve the treatment of sexual violence cases in the criminal justice
system).

\textsuperscript{7} See discussion infra Part I (exploring the use of restorative justice programs in cases of sexual
assault).

\textsuperscript{8} Importantly, I am not suggesting that victims should want apologies, or that all will benefit
from hearing them. I argue only that apologies are highly valuable.

\textsuperscript{9} See Jennifer K. Robbennolt, 2018 Symposium Lecture: The Range of Remedies and Responses in
Range of Remedies] (noting that liability concerns can make it difficult for offenders to take
responsibility, which is the central feature of an apology).

\textsuperscript{10} See discussion infra Section III.A (outlining evidentiary rules).

\textsuperscript{11} Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, #MeToo, Time’s Up, and Theories
of Justice, 2019 U. ILL. L. REV. 45, 76.
sentences\textsuperscript{12} and collateral consequences of sexual assault convictions, it is unsurprising that defendants are reluctant to admit their wrongdoing through apologies.\textsuperscript{13} However, this Comment argues that promoting apologies is good for defendants, victims, and justice overall, and thus, the evidentiary value of an apology is outweighed by the good that its exclusion can create.

This Comment proceeds in four parts. Part I explores the intersection of sexual assault and restorative justice programs. Despite the potential merits of restorative justice programs, Part I argues that it may be unwise to implement them fully at this time. But the criminal justice system may learn from restorative justice, specifically by encouraging apologies.

Part II discusses the significant value of apologies for sexual assault and argues that this value justifies an evidentiary exclusion. It describes the psychological benefits of apologies, their potentially positive effects on litigation, and how apologies facilitate retributivism. Finally, it addresses the concern that adopting an exclusion would encourage false apologies.

Part III describes the current legal status of apologies. It begins by outlining the dearth of evidentiary protections in both the federal and state systems. It then analyzes and ultimately rejects as insufficient other proposals to exclude apologies.

Finally, Part IV begins by addressing the probative value of apologies for sexual assault. It then illustrates, by referencing privilege doctrine and two similar exclusionary rules, that we may exclude relevant evidence for sufficiently strong normative and policy reasons. Subsequently, Part IV outlines and defends an apology exclusion that is justified by the high value of apologies. It suggests various parameters for the exclusion, including the type of apology, how it is conveyed, the way it may be used, and how publicity should be treated so as to make the exclusion only as broad as is necessary to accomplish its goals.

As the breadth of the #MeToo movement illustrates, victims have gone without sufficient consideration or restoration for too long. They have been forced to navigate a complex criminal justice system that fails to represent their interests sufficiently, and they have faced both public and private skepticism when they have chosen to come forward. It is the goal of my proposed exclusion to help remedy this injustice. Implementing a narrowly tailored apology exclusion will improve the criminal justice system’s treatment of sexual assault cases. It will encourage defendants to apologize, facilitate both restoration and retribution for sexual violence, and increase

\textsuperscript{12} See U.S. Sent’g Comm’n, Guidelines Manual § 2A3.1 (2021) (describing offense levels for sexual abuse and noting the long guideline sentences for sexual offenses).

\textsuperscript{13} See discussion infra subsection II.A.1 (describing the psychological benefits of apologies to victims and noting that many victims do not receive apologies).
public and private accountability without overly sacrificing the truth-seeking process.

I. SEXUAL ASSAULT & RESTORATIVE JUSTICE

Despite the prevalence and severity of sexual violence, the criminal justice system serves victims of sex crimes insufficiently. As such, some scholars have suggested the use of restorative justice to address sexual misconduct. Rather than focusing on punishment, restorative programs focus on “the restoration and reintegration of victims” and offenders, as well as the harm to the broader community. They are generally considered “alternative[s] to criminal justice.” Although restorative justice aims are positive, I argue in this Part that the widespread implementation of such programs in sexual assault cases is unlikely, premature, and potentially harmful. However, criminal law can learn from and incorporate a key insight of restorative justice: the value of apologies.

14 See, e.g., Clare McGlynn, Julia Downes & Nicole Westmarland, Seeking Justice for Survivors of Sexual Violence, in RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS 179 (Estelle Zinsstag & Marie Keenan eds., 2017) (explaining that the criminal justice system fails to address the needs and interests of sexual assault survivors); Stephanos Bibas & Richard A. Bierschbach, Essay, Integrating Remorse and Apology into Criminal Procedure, 114 YALE L.J. 85, 87 (2004) [hereinafter Bibas et al., Integrating Remorse and Apology into Criminal Procedure] (describing a victim who wanted an apology but could not receive one during the criminal process).

15 See, e.g., Wexler et al., supra note 11, at 68-70 (describing how aspects of restorative justice “might apply” to “sexual harassment”); Deborah Gartzke Goolsby, Note, Using Mediation in Cases of Simple Rape, 47 WASH. & LEE L. REV. 1183, 1183-85 (1990) (arguing that mediation for non-aggravated rape “may result in greater healing and more effective resolution” for those involved).


18 Some scholars, such as Benjamin B. Sendor, have argued that retribution—one major theory of criminal law—may also be restorative. Sendor has proffered a “restorative theory of retributivism”:

Crime, understood in this way, produces two kinds of harm. First, it produces the actual harm of an injury to a legally protected interest. Second, it produces the social harm of damaging the legally required relationship of restraint between the offender and the victim and the offender and the community, thereby diminishing the victim’s and the community’s sense of autonomy over the interest. This diminution in turn demeans the value of the victim’s interest relative to the value of the offender’s interests. The reduction of autonomy and the demeaning of the relative value of the violated interest in turn cause genuine insecurity about the injured interest, an individual and communally shared sense of vulnerability about the interest. From a retributive viewpoint, punishment seeks to restore, to repair the broken relationship of restraint by defeating the offender’s imposition of control over the injured interest—or by at least nulling the offender’s assertion of power to control the
Restorative justice programs are one aspect of diversion, which is a process that allows defendants to receive “dismissal, a reduction of the charges, and, if relevant, a significantly lower sentence, typically involving no jail time” if they meet certain requirements. Some restorative programs, such as those “for serious crimes,” require “victim consent and participation,” as the programs are “victim-centered.” They may involve “[p]eacemaking circles, victim-offender mediation, community and family group conferencing[,] and peer mediation.” Participants may include victims, offenders, families, friends, and members of the community.

Apologies are “[a]n important feature of restorative justice,” as they serve the restorative goals of facilitating healing and relationship repair. They illustrate that offenders acknowledge and accept the societal values that they previously infringed through their wrongful conduct. They are also a key aspect of restorative justice’s efforts to “engag[e] the affected parties in a dialogue . . . toward the reestablishment of a consensus between the parties.” One restorative program focused on sexual assault culminated in offenders writing apology letters wherein they accepted responsibility for their wrongful conduct.

Although restorative programs may benefit victims, offenders, and communities, there are few focused on sexual assault. And while their

injured interest—by seeking to annul the demeaning of the relative value of the injured interest, and by reducing insecurity about the injured interest.

Benjamin B. Sendor, Restorative Retributivism, 5 J. CONTEMP. LEGAL ISSUES 323, 324 (1994) (emphasis added).


20 Id. at 530.


22 Bletzer et al., supra note 17, at 1 (explaining that restorative justice seeks to consider the entire network of those involved in sexual assault).

23 Georgia Nigro, Eleanor Ross, Talia Biins & Ceria Kurtz, Apologies in the #MeToo Movement, 9 PSYCH. POPULAR MEDIA 403, 411 (2020); see also Carrie J. Petrucci, Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System, 20 BEHAV. SCIS. & L. 337, 347 (2002) (noting that restorative justice’s focus on restoring relationships relies on the emotional processes of remorse and forgiveness).

24 Wenzel et al., supra note 16, at 381 (illustrating that offender apologies provide validation of societal norms).

25 Id.

26 See Bletzer et al., supra note 17, at 4 (describing the letters apologizing to victims and displaying aspects of offenders’ “personal growth”).

27 See id. at 1 (“Applications of [r]estorative [j]ustice . . . to sexual assault are few in number.”). For examples of restorative programs focused on sexual assault, see Keith V. Bletzer & Mary P. Koss, From Parallel to Intersecting Narratives in Cases of Sexual Assault, 22 QUALITATIVE HEALTH RSCH. 291, 293-95 (2012), which describes RESTORE, a restorative justice program for sexual assault that involves writing apology letters, and Amy Kasparian, Note, Justice Beyond Bars: Exploring the
prevalence could increase, it seems unlikely that they will grow to replace all criminal prosecutions of sexual assault. For that to occur, every jurisdiction would have to adopt and fund these programs, every prosecutor would have to offer them in every case, and every defendant would have to participate in them.

However, even if it was possible to substitute restorative programs for all prosecutions of sexual assault, it may be unwise to do so at this point. The use of restorative justice for sexual violence is controversial and underexplored, so introducing widespread reform is premature. Restorative programs “may undervalue the harm of [sexual violence], place undue demands on survivors, reprivatize gendered violence in ways that perpetuate harm, or revictimize victims through the expression of power imbalances.”

Restorative justice practices also conflict with criminal punishment goals for sexual violence. Redirecting prosecutions would undermine deterrence: If all offenders may participate in restorative programs that carry no sanctions, then there would be few consequences to dissuade would-be offenders from committing sexual assault. Moreover, while apologies facilitate

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Restorative Justice Alternative for Victims of Rape and Sexual Assault, 37 Suffolk Transnat’l L. Rev. 377, 393-401 (2014), which outlines national and international restorative justice programs that focus on sexual assault and take place before, within, and after criminal justice intervention. As an additional example of a broader program that does not specifically focus on sexual assault, the Victims’ Voices Heard program in Delaware provides an opportunity for victims of violent crime to receive apology letters from offenders and to meet with them to discuss the offense and its impact. See Victims’ Voices Heard: We Work to Restore Victims’ Lives and End Repeated Violence, VICTIMS’ VOICES HEARD (2022), https://www.victimsvoicesheard.org [https://perma.cc/N7GT-5CMY]. The opportunity to meet with the offender serves "in large part [as] a transfer of power from offender to victim." See Victim-Offender Dialogue Program, VICTIMS’ VOICES HEARD (2022), https://www.victimsvoicesheard.org/programs/victim-offender-dialogue-program.html [https://perma.cc/4BQ3-MTHW]. It enables victims to “[a]sk questions and receive answers,” “[r]eceive personal insight and feel empowered,” and “[h]ear offenders take responsibility for the crime and express their remorse.” Id.

28 See, e.g., Michele R. Decker, Charvonne N. Holliday, Zaynab Hameeduddin, Roma Shah, Janice Miller, Joyce Dantzler & Leigh Goodmark, Defining Justice: Restorative and Retributive Justice Goals Among Intimate Partner Violence Survivors, 37 J. INTERPERSONAL VIOLENCE 2844, 2845-47 (2020) (noting that the “extent” to which restorative justice is "appropriate" for intervention is somewhat “contentious” and “understudied”); Wexler et al., supra note 11, at 70 n.164 (“Scholars have debated the appropriateness of restorative practices for cases involving sexual violence.” (citing RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL, AND THERAPEUTIC DIMENSIONS (Estelle Zinsstag & Marie Keenan eds., 2017))).

29 Decker et al., supra note 28, at 2846-47; see also Clare McGlynn, Nicole Westmarland & Nikki Godden, ‘I Just Wanted Him to Hear Me’: Sexual Violence and the Possibilities of Restorative Justice, 39 J.L. & SOC’Y 213, 214 (2012) (outlining the debate about using restorative justice programs for sexual assault cases and noting concerns that doing so could “trivialize violence against women, re-victimize the vulnerable, and endanger the safety of victim-survivors.”). 

30 But see R.A. Duff, Penal Communications: Recent Work in the Philosophy of Punishment, CRIME & JUST., 1996, at 53 [hereinafter Duff, Penal Communications] (arguing that mandatory participation in a program could be considered punishment designed to have the offender “recognize a need to
retributivism, they may not, standing alone, constitute morally sufficient punishment for at least the most culpable offenders.\textsuperscript{31} Incorporating restorative justice’s focus on apologies by implementing an evidentiary exclusion will improve the criminal justice system’s response to sexual assault and raise fewer concerns than using alternative programs.\textsuperscript{32} It will facilitate restorative justice’s emphasis on “victim participation, offender accountability, harm repair, and reintegration”\textsuperscript{33} without endangering victims or the pursuit of deterrence and retributivism.

