

# Contradictions in Missouri: Do Apologies Really Matter in Criminal Sentencing?

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## INTRODUCTION

The once great criminal trial has all but vanished from the United States. Almost 95 percent of all criminal cases in the United States are resolved by guilty plea.<sup>1</sup> As such, much work in the criminal justice system has focused on the disposition of criminal cases. Because of this, judges often impose a sentence on a defendant with whom they have had very little interaction.

Conventional wisdom suggests that a defendant who is remorseful may receive a more lenient sentence than a defendant who is not. Almost without fail, a visit to a criminal sentencing in almost any courthouse in the United States will include a defendant offering an apology for his or her wrongful conduct during allocution. It is commonplace for a defendant to apologize to many people and institutions, such as the victim, family members, the judge, attorneys, and even the United States.<sup>2</sup> Do these apologies have any effect on the sentencing judge? Seasoned criminal justice practitioners will reply with mixed results; some say yes and some say no. Some contend that it is a gamble for a defendant to apologize at sentencing as it sometimes backfires and results in a more severe sentence. Case law is full of such apology attempts gone wrong.

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<sup>1</sup> Hornby, B., "Speaking in Sentences," *Green Bag* 14, no. 2 (2011): 147-161.

<sup>2</sup> *Ibid.*

This study examined the effect of a criminal defendant's apology on judges and commissioners sitting in St. Charles County, St. Louis County, and St. Louis City, Missouri.

## LITERATURE REVIEW

### Pertinent Sentencing Law

Missouri law provides that the sentencing judge must decide a defendant's sentence after examining all of the circumstances concerning the offense as well as the history and character of the defendant.<sup>3</sup> In some cases, whether a defendant lives or dies may come down to, in part, the defendant's remorse.<sup>4</sup>

Both state and federal courts agree that a defendant's remorse is an appropriate factor to consider at sentencing. For instance, one court found that remorse is an appropriate consideration because it relates to the defendant's dangerousness to society.<sup>5</sup> Echoing the same sentiment, another court found that it was important for the defendant to be allowed to apologize and demonstrate his remorse for having committed the crime.<sup>6</sup>

### Mechanics of Apologies

Apologies generally help mend a relationship between an offender and the person hurt by the offender's words or conduct. When executed properly, an apology reduces the blame directed to an offender for their wrongful or hurtful conduct. The goal of an apology is to rebuild trust that was lost by

<sup>3</sup> Sec. 557.036 RSMo.

<sup>4</sup> *Riggins v. Nevada*, 504 U.S. 127 (1992).

<sup>5</sup> *Pickens v. State*, 850 P.2d 328 (Okla. Crim. App. 1993).

<sup>6</sup> *United States v. Landeros-Lopez*, 615 F.3d 1260 (10<sup>th</sup> Cir. 2010).

the offender's wrongful conduct.<sup>7</sup>

Since apologies do not cost anything, there is a risk that offenders will make insincere apologies to their victims in an effort to rebuild lost trust. This of course is common sense, and insincere apologies are not well received by the victim. As a result, insincere apologies have the opposite effect, and further reduce trust and place more blame on the offender. Because of this, offering an apology presents a risk to the offender that the victim will not deem the apology sincere.<sup>8</sup>

As one would expect, there is no magic formula to presenting a sincere apology, as each case is different. The best apologies fall in line with the expectations of what the victim wants to hear from the offender. While there is no concrete form an apology must take, there are essentially four parts to an apology: (1) an acceptance of responsibility; (2) an expression or demonstration of the offender's sorrow; (3) an offer to right the wrong; and (4) a promise not to repeat the offense in the future.<sup>9</sup>

In the criminal justice context, it would seem that defendants have much to gain if the recipient believes that their apology is authentic.

