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APOLOGY EXCEPTED: INCORPORATING A FEMINIST ANALYSIS INTO EVIDENCE POLICY WHERE YOU WOULD LEAST EXPECT IT

Aviva Orenstein*

I. INTRODUCTION

“Some persons hold,” he pursued, still hesitating, “that there is a wisdom of the Head, and that there is a wisdom of the Heart. I have not supposed it so; but, as I have said, I mistrust myself now. I have supposed the head to be all-sufficient. It may not be all-sufficient; how can I venture this morning to say it is!”

—Charles Dickens¹

Evidence law derives from a combination of logic, policy, tradition, and historical anomaly. Many have observed that the law of evidence is based on concepts of relevance and fairness that seem

* Associate Professor of Law, Indiana University School of Law, Bloomington. I wish to thank the following people for their assistance, support, and good advice: Rabbi Debby Orenstein, Professors Roger Park, Myrna Raeder, Andrew Taslitz, and all those who participated in that informal “ideas lunch” convened at Indiana School of Law, Bloomington to discuss this topic, especially Hannah Buxbaum, Seth Lahn, Lauren Robel, and Susan Williams. Special thanks also to Ruthie Cohen, Madi Hirschland, Jessica Mott, and David Szonyi, whose good editing is only surpassed by their deep friendship. I appreciate the research assistance of Erika Schneider, Heather DeCoursey, Dorie Hertzell, and Tabitha Tyle. I apologize to my wonderful secretary, Terry Kaczmarek, who has typed multiple drafts and is sorry that she ever laid eyes on it. Obviously, all mistakes are my own.

Finally, I wish to dedicate this Article to my grandmother, Libby Mowshowitz, of blessed memory, who passed away June 11, 1998, 17 Sivan 5758. In a letter dated December 19, 1993, which she left for her children to be read upon her death, she wrote: “I don’t claim any other accomplishment in my life except for my two children. I hope I go soon before I give you much more trouble. I apologize if I don’t.” She lived a rich life, with humor, dignity, meaningful friendships, and a keen sense of social responsibility. My grandmother apologized often, almost reflexively, but rarely was ever at fault. As a peacemaker and social conscience, she was an inspiration. She will be deeply missed.

1. CHARLES DICKENS, *HARD TIMES* 199-200 (J. M. Dent & Sons, Ltd. 1979) (1907).

remarkably unreflective.² As part of that intellectual self-satisfaction, the *Federal Rules of Evidence* exude confidence that the rules are neutral and rational, and as such, most likely to achieve fair and socially useful results.

In this Article, I offer a feminist critique to challenge the Federal Rules' so-called objectivity and neutrality. In Part II, I apply a feminist analysis to argue that the evidence rules are not neutral or objective, nor could they ever be. Even where the rules of evidence do not claim to be relying on or transmitting values, they nevertheless do so. The Rules purport to elevate logic over emotion. I suggest that the "logic" embedded in evidence rules is laden with cultural biases and that emotion, if properly understood, has a legitimate role to play in crafting evidence policy. In addition, as a practical matter, the rules may discriminate against the cognitive and linguistic styles of women and other subordinate groups.

My focus is on evidence rules that avowedly and unabashedly promote extrinsic policies. In Part III, I briefly consider two such evidence rules: Rule 407, which prohibits evidence of remedial repair,³ and Rule 408, which prohibits evidence of compromise or offer to compromise.⁴ These two rules articulate social goods, aspire to social goals, and inevitably reflect assumptions about human behavior. The policies underlying these rules, though interesting and defensible, are not self-evident and certainly not neutral. They reflect cultural values and presumptions, rather than human truths.

2. See, e.g., Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 Nw. U. L. REV. 995, 995-96 (1994).

3. Rule 407 provides:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FED. R. EVID. 407.

4. Rule 408 provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

In Part IV, I propose a new evidence rule, the apology exception. Like Rules 407 and 408, my proposed rule would apply in civil cases.⁵ My proposed rule would serve as an exception to the general principle that statements by party-opponents are admissible at trial.⁶ Generally, such statements are deemed admissions and are admissible despite their hearsay status.⁷ Like Rules 407 and 408, my proposed exception to the party admissions rule arises from suppositions about human nature and the related policy analysis of how to influence behavior through the evidence rules. My proposed apology doctrine, however, reflects a different view of human psychology. It does not derive exclusively from the highly rationalistic, arid wisdom of the "head." Instead, my proposal also relies on wisdom of the "heart." It emanates from feminist values that are concerned with power, relationships, and finding practical contextual solutions to social problems. Even apologies that originate from self-protection, which are not entirely sincere or fully contrite, serve a vital social purpose. I posit that apologies are especially important for subordinate groups, who often feel unnoticed, and whose wrongs have gone unacknowledged. In addition, my interest in applying a feminist analysis is sparked because arguably women are disproportionately inclined to apologize and may suffer the legal consequences of the use of their apology as an admission against them.

Finally, in Part V, I apply the proposed apology exception to the specific problem of doctors who commit medical errors. Feminist insights into power differentials and feminist advocacy of an ethic of

5. *But cf.* DAVID LEONARD, *THE NEW WIGMORE: SELECTED RULES OF LIMITED ADMISSIBILITY* § 2.2, at 2:3-2:4 (Richard D. Friedman ed., Supp. 1999) (noting that Rule 407 could technically arise in a criminal case in which "negligence or culpable conduct" is an issue).

