

# Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases

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## I. INTRODUCTION

In a case in which I represented the plaintiff, the wrongdoer himself tearfully acknowledged his role in the tragic accidental death of my client's son. It had a huge impact on the settlement of the case. There would never have been a lawsuit if the same person had made the same comments to the mother during the 30-day period in which her son lay dying in the hospital, or during the three days his young body was at the funeral home. The sad part in that case is that the defendant and his company wanted to express the same thought near the

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time of the accident, but claimed to have been prohibited from doing so by their insurance carrier.<sup>1</sup>

The preceding anecdote illustrates the difficulty with which the U.S. legal system approaches the notion of apology. The insight that apology may be an important tool in dispute resolution is one apparent even to an eight-year-old.<sup>2</sup> However, the design and function of the U.S. legal system, to reduce disputes to dollar amounts, resist such intuition.<sup>3</sup> The result is a culture so litigious that its corporations are required by the SEC to highlight their myriad lawsuits in their annual reports lest they remain open to further liability for misleading their shareholders.<sup>4</sup>

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1. Bruce W. Neckers, *The Art of the Apology*, 81 Mich. B.J. 10, 11 (2002); see also Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29, 33, 45–46 (1982) (arguing for an increased use of mediation among lawyers and discussing its lack of use resulting in a capacity for deafness to “ordinary good sense,” and arguing that mediation can lead to novel solutions, such as an apology, which could actually be in a client’s best interest (citing John D. Ayer, *Isn’t There Enough Reality to Go Around? An Essay on the Unspoken Promises of Our Law*, 53 N.Y.U. L. Rev. 475, 489–90 (1978))). Riskin offers an interesting anecdote from Professor Kenney Hegland:

In my first year Contracts class, I wished to review various doctrines we had recently studied. I put the following:

In a long term installment contract, Seller promises Buyer to deliver widgets at the rate of 1000 a month. The first two deliveries are perfect. However, in the third month Seller delivers only 999 widgets. Buyer becomes so incensed with this that he rejects the delivery, cancels the remaining deliveries and refuses to pay for the widgets already delivered. After stating the problem, I asked, “If you were Seller, what would you say?” What I was looking for was a discussion of the various common law theories which would force the buyer to pay for the widgets delivered and those which would throw buyer into breach for cancelling the remaining deliveries. In short, I wanted the class to come up with the legal doctrines which would allow Seller to crush Buyer.

After asking the question, I looked around the room for a volunteer. As is so often the case with the first year students, I found that they were all either writing in their notebooks or inspecting their shoes. There was, however, one eager face, that of an eight year old son of one of my students. It seems that he was suffering through Contracts due to his mother’s sin of failing to find a sitter. Suddenly he raised his hand. Such behavior, even from an eight year old, must be rewarded.

“OK,” I said, “What would you say if you were the seller?”

“I’d say, ‘I’m sorry.’”

*Id.* at 46.

2. See Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC’Y REV. 461, 493 (1986).

3. See *id.* at 464 (explaining the relative absence of apology in the U.S. legal system as possibly correlated to the legal system’s propensity to reduce all losses to economic terms and its juries’ awards of high damage amounts for injuries that do not easily reduce to quantifiable economic terms).

4. Jeffrey A. Berens, *Pleading Scienter Under the Private Securities Litigation Reform Act of 1995*, COLO. LAW. (Colo. Bar Ass’n, Denver, Colo.), Feb. 2002, at 39, 42 (discussing certain pleading requirements regarding securities class action litigation,

The U.S. treatment of apology stands in stark contrast to practices in other societies, such as Japan,<sup>5</sup> where apology plays a central, if not dominant role in dispute resolution.<sup>6</sup> In the United States, however, Federal Rule of Evidence 801(d)(2) provides that an admission of fault by a party-opponent is “not hearsay” and, therefore, not excluded from admissibility by the hearsay rule.<sup>7</sup> 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 . . . .”<sup>8</sup> Consequently, even though an apology would fit the classical definition of hearsay as an out of court statement “offered in evidence to prove the truth of the matter asserted,”<sup>9</sup> the Federal Rules of Evidence treat it as nonhearsay and thus, as admissible evidence.

Federal Rule of Evidence 408 applies to “compromise and offers to compromise” in civil cases and provides that “[e]vidence of . . . conduct or statements made in compromise negotiations” are not admissible to prove liability for or invalidity of a claim or its amount.<sup>10</sup> The modus

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Berens notes that a corporation’s intent to deceive, manipulate, or defraud its shareholders can be evidenced by its nondisclosure of material litigation per SEC regulation).

5. As the societies of the United States and Japan are so culturally distinct, it may seem counterintuitive, on first impression, to discern anything of significant value through considering Japanese law. Indeed, given the debate regarding whether law shapes culture or culture shapes law, and given that the United States and Japanese cultures are so distinct, one might conclude that the Japanese propensity to apologize emanates from a culture so distinct from our own that it renders Japan a poor primer for any such analysis. Recent studies, however, suggest that there appears to be a basic, universal human preference for an apology when one is wronged. *See* discussion *infra* Parts III–IV. As such, it is apparent that the absence of fully protected apologies as a facet of formal dispute resolution in the United States may have more to do with the structure and flawed assumptions informing its legal system than any cultural barrier to considering the effectiveness of apologies.

6. *See* Wagatsuma & Rosett, *supra* note 2, at 461–62, 472–73, 478–479, 482, 488.

7. FED. R. EVID. 801(d).

8. *Id.* Rule 801(d)(2) provides that a statement is not hearsay if:

The 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 . . . .

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

9. FED. R. EVID. 801(c).

10. FED. R. EVID. 408. The rule provides in relevant part:

operandi of this rule is the “promotion of the public policy favoring the compromise and settlement of disputes.”<sup>11</sup> Therefore, an apology made during settlement negotiations generally should not be admissible to prove liability. There are, however, significant limitations to the rule, including the fact that the apology must be made during and not before settlement negotiations, which runs counter to the underlying policy priority that the rule contemplates.<sup>12</sup> Accordingly, it would scarcely be sound legal advice for a defense attorney to advise a client to deliver an apology that would leave the client open to liability.

This Article joins the current debate regarding the proper relationship between apology and the law.<sup>13</sup> Like Rule 408, this Article focuses

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(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority. (b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

*Id.*

11. FED. R. EVID. 408 advisory committee’s note (citing KENNETH S. BROUN, MCCORMICK ON EVIDENCE §§ 76, 251, at 138–40, 431–44 (6th ed. 2006)).

