THE ROLE OF APOLOGIES IN LABOR ARBITRATION OUTCOMES

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I. INTRODUCTION

Arbitration is the main mechanism to resolve grievances under the vast majority of collective bargaining agreements.[1] In fact, the presence of an arbitration clause for resolving grievances has become omnipresent in labor contracts. Most contracts allow grievances over any clause of the labor agreement and/or any employer action which a union believes may violate the agreement. The scope and breadth of arbitral authority is notable, covering virtually every issue within a labor contract.[2] Arbitrators have a variety of objective and subjective factors they must consider to render an award. Objective factors include factual aspects of the issue in the case, prior grievant work history, and grievant seniority. Arbitrators generally espouse a strong belief that cases should be decided on this type of objective factor. In open-ended comments provided by respondents from this analysis, arbitrators almost universally stated that subjective factors, such as apologies, were irrelevant to their decisions. But as our data show, there are marked differences between such espoused values and how arbitrators actually weigh apologies in hypothetical cases. Our data support other studies which show subjective factors have an independent effect on the severity of arbitration outcomes.[3]

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1. There is also a growing use of arbitration in non-union settings, although the use of arbitrators in this context is more controversial. Scholars and policy practitioners have argued that the use of arbitration in a non-union setting can cause problems because one party involved does not have representation.

2. *See* FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS 105 (1997). However, it should be noted that the breadth of arbitration authority is constrained in practice by the contract itself. Arbitrators are bound by labor and management to only apply the terms of the contract before them. They cannot write the language of the contract. *Id*. at 106. Additionally, arbitrators may not import external law like the National Labor Relations Act of 1935, 29 U.S.C. § 151–69 (2012) or Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241.

3. Dafna Eylon, Robert Giacolone, & Hinda Pollard, *Beyond Contractual Interpretation: Bias in Arbitrators' Case Perceptions and Award Recommendation*, 21 J. ORGANIZ. BEHAV. 513 (2000).

Arbitration is defined as the submission of a dispute under the terms of a contract to a neutral third-party for final resolution.[4] The arbitration process is quasi-judicial in nature. However, unlike traditional court cases, there is no discovery process in arbitration.[5] When deciding issues, arbitrators use less strict evidentiary standards including "preponderance of the evidence" and "clear and convincing" to make awards.[6] Arbitration of grievances usually involves two steps. First, if any facts are in dispute, arbitrators use witnesses' testimony to establish all relevant case facts. Second, arbitrators apply the contract language to the facts at hand.[7] In United States labor law, there are generally two types of arbitration: grievance arbitration (voluntary/binding) and interest arbitration.[8] Grievance arbitration is voluntary, inasmuch as it derives its life from the collective bargaining agreement, which the parties voluntarily entered into, and binding, inasmuch as the parties have agreed to abide by the terms of an arbitrator's decision.[9] Interest arbitration involves disputes over the terms of a contract when parties are unable to reach an agreement.[10] This study considers the impact of apologies in the context of grievance arbitration.

Arbitration is the preferred method of conflict resolution for grievances in industrial relations.[11] There is a strong precedent in favor of acceding to arbitrator decisions and upholding arbitrator awards.[12] The

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4. *Arbitration*, BLACK'S LAW DICTIONARY, (10th ed. 2014).
5. 6 C.J.S. *Arbitration* § 124 (2016).
6. 6 C.J.S. *Arbitration* § 241 (2016).
7. In some instances, it is also appropriate to consider past practices, such as when the contract language is not clear or when the parties attest that a time-honored practice has supplanted or replaced explicit contract language.
8. *See* Charles B. Craver, *Public Sector Impasse Resolution Procedures*, 60 CHI.-KENT L. REV. 779, 796─97 (1984).
9. *Id.* Grievance arbitration is often referred to as voluntary binding arbitration.
10. A subcategory of interest arbitration is compulsory arbitration. Compulsory arbitration is the resolution of contract terms as a whole, not just an individual's claim under the terms of an already negotiated contract. It occurs frequently in the public sector when state laws mandate it for "essential" employees. Employees covered under these clauses usually include police, fire-fighters, and sometimes teachers. Examples of states which permit compulsory arbitration for public employees include New York (Public Employees Fair Employment Act, N.Y. CIVIL SERVICE LAW §§ 200-214 McKinney 2016)), Michigan (MICH. COMP. LAWS ANN. §§ 423.231-423.247 (West 2016); P.A.1969, No. 312), and Iowa (IOWA CODE ANN. § 20.22 (West 2016)). The public policy justification for compulsory arbitration is simple: strikes by essential public sector employees should be avoided. Generally, states with compulsory arbitration view labor peace as being more important than the right of essential public employees to strike.
11. Julius Getman, *Was Harry Shulman Right? The Development of Arbitration in Labor Disputes*, 81 ST. JOHN'S L. REV. 15, 15 (2007).
12. *See* David L. Gregory, Michael K. Zitelli, & Christina E. Papadopolous, *The Fiftieth Anniversary of the Steelworks Trilogy: Some Reflections on Judicial Review of Labor Arbitration Decisions—Will Gold Turn to Rust?*, 60 CATH. U. L. REV. 47 (2010). There is also precedent for deferral to arbitration by regulatory agencies. For example, the National Labor Relations Board may choose not to exercise statutory authority on unfair labor practices when the matter has been decided by

importance and primacy of arbitration first emerged in the law through the *Steelworkers* case trilogy (*United Steelworkers vs. American Manufacturing Co.*;[13] *United Steelworkers v. Warrior & Gulf Navigation Co.*;[14] *United Steelworkers v. Enterprise Wheel and Car Corp.*[15] The *Steelworkers* cases established that courts give deference to the arbitration provisions of contracts,[16] even when there is disagreement over whether a claim is

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arbitration. (e.g., Carey v. Westinghouse Elec. Co., 375 U.S. 261, (1964); International Int'l Harvester Co. (Indianapolis Works), 138 N.L.R.B. 923 (1962). Historically, the Board has delayed investigations into an unfair labor practice allegations until the arbitral process is complete. *E.g.*, Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955); Olin Corp., 268 N.L.R.B. 573 (1984). More recently, the case law has shifted burden of proof requirements to the party moving the agency to thwart its deferral policy. Babcock & Wilcox Construction Co., 361 N.L.R.B 132 (2014). In effect, the new standards have shifted the burden of proof to the employer. *See* George W. Loveland II, *NLRB Changes Standard for Deferral to Arbitration in Discrimination and Retaliation Cases*, LITTLER (Dec. 24, 2014), https://www.littler.com/nlrb-changes-standard-deferral-arbitration-discrimination-and-retaliation-cases. The new deferral standards established by *Babcock* require the party urging deferral to demonstrate three things. First, there should be agreement by the parties that arbitration is binding and that arbitrator is authorized to hear the unfair labor practice issue. Second, the statutory aspects of the case were presented in the arbitral process. Third and finally, there is external law which permits arbitral outcomes. The implication of the new deferral policy is cases formally reaching final resolution via arbitration now have a possibility of court review.