6. Rule 801(d)(2) provides:

Admission by party-opponent. 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, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

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

7. As out-of-court statements used to prove the truth of the matter asserted, such apologies would fit the definition of hearsay (e.g., "Sorry I ran the stop sign, to prove that the declarant ran the stop sign"). See FED. R. EVID. 801(a)-(c) (defining a hearsay statement, declarant, and hearsay itself).

care support the need for an apology exception in medical malpractice cases. My proposal would allow doctors to be forthcoming, and encourage patients to trust their doctors and feel valued by them. Disclosure and apology are imperative for a patient's physical, emotional, and spiritual health; they are beneficial for a doctor as well. Society benefits when doctors can face their mistakes and learn from them. We all benefit from less litigation and more supportive interaction, including forgiveness.

II. A FEMINIST CRITIQUE OF EVIDENCE LAW

Feminist analyses of evidentiary law have focused primarily on rape law because disrespect and disbelief of the rape survivor in the courtroom beg for feminist analysis and concern.⁸ But feminist analysis of evidence need not stop there. Feminists are interested in the subtle biases and preferences in the law. Evidence law, with its concerns about relevance and credibility, is an exciting subject for feminist analysis.⁹

Evidence law has been called optimistic¹⁰—I believe it borders on smug—in its faith in rationalism. The *Federal Rules of Evidence*¹¹ have departed in some respects from the common law of evidence¹²

8. See generally, e.g., Kathy Mack, *Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327 (1993) (focusing on the "particular problem facing women who testify about rape—the need for corroboration"—and describing barriers to women's credibility in courtroom settings by "drawing on social-psychological research and task force reports on gender bias in the courts"). Interesting work has also been done on spouse abuse evidence. See generally Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463 (1996); Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283 (1992).

9. See, e.g., Mack, *supra* note 8, at 331 (discussing women's problems in gaining respect and credibility in the courtroom by drawing on psychological research and gender task force reports); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 127 (1996) (exploring questions of credibility and relevance, the author argues that "[c]ourts must first allow women's stories into evidence, and then they must take these stories seriously").

10. See WILLIAM TWINING, *RETHINKING EVIDENCE* 75 (1990).

11. The *Federal Rules of Evidence*, adopted in 1975, have been around now for over twenty years; only recently, with the appointment of an advisory committee overseeing the rules, have we seen a move toward updating and making changes. See Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 142 F.R.D. 519, 521 (1992).

12. Some examples are: the Federal Rules are less restrictive of opinion evidence. See FED. R. EVID. 701 (allowing lay opinion testimony that is rationally based on perception and helpful to the trier of fact). Expert scientific testimony is now governed by a rule of reliability instead of the older *Frye* test. See FED. R. EVID. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579,

and tend to favor admissibility.¹³ Nevertheless, the Federal Rules have perpetuated most of the common law's prevailing policies, as well as its focus on logic and suspicion of emotion.¹⁴

For instance in its commentary to Rule 403, the Advisory Committee's Note specifically explains that "[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."¹⁵ Evidence law is premised on the notion that the grand tradition of Anglo-American courtroom procedure—blessed by history, enhanced by logical analysis, hampered in part by pesky juries—will reach the right result in deciding evidence questions. The result is not held up as objective truth (few claim that anymore), but a respectable cousin: a reasonable resolution to end the dispute arrived at through neutral rules that treat everyone equally and allow for fair administration of justice.¹⁶

A feminist critique points out the fallacy in this naive and sometimes willfully blind belief in the neutrality of evidence rules. Feminist method "identif[ies] the gender implications of rules and practices

587, 590 (1993); *cf.* *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (providing for the admission of scientific evidence that has "acquired general acceptance in the particular field in which it belongs"). Conspiracy need not be proved entirely by independent evidence to qualify a statement as a coconspirator's admission. *See* FED. R. EVID. 801(d)(2)(E). The rules also provide a residual exception to the hearsay rule. *See* FED. R. EVID. 807 (allowing the admission of certain hearsay statements that have "circumstantial guarantees of trustworthiness"). Moreover, the Federal Rules' version of the best evidence rule is not preoccupied with locating the original document, and in many cases will permit the admission of a copy. *See* FED. R. EVID. 1004 (allowing the admission of a copy where an original is lost, destroyed, not obtainable, in the possession of the opponent, or relates to a collateral matter in the case).

13. Rule 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402. *See generally* Edward J. Imwinkelreid, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129 (1987).

14. *See, e.g.*, Hunter, *supra* note 9, at 129-30, 158 ("The rules of evidence clearly embody Enlightenment epistemology. They privilege fact over value, reason over emotion, presence over absence, physical over psychological perceptions." (citations omitted)).

15. FED. R. EVID. 403 advisory committee's note.

16. *Cf.* FED. R. EVID. 102 (advocating the fair administration of justice as one purpose of the Federal Rules, along with the ascertainment of truth); *cf. also* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 414 (1989). Mengler opined that:

The drafters believed that the trial process itself and the traditional rules of evidence are imperfect tools in getting at the truth of a particular controversy All things considered, trial procedures, including evidentiary rules, provide litigants with an acceptably fair means for resolving their disputes. But few believe—least of all the drafters of the Federal Rules—that detailed evidence rules can be devised which, if mechanically applied, would be appropriate for every controversy.

