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LEGISLATING APOLOGY: THE PROS AND CONS

Jonathan R. Cohen*

INTRODUCTION

Should apologies be admissible into evidence as proof of fault in civil cases? While this question is a simple one, its potential ramifications are great, and legislative and scholarly interest in the admissibility of apologies has exploded. Shortly after the idea of excluding apologies from admissibility into evidence was raised in academic circles three years ago,¹ it rapidly spread to the policy arena.² For example,

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1. The idea of excluding apologies from admissibility into evidence was independently and contemporaneously raised by Aviva Orenstein and myself. See Aviva Orenstein, *Apology Excepted: Incorporating A Feminist Analysis Into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 237-53 (1999); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1061-64 (1999) [hereinafter Cohen, *Advising*]; Jonathan R. Cohen, *Nagging Problem: Advising the client who wants to apologize*, DISP. RESOL. MAG., Spring 1999, at 19. The strongest critique of legislative revision is Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1133, 1151-54 (2000). For a recent evaluation of that debate generally supportive of revision, see Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 301-02, 308-10, 316-20 (2001). See also William K. Bartels, Recent Developments, *The Stormy Sea of Apologies: California Evidence Code Section 1160 Provides a Safe Harbor for Apologies Made After Accidents*, 28 W. ST. U. L. REV. 141 (2000/2001) (analyzing California's recent legislation).

There has been much fine legal scholarship addressed to other aspects of apology. Several notable works are Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461 (1986); Stephen B. Goldberg et al., *Saying You're Sorry*, 3 NEGOTIATION J. 221 (1987); Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 J. DISP. RESOL. 115 (1996); Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1163 (1997); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 112-17 (1998); David A. Hoffman, *The Use of Apology in Employment Cases*, 1 PRAC. DISP. RESOL. 1 (1999); Jonathan R. Cohen, *Apology and Organizations: Exploring An Example From Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000) [hereinafter Cohen, *Apology*]; Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000); Carl D. Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation*, MEDIATION Q., Spring 2000, at 263; Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 345 (2000); Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence*

California and Florida enacted laws in 2000 and 2001 respectively excluding from admissibility apologetic expressions of sympathy ("I'm sorry that you are hurt") but not fault-admitting apologies ("I'm sorry that I injured you") after accidents.³ Eight states are now considering pending apology bills,⁴ and other states likely will follow.⁵

Though such bills may at first appear mere modifications of the states' evidence codes, such "mere modifications" may indeed be revolutionary. Apologies can be central elements in preventing and settling lawsuits.⁶ Yet apologies are often not offered after injuries, in part from the fear of liability. Thus, rules barring apologies from admissibility, in particular rules excluding fault-admitting apologies, have the potential to dramatically alter dispute resolution and legal practice.⁷ Such bills also raise many questions. If apologies are to be excluded from admissibility, why draw the line where states like California and Florida have in excluding apologetic expressions of sympathy and benevolence after accidents? Would it be better to exclude full, fault-admitting apologies? And what of intentional injuries? Are not apologies needed in such cases too?

The goal of this Article is to present the pros and cons of such legislation, that is, policy arguments that can be made supporting and opposing such legislation. As with most issues of substance, sound

of Including Apology as an Additional Component in the Legal System, BEHAV. SCI. & L. (forthcoming). Also of relevance is apology's sometimes-reciprocating counterpart, forgiveness. See JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 112-17 (1998); DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH AND THEOLOGICAL PERSPECTIVES (Everett L. Worthington, Jr., ed., 1998); Daniel W. Shuman & Alexander McCall Smith, *Forgiving the Past: Resentment and Morality*, in JUSTICE AND THE PROSECUTION OF OLD CRIMES 39-54 (2000).

2. The bridge from the ivory tower to California's legislative floor came by way of Steven Keeva's fine article, *Does Law Mean Never Having to Say You're Sorry?*, 85 A.B.A.J. 64 (1999). California Superior Court Judge Quentin L. Kopp, inspired by Keeva's article, prompted California's legislation. See Mark Hansen, *No Hard Feelings: California Bill Would Let People Apologize After Accidents Without Setting Themselves Up for Civil Suits*, 86 A.B.A.J. 28 (2000). See also Richard C. Reuben, *States Starting to Offer Legal Protection for Apology*, DISP. RESOL. MAG., Summer 2000, at 30. California's law excluding apologetic expressions of sympathy drew upon similar bills previously passed in Massachusetts (1986) and Texas (1999). See *infra* Part I. However, to the best of my knowledge, the widespread discussion of such bills as apology legislation arose with Keeva's article and California's law.

3. See *infra* Part I.

4. *Id.*

5. See *Editorial: The Role of Apology*, 163 N.J. L.J. 178 n.3. ("[W]e should consider re-writing the rules of evidence to exclude some apologies from the admissions-by-a-party-opponent doctrine."). The debate concerning the interaction between apology and the legal system has reached Canada as well. See, e.g., Susan Alter, *Apologizing For Serious Wrongdoing: Social, Psychological and Legal Considerations* (Final Report for the Law Commission of Canada, May 1999); Frances Backhouse, *Sorry Seems to be the Hardest Word*, 10 THE NAT'L 28 (June-July 2001).

6. See generally Cohen, *Advising*, *supra* note 1.

7. See *infra* Parts III, IV.

arguments exist on both sides. While I have supported the effort to advance such legislation,⁸ and while my proclivity toward such legislation may occasionally show through, my purpose here is not that of advocacy but of analysis. I present what I see as the best arguments for and against such legislation and leave it to others to judge the merits of those arguments. I do this for two reasons. First, to the best of my knowledge, the arguments supporting and opposing such legislation, as well as the areas of uncertainty concerning such legislation, have not been systematically presented. I hope that this Article may assist those assessing pending legislation or drafting future legislation. Second is the matter of scholarly interest. Although the initial question of whether apologies should be admissible into evidence as proof of fault in civil cases is simple, it implicates a fascinating array of legal, ethical, psychological, economic, and even cross-cultural issues. Consider a few representative questions. (Law) How would an apology exclusion compare to existing evidentiary exclusions for subsequent remedial measures, statements made during settlement negotiations, or confessional statements made to clergy under the priest-penitent privilege? (Ethics) If an injurer is truly sorry, why shouldn't his apology be used against him in court? Doesn't being sorry mean taking responsibility, including paying, for what he has done? (Psychology) How does an apology, or the lack of an apology, affect the injured and the injurer? (Economics) While doctors who make mistakes often don't apologize for fear that the apology will be used against them to prove liability, many patients who sue their doctors say they would not have sued if only the doctor had apologized. Could excluding apologies from admissibility help avoid this vicious cycle? (Cross-cultural studies) In Japan, apologies after injuries are highly typical and lawsuits highly atypical. Could the United States emulate the Japanese approach? This Article does not aim to fully resolve these specific questions. Rather, I hope the reader will gain a taste of the interdisciplinary issues involved.

This Article proceeds as follows. Part I provides a brief background on existing evidentiary rules and pending legislation related to apology. Part II explores through dialogism the pros and cons of laws excluding apologetic expressions of sympathy, but not fault-admitting apologies, from evidence to prove liability. Part III examines laws that would exclude fault-admitting apologies following either unintentional or intentional injuries. Part IV presents questions for future research.

8. See, for example, my remarks praising California's law for excluding apologetic expressions of sympathy but critiquing it for not also excluding fault-admitting apologies in Hansen, *supra* note 2.

A few words on this Article's scope may be in order at the outset. This Article examines apology legislation in the civil, rather than the criminal, setting.⁹ This is not to say that apology has no place in criminal cases. Apology's potential within the criminal setting may well exceed that within the civil setting. From the viewpoints of morality and psychology, the more serious the harm, the *greater* is the need for an apology. Further, while apologies have long influenced criminal sentencing,¹⁰ the use of apology in ordinary criminal cases appears to be growing both domestically and internationally,¹¹ particularly within victim-offender mediation programs.¹² Apology is even playing an increasing role in responding to gross human rights violations. (Compare the recent approach of the South African Truth and Reconciliation Commission, where amnesty was granted upon a full confession, with the prosecutorial model of the Nuremberg a half-

9. For a fine sociological analysis of the use and potential of apologies in the criminal setting, see Petrucci, *supra* note 1.

10. Apologies have long had their place within the formal criminal system, where following conviction but prior to sentencing, defendants often apologize. Some criminal sentencing guidelines explicitly make the defendant's remorse a factor for consideration. *See, e.g.*, 18 U.S.C.S. app. § 3E1.1 (Law. Co-op. 2000) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, [his sentence shall be decreased by two levels.]"). Such remorse, however, must be perceived to be sincere. *See, e.g.*, United States v. Camargo, 908 F.2d 179, 185 (7th Cir. 1990) (denying sentence reduction where defendant's apology was "a calculated simulation of remorse"). *See generally* ROGER W. HAINES, JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 859 n.605 (2000). The widespread practice of plea bargaining also involves an admission of fault, though not necessarily an expression of remorse, by the defendant.

11. On the growth of victim-offender mediation programs (VOMPs) internationally, see MARK S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH, at xlv (2001) (describing over 1300 programs in seventeen countries), 179-93 (focusing on the U.S., Canada, and England). *See also* RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE (Heather Strang & John Braithwaite eds., 2000) (analyzing particularly New Zealand's extensive experience); David B. Moore, *Shame, Forgiveness and Juvenile Justice*, 12 CRIM. JUST. ETHICS 3, 6 (Winter/Spring 1993); Carol LaPrairie, *Developments in Criminal Law and Criminal Justice: Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice?*, 6 CRIM. L.F. 576, 584 (1995) (same for aboriginal communities in Canada). For a philosophical analysis of apology within the restorative criminal settings, see R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 92-96, 103-15 (2001).

12. For an overview of VOMPs, see generally MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION; UMBREIT, *supra* note 11. Apologies are often centerpiece of such mediations. In a study of VOMPs in four American cities, Umbreit found that 70% of victims considered receiving an apology an important issue before the mediation, and 78% after the mediation. This was *higher* than the percentages, 66% and 71% respectively, for those who considered receiving restitution an important issue. Offenders too (88% pre-mediation and 89% post-mediation) felt apologizing to the victim was an important issue. UMBREIT, *supra*, at 72-73. For a critique of VOMPs, see Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994). While VOMPs commonly handle minor crimes, often by youths, they have been applied in cases as extreme as murder. For a powerful documentary of an apology by a convicted murderer to the victim's mother within a VOMP, see *48 Hours: My Daughter's Killer* (CBS television broadcast, Feb. 4, 1999). *See also* Schneider, *supra* note 1, at 271-73 (describing the apology within a VOMP by an attacker to the man he shot and seriously wounded).

century ago.)¹³ However, this Article focuses on the civil setting. There are several reasons for this. Both the existing and the proposed legislation address only the civil setting. This is in contrast to most American evidence law which draws no distinction between civil and criminal cases.¹⁴ Further, criminal charges are brought by the state rather than the injured person. If the offender apologizes to the injured party in a civil case, this means that the defendant has apologized to the plaintiff. In a criminal case, that correspondence is severed. Criminal cases also present a risk of coerced confessions. As reflected in the Fifth Amendment right against self-incrimination, constitutional law has long been wary of the potential for the state to abuse its power and coerce confessions, both false and true.¹⁵ Civil cases typically pose little risk that a plaintiff could coerce a confession from the defendant. In the criminal setting, where the state arrests, prosecutes and incarcerates, that risk is quite real.

This Article also does not address public, political apologies that have recently mushroomed in which the state or other entity apologizes for some past or current wrong, such as the United States's apology for the internment of Japanese Americans, Pope John Paul II's apologies for various sins committed by the Catholics over the past millennium, the Chinese government's demand that the U.S. government apologize following a recent air collision off Chinese waters, and African-American calls for an apology for slavery.¹⁶ Although the rise of such

13. See MINOW, *supra* note 1, at chs. 3, 4.

14. Though particular rules of evidence differentiate between civil and criminal cases (*see, e.g.*, FED. R. EVID. 412(a), (b)), most rules of evidence do not distinguish between these settings. Contrast this with the bifurcated FEDERAL RULES OF CRIMINAL PROCEDURE and the FEDERAL RULES OF CIVIL PROCEDURE or the separation between American criminal and civil law generally.

15. As Justice Frankfurter expressed, involuntary confessions are excluded, not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 540-41 (1961). See generally CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE, at ch. 13 (John W. Strong et al. eds., 5th ed. 1999).

16. On the rise of such public, political apologies nationally and internationally, see generally Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47 (1997). See also MINOW, *supra* note 1, at 91-117; RICHARD L. ABEL, SPEAKING RESPECT, RESPECTING SPEECH 264-67 (1998); Mark Gibney & David Warner, *What Does It Mean to Say I'm Sorry? President Clinton's Apology to Guatemala and Its Significance for International and Domestic Law*, 28 DENV. J. INT'L L. & POL'Y 2, 223 (2000). Also of relevance to such cultural transitions are JAMES B. TWITCHELL, FOR SHAME: THE LOSS OF COMMON DECENCY IN AMERICAN CULTURE (1997); PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE (2000). Regarding specific apologies, see, for example, ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 399-401 (2001) (noting the United States's apology for Japanese American internment); LUIGI ACCATTOLI, WHEN A POPE ASKS

public, political apologies and the rise of apology legislation for “ordinary” civil cases discussed here may not be coincidental, such public, political apologies implicate distinct issues.

As this new apology legislation may generate major changes in dispute resolution and legal practice, fully evaluating its evolution and impact must ultimately await history’s judgment. How these laws will develop and what social changes they will produce is uncertain. This does not mean that the pros and cons of these new laws should not be considered at the time of their making. Rather we must be mindful of the uncertainties inherent in such assessments, the greatest of which may be ones that we do not now appreciate. It may take several decades, if not longer, before the impact of such legislation is thoroughly understood.

I. A BRIEF LEGAL BACKDROP

Under existing American law, (fault-admitting) apologies are ordinarily admissible to prove liability.¹⁷ Rule 801(d)(2) of the Federal Rules of Evidence (FRE) and analogous state provisions provide that an admission by a party-opponent is “not hearsay” and hence not excluded from admissibility by the hearsay rule.¹⁸ Rule 801(d)(2) defines an admission by a party-opponent as, among other things, “the party’s own statement, in either an individual or a representative capacity.”¹⁹ Hence, even though an apology would fit the classical definition of hearsay as “[an out of court statement] . . . offered in evidence to prove

FORGIVENESS: THE MEA CULPA’S OF JOHN PAUL II (Jordan Aumann trans., 1998) (describing Catholic Church’s various apologies); Elisabeth Rosenthal, *Reaction in China: Beijing Declares Victory but Chat Rooms are Skeptical*, N.Y. TIMES, Apr. 13, 2001, at A11 (describing U.S.-China incident); RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 201-34 (2000) (demanding reparations, including an apology, for slavery).

17. There are many ways of defining the term “apology.” For the purposes of this article, I will use a definition I offered earlier, namely, that an apology is “an admission of one’s fault combined with an expression of regret for having injured another as well as an expression of sympathy for the other’s injury.” Cohen, *Advising*, *supra* note 1, at 1015 (emphasis omitted). No definition of apology is perfect, in part because apologies vary considerably. For assorted definitions, see Rehm & Beatty, *supra* note 1, at 116; Orenstein, *supra* note 1, at 239; Petrucci, *supra* note 1, at 7.

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

19. FED. R. EVID. 801(d)(2) provides in part:

A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]

Id.

the truth of the matter asserted,”²⁰ the Federal Rules treat it as non-hearsay. Observe that the reason an apology counts as an admission by a party-opponent rests *not* in the fact that when apologizing one admits one’s fault, but rather that, when apologizing, one is making a statement.²¹ The term “admission” in the phrase “admission by a party-opponent” might more accurately be read as “statement,” as FRE 801(d)(2) permits the introduction of many statements which are not themselves admissions of fault.²²

In civil cases, there are two exclusionary rules that might preclude a fault-admitting apology from admissibility. First is the possibility that the apology was made during mediation. Rule 501 provides that, “[I]n civil actions and proceedings . . . the privilege of a witness, person, [and other entities] shall be determined in accordance with State law.”²³ Accordingly, where statements made in the course of mediation are privileged under state law, they can be excluded from admissibility. Second is the possibility that the apology was made during settlement negotiations.²⁴ Rule 408 (“Compromise and Offers to Compromise”) provides in part, “Evidence of conduct or statements made in compromise negotiations is . . . not admissible [to prove liability for or

20. See FED. R. EVID. 801(c).

21. Some cases present additional grounds for the admissibility of an apology besides the admission by a party-opponent doctrine. For example, an apology offered shortly after an accident “while the declarant was under the stress of excitement caused by the [accident]” could fit the excited utterance exception to the hearsay rule. FED. R. EVID. 803(2). More commonly, an apology might be admissible under the exception for declarations or statements against interest under Rule 804(b)(3). However, Rule 804(b)(3) applies only where the declarant is “unavailable as a witness,” where the statement was “at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true[.]” and where the declarant has personal knowledge of the facts alleged. See FED. R. EVID. 804(b)(3); MCCORMICK, *supra* note 15, § 316, at 318. Hence, there are many cases where an apology would be admissible as an admission by a party-opponent, but not as a statement against interest. Seldom are witnesses, especially party-witnesses, “unavailable” in civil cases within the meaning of 804(b)(3). See MCCORMICK, *supra* note 15, § 316, at 316.