II. THE VALUE OF APOLOGIES FOR SEXUAL ASSAULT

Apologies for sexual assault are highly valuable. Not only do they significantly benefit victims, offenders, and some litigation outcomes, but they also facilitate the goals of criminal punishment: deterrence, rehabilitation, and retribution. Because of their substantial value, these apologies should not be discouraged by evidence law; ideally, they should be encouraged. Therefore, in this Part, I will justify the proposed exclusion by outlining the instrumental value of apologies before turning to their retributive value. Then, I will address the counterargument that an exclusion could increase the number of false apologies.

A. Instrumental Value of Apologies

In this Section, I justify the proposed exclusion by exploring several ways that apologies create value. I begin by focusing on the psychological benefit of apologies to victims. Then, I describe the psychological benefit to offenders, as well as how apologies further the consequentialist goals of criminal punishment. Lastly, I discuss the potentially positive impact that apologies may have on litigation.

\textsuperscript{31} See discussion infra Section II.B (describing the retributive value of apologies).
\textsuperscript{32} See McGlynn et al., \textit{supra} note 29, at 237, 239 (suggesting that restorative practices can be “undertaken as part of the criminal justice treatment of a complaint of rape or sexual abuse” but that they should not “pit restorative justice against conventional criminal justice in some sort of mirror of the adversarial process itself”).
\textsuperscript{33} Wexler et al., \textit{supra} note 11, at 70 (citing Gordon Bazemore, \textit{Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration}, 41 AM. BEHAV. SCI. 768, 771-72 (1998)).
1. Psychological Benefits to Victims

While apologies are generally valuable, they are particularly restorative for victims of sexual assault. They may reduce the prevalence of victims blaming themselves, alleviate victims’ negative feelings about the offense and offender, and increase victims’ agency through empowerment.

Receiving an apology can encourage healing by allowing victims to internalize the fact that they are not responsible for the offense. According to the psychological theory of attribution, victims of crime often seek to understand the reasons that the offense occurred, and initially, they may “make negative attributions through self-blame.” In doing so, some victims may believe that they had control over the situation, which may lead to “feelings of shame, guilt, anger, and pity.” Attributing the situation to an internal and stable failure, as victims may, is associated with feelings of hopelessness and lowered self-esteem.

Sexual assault victims, in particular, may experience these issues. They often want to know that they “weren’t overreacting” and are not to be blamed for the assault. One qualitative study, for example, found that twenty-three victims “recommended that support providers assure survivors the assault was not their fault.” Additionally, several participants wanted young girls to receive self-defense training and recommended that they “avoid risky behavior,” which reflects self-blaming. Victims of sexual assault often “hope that their offenders will accept responsibility for their behavior and for the harm that their behavior has caused.” An apology may alleviate self-blame and its negative impacts by showing victims of sexual assault that they were

34 See Jonathan R. Cohen, Advising Clients to Apologize, 72 S. CAL. L. REV. 1009, 1019-23 (1999) (discussing the positive effects of apologies, including the prevention of disrespectful and antagonistic behavior, the restoration of damaged relationships, the facilitation of settlements thereby reducing litigation, and the encouragement of spiritual and psychological growth).

35 See, e.g., Robbennolt, The Range of Remedies, supra note 9, at 36-37 (explaining that victims may blame themselves for the offense and seek “acknowledgement” of the harm); Petrucci, supra note 23, at 352 (stating that victims may feel anger and aggression toward their offenders); Anne Kirkner, Katherine Lorenz & Sarah E. Ullman, Recommendations for Responding to Survivors of Sexual Assault: A Qualitative Study of Survivors and Support Providers, 36 J. INTERPERSONAL VIOLENCE 1005, 1017 (2021) (noting that victims often want to feel empowered and regain their agency).

36 Petrucci, supra note 23, at 351.

37 Id.

38 Id. at 352.

39 See Robbennolt, The Range of Remedies, supra note 9, at 37 (stating that victims of sexual assault may blame themselves for the offense).

40 Id.

41 Kirkner et al., supra note 35, at 1017.

42 Id. at 1015-16.

43 Robbennolt, The Range of Remedies, supra note 9, at 38.
not in control, that there was an external cause (the offender), and that the assault is unlikely to recur (that the cause is unstable). 44

Additionally, receiving an apology is beneficial because it may reduce victims’ “natural feelings of aggression toward their offenders,” emotions which may have detrimental health impacts. 45 This effect is particularly important in cases of sexual assault. Studies have shown that “as harm [from an offense] increased, victims felt more strongly that an apology was necessary,” and more harm led to more feelings of aggression. 46 Because sexual assault can result in substantial harm, it is likely that some victims may believe that an apology is required. For the same reason, sexual assault victims may have significant negative feelings, including anger and aggression, associated with the offense. 47 This increased aggression may be harmful to victims, as studies suggest that anger and aggression have significant negative impacts on health. 48 Anger, for example, may contribute to the development of cardiovascular disease, diabetes, and bulimia, as well as encourage maladaptive health behaviors. 49 Receiving an apology may help victims of

44 See Petrucci, supra note 23, at 352 (emphasizing that these factors can reduce feelings of hopelessness and lowered self-esteem, reflective of self-blame).
46 Petrucci, supra note 23, at 352.
48 See generally Spielberger et al., supra note 45 (outlining the harmful impacts of anger and other negative emotions on health). “The maladaptive effects of anger are traditionally [emphasized] as a major contributor to the etiology of the psychoneuroses and depression.” Id. at 280. Relatedly, studies have found that psychologically aggressive behavior (which may include psychological abuse or maltreatment) is associated with negative physical health symptoms. See Diane R. Follingstad, The Impact of Psychological Aggression on Women’s Mental Health and Behavior: The Status of the Field, 10 TRAUMA, VIOLENCE & ABUSE 271, 280-81 (2009) (describing that psychologically aggressive behavior is associated with negative physical health symptoms, including “chronic neck or back pain, arthritis, headaches, chronic pelvic pain, stomach ulcers, sexually transmitted infection, [and] spastic colon,” as well as “irritable bowel syndrome” and “depression surrounding pregnancy”) (citing Ann L. Coker, Paige H. Smith, Lesa Bethia, Melissa J. King & Robert E. McKeown, Physical Health Consequences of Physical and Psychological Intimate Partner Violence, 9 ARCHIVES FAM. MED. 451, 457 (2000)); Mihaela-Luminia Staicu & Mihaela Cuto, Anger and Health Risk Behaviors, 3 J. MED. & LIFE 372, 372-74 (2010); see also Timothy W. Smith, Kelly Glazer, John M. Ruiz & Linda C. Gallo,
crime, including sexual assault victims, resolve harmful negative emotions that they may have about the offense and thus alleviate some of the negative health impacts. Because eight out of every ten sexual assault victims know their offenders and thus could interact with them after the assaults, apologies may also be particularly beneficial in these cases.\footnote{Petrucci, supra note 23, at 352.}

Statements from victims of sexual assault show that many value apologies. For example, some victims describe receiving a sincere apology as a “fervent wish.”\footnote{Petretti, supra note 23, at 352.} They “believe[] that [it] would be the most meaningful restitution the offender could give.”\footnote{Perpetrators of Sexual Violence: Statistics, RAINN (2022), https://www.rainn.org/statistics/perpetrators-sexual-violence [https://perma.cc/R97F-QYC8]; Shepp et al., supra note 45, at 726.} Many crime victims want offenders to “[a]cknowledge[] their experience[s],” “the specifics of the behavior,” and “how [the behavior] affected them.”\footnote{Judith Lewis Herman, Justice from the Victim’s Perspective, 11 VIOLENCE AGAINST WOMEN 571, 586 (2005).} Consider how playwright and activist Eve Ensler longs for apologies that are never received:

I was sexually abused by my father from the time I was 5 until I was 10. Then physically battered regularly and almost murdered several times until I left home at 18. Some place deep inside, I believed my father would one day wake up out of his narcissistic, belligerent blindness, see me, feel me, understand what he had done, and he would step into his deepest truest self and finally apologize. Guess what? This didn’t happen. And yet the yearning for that apology never went away. I cannot tell you how many times I’ve rushed to the mailbox, believing that finally today there will be a letter waiting, an amends, an explanation, a closure to explain and set me free.\footnote{Eve Ensler, Alchemy of the Apology, Keynote Address at the Bioneers Conference (Oct. 18, 2019), https://bioneers.org/eve-ensler-alchemy-apology-zstf911 [https://perma.cc/9UVN-6X8f].}

Finally, receiving apologies may provide sexual assault victims with the empowerment and agency they often seek.\footnote{Robbennolt, The Range of Remedies, supra note 9, at 36.} They may be in control when they receive an apology, as they can decide whether they will forgive and “allow offenders back into the ‘moral community.’”\footnote{Id.} In this way, the mere

\textbf{Hostility, Anger, Aggressiveness, and Coronary Heart Disease: An Interpersonal Perspective on Personality, Emotion, and Health, 72 J. PERSONALITY 1217, 1252 (2004)} (“Research suggests that anger, hostility, and aggressiveness may contribute to [coronary heart disease] . . . .”).

\footnote{Petrucci, supra note 23, at 352.}


\footnote{Judith Lewis Herman, Justice from the Victim’s Perspective, 11 VIOLENCE AGAINST WOMEN 571, 586 (2005).}

\footnote{Robbennolt, The Range of Remedies, supra note 9, at 36.}


\footnote{See Kirkner et al., supra note 35, at 1017 (“[Survivors] preferred to be supported in ways that did not demean their agency.”); see also id. (stating that survivors wanted their support to be “as positive[] and encouraging as possible”).}

\footnote{Petrucci, supra note 23, at 352; see also Aaron Lazare, Go Ahead, Say You’re Sorry, PSYCH. TODAY (Jan. 1, 1995), https://www.psychologytoday.com/us/articles/199501/go-ahead-say-yoursorry [https://perma.cc/E585-HTAB] (“[When offenders] acknowledge[e] [their] shame, [they] give the offended the power to forgive.”).}
existence of the exclusion would be restorative; it would limit the extent to which victims’ healing is dictated by others and provide an avenue for them to exert control. Although a victim’s receipt of an apology is still dependent on the offender’s decision to apologize, an exclusion would remove an external barrier to receiving the apology that would help her heal. Hence, apologies are highly valuable because they may provide significant psychological, restorative benefits to victims of sexual assault.

2. Psychological Benefits to Offenders

Apologizing rectifies discrepancies in offenders’ identities, improves others’ perceptions about them, and alleviates negative emotions. Additionally, apologies may further the consequentialist goals of criminal punishment, especially rehabilitation. These effects are strengthened in cases of sexual assault due to the significance of the wrong and the resulting harm.

First, offenders may apologize “to maintain some self-respect, because they are nurturing an image of themselves in which the offense . . . violates some basic self-concept.” In other words, the fact that one committed an offense may conflict with his identity, and apologizing may reduce the dissonance. In sexual assault cases, these effects are likely amplified. The damage to an offender’s self-concept may be large because of the severity of the wrong committed. At the same time, those who commit sexual assault may be more likely to experience a conflict with their identity than those who commit crimes that require a higher degree of mens rea, particularly intent. Said differently, because the non-consent element of sexual assault is often treated as strict liability, offenders may commit sexual assault without intending to do so. Therefore, there may be a larger discrepancy between


59 See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03, at 17 (9th ed. 2022) (“[A]dvocates of this [rehabilitative] model prefer to use the correctional system to reform the wrongdoer rather than to secure compliance through the fear or ‘bad taste’ of punishment.”); see also Bibas et al., Integrating Remorse and Apology into Criminal Procedure, supra note 14, at 126 (stating that the failure to apologize may hinder a defendant’s “moral reform”).

60 See Lazare, supra note 57, at 42 (“The self-concept . . . [is] our thoughts and feelings about who we are, how we would like to be, and how we would like to be perceived by others.”).

what they have legally committed and how they view themselves, and thus there may be increased value in apologizing.

Apologies may also begin to restore others' perceptions about offenders. Psychologists suggest “the offense and the intention that produced it are less likely to be perceived as corresponding to some underlying trait of the offender” if the offender apologizes for his transgression.\(^{62}\) Hence, those who apologize may be perceived “as being of better character.”\(^{63}\) Because I am proposing to protect mostly private apologies, this benefit may be limited. But offenders who apologize to victims may at least receive more positive perceptions from them and those who learn of the conversation.