Id.

which might otherwise appear to be neutral or objective."¹⁷ By applying feminist method we can examine how evidence rules are gendered, that is to say, how the rules reflect the sexual power and social dynamics in our culture, how women may be underrepresented in the evidence rules, and how women's insights may be ignored.¹⁸

As outsiders—in legal culture, as well as the culture at large—women have a unique perspective to offer. This perspective is fairly easy to imagine when the subject is rape law. I hope, however, to demonstrate the relevance of feminist analysis to rules that appear neutral and to propose changes arising from those insights.¹⁹

There is no one feminist approach, and feminist scholarship often identifies various and sometimes contradictory branches of thought. "Difference feminism" emphasizes that a woman's "voice" is different from that of a man's.²⁰ Without necessarily claiming that all women are naturally or essentially different from all men, difference feminists draw generalized distinctions between the genders, noting that women tend to value personal relationships and seek connection with other people, relying on "webs of interconnectedness."²¹ Difference feminism holds that women prefer consensus rather than hierarchy and

17. Katharine T. Bartlett, *Feminist Legal Methods [1990]*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 371 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991). Bartlett set out a method for feminist analysis that is designed to "reveal features of a legal issue which more traditional methods tend to overlook or suppress." *Id.*

18. See, e.g., Marilyn MacCrimmon, *A Forum on Lavalley v. R.: Women and Self-Defence*, 25 U.B.C. L. REV. 23, 36 (1991) (examining the Supreme Court of Canada's decision in *Lavalley* and how the rules of evidence law fail "to take into account experiences that differ from the dominant view of human behaviour" and how this may contribute to the silencing of women).

19. See Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 430-52 (1991). Kinports's article is among the first to avowedly attempt a feminist critique of evidence offering insights into how the evidence rules may ignore the experiences of women and instead reflect male values and norms. See *id.*

20. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) (discussing the differences between how men and women reason morally and consider relationships). Difference feminists reject a parity based approach aimed solely at encouraging gender-blindness, arguing that formal equal treatment can be hollow if it does not respect the real-life different experiences of women. See, e.g., Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 72-73 (1988) (discussing the Supreme Court's so-called equality of treating "pregnant persons" differently from "non-pregnant persons"). See generally Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

21. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 28-30 (1988) (discussing the work of Carol Gilligan); see also Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 40 (1985) (summarizing psychological and sociological research that "has postulated that women grow up in the world with a more relational and affiliational concept of self than do men").

status.²² Women distrust abstract, rights-based argument and, instead, prefer context-based decisionmaking.²³

Dominance feminists focus on disparities in power, rather than style, ethic, or ways of thinking. These feminists analyze women's place in society by examining male subjugation of women, focusing particularly on sex.²⁴ They believe that women's subjugation stems not merely from discrimination or society's failure to appreciate women's unique roles and perspectives.²⁵ Rather, dominance feminists believe oppression of women stems from threats to women's safety and physical integrity.²⁶

Postmodernist feminism rejects the notion that gender is natural or fixed.²⁷ Postmodernist feminism does not accept identity as fixed,

22. See generally Kinports, *supra* note 19, at 419, 423 (offering a feminist critique of evidence rules as formal, abstract, overly complex, and hierarchical). See also Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 428 (1992) (applying game theory to the question of why women acquire less property than men, and postulating that women have "a greater taste for cooperation").

23. See Menkel-Meadow, *supra* note 21, at 48 (observing that "[m]en focus on universal abstract principles like justice, equality and fairness so that their world is safe, predictable and constant. Women solve problems by seeking to understand the context and relationships involved and understand that universal rules may be impossible"); see also MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 193 (1990) (stating that "[b]y grounding concern for relationships in the social and historical experience of women, feminist studies in many fields avoid floating abstractions and help to articulate and sustain value judgements amid the challenges of relativism").

24. See Kathryn Abrams, *Sex War Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 304 n.1 (1995) (describing dominance feminism as "that strand of feminist (legal) theory that locates gender oppression in the sexualized domination of women by men and the erotization of that dominance through pornography and other elements of popular culture").

25. See, e.g., Lisa R. Pruitt, *A Survey of Feminist Jurisprudence*, 16 U. ARK. LITTLE ROCK L.J. 183, 198 (1994). Dominance theory is also influenced by marxism's focus on economic differences, noting that women's lack of political power reflects their dependent economic status. See *id.* at 197 (noting that Catharine MacKinnon, dominance feminism's "best known proponent," once analogized marxism to feminism). "MacKinnon opined that '[s]exuality is to feminism what work is to marxism: that which is most one's own, yet most taken away.'" *Id.* at 97 & n.75 (quoting Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 515 (1982)).

26. See, e.g., Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 796 (1991) ("Women remain reproductively colonized, subjected to systemic physical and sexual insecurity and violation, and blamed for it").