### **Experiments with Apologies in the Legal Setting**

Experiments with apologies in legal settings have shown mixed results. In one study concerning the effect of an apology in a civil lawsuit, the results were surprising. In this study, a number of federal district judges and magistrate judges were asked to review a hypothetical personal injury lawsuit in which the plaintiff was injured due to a defective saw. The judges were to play the role of a mediator recommending the value of the plaintiff's claims to the parties. The control group was provided a description of the injuries along with an acknowledgement of fault on behalf of the manufacturing company. The other group, however, received the same information but also learned that the CEO of the manufacturing company also attended the settlement conference and told the plaintiff that on

behalf of the corporation he was sorry for the injuries caused by the defect and that he took full responsibility for the plaintiff's injuries.<sup>10</sup>

The researchers thought that the judges evaluating the worth of the plaintiff's claim would find a lower value for the apology condition given the previous research on the effect of apologies. They found, however, that the judges tended to place a higher value on the cases in which the CEO expressed his apology as opposed to the cases in which liability was only admitted. One possible explanation, however, for this result is that the apology only served to further strengthen the plaintiff's case against the defendant. In addition, it is possible that the judges placed a higher value on the apology condition because they were not the victim, but instead were a third party.<sup>11</sup>

After learning the results of this study, the researchers presented the exact same scenario to a group of lawyers who were asked to predict the judge's estimation of the value of the plaintiff's injuries. As the researchers themselves first believed, the lawyers anticipated the judges would place a lower value on the apology condition. The study revealed that the lawyers expected the apology to have an impact on the judge's decision making, when in fact it did not.<sup>12</sup>

Continuing experiments with apologies in legal settings, another study was conducted in which judges were asked to evaluate a fair settlement for a plaintiff injured when attempting to sit in a lawn chair. In the first condition, the judges learned that the plaintiff was injured when trying to sit in a lawn chair that was accidentally knocked out of the way by an inebriated passerby. In this study, some judges were told that a defendant accidentally knocked the lawn chair out of the way as the plaintiff was attempting to sit in it and other judges were told that the defendant intentionally pulled the chair out from the plaintiff. In addition, the researchers randomly told some of the judges that the defendant had apologized for the negligence or intentional conduct. For the negligence/apology condition, the study revealed that the judges placed a lower settlement value on the case compared to the

<sup>7</sup> Rachlinski, J. J., Guthrie, C., & Wistrich, A. J., "Contribution in the Courtroom: Do Apologies Affect Adjudication?" *Cornell Law Review* 98, no. 5 (2013): 1189-1243.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

value the judges placed on the intentional/apology condition. Statistically, however, the study found that the apology in either condition was not significant. The takeaway from this study was that judges did not appear to be swayed by an apology.<sup>13</sup>

A similar study was conducted concerning an apology in a bankruptcy proceeding. Given the results of the previous two studies, it was not surprising that the study revealed that the apology did not have a significant effect on the judges.<sup>14</sup>

### Apologies in Criminal Cases

With respect to criminal cases, research has revealed that an apology may help in some cases and hurt a defendant in others. For instance, one study focused on the impact of an apology in traffic court. In this study, a number of judges attending a conference were asked to play the role of a traffic court judge. The handout given to the judges described a hypothetical defendant named Debbie who was ticketed for speeding (52 miles in a 35 miles per hour zone) in a work zone. In the hypothetical, the ticketing officer testified that the defendant was ticketed for speeding and conceded that the work zone signs were confusing. Debbie admitted that she was speeding but explained that she did not drive often and thought the speed limit was higher. She also told the judge that she did not notice any signs indicating she was driving in a work zone. Lastly, Debbie informed the court that she had not received any traffic tickets within the last three years.<sup>15</sup>

The judges were advised that the possible range of punishment was \$50 to \$400, but those fines could be doubled since the offense occurred within a work zone. In the study, a picture of Debbie was attached to the materials, one of which portrayed an unattractive woman and the other, an attractive woman. In addition, some of the judges were told

that Debbie apologized for committing the offense, accepted full responsibility, and that she would not do it again. The judges were asked what fine they would impose. The results revealed that the apology did not help the defendant. The researchers concluded that the judges must have believed that the apology was insincere and imposed a more significant fine.<sup>16</sup>