Finally, apologizing may allow offenders to alleviate negative emotions like guilt and shame.\(^{64}\) These emotions are particularly likely to arise after committing sexual assault because, as previously mentioned, defendants may have had no intent to assault. In this way, apologizing for sexual assault can be valuable and rehabilitative, as it facilitates offenders’ psychological healing.

3. Impact on Litigation

While apologies are valuable to both victims and offenders, their impact on litigation is less clear. In this subsection, I will explore the potential effects of an exclusion on criminal and civil cases. I argue that, despite concerns, there is reason to think that there will be a sufficiently positive impact on case outcomes to justify exclusion in light of the other positive effects of apologies.

a. Criminal Cases

First, because of the centrality of plea bargaining in the criminal justice system, it is essential to consider the impact of excluding apologies on that criminal process.\(^{65}\) Some scholars have expressed concerns that apologies made during plea discussions may negatively impact negotiation outcomes for defendants because they may strengthen prosecutors’ cases.\(^{66}\) They argue that prosecutors may view apologies with an eye toward their “evidentiary


\(^{63}\) Etienne et al., supra note 58, at 296 (footnote omitted).

\(^{64}\) Id. at 297-98.

\(^{65}\) Id. at 300-01. In 2020, nearly ninety-eight percent of all federal charges, and ninety percent of federal sex abuse charges, were resolved through guilty pleas. U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.12 (2020), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/Table12.pdf [https://perma.cc/TV7Q-zZJ2].

\(^{66}\) See Etienne et al., supra note 58, at 318 (“[T]o the extent that an apology by a criminal defendant provides evidence of the defendant’s responsibility for having committed a crime, the apology may serve to bolster the prosecution’s case.” (footnote omitted)).
value.\textsuperscript{67} However, because the exclusion would not allow prosecutors to introduce apologies to prove liability, apologies covered by the exclusion would have less evidentiary value. And while certain permitted uses—impeachment and rebuttal—are valuable from an evidentiary perspective, it is not clear that the value derived from these uses would have a significant impact on negotiations. Instead, prosecutors’ responses to learning that defendants have apologized would be highly context dependent. A response would depend, for example, on the apology’s sincerity, the strength of alternative evidence, the nature of the case, and whether the prosecutor believes that the defendant deserves more or less punishment as a result.

One consideration that would impact both pleas and trial verdicts is an apology’s impact on a victim’s willingness to testify. That is, a victim may decide not to cooperate as a result of receiving an apology, thereby significantly weakening the prosecution’s case. This situation occurred in the Kobe Bryant case, where the victim decided not to testify and the criminal charges were dropped after Bryant publicly apologized at the victim’s request.\textsuperscript{68} While this effect does present a certain danger to the prosecution, it is worth considering whether it is problematic in this context. Although public apologies may compel victims to forgive or oppose prosecution, I propose the protection of mostly private apologies, which makes the danger less palpable.\textsuperscript{69} In the case of private apologies, if a victim chooses not to testify as a result of receiving an excluded apology, her decision is less likely to be motivated by external pressures and more likely to be an internal, free choice.\textsuperscript{70} Therefore, citing the possibility of victims not testifying as a reason

\textsuperscript{67} Id. at 319.

\textsuperscript{68} Marc T. Boccaccini, Cynthia A. Mundt, John W. Clark & Siji John, I Want to Apologize, but I Don’t Want Everyone to Know: A Public Apology as Pretrial Publicity Between a Criminal and Civil Case, 32 LAW & PSYCH. REV. 31, 32, 45 (2008).

\textsuperscript{69} See Wexler et al., supra note 11, at 88-89 (describing how a victim could be "pressured to forgive" because not doing so could cause “continued diminishment of her harm and a public perception that she was now the one at fault for holding a grudge”) (emphasis added).

\textsuperscript{70} Cf. Shepp et al., supra note 45, at 744 (describing victims who interacted with offenders and had “justifiable anger, but did not necessarily want perpetrators jailed or harmed”). The exception, of course, is in cases of domestic abuse, wherein apologies are part of the violence cycle. See Crystal Raypole, Understanding the Cycle of Abuse, HEALTHLINE (Nov. 29, 2020), https://www.healthline.com/health/relationships/cycle-of-abuse [https://perma.cc/UQ59-R4UX]. However, because there are already significant problems with the cooperation of domestic violence victims and with offenders "apologizing" to manipulate victims, excluding these apologies may not worsen the situation significantly. Id.; see also Andrew R. Klein & Kristina Rose, NAT’L INST. OF JUST., U.S. DEP’T OF JUST., PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 43 (2009), https://www.ojp.gov/pdfs/nij/225722.pdf [https://perma.cc/C4L4-QEND] ("[The] lack of cooperative or available victims is cited as the prime reason prosecutors drop or dismiss domestic violence cases."). It is also possible that abusers would not act differently as a result of evidentiary rules. And because other charges are likely to follow from domestic violence beyond sexual assault,
to not protect certain apologies borders on paternalism and decreases victims’ agency.

Despite the possible negative impacts on prosecutions, there is reason to think that creating an exclusion would improve the outcomes of criminal cases by emboldening victims. If victims receive an apology, it may be easier for them to testify when it is otherwise excruciating, which could increase the likelihood of conviction.\textsuperscript{71} Processing the trauma prior to trial may also improve the quality of the victim’s testimony, which is crucial in sexual assault cases because the victim’s credibility is a key aspect of the jury’s determination but is often met with skepticism.\textsuperscript{72} The offender’s admission that he was responsible for the offense may alleviate the victim’s internalized blame that could otherwise negatively impact her presentation at trial.\textsuperscript{73} Hearing the offender’s perspective in advance of trial may also help the victim prepare emotionally to hear his testimony. And if the exclusion results in more apologies, there will be increased material available for impeachment and rebuttal, which may assure hesitant victims (and prosecutors) that offenders will not be able to elude a jury with false testimony.\textsuperscript{74}

Finally, considering the grave difficulty of obtaining convictions for sexual assault,\textsuperscript{75} encouraging apologies may serve as a stand-in method to provide

\textsuperscript{71} See Goolsby, supra note 15, at 1190 (“[T]estifying in court may be as psychologically painful . . . as the rape itself.”).
\textsuperscript{72} Deborah Tuerkheimer, Incredible Women: Sexual Violence and the Credibility Discount, 166 U. PA. L. REV. 1, 3 (2017).
\textsuperscript{73} See Goolsby, supra note 15, at 1205 (“The use of mediation would avoid the victim’s trauma during court testimony.”); see also Kirkner et al., supra note 35, at 1016 (“[Victims] internalized victim-blaming attitudes . . . ”).
\textsuperscript{74} We should also consider the effects of the exclusion on spousal cases. Ordinarily, marital privilege may be invoked, which protects spouses from having to testify against each other and excludes from evidence “marital communications.” Sasha N. Rutizer, Marital Privilege in Domestic Violence and Child Abuse Cases in Federal Courts: Exceptions to the Privilege and Compelling Testimony, 66 DEPT JUST. J. FED. L. & PRAC. 105, 105, 114 (2018). However, these privileges do not apply when one spouse is facing criminal charges for harming his spouse. See id. at 107-08 (summarizing the holdings of Wyatt v. United States, 362 U.S. 525, 526 (1960) and Hawkins v. United States, 358 U.S. 74, 74 (1958), where the Courts held that the “exception” to marital privilege is “where the husband commits an [offense] against” his wife). Therefore, if apologies increase spousal victims’ cooperation, there will likely be a significant effect on case outcomes, as privileges will not bar testimony. This effect may be particularly beneficial if cases are in jurisdictions with no-drop policies for domestic violence. Finally, prosecutors may be less likely to dismiss cases due to insufficient evidence if victims testify. But even if apologies decrease spousal victims’ cooperation, prosecutors may still (theoretically) compel their testimony, as privilege doctrine would not pose an obstacle to admissibility.

\textsuperscript{75} See infra note 104 and accompanying text (describing the low frequency of sexual assault convictions); see also Thomas A. Mitchell, We’re Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System’s Treatment of Rape Victims (or Learning From Our Mistakes: Abandoning a
victims with some satisfaction and further criminal justice goals. As previously described, receiving apologies results in numerous psychological, restorative benefits for victims. Apologies may also facilitate retributivism, deterrence, and rehabilitation. Moreover, the absence of an apology may contribute to recidivism, as it may “impede[] treatment and moral reform” and cause offenders to fail to “acknowledg[e] their moral agency.” Overall, while there are some concerns about the impact of an exclusion on victims’ cooperation, apologies may ultimately improve outcomes in criminal cases.

b. Civil Cases

Apologies also have positive effects on civil litigation. Those apologies that include a full acceptance of responsibility tend to increase the acceptance of settlement offers. Thus, sufficient apologies may allow both parties to avoid some monetary and psychological costs of litigation.

While there are still concerns that apologies could decrease victims’ willingness to litigate, they are much less pronounced in civil settings. Victims initiate these proceedings to obtain private remedies. Therefore, if a victim decides to settle her case after receiving an apology from the offender, we may presume that she has received what she sought by pursuing civil litigation.

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76 See discussion supra subsection II.A.1 (discussing the psychological benefits of apologies for victims).

77 See discussion supra Section II.A (arguing that apologies further deterrence and rehabilitation); see also discussion infra Section II.B (arguing that apologies further retribution).


79 See Jennifer K. Robbennolt, Apology—Help or Hindrance?, DISP. RESOL. MAG., Spring 2004, at 33 [hereinafter Robbennolt, Apology—Help or Hindrance?] (“[R]ecipient of a full, responsibility-accepting apology increased the likelihood that the offer would be accepted.”).

80 This presumption is particularly likely to be true if victims receive apologies covered by my proposed exclusion. Because I suggest excluding (mostly) private statements, it is unlikely that receiving these apologies would cause victims to feel public pressure to settle prematurely. See infra notes 190-191 and accompanying text (describing the potential for apologies to pressure victims to forgive).
B. Apologies & Retributivism

This Section argues that, in addition to having instrumental value, apologies for sexual assault are highly valuable because they facilitate retributivism. First, I explain that these apologies have retributive value, as they carry substantial moral weight and serve a punishing function. Second, I address two objections to excluding apologies based on their retributive value.

1. Retributive Value

Apologies for sexual assault are also valuable because they facilitate retributivism. While there are different versions of the theory, the general concept is that “punishment is justified if and only if it is deserved in virtue of a past crime.”\(^81\) That is, the results of punishment cannot justify its infliction; rather, the sanctions must be justified “in terms of [their] intrinsic character as a response to past wrongdoing.”\(^82\) Although I am not advocating for forced apologies or suggesting that they are sufficient punishment for rape, voluntary apologies carry significant moral weight and serve a punishing function. Therefore, this subsection argues that evidence law should encourage apologies because they further the goal of retributive justice—that criminal offenders receive their “just deserts.”\(^83\)

According to Peter Strawson, we may hold people morally responsible for and regulate wrongful conduct because of our moral attitudes about that conduct.\(^84\) Specifically, we feel “moral indignation” when offenders, through their wrongful conduct, demonstrate an absence of a “reasonable degree of goodwill or regard” toward another person.\(^85\) Offenders may also maintain “self-reactive attitudes,” including guilt, remorse, responsibility, and shame, related to their insufficient consideration of others’ interests.\(^86\) These attitudes may reflect their willingness to “accept punishment,” while others’ indignation may support their “preparedness to acquiesce in that infliction of suffering on the offender.”\(^87\)

\(^{81}\) Duff, Penal Communications, supra note 30, at 7.
\(^{82}\) Id. at 6-7.
\(^{83}\) Id. at 25.
\(^{85}\) STRAWSON, supra note 84, at 346-47.
\(^{86}\) Id. at 347.
\(^{87}\) Id. at 350.
This perspective on moral responsibility supports a legal framework that encourages apologies. It demonstrates that apologies are valuable because admitting guilt may further, or at least reflect, offenders’ self-reactive attitudes. They illustrate that the offender recognizes his violation, show that he may accept punishment, and validate the “moral indignation” for his wrongful conduct. Further, pre-conviction apologies are particularly valuable because they involve offenders admitting, voluntarily and independently, that they engaged in immoral conduct before a trier of fact declares their guilt.