27. See John A. Powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1497 (1997); Nancy Levit, *Feminism For Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1050 (1996) ("Femininity is socially constructed, and knowledge, rather than consisting of objective, timeless truths, is situational and constructed from a confluence of multiple perspectives."). "By refusing to treat gender as if it were the 'truth' about men and women, the postmodern account focuses our attention on the external forces, such as law, that construct gender." Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1974-75

stable, or transparent, but instead as inherent.²⁸ Postmodernist feminists focus particularly on the way legal language restricts women.²⁹

Using the literary tool of deconstruction, postmodernist feminists rely on multiple reinterpretations to unsettle fixed notions of gender.³⁰ Because, according to postmodernist feminism, little is determinate or static, grand theorizing or all-encompassing solutions have little utility. Postmodernist feminists, therefore, advocate pragmatic and contextual solutions to social problems, despite their highly theoretical approach to gender issues.³¹

Although obvious and sometimes deep conflicts exist among the various branches of feminism, many of the tensions are at least amenable to common ground, if not entirely resolvable. For instance, the theory of subordination that is central to dominance feminism can explain some of the origins of difference and connectedness. The skepticism of postmodern feminism encourages us to reject rigid stereotypes and reminds us that all categories are socially constructed and that we must be wary of declaring a tendency natural or fixed.

Despite significant differences in approaches, all three types of feminism have in common certain basic principles. First is the desire to eliminate subordination of women. Second, all feminists seek to draw on women's practical experience as a source of knowledge and power.³² Third, feminists of every stripe are suspicious of theories of autonomy that do not account for interpersonal relationships. As Professor Martha Minow explained: "Feminists criticize the assumption of autonomous individualism behind American economic and political theory and legal and bureaucratic practice" because such an assumption "rests on a picture of public and independent man rather than

(1995). Postmodern feminism also "emphasizes that there is no monolithic female experience, but many experiences that vary according to a woman's race, class, ethnicity, and culture." Levit, *supra*, at 1050.

28. See Susan H. Williams & David C. Williams, *A Feminist Theory of Malebashing*, 4 MICH. J. GENDER & L. 35, 121-22 (1996) (describing postmodern feminism and the work of Mary Jo Frug).

29. See *id.*

30. See *id.* at 123.

31. See Levit, *supra* note 27, at 1050.

32. See Bender, *supra* note 21, at 9 (describing the process of validated women's experience and learning from them as consciousness raising); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories [1990]*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 263, 263 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (stating that "there does appear to be general agreement that feminist method begins with the primacy of women's experience"). Additionally, Kit Kinports's first piece to avowedly attempt a feminist critique of evidence offered insights into how the evidence rules may ignore the experiences of women and instead reflect male values and norms. See Kinports, *supra* note 19, at 430-52.

private and often dependent, or interconnected, woman.”³³ Fourth, feminists are constantly on the lookout for so-called neutral principles or abstract values that camouflage support for patriarchy. Suspicion of abstraction is more than just a different cognitive style; it arises from the concern that abstractions “are likely to hide under claims of universality what is in fact the particular point of view and experience of those in power.”³⁴ For this reason all three schools of feminist analysis mentioned here would reject the notion of “neutral” evidence rules and would instead examine how the rules affect women and perpetuate patriarchal values.³⁵

III. DISCUSSING TWO CULTURALLY LADEN EVIDENCE RULES

Many evidence rules rely on policy judgments that in turn rely on assessments of human nature. Once we have tasted from the tree of knowledge and recognized the breadth and majesty of the rules, it is hard to hide behind the fig leaf of neutrality. How can a set of rules that makes assessments about a witness’s propensity to be dishonest,³⁶ or a rule that predicts jurors’ reaction to the fact of insurance³⁷ be culturally neutral? Feminism notices the inherent nonneutrality of these issues and questions the assumptions about human nature on which evidence policy relies. My focus here is on two highly policy-laden rules: Rule 407, which prohibits evidence of remedial measures to show negligence,³⁸ and Rule 408, which excludes evidence of compromise or an offer to compromise.³⁹

Both rules can be conceived as exceptions to the admissions doctrine,⁴⁰ which is itself an exception to the hearsay rule. Admissions technically fit within the definition of hearsay because they are out-of-court statements used to prove the truth of the matter asserted.⁴¹ Ad-

33. MINOW, *supra* note 23, at 194.

34. *Id.* at 217.

35. See generally Susan H. Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN’S L.J. 63 (1993).

36. See FED. R. EVID. 608(c) (allowing the use of character evidence for purposes of impeachment).

37. See FED. R. EVID. 411 (precluding most uses of evidence pertaining to the existence of liability insurance).

38. See FED. R. EVID. 407.

39. See FED. R. EVID. 408.

40. The admissions doctrine holds that any statement or action made by a party may be used by his opponent as evidence. See MCCORMICK ON EVIDENCE § 254 (John W. Strong ed., 4th ed. 1992) (quoting Rule 801(d)(2), “Admission By Party-Opponent”).

41. This traditional common law statement of hearsay has been adopted by the Federal Rules. See FED. R. EVID. 801(c).

missions are nevertheless deemed "not hearsay" under the Federal Rules.⁴² Under this evidence scheme, with few exceptions, whatever a party says or does is admissible against that party.⁴³

The theory behind the wide admissibility of admissions is complex. The admissions doctrine rests partly on the notion that many (but certainly not all) admissions are contrary to the declarant's interest and hence likely to be trustworthy because people generally do not say things contrary to their interests unless they happen to be true.⁴⁴ Another justification rests on a functional understanding of hearsay. According to this theory, hearsay is grounded in the right to cross-examine; therefore, such admissions cannot be hearsay because one cannot cross-examine oneself.⁴⁵ But by far the most persuasive rationale for why admissions are exempted from the general rule barring hearsay derives from the adversary system itself.⁴⁶ Essentially, the law of evidence reflects the adversarial nature and win-lose philosophy of courtroom proceedings. A party may introduce any evidence deriving from the opposing party that in any way deviates from the opposing party's current position. The statement itself is admissible, although the party-opponent that made the admission is free to explain or disavow it.