12. See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1032–35 (1999).

13. See, e.g., William K. Bartels, *The Stormy Seas of Apologies: California Evidence Code Section 1160 Provides a Safe Harbor for Apologies Made After Accidents*, 28 W. ST. U. L. REV. 141, 156 (2001); Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545, 545 (2000); William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 17 (2002); Charles R. Calleros, *Conflict, Apology, and Reconciliation at Arizona State University: A Second Case Study in Hateful Speech*, 27 CUMB. L. REV. 91, 125 (1997); Cohen, *supra* note 12, at 1013; Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, DISP. RESOL. J. (Am. Arbitration Ass’n, New York, N.Y.), May–July 2002, at 26, 27; Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 320 (2001); Erin Ann O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1122 (2002); Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 223 (1999); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 831 (2003); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 461–63 (2003) [hereinafter Robbennolt, *Apologies and Legal Settlement*]; Jennifer K. Robbennolt, *What We Know and Don’t Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009, 1010 (2005) [hereinafter Robbennolt, *Role of Apologies*]; Lee Taft,

exclusively on civil cases.<sup>14</sup> This Article adds to scholarly debates about apology and law by giving legal change a final push. Namely, this Article provides language, and a rationale for the language, that makes federal protection for “full apologies” in civil cases possible.<sup>15</sup>

In particular, this Article considers the aforementioned limitations of Rule 408 and provides a critique of its effectiveness in facilitating its modus operandi of encouraging private settlements between adversarial parties. Part II discusses apologies generally and considers the role they can play as a dispute resolution tool. Part III then proposes an amendment to Rule 408, which would prevent full apologies offered during compromise negotiations from being admissible in civil cases. The amendment to Rule 408 that this Article proposes also furthers the underlying policy priority of Rule 408 by encouraging private settlements. Part IV provides support for the proposed amendment to Rule 408 by examining empirical

*Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1135–36 (2000); Wagatsuma & Rosett, *supra* note 2, at 462, 478–79; Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1261 (2006); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1166 (1997); Jonathan R. Cohen, *Ethical Quandary: Advising the Client Who Wants to Apologize*, DISP. RESOL. MAG., Spring 1999, at 19, 19; *see also* Carl D. Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation*, 17 MEDIATION Q. 265, 265 (1999).

14. There are several rationales for this. Both Rule 408 and this Article’s proposed amendment to Rule 408 address only civil cases. As Jonathan Cohen explained:

This is in contrast to most American evidence law which draws no distinction between civil and criminal cases. 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.

Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 823 (2002) (footnotes omitted). 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) (citations omitted). In civil cases, there is typically little risk that a plaintiff will coerce a confession from the defendant; but in a criminal setting, that risk is quite real. Cohen, *supra*, at 823.

15. *See infra* Part II for a definition of both “full” and “partial” apologies.

evidence that suggests this amendment would, in fact, do more to encourage private settlements between adversarial parties than Rule 408 currently does.

Part V describes apology exclusionary rules that states have adopted and gauges the effectiveness of these exclusionary rules. Part VI addresses critiques of the fully protected apology, which assert that such an exclusionary rule is not only fraught with moral ambiguity, but rewards bad actors engaging in strategic tactics by offering insincere apologies, thereby allowing them to escape proper punishment.<sup>16</sup> This section reconsiders the resistance to the fully protected apology and suggests that this resistance stems from two ideas—the propensity of U.S. law to quantify harm in economic terms,<sup>17</sup> and the belief that the United States has a naturally litigious culture.<sup>18</sup> These critiques miss the point, as studies suggest,<sup>19</sup> that the fully protected apology is both good business<sup>20</sup> and consistent with U.S. cultural values. Concluding, Part VII offers final thoughts on this Article’s proposed amendment to Rule 408.

## II. APOLOGIES AS A DISPUTE RESOLUTION TOOL

Authors differ as to the proper definition of what makes an effective full apology. For example, Orenstein argues:

At their fullest, apologies should: (1) acknowledge the legitimacy of the grievance and express respect for the violated rule or moral norm; (2) indicate with specificity the nature of the violation; (3) demonstrate understanding of the harm done; (4) admit fault and responsibility for the violation; (5) express genuine regret and remorse for the injury; (6) express concern for future good relations; (7) give appropriate assurance that the act will not happen again; and, if possible, (8) compensate the injured party.<sup>21</sup>

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16. See generally Taft, *supra* note 13, at 1138.

17. See Pavlick, *supra* note 13, at 854. Explaining why the role of apology in litigation may be a poor fit within the U.S. legal system, Pavlick argues:

In a rights-based, adversarial system, the moral and psychological interests of the parties are often overlooked. The victim’s interests are routinely converted into a remedy or commodity with which the legal system is more familiar and better able to deal—namely money. If interests are overlooked and replaced by a demand for money, then apology, which has no dollar value and no predictable value with regard to future occurrences, is of very little use in litigation.

*Id.* (footnotes omitted).

18. See Wagatsuma & Rosett, *supra* note 2, at 464.

19. See Robbennolt, *Apologies and Legal Settlement*, *supra* note 13, at 482; see also discussion *infra* Part IV.

20. The fully protected apology could lead to greater occurrences of corporate apologies and fits well within the rubric of corporate social responsibility.

21. Orenstein, *supra* note 13, at 239.

Wagatsuma and Rosett state that to constitute a “meaningful apology,” the apologizer must acknowledge five things: (1) the harmful act happened, caused injury, and was wrongful; (2) the apologizer was at fault and regrets participating in the act; (3) the apologizer will compensate the injured party; (4) the act will not happen again; and (5) the apologizer intends to work for future good relations.<sup>22</sup> Cohen identifies three elements: “(i) admitting one’s fault, (ii) expressing regret for the injurious action, and (iii) expressing sympathy for the other’s injury.”<sup>23</sup> For the purposes of this Article, a “full apology” is defined as an expression of regret that acknowledges fault and is coupled with compensation for the harmed party.<sup>24</sup> A “partial apology” is defined as an expression of remorse or regret without any admission of fault.

When offenders apologize for their conduct, “the offense and the intention that produced it are less likely to be perceived as corresponding to some underlying trait of the offender.”<sup>25</sup> As such, apologies influence beliefs about the general character of the offender, and when an apology is offered, the offender is viewed as having better character.<sup>26</sup> The

22. Wagatsuma & Rosett, *supra* note 2, at 469–70.

23. Cohen, *supra* note 12, at 1014–15.

24. Wagatsuma & Rosett, *supra* note 2, at 487 (arguing that “[a]n apology without reparation is a hollow form,” Wagatsuma and Rosset note the centrality of compensation to an apology).

25. Seiji Takaku, *The Effects of Apology and Perspective Taking on Interpersonal Forgiveness: A Dissonance-Attribution Model of Interpersonal Forgiveness*, 141 J. SOC. PSYCHOL. 494, 495 (2001); see Edward E. Jones & Keith E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, in 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 219, 222–36 (Leonard Berkowitz ed., 1965) (describing correspondent inference theory).

26. See, e.g., Bruce W. Darby & Barry R. Schlenker, *Children’s Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742, 746–52 (1982); Bruce W. Darby & Barry R. Schlenker, *Children’s Reactions to Transgressions: Effects of the Actor’s Apology, Reputation and Remorse*, 28 BRIT. J. SOC. PSYCHOL. 353, 360 (1989); Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291, 291–92 (2000); Marti Hope Gonzales et al., *Victims as “Narrative Critics”: Factors Influencing Rejoinders and Evaluative Responses to Offenders’ Accounts*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 691, 698 (1994); 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, 219–24 (1989); Ken-ichi Ohbuchi & Kobun Sato, *Children’s Reactions to Mitigating Accounts: Apologies, Excuses, and Intentionality of Harm*, 134 J. SOC. PSYCHOL. 5, 11 (1994); Jennifer F. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressors*, 6 ACAD. PSYCHOL. BULL. 49, 49 (1984); Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY 281, 285–86 (1991).

apologetic offender will therefore be perceived as less likely to engage in similar offending behavior in the future.<sup>27</sup> Apologies also tend to reduce negative emotions such as anger, and increase levels of more positive emotions, such as sympathy for the offender.<sup>28</sup> Indeed, medical malpractice survey research suggests that victims desire apologies and some would not have pursued litigation had an apology been offered.<sup>29</sup> In addition, there is anecdotal evidence of injured parties who would not have pursued litigation if apologies were offered,<sup>30</sup> of settlement negotiations coming to a halt over the issue of apology even after an agreement on an appropriate damage amount was reached,<sup>31</sup> of plaintiffs who would have preferred an apology as part of a settlement,<sup>32</sup> and of

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27. See, e.g., Gold & Weiner, *supra* note 26, at 291–92; Ohbuchi et al., *supra* note 26, at 219–20; Orleans & Gurtman, *supra* note 26, at 52–53; Gary S. Schwartz et al., *The Effects of Post-Transgression Remorse on Perceived Aggression, Attributions of Intent, and Level of Punishment*, 17 BRIT. J. SOC. CLINICAL PSYCHOL. 293, 297 (1978); Weiner et al., *supra* note 26, at 285.