To some retributivists such as Antony Duff, punishment “communicates (directly to the offender, but also to all citizens) the censure that the crime deserves.”88 While it is limited by the scope and significance of the offender’s wrongful conduct, the punishment shows offenders that they “should take care to reform their future conduct to avoid such wrongdoing, and that they should make some suitable reparation.”89 One part of the theory involves society communicating to the offender that his conduct was wrongful and may require burdening him “to make it harder for [him] to ignore the message that his punishment communicates.”90 The other aspect involves the offender communicating to the community and the victim, making “moral reparation for the wrong that was done.”91

An apology, Duff argues, may comprise this reparation.92 It “expresses [the offender’s] repentant recognition of the wrong,” shows that the offender “owns the wrong as [his]” but also “disowns it as something [he] now repudiate[s],” and illustrates that the offender will strive to avoid reoffending.93 For these reasons, Duff suggests there is value even in forced apologies, as all forms of apology mandate that the offender “undergo the burdensome sanction that would constitute appropriate reparation for his wrong.”94 However, despite the value of apologies and the fact that “[a] verbal apology is often sufficient reparation,” Duff argues that more is required for serious wrongs.95 In those cases, an offender must suffer “something burdensome” so that he can “give material form to [his] repentant recognition of [his] burden of guilt.”96

89 Id.
90 Id.
91 Id. at 79.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
At this point, it is important to note that I am only discussing voluntary, pre-conviction apologies. Notwithstanding Duff’s argument, apologies during sentencing hearings “are largely pro forma,” as “the context of the sentencing allocution inhibits rather than facilitates meaningful remorse and apology.” As a result, these post-conviction apologies may not advance retributive goals as much as those made pre-conviction.

Regardless, Duff’s conception of communicative punishment supports encouraging voluntary apologies. Offenders who apologize take significant steps toward making “moral reparations” for their conduct. Apologies may begin repairing the moral relations between offenders and victims, show that offenders understand that their conduct was wrongful, and be somewhat “burdensome” if it is difficult to admit fault. To be clear, I am not arguing that pre-conviction apologies are necessary or sufficient for offenders to receive adequate punishment. But they are highly valuable because they facilitate retributive justice, and thus the law should encourage their production.

By contrast, it hinders retributive goals if offenders do not apologize but instead deny that they committed harm. In these situations, offenders fail to “acknowledge[e] their moral agency,” meaning that they do not take ownership of their wrongful conduct. Of course, obtaining a conviction furthers retributivism because it enables the state to impose punishment and, from a communicative perspective, it expresses that the offender’s conduct was wrongful. And, as discussed, excluding apologies may make it marginally more difficult to obtain convictions insofar as it discourages victims from testifying or excludes apologies that would have been made regardless of the rule. But if offenders do not see themselves as responsible, then they will not “accept punishment” or express “repentant recognition of the wrong.”

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97 Bibas et al., Integrating Remorse and Apology into Criminal Procedure, supra note 14, at 98.
98 But see Duff, Responsibility, Restoration, and Retribution, supra note 88, at 79 (“[W]hat punishment requires of the offender is not actual repentance, but that [they] undergo the ritual of apology and moral reparation.”). Even if Duff’s argument is accurate, sincere apologies may have greater value because they signal that the offender is willfully acknowledging his wrongful conduct, rather than doing so, for example, in the context of a sentencing allocation. See Christopher Bennett, Taking the Sincerity Out of Saying Sorry: Restorative Justice as Ritual, 23 J. APPLIED PHIL. 127, 132 (2006) (“[The apology] will be better in various ways (better for victims; better for the goal of reconciliation) if they do really mean it. But it can be valid even if they do not.”).
99 Duff, Responsibility, Restoration, and Retribution, supra note 88, at 79.
100 Id.; see also discussion infra note 120 and accompanying text (describing the difficulties of apologizing).
101 Bibas et al., Integrating Remorse and Apology into Criminal Procedure, supra note 14, at 126.
102 See discussion supra subsection II.A.3 (describing the potential impact that an exclusion can have on litigation).
103 STRAWSON, supra note 84, at 350; Duff, Responsibility, Restoration, and Retribution, supra note 88, at 79.
The Value of Apologies

It undermines the process of making moral amends if offenders do not apologize and take ownership of their wrongful conduct.

The arguments for encouraging pre-conviction apologies apply in stronger force to sexual violence. This is partly because apologies enable offenders to begin redressing their wrongs regardless of the result of a prosecution. While this reasoning applies to all crimes, the potential for sexual offenders to make partial moral amends by apologizing is particularly valuable because, despite the pervasiveness of sexual assault, there are few convictions and incarcerations.\textsuperscript{104} So, many culpable offenders are not punished at all, let alone sufficiently. Their moral violations often go unrectified. Therefore, although apologizing is insufficient punishment for sexual assault, any occasion for an offender to address his wrong is highly valuable, as the state is unlikely to receive an opportunity to impose sanctions.\textsuperscript{105} And even if an offender would apologize post-conviction or receive a sufficient punishment, pre-conviction apologies are still valuable because they allow the retributive process to begin earlier.

The severe wrong of sexual assault also bolsters the argument for excluding apologies in these cases. As Duff notes, more serious crimes may require more serious reparations to constitute sufficient communicative punishment.\textsuperscript{106} This relates also to Strawson’s idea that “moral indignation” stemming from the offender’s failure to treat others with “goodwill or regard” may contribute to the justification of punishment.\textsuperscript{107} That is, because sexual assault is one of the most serious crimes (as evident from the #MeToo movement, it results in significant “moral indignation”) and may cause substantial harm, it is a severe moral offense that deserves more severe punishment than lesser offenses. Although these are voluntary apologies, they may still further retributivism and function as punishment.

In Strawson’s terms, sexual offenders act with “active ill will” toward victims, departing substantially from the “expectation of, and demand for, the manifestation of a certain degree of goodwill or regard on the part of other human beings.”\textsuperscript{108} Hence, apologies are particularly valuable for sexual assault victims because there is a great moral deviation to be remedied. Said differently, an apology for a severe crime is more morally significant than an

\textsuperscript{104} Only twenty-eight out of every 1,000 sexual assaults will lead to a felony conviction, and only twenty-five of those 1,000 offenders receive incarceration. See The Criminal Justice System: Statistics, RAINN (2022), https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/Q7SP-59MZ].

\textsuperscript{105} See id. (describing the dearth of criminal convictions for sexual assault).

\textsuperscript{106} See Duff, Responsibility, Restoration, and Retribution, supra note 88, at 79 (noting that a “verbal apology” alone may be insufficient for serious offenses).

\textsuperscript{107} STRAWSON, supra note 84, at 346-47.

\textsuperscript{108} Id. at 347.
apology for a minor offense because, since there was a greater offense, the apology has the capacity to do more moral work (as there is more moral work to be done).109 Again, I am not arguing that apologies are sufficient punishment for sexual assault. But I do suggest that they are highly valuable because of the gravity of the wrong. Further, because apologizing and accepting responsibility for sexual assault requires offenders to take ownership of severely wrongful conduct, the apology carries substantial moral weight. It means more for someone to admit to being a rapist than to being a petty thief.110

Ultimately, this subsection illustrates that implementing an apology exclusion may facilitate retributivism. Apologizing allows offenders to take responsibility, make moral amends, and communicate remorse. This opportunity is highly valuable in sexual assault cases because of the severity of the wrong, the difficulty in obtaining convictions, and the generally inadequate criminal sanctions.

2. Addressing Objections

Setting aside the general arguments against retributivism, there are several objections to excluding apologies based on a retributive theory. This subsection will respond to two: first, that apologies are less valuable if they are legally protected and second, that offenders do not deserve to apologize.

109 Of course, apologies for minor offenses are valuable. See Duff, Responsibility, Restoration, and Retribution, supra note 88, at 79 (describing, without mention of the degree of the wrong, that when a person realizes that he “wronged” another, he must “recognize that [he] owe[s] [them] an apology”). However, if there was only one apology available, and person A was a rape victim while person B had his car stolen, the apology should go to person A, for they experienced a greater wrong and have a resulting greater need for moral amends.

110 While these arguments show how apologies may facilitate retributivism, “[a] classical Kantian” who believes that the criminal justice system should “ignore the victim’s desires and wishes” because “punishment [is] entirely the state’s prerogative” may think that incentivizing apologies by creating an exclusion undermines criminal justice values. For an exemplative overview of this argument, see Stephanos Bibas, Invasions of Conscience and Faked Apologies, in CRIMINAL LAW CONVERSATIONS 197 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009). However, this perspective contains several flaws. First, “the victim is the real party in interest, the one most directly harmed whom the state seeks to vindicate and heal,” especially for the deeply personal harm of sexual assault. Id. Second, this argument relies on a false dichotomy: The state may consider victims’ interests while still maintaining exclusive control over punishment. Third, it may be in the state’s interest to consider victims’ needs, as it has a responsibility to seek justice for its citizens, and the failure to do so may threaten the public legitimacy of the criminal justice system. See Douglas E. Beloof, Weighing Crime Victims’ Interests in Judicially Crafted Criminal Procedure, 56 CATH. U. L. REV. 1135, 1147-51 (2007) (discussing how states have considered victims’ rights when crafting legislation about criminal law). Finally, the law already considers victims in some of its provisions. Rape shield laws, for example, are designed in part to protect victims from “the invasion of privacy, potential embarrassment and sexual stereotyping.” See FED. R. EVID. 412 advisory committee’s note to 1994 amendment.
Lee Taft argues that apologies must be unprotected to be morally restorative.¹¹¹ He believes that if his “suffering was due to harm inflicted by another, only the full, unprotected apology would alleviate the spiritual dimension of [his] angst.”¹¹² In his opinion, to be a “moral act,” an apology must reflect a “willing[ness] to accept all of the consequences” resulting from his conduct, and that if legal consequences of an apology are removed, “[t]he moral process of apology” is undermined.¹¹³ But others argue that this view is paternalistic and erroneously “considers forgiving as a moral activity and conflates it with reconciliation.”¹¹⁴

The first issue with Taft’s view is that it presupposes that there will be legal consequences to apologizing. If apologies were excluded from evidence, then there would be no legal consequences for the offender to accept. But by apologizing, the offender could still express a willingness to assume all of the extant consequences of his conduct. An exclusion would simply mean that legal implications that come from the apology itself are no longer one of those consequences.

Second, hinging the moral weight of an apology on the presence of legal consequences conflates its retributive and instrumental value. An apology’s retributive value is intrinsic; it is not affected by the presence or absence of external consequences.¹¹⁵ While the moral weight of an apology could indeed stem, at least partially, from a willingness to bear consequences, exactly what those consequences are is irrelevant and unknowable ex ante.

Finally, protecting apologies does not erode their value because apologies post-verdicts or for legally unactionable conduct are still morally valuable. An apology for sexual assault still facilitates moral amends if, for example, there is insufficient evidence to pursue litigation. Or if the offender and victim were alone on an island with no criminal justice system, the fact that there would be no legal consequences does not mean that an apology lacks value. In both situations, it still furthers retributive goals for a culpable offender to accept responsibility for his wrongful conduct.¹¹⁶

¹¹² Id.
¹¹⁶ For more detailed discussion on the intersection of apologies and retributivism, see Duff, Responsibility, Restoration, and Retribution, supra note 88, at 78-79.
A second objection to excluding apologies is the view that, because of their wrongful conduct, sexual offenders do not deserve to apologize.\footnote{But see Bletzer et al., supra note 17, at 5 (noting that by the end of the “reparative process,” offenders have “earned the right to make amends”).} Depending on the culpability of the offender, this argument may be true in certain circumstances. However, our criminal justice system does presuppose some rehabilitative purposes; that is, we punish offenders in part to encourage positive behavioral changes and moral development.\footnote{See supra note 59 and accompanying text (describing rehabilitation as a punishment goal).} Encouraging apologies advances this goal, as apologizing allows offenders to begin making moral amends. Moreover, unlike some restorative justice advocates, I do not claim that these apologies are sufficient resolutions of sexual assault cases.\footnote{See, e.g., Bronwyn Naylor, Effective Justice for Victims of Sexual Assault: Taking Up the Debate on Alternative Pathways, 33 U. NEW S. W.ALES L.J. 662, 670-72 (advancing a restorative justice model as an alternative to criminal prosecution for sexual assault); Christian B. N. Gade, Is Restorative Justice Punishment?, 38 CONFLICT RESOL. Q. 127, 128-31 (2021) (outlining various interpretations of restorative justice, including the idea that it is a replacement for punishment); Lindsey Pointer, What is “Restorative Justice” and How Does It Impact Individuals Involved in Crime?, BUREAU JUST. ASSISTANCE NAT’L TRAINING & TECH. ASSISTANCE CTR. (Aug. 5, 2021), https://bjatta.bja.ojp.gov/media/blog/what-restorative-justice-and-how-does-it-impact-individuals-involved-crime [https://perma.cc/F3JF-Ky7WV] (”Rather than justice as ‘punishment,’ restorative justice conceives of justice as ‘repair’ to the harm caused by crime and conflict. Understanding and responding to the needs of each involved party and the broader community is central to the collective creation of a just outcome.”).} Therefore, facilitating such apologies will not prevent just outcomes.