In considering the implications of the *Babcock* ruling, other pertinent sources to note include: Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465 (D.C. Cir. 1997); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Christine Godsil Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203 (1992); Jean R. Sternlight, *Panacea or Corporate Tool: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

At the trial level in *Cole*, the plaintiff was discharged after attempting to move his racial discrimination case to court under a binding arbitration clause. *See Cole*, 105 F.3d at 1467─68. The case was found in favor of the defendants after the court granted the employer's motion to compel arbitration. *Id.* Upon appeal, a few important changes were made. The appeal of *Cole* established that claimants may not be held responsible for costs associated with mandatory arbitration. *Id.* at 1479─80. It also established a new judicial standard: arbitration awards are only valid if they do not violate fundamental principles of external law. *See id.* at 1486─87. Thus, even arbitration cases are now subject to some level of judicial review. *See* Adriaan Lanni, *Protecting Public Rights in Private Arbitration*, 107 YALE L.J. 1157 (1998) (distinguishing the *Cole* opinion itself from similar cases via its lofty reasoning).

13. 363 U.S. 564 (1960).
14. 363 U.S. 574 (1960).
15. 363 U.S. 593 (1960).
16. However, there are some important exceptions to the general deference of courts to arbitration. First, courts may reverse an arbitration award over due process concerns like lack of a fair hearing. The notable case here is *Cole*, which established that mandatory individual arbitration agreements involving federal civil rights claims must include certain due process safe guards. *See* Lanni, *supra* note 13. Second, courts sometimes review awards due to public policy exceptions. If an arbitral outcome is contrary to an established public policy, it will not be subject to the usual automatic deference by courts. One example of the public policy exception is the landmark case of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 1974. In *Alexander*, the court ruled a discharged black employee could still pursue a civil rights claim under equal employment law after failing to win in arbitration under a labor contract. The court reasoned that the plaintiff's statutory rights under Title VII of the Civil Rights Act of 1964 existed parallel to his contractual rights. Thus, the court concluded that the plaintiff's statutory rights could not be taken away

arbitrable.[17] Arbitrators, not the courts, have great latitude when deciding the scope and meaning of collective bargaining agreement language.[18] Judicial review of arbitration decisions is extremely limited[19] except in cases of "manifest disregard" for the law.[20] Quantitative analyses of case decisions have affirmed the tendency of courts to uphold arbitration awards. One analysis of 1,636 federal district and circuit court decisions found arbitration awards were sustained in 70% of cases.[21] In another example, Hoyman and Stallworth also found a very low reversal rate (7%) of those race and sex discrimination claims which were being reviewed (30% review rate) under the *Alexander v. Gardner-Denver Co.* doctrine.[22]

There are numerous studies that seek to understand factors influencing arbitral outcomes. Our study adds to the literature by looking at one type of subjective factor that might influence the arbitral process: apologies.[23] In a general sense, the academic literature exalts the use of apologies and lauds them as a tool of great potential in dispute resolution. According to Lazare,

> A genuine apology offered and accepted is one of the most profound interactions of civilized people. It has the power to restore damaged relationships, be they on a small scale, between two people, such as intimates, or on a grand scale, between groups of people, even nations. If

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because he had pursued a remedy under his contractual rights via the collective bargaining agreement. A key factor in this case was that the union did not raise race as a basis of the claim. This was important because there is a statutory right to nondiscrimination based on race under Title VII law. In coming to its conclusions, the court noted that many labor arbitrators are more familiar with statutory standards of labor law (via the National Labor Relations Board) and less familiar with statutory standards under equal employment opportunity laws (under Title VII law). In the wake of the decision, however, some scholars have asserted that arbitrators may have greater latitude in deciding employment claims than the case law would otherwise suggest (Edwards, 1975, 1976).

17. *Am. Mfg. Co.*, 363 U.S. at 568.
18. See *Warrior & Gulf Navigation Co.*, 363 U.S. at 583─85.
19. *Enter. Wheel and Car Corp.*, 363 U.S. at 596.
20. *Wilko v. Swan*, 346 U.S. at 436─37. *See* James P. Kurtz, *Arbitration and Federal Rights under Collective Agreements in 1976*, IN ARBITRATION—1977: PROCEEDINGS OF THE THIRTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, TORONTO, ONTARIO, CANADA, APRIL 13-15, 1977, 265 (Barbara D. Dennis & Gerald George Somers eds., 1978).
21. Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 INDUS. REL. L.J. 78 (1991).
22. Michele Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 ARB. J. 49 (1984).
23. We analyze the effects of apologies on arbitrators in this analysis, but it is important to note the broader importance of apologies for other forms of dispute resolution. For example, in mediation, rendering an apology is often the first step in the process and a necessary condition for progressing forward.

> done correctly, an apology can heal humiliation and generate forgiveness.[24]

Apologies are a part of basic social interaction among people in every part of the world.[25] Research into apologies is innately multi-disciplinary and includes law,[26] sociology,[27] psychiatry,[28] and business.[29] Any review of public affairs events and international affairs will show numerous examples concerning the use and importance of apologies.[30] Politicians routinely apologize for everything from sexual transgressions to egregious abuses of power. Apologies also play a central role in areas as disparate as sports[31] and international conflict.[32] Some apologies can take on a monumental level of historical or moral importance. Examples of this include President Bill Clinton's apology for the Tuskegee experiments[33] and Pope John Paul II's apology for the inquisition.[34] A recent example is Prime Minister Shinzo Abe's controversial apology for Japan's role in World War II.[35]

The paper will proceed as follows: First, we will define an apology, examine qualities of apologies, consider the use of apologies in courts and arbitration, and analyze variables which influence arbitration decisions.

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24. Aaron Lazare, *Go Ahead, Say You're Sorry*, 28 PSYCHOLOGY TODAY, Jan. 1995, at 40, 43, https://www.psychologytoday.com/articles/200909/go-ahead-say-youre-sorry.
25. *See id*.
26. *See, e.g.*, Daniel J. Kaspar & Lamont Stallworth, *The Impact of a Grievant's Offer of Apology and the Decision-Making Process of Labor Arbitrators: A Case Analysis*, 17 HARV. NEGOT. L. REV. 1 (2012).
27. *E.g.*, NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION, (1991).
28. *E.g.*, Alfred Allan, *Functional Apologies in Law*, 15 PSYCHIATRY, PSYCHOL. AND LAW 369 (2008).
29. *E.g.*, John Hollon, *It Ain't Rocket Science*, WORKFORCE MANAGEMENT, June 2008 at 42.
30. *E.g.*, Elizabeth Cole, *Apology, Forgiveness and Mutual Repair*, 22 ETHICS & INT'L AFF. 421 (2008).
31. *E.g.*, Sean Tucker et al., *Apologies and Transformational Leadership*, 63 J. BUS. ETHICS 195 (2006).
32. *E.g.*, Trudy Govier & Wilhelm Verwoerd, *The Promise and Pitfalls of Apology*, 33 J. OF SOC. PHIL. 67 (2002).
33. *E.g.*, Centers for Disease Control and Prevention, Remarks by the President in Apology for Study Done in Tuskegee, White House press release, May 16, 1997, available at http://www.cdc.gov/tuskegee/clintonp.htm.
34. *E.g.*, *A Papal Apology*, PBS NEWSHOUR (Mar. 13, 2000), http://www.pbs.org/newshour/bb/religion-jan-june00-apology_3-13/.
35. *E.g.*, Jonathan Soble, *Premier's Remorse for Japan's Aggression Stops Short of Apology*, N.Y. TIMES, Aug. 14, 2015, at A4. Although these apologies are legion in the news, such group gestures have been often been noted as ineffective and flawed. There are often long delays between the precipitating event(s) and the public apology action. Additionally, it is sometimes questionable as to whether the apology comes from someone who can speak on behalf of the offending group. *See* Richard Joyce, *Apologizing*, 13 PUB. AFF. Q. 159 (1999); Michael J.A. Wohl, Michael J. Hornsey, & Catherine R. Philpot, *A Critical Review of Official Public Apologies: Aims, Pitfalls, and a Staircase Model of Effectiveness*, 5 SOC. ISSUES AND POL'Y REV. 70 (2011).