28. See, e.g., Mark Bennett & Deborah Earwaker, *Victims' Responses to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. SOC. PSYCHOL. 457, 462 (1994); Gold & Weiner, *supra* note 26, at 291–92; Ohbuchi et al., *supra* note 26, at 219–20; Takaku, *supra* note 25, at 495; Weiner et al., *supra* note 26, at 286.

29. See Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1001, 1005–06 (2003) (finding that patients emphasized a desire to receive an apology following a medical error); Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361 (1992) (noting that twenty-four percent of families filed claims “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”); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (finding that thirty-seven percent of respondents said that they would not have sued had there been a full explanation and an apology, and fourteen percent indicated that they would not have sued had there been an admission of negligence); 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 INTERNAL MED. 2565, 2566 (1996) (finding that ninety-eight percent of respondents “desired or expected the physician’s active acknowledgement of an error. This ranged from a simple acknowledgement of the error to various forms of apology” and that “[p]atients were significantly more likely to either report or sue the physician when he or she failed to acknowledge the mistake.”).

30. See *supra* note 1 and accompanying text.

31. See Schneider, *supra* note 13, at 274 (describing negotiations stalling “over the plaintiff’s demand for an apology, even after the sides had agreed on the damages to be paid!”) (emphasis omitted).

32. See, e.g., Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL’Y & L. 433, 442 (1998); Piper Fogg, *Minnesota System Agrees to Pay \$500,000 to Settle Pay-Bias Dispute*, CHRON. HIGHER EDUC., Feb. 14, 2003, at A12, available at <http://chronicle.com/weekly/v49/i23/23a01202.htm> (describing class-action plaintiff’s disappointed reaction to the settlement: “I want an apology,” she said, “and I’m never going to get it.” (internal quotation marks omitted)); Editorial, *The Paula Jones Settlement*, WASH. POST, Nov. 15, 1998, at C6.



occasions where a failure to apologize triggered litigation by adding insult to injury.<sup>33</sup>

To the extent that a place may be found for apology in the resolution of civil cases, U.S. law will be enriched and it will be better able to deal with the heart of what initially created the dispute between parties.<sup>34</sup> Moreover, as Wagatsuma and Rosett explain, “society at large might be better off and better able to advance social peace if the law, instead of discouraging apologies . . . by treating them as admissions of liability, encouraged people to apologize to those they have wronged and to compensate them for their losses.”<sup>35</sup> In such situations, lawsuits might never be filed, thereby reducing the amount of judicial resources consumed by such litigation.<sup>36</sup> Without a mechanism that carves out a place for apology in civil cases, the U.S. justice system, which seeks to resolve conflicts through settlement, mediation, or alternative methods

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33. Cohen, *supra* note 12, at 1010–11; Orenstein, *supra* note 13, at 243.

34. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 138 (5th ed. 2007); *see generally* Cohen, *supra* note 12, at 1019; Orenstein, *supra* note 13, at 242; Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 180 (2000); Levi, *supra* note 13, at 1166. In addition to the strategic benefits of apologies for settlement, which is the focus here, a number of nonstrategic benefits of apologies in civil cases are also posited. Apologies may reduce negative emotions, repair relationships, fulfill a need to make reparations and to restore equity, make forgiveness possible, and facilitate psychological growth. GOLDBERG ET AL., *supra*, at 138; *see also* Cohen, *supra* note 13, at 19; Michael E. McCullough et al., *Interpersonal Forgiving in Close Relationships*, 73 J. PERSONALITY & SOC. PSYCHOL. 321, 324 (1997); Orenstein, *supra* note 13, at 243–44; Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151, 163 (1973); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 52–53; Charlotte vanOyen Witvliet et al., *Please Forgive Me: Transgressors’ Emotions and Physiology During Imagery of Seeking Forgiveness and Victim Responses*, 21 J. PSYCHOL. & CHRISTIANITY 219, 228 (2002); Charlotte Witvliet et al., *Victims’ Heart Rate and Facial EMG Responses to Receiving an Apology and Restitution* (Oct. 2–6, 2002) (paper presented at the Forty-Second Annual Meeting of the Society for Psychophysiological Research) (abstract available in 39 PSYCHOPHYSIOLOGY S88 (Supp. 2002)).

35. Wagatsuma & Rosett, *supra* note 2, at 488; *see* FED. R. EVID. 408 advisory committee’s note (discussing part of the rationale of excluding evidence of offers to compromise, the committee explains that “[t]he evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position”); *see also supra* note 24 and accompanying text (discussing the importance of coupling apologies with compensation for apologies to be effective).

36. Wagatsuma & Rosett, *supra* note 2, at 488; *see also supra* note 29 and accompanying text.

of dispute resolution, rather than trial, is without a tool that serves these policy priorities more effectively than Rule 408 currently does.<sup>37</sup>

### III. A PROPOSED AMENDMENT TO RULE 408

Rule 408 was enacted to address the inadequacies in the traditional common law rules. Under common law, statements made during settlement negotiations were admissible in court unless posed as hypotheticals.<sup>38</sup> As a result, when one preceded a statement by uttering the phrase *without prejudice*, it helped ensure that the statement would be deemed hypothetical.<sup>39</sup> Rule 408 was created to address the difficulties that the common law reliance on legal formalisms presented to parties who may have been otherwise inclined to settle. The Federal Rules of Evidence Advisory Committee noted:

An inevitable effect [of these common law rules] is to inhibit freedom of communication with respect to compromise . . . . Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of [Rule 408] to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself.<sup>40</sup>

The underlying policy rationale of Rule 408 is to create a protected space between parties so as to encourage private settlement.<sup>41</sup> Rule 408, however, contains significant limitations that all but eviscerate this rationale. First, although Rule 408 classifies evidence as inadmissible only when it is used “to prove liability for, invalidity of, or amount of a claim,”<sup>42</sup> evidence may be offered for another purpose, such as “proving a witness’s bias or prejudice.”<sup>43</sup> Courts have construed this language to mean that such evidence is admissible when used to impeach a witness.<sup>44</sup> The practical implication of this interpretation is that if an offender apologizes during settlement negotiations and then denies doing so at

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37. Wagatsuma & Rosett, *supra* note 2, at 495; see *Williams v. First Nat’l Bank of Pauls Valley*, 216 U.S. 582, 595 (1910) (“Compromises of disputed claims are favored by the courts . . . .”); see also *infra* note 48 and accompanying text.