However, even if offenders do not deserve to apologize, apologies should still be protected because they are highly valuable. Because these apologies would occur before guilt determinations, we would not know whether an offender deserved to apologize ex ante (assuming that convictions track this desert). And even if some offenders apologize as a result of an exclusion when they do not deserve to do so, having to overcome the numerous psychological barriers\footnote{For discussion of these psychological barriers, see argument from Jennifer K. Robbennolt, stating: “There are many psychological reasons . . . why offenders may not be able to recognize that they have acted inappropriately or to accept responsibility for their behavior. Denial, embarrassment, difficulty in accepting that you’ve done something wrong and inconsistent with your self-image as a good person, concern for reputation, the belief that a denial will be more effective . . . vulnerability, [and] the fear that taking responsibility is to cede control . . . .” Robbennolt, The Range of Remedies, supra note 9, at 38-39.} involved in making the apology may compensate for the undeserved opportunity.

While reasonable, the objections to which this subsection responds are overcome by considering the high value of apologies in cases of sexual assault. Apologies still benefit victims and further retributivism if they do not carry legal consequences, and whether offenders deserve to apologize is not dispositive.
C. The Danger of False Apologies

Thus far, this Part has focused on the value of sincere apologies to justify an evidentiary exclusion. One concern with excluding apologies, however, lies in the potential for offenders to issue false ones. A false apology could undermine the normative goals that justify protection if that false apology negatively impacts the victim’s healing or the offender’s rehabilitation. But as discussed in this Section, the concern over false apologies in this context is exaggerated.

First, because hearsay rules will largely prohibit defendants from introducing their apologies, offenders are unlikely to have compelling reasons to lie. This is especially so since I am (mostly) proposing only the protection of private apologies, thereby eliminating the possibility that defendants will make insincere public admissions to receive reputational or financial benefits. And because there is an exception for impeachment and rebuttal, offenders may think critically before apologizing falsely.

Second, encouraging voluntary apologies for sexual assault carries a significantly different valence, and thus raises fewer concerns, than coerced, false confessions. Although both voluntary apologies and false confessions may include statements evincing guilt, which could (without an evidentiary exclusion) undermine defendants’ assertions of innocence, they are different in most other respects. The primary concerns about false confessions arise in the context of police interrogations. While false confessions have been found to contribute to wrongful convictions, they occur mainly when defendants “succumb to the pressures of interrogation” and when there is “a high incidence of government-created evidence.” Those factors would not be present in most cases when defendants decide to apologize directly to a victim of sexual assault in a private setting. Moreover, because I am not advocating for forced apologies, defendants who choose to apologize would presumably do so willingly and without coercion.

Next, it is impossible to determine ex ante whether an offender will apologize honestly. If an offender apologizes pre-conviction, we will not know whether that apology is genuine until the fact finder reaches a verdict. Further, the offender’s conduct could be legally innocent but still morally wrong, meaning that we may not be able to judge the sincerity of the apology.

121 But see Bibas et al., Integrating Remorse and Apology into Criminal Procedure, supra note 14, at 143 (“Even insincere remorse and apologies may be better than none at all. Such [insincere] expressions [still] vindicate victims, drive home awareness of wrongs, and may ultimately lead offenders to internalize that awareness.”).

122 See Lisa Kern Griffin, Silence, Confessions, and the New Accuracy Imperative, 65 DUKE L.J. 697, 701 n.16, 720–22 (2016) (citing contexts in which police tactics have facilitated false confessions).

123 Id. at 717, 722.
even post-verdict. The possibility of receiving an unknowable number of disingenuous apologies cannot outweigh the known value of sincere ones.

There is an additional concern that offenders will apologize falsely to discourage victims from testifying, which would significantly weaken the state’s ability to prosecute.\footnote{See discussion supra subsection II.A.3 (describing the impact of apologies on victim cooperation).} However, there is no current safeguard against this practice.\footnote{This claim assumes that apologizing is not considered a form of witness intimidation. While this Comment does not explore the question, it is important to note that construing an apology as witness intimidation may have a chilling effect on defendants’ willingness to apologize.} Although it is possible that an evidentiary exclusion would encourage more insincere apologies, it is unclear to what degree it would do so. Even if an exclusion incentivized offenders to make some number of false statements, that number may still be outweighed by the number of meaningful apologies that result. On balance, an exclusion will avoid deterring meaningful, sincere apologies and will likely have little effect on defendants’ motivations to apologize falsely.

Finally, it is possible that even an insincere apology could be beneficial.\footnote{Bibas et al., Integrating Remorse and Apology into Criminal Procedure, supra note 14, at 143.} Victims may not know that an apology is insincere, so they may still benefit from it as if it was sincere. But even if victims are aware of an apology’s lack of sincerity, they may nonetheless feel “vindicate[d].”\footnote{See id. (emphasizing the benefits of apologies, even when they are insincere).} Offenders who apologize insincerely may also benefit, as an insincere apology could still “lead offenders to internalize that awareness [of the wrong].”\footnote{Id.}

Ultimately, the danger of false apologies may strengthen the argument for exclusion. If we assume that there will be some dishonest apologies, then excluding all apologies will help reach more accurate outcomes. If a false apology is admissible and the jury believes it, then erroneous evidence may influence the verdict. Or, if the jury knows the apology is false, then they may place undue weight on the fact that the defendant apologized falsely. Thus, excluding false apologies will reduce their negative effects, and excluding genuine ones may increase their frequency. Coupled with the absence of motivation to apologize falsely in this context, it is likely that excluding all apologies will result in a net positive situation—more genuine apologies.

III. LEGAL STATUS OF APOLOGIES

This Part explores the current legal treatment of apologies, as well as scholars’ suggested improvements, to provide background for the more tailored exclusion I propose. First, I will describe how federal and state
evidence rules treat different types of apologies. Then, I will outline and assess alternative proposals to exclude these admissions.

A. Current Status

1. Federal

There is no federal rule that excludes apologies. Rather, the Federal Rules of Evidence allow prosecutors and plaintiffs to admit any relevant out-of-court statements made by defendants unless they are uttered during certain plea negotiations or settlement discussions.\(^{129}\)

2. State

In contrast, over two thirds of states and the District of Columbia exclude at least some apologies from evidence in civil cases.\(^{130}\) According to a list compiled by Jennifer K. Robbennolt, nine states have general statutes that exclude apologies in civil cases.\(^{131}\) Consider, for example, California:

The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.\(^{132}\)

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\(^{129}\) See, e.g., FED. R. EVID. 801(d)(2) (excluding from hearsay statements made by opposing parties); FED. R. EVID. 410 (excluding from evidence statements made during plea negotiations); FED. R. EVID. 408 (excluding from evidence statements made during settlement discussions).

\(^{130}\) See, e.g., Cayce Myers, Apology, Sympathy, and Empathy: The Legal Ramifications of Admitting Fault in U.S. Public Relations Practice, 42 PUB. RELS. REV. 176, 177 (2016) (finding that thirty-eight states have some form of “I’m sorry” laws); Jennifer K. Robbennolt, Attorneys, Apologies, and Settlement Negotiation, 13 HARV. NEGOT. L. REV. 349, 356 (2008) [hereinafter Robbennolt, Attorneys, Apologies, and Settlement Negotiation] (noting that over two thirds of states have statutes that provide evidentiary protection for certain apologies).

\(^{131}\) See Robbennolt, Attorneys, Apologies, and Settlement Negotiation, supra note 130, at 356 (“[S]tatutes that explicitly provide some apologies with evidentiary protection . . . apply to civil litigation generally.” (citations omitted)); see also John Hicks & Courtney McCray, When and Where to Say “I’m Sorry”: A 50-State Survey of Apology Laws and Their Impact on Medical-Malpractice Suits, CLM MAG. (Feb. 16, 2021), https://www.theclm.org/Magazine/articles/apology-laws-medical-malpractice/2172 [https://perma.cc/BX3-T-HL3T] (providing a smaller list of states with statutes covering generic apologies). The remaining states with statutes that exclude apologies cover only healthcare providers or “cases of medical error.” Robbennolt, Attorneys, Apologies, and Settlement Negotiation, supra note 130, at 356.

\(^{132}\) CAL. EVID. CODE § 1160(a) (West 2001).
Like California, none of the nine states that have general exclusionary statutes exclude statements of fault for non-accidents. Six states have statutes that expressly limit their applicability to “accident[s],” only excluding apologies for non-intentional conduct, while seven states’ statutes do not cover statements admitting fault. The two statutes that are silent about fault apply only to accidents; conversely, the three states whose statutes apply to non-accidents expressly do not cover fault statements.

133 See, e.g., CAL. EVID. CODE § 1160(a) (West 2001) (“[S]tatements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident . . . shall be inadmissible . . . .”); FLA. STAT. § 90.4026(2) (2001) (same); MASS. GEN. LAWS. ANN. ch. 233, § 23D (West 1986) (“Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence . . . shall be inadmissible); TENN. COMP. R. & REGS. 409.1(a) (2003) (same); WASH. REV. CODE ANN. § 5.66.010(i) (West 2008) (same); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061(a)–(b) (West 1999) (“A court in a civil action may not admit a communication that: (1) expresses sympathy or a general sense of benevolence relating to the pain, suffering, or death of an individual involved in an accident . . . .”).

134 See, e.g., CAL. EVID. CODE § 1160(a) (West 2001) (“A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.”); FLA. STAT. § 90.4026(2) (2001) (“A statement of fault, however, which is part of, or in addition to, any of the above shall be admissible pursuant to this section.”); HAW. REV. STAT. ANN. § 626-1 (West 2007) (“This rule does not require the exclusion of an apology or other statement that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this rule.”); IND. CODE ANN. § 34-43.5-1-5 (West 2021) (“A court may admit a statement of fault into evidence, including a statement of fault that is part of a communication of sympathy, if otherwise admissible under the Indiana Rules of Evidence.”); MO. ANN. STAT. § 538.229 (West 2021) (“[N]othing in this section shall prohibit admission of a statement of fault.”); TENN. COMP. R. & REGS. 409.1(a) (2003) (“A statement of fault that is part of, or in addition to, any of the above shall not be inadmissible because of this rule.”); WASH. REV. CODE ANN. § 5.66.010(i) (West 2008) (“A statement of fault, however, which is part of, or in addition to, any of the above shall not be made inadmissible by this section.”).

135 See MASS. GEN. LAWS. ANN. ch. 233, § 23D (West 1986) (“Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.”); see also TEX. CIV. PRAC. & REM. CODE ANN. § 18.061(a) (West 1999) (“A court in a civil action may not admit a communication that: (1) expresses sympathy or a general sense of benevolence relating to the pain, suffering, or death of an individual involved in an accident; (2) is made to the individual or a person related to the individual within the second degree by consanguinity or affinity, as determined under Subchapter B, Chapter 573, Government Code; and (3) is offered to prove liability of the communicator in relation to the individual.”).

136 See HAW. REV. STAT. ANN. § 626-1 (West 2007) (“Evidence of statements or gestures that express sympathy, commiseration, or condolence concerning the consequences of an event in which the declarant was a participant is not admissible to prove liability for any claim growing out of the event. This rule does not require the exclusion of an apology or other statement that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this rule.”); IND. CODE ANN. § 34-43.5-1-4 (West 2021) (“Except as provided in section 5 of this chapter, a court may not admit into evidence a communication of sympathy that relates to causing or contributing to: (1) a loss; (2) an injury; (3) pain; (4) suffering; (5) a death; or (6) damage to property.”); IND. CODE ANN. § 34-43.5-1-5 (West 2021) (“A court may admit a statement of fault
Because none of the statutes apply in criminal cases or cover fault statements related to intentional conduct, they do not exclude apologies for sexual assault that include an acceptance of responsibility. But these state statutes, while varying, illustrate that at least some apologies are sufficiently valuable to justify an exclusion. They show that the trade-offs between excluding relevant evidence and encouraging positive action are justified in certain circumstances. Therefore, my proposal to exclude apologies for sexual assault that include an acceptance of responsibility is a novel yet supported extension of existing law.