Second, we describe our methodology of using hypothetical cases to assign different apology treatments to the membership of the National Academy of Arbitrators. Third and finally, we present the results and discuss the implications of our findings.

II. APOLOGY RESEARCH

A. Definitions and Qualities of Apology

There are a variety of apology definitions in scholarly literature.[36] According to Lazare, an apology is defined as having four elements: (1) it must contain an acknowledgement that a moral norm was violated, (2) it must accept responsibility, (3) it must be specific, and (4) it must acknowledge impact and damage.[37] Definitions of the term can become even more complex. For example, Goffman offers a complete apology template with seven requirements: (1) the expression of concern for the victim's suffering, (2) acknowledgement of the rule being violated, (3) the approval of sanctions, (4) the non-approval of one's own behavior, (5) the dissociation from the misdeed, (6) the affirmation of obeying the rule in the future, and (7) an offer of compensation for the deed.[38]

There are multiple theories which seek to explore how apologies work as a dispute resolution mechanism. Exline, Deshea, and Holeman argue that apologies help to re-equilibrate a relationship which has become imbalanced due to the offense.[39] This is consistent with theories that frame apology as being a way to maintain or restore harmony.[40] Tavuchis and Taft believe that apologies work because they address a shift in the moral high ground.[41] Other scholars conceptualize apologies as a way to redress a temporary power imbalance.[42] Taft asserts that the act of apologizing is an

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36. *See generally* David A. Hoffman, The Use of Apology in Employment Cases, 2 EMP. RTS. Q. 21 (2002).
37. Lazare, *supra* note 25 at 40, 42─43.
38. *Id.* at 43. Another critical ingredient for apologies is an explanation for the offense. An experiment with children by Scher and Darley varies apologies by whether or not they included an explanation. Children became more sympathetic to offenders who admitted guilt *and* offered explanations over those who simply expressed remorse. *See* Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127 (1997).
39. Julie J. Exline, Lise DeShea & Virginia Todd Holeman, *Is Apology Worth the Risk? Predictors, Outcomes, and Ways to Avoid Regret*, 26 J. SOC. & CLINICAL PSYCHOL. 479 (2007).
40. Wei Hong, *Effects of Cultural Background of College Students on Apology Strategies*, 189 INT'L J. SOC. LANGUAGE 149 (2008).
41. *See* Tavuchis, *supra* note 28; Lee Taft, *Apology Subverted: the Commodification of Apology*. 109 YALE L.J. 1135 (2000).
42. *See, e.g.*, John O. Haley, *Comment: The Implications of Apology*, 20 LAW & SOC'Y REV. 499 (1998); Shlomo Hareli & Zvi Eisikovits, *The Role of Communicating Social Emotions Accompanying Apologies in Forgiveness*, 30 MOTIVATION AND EMOTION 189 (2006).

exchange and that apologies have been converted into a commodity. Exchange theory is partially supported by others like Lazare, who frames apology as an exchange of shame and power.[43]

There are two key variables which can influence apology quality. First, apologies vary by whether they are perceived as sincere or insincere. Goffman argues that there are five qualities of an apology which are needed to maximize chances of being perceived as sincere.[44] Those qualities include: (1) admission of fault, (2) admission of damage, (3) expression of remorse, (4) request for pardon, and (5) offer of compensation.[45] Apologies which lack one of these five components are more likely to be viewed as insincere. There is some empirical evidence that an insincere apology may make the situation worse as compared to simply not apologizing.[46] Robbennolt uses an experimental design to empirically test apologies with a hypothetical scenario involving a bicyclist and pedestrian accident.[47] The quality and completeness of the apology was varied from no apology to a sincere apology.[48] The acceptance rate for insincere apologies was 35%, which was lower than the 52% acceptance rate for no apology.[49] Comparably, the sincere apology acceptance rate was notably higher at 73%.[50] This suggests apologies perceived as insincere can have a larger negative impact than the absence of an apology.

Second, apologies can vary by timeliness. Timeliness refers to both when an apology is issued relative to the offense and whether it is issued before or after a major intervening event like an arbitration hearing. It seems logical to believe that earlier apologies are better. Acts of contrition

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43. Lazare, *supra* note 25.

44. *See* ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 265–66 (1971).

45. *See id. See also* Lazare, *supra* note 25; Tavuchis, *supra* note 28, at 19–20 (concurring with Goffman in arguing there must be an acknowledgement of wrongdoing in order for an apology to be sincere). The importance of such acknowledgement is highlighted by a historical example—Richard Nixon's apology for Watergate. Nixon's apology has been used an example of a failed apology because it failed to fully acknowledge wrongdoing. Instead, Nixon simply regretted any "injuries that may have been done." *See* Paul Davis, *On Apologies*, 19 J. APPLIED PHIL. 169 (2002); AARON LAZARE, ON APOLOGY, 95 (2005).

46. The expression of remorse is salient to our research because of its implications in legal and arbitration settings. In courtroom settings, a judge or jury are more likely to be sympathetic with a truly repentant offender. In arbitration, arbitrators must make a decision on whether the grievant can be remediated. The chance for remediation usually seems unlikely without remorse. Scholars have suggested failure to express remorse is perceived as an offender justifying the offense or an offender being indifferent to the impacts of the offense. *See* Jennifer Roback Morse, *Rationality Means Being Willing to Say You're Sorry*, 22 SOC. PHIL. & POL'Y 204 (2005); Haley, *supra* note 43.

47. *See* Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 484 (2003).

48. *Id.*

49. *Id.* at 485–86.

50. *Id.* at 486.

that only appear later in the arbitral process may be seen as too little, too late. But there is little literature consensus on this subject. In tort law, Shuman has argued that early apologies are generally better.[51] However, other scholars have argued that apologies, which occur later, are more well-received by the offending party.[52] Apologizing extremely quickly can have adverse effects. Extremely early apologies may be seen as insincere because the offender has not had the opportunity to properly reflect on events.[53] In reconciling these disparate themes in the literature, the message seems to be: apologize soon relative to the offending event, but not so early that it appears you have not thought about your actions. Apologies which are offered later may be effective. However, such late apologies may appear as insincere because they are offered "on the courthouse steps" and perceived as self-serving. Overall, we believe the weight of the research in this area supports the idea that earlier apologies are more effective.

B. Apologies in Courts

Acts of remorse have played an increasingly prominent role in the justice system.[54] In criminal cases, apologies can have a powerful impact for victims and be an important aspect of the rehabilitation process.[55] Bibas and Bierschbach argue that apologies are key and should be considered throughout the criminal procedure process—from pre-trial negotiations to sentencing.[56] In civil suits, apologies can be used as a tool to encourage settlement or otherwise minimize litigation.[57] Similar arguments have been made for torts, where apologies have been lauded as a mechanism to resolve conflict.[58] Studies show that apologies are utilized throughout the

51. *See* Daniel Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000).

52. *E.g.*, Cynthia McPherson & Courtney Benningson, *Better Late than Early: The Influence of Timing on Apology Effectiveness*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201 (2005).