Even if the witness is unavailable, one may question whether the prior apology was sufficiently against the declarant’s interests to fall within FRE 804(b)(3). Might the declarant have apologized not because he believed himself at fault but simply to “smooth things over” and avoid future conflict? Such a statement might have been made with the intent of self-benefit, lacking the veracity guaranty presumed by the “against interest” exception. Where an organization apologizes through a representative without first-hand knowledge; the apology would be admissible as an admission by a party-opponent but not as a statement against interest. This Article focuses on the admission by a party-opponent exception, for this casts the broadest net for the admissibility of an apology. See also Orenstein, *supra* note 1, at 223.

22. See MCCORMICK, *supra* note 15, § 254, at 138 (“An admission does not need to have the dramatic effect or to be the all-encompassing acknowledgment of responsibility that the word confession connotes. Admissions are simply words or actions inconsistent with the party’s position at trial . . .”).

23. See FED. R. EVID. 501.

24. See Cohen, *Advising*, *supra* note 1, at 1032-36.

invalidity of a claim or its amount].²⁵ The basic rationale behind this rule is the “promotion of the public policy favoring the compromise and settlements of disputes.”²⁶ Hence, an apology made during settlement negotiations generally should not be admissible to prove liability.²⁷ There are, however, significant requirements to the rule, including the fact the apology must be made during and not before settlement negotiations and that the apology can be introduced for a variety of other purposes, including at times impeachment.²⁸ Hence, the offender who apologized during settlement negotiations but then denied his fault at trial faces such a risk.²⁹

Several other rules of evidence deserve mention, not because in their existing forms they would exclude an apology, but because they provide further context for understanding where an apology exclusion would fit within the evidence rules. Rule 407 (“Subsequent Remedial Measures”) provides in part, “When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence[.]”³⁰ The reasoning behind this rule is straightforward. As the advisory committee notes state, “The [best] ground for exclusion [of subsequent remedial measures] rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.”³¹ Along similar lines, FRE 409 (“Payment of Medical and Similar Expenses”) provides, “Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.”³² The rationale given for this rule is that “such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend

25. See FED. R. EVID. 408.

26. FED. R. EVID. 408 advisory committee notes (citing MCCORMICK, *supra* note 15, at §§ 76, 251).

27. Some might query whether, where a party admits his fault within an apology, the claim may be judged “disputed” for the purposes of FRE 408. See, e.g., ARTHUR BEST, EVIDENCE: EXAMPLES & EXPLANATIONS 22-23 (4th ed. 2001) (“The proponent of [Rule 408’s] application must show that there was a disputed claim. This means that Rule 408 does *not* prevent the admission of an offer of payment like, ‘I know I made a mistake and there’s about \$500 worth of damage to your car, but I’ll only pay \$200.’ Those words admit responsibility and also concede the amount of harm caused.”). Rule 408 applies where either the validity *or* the amount of the claim is disputed. See FED. R. EVID. 408. Accordingly, if during settlement negotiations one admits one’s fault in an apology but the extent of damages or compensation has yet to be determined, FRE 408’s protection should still apply.

28. See Cohen, *Advising*, *supra* note 1, at 1034-35.

29. I know of no cases where this has occurred. The risk, however, is real.

30. FED. R. EVID. 407.

31. FED. R. EVID. 407 advisory committee notes.

32. FED. R. EVID. 409.

to discourage assistance to the injured person."³³ Also of relevance is FRE 410 ("Inadmissibility of Pleas, Plea Discussions, and Related Statements") which provides that prior guilty pleas which were later withdrawn, prior pleas of *nolo contendere*, and prior statements made in plea discussions cannot be used in most civil and criminal proceedings.³⁴ Noteworthy too, is the ancient priest-penitent privilege adopted in different forms by all fifty states, which paradigmatically excludes a confession made by a person to his or her clergyman.³⁵

Against this backdrop, let us now turn to the fairly recent development of apology laws implicating apology in civil cases. This development begins *not* with bills that would exclude full, fault-admitting apologies from evidence, but rather with bills that exclude expressions of sympathy and benevolence.

In 1986, Massachusetts became the first state to exclude expressions of sympathy and benevolence after accidents from admissibility to prove liability. Massachusetts General Laws ch. 233, Section 23D ("Admissibility of Benevolent Statements, Writings, or Gestures Related to Accident Victims") provides, "Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action."³⁶ This law's genesis is poignant. As Lee Taft describes:

In the 1970s a Massachusetts legislator's daughter was killed while riding her bicycle. The driver who struck her never apologized. Her father, a state senator, was angry that the driver had not expressed contrition. He was told that the driver dared not risk apologizing, because it could have constituted an admission in the litigation surrounding the girl's death. Upon his retirement, the senator and his successor presented the legislature with a bill designed to create a "safe harbor" for would-be apologizers.³⁷

One issue the Massachusetts law left unresolved was the scope of "[s]tatements, writings or benevolent gestures expressing sympathy or a general sense of benevolence."³⁸ No doubt these categories would cover a statement by the injurer such as, "I hope you feel better soon."

33. FED. R. EVID. 409 advisory committee notes.

34. FED. R. EVID. 410.

35. See *infra* Part III.

36. MASS. GEN. LAWS ANN. ch. 233, § 23D (West Group 2001, WESTLAW current through c. 122 of the 2001 First Annual Sess. of Gen. Court).

37. Taft, *supra* note 1, at 1151.

38. *Supra* text accompanying note 36.

But would they also cover statements such as, "I'm sorry that you are hurt" or even "I'm sorry that I hurt you?" Put differently, what would happen if a statement of fault were embedded within an expression of sympathy or benevolence? The law was silent on that issue.³⁹

Texas was the next state to adopt legislation, and it explicitly resolved the ambiguity present in the Massachusetts statute.⁴⁰ Texas Civil Practice & Remedies Code § 18.061 ("Communications of Sympathy") made inadmissible a "communication" that "expresses sympathy or a general sense of benevolence relating to the pain, suffering, or death of an individual involved in an accident[.]"⁴¹ It defined a "communication" as a statement, writing, or gesture that conveys a sense of "compassion or commiseration emanating from humane impulses."⁴² These parts were virtually identical to the Massachusetts law. Yet Texas's law, passed in 1999, went further. Texas's law also provided that, "a communication, including an excited utterance . . . which also includes a statement or statements concerning negligence or culpable conduct pertaining to an accident or event, is admissible to prove liability[.]"⁴³ Expressions of sympathy or benevolence after an

39. My research has found no Massachusetts case addressing that issue.

40. Georgia has case law to a similar effect. See *Deese v. Carroll City Hosp.*, 416 S.E.2d 127, 129 (Ga. Ct. App. 1992) (explaining that a trial judge's exclusion of defendant's sympathetic and benevolent gestures was not an abuse of discretion as, "activity constituting a voluntary offer of assistance made on the impulse of benevolence or sympathy should be encouraged and should not be considered as an admission of liability."). The impulse to encourage not only expressions of sympathy and benevolence but also fault-admitting apologies can be found in case law too, both concerning mitigating damages, see, for example, *Groppi v. Leslie*, 404 U.S. 496, 306 n.11 (1972) ("[m]odification of contempt penalties is common where the contemnor apologizes"), and establishing fault. See *Senesac v. Assocs. in Obstetrics and Gynecology*, 449 A.2d 900, 903 (Vt. 1982) (holding a physician's fault-admitting apology insufficient to establish medical negligence); *Phinney v. Vinson*, 605 A.2d 849, 849 (Vt. 1992) (same). On the sympathy of judges and juries toward apologizers, see *Rehm & Beatty*, *supra* note 1, at 122-26. Such pro-apologizer sentiment has also been shown in some psychological studies. See Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742 (1982); Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Transgressions: Effects of the Actor's Apology, Reputation and Remorse*, 28 BRITISH J. OF SOC. PSYCHOL. 353 (1989) (noting that children tend to assess individuals who apologize for transgressions more positively than individuals who fail to apologize).

41. TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West Group 2001, WESTLAW current through end of 2001 Reg. Sess.).

42. *Id.*

43. *Id.* Texas's mention of an excited utterance raises the issue of the apology offered soon after the injury, while the injurer was "under the stress of excitement" caused by the accident. See TEX. R. EVID. § 803(2). It is interesting that the drafters of Texas's law deemed that scenario worth mentioning explicitly, for without the phrase "including an excited utterance," an apology which constituted an excited utterance would have still been admissible either under § 18.061 or under the excited utterance exception to the hearsay rule, making the phrase "including an excited utterance" in § 18.061 superfluous. Such language may point to the idea of limiting the exemption of fault-admitting apologies only to those offered spontaneously after the accident. See *Cohen, Advising*, *supra* note 1, at 1063.

accident would be excluded from evidence, but not embedded admissions of fault.

In 2000, California became the next state to pass such legislation. Its statute ("Statement of Benevolence") was virtually identical to that of Texas:

The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.⁴⁴

Noteworthy too is a hypothetical example provided by the California Senate Judiciary Committee to the California legislature to assist in understanding the statute's parameters:

An accident occurs and one driver says to the other: 'I'm sorry you were hurt, the accident was all my fault.'—or—'I'm sorry you were hurt, I was using my cell phone and just didn't see you coming.' Under the bill, only the portions of the statements containing the apology would be inadmissible; any other expression acknowledging or implying fault would continue to be admissible, consistent with present evidentiary standards.⁴⁵

Under the Judiciary Committee's highly plausible interpretation of California's law, in the above hypothetical, the phrase, "I'm sorry that you were hurt" would be inadmissible, but the phrases "the accident was all my fault" and "I was using my cell phone and just didn't see you coming" would be admissible. Consider another hypothetical. What if instead of saying, "I'm sorry that you were hurt" (which is inadmissible), the driver had said, "I'm sorry that I hurt you"? Now the statement, or at least the last three words of it containing the admission of fault, would be admissible.⁴⁶ Slight linguistic changes could have dramatic legal

44. CAL. EVID. CODE § 1160 (LEXIS through 2001 Sess.).

45. Rep. No. 6-1 Bill Analysis Submitted to Senate Judiciary Comm., Hearing Date June 20, 2000.

46. Ironically, California's law might appear to preclude the defendant who wants to offer the beginning of the statement (*i.e.*, "I'm sorry that") to provide the context for the admission of fault from so doing, that is, the plaintiff might introduce the fragment of the sentence that admits fault, but the defendant could not introduce the fragment that shows it was an apology. Surely the better approach is to follow the completeness doctrine and hold that, if the inculpatory piece of the apology is admissible, then the introductory expression of regret ("I'm sorry about that . . .") should also be admissible. See CAL. EVID. CODE § 336 ("Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the adverse party . . ."); FED. R. EVID. 106 ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the

consequences based upon the precise content of the statement. "I'm sorry that you are hurt" does not include an admission of fault, whereas "I'm sorry that I hurt you" does.⁴⁷

In 2001, Florida enacted legislation virtually identical to California's, and six other states now have similar pending legislation.⁴⁸ Four of these bills (in Illinois, Iowa, Rhode Island, and Tennessee) follow the Texas/California/Florida pattern of excluding expressions of benevolence and sympathy following accidents but expressly providing that admissions of fault contained within such expressions are admissible. Like Massachusetts's earlier law, two of them (Rhode Island and West Virginia) remain silent on the issue of an admission of fault embedded within an apology. To date, no law has been enacted excluding a fault-admitting apology.⁴⁹ Yet two states, Connecticut and Hawaii, have pending bills that, if enacted, would appear to take that step.

Before turning to the Connecticut and Hawaii bills, it is worth observing how the recently enacted laws in Texas, California, and Florida were depicted in the media. These laws specifically excluded only expressions of sympathy and benevolence and not admissions of fault contained within such expressions. Yet they were publicly presented as "apology" statutes that allowed people to "say they were sorry" after an accident.⁵⁰ While some, but not all, of the news accounts were technically accurate in their details, a sampling of headlines is

introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.").

47. From the viewpoint of legal relevance, *both* the statement, "I'm sorry that you are hurt" and the statement, "I'm sorry that I hurt you" are relevant on the issue of fault, though of course the latter has much greater probative value than the former. With either statement, the chain of inference runs from the statement, to the declarant's subjective belief about his fault, to the defendant's actual fault. As a person who is actually at fault is more likely to say "I'm sorry that you are hurt" than one who is not actually at fault, that declaration too has logical relevance regarding fault. *See also infra* note 67.

48. *See* FLA. STAT. § 90.4026 (2001). *See also* 2001 Bill Text IL S.B. 439 (version Feb. 20, 2001) (Illinois); 2001 Bill Text IA S.S.B. 1071 (version Jan. 31, 2001) (Iowa); 2001 Bill Text RI H.B. 6905 (version Jan. 23, 2002) (Rhode Island); 2001 Bill Text TN H.B. 2185 (version Jan. 17, 2002) (Tennessee); 2001 Bill Text WA S.B. 6429 (version Jan. 17, 2002) (Washington); 2001 Bill Text WV S.B. 387 (version Mar. 26, 2001) (West Virginia).

49. The argument might be advanced that an admission of fault contained within an expression of sympathy could be excluded under Massachusetts's law and Rhode Island and West Virginia's pending bills, for they do not explicitly provide for the admissibility of such statements. However, given the long history of the admissions doctrine, I would not place much stock in that argument.

50. Consider too the title of West Virginia's proposed bill ("Certain Apologies Admissible"). *See* 2001 Bill Text WV S.B. 387 (version Mar. 26, 2001) (West Virginia). Although this bill would exempt only statements expressing "sympathy or a general sense of benevolence," the word "apology" is used in the title of the statute. Such "mislabeling" in the title is not present in the laws enacted in Massachusetts, Texas, California, and Florida, nor in the bills pending in Illinois, Iowa, Rhode Island, Tennessee, or Washington.

indicative of how these laws were presented: "Sorry's Safe Now,"⁵¹ "Accident Can Mean Saying You're Sorry in California, Apology is No Longer Evidence of Liability," "No Hard Feelings: California bill would let people apologize after accidents without setting themselves up for civil suits."⁵² It is perhaps unsurprising that the Texas and California laws received virtually unanimous support within their legislatures.⁵³ Though publicly presented as "apology" laws, the substantive changes these laws made to the evidence codes was comparatively minor. As a statement which merely expresses sympathy or benevolence after an injury has little probative value on the issue of fault, precluding juries from hearing such expressions was not a major change in trial practice.⁵⁴ This may help explain the overwhelmingly favorable votes these laws received: If these laws made major legal changes, even if their overall effects were positive, no doubt some adversely affected interest group would have opposed them.

Now let us consider the Connecticut and Hawaii bills. Connecticut's proposed bill ("An Act Concerning Statements of Apology Made after an Accident") would provide that apologies could not be used to prove culpability. The bill's stated purpose is, "[t]o make statements of apology to injured person[s] or families inadmissible in court[.]"⁵⁵ It provides:

In any civil action to recover damages resulting from personal injury or wrongful death . . . in which it is alleged that such injury or death resulted from the negligence of a party, the use of an expression of apology, whether oral or written, by such party shall not be admissible in evidence to establish culpability or state of mind.⁵⁶

While this bill does not explicitly state that an admission of fault contained within an apology would be inadmissible, this appears to be the most plausible, but not an indisputable, reading of the bill. (The potential ambiguity rests in how broadly the term "apology," which is

51. See respectively AUSTIN AM.-STATESMAN, July 2, 1999, at A14; USA TODAY, Feb. 5, 2001, at A1; Hansen, *supra* note 2, at 28; ST. PETERSBURG TIMES, Feb. 28, 2001, at 16A.

52. Hansen, *supra* note 2, at 28.

53. The California Assembly voted 75 to 0 in favor of the law, and the California Senate 27 to 1. See http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2801-2850/ab_2804_bill_20000724_history.html (last visited Aug. 8, 2001). Though no record was taken of the Texas House vote, Texas's law passed its Senate 30 to 0. See e-mail from Douglas Dunsavage, Legislative Aide to State Representative Patricia Gray, to Kathleen Loftus (Aug. 6, 2001) (on file with the Author). There was no roll call taken of the vote on the Massachusetts law. Telephone Interview by Kathleen Loftus with Naomi Allen, Research Librarian, Massachusetts State Library (Aug. 24, 2001). To the best of my knowledge, the Florida law went unopposed.