B. Proposed Solutions

Considering the value of apologies and their scant legal protection, scholars have advocated for varying degrees of new evidentiary exclusions. However, most of these proposals do not protect apologies for sexual assault; and those that would are overbroad. Therefore, because of the substantial value of such apologies, there is a need for a new, specific exclusion.

Suggestions to exclude apologies vary widely. The narrowest proposal would exclude apologies made by healthcare practitioners to patients about medical services in civil cases. Broader suggestions exclude apologies to prove liability in all civil, but not criminal, cases. Additionally, Jennifer Pusateri has proposed a general exclusion that seems to apply to both criminal and civil cases. Finally, Michael Jones has suggested the creation of a
privilege that would apply to “[a]pologies and statements of sympathy, made to a victim, during a hearing conducted by the court.”

The suggestions that do not apply to criminal cases are underinclusive. First, limiting an exclusion to civil cases undermines its effectiveness, as defendants would still be concerned with the admissibility of their apologies in a potential prosecution. Even if charges have not been filed, their statements may provide the remaining evidence that the state needs to justify prosecution. They may also strengthen prosecutors’ bargaining positions in plea discussions. Thus, defendants would likely apologize in this circumstance only if they were already acquitted. Additionally, apologies for the same conduct carry the same retributive weight regardless of the legal posture; therefore, it is inconsistent to exclude apologies only in civil cases. Further, it is unclear that the instrumental value of apologies for the same conduct would differ significantly based on the type of litigation.

Conversely, excluding apologies in all civil and criminal cases is overinclusive, as this form of exclusion covers apologies that are not valuable enough to warrant exclusion and thus results in unjustifiable evidentiary loss. To be sure, all sincere apologies have some value because if someone is culpable for harm, there is at least some moral imbalance and injury that an apology may help rectify. But to exclude relevant evidence, the benefits must outweigh the resulting evidentiary loss. Sexual assault, compared to other offenses, is unique in both the degree of victim-blaming and the degree to which defendants are not brought to justice. Therefore, the psychological and retributive functions of apologies for sexual assault are uniquely

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142 See Etienne et al., supra note 58, at 318 (describing how apologies may “bolster the prosecutor’s case”).
143 See discussion supra subsection II.A.3 (describing the instrumental value of apologies in various litigation contexts).
144 See supra note 109 and accompanying text (discussing the value of an apology for different offenses). Antony Duff has also argued that when a person is wronged, moral reparation, including but not limited to an apology, is required:

The direct victim of the wrongdoing (where there is one) is of course owed whatever compensation is possible for the material harm he suffered. But, first, he has also been wronged. While it is not clear what could count as compensation for that moral injury, the wrongdoer owes him something for this: most obviously apology, and a serious attempt to show that the apology is sincere. Second, insofar as crimes are wrongs against the entire community, moral reparation and apology are also owed to the community. But genuine apology and moral reparation must involve a repentant recognition of wrongdoing: to seek such reparation must involve bringing the offender to recognize and accept her guilt.

Duff, Penal Communications, supra note 30, at 80.
145 See supra note 104 and accompanying text (describing the low conviction rates in sexual assault cases); see also supra subsection II.A.1 (discussing victim-blaming).
valuable, justifying an exception to what would otherwise be an indefensible evidentiary loss.

Finally, exclusions that cover only statements made during court proceedings are underinclusive and suboptimal. They are underinclusive because they do not include valuable apologies made outside the courtroom. For this reason, they are also suboptimal because they would not facilitate restoration as much as they could. They may encourage apologies, but they would overly formalize the process, take it largely out of victims’ control, and discourage open conversations. They also require that victims hear apologies in court, where victims may be concerned about judges’ credibility determinations. Similarly, defendants may hesitate to apologize because they may worry that, even subconsciously, hearing their apologies may influence judges’ decisions on many important but highly discretionary and almost unreviewable rulings. Or defendants may apologize insincerely to earn credibility. These possibilities are even more dangerous during bench

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146 Apologies for sexual assault are more valuable than apologies for lesser offenses because of the gravity of the wrong. Apologies for less serious offenses are less morally significant and instrumentally beneficial because offenders did not act as wrongfully or cause as great of an injury. For a more detailed argument on this point, see discussion supra Section II.B (describing apologies and retribution).

147 One counterargument is that if apologies have any moral value, they should be protected in all contexts. But that approach would result in untenable outcomes. If evidence with any moral value was excluded, little would remain. It would, for example, bar testimony about relationships to establish personal knowledge, expert qualifications, defendants’ peacefulness, and witnesses’ truthfulness, all of which are permissible relevancies. See, e.g., FED. R. EVID. 602 (requiring personal knowledge); FED. R. EVID. 702 (allowing the admission of expert testimony); FED. R. EVID. 404(a)(2)(A) (permitting defendants in criminal cases to introduce certain forms of character evidence); FED. R. EVID. 608(a) (permitting evidence of a witness’s character for truthfulness or untruthfulness). For discussion about the probative value of apologies and the potential evidentiary loss that may result from this exclusion, see discussion infra Section IV.A, which discusses the evidentiary relevance of apologies.

148 If apologies are aired in court in front of a judge, then judges may make implicit judgments about a victim based on how she responds to the apology. Not only may this impact the case’s resolution, but it may also distract victims from internalizing and responding to the apology. Additionally, victims may also be concerned that a judge would think more positively about the defendant because he apologized. For an analysis of judicial credibility findings, see generally Mark W. Bennett, Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility, 64 AM. U. L. REV. 1331 (2015).

149 See Toby J. Heytens, Changing What Judges Do: A Response to Matthew Tokson, Judicial Resistance and Legal Change, 82 U. CHI. L. REV. DIALOGUE 151, 154 (2015) (“[M]any trial court rulings are, for all intents and purposes, effectively unreviewable.”). Heytens highlights several reasons for this lack of reviewability: final judgment rules, the fact that only losing parties may appeal, deferential appellate review standards, findings of harmless error, and the costs of appeal. See id. (describing various barriers to more thorough review); see also David P. Leonard, Appellate Review of Evidentiary Rulings, 70 N.C. L. REV. 1155, 1228-29 (1992) (noting that, although appellate courts have the power and authority to review evidentiary rulings, there is an “absence of meaningful appellate review” and an “extreme deference [that] now defines the relationship of appellate to trial courts in the application of evidence rules”).
trials, as in those cases, judges make evidentiary rulings, factual findings, and credibility determinations.

Despite the value of apologies, this Part illustrates that they do not receive sufficient protection. Scholars have proposed various exclusions, but many would not cover apologies for sexual assault. And those that would are overbroad. Therefore, in Part IV I will suggest a tailored exclusionary rule that reflects the value of apologies and encourages their production while limiting the costs of excluding relevant evidence.

IV. PROPOSED RULE

The value of apologies for sexual assault justifies the creation of a limited exclusionary rule. Excluding these apologies, however, will result in a corresponding loss of relevant evidence, hindering the truth-seeking process of trials. Therefore, I will begin this Part by describing the evidentiary relevance of these apologies before explaining that, despite their probative value, we may justify exclusion to promote positive outcomes because other areas of evidence law rely on similar reasoning. I will then propose the specific text of the exclusion and defend its nuances.

A. Evidentiary Relevance of Apologies

There is a diversity of opinion regarding the probative value of apologies to prove liability.\textsuperscript{150} I could minimize their relevance; but it is clear that their probative value will vary on a case-by-case basis, and that sometimes excluding an apology will result in evidentiary loss that negatively impacts the truth-seeking process. However, this Section argues that, despite the probative value, we may still justify exclusion to promote positive outcomes because other areas of evidence law rely on similar reasoning. I will then propose the specific text of the exclusion and defend its nuances.

\begin{footnotesize}
\begin{enumerate}
\item Compare Pusateri, supra note 137, at 201-02, 223 (arguing that apologies are not relevant to prove liability), \textit{with} Etienne et al., supra note 58, at 318 (discussing that an apology may "provide[\ldots] evidence of the defendant's responsibility").

\item Kenneth Culp Davis, \textit{An Approach to Problems of Evidence in the Administrative Process}, 55 Harv. L. Rev. 364, 384 (1942).

\item \textsc{Paul C. Giannelli}, \textsc{Understanding Evidence} 560 (5th ed. 2018) (citing \textit{Fed. R. Evid.} 407, \textit{Fed. R. Evid.} 408, \textit{Fed R. Evid.} 409, \& \textit{Fed R. Evid.} 410). Although I am not proposing a privilege, these rationales apply to some exclusionary relevance rules, which are "often considered quasi-privileges." \textit{Id.} at 560 n.20.
\end{enumerate}
\end{footnotesize}
that society values might not fully function.” Th There are, for example, privileges between attorneys and clients, spouses, doctors and patients, psychotherapists and patients, and members of the clergy and those seeking spiritual guidance. These communications may involve highly relevant evidence and yet, because their content is crucial and may “be chilled,” they receive evidentiary protection.

This reasoning supports excluding apologies for sexual assault. Despite their likely relevance, apologies are highly valuable for victims, offenders, and criminal punishment. Yet, fears of liability discourage offenders from apologizing. Further, to the extent that the exclusion increases the number of apologies, there may be less pronounced evidentiary loss if “much of the desirable evidence . . . is unlikely to come into being” otherwise, as is the case with some privileges.

In addition to privilege doctrine, the existence of two evidentiary rules that exclude relevant evidence supports the idea of using evidence law to encourage, and avoid penalizing, valuable behavior such as apologizing for sexual assault. First, Federal Rule of Evidence 407 excludes subsequent remedial measures from evidence if offered to prove “negligence[,] culpable conduct[,] a defect in a product or its design[,] or a need for a warning or instruction.” There are several rationales for the exclusion; one “stems from a concern that a contrary rule would penalize do-gooders, the diligent, and conscientious repairers,” while another is to encourage changes that improve safety. These justifications apply also to an apology exclusion, as it would function both to encourage and avoid punishing defendants for apologizing. Although critics suggest that manufacturers would make changes without Rule 407 to avoid future liability, this reasoning does not apply to apologies, as offenders are (hopefully) not in the business of repeat

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154 GIANNELLI, supra note 152, at 557.
155 See Jaffee v. Redmond, 518 U.S. 1, 11-12 (1996) (finding that without the psychotherapist privilege, fewer communications between treatment providers and patients may occur).
156 See discussion supra Part II (describing the instrumental and retributive value of apologies).
157 See supra notes 9–13 and accompanying text (describing defendants’ hesitation to apologize).
158 Jaffee, 518 U.S. at 12.
159 FED. R. EVID. 407.
161 See FED. R. EVID. 407 advisory committee’s note on proposed rule (justifying the exclusion because it would encourage people to take “steps in furtherance of added safety”).
offending—and certainly not in the way that manufacturers are consistently placing goods in commerce.  

A second example is Federal Rule of Evidence 409, which bars “[e]vidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury . . . to prove liability.” Like Rule 407, it rests on two rationales: encouraging valuable conduct and not penalizing it, as these actions are “usually made from humane impulses and not from an admission of liability.” They are “substantial steps at moral repair.” As Jeffrey Helmreich argues, apologies should also be protected under this rationale because they “play an important reparatory role for the injured party.” This reasoning applies more strongly to apologies for sexual assault because, as explained previously, they carry significant moral weight and produce psychological benefits.  

Ultimately, there are significant normative and policy reasons to exclude apologies for sexual assault despite their probative value. Therefore, I will propose an exclusion and justify its features in the following Sections.

B. Text of the Rule

The language of the proposed rule is as follows:

Federal Rule of Evidence 416: Apologies in Sexual-Assault Cases

(a) Prohibited Uses. In a criminal or civil case in which a defendant is accused of sexual assault, evidence that the defendant apologized for the same alleged assault is inadmissible when the apology is:

(1) Made directly by the defendant to the victim;
(2) Non-public; and
(3) Offered by any party.

(b) Exceptions.

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163 It is unclear how many sexual offenders are repeat sexual offenders. Persons convicted of rape or sexual assault may be less likely to recidivate generally compared to those convicted of other crimes (with recidivism rates of approximately sixty-seven percent compared to general recidivism rates of approximately eighty-four percent), but they are more likely to commit another rape or sexual assault (roughly eight percent compared to two percent). BUREAU OF JUST. STAT., U.S. DEPT OF JUST., RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005-14), at 4 tbl.2 (2019), https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf [https://perma.cc/B5U4-WWLV].