Federal Rules of Evidence 407 and 408 provide special exceptions to the admissions doctrine. For highly self-conscious and clearly articulated reasons, the Federal Rules follow traditional evidence policy of excepting certain statements or actions by party-opponents that would otherwise be admissible as party-opponent admissions or as some nonhearsay recognition of facts.

A. Rule 407

Rule 407 provides that: "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the

42. See FED. R. EVID. 801(d) (defining some prior statements as "not hearsay").

43. See, e.g., ROGER C. PARK ET AL., EVIDENCE LAW 254-55 (1998). "As applied to individual admissions, the Federal Rule is very broad. It means that any statement by a party, offered by an opponent, overcomes the hearsay hurdle." *Id.* at 255.

44. See FED. R. EVID. 801(d)(2) advisory committee's note.

45. See *id.*

46. See McCORMICK ON EVIDENCE, *supra* note 40, § 254, at 141 (discussing various rationales and concluding that "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 and stipulations").

event.”⁴⁷ The rationale for Rule 407 is three-fold. First, Rule 407 rests on notions of logical relevance; just because one improves something does not mean the item was broken before. The fact of repair does not logically mandate that the prior condition was negligent or dangerous.⁴⁸ Similarly, just because one offers to pay someone off, does not mean that one did anything wrong. Or, as Baron Bramwell argued, it is ridiculous to hold that “because the world gets wiser as it gets older, therefore it was foolish before.”⁴⁹

The second rationale stems from a concern that a contrary rule would penalize do-gooders, the diligent, and conscientious repairers. As Professors Muller and Kirkpatrick explain: “It appears unseemly, and it may be even unfair, to allow, as evidence offered against a person over his objection, proof that he reacted sensibly and constructively to the fact that an accident occurred.”⁵⁰

But the main explanation behind Rule 407 is an administrative and utilitarian rationale—we need these rules to encourage desirable behavior outside the courtroom. The concern is that without the protection of Rule 407, defendants would hesitate to repair dangerous conditions out of fear that such repair will be an admission of negligence.⁵¹ As a Georgia appellate court explained in the 1995 case of *Stuard v. Department of Transportation*,⁵² “excluding such evidence lies in sound public policy ‘that *men* should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been

47. FED. R. EVID. 407. Recently, Rule 407 has been amended to include product liability cases and to clarify that it applies only to changes made *after* the occurrence or incident that gave rise to suit. As Professor David Leonard has noted, many perceive subsequent remedial measures as admissions. See LEONARD, *supra* note 5, § 202. He argues, however, that such nomenclature is confusing because subsequent remedial measures are not intended as communicative conduct and hence not hearsay at all. See *id.*; see also FED. R. EVID. 801(a) (defining a “statement” as “an oral or written assertion” or “nonverbal conduct . . . intended . . . as an assertion”). Professor Leonard suggests instead describing them as a “recognition of fault.” See LEONARD, *supra* note 5, § 202, at 2:9. I agree with Professor Leonard that many actions that would qualify as remedial measures are probably not hearsay at all. Nevertheless, the theories of relevance and the policies behind the Rules pertaining to admissions and subsequent remedial measures are closely related.

48. See FED. R. EVID. 407 advisory committee’s note.

49. Hart v. Lancashire and Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869), *quoted in* FED. R. EVID. 407 advisory committee’s note.

50. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 128, 30 (2d ed. 1994).

51. See McCORMICK ON EVIDENCE, *supra* note 40, § 267, at 200 (“The predominant reason for excluding such evidence . . . is not lack of probative significance, but rather a policy against discouraging the taking of safety measures.”).

52. 466 S.E.2d 236 (Ga. Ct. App. 1995).

wrongdoers.’”⁵³ Rule 407 defines both what is socially desirable and reflects its conception of human nature as to how to achieve that desired result. The presumption is that without Rule 407’s exclusion of remedial measures, people would allow dangerous conditions to persist in order to avoid admitting negligence. The rule assumes the prudent economic actor, who makes choices out of financial interest. Indeed, *Flaminio v. Honda Motor Company*,⁵⁴ an important opinion by Judge Posner, construes Rule 407 in a product liability design defect case by using a law and economics analysis. The court stated:

[A]ccidents are low-probability events. The probability of another accident may be much smaller than the probability that the victim of the accident that has already occurred will sue the injurer and, if permitted, will make devastating use at trial of any measures that the injurer may have taken since the accident to reduce the danger.⁵⁵

Judge Posner reasoned that “if evidence of subsequent remedial measures is admissible to prove liability, the incentive to take such measures will be reduced.”⁵⁶

Rule 407 posits a “sociopathic caricature” of the autonomous person.⁵⁷ The actor conceptualized by Rule 407 is willing to let others be injured rather than fix the problem, which might admit to a mistake and expose him to contrary evidence in a tort action. The person postulated by the rule seems calculating and heartless. He possesses no sense of empathy or connection with others who may be harmed in the future. He is willing to sit back and let others be injured rather than admit fault. He certainly is not one who has been socialized to fix problems.