38. M.C. Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 675, 720 (1957) (explaining that “when made in hypothetical form, offers are inadmissible for the reason that they cannot be treated as an assertion representing the party’s actual belief”).

39. See Robert A. Weninger, *Amended Federal Rule of Evidence 408: Trapping the Unwary*, 26 REV. LITIG. 401, 430 (2007).

40. FED. R. EVID. 408 advisory committee’s note.

41. FED. R. EVID. 408 Senate Judiciary Committee report (explaining that “[t]he purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible”).

42. FED. R. EVID. 408(a).

43. FED. R. EVID. 408(b).

44. Cohen, *supra* note 12, at 1034 (describing the impeachability inference as a loophole within Rule 408 that “may de facto swallow the rule”).

trial, the apology might be deemed admissible.<sup>45</sup> Therefore, if the reasoning behind Rule 408 is to provide parties with enough certainty so as to allow them to speak freely without fear that their statements will be deemed admissible at trial, Rule 408 is fatally flawed.

Second, the aforementioned limitations notwithstanding, Rule 408 neither precludes such evidence from pre-trial discovery nor proscribes such evidence from being revealed to third parties.<sup>46</sup> Third, Rule 408 only bars those apologies made during “compromise negotiations,” which poses two problems: (1) It is not particularly clear as to when a compromise negotiation has begun; and (2) although a sincerely apologetic offender may want to apologize immediately after the harm, Rule 408 does not clearly classify such an apology as inadmissible.<sup>47</sup> Both of these problems serve to effectively obviate the creation of the protected space between parties that Rule 408 considers essential to making private settlements more likely. From this perspective, the central legal tension in the effective use of apology as an effective dispute resolution tool is not cultural—it is evidentiary.

Courts in the United States have long recognized a public policy in favor of private settlement between adversarial parties.<sup>48</sup> This policy is informed by the belief that private settlements make a more efficient court system<sup>49</sup> and reduce the adverse impact on the parties caused by litigation.<sup>50</sup> Private dispute resolution also allows the parties to craft resolutions that best fit their needs and desires.<sup>51</sup>

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45. *Id.* at 1035.

46. *See* Bolstad, *supra* note 13 at 572–73 (arguing that Rule 408 offers “scant protection for apologies made during the course of mediation,” Bolstad argues that the revelation of an apology to third parties may result in the apologizer being forced to defend numerous other suits resulting from such revelation).

47. FED. R. EVID. 408; FED. R. EVID. 408 House Judiciary Committee report (enacting a change to Rule 408 and reversing an earlier judicial practice which deemed statements offered in compromise negotiations admissible in subsequent litigation between the parties, the House Judiciary Committee notes that, “[f]or one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end”).

48. *See* St. Louis Mining & Milling Co. v. Mont. Mining Co., 171 U.S. 650, 656 (1898) (“[S]ettlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored . . . .”); *see also* Keahole Def. Coal., Inc. v. Bd. of Land & Natural Res., 134 P.3d 585, 605 (Haw. 2006) (“[T]his court has acknowledged the strong public policy in favor of settlement of claims.”).

49. *See* Long Term Mgmt., Inc. v. Univ. Nursing Care Ctr., Inc., 704 So. 2d 669, 673 (Fla. Dist. Ct. App. 1997) (“Settlements are highly favored as a means to conserve judicial resources . . . .”).

50. *See* Vill. of Kaktovik v. Watt, 689 F.2d 222, 231 (D.C. Cir. 1982) (noting that successful settlements avoid the expense and delay of litigation); *see also* David Luban,

Given such an unambiguous judicial preference for private settlements, one would expect the federal judiciary to continue taking affirmative steps in facilitating this policy. In line with both judicial preference and the public policy underlying Rule 408, this Article proposes that the language of Rule 408 be amended to protect a full apology<sup>52</sup> in four specific ways: (1) defining compromise negotiations as attaching immediately after an injury; (2) rendering an apology offered during compromise negotiations undiscoverable; (3) proscribing the admissibility of such apology to impeach a witness; and (4) proscribing the revelation of such apology to third parties. Incorporating the aforementioned definition of compromise negotiations, this Article's proposed Rule 408 would read:

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence made to any party, including any third party, in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority. (b) Permitted use. This rule does not require exclusion if the evidence is offered for purposes of proving an effort to obstruct a criminal investigation or prosecution.

Such an amendment would bring Rule 408 closer in line with the rule's original rationale.<sup>53</sup>

#### IV. WHAT EMPIRICAL EVIDENCE TELLS US

Professor Jennifer K. Robbennolt conducted a comprehensive empirical analysis regarding the role of apology in settling disputes, and her

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*Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995) (arguing that “[l]awsuits are expensive, terrifying, frustrating, infuriating, humiliating, [and] time-consuming . . .”).

51. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 502 (1985) (noting that parties are more likely to abide by agreements they make themselves).

52. See *supra* Part II for the Author's definition of a full apology.

53. FED. R. EVID. 408 Senate Judiciary Committee report (discussing the underlying rationale behind Rule 408, the Senate Judiciary Committee notes that “[t]he exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements—the encouragement of which is the purpose of the rule.”). Indeed, when explaining this rationale, the Advisory Committee went further in discussing the principle upon which Rule 408 is founded, noting that “[a] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.” *Id.*

findings suggest that a codification—such as the one proposed in this Article—will enhance Rule 408.<sup>54</sup> In her study, Robbennolt required her subjects to visit a website to read an accident hypothetical in which one party was injured.<sup>55</sup> The participants were assigned the role of the injured party and were asked to evaluate a settlement offer from the offending party.<sup>56</sup> Robbennolt introduced numerous control variables into the examination which enabled her to gauge how different types of apologies affected the likelihood of settlement and, most interestingly, whether a legally protected apology such as the one proposed here or an apology without protection affected the outcomes in any demonstrable manner.<sup>57</sup>

In describing the differing types of apologies, Robbennolt adopted language commonly used in recent scholarship regarding the utility of apology in fostering settlement between adversarial parties.<sup>58</sup> A “partial apology” is one in which the offending party expresses sympathy and hope for a rapid recovery, but does not accept responsibility for the accident causing the injury.<sup>59</sup> In her study, Robbennolt’s offender offered the following partial apology: “I am so sorry that you were hurt. I really hope that you feel better soon.”<sup>60</sup> A “full apology” includes the same expression of sympathy contained in the partial apology, but adds an acknowledgment of responsibility: “I am so sorry that you were hurt. The accident was all my fault. I was going too fast and not watching where I was going until it was too late.”<sup>61</sup>

The results of Robbennolt’s analysis were unambiguous. Those participants receiving a full apology were much more inclined to accept the settlement

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54. See generally Robbennolt, *Apologies and Legal Settlement*, *supra* note 13, at 462.

55. *Id.* at 483.

56. *Id.*

57. *Id.* at 484. Robbennolt controlled for several other variables in her empirical examination in addition to those mentioned here. For the purposes of this Article’s proposal, however, variables were not mentioned if they were not material to support the general notion that a legally protected apology has a favorable direct correlation with the inclination of parties to settle outside of court. See generally *id.*

58. See Mitchell A. Stephens, *I’m Sorry: Exploring the Reasons Behind the Differing Roles of Apology in American and Japanese Civil Cases*, 14 WIDENER L. REV. 185, 194 (2008).