54. See *infra* Part II.

55. 2001 Bill Text CT S.B. 577 (version March 7, 2001), available at <http://www.lexis.com>.

56. *Id.*

not defined in the bill, is interpreted. My sense is that interpreting the term “apology” to cover an admission of fault contained within the apology is the most plausible reading.) Note too that, unlike most of the other laws and bills discussed above, the language of this bill explicitly speaks in terms of “apologies” and not in terms of expressions of “sympathy” and “benevolence.”⁵⁷

Hawaii’s proposed legislation goes further than Connecticut’s. Hawaii’s bill (“Apologies”) provides:

Evidence of written or oral apologies issued by or on behalf of an individual, corporation, or government entity, whether made before or during legal or administrative proceedings relating to the subject matter of the apology, is not admissible to prove liability. Evidence of benevolent gestures made in connection with such apologies is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable or admissible merely because it is presented in conjunction with an apology. This rule also does not require exclusion when the evidence is offered for another purpose, such as negating a contention of bad faith.⁵⁸

Here too the most plausible, though not indisputable, reading of Hawaii’s bill is that an admission of fault contained within an apology is inadmissible.⁵⁹ Hawaii’s bill also appears to exclude apologies for both intentional and unintentional injuries in civil cases, for there is no mention of limiting conditions such as “involved in an accident” as with Massachusetts, Texas, California, or Florida or “negligence” as with Connecticut. Hawaii’s bill is explicit, however, that an apology could

57. West Virginia’s bill is the one exception. *See supra* note 50.

58. S.B. 1477, 21st Leg. (Haw. 2001) (version Jan. 6, 2001), *available at* <http://www.lexis.com>.

59. I do not read the third sentence of Hawaii’s bill (“This rule does not require the exclusion of any evidence otherwise discoverable or admissible merely because it is presented in conjunction with an apology.”) as permitting an admission of fault contained within an apology to be introduced into evidence. This third sentence tracks a parallel provision of FRE 408 (“This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.”). *See* FED. R. EVID. 408. That parallel provision was “drafted to meet the objection [that] a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources.” HOUSE-SENATE CONFERENCE COMMITTEE REPORT to FED. R. EVID. 408. In other words, it appears that the proposed apology bill is not intended to allow evidence obtained independent of the apology to be excluded because subsequent similar information was also given within the apology. For example, suppose an injurer fully confesses his fault to a friend (not the injured party) and subsequently makes a fault-admitting apology to the injured party. As I understand this third sentence, the apology to the injured party would not prevent the confession to the friend from being introduced. The fault-admitting apology itself, however, would remain inadmissible. The apology could not be used to “immunize” otherwise admissible evidence. Note that the second sentence of the bill distinguishes between an apology and a benevolent gesture, implying that the former is distinct from the latter, most likely with respect to its typically fault-admitting nature. This supports the reading that an admission of fault contained within an apology would be inadmissible under this bill.

be introduced into evidence not to prove liability but “for another purpose, such as negating a contention of bad faith.” This exception for other purposes potentially creates a significant loophole to allow for the introduction of the apology.⁶⁰

The bill’s eloquent statement of purpose is likewise noteworthy:

While it is only civil and humane to apologize and offer sympathy or other expressions of understanding to persons who have been harmed in some way, the reality of lawsuits oftentimes prevents such expressions of apology or sympathy from being made for fear that they will be used subsequently as an admission of liability. Many people will bring a claim or a lawsuit against another person or other entity for the simple reason that there has been no apology or expression of empathy. Particularly in our State, the Aloha State, it is regrettable that members of our statewide community cannot reach out to others in a humane way without fear of having such a communication used subsequently as an admission of liability. This Act will allow such expressions without fear of their being used against those who express such sentiments to others.⁶¹

As with the laws in Massachusetts, Texas, California, and Florida, Hawaii’s bill seeks to protect statements and gestures emanating from humane impulses or feelings. Yet Hawaii’s bill, which would appear to exclude fault-admitting apologies, presents three related rationales not present in these earlier laws: (1) to encourage apologies through eliminating the fear that the apology will be used in court to prove liability, (2) to avoid lawsuits that could have been prevented through an apology, and (3) to foster an “Aloha” type of community, where, roughly put, people feel a humane connection to one another. Consider the *Oxford English Dictionary*’s definition of “aloha”: “a word that survives from old Hawaii [meaning] both farewell and greeting, friendship and love, hope and promise.”⁶²

60. As with the final sentence to FRE 408 (allowing statements made in compromise negotiations to be introduced “for another purpose” such as “proving bias or prejudice of a witness”), this final sentence of the Hawaii bill could create a large “loophole” for admitting the apology. For example, if a defendant who previously had made a fault-admitting apology to the plaintiff were to deny his fault at trial, might the apology be introduced not as substantive evidence of fault but rather to impeach? See *infra* note 130. For a discussion of analogous concerns about FRE 408, see Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988); Cohen, *Advising*, *supra* note 1, at 1034. While the Connecticut bill does not contain such a provision, a similar concern exists with that bill, for it only excludes apologies offered “to establish culpability or state of mind.” The Connecticut bill is silent concerning apologies offered for other purposes.

61. *Id.*

62. OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989).

II. LAWS EXCLUDING EXPRESSIONS OF SYMPATHY AND BENEVOLENCE

Before addressing laws excluding fault-admitting apologies, let us first consider laws excluding expressions of sympathy and benevolence after accidents. Not only will this lay the groundwork for evaluating laws excluding fault-admitting apologies, but laws that exclude expressions of sympathy and benevolence are important in their own right. Massachusetts, Texas, California, and Florida have passed such laws, and no doubt other states will follow. Further, such laws avoid certain problems that arise with laws excluding fault-admitting apologies that will be discussed later.

To aid in this exposition, imagine a debate between two old friends from law school.⁶³ **Ira** is an **I**ncremental **R**eform **A**dvocate who supports only laws that exclude expressions of sympathy and benevolence after accidents. **Flo**, a devoted revisionist who prefers **F**ull **L**egal **O**verhaul (why tinker when we should replace!), supports laws that exclude *both* expressions of sympathy and benevolence *and* fault-admitting apologies in all civil cases. However, Flo opposes laws that exclude *only* expressions of sympathy and benevolence, believing such “half-step” laws do more harm than good.

Ira: Laws excluding expressions of sympathy and benevolence after accidents from admissibility make good sense. First, such expressions are only minimally relevant to the issue of fault. If I say to you after the accident, “I hope you feel better,” or send flowers to your hospital room, that of course doesn’t mean that I committed the accident. There’s little or no logical connection between such expressions and the issue of fault. Second, the law should encourage, or at least not discourage, people from taking such steps. Such gestures reflect the better part of humanity. Our laws should give people the secure reliance they need to feel free to make these statements. Third, these laws are a proper and logical extension of FRE 409, “Payment of Medical and Similar Expenses.”⁶⁴ If I can offer to pay for your medical expenses after an accident, why shouldn’t I be able to say, “I hope you feel better” or send you flowers? The logic within FRE 409 of encouraging sympathetic and benevolent gestures after accidents is not limited to payment of medical and similar expenses. Such payments are a special case of a general

63. This dialogism is intended to reflect the complexity of the valid arguments that can be advanced on both sides of these issues.

64. Rule 409 provides: “Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.” FED. R. EVID. 409.

class, namely, sympathetic and benevolent actions, including expressions, after accidents. The proper place to draw the line is around the general class, not the special case. Though there are more reasons to support such laws, and we can discuss them if you wish, these three reasons alone should persuade any reasonable person. How good it is to see that Massachusetts, Texas, California, and Florida got it right. Other states will no doubt follow their lead.

Flo: Your arguments sound appealing, but they will not withstand scrutiny. May we take them one by one?

Ira: By all means.

Flo: You begin by asserting that such expressions are only minimally relevant, having little or no logical connection to the issue of fault. Your view rests upon a basic, and unfortunately all-too-common, misunderstanding of evidence law.

Ira: How so?

Flo: The modern approach to relevance within the Federal Rules of Evidence is a liberal, inclusive one. Rule 401 defines “relevant evidence” as “evidence having *any* tendency to make the existence of any fact that is of consequence . . . more probable or less probable[.]”⁶⁵ As the Advisory Committee Notes to that Rule so clearly state: “The standard of probability under the rule is ‘more . . . probable than it would be without the evidence.’ Any more stringent requirement is unworkable and unrealistic. As McCormick says, ‘A brick is not a wall.’”⁶⁶

Ira: But what logical relevance is there between sending someone flowers at the hospital and being at fault for the accident? Surely sending someone flowers doesn’t mean that you committed the accident?

Flo: No, of course not. But that is not the test of logical relevance. If it is more likely that someone who was at fault for an accident would send flowers than someone who was not at fault – and I assert that it is – then that’s all the logical relevance that’s needed.⁶⁷

Ira: But that is precisely why such sympathetic and benevolent gestures should be excluded. If the jury learns that the defendant sent flowers, it might mistakenly conclude that the defendant was liable. Even accepting, *arguendo*, that there might be some minimal logical

65. FED. R. EVID. 401 (emphasis added).

66. FED. R. EVID. 401 advisory committee notes.

67. The chain of inference runs from the act of sending flowers, to the defendant’s mental state, to actual fault. Sending flowers makes it more likely that the defendant believed he was at fault (for people who believe themselves at fault are more likely to engage in sympathetic acts) which in turn makes it more likely that the defendant actually was at fault (for people who actually are at fault are more likely to believe themselves at fault than those who are not actually at fault).

relevance to the evidence, surely the risk of unfair prejudice must outweigh it under Rule 403?

Flo: Rule 403 only excludes relevant evidence where “its probative value is substantially outweighed by the danger or unfair prejudice, confusion of the issues, or misleading the jury[.]”⁶⁸ Here those risks are minimal. Unfair prejudice? This is not a case where showing a gruesome photograph will so disgust the jury that they can no longer see straight. Confusion of the issues? Misleading the jury? No, this is not some highly sophisticated, obtuse matter. Having a small degree of relevance and being unfairly prejudicial are very different matters. Jurors can *rationaly judge* – and that’s the key, the jury is capable of fairly making that judgment – how much probative value to attach to the fact that the defendant offered to pay the plaintiff’s medical bills.⁶⁹ Surely the risk of unfair prejudice does not substantially outweigh the probative value here. If these new laws are to be defended, it must be on other grounds.

Ira: You’ve missed my point. Even accepting what you’ve said about relevance and prejudice, the weak probative value of such evidence is relevant in assessing these new laws. I said before that the law should encourage, or at least not discourage, people from taking such steps. People need an evidentiary exclusion on which they can confidentially rely or else they won’t make such gestures and expressions. They need full assurance. It’s not enough to tell them, “Don’t worry, the jury will probably interpret your benevolent gesture the right way.” This second reason *combined with* the weak probative value of this evidence justifies its exclusion.

Flo: That is a more plausible position. I thank you for clarifying your argument.

Ira: So you concede that these laws should be passed?

Flo: Not at all. I merely accept the validity of your last argument. Overall, these laws should still be rejected.

Ira: And why?

Flo: Let me address your third point about Rule 409, for examining it will reveal the basic flaws with these new laws. You said that these laws were merely the logical completion – the general case, as you put it – of Rule 409 which excludes the payment of medical and similar

68. FED. R. EVID. 403.

69. See MCCORMICK, *supra* note 15, § 185, at 645 (“Prejudice can arise . . . from facts that arouse the jury’s hostility or sympathy for one side without regard to the probative value of the evidence.”); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.10 (2d ed. 1999) (“[FRE 403] expects courts to distinguish between prejudice resulting from the reasonable persuasive force of evidence and prejudice resulting from excessive emotional or irrational effects that could distort the accuracy and integrity of the factfinding process.”).

expenses after an accident. But language and action (here the action of payment) are very different creatures. Language can be much more complex and nuanced than simple actions like paying medical bills. Accordingly, laws that exclude *expressions* of sympathy and benevolence tread upon a perilous terrain.

Ira: I don't see what's so perilous. If the defendant is permitted to pay the plaintiff's hospital bills after the accident, why shouldn't he be permitted to verbally express to the plaintiff that he hopes he feels better?

Flo: The nutshell reason is that half a loaf is worse than no loaf at all. What happens if, instead of saying, "I hope you feel better," the defendant had said, "I'm sorry that you are hurt, and I hope you feel better?"

Ira: I don't see a problem with that. Clearly the second part of his statement, "I hope that you feel better," is an expression of sympathy. I would say that the first part of his statement, "I'm sorry that you are hurt," is an expression of sympathy too. Any sensible person would interpret it that way.⁷⁰ It's certainly not an admission of fault.

Flo: I accept your interpretation, but can't you see the problem this creates? Here the defendant says, "I'm sorry" to the injured party, and we're saying that his statement is inadmissible, that it merely expresses sympathy. But what if instead of saying, "I'm sorry that you are hurt," the defendant had said, "I'm sorry that I hurt you?"

Ira: That's a fundamentally different case. Now the defendant is admitting his fault.

Flo: So it's okay to say, "I'm sorry," just as long as you don't say you've done anything wrong?

Ira: That's the line.

Flo: Can't you see the problems this creates? Consider three. First, these laws are a trap for the unwary. Sophisticated parties will comprehend this line, but naive parties won't, and naive parties will think they're apologizing "safely" when in fact they aren't. Relatedly, the media will call these "apology laws." "Apology Now Safe!" the headlines will read, when in fact they aren't. Second, these laws

70. See Rehm & Beatty, *supra* note 1, at 129 (reviewing case law to show that "judges and juries understand that expression of sympathy, regret, remorse and apology are not necessarily admissions of responsibility or liability."). This does not mean, however, that error never occurs. See *Denton v. Park Hotel, Inc.*, 180 N.E.2d 70, 73 (Mass. 1962); *Giangrasso v. Schimmel*, 207 N.W.2d 517, 518 (Neb. 1973); *Bonser v. Shainholtz*, 983 P.2d 162, 166 (Colo. App. 1999) (all holding that the trial court erred when finding defendant's expression to plaintiff that he was "sorry" about the accident or the plaintiff's condition an admission of liability); *State v. Canaday*, 911 P.2d 104, 110 (Haw. App. 1996) (holding that the trial court erred when it found the defendant's statement that he wanted to go to the hospital and apologize to the victim to be an admission as the meaning of defendant's statement was "ambiguous").

encourage evasiveness by sophisticated parties. It encourages the sophisticated defendant to act as though he's apologizing, when in fact he isn't. If the plaintiff understands what's going on, this can be more insulting than if the defendant had said nothing. Remember Nixon's non-apology for Watergate? ("I regret deeply any injuries that may have been done in the course of events that have led to this decision. I would say only that if some of my judgments were wrong, and some were wrong, they were made in what I believed at the time to be in the best interest of the nation.")⁷¹ Where you know you are to blame for injuring another, telling that person simply, "I'm sorry that you are hurt," rather than, "I'm sorry that I hurt you," can be worse than saying nothing at all. It's insulting to merely express sympathy or benevolence when you should be admitting your fault.⁷² Third, and this relates to my first point, by passing laws like these we lose momentum from passing laws we really should be passing, namely, laws excluding both expressions of sympathy and benevolence *and* fault-admitting apologies after injuries.

Ira: I disagree. Let's go point by point. You say that sophisticated parties will "get it" and naive parties won't. I don't think that's true. Most people can understand the difference between an expression of sympathy or benevolence and an admission of fault. It's not such a complex idea. What proof do you have that such laws are so hard to understand?

Flo: If the misleading newspaper headlines are not enough,⁷³ consider an example. I was recently visiting a website maintained by the Risk Management Foundation of the Harvard Medical Institutions – hardly a fly-by-night organization! The website advises doctors and hospitals about reducing the malpractice costs through decreasing errors, better claims handling, choosing among various insurance options, and so forth.⁷⁴ Below is the advice they offer about whether a doctor should apologize for an error.

[Q.] Is an apology after an adverse event treated as an admission of negligence?

[A.] No.

71. Aaron Lazare, *Go Ahead, Say You're Sorry*, PSYCHOL. TODAY, Jan.-Feb. 1995, at 76.

72. See Taft, *supra* note 1, at 1152 ("The kinds of expressions protected by statutes [like Massachusetts's and Texas's that only protect expressions of sympathy and benevolence] are more akin to botched apologies, apologies that fail precisely because of their generality. While sympathetic expressions may be useful in a fender bender, they are more likely to exacerbate pain in situations of catastrophic loss.")