A feminist analysis would question the rationale for Rule 407, observing that the underlying reasons for the rule are, at the very least, debatable and incomplete both empirically and normatively.⁵⁸

53. *Id.* at 239 (quoting *Georgia S. & F. Ry. Co. v. Cartledge*, 42 S.E. 405, 407 (Ga. 1902)) (emphasis added). I emphasize the word “men,” which was obviously not emphasized in the original, to foreshadow my feminist analysis and prompt the reader to wonder whether women, given their socialization and connectedness, would demand or require the protection of Rule 407 to correct a flaw or improve a condition.

54. 733 F.2d 463 (7th Cir. 1984).

55. *Id.* at 469.

56. *Id.* This reasoning is assailable on its own economic grounds because it ignores the independent economic reasons manufacturers have to repair defects, such as avoiding other injuries and lawsuits.

57. ROBIN WEST, *CARING FOR JUSTICE* 5 (1997).

58. As with many evidence rules, Rule 407 is based, at least in part, on assertions about human nature that could be tested empirically. See LEONARD, *supra* note 5, § 2.4.1, at 2:29 (noting that Rule 407 is “based on unverified motivational and behavioral assumptions”). To the

Assuming, arguendo, that people know about the rule⁵⁹ (and only sophisticated, repeat players necessarily will), there are other reasons to doubt the logic or wisdom of Rule 407. For instance, from a pragmatic standpoint many manufacturers have independent reasons to repair defective products, such as fear of future suits or loss of good reputation. An analysis from an ethic of care, however, would dispute the underlying assumption that economic self-interest would be the sole motivation in a person's decision whether to repair a dangerous condition.

Rule 407 is certainly not all bad, particularly because it does reward those who do repair—whether they knew of the rule or not. My feminist critique is aimed more at the rationale than the rule. Rule 407 is emblematic of the assessments of human nature underlying the rules of evidence generally, which tend to be arid, incomplete, and tendentious. Failure to recognize the human impulse to repair or remediate is typical of the bias of our evidence rules, which, even when overtly attempting to shape human behavior, demonstrates a very constricted view of how people think and act. The evidence rules' narrow, ungenerous, and almost brutish conception of human behavior ignores certain groups or certain types of interactions.

B. Rule 408

Rule 408 follows the traditional common law rule promoting compromises—excluding evidence of an offer or fact of compromise in order to prove fault.⁶⁰ Additionally, Rule 408 provides that: “Evi-

extent that such psychological tests are possible, I agree wholeheartedly with David Faigman that we should conduct such investigations, a point Professor Faigman made as a panelist at the Association of American Law Schools' 1998 presentation on gender and race in evidentiary policy. For instance, examining the inclination to repair despite adverse financial consequences is a worthwhile psychological project. I want to emphasize, however, that my critique is also normative and cultural, as well. I believe that a dynamic link connects legal rules and social values. Therefore, even if all empirical evidence pointed to the correctness of Rule 407's assumptions about human behavior, the rule would still be subject to a feminist critique.

59. See Leonard, *supra* note 5, § 2.4.1, at 2:26 (noting that the policy rationale behind Rule 407 is “built on the assumption that the party contemplating remedial measures is aware of the exclusionary rule”).

60. The language of the rule provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

FED. R. EVID. 408. This exclusion of evidence of compromise was first grounded in contract law on the theory that compromise offers made with no consideration had no evidentiary weight. See Fred S. Hjelmeset, *Impeachment of Party by Prior Inconsistent Statement in Compromise Negotiations: Admissibility Under Federal Rule of Evidence 408*, 43 CLEV. ST. L. REV. 75, 86-87

dence of conduct or statements made in compromise negotiations is likewise not admissible.”⁶¹ In this respect, Rule 408 provides a wider net of protection and exclusion than did the common law. The common law only excluded the actual settlement offer, but not the surrounding statements, unless such statements were inextricably linked to the offer, couched in hypothetical terms, or masked by the words “without prejudice.”⁶² Rule 408 dispenses with such niceties (which tended to protect those represented by counsel) and excludes not only the offer, but all statements made during the course of the negotiations.⁶³

Like Rule 407, Rule 408 stems from an assessment of relevance, concern for fairness to the parties, and extrinsic policy concerns.⁶⁴ To a lesser extent, Rule 408 has also been justified on a privilege rationale.⁶⁵ As to relevance, the argument runs that just because a potential defendant offers to settle a claim does not necessarily mean that the defendant believes he is at fault or in fact is at fault. The defendant could be a peacemaker, a generous spirit, a risk-averse person, or

(1995). This rationale was superseded by Lord Kenyon’s justification that “men should be allowed to ‘buy their peace.’” *Id.* (citations omitted).

61. FED. R. EVID. 408.

62. See McCORMICK ON EVIDENCE, *supra* note 40, § 266, at 466; Hjølmeset, *supra* note 60, at 87; Note, *Rule 408: Compromise and Offers to Compromise*, 12 *TOURO L. REV.* 443, 443-44 (1995).

63. Rule 408 provides:

The mere fact that information was transmitted during a settlement negotiation does not cover that piece of information in a blanket of secrecy. The actual disclosure during negotiations may not be admitted to prove fault, but facts otherwise discoverable are still admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408. See generally Kristina M. Kerwin, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 *REV. LITIG.* 665 (1993) (noting that Rule 408 poses some recurrent problems such as the discoverability of compromise negotiations for the use in other proceedings); Hjølmeset, *supra* note 60 (the use of statements in negotiations to impeach a lying witness with his own prior statement). These questions, though interesting, do not concern the analysis here.