In another study, judges attending a conference in 2004 were asked what sentence they would impose on a defendant who was convicted of threatening a judge after having lost a motion in a civil proceeding. Judges assigned to the control group were told that the defendant, at sentencing, was given an opportunity to speak but chose not to. The remaining judges were told that the defendant apologized for threatening the judge and explained that he was under a great deal of stress. In addition, the defendant accepted full responsibility for his actions and promised not to do it again. The results revealed that the judges who were told of defendant's apology sentenced the defendant to less time than those judges who were told the defendant did not speak at sentencing.<sup>17</sup>

Robinson, Jackowitz, and Bartels also studied the effect of remorse and apology, among other things, in criminal cases.<sup>18</sup> They collected data from participants who responded to advertisements at the University of Chicago and those who responded on Amazon's Mechanical Turk. The subjects were presented with a survey listing five different hypothetical criminal offenses and were asked to indicate their thoughts on the appropriate punishments. After having done so, the subjects were then given additional information such as the fact that the defendant showed true remorse, publicly acknowledged guilt, and apologized to the victim immediately after the offense. They were then asked whether the additional facts influenced their thoughts

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Robinson, P. H., Jackowitz, S. E., & Bartels, D. M., "Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment," *Vanderbilt Law Review* 65, no. 3 (2012): 737-826.

on punishment, and if so, what the appropriate punishment should be.

The study found that most participants lowered a defendant's punishment when true remorse, a public acknowledgement of guilt and an apology immediately after the offense were introduced into the hypothetical. Interestingly, while most participants reduced punishment for theft or assault, they did not do so with the crime of homicide. In addition, while not resulting in as significant a sentence reduction, the majority of participants also reduced the sentence when a defendant was found to be truly remorseful, publicly acknowledged guilt, and apologized at sentencing.<sup>19</sup>

Gold and Weiner also examined the effect of, among other things, remorse and confession.<sup>20</sup> In their study, a number of University of California at Los Angeles undergraduate students were provided a handout with essentially three different scenarios, one of which included a hypothetical based upon the crime of passing of State Department secrets to a foreign country. The results of the study support the proposition that wrongdoers are considered less blameworthy when they showed remorse for their actions.

Likewise, a study conducted by Jacobson and Berger, examined the impact of repentance and the attractiveness of a defendant on punishment.<sup>21</sup> In their study, 212 residents of a Chicago suburb were given a questionnaire describing a criminal case and asked them to determine the appropriate sentence for the defendant. Attached to the survey was a picture of the defendant. One group received a photograph of a well-dressed, attractive defendant, while the other group received a picture of the same model, but this time he was not well dressed, nor well groomed.

In addition, those that received the well-dressed photograph were also advised that during the trial the defendant appeared to be truly remorseful, while

those receiving the unattractive photo were advised that the defendant, at times during the trial, appeared to be arrogant. Their study found that the attractive repentant group received a significantly lower sentence than the unattractive arrogant group.

Finally, Bennett and Robbins, conducted a survey of federal judges to learn their views on a defendant's allocution in sentencing.<sup>22</sup> The survey requested that the judges set out the top five characteristics or features of a defendant's allocution that impresses them most. Genuine remorse and a sincere apology to the victims of the crime made the top five of the list.

### **Drawbacks of Apologies in Criminal Cases**

While case law and statutory law have echoed the appropriateness of considering a defendant's remorse in imposing the sentence, some legal scholars have stated that remorse is not an appropriate consideration. To begin with, remorse is a double-edged sword for a defendant. There is the danger that the judge may believe that a defendant is expressing remorse or apologizing simply to obtain a reduced sentence. In addition, there is the possibility that a truly remorseful defendant will be seen as unrepentant, and instead of receiving a reduced sentence, will receive a harsher punishment. This dilemma is caused by the fact that evaluating a defendant's remorse is subjective. No one can truly know whether or not a defendant is truly remorseful, except for the defendant.<sup>23</sup>

One of the chief complaints for using remorse as a sentencing factor is the fact that it is judged by an arbitrary standard. Cases abound detailing a sentencing court's dissatisfaction with a defendant's expression of remorse and apology because the defendant did not use wording that the sentencing court desired. In one instance, a defendant was found to be unremorseful after apologizing because the defendant did not specifically reference the victim in

<sup>19</sup> Ibid.