73. See *supra* text accompanying notes 51-52.

74. *About RMF & CRICO*, at <http://www.rmhf.harvard.edu/about/index.html> (last visited July 6, 2001). Their foundation has "S480 million in assets and insures 23 hospitals with over 4700 beds, as well as 431 additional insured organizations in Massachusetts and New Hampshire." *Id.*

In Massachusetts, any statements, writings, or benevolent gestures relating to the suffering of patients involved in an unexpected outcome are inadmissible as evidence of liability. Even so, some types of apologies are better than others. An apology that includes such words as “I am so sorry that my treatment caused you harm” is inappropriate.

A sincere expression of regret following a poor outcome or upsetting experience, such as “I am sorry this happened” coupled with a discussion about future treatment options can demonstrate an empathic and caring attitude. Apologies can help to mitigate any anger the patient may feel, and communicate that you will work with the patient to improve the outcome.⁷⁵

Talk about double-speak! Is a doctor’s apology admissible to prove negligence? “No,” they say. Sure, the next sentence, “In Massachusetts, any statements, writings, or benevolent gestures relating to the suffering of patients involved in an unexpected outcome are inadmissible as evidence of liability,” is technically right. But don’t you think a doctor reading this might mistakenly conclude that it’s okay to go ahead and admit his fault when apologizing? Isn’t admitting one’s fault, after all, the core of apologizing? This law is just a set-up for the unwary. Note too that Massachusetts enacted this law some fifteen years ago. Time has not alleviated the confusion.

Ira: I see the risk to which you point. However, lawyers get paid to help clients understand laws. Clients should rely on specific advice of counsel, not newspaper headlines or website postings. You wouldn’t rely on some website if you were sick, you’d visit a doctor. The same is true if you’ve injured another: you should get specific legal advice. Your first point about these laws forming a trap for the naive has some merit, but it does not persuade me. Your second point, in contrast, about encouraging evasiveness – inducing people to say “I’m sorry you are hurt” rather than “I’m sorry that I hurt you” – is fundamentally errant.

Flo: Really?

Ira: Yes. Consider the two relevant scenarios: (a) the defendant is unsure about whether he was at fault for the accident, and (b) the defendant believes he was at fault for the accident. Let’s start with case (a). If the defendant is unsure about whether he was at fault, what he *should* say to the plaintiff is “I’m sorry that you are hurt” or “I hope you feel better soon.” He should *not* admit his fault. Rather he only should

75. 100 Frequently Asked Questions about Health Care Risk Management, at <http://www.rm.f.harvard.edu/rmLibrary/faqs/featured/qw1/index.html> (in the *Adverse Events* section) (last visited July 6, 2001).

express his sympathy, for by presumption he is unsure about the question of fault. Don't you agree?

Flo: Of course.

Ira: In such cases, would you object to a law permitting him to express that sympathy without the fear that it would be used against him to prove liability?

Flo: No.

Ira: Very good. Observe that this is a *significant* class of cases.⁷⁶ Following an accident, it is often unclear who was at fault, and to precisely what degree.

Flo: But what about case (b) where the defendant believes that he was at fault? Why should the law encourage such a defendant only to express sympathy and benevolence? Wouldn't it be better if the defendant both expressed sympathy and benevolence *and* admitted his fault?

Ira: Of course it would – but that's the wrong counterfactual! If you want to debate which is better, laws that only exclude expressions of sympathy and benevolence or laws that exclude both expressions of sympathy and benevolence *and* fault-admitting apologies, we can do that later. For now, however, let us consider these laws that exclude expressions of sympathy and benevolence on their own merits. The right counterfactual is the status quo under which even expressions of sympathy and benevolence are admissible rather than an imagined world where fault-admitting apologies are excluded. Suppose the defendant believes that he was at fault, and suppose further that absent any evidentiary exclusion he would say nothing. If we pass a law saying that he can express sympathy or benevolence without fear of liability, then at least he may do that much. Which is better, that the defendant who believes himself at fault says, "I'm sorry that you are hurt," (ducking the issue of fault) or that the defendant say nothing? The former, I submit, is to be preferred to the latter.

Flo: I complement you on the internal logic of your argument, but I think you're seeing the trees and not the forest. What we really need are laws that exclude fault-admitting apologies. You've almost said so yourself. Why take the incremental step of excluding only expressions of sympathy and benevolence when what we really need are laws that exclude both those expressions and fault-admitting apologies? Why pass "half a loaf" when what we really need is the "whole loaf"? If the defendant believes he is at fault, the law should encourage him to fully apologize. Surely that's to be preferred to inducing a mere expression

76. See Cohen, *Advising*, *supra* note 1, at 1048.

of sympathy or benevolence, a partial apology as it were, which could as easily cause offense as repair. Let's get it right and put our full effort behind laws that exclude both expressions of sympathy and benevolence *and* fault-admitting apologies.

Ira: I could not disagree more.

III. LAWS EXCLUDING FAULT-ADMITTING APOLOGIES

Flo: Why do you oppose laws like Hawaii's and Connecticut's proposed bills that would exclude both expressions of sympathy and benevolence *and* fault-admitting apologies from evidence? From your earlier statements, I would have expected that you supported such laws.

Ira: Why do I oppose such laws? Why do you favor them? For centuries evidence law has provided that admissions by party opponents are admissible. A fault-admitting apology falls squarely into that category. Indeed, what could be more quintessentially an admission than a fault-admitting apology?⁷⁷ There is no more basic principle of evidence law than that relevant evidence should be admitted. While sometimes people who do not think themselves at fault apologize simply to "smooth things over," generally speaking, is not a defendant's apology extraordinarily relevant to the issue of fault? The burden lies not on me to demonstrate why such bills are misguided but on you to demonstrate why they merit enactment.

Flo: Very well. There are four broad, overlapping reasons to support these laws. They encourage settlement and avoid needless litigation; they promote natural, open and direct dialogue between people after injuries; they express the culmination of the logic already implicit in the evidence codes;⁷⁸ and, perhaps most basically, they encourage people to engage in the moral and humane act of apologizing after they have injured another. There are other specific reasons to support these laws. For example, I take issue with your assertion that an apology is quintessentially an admission by a party opponent, as the adversarial model presupposed by the admissions-by-a-party-opponent doctrine is precisely what apologies are meant to avoid.⁷⁹ But, hopefully, these four reasons can structure our discussion.

77. If laws excluding apologies are enacted, cases will undoubtedly arise testing the boundary of what is and is not an apology, which of a defendant's statements was included within the apology, and so on. Such issues can be assessed best on a case-by-case basis. For example, most would take the words "I'm sorry" to be strong evidence of an apology, but neither dispositive nor absolutely necessary evidence.

78. See Orenstein, *supra* note 1 (arguing for the evidentiary exclusion of apology using a feminist analysis of evidence codes).

79. See *infra* text accompanying notes 135-37.

Ira: Good. Let's go point by point.

Flo: Suppose a doctor makes a mistake in treating a patient. What is the doctor to do? If the doctor consults her lawyer or her hospital's risk management board, it is likely that she will be told to keep quiet. "Don't say anything, and above all don't apologize, for it will just be used against you in court."⁸⁰ On the other hand, there have been some top-notch studies of what leads patients to sue their physicians. Researchers have asked patients what leads them to sue their doctors, and, if the patients are to be believed, a sizable fraction would never have sued had they received an apology.⁸¹ It's a vicious cycle. The doctor won't apologize out of fear of liability, and it's precisely the absence of the apology that triggers the lawsuit. The damage to the relationship when their trusted caregiver, who used to be honest and open, turns stone silent is tremendous.⁸² I'm not saying all lawsuits would be prevented if there were an apology, but certainly some would. Most physicians, after all, are not evil. The harm was caused by mistake. Many patients can understand that. I won't deny that patients are rightly angry about the substantive injuries, but many are also angered by the doctor's *intentional* decision not to admit the mistake and apologize to them.⁸³

80. Automobile insurance companies often give their policy holders similar advice. See Cohen, *Advising*, *supra* note 1, at 1012 n.9 (describing a card sent to a policy holder by his insurance company after an accident, instructing him to "[k]eep calm, don't argue, accuse anyone, or admit guilt").

81. See Cohen, *Advising*, *supra* note 1, at 1011-12 n.7 (citing Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361 (1992) (noting 24% of families suing their physicians following prenatal injuries did so when "they realized that physicians had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them" and a further 19% did so out of "a desire to deter subsequent malpractice by the physician and/or seek revenge."); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 THE LANCET 1609, 1612 (1994) (detailing a British study finding 37% of families and patients bringing suit may not have done so had there been a full explanation and apology, factors more significant than monetary compensation); Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES OF INTERNAL MED. 2565, 2568 (1996) (explaining that in cases of moderate physician error, only 17% of patients would sue if the physician informed the patient of error, but if the physician did not inform the patient of error, 29% would sue if later learning of error); Francis H. Miller, *Medical Malpractice Litigation: Do the British Have a Better Remedy?*, 11 AM. J.L. & MED. 433, 434-35 (1986) (commenting on the much greater role of apology and significantly lower incidence of malpractice suits in Great Britain as compared to the United States).

82. For a poignant, in-depth example of the harm caused by the physician's and hospital's silence toward a widow following her husband's death immediately after routine surgery, and the protracted lawsuit that ensued, see SANDRA M. GILBERT, *WRONGFUL DEATH: A MEDICAL TRAGEDY* (1997).

83. Mindful of the liability exposure involved in a fault-admitting apology and the relational breakdown that often precipitates lawsuits, doctors sometimes are advised to handle medical mistakes by fully disclosing the patient's current medical condition and expressing sympathy to the patient, but not admitting the doctor's fault. See *supra* text accompanying note 75 (describing the Risk Management Group of the Harvard Medical Institution's advice); Larry L. Veltman, *Managing Bad Results*, 46 GROUP PRAC. J. at 26-32

Accidentally injuring another makes one a klutz. Failing to apologize makes one a jerk. It adds insult to the injury. It is that insult – that relational breakdown – that often triggers lawsuits.⁸⁴ Recall, after all, that in the vast majority of cases involving medical negligence claims are never brought.⁸⁵ Apologizing after you've injured someone should be the norm. The moral burden-of-proof falls on those who fail to apologize.

Even if suit were not averted, in many cases, the settlement process would be much swifter if the injurer apologized. After an apology is offered, parties often strike settlements quite quickly. As Goldberg, Green, and Sander write, “[at] times, an apology alone is insufficient to resolve a dispute, but will so reduce tension and ease the relationship between the parties that the issues separating them are resolved with dispatch.”⁸⁶ Given that most lawsuits settle, the savings in time, psychological anguish and money (*e.g.*, lawyers' fees) through speeding

(Sept. 1997) (“[Following an adverse outcome the doctor should meet as soon as possible with the family and the patient. . . . At that meeting it is all right to apologize to the patient for the occurrence of the event. ‘I am very sorry that this has happened.’ (This does not mean apologize because you caused the outcome.) A summary of the entire situation is in order. It is important that, at this early time, acceptance of responsibility for a bad result may be unreasonable on the part of the physician. . . . The physician should let the family vent any emotions without getting defensive. Empathy is the key at this meeting and at all follow-up visits. Make sure the patient knows what is going to be done, who will do it, how results and progress will be communicated to them, and that you will be there for them.”). See also Susanna E. Bedell et al., *The Doctor's Letter of Condolence*, 344 NEW ENG. J. MED. 1162 (2001) (advising doctors to write letters of condolence to deceased patient's families where, “[i]n order to avoid issues of legal liability, the letter should focus on the sadness of death rather than revisit the clinical details of the illness.”).

The assumption that under existing law a full, fault-admitting apology will necessarily be to the apologizer's financial detriment can be challenged. See Cohen, *Apology*, *supra* note 1 and references therein (noting a detailed study of one Veteran Administration hospital's decision to fully assume responsibility for errors, including providing fault-admitting apologies, which apparently worked to the apologizer's financial benefit).

84. See LaRae I. Huycke & Mark M. Huycke, *Characteristics of Potential Plaintiffs in Malpractice Litigation*, 120 ANNALS OF INTERNAL MED. 792, 792 (1994) (noting that a poor relationship with health care provider and impression of not being kept appropriately informed by health care provider significant factors leading patients to seek legal counsel); Ann J. Kellett, *Comment, Healing Angry Wounds: The Role of Apology and Mediation in Disputes Between Patients and Physicians*, 1987 MISS. J. DISP. RESOL. 111, 126-27 (emphasizing apology in managing patient-physician disputes); Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 68 (1994) (“When physicians are more forthright about what has occurred and assume responsibility for it, patients are less likely to sue.”); Orenstein, *supra* note 1, at 263-74.

85. See A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Malpractice Study III*, 325 NEW ENG. J. MED. 245, 249 (1991) (highlighting a study of 31,429 patient records and finding that malpractice claims were filled in less than two percent of cases in which injury-causing medical negligence occurred). See also PAUL C. WEILER ET AL., *A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION* (1993); see generally Bryan A. Liang, *Error in Medicine: Legal Impediments to U.S. Reform*, 24 J. HEALTH POL., POL'Y & L. 1, 28-38 (1999).

86. Goldberg et al., *supra* note 1, at 221. See also Keeva, *supra* note 2; “On Apology,” <http://www.transformingpractices.com/qa/qa8apology.html> (last visited May 3, 2002) (describing lawsuits where an apology was the pivotal step toward settlement, fundamentally altering the dynamics of the interaction).

up settlements may well be greater than what's saved through preventing needless lawsuits. Apologies can be the turning point in the negotiations. Indeed, practitioners often report that apologies work "magic" or "miracles" in helping to settle what seemed to be intractable disputes.⁸⁷

Ira: Your arguments have basic flaws. However, before addressing them, let us clarify a few issues. You say that many patients would not have sued their doctors if only they had received apologies. Do you have any precise numbers on this? And how can you *know* that they wouldn't have sued if they had received an apology? Am I wrong to be cynical and think that some patients *say* that they would not have sued if they had received an apology, but really would have? If the doctor amputates the wrong leg, even if he apologizes, you still need monetary compensation! The same questions apply to settlement. You say that apologies speed the settlement process. Do you have data supporting this? Further, you've talked a lot about the medical setting. I don't think it's fair to generalize from that example. The doctor and patient have a prior relationship. Ideally that relationship is rooted in the doctor's care for the patient. When the doctor fails to apologize, the patient feels a betrayal of trust. Moreover, medical ethics dictate that doctors should fully inform patients, including disclosing when the doctor has made a mistake.⁸⁸ If a stranger drives his car into mine and doesn't apologize, I might care, but I don't think I would care about the lack of apology nearly as much as the patient who feels betrayed. There's no general rule of ethics that an injurer must inform the injured of everything he knows.

Flo: Your questions are good ones, and I appreciate your raising them. It is impossible to know with perfect certainty what fraction of patients would not have sued if they had received an apology. Some skepticism is warranted. When a patient *says* that he would not have sued if he had received an apology, you can never know for sure what he would have done if he had. But surely some patients can be taken at their word. Doctors have a very strong incentive to figure out what leads patients to sue them, and the studies I've seen seem well-designed. I can't say for sure whether the percentage of patients who would have forgone suit if they had received an apology is 5%, 15%, 25%, or perhaps even 35%.⁸⁹ But if the percentage is even half of what these studies suggest, it is a sizable percentage. The same applies to

87. See Cohen, *Advising*, *supra* note 1, at 1044.

88. See *id.* at 1012 n.8; Orenstein, *supra* note 1, at 264-65; Martin L. Smith & Heidi P. Foster, *Morally Managing Medical Mistakes*, 9 CAMBRIDGE Q. OF HEALTHCARE ETHICS 38 (2000).

89. See *supra* note 81 (reporting percentages).

settlements. I don't know of hard data that shows that after an apology, the settlement process becomes, on average, X% faster. However, there are countless anecdotes to that effect and a few snippets of data too.⁹⁰ There are also psychological studies demonstrating that apologies decrease the injured party's anger and that people judge injurers who apologize more favorably than those who don't.⁹¹

As to your point about the need for apologies generally being greatest when the parties have a prior relationship, I agree. However, many injuries and lawsuits occur in the context of relationships: think of family disputes, employment disputes, neighborhood disputes, and even contractual business disputes. Where there is no prior relationship, often the injury ironically (for this may be something the injured party least wants) creates a relationship between the parties, if only to address how to handle the injury. Even among strangers, the failure to apologize can be deeply painful and offensive. Finally, as to the subject of ethics, though medical ethics is of course irrelevant when two strangers have a car accident, general ethics is relevant. Virtually all moral or religious traditions would say that, where you've injured another person, you should apologize for it.⁹²

Ira: I accept your points, but I want to get one thing clear. On the one hand, you say more apology is good because it would avoid lawsuits. On the other hand, you say more apology is good because it would speed the settlement process. From the moral viewpoint, these are very different cases. Where both an apology and a settlement occurs, I say, "all is well and good." If the doctor apologizes and the parties work out

90. See Cohen, *Apology*, *supra* note 1, at 1454, 1461 (describing marked savings in legal costs by the Veterans Medical Affairs Center in Lexington, Kentucky and by the Toro Corporation following the adoption of a policy of apologizing and assuming financial responsibility for injuries rather than denying them).