53. *See* Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997); Jennifer Gerarda Brown, *The Role of Apology in Negotiation*, 87 MARQ. L. REV. 665 (2004); Lazare, *supra* note 25.

54. For more information on how apologies can also play an important role in legal negotiations, *see* Pieter Laverns, *Negotiation and Apologies: The Role of an Apology, the Role of the Law and the Role of the Lawyer*, (Faculty Research Paper, Bond University School of Law) (2013) *available at* http://ssrn.com/abstract=2473234.

55. *See* W. Jonathan Cardi, *Damages as Reconciliation*, 42 LOY. L.A. L. REV. 5 (2008).

56. Stephanos Bibas and Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 85 (2004).

57. *See* Jennifer K. Robbennolt, *Attorneys, Apologies and Settlement Negotiation*, 13 HARV. NEGOT. L. REV 349 *(*2008). *See* Tavuchis, *supra* note 28 (But, some scholars disagree with the idea that use of apologies in the criminal justice system should be encouraged.). Murphy argues that the emotional nature of apologies can unfairly alter fair and equitable outcomes in the trial and sentencing process. *See* Jeffrie Murphy, *Well Excuse Me! —Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371 (2006).

58. *See* Jennifer K. Robbennolt, *Apologies and Reasonableness: Some Implications of Psychology for Torts*, 59 DEPAUL L. REV. 489 (2010).

civil and criminal court system. There has been a large amount of scholarly focus in malpractice claims in particular, which we highlight because it offers empirical evidence for the positive outcomes of using apologies. In medical malpractice law, apologizing has reduced both average payouts and settlement time.[59]

There is some literature which explores the specific role of how judges consider apologies. Apologies are included as part of federal sentencing guidelines,[60] and some state judges attest that they strongly consider acts of contrition when issuing sentences.[61] In criminal cases, apologies appear to have a mitigating impact on sentencing when defendants appear genuinely remorseful.[62] Scholars have also noted the ability of apologies to impact judicial decisions in civil cases. For example, people offering apologies for their financial circumstances are more likely to have their bankruptcy cases approved.[63] However, some research suggests more mixed outcomes. For example, in a survey of judges, Rachlinski, Guthrie, and Wistrich found apologies can lead to favorable outcomes for criminal defendants but have a negative impact on civil outcomes.[64]

C. Apologies in Arbitration

Apologies are often seen as part of the rehabilitation process in arbitration.[65] Broadly speaking, apologies appear to be considered as part

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59. Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141, 163 (2011). Research on apologies in the context of medical malpractice demonstrates that apologies may have large benefits in reducing claims, costs, and conflict. Scholars in this area claim that patients or patients' families want three things: (1) to know what went wrong, (2) to know what is being done to ensure the issue doesn't happen again, and (3) an apology. *See* Karen S. Fasler, *In a Nutshell: Use of the Collaborative Law Process to Resolve Medical Issues*, 13 J. NURSING L. 4 (2009). In experiments being conducted at the University of Michigan, where doctors are asked to apologize in person, medical malpractice claims went from 121 in 2001 to 61 in 2006. The backlog of claims has been reduced from 262 in 2001 to 83 in 2007. In the same time frame, claim processing time has been reduced from 20 months to 8 months. David Goodman, *Saying 'Sorry' Pays Off for U.S. Doctors*, ASSOCIATED PRESS (July 20, 2009, 3:05 PM), http://www.nbcnews.com/id/32011837/ns/health-health_care/t/saying-sorry-pays-us-doctors/#.VsJACvkrJD8. *See also* Jeffrey Helmreich, *Does 'Sorry' Incriminate? Evidence, Harm and the Protection of Apology*, 21 CORNELL J.L. & PUB. POL'Y 567 (2012) (confirming positive findings; the program has reduced costs by 47%).

60. *E.g.*, 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 (2002).

61. *E.g.*, D. Brock Hornby, *Speaking in Sentences*, 14 GREEN BAG 2D 147 (2011).

62. *See* Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131 (2006).

63. *See* Jennifer K. Robbennolt & Robert M. Lawless, *Bankrupt Apologies*, 10 J. EMPIRICAL LEGAL STUD. 771 (2013).

64. Jeffrey J. Rachlinski, Chris Guthrie, & Andrew J. Wistrich, *Contrition in the Courtroom: Do Apologies Affect Adjudication?*, 98 CORNELL L. REV. 1189 (2013).

65. *See* Scher & Darley, *supra* note 28.

of what the scholarship has called "bias."[66] In this case, bias means the weight of non-factual aspects of the case over factual aspects.[67] Aspects of bias include "impressionistic factors." Impressionistic factors are subjective variables like apologies (but can also include other things—like testimony on personal consequences to the grievant because of a discharge, or the financial cost to the company due to a grievant's actions). The research strongly suggests that impressionistic factors can affect the severity of punishment rendered by arbitration awards.[68] Such findings are supported by others like Gross, who argues that arbitral outcomes can be considered as an inherent value choice heavily influenced by outside considerations.[69]

The value decisions weighed by arbitrators are influenced by a variety of objective and subjective variables.[70] As a subjective factor, apologies have generally been shown as important in arbitration. Graduate students, acting as arbitrators, were strongly impacted by the presence of apologies in case study research.[71] However, there is a lack of empirical research on how apologies influence arbitral awards. The gap may be explained by the small number of apologies which are issued in the arbitration process. According to one analysis conducted by Kaspar and Stallworth, only 43% of cases involve a grievant offering an apology.[72] However, when apologies are issued, their potential impact can be large. Research shows that use of apologies consistently results in more partially or fully sustained grievances.[73]

D. Variables Influencing Arbitration Outcomes

Beyond the use of apologies, there are three other variables noted by the literature: characteristics of the arbitrator, characteristics of the grievant,

66. *See* Eylon, Giacolone, & Pollard, *supra* note 3.
67. *See id.*
68. *See id.* These findings should not be taken to mean that arbitrators heavily weigh subjective variables over objective facts. On the other hand, Eylon, Giacolone, and Pollard also show that objective factors, like the grievant's work record, play heavily in the award process. *Id. See also*, Michele Hoyman, Lamont Stallworth, & David Kershaw, *The Decision Making of Labor Arbitrators in Discipline and Discharge Cases Where a Grievant Offers an Apology: A Policy Capturing Study*, *in* 63 DISPUTE RESOLUTION IN THE WORKPLACE: THE PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS (P. Standuhar, et al. ed., 2010).
69. James A. Gross, *Value Judgments in the Decisions of Labor Arbitrators*, 21 INDUS. & LAB. REL. REV. 55 (1967).
70. *See* Patricia A. Simpson & Joseph J. Martocchio, *The Influence of Work History Factors on Arbitration Outcomes*, 50 INDUS. & LAB REL. REV. 252 (1997).
71. Robert Giacolone & Hinda Pollard, *Comparative Effectiveness of Impression Management Tactics on the Recommendation of Grievant Punishment: An Exploratory Investigation*, 2 FORENSIC REPS. 147 (1989).
72. Kaspar & Stallworth, *supra* note 27, at 53.
73. *Id.* at 55.

and case issue. We discuss each of these categories briefly. First, arbitrator characteristics are the personal qualities of an arbitrator that might influence his or her decisions.[74] Common examples of such attributes include a variety of sociodemographic variables like gender, education, and age.[75] Some personal qualities, like gender, appear to have little effect on arbitration outcomes.[76] When it comes to education, having more credentials does appear to have an impact on arbitration awards. Bemmels finds an inverse relationship between education and leniency.[77] Arbitrators with more education (doctorates) are less likely to reinstate grievants compared to arbitrators with lower levels of education (masters or law degrees).[78] Other characteristics, like age, yield differing results. Heneman and Sandver found that age made no impact on awards.[79] Conversely, Bemmels found a correlation between age and a tendency to sustain discharge grievances.[80]

Second, some research has been conducted to determine if the characteristics of a grievant will influence the outcome of an arbitration case. Like arbitrator characteristics, the influence of different grievant

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74. Alexander Colvin & Kelly Pike, *The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes*, paper presented at the annual meeting of the National Academy of Arbitrators, at 19─20 (June, 2012).