59. See Robbennolt, *Apologies and Legal Settlement*, *supra* note 13, at 468–69.

60. *Id.* at 484 n.112.

61. *Id.*

offer<sup>62</sup> and found that the “offender who offered a full apology was seen as experiencing more regret, as more moral, and as more likely to be careful in the future than one offering a partial or no apology.”<sup>63</sup> As to the effects of whether evidentiary rules protected an apology or not, Robbennolt found:

Differences in evidentiary rules did not produce significant differences in settlement rates nor did they produce differences in participants’ perceptions and attributions. Importantly, there were no effects of the evidentiary rules on ratings of the sufficiency or sincerity of the apology given. Participants were, however, aware of the differences in the rules as they assessed the scenario; analysis of participants’ ratings of the likely motives for the apology revealed that apologies that were not protected by an evidentiary rule were seen as less likely to have been motivated by desire to avoid a lawsuit. Thus, participants were aware of the content of the different evidentiary rules, but did not adjust their assessments of the apologies received in response to those rules.<sup>64</sup>

Robbennolt further offers that there is “at present, no evidence to suggest that protected apologies will be less effective or less valued by claimants than unprotected apologies.”<sup>65</sup> Moreover, she argues that “providing evidentiary protection for apologies may serve to encourage the offering of apologies, or at least to signal that apologies are a desired response to an injury-producing event, without diminishing the value and effectiveness of apologies so offered.”<sup>66</sup> Thus, the full apology, whether protected or not, was viewed by the participants as more satisfactory than either a partial apology or no apology. With this data, Robbennolt empirically established that apologies affect harmed parties’ inclination to accept or reject a settlement offer and that “[o]nly the full, responsibility-accepting apology increased the likelihood that the offer would be accepted.”<sup>67</sup> The partial apology, by point of comparison, “increased participants’ uncertainty about whether or not to accept the offer.”<sup>68</sup>

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62. *Id.* at 485–86. When no apology was offered, 52% of participants indicated that they would definitely or probably accept the settlement offer, while 43% would reject it, leaving 5% uncertain. *Id.* When a partial apology was offered, 35% of participants were inclined to accept the offer, 25% were inclined to reject it, and 40% were uncertain. *Id.* at 486. When a full apology was offered, 73% of participants were inclined to accept the settlement offer, with only 13%–14% each rejecting the offer and remaining uncertain. *Id.*

63. *Id.* at 487 (footnotes omitted).

64. *Id.* at 490–91 (footnotes omitted).

65. *Id.* at 504.

66. *Id.* (footnotes omitted).

67. *Id.* at 491.

68. *Id.*

## V. STATE STATUTES THAT ENCOURAGE APOLOGIES

To date, thirty-five states—consistent with their characterization by Justice Brandeis as laboratories of democracy<sup>69</sup>—have enacted statutes designed to encourage apologies by providing evidentiary protections similar to the one proposed in this Article.<sup>70</sup> In 1986, Massachusetts became the first state to adopt an evidence rule designed to proscribe apologetic expressions of sympathy and benevolence from admissibility when used to prove liability in civil cases.<sup>71</sup> The statute 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.<sup>72</sup>

The catalyst and rationale of this statute is rooted in an ill-fated event, as described by Lee Taft:

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

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69. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

70. ARIZ. REV. STAT. ANN. § 12-2605 (2008); CAL. EVID. CODE § 1160(a) (Deering 2004); COLO. REV. STAT. § 13-25-135(1) (2008); CONN. GEN. STAT. § 52-184d(b) (2008); DEL. CODE ANN. tit. 10, § 4318(b) (2006); FLA. STAT. § 90.4026(c)(2) (Supp. 2008); GA. CODE ANN. § 24-3-37.1 (Supp. 2008); HAW. REV. STAT. § 626-1 (Supp. 2007); IDAHO CODE ANN. § 9-207(1) (Supp. 2008); 735 ILL. COMP. STAT. 5/8-1901(b) (Supp. 2008); IND. CODE § 34-43.5-1-4 (Supp. 2008); IOWA CODE § 622.31 (Supp. 2008); LA. REV. STAT. ANN. § 13:3715.5 (2006); ME. REV. STAT. ANN. tit. 24, § 2907(2) (Supp. 2007); MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (LexisNexis 2006); MASS. GEN. LAWS ch. 233, § 23D (2008); MO. REV. STAT. § 538.229 (2008); MONT. CODE ANN. § 26-1-814 (2007); NEB. REV. STAT. § 27-1201(1) (2008); N.H. REV. STAT. ANN. § 507-E:4 (Supp. 2007); N.C. GEN. STAT. § 8C-1, Rule 413 (2007); H.B. 1333, 60th Leg., Reg. Sess. (N.D. 2007); OHIO REV. CODE ANN. § 2317.43(A) (West Supp. 2008); OKLA. STAT. tit. 63, § 1-1708.1H(A) (Supp. 2009); OR. REV. STAT. § 677.082 (2007); S.C. CODE ANN. § 19-1-190(B) (2007); S.D. CODIFIED LAWS § 19-12-14 (2008); TENN. R. EVID. 409.1(a) (2008); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 2008); UTAH CODE ANN. § 78B-3-422(2) (Supp. 2008); VT. STAT. ANN. tit. 12, § 1912 (Supp. 2007); VA. CODE ANN. § 8.01-52.1 (2007); WASH. REV. CODE § 5.64.010(2) (Supp. 2008); W. VA. CODE § 55-7-11a(b)(1) (Supp. 2008); WYO. STAT. ANN. § 1-1-130(a) (2007).

71. See Robbennolt, *Apologies and Legal Settlement*, *supra* note 13, at 471.

72. MASS. GEN. LAWS ch. 233, § 23D (Supp. 2008).

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 [sic].<sup>73</sup>

Because the language of the Massachusetts law neglected to describe what constitutes "[s]tatements, writings or benevolent gestures expressing sympathy or a general sense of benevolence,"<sup>74</sup> it remained unclear as to whether an apology containing a clear admission of fault would be admissible.<sup>75</sup>

Texas, the next state to adopt such legislation, resolved this uncertainty by adopting similar language to the Massachusetts statute while making it clear 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 . . . ."<sup>76</sup> Thus, an admission of fault embedded within an apology is admissible evidence. By way of example, if a party driving a vehicle hit another party and the driver uttered the phrase, "I'm sorry that you were hurt," the statement would be inadmissible, as it is an apologetic statement of sympathy. If, on the other hand, the driver said, "I'm sorry that I hurt you," the statement would be admissible, as it is a clear apologetic admission of fault.<sup>77</sup> Such codification, therefore, effectively renders apologetic statements of sympathy or benevolence partial apologies. Subsequently, several other states enacted rules of evidence to protect such partial apologies.<sup>78</sup> Such apologies are said to encourage contrition and, consequently, promote the settlement of civil cases.<sup>79</sup> Robbenolt's study, however, makes plain that these partial apologies may very well be perceived by a harmed party to be no apology at all, and would thus be unlikely to encourage settlement between the parties.<sup>80</sup>

Though no hard empirical data exists that shows a positive correlation between partial apologies and lower civil litigation rates, states continue to pass and consider such partial apology legislation. A number of states, however, have narrowed their protections from civil cases in

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73. See Taft, *supra* note 13, at 1151 (footnote omitted).