91. The growing psychological and sociological literature on apology has been well collected by Petrucci, *supra* note 1. For several of the finest theoretical introductions to the psychology and sociology of apology, see IRVING GOFFMAN, *RELATIONS IN PUBLIC* 113-18 (1972); NICHOLAS TAVUCHIS, *MEACULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION*, at chs. 3, 4 (1991) ("Modes of Apology"); Lazare, *supra* note 71, at 40. On the role of apologies in reducing victims' anger, see Mary B. Harris, *Mediators Between Frustration and Aggression in a Field Experiment*, 10 *J. EXPERIMENTAL SOC. PSYCHOL.* 561, 570 (1974); Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 *J. PERSONALITY & SOC. PSYCHOL.* 219 (1989); Michael E. McCullough et al., *Interpersonal Forgiving in Close Relationships*, 73 *J. PERSONALITY & SOC. PSYCHOL.* 321, 323 (1997). Apologies tend to produce a more positive image of the apologizer in others. See Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 40; Darby & Schlenker, *Children's Reactions to Transgressions: Effects of the Actor's Apology, Reputation and Remorse*, *supra* note 40. There is some evidence suggesting that while an apology with an offer of repair is seen as better than one without an offer of repair, the latter is still seen positively. See *infra* note 128 (discussing research by Scher and Darley).

92. For references to religious literature on apology and forgiveness, see Cohen, *Advising*, *supra* note 1, at 1021 n.31. See also REPENTANCE: A COMPARATIVE PERSPECTIVE (Amitai Etzioni & David E. Carney eds., 1997).

a settlement in which the doctor, or more typically her insurance company, compensates the patient, then the patient has received compensation for his injury. But if the doctor makes a mistake that causes harm to the patient, apologizes, and the patient forgoes suit, I don't see why that should be lauded. Where damage has occurred, an apology alone is inadequate compensation. The offender should both apologize and pay compensation for the injury.

Flo: I see your point, however, I disagree. If the injured party wants to forgo suit following the apology, who are we to say that he has made the wrong decision? A student told me that several years ago her grandmother received negligent medical treatment that left her unable to walk without great discomfort. The doctor who erred came to the grandmother and apologized fully. Despite the urgings of her family and friends, from that point on, the grandmother decided to forgo suit. "I'm a Christian," she said. "When a person asks me to forgive them, I do."⁹³

Ira: But surely there are different meanings to forgiveness. Isn't the right thing for the grandmother to do to forgive the doctor in the sense of ceasing her anger toward him, but not to forgive the debt of monetary compensation the doctor owes her? What will she do if later she needs money to pay for services she can no longer perform for herself because of the doctor's error?

Flo: That's not how the grandmother saw it, and isn't it the grandmother's view that matters? *You* may think that the critical issue is whether the injurer took fiscal responsibility. The grandmother cared primarily about whether the injurer admitted her moral responsibility.

Apologies can help avoid lawsuits for reasons other than such strong notions of forgiveness. Sometimes the substantive harm is minor, and the patient feels the apology is adequate. Some patients sue because of what they perceive as the doctor's arrogance in not telling them what

93. This example was told to the Author by a student. One question this example implicitly raises is whether it is appropriate for an offender to ask for forgiveness. If one were truly sorry, one should be expected to apologize for what has done. Should one ask to be released from—forgiven for—the shame of what one has done? Seeing forgiveness as the injured party's prerogative, rather than as the injured party's burden, may be particularly important for serious injuries. As Minow writes of South Africa's Truth and Reconciliation Commission,

[T]he survivors recoil when perpetrators greet victims with open arms and handshakes. In these cases, forgiveness is assumed, rather than granted. A survivor may think, "should you not wait for me to stretch out my hand to you, when I'm ready, when I've established what is right?" Forgiveness is a power held by the victimized, not a right to be claimed. The ability to dispense, but also to withhold, forgiveness is an ennobling capacity and part of the dignity to be reclaimed by those who survive the wrongdoing To expect survivors to forgive is to heap yet another burden on them.

Minow, *supra* note 1, at 17 (footnotes omitted).

happened. Some patients sue because they're concerned that the mistake that happened to them will happen to someone else, and until the doctor or hospital admits the mistake to the patient, the patient fears the doctor or hospital hasn't really faced the mistake. There are lots of reasons an apology may cause the injured party to forgo suit.

Ira: I accept your points, but I don't think you can brush off my criticism so easily. Even if this particular grandmother wanted to forgo compensation, *why should the law encourage apologies without compensation? If the injurer is truly sorry, shouldn't he pay for what he has done?*⁹⁴ You say that these laws promote "natural, open and direct dialogue between people after injuries." I don't see it that way at all. What these laws do is promote insincere apologies between people. They cheapen the meaning of an apology. If a person who has the resources isn't willing to pay compensation when apologizing, then he's not really remorseful. He's apologizing, but he's not putting his neck on the line. If the injured party wants to forgive the debt owed as the grandmother did, so be it. But that should be the injured party's prerogative. The law should not set that as a default.

Can't you see your mistake my friend? You see the power of what one might call the sacred object of apology and think, "why should this object only be used on special occasions? Let's use it more often." But the object is only sacred – the apology is only powerful – *because* it is reserved for special uses. No one would derive cheer if Christmas trees were erected every month: it's because they're lit only once a year that their symbolism works. The power of an apology lies in its integrity, and that integrity is assured only because the law attaches consequences to

94. See Cohen, *Advising*, *supra* note 1, at 1067 ("Some may feel that 'safe' apologies are duplicitous: If you are *really* sorry, should you not be willing to pay for what you have done? . . . Many may think that if you are unwilling to 'put your money where your mouth is' you are insincere. As Wagatsuma and Rosett argue, 'An apology without reparation is a hollow form, at least when the injured person has suffered a clear economic loss and when the actor has the capacity to make compensation.'") (citation omitted). See also Taft, *supra* note 1, at 1156 ("If apology is to be authentic, the offender must clearly admit his wrongdoing; he must truly repent if the apology is to be considered a moral act. When an offender says, 'I'm sorry,' he must be willing to accept all of the consequences-legal and otherwise-that flow from his violation. If a person is truly repentant, he will not seek to distance himself from the consequences that attach to his action; rather, he will accept them as a part of the performance of a moral act and the authentic expression of contrition."). Responding to Taft's argument, Linda Ross Meyer observed that the legal consequences that attach to an apology are in part a matter of social construction, and hence of policy choice. Linda Ross Meyer, Remarks at Yale-Quinnipiac Dispute Resolution Colloquium (Dec. 12, 2000).

apologizing.⁹⁵ To use a British phrase, laws that would exclude apologies from admissibility are “too clever by half.”

Flo: Your points are important, and we shall discuss them. But first let me make a preliminary point on which I hope we will agree. If we enact laws excluding apologies from proof of liability, nothing prevents an injurer who wants to apologize *and* offer compensation from doing so. Put differently, if, as *you've* defined it (and I will take issue with that definition later) a “sincere apology” means both the verbal statement and the offer of compensation, a law that excludes apologies from proof does not preclude sincere apologies.

Ira: Yes. That is true. But my concern was not with sincere apologies, but with insincere ones. Why is it that our law should encourage insincere apologies?

Flo: I will respond to your question in several stages. Earlier I mentioned a second reason to exclude apologies, namely, to promote dialogue after injuries. There is a natural, human way of dealing with injuries: talking directly with the other person about what has happened. Apologies are a key part of those conversations. By allowing apologies to be admitted in court, our laws inhibit that natural dialogue. Instead of people talking with one another directly after injuries, in our culture all too often they *begin by or soon start* talking through lawyers. The fact that apologies can be used as proof in court inhibits people from entering that human dialogue, that human encounter. And that's precisely when disputes escalate. *The issue is not the sincerity or insincerity of the apology, as you call it, but whether that dialogue takes place.*

I too am concerned with the quality of apologies: I don't think people should apologize insincerely. However, I am also concerned with the level or quantity of apologies. The world of apology, and of dialogue more generally, is not black and white. Sometimes the injurer intends to apologize ahead of time. Sometimes injurers who did not intend to apologize when entering a conversation end up apologizing during the conversation. Sometimes the act of apologizing helps to generate the remorse.⁹⁶ Sometimes fault is crystal clear, and sometimes it is deeply ambiguous. Some apologies are full-blown assumptions of responsibility and some are only partial statements. The critical issue is whether,

95. See also Wagatsuma & Rosett, *supra* note 1, at 496 (“[I]t would seem to invite manipulative and insincere behavior by wrongdoers if the law were to adopt a firm rule that relieved them of liability if they apologize.”); Taft, *supra* note 1, at 1153-54 (“[T]hose who favor the creation of ‘safe harbors’ [i.e., laws excluding apologies from admissibility] miss the mark. In joining the growing chorus who want to blame the system, they fail to see that what they consider systemic impediments to the performance of apology are actually safeguards of the moral integrity of the act.”).

96. See E. Tory Higgins & William S. Rholes, “Saying is Believing”: *Effects of Message Modification of Memory and Liking for the Person Described*, 14 J. EXPERIMENTAL SOC. PSYCH. 363 (1978).

within our world of gray, the apology, and hence the conversation, takes place.

Think, by way of analogy, of the confidentiality privileges that attach to mediations. Suppose someone argued that statements made in mediation should not be privileged, for all privileging such statements does is protect lies made within mediation, for if people are telling the truth, there's no reason to have such a privilege.⁹⁷ The purpose of laws excluding statements made in mediation from evidence is not so people will feel free to lie within mediation. Rather, the purpose is to facilitate a conversation between the parties, a conversation that can help them transform the dynamic between them, which could help them resolve the dispute. If you don't have the privilege, the conversation may never take place. The same applies to apology: if apology isn't privileged, many apologies will never occur, but if we create the privilege, then they may.⁹⁸

Ira: Your analogy is off point. Absent a mediation privilege, many parties would have no dialogue. This is true. The mediation privilege, however, is designed to protect true or sincere dialogue, and the fact that some false or insincere dialogue slips in is a price we must pay. But this is not the case with an apology privilege. All an apology privilege does is protect people who want to apologize insincerely, for if they were sincere, they would be willing to have their apology used against them. Unlike you, I care deeply about the quality of the apologies that are offered. I'd much rather see a few sincere apologies than a plethora of half-baked ones. Apologizing should be a serious, meaningful act. When I start to think of all the meaningless public "apologies" I've heard, I feel sick.⁹⁹ Comedian George Burns once quipped, "[t]he secret to success is sincerity. If you can fake that, you've got it made."¹⁰⁰ Feigning sincerity may be critical for acting, but it should not be a goal of public policy.

Flo: I don't think you get my point. I believe that there are many remorseful people who don't apologize because of the current legal

97. For such a critique of blanket mediation privileges, see Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 29 (1986) ("[Blanket mediation privileges are problematic because they contain] no exception for bad faith, illegal conduct, fraud, or any other abuse of the mediation process.").

98. Even if apologies are privileged, some injurers may still refrain from apologizing for strategic reasons. For example, an injured party who receives a fault-admitting apology may harden his stance -- for now he is positive that he is in the right -- and insist upon a high level of settlement. Knowing this, even if apology is privileged, some injurers may still refrain from apologizing.

99. For references, see Cohen, *Advising*, *supra* note 1, at 1017 n.23.

100. I have found no precise citation to Burns's quotation. However, there are numerous attributions of this quotation and minor variations of it to Burns.

regime – and that doesn't mean they're not truly remorseful. When the risk management board of the hospital says to the doctor "don't apologize," the doctor won't. If a driver receives a card from his insurance company saying not to admit his fault if he's in an accident, he won't. They may be quite remorseful, but it's the insurance company that is calling the shots.¹⁰¹

This is true even where there is no third party controlling the purse strings. *Our culture, especially our legal culture, is tremendously focused on denial.* If you've caused injury to another person and go see a lawyer, the initial focus is almost always on whether you can deny it, whether the lawyer can "get you off." Lawyers regularly instruct their clients to admit nothing, especially their fault, because of the liability risk. If a remorseful client wants to speak with the other party directly, his lawyer will often advise him not to. "I know you may think you are partly at fault for the accident," the lawyer might say. "However, if you apologize, there's a chance the jury will take your statement to mean that you are completely at fault. Remember that what it means to be morally at fault and legally at fault are very different things. You may think you are at fault, but that doesn't mean you are legally at fault. If at some later point you want to say something like an apology, that of course is up to you. But I wouldn't recommend beginning that way. Let me (the lawyer) do the talking for now."

Upon encountering the legal system, a person who is naturally inclined to apologize often will be implicitly or explicitly told not to. Once the pattern of silence and denial sets in, it can become difficult to break. Hostilities escalate. The combative view becomes self-fulfilling.

Embracing apology is really part of a broader social movement to treat others with respect and *directly* take responsibility for one's actions.¹⁰² Think, for example, of other cultures like Japan.¹⁰³ If an

101. See Orenstein, *supra* note 1, at 260 ("Many malpractice insurers affirmatively 'instruct doctors not to admit fault to patients without consulting the company or their hospital's lawyer.' According to one medical academic, '[T]he message is very clear from insurers that even in the case of an obvious mistake, the doctor should retreat from the patient and do all his communicating through his lawyer.") (footnotes omitted). Additionally, the insured has a contractual obligation to the insurer to cooperate in the defense of the claim. See Cohen, *Advising*, *supra* note 1, at 1023-28.

102. Flo might also point to the recent rise of public, political apologies. See *supra* note 16.

103. For references to the literature on Japan apology, see Wagatsuma & Rosett, *supra* note 1 (on legal dimensions); JAPANESE APOLOGY ACROSS DISCIPLINES (Naomi Sugimoto ed., 1999) (on psychological, sociological, and literary dimensions). See also John O. Haley, *Comment: The Implications of Apology*, 20 LAW & SOC'Y REV. 499 (1986); Robert B. Leflar, *Personal Injury Compensation Systems in Japan: Values Advanced and Values Undermined*, 15 U. HAW. L. REV. 742 (1993); Ohbuchi et al., *supra* note 91. For an introduction to Japanese legal culture and attitudes toward litigation, see JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 692-93 (1994). For references concerning apologies in other cultures, see Cohen, *Advising*, *supra* note 1, at 1013 n.10, especially Letitia Hickson, *The Social Contexts of Apology in Dispute Settlement: A Cross-Cultural Study*, 25 ETHNOLOGY 283 (1986).

accident occurs in Japan, the first thing that happens is that the injurer apologizes. As Wagatsuma and Rosett write, “[i]n contrast [to America], a basic assumption in Japanese society seems to be that apology is an integral part of every resolution of conflict.”¹⁰⁴ Indeed, often both parties apologize, even when one is not at fault.¹⁰⁵ It’s a matter of respect. Japan also has a dramatically lower incidence of lawsuits.¹⁰⁶ It’s hard for me to imagine these two things – frequent apology and infrequent lawsuits – are unrelated. Or consider the language Hawaii used in stating the purpose of its apology bill: “Particularly in our State, the Aloha State, it is regrettable that members of our statewide community cannot reach out to others in a humane way without fear of having such a communication used subsequently as an admission of liability.”¹⁰⁷ What we need to do is move to such a new cultural equilibrium where parties act upon their humane sensibilities and resolve disputes directly rather than through lawyers. I take issue with your Christmas tree analogy, and not just because Christmas has become so commercialized and secularized that Christmas trees have lost (at least in the Supreme Court’s opinion) their religious connotation.¹⁰⁸ Unlike Christmas trees, apologies need not, and should not, be reserved for a small subset of injuries. They can and should have much wider social use.

Ira: I am no expert on Japan, but from what little I know, and from what little you’ve said, I am skeptical of your comparison. Japan has a radically different culture from the United States. There is much more homogeneity and much more emphasis on maintaining social order.¹⁰⁹ There are also far fewer lawyers in Japan, and they are extremely expensive.¹¹⁰ You’ve said that in Japan apologizing doesn’t always mean

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

105. Comments Professor Morishima, “In Japan, apology may mean an acknowledgment of guilt by the morally guilty. But in most cases, . . . it doesn’t mean that we are morally guilty, it just expresses sympathy and a promise to deal with this matter with sincerity.” *Discussion: The Japanese Experience*, 15 U. HAW. L. REV. 737, 758 (1993). Hence, “[m]aking an early expression of sympathy would track the very common role of apology in Japan, where, following accidents, speedy apologies that express sympathy but are not at root admissions of fault are the norm.” Cohen, *Advising*, *supra* note 1, at 1048.