<sup>20</sup> Gold, G. J., & Weiner, B., "Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression," *Basic and Applied Social Psychology* 22, no. 4 (2000): 291-300.

<sup>21</sup> Jacobson, S. K., & Berger, C. R., "Communication and Justice: Defendant Attributes and Their Effects on the Severity

of His Sentence," *Speech Monographs* 41, no. 3 (1974): 282-286.

<sup>22</sup> Bennett, M., & Robbins, I., "Last Words: A Survey of Federal Judges' Views on Allocution in Sentencing," *Alabama Law Review* 65, no. 3 (2014): 735-814.

<sup>23</sup> Ward, B., "Sentencing Without Remorse," *Loyola University Chicago Law Journal* 38, no. 1 (2006): 131-167.

the apology.<sup>24</sup>

Another shortcoming of considering remorse as a sentencing factor is that some defendants are more articulate than others and are able to express their emotions in a more convincing manner. Therefore, a truly remorseful defendant that is inarticulate may not be persuasive enough for the sentencing court to find true remorse. Likewise, courts in considering a defendant's remorse often look to actions of the defendant that occurred long before sentencing. Some courts have looked at the defendant's actions during the offense, immediately after the offense, and even during trial. None of these, however, is indicative of how a defendant may truly feel at the time of sentencing. All of these operate to the defendant's detriment in demonstrating remorse at sentencing.<sup>25</sup>

### Filling the Gap

Given the conflicting sentiment on the role of remorse and apology at sentencing and its impact on the sentence imposed, this study attempted to fill the gap by further clarifying the impact of a criminal defendant's remorse on the sentence imposed. For example, some of the earlier studies used laypersons as opposed to judges, which may have skewed the results as the effect of an apology by a criminal defendant, and which may be different for a judge who sees defendants on a daily basis and may have become hardened or less sympathetic to an apology than a layperson.

Further, this study attempted to clarify the role remorse and apology may have upon judges and commissioners in the Circuit Courts of St. Charles County, St. Louis City, and St. Louis County, Missouri.

### Methodology

The purpose of this research was to examine whether a defendant's demonstration of remorse at a sentencing proceeding during allocution for a crime committed in St. Charles County, St. Louis City, and

St. Louis County, Missouri, has any effect upon the sentence imposed by the sentencing judge. Conventional wisdom and case law all support the proposition that an apology by the defendant at sentencing is beneficial for the defendant. In practice, however, offering an apology often backfires on a defendant and results in a more severe punishment by the sentencing judge.

### Overview

In this study, the current judges and commissioners sitting in the Circuit Courts of St. Charles County, St. Louis City, and St. Louis County, Missouri, during the winter of 2016 were surveyed and serve as the unit of analysis. Given previous literature and statements from judges concerning the importance of an apology and remorse as a sentencing factor, a sincere apology and demonstration of remorse by a defendant should have an impact on the sentence imposed. In this study, modeled very closely after the Rachlinski speeding ticket study,<sup>26</sup> the sentence imposed consisted of the judge's response set out in a dollar figure for a fine for a hypothetical littering case.

For purposes of this study, an apology consisted of a defendant's acceptance of responsibility, an indication of remorse, and an offer to make amends for the offense to the extent possible, as well as an indication that the defendant would not commit another offense in the future.

### Sample Data

The study sample consisted of all sitting judges and commissioners in the Circuit Courts of St. Charles County, St. Louis City, and St. Louis County, Missouri, in November of 2016. They were sent a study participation letter by U.S. mail, in addition to a warning letter, and the hypothetical case upon which they were asked to impose sentence. They were requested to render their sentence, stated in dollars, after having read the hypothetical case. The control group survey consisted of a written description of the offense, applicable penalty range, a brief background

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Rachlinski, J. J., Guthrie, C., & Wistrich, A. J., "Contribution in the Courtroom: Do Apologies

Affect Adjudication?" *Cornell Law Review* 98, no. 5 (2013): 1189-1243.

of the defendant, and that the defendant chose not to speak at allocution.