75. Even the way an arbitrator is selected for cases has been proposed as impacting case outcomes. Colvin and Pike hypothesized that arbitrators would "split the baby" in their awards due to being selected by the parties in a repeat sequencing. *See id.* at 20─21. However, they found no evidence found for this phenomenon, which would be manifest in a tendency to reinstate a grievant with no back pay. *Id.*

76. *E.g.*, Brian Bemmels, *Gender Effects in Discharge Arbitration*, 42 INDUS. & LAB. REL. REV. 63 (1988); Sandra Crews & Michele Hoyman, *Arbitration as a Social System: The Importance of Gender and Other Characteristics in Determining Arbitrator Reasoning*, conference paper presented at the Midwest Political Science Association, Chicago, IL (April 1997); Robert J. Thornton & Perry A. Zirkel, *The Consistency and Predictability of Grievance Arbitration Awards*, 43 INDUS. & LAB. REL. REV.294 (1990). There are some exceptions to the general finding of no correlation between gender and outcomes. First, Block and Stieber find a pattern of female arbitrators leaning toward shorter suspensions as compared to their male counterparts. Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV.543, 545 (1987). Second, some research suggests female arbitrators are less likely to fully reinstate grievants. *See* Steven B. Caudill & Sharon L. Oswald, *A Sequential Selectivity Model of the Decisions of Arbitrators*, 14 MANAGERIAL AND DECISIONAL ECON. 261 (1993). Or generally rule in favor of the grievant. *Id*. Finally, Crews and Hoyman find a conditional relationship between gender and outcomes. If the grievant and the arbitrator are both female, there will be a significant positive advantage in the probability of a favorable outcome for the employee. For all other combinations of arbitrator-grievant gender match there is no effect.

77. Brian Bemmels, *Arbitrator Characteristics and Arbitrator Decisions*, 11 J. LAB. RES. 181, 184 (1990); Sandra Crews & Michele Hoyman, *Arbitration as a Social System: The Importance of Gender and Other Characteristics in Determining Arbitrator Reasoning*, conference paper presented at the Midwest Political Science Association, Chicago, IL (April 1997).

78. *Id.*

79. Herbert G. Heneman III and Marcus H. Sandver, *Arbitrators' Backgrounds and Behavior*, 4 J. LAB. RES. 115, 118, 121–22 (1983).

80. *See* Bemmels, *supra* note 77, at 186.

characteristics varies. Gender does appear to matter, although the extent of its importance is unclear. Some research has shown a slight bias in favor of finding for female grievants.[81] Other research suggests arbitrators are less likely to exhibit gender bias, but are still influenced by implicit gender cues.[82] Another grievant characteristic which shows mixed outcomes in the literature is the impact of seniority. Arbitral case law generally holds that more senior grievants are more likely to receive favorable arbitration outcomes.[83] In support of that idea, Simpson and Martocchio used an experimental design which varied seniority, absenteeism, disciplinary record, job performance, and due process conditions.[84] They found that seniority was key in predicting grievant success, while other factors (prior discipline and bad job performance) predicted grievance denials.[85] But other research disagrees. For example, Boganno et al. find that arbitrators are *not* more likely to uphold a discharge action as the amount of seniority increases.[86]

Finally, the type of issue in arbitration can also have a large influence on case outcomes. In arbitration, case issue is the reason for the action taken against the grievant: lying, theft, absenteeism, insubordination, sexual harassment, etc. Because most research focuses on only one or a few of these issues at a time, it is hard to determine whether there are any overall patterns. One study that illustrates this is Block and Stieber, which found that grievants who were discharged for insubordination were treated more leniently than those who were discharged for other reasons.[87]

III. METHODOLOGY

Empirical studies of arbitral outcomes rely on two alternative methodologies: (1) coding cases from published volumes like *Labor Arbitration Reports* or (2) surveying arbitrators and asking how they would rule on hypothetical scenarios. Each approach comes with its own set of advantages and disadvantages. For methodology (1), the main advantage is that it is based on "real world" cases, but there are a number of notable disadvantages too. Studies from published sources are constrained by the fact that only a small number of cases are published annually. Moreover,

81. *See* Bemmels, *supra* note 77.
82. *See* Erik James Girvan, Grace M. Deason, & Eugene Borgida, *The Generalizability of Gender Bias: Testing the Effects of Contextual, Explicit, and Implicit Sexism on Labor Arbitration Decisions*, 39 L. & HUM. BEHAV. 525 (2015).
83. *See* ELKOURI & ELKOURI, *supra* note 2.
84. Simpson & Martocchio, *supra* note 71 at 254–55.
85. *Id.* at 264.
86. Mario Boganno, et al., *The Conventional Wisdom of Discharge Arbitration Outcomes and Remedies: Fact or Fiction*, 16 CARDOZO J. CONFLICT RESOL. 153 (2014).
87. *See* Block & Stieber, *supra* note 77.

published cases do not constitute a random sample, and therefore the generalizability and external validity of such data is limited. In fact, the two criteria for publishing cases are usually the novelty of the facts of the case (such as emerging cases on social media) and/or the novelty of the arbitrator's reasoning. Those two criteria create bias among published cases compared to the modal or normal arbitration case. We found that methodology (2) was a more appropriate research design. A survey utilizing hypothetical scenarios has the advantage of being able to apply several versions of a treatment effect (different types of apologies). Additionally, we believe the latter research design provides better opportunity to avoid the selection bias that comes from published cases.[88]

We surveyed, via mail, all 586 members of the National Academy of Arbitrators (NAA) using hypothetical grievance cases in unionized employment.[89] The response rate of arbitrators was 31%, resulting in 177 respondents with usable surveys, which is on the high end of response rates for surveys for this type.[90] NAA members were randomly assigned to render a decision on different hypothetical scenarios, which resulted in a total of 1773 fully completed cases. All the hypothetical cases involve either discharge or discipline. Additionally, all cases specified that the parties established a collective bargaining agreement which mandates arbitration to resolve disputes.[91] The unit of analysis in this study is the case (the hypothetical scenario). In our model, the dependent variable is whether or not the arbitrator chose to sustain the grievance. Sustaining the grievance (or the grievant succeeding) means that the arbitrator either reversed the discharge and reinstated the employee (with or without full pay) or, in a discipline case, reduced the penalty. The grievance sustained rate is measured as the number of cases either partially or completely overturned by the arbitrator over the total number of cases decided.[92] We expressed the grievant prevailed rate in percentage terms, i.e., what is the probability that the grievance would be sustained.