74. MASS. GEN. LAWS ch. 233, § 23D (Supp. 2008).

75. See Cohen, *supra* note 14, at 827–28.

76. TEX. CIV. PRAC. & REM. CODE ANN. § 18.061(c) (Vernon 2008).

77. See Cohen, *supra* note 14, at 829–30 (discussing Rule 408's structural deficiencies).

78. See *supra* note 70.

79. See generally Cohen, *supra* note 12, at 1011; Cohen, *supra* note 14, at 843; Latif, *supra* note 13, at 291; Orenstein, *supra* note 13, at 223; Shuman, *supra* note 34, at 180.

80. See Robbenolt, *Apologies and Legal Settlement*, *supra* note 13, at 491 (discussing the lack of a correlation between the offering of a partial apology and the harmed party's inclination to forgo litigation).



general to focus exclusively on civil cases involving medical malpractice.<sup>81</sup> This change is perhaps due to the high degree of trust and intimacy that defines the relationship between doctor and patient as well as the increasingly high-profile nature of medical malpractice litigation.<sup>82</sup>

Victims of medical malpractice rely on the legal profession to provide them with information regarding how the medical error occurred, what constitutes just compensation,<sup>83</sup> and, notably, how to receive an apology from their doctors.<sup>84</sup> Such reliance, however, is proving to be increasingly ill-founded.<sup>85</sup> Even though few cases result in the victim filing a lawsuit<sup>86</sup> and even fewer cases result in lawsuits that end with large verdicts,<sup>87</sup> a recent surge of large jury awards has been driving medical premiums higher and encouraging plaintiffs and their lawyers to pursue litigation.<sup>88</sup> The U.S. General Accounting Office's 2003 report

81. See, e.g., OKLA. STAT. tit. 63, § 1-1708.1H(A) (Supp. 2008). The Oklahoma statute provides:

In any medical liability action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the plaintiff, a relative of the plaintiff, or a representative of the plaintiff and which relate solely to discomfort, pain, suffering, injury, or death as the result of the unanticipated outcome of the medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

*Id.*; see also OHIO REV. CODE ANN. § 2317.43(A) (West Supp. 2008); WYO. STAT. ANN. § 1-1-130(a) (2007).

82. See generally Robbenolt, *Role of Apologies*, *supra* note 13, at 1010 (discussing the increasing debate regarding medical error in medical literature, legal literature, and the popular press).

83. See Richert Quinn, Med. Dir., COPIC, COPIC's 3Rs Program: Recognize, Respond to and Resolve Patient Injury, available at <http://sorryworks.net/files/3rsaosreq.ppt> (last visited Jan. 20, 2009); see also Max Douglas Brown et al., *Alternative Dispute Resolution Strategies in Medical Malpractice*, 6 DEPAUL J. HEALTH CARE L. 249, 265-66 (2003).

84. Carol Patton, *Physicians Wary of JCAHO Rules on Medical Errors*, PHYSICIANS FIN. NEWS, Sept. 15, 2001, [http://www.doctorquality.com/www/news/news\\_091501.htm](http://www.doctorquality.com/www/news/news_091501.htm) (discussing that patients and their families first want the facts, then an apology, and then money, which comes in a "distant third").

85. Quinn, *supra* note 83. The litigation system is designed as an adversarial system that is defined by drawn-out and expensive disputes, which provides unfair compensation and often shatters the physician-patient relationship. *Id.*

86. See Jeffery O'Connell & James F. Neale, *HMOs, Cost Containment, and Early Offers: New Malpractice Threats and a Proposed Reform*, 14 J. CONTEMP. HEALTH L. & POL'Y 287, 294 (1998).

87. *Id.* at 295.

88. See OFFICE OF DISABILITY, AGING, AND LONG-TERM CARE POLICY, U.S. DEP'T OF HEALTH & HUMAN SERVS., UPDATE ON THE MEDICAL LITIGATION CRISIS: NOT THE

on escalating medical malpractice premiums found that the primary reason for this rise was the losses incurred by insurance companies in medical malpractice litigation.<sup>89</sup> As a result of this vicious cycle, doctors and hospitals are currently facing a crisis of increasing malpractice insurance costs.<sup>90</sup> One increasingly utilized method to break this cycle, however, is for a doctor to say “I’m sorry” before saying “see you in court.”<sup>91</sup>

Hospitals are progressively becoming open to the notion that an apology can lower litigation rates and encourage healthier relationships between doctors and their patients.<sup>92</sup> Unsurprisingly, the initial apprehension of apologizing stems from defense attorneys whose mantra in situations of medical error is “deny and defend.”<sup>93</sup> As Lucian Leape of Harvard Medical School explained:

For decades, lawyers and risk managers have claimed that admitting responsibility and apologizing will increase the likelihood of a patient filing a malpractice suit and be used against the doctor in court if they do sue. However, this assertion, which on the surface seems reasonable, has no basis in fact. There is to my knowledge not a shred of evidence to support it. It is a myth.<sup>94</sup>

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RESULT OF THE “INSURANCE CYCLE” (2002), <http://aspe.hhs.gov/daltcp/reports/mlupd2.htm>. The median jury award has more than doubled from \$475,000 in 1996 to \$1,000,000 in 2000. *Id.*

89. U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 3–4 (2003). The report explains that the increase in “paid losses” increases premiums for several reasons:

First, higher paid losses on claims reported in current or previous years can increase insurers’ estimates of what they expect to pay out on future claims. Insurers then raise premium rates to match their expectations. In addition, large losses . . . on even one or a few individual claims can make it harder for insurers to predict the amount they might have to pay on future claims.

*Id.* at 22. The report further argues that the tendency to expect higher losses intuitively results in higher premium rates. *Id.*

90. Hillary Rodham Clinton & Barack Obama, *Making Patient Safety the Centerpiece of Medical Liability Reform*, 354 NEW ENG. J. MED. 2205, 2205 (2006).

91. See Kevin Sack, *Doctors Start to Say ‘I’m Sorry’ Long Before ‘See You in Court,’* N.Y. TIMES, May 18, 2008, at A1, A21 (describing the success of voluntary disclosure and fault-admitting apology programs in hospitals across the country). Although these disclosure programs developed independently of the apology legislation discussed in this Article, they provide clear evidence of the correlation between fault-admitting apologies and lower litigation rates. *Id.* Since enacting the disclosure program, the University of Michigan Health System has seen existing claims and lawsuits drop from 262 in August 2001 to 83 in August 2007. Moreover, the number of malpractice filings against the University of Illinois dropped by half since the initiation of the disclosure program two years ago. *Id.*

92. *Id.*

93. Telephone Interview with Doug Wojcieszak, Founder & Spokesperson, Sorry Works! Coalition (May 23, 2008).

94. Lucian L. Leape, *Full Disclosure and Apology—An Idea Whose Time Has Come*, PHYSICIAN EXECUTIVE, Mar.–Apr. 2006, [http://findarticles.com/p/articles/mi\\_m0843/is\\_2\\_32/ai\\_n16123939](http://findarticles.com/p/articles/mi_m0843/is_2_32/ai_n16123939).