The other group received the same information as above except it indicated that the defendant wished to address the court at allocution, and set out the defendant's apology that consisted of her acceptance of responsibility, an indication of remorse, and an offer to make amends for the offense to the extent possible, as well as an indication that she would not commit another offense in the future.

All information collected from the judges and commissioners was kept anonymous. All survey information that was returned did not have a place for the responding judge to write any identifying information. Further, there was a separate return envelope provided in which to return the judge's completed hypothetical case.

### **Variables**

In this study, the independent variable was the defendant's apology at allocution. The dependent variable is the sentence imposed. The dependent variable was stated as a dollar figure of the fine imposed as the sentence given.

### **Hypothesis**

It was expected that those judges and commissioners receiving the apology condition would impose a lesser sentence than those receiving the condition without apology. The hypothesis for this study can then be stated as: Judges and commissioners viewing the apology condition will impose a lower fine than those without.

### **Analysis**

This study is a classical experiment as it contains independent variables, post testing and experimental and control groups. Pretesting in this study was not done due to the risk that the judges may have been influenced by having seen both conditions, apology and non-apology of the defendant.<sup>27</sup>

### **Results**

In St. Louis City, there were eleven *apology* respondents from a sample size of twenty. Of the eleven, the average fine was \$50 and the maximum financial penalty was \$100. There were also nine *no apology* respondents from a sample size of twenty. Of the nine, the average fine was \$75 and the maximum financial penalty was \$250. Based on the collected results, it is suggested that an apology, on average in St. Louis City, saved the hypothetical defendant \$25 or 33 percent more than the hypothetical defendant that did not apologize, which is 10 percent of the maximum financial sentence.

In St. Louis County, there were five *apology* respondents from a sample size of thirteen. Of the five, the average fine was \$60 and the maximum financial penalty was \$100. There were also eight *no apology* respondents from a sample size of thirteen. Of the eight, the average fine was \$50 and the maximum financial penalty was \$150. Based on the collected results, it is suggested that an apology, on average in St. Louis County, cost the hypothetical defendant \$10 or 20 percent more than the hypothetical defendants that did not apologize, which is 12 percent of the maximum financial sentence.

In St. Charles County, there were three *apology* respondents from a sample size of five. Of the three, the average fine was \$58 and the maximum financial penalty was \$100. There were also two *no apology* respondents from a sample size of five. Of the two, the average fine was \$100 and the maximum financial penalty was \$100. Based on the collected results, it is suggested that an apology, on average in St. Louis County, cost the hypothetical defendant \$42 or 24 percent more than the hypothetical defendants that did not apologize, which is 8 percent of the maximum financial sentence.

### **Limitations**

Of course, this study is not without limitations. To begin with, the study asked judges to sentence a hypothetical defendant based upon a written description of the facts. Obviously, the study cannot replicate an actual criminal defendant appearing for

<sup>27</sup> Maxfield, M. G., & Babbie, E. R., *Research Methods for Criminal Justice and Criminology: Student Edition* (Belmont, CA: Wadsworth Cengage Learning, 2011).

**Table 1.**

Apology Condition	Fines Imposed										\$ Average	Respondents	
Apology - STL City	25	100	50	25	25	100	25	50	25	25	100	\$50	11
No Apology - STL City	250	150	25	25	50	50	25	50	50			\$75	9

**Table 2.**

Apology Condition	Fines Imposed							\$ Average	Respondents	
Apology - STL County	25	25	50	100	100			\$60	5	
No Apology - STL County	25	50	25	25	50	25	150	50	\$50	8

**Table 3.**

Apology Condition	Fines Imposed			\$ Average	Respondents
Apology -STC	50	25	100	\$58	3
No Apology - STC	100	100		\$100	2

*Results from St. Louis City, St. Louis County, and St. Charles County respectively.*

sentencing before a judge. In addition, the very fact that this is a hypothetical case may affect the validity of the study. Likewise, as there are endless possible ways offenses can be committed and charges brought against defendants, this study is limited in that the hypothetical defendant in the study was charged with littering. Therefore, the findings of the study may not have application to other types of crimes, such as drug, property, or violent crimes. In addition, this study is limited to St. Charles County, St. Louis City, and St. Louis County, Missouri, judges and commissioners. While their responses to the survey may provide enlightening information, there is obviously an inherent risk of trying to generalize the findings of this study and apply them to judges in other jurisdictions. Lastly, this study examined responses from a very small number of respondents.