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88. We acknowledge that the use of hypothetical studies limits the "real world" generalizability of the data. Additionally, although the cases were framed to be realistic and respondents were informed that their answers would be anonymous, social desirability bias may still be present. The treatment effect in the hypothesized cases could not be concealed from respondents because the presence and qualities of the apology were critical aspects of each case. Thus, social norms involving apologies could have influenced answers.

89. The NAA only admits arbitrators with a very large volume of cases that have an increasing caseload over a period of several years. NAA members were chosen for this study to ensure respondents had a breadth of experience with a large variety of cases.

90. Other studies which have surveyed arbitrators have ranged in response rates from 11% to 32%.

91. The standard for review in such cases is heavily guided by the contract language.

92. Partially overturned would mean, in the case of a discharge, that the employee would be reinstated without pay. In contrast, completely overturned would be reinstatement with full back pay and any benefits which would have accrued.

The treatment variable was the grievant's offer of an apology, but the type of apology varied in two ways: sincerity (sincere or insincere) and timeliness (early or late).[93] Overall, this resulted in five different types of apologies: (1) cases with no apology, (2) cases with a sincere early apology, (3) cases with a sincere late apology, (4) cases with an insincere early apology, and (5) cases with an insincere late apology. We also included two control variables: the issue in the case and the seniority of the grievant. There were three different issues: (1) an employee who was disciplined after being accused of committing sexual harassment, (2) insubordination due to use of profanity, and (3) insubordination due to refusal to work.[94] Other basic facts in the hypothetical cases do not vary. The work record of the grievant in each is described as good. All grievants in the cases have the same prior infractions, meaning the grievant is not a first time offender for this violation. Our methodology allows us to consider whether arbitrator decisions on a comparative basis are more heavily influenced by apologies (and if so, what type), the issue in the case, or the seniority of the grievant.

We checked to determine whether there was a difference between survey respondents and non-respondents. Our analysis of the data measured for differences along two dimensions, gender of the arbitrator and the issue in the case. First, on gender, 84% of returned surveys were from male arbitrators, compared to 83% of the NAA population. Thus, there is no gender bias among respondents. Second, we checked for response bias by the issue in each case. The distribution of cases by issue in returned surveys generally matched the distribution of issues that were mailed to survey respondents—one third for each type of issue in mailed surveys. (Of the returned surveys, 34% were for sexual harassment, 31% were for insubordination/profanity, and 35% were for insubordination/refusal to work). Overall, our respondent sample was generally representative of the surveys mailed to the NAA population by gender and issue.

IV. HYPOTHESES

This research examines four hypotheses about the effect of apologies on arbitration outcomes:

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93. As we noted in the literature review, the perception of an apology as sincere or insincere is crucial to both judicial and arbitral outcomes. The literature portrays sincerity as whether the whether the party being apologized to perceives that the action was genuine. However, operationalizing concepts like sincerity in a uniform manner for survey respondents is difficult. For that reason, we did not instruct survey participants on the meaning of sincerity. Instead, subjective judgment was used.

94. *See generally*, Susan Fitzgibbon, *Sexual Harassment and Labor Arbitration*, 20 GA. J. INT'L & COMP. L. 71 (1990). Sexual harassment cases are becoming an increasingly important part of the work done by labor arbitrators.

I. First, we test the impact of a sincere apology on arbitral outcomes.[95] It is hypothesized that an apology seen as sincere will result in a higher rate of sustained grievances compared to cases where there is an insincere apology or no apology.
II. Second, the research tests the impact of an insincere apology. It is hypothesized that the issuance of an insincere apology by the grievant will result in a lower rate of sustained grievances compared to cases where there is a sincere apology or no apology is given.
III. Third, we hypothesize that timing is important: an early apology (one made earlier in the grievance process) will be perceived as more genuine than one made at the final stage (at the arbitration hearing). Thus, an early apology should result in a higher grievance sustained rate as compared to a late apology.
IV. Fourth and finally, it is hypothesized that a grievant with higher seniority will have a greater sustain rate than those with a lower amounts of seniority. We base this idea on the prevailing law of the shop in industrial relations, which stresses the importance of seniority.

V. FINDINGS

A. Qualitative Results Analysis: What Arbitrators Say about Apologies

Before discussing our quantitative findings, it is important to highlight trends from the open-ended response section of the survey. The survey included an open-ended question on the arbitrators' views concerning the role of apologies in arbitration outcomes. These responses are important because they represent what arbitrators believe concerning apologies. We note that this data represents espoused views—not necessarily what arbitrators do in practice. However, combined with the quantitative data on respondents' actual decisions in the hypothetical cases, the data is very useful for our analysis.

Several key themes run throughout the qualitative responses. Overall, respondents firmly assert that an offer of apology by a grievant will make no difference to the arbitral outcome. A typical comment demonstrating this view was "An apology does not negate the offense, nor relieve a responsibility." Other comments included things like "Conduct is what counts . . ." and "An apology is irrelevant once a discharge or discipline has been imposed." Only a minority of respondents indicated apologies were important. However, when apologies are used, both timeliness and sincerity may be important. On the issue of timeliness, our qualitative data

95. The literature basis for Hypotheses (1) and (2) is based on research which holds sincere apologies result in more favorable outcomes for grievants. *See, e.g.*, Helmreich, *supra* note 59; Lazare, *supra* note 25; Robbennolt, *supra* note 48.

would suggest earlier is better. For example, one respondent stated: "If they happen after discipline, [the importance of an apology] very little, unless it is a close case." Timeliness also seems to influence perceptions of sincerity, with earlier apologies being perceived as more sincere by respondents. As one respondent noted: "A sincere apology has weight only if offered to the employer prior to arbitration and preferably at or soon after the termination."

The espoused reluctance of arbitrators to consider apologies may be influenced by two factors. First, some respondents indicate that taking apologies into account would be a change of role for the arbitrator. For example, one respondent noted: "Management may consider such appeals, arbitrators should not." This idea was echoed by another respondent who stated, "If discipline was otherwise proper, the arbitrator should not play 'social worker' and change the employer's proper response to an infraction which better suits the arbitrator's sense of justice." Second, hesitance to weigh apologies may be due to the perception that arbitrators should make decisions based only on objective factors. One arbitrator remarked: "I do not think we should be introducing a subjective factor into someone's disciplinary procedure." Respondents' emphasis on objective factors is interesting considering the literature we have noted which stresses how subjective factors play a role in case outcomes. Out of all the open-ended responses, only one respondent acknowledged that arbitral outcomes include subjective factors. Ironically, the one respondent who noted subjective factors did so when telling the authors why he was declining to participate in the survey. The respondent stated: "Having a witness in front of you allows you to judge the demeanor, attitudes, sincerity . . . all of which are important in answering your questions in the survey . . . ."[96]

B. Quantitative Results: Decisions of Arbitrators

The quantitative data suggests a stark difference between the values espoused by respondents in open-ended questions and actual case outcomes. Table 1 below provides the statistics for grievance sustained rates across all variables of interest. The overall grievance sustained rate across all scenarios is 21%. Thus, if one knows nothing about the characteristics of an apology (either sincerity or timing), issue in the case, or grievant characteristics (like seniority), we would we would expect arbitrators to decide in favor of grievants in approximately one out of five cases:

96. This supports our earlier discussions regarding the subjectivity involved in parts of the arbitration process, like credibility findings.