106. See MERRYMAN, *supra* note 103, at 643 (“[The Japanese rate of filing civil claims] is 18 percent of the level of civil filings in Germany and only 42 percent of the lower level in Italy. The Japanese rate is a mere 11 percent of the filings rate in the United States.”).

107. S.B. 1477, 21st Leg. (Haw. 2001) (version Jan. 6, 2001).

108. See *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 616 (1989) (“Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas.”).

109. Wagatsuma & Rosett, *supra* note 1, at 493 (“Apology may be given a lower legal priority in the United States because American society does not place as high a value on group membership, conformity, and harmonious relationships among people as Japanese society does.”).

110. For example, in 1985 only 2.0% or 486 individuals passed the Japanese National Legal Examination, in 1990 only 2.2% or 499 individuals, and in 1992 only 2.7% or 630 individuals. MERRYMAN,

saying one is at fault – it's more seen as a sign of respect. I have no problem with expressions of sympathy and benevolence that show respect. My problem is when someone would say he is at fault, but not take responsibility. As to your point about Hawaii, I think that language about the "Aloha State" is mostly rhetoric. I can't imagine values there are all that different from the rest of the United States.¹¹¹ If an injurer who has the means apologizes but is unwilling to pay compensation, how can the apology be anything but insincere?

Flo: The picture is more complex than that. Why should we equate remorse with the willingness to make monetary compensation?¹¹² What if the offender sincerely believed that money could not fully compensate for what had happened, that whatever he offered, it would not replace a lost limb? What if the offender were remorseful but also materialistic? What if the injurer were poor and the injured party rich? Suppose a driver who is poor mistakenly hits an expensive luxury car, knocking the luxury car's rear bumper slightly askew. Suppose further that although the damage is slight, it would cost \$4000 to fully repair – one third of the poor person's annual income. Might not the poor person be sincerely remorseful for what he has done without wanting to give up one third of his annual income?

Ira: These are interesting questions, but they strike me as esoteric. Yes, there might be cases where injuries are ultimately "uncompensable" (as with the loss of the limb), where people are both remorseful and greedy, or where the fundamental morality of basing compensation solely on the plaintiff's loss is problematic because of the economic disparity between the parties.¹¹³ The law's first concern, however, should be with the basic, ordinary case where the injury is

supra note 103, at 887. American bar exam passage rates are dramatically higher. For example, the passage rates on the New York State Bar exam for 1997-2000 were between 75% and 78%. *NYS Law Schools' Bar Exam Pass Rates*, at <http://www.nylawyer.com/exam/schoolrates.html> (last visited Aug. 27, 2001).

111. Flo might respond by noting (1) Hawaii is geographically distinct from other states, being not only separate from the forty-eight contiguous states but also composed of a series of islands; (2) Hawaii's special experience with apology, namely, the 1993 apology by United States for the overthrow of the sovereign Kingdom of Hawaii in 1893, see Yamamoto, *Race Apologies*, *supra* note 16, at 68; and (3) Hawaii is the only state where whites (24%) are a minority. See www.census.gov/population/cen2000/phc-t6/tab02.pdf (last visited Nov. 1, 2002) (summarizing data from 2000 census).

112. Wagatsuma and Rosett report, "[A]n offer to pay the damages or accept other punishment without offering apology is considered insincere . . . in the Japanese context." Wagatsuma & Rosett, *supra* note 1, at 462; "[I]n Japan a person too willing to pay damages may be thought to lack regret." *Id.* at 487.

113. Cf. *Exodus* 23:2-3 (Jerusalem) ("Thou shalt not follow a multitude to do evil; neither shalt thou speak in a cause to include after a multitude to pervert justice: nor shalt thou favour a poor man in his cause.") and *Deuteronomy* 1:16-17 (Jerusalem) ("Hear the causes between your brethren, and judge righteously between every many and his brother. . . . Do not respect persons in judgment; but hear the small as well as the great[.]").

compensable, the offender has adequate wealth, and so on. That's where our focus should be.¹¹⁴

Flo: But even in this "basic" case, why must the conversation about remorse and the conversation about compensation be *joined*?¹¹⁵ Why must responsibility be equated with monetary responsibility? Why can't admitting moral responsibility in words ("I'm sorry about what happened. It was my fault") and taking fiscal responsibility ("I'm willing to pay for the damage") occur in two separate conversations? Think of the bifurcated structure of many trials. First, liability or guilt is determined, and then damages and sentences are determined. We don't need to have both conversations at once.

Ira: I fear you've succumbed to sophistry, my friend. The first conversation about moral responsibility only has meaning in light of the second conversation about fiscal responsibility. It's through the consequences that the sincerity is established.

Flo: How can you be so certain? Cannot the injured party judge the sincerity of an apology by the apologizer's demeanor, whether he truly looks remorseful? It's not as easy to deceive others in face to face conversations as one might think.¹¹⁶ Sometimes it is when conversations have "no consequences" that sincerity is clearest and honesty most forthcoming. When strangers talk with one another on an airplane, often their conversations are deeply heartfelt *precisely because* they will never meet again. Because the conversation has "no consequences," no one has an incentive to lie.

Indeed, some attorneys have begun arranging confidential "apology meetings" between opposing parties in certain difficult cases. Even though all agree that the apology is off the record, often the apology radically transforms the dynamic between the parties, cracking the shell of the plaintiff's anger. Some of these meetings occur prior to litigation, and often lead to settlement. Others occur after the litigation is completed. What is key is that, even though the parties intend that legal liability will not attach to the apology, the apology still has meaning to the injured party. Consider one powerful example of such an apology meeting arranged by Attorney Rick Halpert:

[I had] a case in which a child was burned to death after the car in which he was riding was rear-ended by a driver who was putting a cd in her disk player. There was a serious question about whether the child's father might physically harm the driver who caused the accident. We felt that our client's recovery would be enhanced by

114. Flo might have responded that examining unusual cases gives us insight into ordinary cases.

115. See Cohen, *Advising*, *supra* note 1, at 1067-68.

116. See *id.* at 1066 n.164.

meeting the woman and seeing that the child's death had destroyed her too.

We participated with the prosecutor in a plea bargain agreement that called for her to accept responsibility on the record for the death, and plead guilty (not "no contest," which is the usual result). We agreed on the record that anything said in the apology meeting would not be admissible in the ongoing civil claim. After the plea we had the apology meeting.

Both sides were represented by counsel. Also present, besides the defendant, were the prosecutor, the victim advocate from the prosecutor's office, and the defendant's husband. Through her sobs, the defendant told the child's father how sorry she was for the death she caused. He told her how much his son had meant to him and how painful the loss was. Then he said, "I cannot live my life hating you. I forgive you." Everyone in the room broke into tears, and as we left the meeting together he said, "I hope God will give both of our families a way to heal through this."¹¹⁷

Or think of the converse circumstance – all too common in our society – where the injurer pays a substantial settlement, but admits no fault. For example, Coca Cola just paid the largest amount in history to settle a race discrimination class action claim, more than \$156 million, *but admitted no wrongdoing*.¹¹⁸ A year ago the Adam's Mark hotel chain paid \$8 million to settle a discrimination claim over the racist treatment of guests, *but again admitted no wrongdoing*.¹¹⁹ This is crazy!¹²⁰ Moreover, that type of settlement, where the defendant pays money but admits no wrongdoing, is the norm in *most* cases, not just race discrimination cases. Companies like Coca Cola and Adam's Mark don't pay that kind of money when they are innocent. What would have been so wrong if they had admitted fault?

I know in some cases, defendants don't want to admit their responsibility because they are involved in multiple suits with different plaintiffs over similar issues. The Coca Cola settlement may have

117. "On Apology," <http://www.transformingpractices.com/qa/qa8apology.html> (last visited May 3, 2002).

118. Greg Winter, *Coca-Cola Settles Racial Bias Case*, N.Y. TIMES, Nov. 17, 2000, at A1.

119. Derek Catron, *Adam's Mark Settled Discrimination Suits*, ORLANDO SENTINEL, Mar. 22, 2000, at A1. See also Settlement Text ("Defendants [Adam's Mark Hotels] have at all times denied and continue to deny the allegations asserted[.]",) at <http://www.usdoj.gov/crt/housing/documents/adamsmarksettle.html> (last visited Aug. 8, 2001).

120. It could be asserted that three groups suffer from such settlements: (1) the injurer, who fails to frankly admit the problem, (2) the injured party, for the injury itself is not acknowledged, and (3) the public, which is misled (e.g., future hotel patrons have an interest in knowing Adam's Mark's true race relations record). Where such a settlement is entered under a court's auspices, query whether the court's reputation for truth-seeking is also tarnished.

involved an element of that.¹²¹ But I think the issue is much deeper. We have a culture where, pardon the pun, we'd rather sugar-coat problems than face them. Indeed, I think the public prefers crafty denials to frank confessions. I think Coca Cola's sales would have been hurt more if they frankly admitted to racism than if they played the formally-deny-but-partially-admit-it-in-fact game.

Note too that when a law is passed saying that the apology is inadmissible in court, it is not the injurer who says, "I'm apologizing, but you can't use my apology against me." Rather, it is the state that says, "he's apologizing, and you cannot use his apology against him." The state is saying in effect, "we the state want the parties to have a conversation about responsibility – a conversation in which the injurer can express his remorse – without having to worry about liability. If later the injured party wants to invoke the state's power to force compensation, we will assist in that, but would prefer the path where the offender expresses his remorse and the parties directly work out a settlement."

Ira: Now I know that you have succumbed to sophistry. The fact that the conversation has no consequences makes it meaningful? Surely the case of the child who burned to death is atypical, for there appears to be no question of who was at fault. You are upset over common settlements like Coca Cola's and Adam's Mark's where, as per the parties' agreement, money was paid and the matter was dropped? The fact that the state, not the defendant, excludes such evidence makes a difference? Cannot you see the obvious? If we pass these laws, offenders will have an incentive to lie! Many offenders will reason as follows: I might as well apologize, for I have nothing to lose. If the plaintiff "buys it," he may drop the suit or settle on inequitable terms – perhaps he has an overblown notion of forgiveness like the grandmother, and, if apologized to, will forgo the compensation he rightly deserves. If the plaintiff doesn't "buy it," so what? He cannot use the apology against me in court. Apologizing will become a gamble with no down-side.

Flo: Perhaps it is you who have succumbed to sophistry my friend. You said before that the burden lay on me to justify laws excluding fault-admitting apologies, for they would significantly change evidence law. I see it the other way. Apologizing after one injures another is a basic humane and moral step. Should not the law encourage it?

In most cases, people (both offenders and injured parties) are neither so sophisticated nor so devious as you make out. Most injurers who

121. See Winter, *supra* note 118, at A7.

don't feel remorse aren't going to apologize insincerely. Telling someone you're sorry face to face when you don't mean it isn't such an easy thing to do. Further, why can't the injured party judge the sincerity of the apology? To the extent that the ethics of a protected apology is an issue, the critical issue, as I see it, is whether the injured party understands that the apology is "safe" – that it cannot be used in court.¹²² As long as he understands this (and if he doesn't, his lawyer should point it out to him) I don't see a problem. If he wants to "discount" the apology because of this, so be it. But such protected apologies are still better than no apology at all.¹²³ We don't live in a world of pristine morality where everyone rushes to take full responsibility for the harms they have committed. We live in a second-best world where many people don't. Within this second-best context, exempting apologies from admissibility to encourage more apologies is a step in the right direction.

Ira: Can't you see the potential for abuse here? Sophisticated defendants are going to take advantage of naive injured parties through these laws. They'll issue apologies knowing that there's no real risk involved, *but naive injured parties will think these apologies are meaningful – that they do involve risk*. Injured parties will think the injurers are putting their necks on the line when in fact they aren't.

Think about what an evidentiary exclusion for apologies would do functionally: it would preclude the jury from hearing a piece of evidence showing the defendant's guilt. And who wants to exclude such evidence? *Defendants*. If these laws get passed, it will be because large organizations such as insurance companies, medical associations and Fortune 500 companies will lobby for them.¹²⁴ They'll say, of course, that it's for good reasons ("to allow doctors to admit their errors to patients when they make them," "to help us correct problems when they arise," and so forth), but the real reason is to limit their liability. Think of how alternative dispute resolution (ADR) mechanisms like binding arbitration have been co-opted: powerful employers make employees

122. See Cohen, *Advising*, *supra* note 1, at 1067.

123. 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. OF PSYCHOLINGUISTIC RES. 127, 135, 137 (1997) (containing a psychological study showing that although an injurer's apology is seen as having greater value when it includes an offer of repair, it is nevertheless seen as having positive value when it does not).

124. In this regard, it will be interesting to watch the future of the proposed legislation to exclude full fault-admitting apologies in Connecticut, which has a strong insurance industry presence. Given the likely opposition by the plaintiff's bar to laws excluding full fault-admitting apologies, the support of the insurance industry – another powerful lobbying group – may be critical. A realist might claim that the future of these laws will depend not upon whether they receive the medical community's support (which they likely will), but upon whether they receive the insurance industry's support.

sign contracts (of adhesion?) providing for binding arbitration of employment disputes¹²⁵ and allowing the employers to choose the arbitrators. Even when both sides jointly choose an arbitrator, the employers are often repeat players, and the arbitrators know that if their awards are too favorable to the employees then they won't get more business. The rhetoric, of course, is that such arbitration is more "efficient," but the reality is that to a significant degree, the employers have "captured" the mechanism.

Flo: You're off-base. I agree that there is a risk that the injured party might think that the protected apology means something other than it does, but this is a limited risk. Further, the plaintiff's bar can work to correct it. Once such laws are passed, plaintiff's lawyers can and should instruct injured parties that the defendant has incurred no financial exposure when offering the apology. The much larger problem is the "vicious cycle" I described before, where the offender wants to offer an apology and the injured party wants to receive one, but the offender says nothing out of fear of liability.

Before impugning the motives of those who support these laws, you might think twice about the motives of those who will oppose them. Who do you think will lead the opposition? Clergy concerned that the repentant, confessional aspect of apology not be compromised? Psychologists wanting to protect a tool of healing from corruption? No. It will be the plaintiff's bar, in particular trial lawyers. They'll say, of course, that they're trying to protect the meaning of apology and the integrity of evidence law. But could the real reason be that apologies prevent lawsuits, thereby cutting into their business?

Ira: Will you at least concede that these laws could induce shallow, insincere "apologies" by offenders who, though unrepentant, calculate that they have nothing to lose and possibly much to gain by apologizing?

Flo: I concede that this is possible, though I am not convinced it would be widespread. If the injurer is being absolutely disingenuous when apologizing, then I too would be repulsed.¹²⁶ But the world of motivation is usually not that black and white. Even supposing that the law induced some injurers to offer half-hearted apologies, would this really be so terrible? Which is better, that the injurer offer a half-

125. On the contracts, see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). See also Richard C. Reuben, *The Pendulum Swings Again: Badie, Wright Decisions Underscore Importance of Actual Assent to Arbitration*, DISP. RESOL. MAG., Fall 1999, at 18; *Developments in the Law – The Paths of Civil Litigation: VI. ADR, the Judiciary, and Justice: Coming to Terms with the Alternatives*, 113 HARV. L. REV. 1851, 1862-66 (2000); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).

126. See Cohen, *Advising*, *supra* note 1, at 1065.

hearted, “protected” apology or that the injurer say nothing?¹²⁷ The right counterfactual in judging these laws is not that the offender apologize and offer full compensation, for under these laws the offender can still do that if he wants. Rather, the right counterfactual to think about is that the offender says nothing. Which would you prefer if you were the injured party: that (a) the injurer say nothing or (b) even though you cannot use his apology in court and even though you are suspicious as to whether he means it, that the injurer tell you he is sorry? While most people would prefer receiving an apology that involves financial exposure to one that does not, I think most people would prefer receiving an apology that does not involve financial exposure to receiving no apology at all. There’s even some psychological evidence supporting that view.¹²⁸

Ira: At last we agree, and disagree. I accept that this is the right counterfactual, but I don’t think apologies without risk are preferable to saying nothing. Why should the law encourage people to be deceptive? Consider what will happen when your rule actually gets implemented – when an injurer has admitted his fault in an apology, but at trial invokes the “apology exception” to have the apology excluded. Can you imagine how maddening this will be for the injured party?¹²⁹ The

127. Orenstein writes,

Obviously, not all apologies stem from noble motives. People may apologize to escape punishment (as in criminal sentencing where expression of remorse can lower a sentence); they may apologize to salve a guilty conscience; or they may apologize to preempt further accusation or discussion of one’s wrongdoing. But for an apology to be successful, the wrongdoer must perform a credible job of faking regret, if not contrition.”