164 FED. R. EVID. 409.

165 FED. R. EVID. 409 advisory’s committee note on proposed rule.


167 Id.

168 See discussion supra Sections II.A, II.B (describing the psychological effects of apologies and their retributive value).
(1) The prosecution or plaintiff may admit the apology as impeachment or rebuttal evidence.

(2) If the prosecution or plaintiff admits only part of the apology, then the defendant may introduce any other part of the apology if in fairness it ought to be considered at the same time.

(c) Definitions.

(1) “Sexual assault” is defined as it is in Rule 413(d).

(2) “Apology” is defined as an oral, written, or recorded statement expressing sympathy, fault, or an acceptance of responsibility.

(3) “Victim” includes an alleged victim.

(4) “Publication” is defined as disseminating the apology beyond the victim’s close relations, including but not limited to family members, close friends, or relationship partners.

(5) “Non-public” is defined as an exchange between the defendant and victim made:
   i. without publication;
   ii. with publication if the apology was non-public and only became public because the victim published it after receiving it; or
   iii. with publication if the victim initiated the exchange containing the apology in a public setting.

C. Explanation of the Rule

1. Criminal and Civil Cases

Apologies are excluded to the same extent in civil and criminal cases because their value does not change with the nature of the litigation.¹⁶⁹ The psychological benefits remain constant. While increased concerns about negative litigation effects apply to criminal cases, covering only civil cases would undermine the rule’s effectiveness for defendants whose conduct is both civilly and criminally actionable. Additionally, the defendant is equally culpable regardless of the legal circumstances, so apologies in both the civil and criminal contexts carry the same retributive value.

2. Same Alleged Assault

For several reasons, this exclusion is limited to situations when the conduct to which a defendant’s apology refers is the subject of the litigation. First, this limitation minimizes evidentiary loss because it will allow more

¹⁶⁹ See discussion supra Section III.B (discussing the constant value of apologies in both criminal and civil cases).
relevant evidence (apologies) to be admitted in future cases. That, in turn, will facilitate the truth-seeking process.

Second, apologies about a different sexual assault are not covered because holding otherwise would essentially immunize recidivists. That is, if the Rule applied to all apologies in all cases of sexual assault, prosecutors would be unable to use previous apologies to prove that a defendant engaged in similar prior conduct.\textsuperscript{170} Notwithstanding the controversy surrounding the use of propensity evidence in sexual assault cases, this limitation would also preclude prosecutors from using apologies to prove other, non-propensity relevancies, such as intent or lack of accident.\textsuperscript{171}

Finally, I suggest this limitation because the purpose of the exclusion is to enable defendants to morally atone for their wrongful conduct and to facilitate psychological benefits. Protecting apologies for different sexual assaults is unrelated to these objectives, as the value of an apology emanates only from the offender’s culpability for, and the harm created by, the assault for which the defendant is apologizing.\textsuperscript{172} In fact, if the defendant recidivates, then the value of the prior apology may decrease insofar as the recidivism exposes its previously veiled insincerity. Further, it is possible that, if the second offense involves the same parties, an apology related to the first offense could result in more harm because it shows that the offender did not learn.\textsuperscript{173} Therefore, limiting the Rule will allow it to track its purpose and minimize evidentiary loss.

\textsuperscript{170} Federal Rules of Evidence 413 and 415 allow, in criminal and civil cases, the admission of “evidence” that the defendant “committed any other sexual assault.” FED. R. EVID. 413(a); FED. R. EVID. 415(a).

\textsuperscript{171} See FED. R. EVID. 404(b)(1)-(2) (allowing evidence of another “crime, wrong, or act” to “prov[e] motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident”). Although not a focus of this Comment, the use of propensity evidence in sexual assault cases is highly debated. Compare Justin Sevier, Legitimizing Character Evidence, 68 EMORY L.J. 441, 503-04 (2019) (advocating for the admissibility of propensity evidence generally, including in cases of sexual assault), with Emily Holtzman, Note, Balancing Act: Admissibility of Propensity Evidence Under Article I, Section 18(c) of the Missouri Constitution, 84 MO. L. REV. 1135, 1154-55 (2019) (discussing the use of propensity evidence in child sex abuse crimes and proposing a middle-ground approach), and Michael S. Ellis, The Politics Behind Federal Rules of Evidence 413, 414, and 415, 38 SANTA CLARA L. REV. 961, 980-88 (1998) (arguing against the use of propensity evidence in sexual assault cases).

\textsuperscript{172} See Duff, Responsibility, Restoration, and Retribution, supra note 88, at 79 (describing that apologies are a means by which offenders can make “moral reparation for the wrong that was done”) (emphasis added).

\textsuperscript{173} Cf. Robbennolt, The Range of Remedies, supra note 9, at 41 ("Many survivors are concerned that offenders will be quick to apologize but slow to change.” (quotation marks omitted)).
3. Made Directly by Defendant to Victim

Limiting the exclusion to apologies made by the defendant to the victim avoids the possibility of defendants using intermediaries to apologize on their behalf. An apology that is not conveyed by the offender is less valuable and does not deserve evidentiary protection. Apologies made directly to victims carry more moral weight because they require offenders to face victims while confronting their culpability, expressing remorse, and accepting responsibility. Intermediaries are not culpable; the only aspect of their statements that bears any moral significance is the extent to which they show that the offenders asked them to apologize. But that act does not carry any of the retributive value of actually apologizing. Additionally, it is doubtful that offenders and victims would receive more than minimal benefits to such an admission; therefore, excluding these forms of apology cannot be justified on instrumental grounds.

4. Non-Public

Apologies for sexual assault that are non-public warrant evidentiary protection because they are more valuable than those made in public. Studies of apologies, mostly conducted during the #MeToo movement, illustrate how public apologies lack several positive qualities that would otherwise underlie

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174 From a retributivist standpoint, the offender who wronged the victim deserves moral blame for the offense and must bear the punishment, rather than an innocent third-party. See Michael S. Moore, Justifying Retributivism, 27 ISR. L. REV. 15, 16 (1993) (“[T]he more distinctive assertion of the retributivist view is that punishment is justified if it is given to those who deserve it. Desert, in other words, is a sufficient condition of just punishment, not only a necessary condition.”) (emphasis added). This argument assumes that voluntary apologies may function as punishment. For argument on this point, see discussion supra Section II.B, which describes how apologies may facilitate criminal punishment from a retributive perspective. For an instrumental argument that apologies are more valuable if they are made by offenders, consider the statement of Jennifer K. Robbennolt:

Although respondents did view an apology offered by the attorney as better than no apology at all, respondents did not view apologies—even full, responsibility-accepting apologies—offered by the offender’s attorney as positively as apologies personally offered by the offender. Apologies offered by attorneys were also viewed as less sincere and were more likely to be perceived as being motivated by a desire to avoid a lawsuit than were the same apologies offered personally by the wrongdoer. It seems likely that apology recipients are less prone to make positive dispositional attributions about the wrongdoer when he or she does not personally offer the apology. They may question why the wrongdoer did not personally offer the apology, and be less compelled to follow an apology script from which the wrongdoer has already departed.


175 See Robbennolt, The Range of Remedies, supra note 9, at 40 (“[M]any survivors would ideally like to hear responsibility-taking from their perpetrator.”) (emphasis added).
their value. If public apologies issued during the #MeToo movement, a time period when offenders were under intense scrutiny, were insufficient, then it seems unlikely that they would improve as public attention moves elsewhere.

“Publication” in the proposed exclusion is defined by applying Michelle Madden Dempsey’s conceptualization of “private accountability,” which consists of “a response to purported wrongdoing that is offered by the direct victim (or perhaps by close friends or family) . . . in such a way that only a small number of people (and often only the wrongdoer) are made aware of the [victim’s] response.” Hence, apologies given to victims and shared only among their close relations will be excluded from evidence. This will strike a balance between allowing victims to share their experiences with those closest to them and avoiding an overinclusive rule that protects less valuable, public apologies.

Public apologies for sexual assault also have less retributive value than non-public apologies. One study reviewed thirty-seven public apologies for sexual misconduct that were made from October 2017 to June 2018; researchers analyzed the statements’ components—“affirmation, affect and action”—and for each component, “the wrongdoer’s focus, which could be either a self-focus (coded elements of admission, regret, and restitution) or a self-other focus (coded elements of acknowledgment, remorse, and reparation).” Of ninety components identified, only twenty-six had a self-other focus. On a positive note, thirty apologies involved an expression of responsibility, twenty-two expressed regret, and ten reflected restitution. But only sixteen apologies—less than half—“acknowledged the harm” to the victim, only eight “expressed remorse,” and only two “conveyed reparation.” While it is good for offenders to accept responsibility, apologies that do not focus on the victim, address the harm, or show remorse have less moral value. From the communicative punishment perspective, these apologies do not sufficiently make “moral reparation” for severe offenses. They do not show that the offender is fully “repent[ing]” or “own[ing] the wrong as [his].”

176 See, e.g., Nigro et al., supra note 23, at 405, 410 (explaining that public apologies, which were self-focused, were perceived less favorably than private apologies); Karina Schumann & Anna Dragotta, Is Moral Redemption Possible? The Effectiveness of Public Apologies for Sexual Misconduct, J. EXPERIMENTAL S. PSYCH., 2020, at 5 (“[P]ublic apologies are generally perceived as less sincere than interpersonal apologies . . . .”).
177 Dempsey, supra note 1, at 359.
178 Nigro et al., supra note 23, at 405.
179 Id.
180 Id. at 406.
181 Id.
182 Duff, Responsibility, Restoration, and Retribution, supra note 88, at 79.
183 Id.
Additionally, the Rule protects non-public apologies because those that are public often have reduced instrumental value. In a follow-up to the previously described study that found public apologies to be self-focused, researchers found that apologies focused on others (e.g., victims) “were rated as more sincere, more likely to be accepted, more likely to meet the needs of the victim, and more likely to lead to closure for the victim.”\(^{184}\) Notably, participants who were themselves victims of sexual misconduct viewed self-focused apologies as “lower on all [of the above] dimensions.”\(^{185}\) In a second series of studies, researchers found that public apologies for sexual misconduct are often perceived as more insincere than other apology types, including interpersonal apologies; though, they can be partially improved by being “comprehensive and non-defensive.”\(^{186}\) Relatedly, public apologies for sexual assault, compared to those for sexual harassment, were viewed as “less valuable” and “received less favorable reactions.”\(^{187}\) While none of these studies addressed apologies’ effects on the victims of the offenses directly,\(^{188}\) they suggest that generally, public apologies for sexual assault contain fewer beneficial aspects and are thus less valuable than private statements.

There is also a danger that receiving apologies, especially those made in public, may increase the pressure on victims to forgive offenders.\(^{189}\) While private apologies may also pressure victims,\(^{190}\) the danger is likely lessened. It is unlikely that victims’ responses to private admissions will face public scrutiny.

Despite these considerations, I propose two exceptions to the non-publication condition. First, I suggest still excluding public apologies if they were initially private but were subsequently publicized by the victim. If the defendant provided a private apology with the understanding that the Rule would exclude his statement, reliance interests caution against allowing the victim to publicize the defendant’s statement and take it outside the scope of the Rule. In this situation, the apology would have the same value as other covered statements.

\(^{184}\) Nigro et al., \textit{supra} note 23, at 410.

\(^{185}\) \textit{Id}.

\(^{186}\) Schumann et al., \textit{supra} note 176, at 2, 16.

\(^{187}\) See \textit{id}. at 22 (citing two studies conducted to analyze differences in apologies); \textit{see also} Boccaccini et al., \textit{supra} note 68, at 47 (describing Kobe Bryant’s public apology for alleged rape as “appear[ing] to have a negative impact on perceptions of [him]”).

\(^{188}\) See, e.g., Schumann et al., \textit{supra} note 176, at 23 (“\textquote{T}he current study did not assess victims’ reactions and thus cannot speak to whether these public apologies are able to promote reconciliation with victims rather than the general public.”).

\(^{189}\) See \textit{supra} note 69 and accompanying text (describing the pressure that may be exerted on victims).