Table 1: Factors that Influence Grievance Sustain Rate in Arbitration

All Scenarios	All Types of Cases	Discipline Cases	Discharge Cases
Overall	21.4%	17.3%	25.7%
Two Years	9.9%	9.6%	10.1%
Twenty-five Years	33.7%	24.9%	41.5%
Employees of All Rank			
No Apology	15.3%	12.1%	18.0%
Early Sincere	34.1%	25.9%	41.3%
Late Sincere	30.8%	26.8%	34.4%
Early Insincere	15.2%	11.4%	18.6%
Late Insincere	13.4%	10.2%	16.1%
N=1773			
Employees with 2 Years			
Early Sincere	18.6%	15.9%	21.1%
Late Sincere	15.1%	16.7%	13.7%
Early Insincere	5.6%	4.8%	6.3%
Late Insincere	5.1%	4.8%	5.3%
No Apology	5.1%	6.1%	4.2%
N=889			
Employees with 25 Years			
Early Sincere	49.4%	35.7%	61.7%
Late Sincere	46.6%	36.9%	55.3%
Early Insincere	25.0%	18.1%	31.2%
Late Insincere	21.7%	15.7%	27.2%
No Apology	25.4%	18.1%	31.9%
N=884			

Only one of the two qualities of an apology we tested seem to impact arbitral outcomes. The sincerity of an apology has a large impact on sustaining a grievance. However, the timing of an apology (early or late) makes no significant difference. Using the 15% grievance sustain rate in no apology cases as a baseline, we see that the grievant sustained rate for a sincere apology is *more than double* the baseline rate, 34% (early) or 31% (late). In contrast, the grievance sustained rates for early insincere (15%) and late insincere (13%) apologies are virtually indistinguishable from the baseline rate of no apology. These findings are in contrast to existing theories on timing.[97] Overall, these results support the conclusion that arbitrators strongly consider apologies when making awards, but the timing of the apology does not seem to influence the probability of a grievant prevailing.[98]

The data in Table 1 also suggest that seniority has a substantial impact. Being a more senior grievant (25 years) raises the probability of sustaining a grievance in arbitration from 10% to 34%. Arbitrators consider seniority as more important than the sincerity of the apology. The seniority effect remains strong across all three issues; sexual harassment, insubordination due to profanity and insubordination due to refusal to work. The data on seniority is striking, and it suggests certain grievant characteristics have a disproportionate effect on positive arbitration outcomes. For example, our analysis shows a high seniority employee providing a late insincere apology has a higher sustain rate (21.7%) than a low seniority employee who gives an early sincere apology (18.6%).

There is also some variation by the issue in the case, as can be seen in Table 2. Arbitrators weigh apologies differently as noted by the variation in grievant success rates across different issues. But the level of difference in utilizing an apology versus not using an apology is high for every issue. The data demonstrates that the use of sincere apologies increases grievant success no matter what the issue is. Relative to an insincere apology or no apology, a sincere apology doubles the grievant success rate (or grievant prevail rate) for both sexual harassment (20% to 42%) and insubordination due to profanity cases (13% to 24%). The increase for insubordination due to refusal to work cases is even larger, a three-fold increase in the grievance sustain rate (from 13% to 31%).

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97. *See*, Levi, *supra* note 54; Brown, *supra* note 54; Lazare, *supra* note 25.

98. In considering these findings, we note that Simpson and Martocchio's experimental results strongly supported the idea of arbitrators considering subjective factors, like the prospect of rehabilitation, when making decisions. *See* Simpson & Martocchio, *supra* note 71. Our results can offer some support for the broad idea that subjective criterion can play a large role in arbitration outcomes.

Table 2: Factors that Influence Grievant Success Rate in Arbitration by Issue Area for Employees of All Rank

	All Types of Cases	Discipline Cases	Discharge Cases
Sexual Harassment			
Early Sincere	44.2%	32.7%	52.9%
Late Sincere	39.7%	30.2%	47.1%
Early Insincere	21.0%	11.5%	28.4%
Late Insincere	17.6%	7.7%	25.4%
No Apology	20.2%	9.8%	27.9%
Sincere Apology	**44.2%**	**32.7%**	**52.9%**
Insincere Apology	**17.6%**	**7.7%**	**25.4%**
N=598			
Refused to Work			
Early Sincere	32.5%	16.1%	45.7%
Late Sincere	28.6%	17.9%	37.1%
Early Insincere	11.9%	3.6%	18.6%
Late Insincere	9.6%	3.6%	14.5%
No Apology	12.7%	7.1%	17.1%
Sincere Apology	**32.5%**	**16.1%**	**45.7%**
Insincere Apology	**9.6%**	**3.6%**	**14.5%**
N=629			
Used Profanity			
Early Sincere	24.8%	29.3%	19.6%
Late Sincere	23.6%	32.2%	13.7%
Early Insincere	12.7%	18.6%	5.9%
Late Insincere	13.0%	19.0%	6.0%
No Apology	12.8%	19.0%	5.9%
Sincere Apology	**24.8%**	**29.3%**	**19.6%**
Insincere Apology	**13.0%**	**19.0%**	**6.0%**
N=546			

Finally, we note some variation by case type, meaning whether it was a discharge or discipline case. Arbitrators were more likely (26% of the time) to sustain a grievance in discharge cases than in discipline cases (17%

of the time).[99] We do see some exceptions to the general pattern. For example, when the issue type is insubordination due to use of profanity, the issuance of early and sincere apologies leads to a higher chance of success (29%) in discipline cases and a notably lower chance (20%) in discharge cases. This second pattern holds for profanity cases overall.

We use a logit analysis since our dependent variable—whether a grievance is sustained or not—is dichotomous.[100] A baseline category of no apology was set and the baseline category for the issue variable was insubordination for refusal-to-work. Caution should be used in interpreting the signs on Tables 3-5 below. For example, a negative sign on the insubordination due to profanity issue does not mean that profanity as an issue has a negative impact on the likelihood a grievance was sustained. It means the profanity issue in that case has a negative impact *relative* to insubordination due to refusal-to-work. The reference category for apology is no apology. As such, the sign on all the variables tells us the effect of that variable relative to the no apology category. The 2 year seniority category is the baseline on the seniority variable. Thus, the 25 year seniority variable should be interpreted as *relative* to the low seniority category. Finally, we need to account for respondent effects, which is the tendency of an arbitrator to be more consistently disposed to either upholding or overturning discipline or discharge. This analysis accounts for respondent effects by clustering the cases by arbitrator.

The results are displayed in Tables 3-5 below. The data largely confirm the findings shown by Tables 1 and 2. Overall, three variables have a disproportionately large impact on grievances being sustained: sincere apologies, seniority, and cases which are discharge cases. Consistent with our earlier analysis, the timing of sincere apologies does not seem to be relevant. Also of note—neither the type of issue nor seniority seem to predict the outcome of a grievance in arbitration cases with apologies.

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99. The finding that arbitrators are more likely to overturn discharge cases is consistent with the scholarship on labor arbitration in industrial settings. *See* ELKOURI & ELKOURI, *supra* note 2. (pointing out that arbitrators consider discharge to be equivalent to capital punishment).

100. We also included an interaction between seniority and discharge case types in order to test whether arbitrators put greater weight on seniority in discharge cases. However, the discharge case type and seniority interaction variable is not significant. This shows that seniority is not weighed more by arbitrators in discharge cases compared to discipline cases in terms of their propensity to rule in favor of the grievant.