Orenstein, *supra* note 1, at 241. In support of the view that an even insincere apology can still have meaning, Orenstein provides the following example: “As liberal Democratic Representative Barney Frank, an openly gay politician who was recently called ‘Barney Fag’ by conservative Republican Representative Dick Army, explained: ‘Very often, the apology is not sincere . . . but you still want it.’” *Id.* n.104 (citation omitted).

128. See Scher & Darley, *supra* note 123. Using a scenario of a friend’s failure to make a crucial phone call in a timely fashion, Scher and Darley asked subjects to assess combinations of apologies containing and not containing the following elements: an expression of remorse (“I’m really sorry that I didn’t call you the other day with the information”), an expression of responsibility (“I know that what I did was wrong”), a promise of forbearance (“I promise something like this will never happen again”), and an offer of repair (“If there is any way I can make it up to you please let me know.”). While their imagined offense is minor compared to the types of offenses that typically generate lawsuits, and while the nature of the possible repair for that offense is more indeterminate than monetary compensation typically at stake in lawsuits, their results are interesting. Scher and Darley found that “[each of the four elements of apology] people use to realize the speech of apologizing have clear and independent [positive] effects on the judgments people make about the transgressor However, the greatest improvement in perceptions came from . . . the offering of an apology, compared to no apology.” *Id.* at 137. More specifically, while an apology with an offer of repair was seen as better than one without an offer of repair, the latter was still seen positively. *Id.* at 135, 137 (Table II). This is suggestive, but certainly not conclusive, of the view that an apology without compensation is generally preferred to no apology.

129. Orenstein writes,

I recognize that there may be problems with apologies if they are used in lieu of fair

injurer has admitted he did it and said he was sorry for it – and now he denies it! (Even if the apology cannot be brought in to prove liability, I think it should be brought in to impeach!¹³⁰) And can you imagine how this will damage public respect for our courts? Suppose that, with the apology excluded, the plaintiff cannot prevail at trial. Can you see what will happen? The offender admitted his fault in the apology, but he'll go scott-free. What could more greatly tarnish the image of the court? Yes, I'll concede that defendants sometimes do get off on "technicalities" when everyone knows they are guilty because of rules like the *Miranda* doctrine that exclude inculpatory evidence. While sometimes the public loses respect for the courts when these rules are invoked, at least they exist for *important* policy reasons. When the Fifth Amendment right against self-incrimination gets invoked,¹³¹ we let certain people we know are criminals go free because we don't want to live in an inquisitorial state where the police can use force to extract confessions.¹³² Here there is no such pressing justification. Further, when evidence is excluded because of a *Miranda* violation, the trigger for the exclusion is the *police's* misconduct, not the *injurer's* misconduct. With an apology privilege, the injurer would hold the key to making the

compensation, and if rich and sophisticated actors take advantage of poor unsophisticated victims. Yet, such disparate power is nothing new, and an apology—even if a corporate ploy—enhances quality of life. Under the current legal regime, corporations are discouraged from apologizing at all. Though it might be maddening for a defendant-corporation to deny in court what it admitted in an apology, the plaintiff on balance is better off—as are we all—in a culture that promotes rather than inhibits expressions of apology and contrition.

Orenstein, *supra* note 1, at 255. Taft rejects Orenstein's position. He writes,

Maddening? The plaintiff in the scenario Orenstein describes is actually in a worse position because of the protection Orenstein's proposal would extend. Now, instead of suffering only from the original injury, the plaintiff must suffer exacerbation of that injury by being forced to prove fault in spite of the defendant's admission. This exacerbation arises not only from the additional expense required to show fault but also from the additional moral indignation the plaintiff must suffer because of Orenstein's evidentiary exception.

Taft, *supra* note 1, at 1153 n.94.

130. Even if enacted, laws that would exclude fault-admitting apologies to prove liability, but that would allow their admission for other purposes, such as impeachment, may be inadequate to provide the protection needed for such apologies to occur. See *supra* note 60. While a court might (or might not) deem that the probative value gained by such impeachment in discrediting the witness is substantially outweighed by the risk of prejudice (*i.e.*, the risk that the apology will be used as proof of fault) under FRE 403, if fault-admitting apologies are to be excluded from admissibility, the safer route would be for legislators to provide that they *cannot* be introduced for impeachment purposes. Similarly, it may be necessary to exempt them from certain discovery processes as well.

131. See Christopher Stobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 436-437 ("[The exclusionary] rule probably does more damage to public respect for the courts than virtually any other single judicial mechanism, because it makes courts look oblivious to violations of the criminal law and involves prosecutors, defense attorneys and judges in charade trials in which they all know the defendant is guilty.").

132. See *supra* note 15.

evidence inadmissible. And where would the privilege end? Would not the “fruits of the poisonous tree” also have to be excluded? Suppose that, following the injurer’s fault-admitting apology, plaintiff’s counsel were to ask the defendant in a deposition: “Didn’t you tell my client that you were at fault for the accident?” Could the injurer invoke the apology privilege and refuse to answer that question?

These rules would not only cheapen the meaning of apology, they would undermine the public respect for our courts. The admissions doctrine has long been a pillar of evidence law, and for good reason.¹³³ Where an injurer has admitted his fault, it is senseless – nay destructive – to preclude a court from hearing that evidence.

Flo: My friend, I respect your respect for tradition, but let us be reasonable. Do you really think the admissions doctrine arose with the case of apology in mind? Yes, an apology is an admission, but it is of a fundamentally different nature than other admissions. The core rationale behind the admissions doctrine is the adversarial one: “Anything that you say can be used against you.”¹³⁴ McCormick writes, “the most satisfactory justification of the admissibility of admissions is that they are the product of the adversary system, sharing on a lower level the characteristics of admissions in pleadings or stipulations.”¹³⁵ The root reason we allow into evidence admissions by party opponents is *not* that they possess circumstantial guarantees of trustworthiness that typically justify hearsay exceptions (*e.g.*, when a person makes an excited utterance, there is little chance he is lying), but because we envision an adversarial model under which, roughly put, “if you said it, then you are stuck to it. We don’t want people changing their stories.”¹³⁶

133. See Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 335 (1921); Edmund M. Morgan, *Admissions*, 12 WASH. L. REV. 181, 182 (1937) (“Whether an admission is hearsay and is received as an exception to the rule, while an interesting speculation, is hardly worth discussion from a practical viewpoint. Certainly it is receivable; its reception is much older than the hearsay rule; it is an unsworn, uncross-examined statement offered for the truth of the matter asserted in it; and often it hasn’t even an attenuated guaranty of trustworthiness. It stands in a class by itself; the theory of its admissibility has not the remotest connection with the jury system [*i.e.*, the distrust of the jury’s ability to effectively evaluate hearsay] and can be explained only as a corollary of our adversary system of litigation.”). For more recent references on the history of the admissions doctrine, see Freda F. Bein, *Parties’ Admissions, Agents’ Admissions: Hearsay Wolves in Sheep’s Clothing*, 12 HOFSTRA L. REV. 393, 401-03 (1984).

134. MCCORMICK, *supra* note 15, § 254, at 135.

135. *Id.* See also Morgan’s remarks in Morgan, *Admissions*, *supra* note 133; DAVID F. BINDER, *HEARSAY HANDBOOK* § 28.01, at 317 (2d ed. 1983) (“The real reason for excepting an admission of a party-opponent to the hearsay rule is that it is an equitable thing to do, consonant with a search for the truth within the confines of the adversary system. It seems only fair that a party should bear responsibility for an assertion reasonably attributable to himself. If the assertion is not true, such party is usually in a better position than his adversary to explain why it was made and to produce evidence to contradict it.”).

136. Or, if the party is to “change his story,” the burden is upon him to produce the supporting evidence. See BINDER, *supra* note 135.

Ira: Well, shouldn't that be the case? Why should people be allowed to change their stories?

Flo: The issue isn't whether people should be able to change their stories.¹³⁷ Rather the issue is how early do we want to impose that adversarial model of dialogue upon the parties. Think of the evidentiary exception for statements made in the course of settlement negotiations and statements made during mediation. The basic reason we have these exceptions is to encourage people to settle their disputes through direct dialogue rather than through litigation. Without those exceptions, they would not talk freely and many settlements would not occur. The same reasoning applies to the case of apology. By establishing a privilege for apology, we encourage parties to settle their disputes privately.

Rather than the state externally *forcing* people to take "responsibility" for their acts – I use quotation marks for "responsibility" as being forced to pay compensation is more accountability than taking responsibility – these laws encourage them to take responsibility for themselves. These laws shift the locus of responsibility from an external, state-imposed judgment to an internal, *private* assumption of responsibility through dialogue. These laws treat people like adults rather than children.¹³⁸ If we hold that an apology is admissible, we are holding, in effect, that the adversarial model governs from the moment of injury.

Ira: There may be something to your argument about the locus of responsibility, but I remain unpersuaded. *Some* statements made in mediation may be probative on the issue of fault, and *some* statements made in settlement negotiations may be probative of the issue of fault, but an apology exception would cover, and only cover, the most probative piece of evidence available.¹³⁹ The embarrassment to the court and the frustration to the plaintiff of excluding that particular

137. The Federal Rules of Civil Procedure do, however, allow pleading in the alternative. See FED. R. CIV. P. 8(e)(2) ("A party may set forth two or more statements of a claim or defense alternately or hypothetically A party may also state as many separate claims or defenses as the party has regardless of consistency . . .").

138. See generally JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (Marjorie Gabain trans., 1963) (describing moral development of children progressing from the obedience to norms and authority to engaging in constructing the norms); JEAN PIAGET, *SOCIOLOGICAL STUDIES*, 119, 172 (Terrance Brown et al. trans., Leslie Smith ed., 1993) (emphasizing the need for respect and direct dialogue among adults). On the role of respect in negotiation, see generally Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739 (2001).

139. As Wagatsuma and Rosett write,

[T]he law of evidence in America is torn between the pull to encourage compromise settlement of disputes by a process that is likely to include an apology and the countervailing attraction to a common lawyer of an admission, that "queen of proof," which can be used to prove the claim despite the hearsay rule and other artificial strictures that make proof at common law so complex.

Wagatsuma & Rosett, *supra* note 1, at 479.

piece of evidence would be tremendous. Unlike these other rules, *every* time the apology exception was invoked, there would be a tremendous price to pay.

Note too the issue of the defendant's explicit or implicit consent. Before mediations occur, the confidentiality provisions are almost always made explicit to the parties, and both parties consent to those provisions. In negotiations, that consent is not usually explicit, but it can be fairly assumed: Both parties know that the reason they are talking is to avoid trial by trying to settle the case. In the case of apology, this is different. When the injurer offers an apology, the injured party has impliedly consented to nothing.

Flo: "Implied consent" is such a slippery concept. The term itself is oxymoronic. Real consent is of course not implied. When people negotiate, can implied consent to confidentiality *really* be assumed? I don't think so. Even if one were to accept your argument that implied consent to confidentiality exists within negotiations, the rationale for the exclusions for statements in mediation and negotiation is *not* the consent of the parties. What right, after all, do two private parties have to preclude a court from hearing evidence? The privilege exists because the state grants it, not because the parties agree to it.¹⁴⁰

Ira: An interesting point. Yet I remain unconvinced. The probative value of an apology is just too great to be ignored.

Flo: What then do you make of Rule 410's exclusion of pleas of *nolo contendere* and guilty pleas which were later withdrawn in criminal cases? Surely these statements have *tremendous* probative value from a logical viewpoint. Even though a plea of *nolo contendere* does not technically admit fault, we know that is usually a legal fiction. Despite their enormous probative value, they are excluded in order to foster settlements.

Ira: Another interesting point. However, the provisions of Rule 410 are well understood by lawyers who use them. In the economist's terminology, it is a full-information game – the players know what a plea of *nolo contendere* is meant to do. These exclusions apply to highly stylized statements within the context of specific legal proceedings. They are not everyday statements like apologies.

Flo: If the rationale of encouraging settlement doesn't persuade you, perhaps the rationales behind the exclusions for subsequent remedial measures and payment of medical and similar measures will.

140. See Cohen, *Advising*, *supra* note 1, at 1039.

While the subsequent remedial measures exclusion can also be justified on the ground of limited relevancy,¹⁴¹ the “more impressive . . . ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.”¹⁴² If after an accident the defendant is allowed to make physical repairs, why shouldn’t he be allowed to make relational repairs? An apology can help prevent conflict from escalating. Further, apologizing involves admitting mistakes, and when mistakes are more easily admitted future mistakes are more easily prevented.

Ira: Your comparison, my friend, is errant. The probative value of an apology vastly exceeds that of a subsequent remedial measure. Such measures may have some probative value, but it is very slight. There is no great embarrassment to the court or insult to the plaintiff by excluding them. Further, the safety issue invoked by the remedial measures doctrine is very different from the relational repair you talk about. The safety at stake is people’s physical safety – erecting a higher fence around the construction site. The physical repair invoked by the subsequent remedial measures doctrine is qualitatively different from the relational repair invoked by apology.

Flo: Consider another analogy: the exclusion of payment of medical and similar expenses under Rule 409. The advisory committee notes justify this exclusion because, “such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.”¹⁴³ Surely most apologies also emanate from humane impulses – it is the moral thing to do when one has injured another. Similarly, “to hold otherwise” would discourage people from apologizing.

Ira: Again, my friend, you overlook the basic fact that an apology is an admission. Re-examine the very line you quote, “such payment or offer is usually made from humane impulses *and not from an admission of liability*.”¹⁴⁴ As I observed when arguing for the exclusion of expressions of sympathy and benevolence earlier, the payment of medical expenses has very limited probative value on the issue of liability. An apology has tremendous probative value. It is quintessentially an admission.

141. One ground is limited relevancy, for a remedial measure does not necessarily show negligence at the time of the accident. “[T]he rule rejects the notion that ‘because the world gets wiser as it gets older, therefore it was foolish before.’” FED. R. EVID. 407 advisory committee notes (quoting *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S. 261, 263 (1869)).

142. FED. R. EVID. 407 advisory committee notes.

143. FED. R. EVID. 409 advisory committee notes.

144. *Id.* (emphasis added).

Flo: Why should we punish people who want to do the right thing, who want to take moral actions?¹⁴⁵ *Because* subsequent remedial measures make the world safer, we exempt those measures despite their probative value. *Because* paying the injured party's medical bills is a humane act, we exempt it from admissibility. Perhaps the most basic reason to exclude apologies is also the most persuasive: The law should not punish people for taking a moral step.

Consider an analogy. Legal tradition has long recognized what is often called the priest-penitent privilege.¹⁴⁶ It has ancient roots¹⁴⁷ and has been enacted in different forms in all fifty states by statute.¹⁴⁸ The paradigm case runs like this. Suppose a person who has committed a wrong is also follower of a religion, such as Catholicism, that requires him to confess to his clergy person. Would it be right to let his confession be used against him in court? The law has long declared that, despite being an admission, such a confession is inadmissible in court. In part, this legal doctrine stems from the law's recognition of the psychological value of such confessions, however, the ultimate root is probably religious in nature, that a person should not be punished for following the dictates of his religion.¹⁴⁹

Now consider the case where, instead of being required to make confession to a priest, the person's religion, or perhaps more simply his

145. See Orenstein's commentary on FRE 407 and 408: "[A] justification for [these rules] arises from a desire to reward goodness We do not want to punish the 'blessed peacemakers[.]' We certainly do not want to disadvantage individuals who do the right thing." Orenstein, *supra* note 1, at 235-36. Orenstein applies similar logic to the case of apology: "[By exemption apologies, people who apologize will feel more protected; they may still be sued, but their kind, heartfelt apology could not be used against them in court." *Id.* at 254. See also Cohen, *Advising*, *supra* note 1, at 1067 n.167 ("There is also an ethical challenge to an injured party who would use the offender's apology against the offender in court. If the offender has come in good faith to settle the dispute, is it wrong for the injured party to use the apology to the offender's harm?"). See also *supra* note 40 (noting both case law and psychological research reflect the judicial impulse to reward rather than punish an apologizer).