\(^{190}\) See Martha Minow, \textit{Essay, Forgiveness, Law, and Justice}, 103 CALIF. L. REV. 1615, 1617 (2015) (“\textquote{P}rivate or public pressure on a victim to forgive can be a new victimization, denying the victim her own choice.”).
Second, I suggest excluding public apologies that are made in response to victims’ initiations of public conversations. If a victim desires a public statement, then a public apology would likely have more value than if a defendant offered a public apology unprompted. A public apology in this context would increase the victim’s agency and the likelihood that she would receive the apology in the form that she prefers.191 Because, if not for the exclusion, offenders may not apologize at all, much less do so publicly.192 However, the exclusion is limited to situations when the offender responds to a victim’s initiation of an exchange; it does not cover situations when the victim’s accusations are made public and the offender is only issuing his own public statement in response. The goal of the Rule is to encourage restorative conversations, not to assist offenders in saving their public reputations.193

Victims’ pursuit of “public accountability” is another reason for encouraging apologies when victims initiate public conversations.194 In so doing, victims transform the wrong from a private one, wherein “the only justifiable response” is seeking “private accountability,” into a public one.195 They “reflect on their otherwise private, personal, individual experiences and begin to recognize how their own experiences are related to broader systems of oppression.”196 Generally, seeking public accountability may involve victims representing a “broader community of persons impacted” and their

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191 While public apologies may benefit victims who want them, there are potential litigation costs associated with these apologies. See supra note 68 and accompanying text (describing the Bryant situation, where the victim requested and received a public apology and decided not to testify, resulting in dropped charges). These costs are not insignificant; however, they do not surpass the value of apologies. In the Bryant case, the victim still pursued civil litigation and ultimately settled. See Boccaccini et al., supra note 68, at 31, 44. Hence, while the criminal case suffered, the victim was still able to receive compensation and the public apology she wanted while avoiding the difficulty of testifying.

192 See Robbennolt, Apology—Help or Hindrance?, supra note 79, at 33 (discussing defendants’ reluctance to apologize for fear that the apology will be used against them at trial).

193 Of course, this limitation may not cover some valuable apologies. For example, in the sexual harassment context, the Rule would cover the Twitter exchange between Megan Ganz and Dan Harmon because she replied to one of his Tweets and asked for an explanation. See Kaitlyn Tiffany, Former Community Writer Megan Ganz Calls Out Dan Harmon for Vague Harassment Apology, VERGE (Jan. 3, 2018, 12:14 PM), https://www.theverge.com/2018/1/3/16845430/dan-harmon-community-abuse-harassment-twitter-conversation [https://perma.cc/4CEP-LGVF]. But it would not cover the subsequent apology that he provided on his podcast, which Ganz ultimately found to be “relieving.” See Robbennolt, The Range of Remedies, supra note 9, at 37-38 (describing the apology and Ganz’s reaction). This type of public apology, however, “tends to be the exception rather than the rule. You’ll more often get very carefully crafted, conditional, and vague statements.” Id. at 38. The proposed exceptions, then, purport to balance facilitating public accountability and protecting only the apologies that are most likely to be valuable.

194 Dempsey, supra note 177, at 359.

195 Id. at 363.

196 Id.
“interests,” as well as using their “voice[s] . . . [to] strengthen and inspire others to join in the political struggle against this kind of wrongdoing.”

As the #MeToo movement illustrates, seeking public accountability for sexual assault has resulted in positive effects. It has prompted others to share their own experiences and has started “to transform the normative landscape” around sexual violence. Public accountability may also contribute to deterrence, and, from a retributive perspective, it enables culpable offenders to receive some deserved punishment. While there is a risk of victims accusing some nonculpable persons publicly and erroneously, it is unclear to what degree that occurs. However, even if an offender is not legally guilty, he may have still morally wronged a victim such that he deserves the public ramifications.

While victims could still call out defendants publicly without an exception to the non-publication condition, I still suggest excluding apologies that defendants make in response. If the victim calls publicly for an apology, the defendant will be unable to respond in the same form without risking liability. He could otherwise only use the Rule to apologize privately while leaving the victim’s public accusations unanswered, which would be unsatisfying to both parties and the community. Hence, excluding some public apologies may ultimately increase public accountability.

5. Any Party

The exclusion prohibits the prosecutor or the plaintiff from introducing the defendant’s apology during their case-in-chief. Apologies for sexual assault are substantially valuable and thus warrant protection so that defendants are neither punished for nor discouraged from expressing remorse or fault for their blameworthy conduct.

Additionally, the Rule bars defendants from introducing their apologies because holding otherwise would undermine its rationale. While the value of genuine apologies would not change if defendants could admit them, the opportunity to do so could create a strong incentive for defendants to apologize falsely. These insincere statements would have few instrumental

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197 Id. Some people believe that survivors have a “duty to hold people accountable for their previous sexual misconduct.” See id. at 364 (citing Mike Flemming, Jr., Beautiful Girls’ Scribe Scott Rosenberg On a Complicated Legacy with Harvey Weinstein, DEADLINE (Oct. 16, 2017)). I do not explore this question.
198 Id. at 364.
199 See discussion supra Part II (discussing the value of apologies).
200 Existing hearsay rules largely prohibit defendants from introducing their apologies, so this aspect of the Rule will rarely have an effect. But it is possible that defendants could introduce apologies for a non-hearsay purpose.
benefits and less retributive value. But prosecutors would still be barred under the Rule from introducing the statements, so there would be few checks on defendants lying to victims in order to introduce their apologies at trial.

6. Allowance for Impeachment and Rebuttal

The Rule allows apologies to be used for impeachment and rebuttal because, although apologies for sexual assault are valuable and thus deserve some protection, it would be harmful to allow defendants to express remorse and admit fault to victims but deny it at trial. That juxtaposition would undermine the apology’s value to the extent that it shows the apology was insincere. It may also negatively affect victims from an emotional and psychological perspective if they hear defendants contradict their apologies.

Moreover, the rationales for impeachment and rebuttal are distinct from those for substantive evidence. The latter is focused on proving the elements of the offense and would thus involve using the apology to meet the state’s burden. But the goal of impeachment is to call into question a witness’s credibility, while the goal of rebuttal is to challenge the defendant’s arguments. Other rules, in which certain evidence is excluded for some theories of relevancy but allowed for impeachment, also reflect this difference. And while the Rule is not designed to punish or disincentivize defendants who wish to apologize, it is also not intended to give defendants free rein to lie—either on the stand or in their apologies. Allowing the use of apologies for impeachment and rebuttal will work simultaneously, then, to guard against defendants issuing disingenuous apologies and committing perjury.

201 See discussion supra Section II.C (describing the impact of false apologies). But see Duff, Responsibility, Restoration, and Retribution, supra note 88, at 79 (arguing that forced apologies still have retributive value).

202 A possible solution is excluding only sincere apologies and allowing judges to make that admissibility decision under a Rule 104(a) analysis. See FED. R. EVID. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”). This approach, however, usurps the jury’s role in evaluating witness credibility and raises the danger that a sincere apology, deserving protection, will be erroneously admitted.


204 See, e.g., FED. R. EVID. 407 (prohibiting “evidence of subsequent remedial measures” to prove enumerated relevancies but allowing it for impeachment); FED. R. EVID. 408(a)-(b) (prohibiting evidence of settlement offers and negotiations in some contexts but allowing it to prove bias); FED. R. EVID. 411 (prohibiting evidence of liability insurance to prove negligence but allowing it for impeachment).
Finally, it is important to allow the use of apologies for impeachment because holding otherwise would significantly add to the evidentiary loss caused by the exclusion. This evidentiary loss, in turn, would endanger the truth-seeking process of trials. It is crucial for the trier of fact to hear evidence of a witness’s credibility in order to ascertain an accurate understanding of the case and reach a correct verdict. Lastly, this exception may reduce the likelihood that defendants will testify falsely, which will also positively affect trial outcomes.\footnote{One counterargument is that allowing apologies to be introduced for impeachment and rebuttal could decrease defendants’ willingness to testify. But their apologies are currently admissible (barring an exclusion by Rule 403), so a limited exclusion should not alter their decisions. See FED. R. EVID. 801(d)(2)(A) (allowing admission of opposing party statements); see also FED. R. EVID. 403 (excluding relevant evidence under certain circumstances, including “unfair prejudice”).}

7. Rule of Completeness

This exception has two rationales. First, it makes clear that the exclusion does not affect the operation of Rule 106, which allows parties to admit related portions of previously admitted statements in similar circumstances.\footnote{See FED. R. EVID. 106 (“If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”).} Second, it addresses the shortcomings of Rule 106 by including non-recorded, oral statements.\footnote{See Daniel J. Capra & Liesa L. Richter, Evidentiary Irony and the Incomplete Rule of Completeness: A Proposal to Amend Federal Rule of Evidence 106, 105 MINN. L. REV. 901, 952-57 (2020) (arguing that oral statements should be included within Rule 106 because no rationale justifies treating them differently; some jurisdictions have successfully done so, and Rule 403 remains available). As of August 2021, an amendment to Rule 106 to include oral statements has been released for public comment. See COMM. ON RULES OF PRAC. & PROC., JUD. CONF., U.S., PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE, & THE FEDERAL RULES OF EVIDENCE 2, 299-303 (2021), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_-_august_2021_o.pdf [https://perma.cc/88DZ-9JLY].}

8. Exclusion of Apologies that Evince Fault

I suggest excluding apologies that express fault or responsibility because those statements are more valuable than those that communicate only sympathy.\footnote{I used the term “sympathy” to refer to apologies that do not contain expressions of fault because it aligns with state rules that exclude apologies. See supra notes 133–134 and accompanying text (describing state evidence rules). The use of the term “fault” was also inspired by state evidence rules, while the term “responsibility” was borrowed from retributivist arguments and Robbenholt’s studies. See id. (same); see also supra subsection II.B.1 (describing responsibility and retributivism); Robbenholt, Apology—\textit{Help or Hindrance?}, supra note 79, at 34 (discussing apologies that admit responsibility). While apologies that admit fault are superior to those that do not, I propose}
they are blameworthy and deserve to bear the moral weight of the offense.\textsuperscript{209} Additionally, apologies that include an acceptance of responsibility tend to increase the acceptance of settlements in civil litigation and may empower victims, decrease self-blaming, and further deterrence and rehabilitation.\textsuperscript{210}

CONCLUSION

Although sexual assault is one of the most serious crimes, victims have long received inadequate resolution through the criminal justice system. One proposed solution is to substitute restorative justice programs for criminal prosecutions of sexual assault. This idea, however, is concerning. It is underexplored, may unintentionally create more harm, and subverts the state’s criminal punishment goals. Instead, I argue that criminal law may incorporate restorative justice’s focus on apologies; and I proffer a limited evidentiary exclusion to encourage them.

Apologies for sexual assault are highly valuable, as they carry significant moral weight and result in numerous benefits. They signify that the offender recognizes his culpability and will rightfully assume the blame for his wrong. They enable healing conversations. They give many victims what they have long desired, and they empower and embolden them to speak their truth. While not a complete solution, excluding these apologies is a step in the right direction. It will encourage private and public accountability without unduly endangering the truth-seeking process of trials; increase deterrence and rehabilitation; and, most importantly, facilitate retribution, vindication, and restoration for victims of sexual violence.

excluding the latter as well as the former because both forms of apology are valuable. \textit{But see} Robbennolt, \textit{Apology—Help or Hindrance?}, supra note 79, at 34 (finding that, for severe injuries, apologies that did not express responsibility negatively affected “perceptions of the situation and the offender” in the context of civil liability). Additionally, non-fault apologies should be excluded because they are still probative of liability: A person who says “I’m sorry” is more likely to be culpable than a person who does not apologize. \textit{But see} Pusateri, supra note 137, at 218-20 (arguing that apologies are not probative of liability because they are equally consistent with non-blameworthy conduct). Pusateri cites the reasoning underlying the exclusionary rules about subsequent remedial measures, offers to pay medical expenses, and settlement offers in support of her proposition. \textit{Id.} at 218-19. However, the advisory committee notes for those rules, specifically Rule 407, explain that, “[u]nder a liberal theory of relevancy[,] this ground alone \textit{would not} support exclusion as the inference is still a possible one.” See \textsc{Fed. R. Evid.} 407 advisory committee’s note on proposed rule (emphasis added).

\textsuperscript{209} \textit{See discussion supra} Section II.B (discussing the retributive value of apologies).

\textsuperscript{210} \textit{See} Robbennolt, \textit{Apology—Help or Hindrance?}, supra note 79, at 33 (describing the effect of apologies on settlements); \textit{see also discussion supra} Section II.A (describing the effects of apologies on victims, offenders, litigation, rehabilitation, and deterrence).