Debunking this myth is the mission of the Sorry Works! Coalition, a grassroots organization comprised of physicians, insurers, patients, attorneys, hospital administrators, and researchers.<sup>95</sup> The Coalition pursues three central goals: (1) educate the public and stakeholders about the power of disclosure and apology; (2) serve as an organizing force and central clearinghouse for information on full-disclosure methods; and (3) lobby for the development of the Sorry Works! programs in hospitals across the nation.<sup>96</sup> As defense attorneys promulgate the “deny or defend” ethos that has taken root in hospitals across the country,<sup>97</sup> the Coalition continues to support the passage of apology legislation.<sup>98</sup>

One such piece of legislation, the National Medical Error Disclosure and Compensation Program, the National MEDiC Act,<sup>99</sup> was drafted by Doug Wojcieszak, the Coalition’s founder, and co-authored by then-Senators Hillary Clinton and Barack Obama.<sup>100</sup> The bill was initially intended to provide protection for full apologies in medical malpractice

95. The Sorry Works! Coalition, <http://www.sorryworks.net> (last visited Jan. 20, 2009). The Sorry Works! Coalition website is a comprehensive source for all issues and developments involving full disclosure.

96. See generally Doug Wojcieszak et al., *The Sorry Works! Coalition: Making the Case for Full Disclosure*, 32 JOINT COMMISSION J. ON QUALITY & PATIENT SAFETY 344 (2006).

97. Doug Wojcieszak, Founder & Spokesperson, Sorry Works! Coalition, Sorry Works! Testimony Before the South Carolina Senate (Aug. 16, 2005), available at <http://www.sorryworks.net/media34.phtml>. Defining and critiquing the “deny and defend” ethos, Wojcieszak testified:

This is where defense lawyers sweep in [to] tell doctors and medical staff to keep quiet. I’m here to tell you today that deny and defend is a tried and failed risk management strategy. It produces anger and it’s a big part of the reason we have a medical liability crisis.

*Id.* Tim McDonald, the chief safety officer at the University of Illinois Medical Center Chicago, recently delivered a speech at Loyola University Chicago and retold a story about how in interviewing defense firms, he opened with the following hypothetical situation: A patient undergoes surgery to have a leg removed, but doctors mistakenly amputate the wrong leg. There is no question the hospital is at fault. When McDonald asked how the defense firms would handle the botched surgery, twelve of the sixteen firms counseled deny and defend, and one even advocated “altering the medical record to imply that the ‘wrong leg’ needed to be removed anyway!” *New Disclosure Program at University of Illinois Medical Center in Chicago*, SORRY WORKS! NEWSLETTER (Sorry Works! Coal., Glen Carbon, Ill.), June 25, 2007, <http://www.sorryworks.net/uofi.phtml>.

98. See Sorry Works! Coalition, <http://www.sorryworks.net> (last visited Jan. 20, 2009).

99. National Medical Error Disclosure and Compensation Program, S. 1784, 109th Cong. § 935(d)(1)(B) (2005).

100. Telephone Interview with Doug Wojcieszak, *supra* note 93.

cases.<sup>101</sup> Another intended effect of the bill was to protect state apology laws that conflict with Rule 408.<sup>102</sup> However, there were disagreements as to whether the language for the full apology should be written into the bill, whether the language should specifically define how the bill would preempt state law, or whether Congress's power to regulate interstate commerce<sup>103</sup> would make such language redundant.<sup>104</sup> As it were, the full apology language never made it into the final version of the bill, effectively rendering the bill a protection for partial apologies.<sup>105</sup> The bill ultimately died in committee.<sup>106</sup>

Consistent with the results of Robbennolt's study,<sup>107</sup> Colorado became the first state to pass an apology statute that protected full apologies delivered in medical malpractice cases from admissibility.<sup>108</sup> To date, Colorado is one among only four states to protect full apologies.<sup>109</sup> The Colorado statute provides, in relevant part:

In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, [or the victim's relatives or representatives] and which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability . . . .<sup>110</sup>

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101. National Medical Error Disclosure and Compensation Program, S. 1784, 109th Cong. § 935(d)(1)(B) (2005).

102. Telephone Interview with Doug Wojcieszak, *supra* note 93.

103. The power to regulate interstate commerce is a power granted exclusively to Congress by the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 3.

104. Telephone Interview with Doug Wojcieszak, *supra* note 93.

105. See *supra* Part II for Author's definition of partial apology. Similar to the aforementioned state apology laws that do not protect an admission of fault, the bill sought to protect expressions of remorse. National Medical Error Disclosure and Compensation Program, S. 1784, 109th Cong. § 935(d)(1)(B) (2005). The bill read, in relevant part:

An agreement that any apology or expression of remorse by a doctor or other designated health care provider at any time during the negotiations shall be kept confidential and shall not be used in any subsequent legal proceedings as an admission of guilt if such negotiations end without an offer of compensation that is acceptable to both parties.

*Id.*

106. Telephone Interview with Doug Wojcieszak, *supra* note 93.

107. See Robbennolt, *Apologies and Legal Settlement*, *supra* note 13, at 491 (discussing the ineffectiveness of partial apologies in encouraging settlement); see also discussion *supra* Part IV.

108. See Jonathan R. Cohen, *Toward Candor After Medical Error: The First Apology Law*, 5 HARV. HEALTH POL'Y REV. 21, 22 (2004).

109. ARIZ. REV. STAT. ANN. § 12-2605 (Supp. 2007); CONN. GEN. STAT. § 52-184d(b) (Supp. 2008); GA. CODE ANN. § 24-3-37.1 (Supp. 2005).

110. COLO. REV. STAT. § 13-25-135(1) (2005).

As Colorado's law protects full apologies, it should theoretically decrease the incidence of medical malpractice suits.<sup>111</sup> As a state privilege, however, Colorado's statute is not guaranteed deference in federal courts in cases involving federal causes of action. By way of illustration, a Colorado evidentiary statute was recently put to the test in federal courts in a medical malpractice case.<sup>112</sup> Noting the Supreme Court's caution that a state's evidentiary privilege should not be recognized or applied unless it promotes sufficiently important interests to outweigh the need for probative evidence, the court held that such a privilege does not bar discovery requests in a federal case involving pendent state jurisdiction.<sup>113</sup> Thus, Colorado's apology legislation, similar to apology legislation in every other state, does not have guaranteed protection for either partial or full apologies. As a consequence, defense attorneys will likely have little confidence in the reliability of state apology laws. Much like the original intent of the National MEDiC Act, the amendment to Rule 408 proposed in this Article would effectively assuage such doubts through creation of a protected space between parties, and this protection would also work to encourage private settlements.

## VI. CRITIQUES OF APOLOGY LAWS

Critics of such apology laws, most notably Lee Taft, are concerned that the sympathetic statements protected by apology laws may become insincere, commodifying<sup>114</sup> behavior that manipulates harmed parties

111. See Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 *FORDHAM URBAN L.J.* 1447, 1447 (2000); Hickson et al., *supra* note 29, at 1359; Vincent et al., *supra* note 29, at 1609; Witman et al., *supra* note 29, at 2566; see also *supra* note 62 and accompanying text.

112. *Atteberry v. Longmont United Hosp.*, 221 F.R.D. 644, 646 (D. Colo. 2004).

113. *Id.* at 646-47.