* An intriguing example of wanting to encourage injurers to "do the right thing" and repent from their actions comes from Jewish law, where, if a robber voluntarily wishes to return what he stole, the person robbed is *discouraged* from accepting it back. See HANINA BEN-MENAHEM, *SELECTED TOPICS IN JEWISH LAW*, v. 3, *LAW AND EQUITY IN JEWISH LAW* 25-26 (Shumel Vosner trans., Hanina Ben-Menahem & Neil S. Hecht eds., 1993) (citing BABYLONIAN TALMUD, BAVA KAMA 94b). Note, however, that this "does not nullify the robber's liability to make restitution, and it does not forbid the plaintiff from accepting restitution." *Id.* at 26. Comments Ben-Menahem, "[T]he legal right conflicts with the public interest of reforming criminals by encouraging repentance. Accepting compensation would raise the expectations of conduct from those who wished to repent, and this may deter others who cannot afford to make amends." *Id.*

146. See MCCORMICK, *supra* note 15, at § 76.2.

147. See Michael J. Mazza, *Should Clergy Hold The Priest-Penitent Privilege?* 82 MARQ. L. REV. 171, 174-78 (1998).

148. See MCCORMICK, *supra* note 15, at § 76.2; Julie Ann Sippel, Comment, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 1127, 1133-36 (1994) (surveying states' statutes).

149. See MCCORMICK, *supra* note 15, at § 76.2.

conscience, requires him to apologize to the person he has harmed. For example, within Judaism, a person is required not to confess his action to rabbi, but rather to reconcile with the person he has harmed.¹⁵⁰ If the law is to exempt a confession made to a priest, should it not also exempt the apology made to the injured party?

Ira: You draw an interesting but flawed analogy. In the case of a confession to a priest, both the penitent and the priest expect and desire that the confession will be kept confidential. Indeed, within the Catholic church, a priest who breaks confession faces extreme sanction.¹⁵¹ Where the injurer apologizes to the injured party, the situation is different. There is no expectation of confidentiality to such a conversation. Unlike the priest, many injurers will want to introduce the apology in court. Put differently, there is little cost to upholding the priest-penitent privilege, for both the priest and the penitent inherently desire to keep the confession confidential. In contrast, where an injurer apologizes to the injurer, the cost is great, for there is no reason to presume that the injured party will want to remain silent.

Flo: I see this distinction, but the lesson is deeper. Why should the person be punished for taking a moral step? When a person apologizes, he is attempting to heal the wound between the parties. He is doing the humane, moral thing. If shrewdness would lead an injurer to remain silent, and morality would lead him apologize, should our laws be designed to reward shrewdness and punish moral behavior? The priest-penitent privilege, like the subsequent remedial measures doctrine, and like rules excluding evidence of payment of medical or similar expenses, reflects a basic wisdom: The law should not punish people who take moral steps.

Ira: At this point, my friend, we have come full circle. I don't believe he is being punished by having his apology used against him in court. I believe that if he is sincerely remorseful, that is what he will want. If he really wants to heal the relational damage, he will put his neck on the line when he apologizes.

150. See MISHNAH YOMA 8:9 ("For transgressions against God, the Day of Atonement atones, but for transgressions against another human being, the Day of Atonement does not atone until one has made peace with that person."). See also UNITED SYNAGOGUE OF AMERICA, HIGH HOLIDAY PRAYER BOOK 206 (Rabbi Morris Silverman ed. 1951); GATES OF REPENTANCE: THE NEW UNION PRAYER BOOK FOR THE DAYS OF AWE 251 (Chaim Stern ed. 1978).

151. As the Fourteenth Lateran Council declared in 1215, "[for if a priest] shall dare to reveal a sin disclosed to him in the tribunal of penance we decree that he shall be not only deposed from the priestly office, but that he shall also be sent into confinement of a monastery to do perpetual penance." Mazza, *supra* note 147, at 174 (quoting R.S. Nolan, *The Law of the Seal of Confession*, in 13 THE CATHOLIC ENCYCLOPEDIA 649 (Charles G. Herbermann et al. eds. 1912)).

Flo: Our time is growing short, Ira, and perhaps it is best for now if we agree to disagree. At root, I think an apology exemption would help avoid needless litigation and drawn-out settlements through raising the incidence of apology. It would facilitate human dialogue and encourage private responsibility-taking. Most basically, it would encourage, or at least not discourage, moral behavior. You think that such an exemption would induce insincere, deceptive apologies and, when the exemption is invoked at trial, anger injured parties and diminish public respect for the courts. Have I got the essence of our disagreement right?

Ira: Yes.

Flo: Perhaps we are not as far apart as might initially appear. It is the power of an apology to resolve conflict that makes the exemption so attractive to me, and it is the powerful content of an apology – the admission of fault – that makes you so opposed to these laws.

Ira: I think that's right as well.

Flo: As always, it is a pleasure debating with you.

Ira: For me as well. And I offer my apologies, Flo, if during our conversation I got carried away with my rhetoric.

Flo: I don't think that was an apology, Ira. Even if it was, no apology is necessary.

IV. QUESTIONS FOR FUTURE RESEARCH

The apology legislation movement is in its infancy, and the examination of these laws will likely continue for years to come. Let me suggest six questions to keep in mind as this legislation develops.

1. What laws will be passed, and how will these laws evolve?

The movement toward apology legislation has not happened, nor will it happen, overnight. Massachusetts passed its law exempting expressions of sympathy and benevolence from admissibility in 1986, and Texas, California, and Florida followed in 1999, 2000, and 2001 respectively. Though a number of states are now considering legislation, including legislation to exempt fault-admitting apologies, the spread of such legislation, *if* it occurs, may take decades. Evidence law revisions are not cutting-edge political issues. Further, if the history of the ADR movement is indicative, these laws probably will not arise from a declaration on high (*e.g.*, through an apology exemption to the Federal Rules of Evidence) but through a series of actions at the state level. We may well witness variety and incremental experimentation among the laws that are passed. Some laws may exempt expressions of sympathy

and benevolence only. Some may exempt both such expressions and fault-admitting apologies. Some may exempt only certain fault-admitting apologies, such as when the apology was spontaneously offered after the injury, or in certain areas of law, such as medical malpractice cases.¹⁵² In examining such legislation, we should frame changes in a broad context. A supporter of excluding fault-admitting apologies might initially think to decry legislation like California's that excludes only expressions of sympathy and benevolence. However, California's incremental step may encourage other states to take larger steps. Should Hawaii's proposed bill exempting fault-admitting apologies be passed, a critic of it may discover that problems arising from implementing that law will lead other states to reject such laws. The legislative path is uncertain.

One issue such legislation will need to address is whether such exemptions should apply only to accidental, unintentional injuries or also to intentional injuries. This applies both to legislation that excludes fault-admitting apologies and to legislation that only excludes expressions of sympathy and benevolence. The key question is whether there are sound policy reasons to differentiate between these types of cases. Does the morality of and need for an apology differ when an injury is intentional ("I harmed you on purpose. I deeply regret that.") versus unintentional ("I am sorry that you are injured. I should have been more careful.")? Exploring this distinction is beyond the scope of this article. Let me simply note that intentional injuries, including in the extreme criminal cases, "up the stakes" in both directions. After an intentional injury, the moral and psychological need for an apology is greater, as is the potential "re-injury" to the injured party and embarrassment to the court if an apology is excluded.

2. *How will these laws affect lawsuit and settlement patterns?*

Two of the strongest arguments for excluding fault-admitting apologies are to prevent lawsuits and to speed settlements.¹⁵³ Yet whether and to what extent such laws will have these effects remains to be seen. Will laws excluding apologies reduce the incidence of lawsuits? Will they speed the settlement process? Will they lead to different settlement outcomes? For example, will plaintiffs come to accept on average less monetary compensation if they have received an apology?

152. See Cohen, *Advising*, *supra* note 1, at 1060-64.

153. Laws excluding expressions of sympathy and benevolence may also be supported on such grounds, but are most simply defended for their encouragement of humane gestures.

Also of relevance is how these laws will affect error reporting and prevention. One might hypothesize that where a person or an organization admits errors they will be better able to prevent similar errors in the future.¹⁵⁴ This is an area in need of research. One not-insurmountable, but also non-trivial, challenge to such research is the private nature of most settlements. When a lawsuit is litigated fully, there is a public record of the events. In contrast, apologies often lead to “non-lawsuits” and private settlements about which data is more difficult to obtain.

3. *How will these laws affect those cases in which they are invoked?*

One critique of laws excluding fault-admitting apologies was that they could do harm in the cases in which they are invoked. A plaintiff who *knows* the defendant is at fault (for the defendant has admitted responsibility when apologizing) but cannot prove it in court is likely to be angered, and the image of the court may become tarnished. Might negative experiences with the application of such rules lead to either their repeal or their refinement?

4. *How will these laws affect the meaning of apology generally?*

One critique of laws exempting fault-admitting apologies is that they would cheapen the meaning of apology by encouraging people to apologize without financial risk. Will shallow, insincere apologies become the norm? Will apologies made without offers of compensation become meaningless? Will the lawyers offer the apologies rather than the clients? Will we see fill-in-the-blank apology forms lawyers download from their computers to apply in particular cases? If apologies becomes more widespread, will they lose their meaning and “magic”? What will happen if this piece of moral, religious, and psychological parlance becomes a more common feature of legal disputes? Will apologies lose their sacred, confessional value and become a cheapened commodity, or will they achieve their ultimate, practical meaning as a tool of dispute resolution?

154. See Cohen, *Apology and Organizations*, *supra* note 1, at 1464-68. In this regard, apologies may play a particularly important role where torts arise from patterns of conduct (e.g., harassment) rather than accidents. Note, however, that accidental injuries too can have systemic roots, the identification of which may be aided by open apology. *Id.*

5. *Will our understandings of dialogue and responsibility after injuries change?*

Two broad social themes implicated by apology are the channeling of dialogue and the locus of responsibility following injuries. The rise of the ADR movement of the past several decades, in particular the growth of mediation and the spread of principled negotiation and now problem-solving negotiation, has shifted the model of dialogue between parties after injuries from an adversarial, courtroom model of dialogue to a more cooperative, direct model of dialogue. Apology legislation may represent a further step in that direction. Rather than seeing dialogue channeled through the highly stylized and restrictive, though sometimes necessary, structure called litigation directed at persuading a third party decision maker (*i.e.*, the judge or jury), the ADR movement has emphasized the importance of direct dialogue between the parties aimed at private settlement. This latter form of dialogue may lead parties to better understand the other party's position and thus develop richer, more complex, and more mature understandings of events and of themselves.

Apology legislation may also lead us to rethink our understanding of responsibility. Under a traditional litigation model, responsibility – or more accurately accountability – is understood as a sanction externally imposed upon the injurer by the state. This is true in both the criminal and civil settings. When the state imposes a sanction upon the injurer, the locus of responsibility is external rather than internal. In contrast, where an injurer apologizes, he assumes responsibility for the injury himself, and then the parties will usually determine the settlement of the case themselves. Note that one of the main arguments against excluding fault-admitting apologies (“If the injurer were truly remorseful, he would be willing to have his apology used against him in court – he would be putting his money where his mouth is!”) implicates the linkage between taking responsibility in words versus in deeds, between verbal and fiscal responsibility. Apology legislation may change our understanding of that linkage. It is now typical for parties to reach settlements where large amounts of money are paid, but where no admission of responsibility is made. Perhaps apology legislation will move us toward an equilibrium where the locus of responsibility is more commonly internal rather than external and where accepting fiscal responsibility and admitting responsibility become better equilibrated.

6. *How will other societies address these issues?*

Cultures throughout the world use apology. Apology's importance in Japan is famed. We may have much to learn from studying other

countries as well. New Zealand has been at the forefront in developing criminal victim-offender reconciliation programs in which apologies are often central, and many other countries, including the United States, are implementing such programs.¹⁵⁵ One of the most unusual uses of apology I have learned of comes not from the public sector but from a small, private company in the not-so-communistic People's Republic of China specializing in delegated apologies:

Mr. Liu, [the founder of the Tianjin Apology and Gift Center and] a former lawyer with a long interest in psychology, decided that the people of Tianjin needed some help apologizing, "as a way of relieving pressure, reducing barriers and the many negative feelings between people today."

The company's 20 employees, who deliver the apologies, are all middle-aged men and women with college degrees who dress in somber suits. They are lawyers, social workers and teachers with "excellent verbal ability" and significant life experience, who are given additional training in counseling.

"I think this work is very meaningful," said Zhang Xiuqing, 47, a soft-spoken former teacher in minimal makeup, a white blouse and conservative navy blue suit. "We all have our disputes, and we need a place to go to think them through and help to resolve them."

The center has had almost 100 clients since it opened in August, mostly estranged lovers and people mired in family or business disputes. On behalf of clients, the apologizers write letters, deliver gifts and make explanations.

The service worked for Mr. Song, the businessman, who was happily reunited with his father after five difficult visits by the apology company's representatives. But others remain a bit suspicious of the idea.

"I'm not sure how long it will last," said Professor Zhou. "In our increasingly commercialized society, people have the idea that you can pay money to others to do your work for you, and that includes apologizing.

"But if you are sincere, you should go and apologize by yourself."¹⁵⁶

I am not eager to see an American franchise added to Mr. Liu's company. Would it be called McApology or McCulpa, or simply a "public relations firm"? There is little doubt, however, that international comparisons can teach us a great deal.

155. See *supra* note 11.

156. Elisabeth Rosenthal, *For a Fee, This Chinese Firm Will Beg Pardon for Anyone*, N.Y. TIMES, Jan. 3, 2001, at A1.

CONCLUSION

The past several years have seen a tremendous rise in apology legislation. This legislation is of essentially two types: (1) enacted and proposed laws that exclude expressions of sympathy and benevolence after accidents (*e.g.*, "I'm sorry that you are hurt") and (2) proposed laws that would exclude both such expressions and fault-admitting apologies (*e.g.*, "I'm sorry that I injured you. It was my fault."). Following Massachusetts's lead, Texas, California, and Florida have recently enacted the former, more conservative type of law. Connecticut and Hawaii are now considering pending bills of the latter type. Other states will likely address the issue in coming years. If enacted, laws excluding fault-admitting apologies, such as Connecticut and Hawaii's pending bills, could *profoundly* change dispute resolution and legal practice.

This Article has addressed the pros and cons of each type of law. The main arguments in favor of laws excluding expressions of sympathy and benevolence after accidents are: (1) the minimal relevance of such statements, (2) to encourage people to take such humane gestures after accidents, and relatedly (3) to complete policy goals already found within FRE 409 ("Payment of Medical and Similar Expenses"). The main arguments against these laws are: (1) such laws form a trap for the unwary who would mistakenly believe that such laws exempt fault-admitting apologies, and (2) such laws encourage evasiveness by sophisticated injurers, *viz.*, they encourage injurers who know they are at fault to make potentially insulting statements expressing sympathy but not admitting fault.

The main arguments in favor of laws excluding both expressions of sympathy and benevolence and fault-admitting apologies after accidents are: (1) to avoid litigation and speed the settlement process, (2) to encourage natural, open and direct dialogue among the parties, (3) to fulfill policy purposes already present in other evidentiary exclusions, such as FRE 408's fostering of private settlement, FRE 407's encouragement of subsequent remedial measures, FRE 409's promotion of benevolent and compassionate gestures, and the priest-penitent privilege's allowance of acts of religious conscience, and most simply (4) to encourage people to take, or at least not discouraging them from taking, the moral and humane act of apologizing after they have injured another. Such laws might also trigger greater responsibility-taking by injurers. Rather than a court externally imposing accountability through a sanction, through apology the injurer would directly admit responsibility verbally and would likely then assume fiscal responsibility through private settlement. The main arguments against

these laws are that such laws could: (1) induce insincere, manipulative apologies from unremorseful injurers, (2) anger injured parties who, despite the injurer's fault-admitting apology, could not prove the injurer's liability in court, and relatedly (3) decrease public respect for the courts when parties who have admitted their guilt when apologizing are not found liable.

The debate over laws excluding fault-admitting apologies has just begun. There is significant uncertainty about how these laws will develop and what their impact will be. The legal "experiment" is in its infancy. Some questions to keep in mind as we evaluate these laws in coming years are: (1) what laws will be passed, and how will these laws evolve? (2) how will these laws affect lawsuit and settlement patterns? (3) how will these laws affect those cases in which they are invoked? (4) how will these laws affect the meaning of apology generally? (5) will our understandings of dialogue and responsibility after injuries change? and (6) how will other societies address these issues?

This Article has approached the topic of apology legislation largely from a legal perspective by presenting some of the central arguments supporting and opposing such legislation, as well as questions for future research. However, I hope that the reader appreciates that more than just legal considerations are involved. Apologies lie at a fascinating crossroads of law, psychology, economics, culture and, above all, morality. Apologizing when one has injured another is a basic moral act, yet it is an act very much outside the traditional adversarial legal framework. The new apology legislation may yield a greater reconciliation between our legal system's emphases on denial, proof, and punishment, and our religious systems' emphases on apology, forgiveness, and the direct assumption of responsibility. How that balance will be struck, how it will change dispute resolution and legal practice, and how it will change our culture generally all remain to be seen.