64. Professor Leonard also discusses a discredited contract law rationale for Rule 408 by which unenforceable offers or contracts were not considered competent evidence. See LEONARD, *supra* note 5, at § 3.3.1.

65. Some justify the rule as a quasi-privilege because it promotes confidential communication. See, e.g., Note, *Making Sense of Rules of Privilege Under the Structural (II) Logic of The Federal Rules of Evidence*, 105 *HARV. L. REV.* 1339, 1348 (1992) (referring to Rule 408 as an “activity” privilege rule, which excludes extrinsic actions of the parties for reasons of public policy). But because there is no special relationship between the parties, such as lawyer-client or spouse-to-spouse, the analogy is weak.

someone jealous of his reputation.⁶⁶ Or, the defendant could have calculated that the cost of litigation outweighs the cost of settlement. None of these defendants believes in his culpability; some are indeed faultless. From a relevance perspective, therefore, the offer to compromise is not particularly probative of fault.⁶⁷

Obviously, however, the timing and amount of a compromise offer influence its relevance.⁶⁸ A substantial offer to settle a case may be probative of liability on the theory that no one would offer a substantial amount unless he thought his opponent possessed a valid claim. If, despite self-interest and the natural human capacity for denial, a party thinks his opponent possesses a valid claim, his opponent probably does. Given the low threshold of relevance under the *Federal Rules of Evidence*, it would be hard to argue that offers to compromise have *no* tendency to make the fact of fault at least slightly more likely.⁶⁹ Therefore, a relevancy rationale is not sufficient to explain Rule 408.

As with Rule 407, another justification for Rule 408 arises from a desire to reward goodness. We exclude compromises from evidence in part because of fairness concerns. We do not want to punish the "blessed peacemakers," and we affirmatively want to encourage potential litigants to be like Aaron, Moses's brother, "loving peace and pursuing peace."⁷⁰ We certainly do not want to disadvantage individ-

66. According to the Advisory Committee, "[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." FED. R. EVID. 408 advisory committee's note.

67. As Wigmore explained:

The true reason for excluding an offer of compromise is that it *does not* ordinarily proceed from and *imply a specific belief that the adversary's claim is well founded*, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered. In short, the offer implies merely a desire for peace, not a concession of wrong done

JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1061, at 36 (1972).

68. The Advisory Committee stated: "The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances." FED. R. EVID. 408 advisory committee's notes. *McCormick on Evidence* states:

The relevancy of the offer will vary according to circumstances, with a very small offer of payment to settle a very large claim being much more readily construed as a desire for peace rather than an admission of weakness of position. Relevancy would increase, however, as the amount of the offer approaches the amount claimed.

MCCORMICK ON EVIDENCE, *supra* note 40, § 266, at 194; *see also* LEONARD, *supra* note 5, at § 3.2.2 (discussing factors affecting the relevance and probative value of compromise evidence).

69. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

70. RABBI MORRIS SCHATZ, *ETHICS OF THE FATHERS IN THE LIGHT OF JEWISH HISTORY* 59-60 (1970) (quoting 1:12 of *Pirke Avot*, a compilation of Jewish maxims on how to live an

uals who do the right thing.⁷¹ Another, perhaps less obvious, benefit to society emerges from the fact that Rule 408 seems to reward the ethic of peacemaking and compromise. As Professor David Leonard notes, compromises promote civility and cooperation among parties specifically and within society generally.⁷²

Overwhelmingly, however, Rule 408, like Rule 407, is justified in crude instrumental terms.⁷³ In the case of Rule 408, the extrinsic benefits of encouraging compromise stem from the relatively speedy and inexpensive disposition of claims.⁷⁴ Any case settled out-of-court is less expensive and less draining on the parties and on public dispute resolution mechanisms, such as juries, courtrooms, judges, and other court personnel.⁷⁵ The theory is that the veil of confidentiality will allow for honest and frank talk that will lead to settlement. The evidence rules, therefore, facilitate such compromises, even though some otherwise good evidence may be lost if the negotiations are not successful and the case ends up in court.

In assessing these benefits, Rule 408, like Rule 407, does not rely on empirical data to support the notion that parties will be more likely to compromise if the exclusion is in place. Furthermore, Rule 408 does not rest on any empirical data concerning the effect on the fact finder who learns of a party's offer to compromise.⁷⁶

ethical life). It is not hard to find religious support for peaceful behavior. See, e.g., Islam: *The Holy Qur'an* 8:61 ("And if they incline to peace, incline thou also to it, and trust in Allah."); Christianity: *Matthew* 5:9 ("Blessed are the peacemakers for they shall be called the children of God.").

71. See LEONARD, *supra* note 5, at § 3.3.4, at 3:37.

72. See *id.* § 3.3.3, at 3:31.

73. As the Advisory Committee's Note to Rule 408 explains: "A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes." FED. R. EVID. 408 advisory committee's note.