Table 3: Logit Coefficients for Independent Variables Predicting Whether Grievant Succeed

Discharge Case†	0.215
	(0.404)
25 Years Seniority	1.333*
	(0.261)
Discharge*25 Years Seniority	0.641
	(0.377)
Profanity Case	-0.097
	(0.375)
Sexual Harassment Case	0.554
	(0.333)
Early Sincere Apology	1.233*
	(0.166)
Late Sincere Apology	1.069*
	(0.152)
Early Insincere Apology	0.032
	(0.108)
Late Insincere Apology	-0.142
	(0.125)
Academic	-0.613
	(0.430)
Male	0.138
	(0.352)
Lawyer	-0.059
	(0.299)
Constant	-3.146*
	(0.447)
N=1723	
Wald $\chi^2_{(12)} = 163.16$	
Pseudo $R^2 = 0.1666$	

* Significant at .05, two-tailed.
† Joint Wald $\chi^2_{(2)} = 8.53$* p=0.0141.
Note that the model allowed for the errors to cluster by respondent.

Table 3 displays two findings of note. First, even with controls for all other variables, the sincerity of apology is still positive and significant. The importance of apologies seems to be independent of the strong influence of seniority. Seniority more than triples the probability of the grievance being sustained. This finding supports our theory that arbitrators give considerable weight to factors like seniority, even in the presence of other factors (like sincere apologies) that normally have strong impacts.[101] Second, Table 3 shows that the arbitrator personal characteristic variables explain very little in terms of case outcomes. Thus, we ran a more parsimonious version of the model displayed by Table 3. The results, displayed in Table 4 below, remain much the same. Even with controls for all other variables, sincerity of apology is still positive and significant.

Table 4: Logit Coefficients for the Independent Variables in Revised Models

Discharge Case	0.567*
	(0.286)
25 Years Seniority	1.658*
	(0.194)
Profanity Case	-0.071
	(0.354)
Sexual Harassment Case	0.616
	(0.327)
Sincere Apology	1.121*
	(0.144)
Insincere Apology	-0.075
	(0.106)
Constant	-3.319*
	(0.392)
N=1773	
Wald $\chi^2_{(6)} = 137.00$	
Pseudo $R^2 = 0.1544$	

* Significant at .05.
Note that the model allowed for the errors to cluster by respondent.

101. Other variables showing strong impact include case type (discharge versus discipline) and case issue. In discharge cases the grievant is more likely to sustain (an approximately 60% increase in the likelihood of succeeding, not shown). In terms of case issue, grievances are more likely to be sustained in sexual harassment cases than insubordination due to profanity cases.

Finally, we consider the impact of sincerity on other strong variables like seniority. A sincere apology more than doubles the probability of a favorable outcome for employees of both low (0.06 to 0.16) and high (0.25 to 0.51) levels of seniority. Once again, the overarching importance of seniority is apparent. Employees who are more senior are more likely to receive favorable arbitration outcomes than less senior employees. Overall, seniority more than triples the probability of the grievant sustaining. But as Table 5 below shows, the *relative gain* for all types of seniority is approximately equal when engaging in *sincere* acts of contrition.

Table 5: The Impact of a Sincere Apology on the Probabilities of Sustaining in a Refusal-to-work, Discharge Case, by Seniority

	Two Years Seniority	Twenty-five Years Seniority
No Apology	0.060	0.251
Sincere Apology Given	0.164	0.507

VI. IMPLICATIONS AND CONCLUSIONS

The data strongly confirm our hypotheses about the importance of apologies and sincerity.[102] In our first hypothesis, we believed that the issuance of a sincere apology would result in a higher grievance sustained rate. In the second hypothesis, we argued that the issuance of an insincere apology would similarly lower the sustained rate. The data confirm hypothesis 1 and 2, showing that the presence of a sincere apology across all case types resulted in a success rate of 44.2%, notably more than the 17.6% for insincere apology (see Table 2). However, our data does not confirm hypothesis 3 on timing. We viewed the timing of the apology as important because an early apology may seem more genuine and a later one could be viewed as self-serving. But as Tables 1 and 2 demonstrate, there is no substantial difference in the chance of grievant success between apologies issued either early or late. Finally, the data do confirm hypothesis 4. More senior employees are likely to have their grievances

102. In considering our findings, we must parenthetically note that hypothetical cases in our sample all include grievants with prior records of disciplinary action. All hypothetical grievants were "repeat offenders." Thus, first-time offenders may be more likely to succeed when issuing sincere apologies. Given the composition of our sample, the results may actually understate the tendency of arbitrators to view apologies in a favorable light.

sustained regardless of apology type or any other case-linked variable (see Tables 1, 2, and 5).

Our findings have important implications for labor relations practitioners. There are clear patterns in the grievance sustained rates. First, in cases where it is indisputable that the grievant committed the offense, the data suggest that unions should advise a grievant to apologize. Since the data also suggest that timing has little impact, the apology can be issued at the hearing or established through the case record of events. Second, for employers, our findings suggest the overarching importance of sincerity. If an employer believes a grievant's apology will be perceived as sincere by the arbitrator, the employer is unlikely to win the case. The seniority findings are notable for both the employer and the union in calculating whether to take the case to arbitration. The seniority variable is associated with the highest levels of grievance sustained rates. If a senior employee is discharged, he or she has 23.8% greater chance of being exonerated than if the employee is junior. Our findings also have impact beyond the industrial relations sector. As the use of arbitration continues to expand across industries, we believe our analysis may be relevant to a variety of areas such as commercial contract arbitration, insurance disputes, and medical malpractice.

As a psychiatrist, Lazare makes a strong case for the importance of complete or sincere apologies in the mending of the relationships.[103] Lazare's compelling claims are echoed throughout the theoretical literature —most scholars agree on the utility of apologies at both the micro and macro levels. But while existing research emphasizes the importance of apologies, their impact on arbitration was largely unknown due to a lack of empirical research. On the one hand, arbitrators claim that they either do not consider apologies or even actively eschew the idea of having apologies influence their awards. Such espoused views are in direct conflict with a variety of theoretical literature which suggests subjective factors can heavily influence arbitration. The contribution of this study is that we add empirical data to the theoretical literature on subjective variables. Our research is one of the few—if not the only—quantitative analyses which shows arbitrators strongly consider apologies in making awards. (Other studies do show the importance of apologies in other arenas such as the courts.) However, not all apologies are equal. While timeliness does not matter, perceived sincerity is extremely important for favorable arbitral outcomes.

This research lays the foundation for how and under what circumstances the use of apologies can affect arbitration outcomes. But much more research is needed to expand upon these findings. While we

103. *See* Lazare, *supra* note 25.

tested a variety of variables representing grievant characteristics and case issue, other research should consider adding new types of variables in these categories. For example, beyond seniority, there are many other types of grievant characteristics (gender, education, etc.) that merit attention. Additionally, our data of NAA members represents senior arbitrators with a high degree of experience. Research is needed to consider whether our findings can be generalized to less experienced arbitrators.[104] Finally, we believe that future research should utilize our design to explore the impact of apologies in other types of dispute resolution, like mediation, where apologies may be even more important. Although more work is needed in terms of generalizing our results, we have definitively shown that sincere apologies play an important role in determining arbitration outcomes.

104. There is some preliminary evidence which suggests our findings are highly generalizable, even with our sample of NAA members, which is a highly experienced group. Other research that has shown being a member of the National Academy of Arbitrators does *not* have an independent effect on case outcomes. *See* Colvin & Pike, *supra* note 75.

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