With those limitations in mind, however, it is expected that the results of this study are reliable. It is expected that the judges attempted to provide as accurate information as possible for a number of reasons, including their own interest in the results. In addition, the study was designed to be very brief so that the judges would not be tempted to overthink their responses.

### Conclusion

In conclusion, this study sought to determine whether a defendant’s apology and demonstration of remorse during allocution at sentencing had an impact on the sentence imposed by a circuit court judge sitting in St. Charles County, St. Louis City, or St. Louis County. All judges and commissioners were provided a brief survey that outlined a minor littering offense. At random, the judges and commissioners received either a scenario in which there is no allocution by the defendant or one in which the defendant chooses to allocute with an apology. The judges and commissioners were then asked to set out what they believe to be the appropriate sentence via a dollar figure. While mixed, the results showed that an apology, within the confines of this hypothetical study, negatively affected the defendant’s sentence. In both St. Charles County and St. Louis County, the results showed that an apology did not reduce the sentence imposed greater than those that did not apologize. In St. Louis City, the results were the converse. The small sample size and inconclusive results leads the researchers to suggest that replication studies should be conducted to further investigate this important topic.

**APPENDIX**

ADVANCED WARNING LETTER

May 1, 2016

Dear (name of judge):

Soon you will receive a survey concerning sentencing practices in Missouri being conducted by myself and Dr. Ryan Guffey of Lindenwood University. Lindenwood University is not providing funding or sponsoring this research. Because of your position and experience in criminal cases, your participation is greatly appreciated.

Thank you in advance for your cooperation.

Sincerely,

Grant J. Shostak



SAMPLE COVER LETTER

October 19, 2016

Re: Sentencing Practices Survey

Dear (judge's name):

My name is Grant Shostak and I currently serve as the Vice President, General Counsel to Lindenwood University. Along with Dr. Ryan Guffey, Vice President, Student Development, of Lindenwood University, we have undertaken a study to further understand sentencing practices in Missouri. Because of your knowledge and experience, it would be most appreciated if you would take a few moments to complete the enclosed survey. Please place and seal your completed anonymous survey in the included envelope.

The survey should not take more than just a few minutes to complete. Please place and seal your completed survey in the self-addressed, stamped envelope. Please mail your completed survey on or before November 19, 2016.

Any responses given in the survey will remain completely anonymous. Your name will not be disclosed in any report. Of course, at the completion of the survey, we would be glad to send you a summary of the study.

Should you have any questions or wish to discuss this further, please do not hesitate to contact me at 314-477-3367.

Very truly yours,

Grant J. Shostak, J.D.

Ryan V. Guffey, Ph.D.

## HYPOTHETICAL CASE

Imagine that you are presiding over a case for littering. Susan was ticketed for littering in a public park. The park ranger testified that he watched Susan eat a bag of fast food in her car and, when finished, threw the paper bag to the nearby grass and drove away. He noted that “No Littering” signs are clearly posted throughout the park, but are sometimes hard to see because of the foliage from trees and because the park is usually very populated, as it is frequented by many local residents.

Susan admitted that she threw the bag to the ground, but said she did not think she was littering because the paper bag is biodegradable. The law in your jurisdiction holds that Susan is liable for littering. The law requires that a fine must be imposed. The schedule of fines calls for a fine of between \$25 and \$250 for littering. The fine may be doubled, however, when the littering takes place in a public park. If doubled the fine range could be \$25-\$500. Any such increase in the fine range is not mandatory, but is left to the discretion of the Court.

**When asked if she had anything to say to the Court before it imposed its sentence, Susan, declined to speak. [When asked if she had anything to say to the Court before it imposed its sentence, Susan said, “Your honor, I am very sorry for littering. I am completely responsible. Rest assured that I will not do it again. Please accept my apology.”]**

What fine would you impose? \$ \_\_\_\_\_