114. See Taft, *supra* note 13, at 1146. Taft acknowledges and opposes the use of apology as a commodity: "[A]pology is frequently commodified in the legal arena, where a moral process can become a market trade." *Id.* Taft cites a Missouri Supreme Court case, in which a Missouri attorney, who was held in contempt and ordered into custody, had the contempt decree vacated after she apologized. *Id.* at 1146-47 (citing *In re Coe*, 903 S.W.2d 916, 916 (Mo. 1995) (en banc)). The same attorney was later found guilty of professional misconduct and initially suspended from practice for six months, but after issuing a public apology, she was instead given only a public reprimand. *In re Coe*, 903 S.W.2d at 918, 921 (Covington, J., dissenting). According to Taft, the attorney's behavior demonstrates that when apology is used only as a commodity, its moral value is vitiated. Taft, *supra* note 13, at 1147; see also Cohen, *supra* note 13. Cohen also acknowledges that the moral process has become an economic tool in that a victim "may be less likely to sue if she receives an apology, and even if she does sue, an

into being duped into accepting too little compensation,<sup>115</sup> thereby obviating the moral purpose of apology. In *Apology Subverted: The Commodification of Apology*, Taft argues that when civil defendants make apologies under the protection of statutes which exclude them from admission as evidence, the apology loses its moral purpose:

When lawyers, legislators, judges, and mediators disrupt this [moral dialectic] process by viewing apology in utilitarian terms, they subvert the moral potential of apology in the legal arena. When the performer of apology is protected from the consequences of the performance through carefully crafted statements and legislative directives, the moral thrust of apology is lost. The potential for meaningful healing through apologetic discourse is lost when the moral component of the syllogistic process in which apology is situated is erased for strategic reasons.<sup>116</sup>

In regards to such apologies being both insincere and delivered for strategic reasons, these apologies are not necessarily ineffective because:

[T]o be successful, an apology must meet the needs of the offended party, such as the restoration of dignity, acknowledgement of shared values, reparations, and the like. To believe that a “pragmatic” apology is somehow less truthful or less effective than a more impassioned one is to value style over substance, as if we believe that the manner in which an apology is delivered is more important [than] the goals it seeks to achieve. . . . As long as an apology meets important psychological needs of the offended, . . . we should not diminish its effectiveness by becoming critics.<sup>117</sup>

Moreover, arguing that almost all apologies offered in efforts to avoid litigation have a degree of insincerity, Wagatsuma and Rosett contend that sensible Americans would do well to recognize that an apology is a useful tool in dispute resolution, even if there is some doubt about an apology’s sincerity.<sup>118</sup> Indeed, Wagatsuma and Rosett go on to argue that “[a] process built around apology and compensation would fit well into a justice system that increasingly seeks to resolve conflicts by

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apology could help facilitate settlement.” *Id.* Apology is thus regarded as a bargaining chip that correlates to the amount of the settlement.

115. See Cohen, *supra* note 12, at 1015–17; Cohen, *supra* note 14, at 825; see also O’Hara & Yarn, *supra* note 13, at 1186 (“[A]pology can be used as a tool for organizations to strategically take advantage of individual victims’ instincts to forgive in the face of apology.”); Levi, *supra* note 13, at 1171 (“For instance, critics might ask, if a plaintiff settles because she’s emotionally fulfilled by an apology, isn’t she being duped out of her legal entitlement—an entitlement that the apology itself makes concrete?”). There is also some empirical evidence that suggests the existence of an apology “script,” in that the offender’s apology will be followed by the recipient’s forgiveness of that apology. See Mark Bennett & Christopher Dewberry, “I’ve Said I’m Sorry, Haven’t I?” *A Study of the Identity Implications and Constraints That Apologies Create for Their Recipients*, 13 CURRENT PSYCHOL. 10, 11 (1994).

116. Taft, *supra* note 13, at 1157.

117. See AARON LAZARE, ON APOLOGY 157–58 (2004) (discussing the growing importance of public and private apologies in U.S. culture).

118. See, e.g., Wagatsuma & Rosett, *supra* note 2, at 477, 495.

settlement, mediation, or alternative methods of dispute resolution, rather than trial.”<sup>119</sup>

Given that no one can divine the motivations and emotional responses of those individuals who agree to resolve their dispute through apology, no one can say with any degree of certainty whether the harmed party is, in fact, being “duped.”<sup>120</sup> Consequently, the party who is supposedly being duped is also arguably taking into consideration the fact that an apology delivered in an effort to forgo litigation might not be completely sincere. The harmed party is therefore simply concluding that the apology, discounted by the possibility that it might be insincere, is worth more than the larger award out of which it is allegedly being duped, because otherwise the harmed party would simply sue despite the apology.

Taft further argues that “when the legal evidentiary ‘impediment’ of admission is removed, the moral dimension of apology is entirely eclipsed.”<sup>121</sup> In response, it is not entirely clear what moral dimension is being referenced, and it is unclear whether moral dimensionality is even an appropriate metric to utilize. This moral dimension could be Zoroastrian, Judeo-Christian, Humanist, Atheist, or the myriad other teleological beliefs that inform the concept of morality. Regardless of the moral dimension relied upon, instead of referring solely to metaphysical concepts as a base from which to critique the viability of such legal mechanisms, it may be more instructive to gauge fairness by what the two parties in a dispute perceive to be a fair resolution. Notably, this is precisely the metric that the Advisory Committee contemplates as the overriding policy priority in their construction of Rule 408.<sup>122</sup> This is not to suggest that morality has no place in this discussion, though, because parties remain free to end compromise negotiations whenever they feel the negotiation is in bad faith. Moreover, neither party is barred from having an attorney present to see to the client’s best interests during said negotiations. However, in critiquing the effects of a rule, such as the one this Article proposes, it is more apropos to look to the legislative intent of Rule 408—which is to create a protected space between parties so as

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119. *Id.* at 495 (citing Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 789 (1984)).

120. Taft, *supra* note 13, at 1159 (arguing that harmed parties must not be “duped into trading [their] resentment for the [offender’s] gain”); *see also* Levi, *supra* note 115 and accompanying text. For Taft to suggest some of these individuals are being “duped” may be quite insulting to their intelligence. White, *supra* note 13, at 1296.

121. Taft, *supra* note 13, at 1150.

122. *See supra* note 41 and accompanying text.

to encourage private settlement<sup>123</sup>—rather than look to the intent of one’s own particular teleological perspective.

## VII. CONCLUSION

Debates about relationships between apology and law are intense in part because stakeholders with different interests and world views make different assumptions about the extent to which changes in legal rules can encourage private settlements between adversarial parties. This Article has suggested that apologies are an important dispute resolution tool. An amendment to Rule 408, which would prevent full apologies offered during compromise negotiations from being admissible in civil cases, would encourage private settlements. Although some scholars assert that a fully protected apology is fraught with moral ambiguity, evidence suggests that such an assertion is flawed. Growing evidence suggests that the fully protected apology is both good business and consistent with U.S. cultural values.

Often, lawsuits begin with an offender who would like to apologize, but who also fears a lawsuit. He then refrains from apologizing, and the absence of this apology is precisely what triggers the lawsuit.<sup>124</sup> Consistent with the underlying policy priority of Rule 408, this Article’s proposed amendment to Rule 408 effectively limits such a fear of suit by creating a federally protected space between parties which encourages private settlement, thereby conserving the judicial resources consumed by litigation.

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123. *Id.*

124. *See* Cohen, *supra* note 12, at 1011.