74. See *Reeder v. American Econ. Ins. Co.*, 88 F.3d 892, 895 (10th Cir. 1996) (citing the "policy behind Rule 408, namely to promote the out-of-court settlement of claims"); Hjelmset, *supra* note 60, at 92-94 (examining the tensions between the policies of promoting settlement negotiations and accommodating the "truth finding" process and noting that admission of settlement offers could inhibit settlement discussions and interfere with the effective administration of justice). See generally Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988) (discussing the policies behind Rule 408 and examining potential pitfalls that the rule presents to lawyers in settlement negotiations).

75. See John R. Schmertz, Jr., *Relevancy and its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence*, 33 FED. B.J. 1, 17 n.94 (1974) ("It takes little imagination to picture the chaos that would pervade our entire federal court system if every civil or criminal action filed actually went to trial.").

76. See LEONARD, *supra* note 5, § 3.4, at 3:38-3:39.

IV. PROPOSAL FOR AN APOLOGY EXCEPTION

A. *The Nature of Apologies*

Apologies are all the rage. Apologies pervade our culture and range from the lowest forms, evident on daytime talk shows where daughters apologize for stealing their mothers' boyfriends, to the highest and noblest goals. South Africa, for example, has bet its future on the value of honest confrontation of wrongful conduct, that is to say on apologies, by forming the Truth and Reconciliation Commission.⁷⁷

Recently, President Clinton apologized for the Tuskegee experiments that, as part of a science project, allowed African American men to suffer syphilis untreated for forty years.⁷⁸ The United States government apologized to Japanese Americans for interring them in camps during World War II.⁷⁹ The CIA apologized for failing to inform U.S. troops about known chemicals in Iraqi bunkers.⁸⁰ The IRS apologized for sending citizens erroneous statements about taxes due.⁸¹ Former Senator Alfonse D'Amato apologized for ridiculing Judge Ito, who presided over the O.J. Simpson murder trial, by using a caricatured pidgin Japanese.⁸² And, George Wallace apologized to

77. See Jean Bethke Elshtain, *True Confessions*, NEW REPUBLIC, Nov. 10, 1997, at 12, 12; Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47, 49-52 (1997) (outlining the procedures and philosophy of the Truth and Reconciliation Commission, including the role of apology).

78. See Abigail Trafford, *The Ghost of Tuskegee*, WASH. POST, May 6, 1977, at A19; Ellis Cose, *Forgive and Forget?*, NEWSWEEK, Apr. 21, 1997, at 45.

79. See Sherry Joe Crosby, *Festival Brings out Views on Atonement*, DAILY NEWS LOS ANGELES, June 22, 1997, at N4. Interestingly, however, a proposal that the United States apologize to African Americans for slavery was not successful. See Scott Montgomery, *Proposal to Apologize for U.S. Slavery Put On Hold Indefinitely*, ATLANTA CONST. J., Aug. 7, 1997, at A9.

80. See Bill McAllister & Dana Priest, *CIA Knew In '84 of Iraq Poison Gas, Agency Official Apologizes to Persian Gulf War GIs*, WASH. POST, Apr. 10, 1997, at A1 ("If you're looking for an apology that we should have given this information out sooner, I'll give that apology. We should have gotten it out sooner.").

81. See Andrew Rice, *'Infernal Revenue Service' No More? 'I'm Sorry' Could Be Part of Agency's New Approach*, NEWSDAY, Aug. 24, 1997, at A4. In addition, during a congressional hearing into the practices of the IRS in investigating and collecting tax claims, IRS Commissioner Michael Donlan issued an apology saying: "No one should have endured what these citizens describe as their experience at the hand of the tax system. At this point, I offer my sincere apology to these taxpayers for any mistakes we have made and for any anguish we have caused." *Week in Review: Government and Politics, Protection Money*, SPOKESMAN REV., Sept. 28, 1997, at A2.

82. Senator D'Amato said: "As an Italian-American, I have a special responsibility to be sensitive to ethnic stereotyping. I fully recognize the insensitivity of my remarks about Judge Ito." See Yamamoto, *supra* note 77, at 80 (citing ARIZ. REPUBLIC, Apr. 7, 1995, at A2). The Senator's earlier apology, a two sentence press release saying that he "was sorry if anyone was offended by his behavior," was deemed insufficient. *Id.*

Vivian Malone, thirty-three years after he stood in the schoolhouse door, trying to keep the young black woman from integrating the University of Alabama.⁸³

The phenomenon is international. Britain's Prime Minister Tony Blair apologized for England's role in the Irish potato famine.⁸⁴ Germany apologized for the invasion of Poland and has acknowledged its guilt for its participation in the destruction of Guernica.⁸⁵ France is "determined to clear its conscience" for its treatment of French Jews during World War II.⁸⁶ Australia's Prime Minister John Howard is under pressure to offer an official apology to tens of thousands of aboriginal peoples who were taken from their homes and placed in white foster care to overcome their "backward" culture.⁸⁷ These examples provide a hint that apologies may indeed have a more extensive function than making whole the rational economic actor.

The apologies I am concerned with tend to be more personal and less driven by public forces or history. For instance, it is not unusual for a plaintiff in a negligence action to declare that he would have gladly settled his claim for payment of his actual medical bills—if only the tortfeasor had acknowledged responsibility and had offered an apology.⁸⁸ Apologies also play a role in dealing with intentional torts, particularly those that insult the plaintiff such as defamation or sexual harassment. What did Paula Jones purportedly want from President Clinton? An apology.⁸⁹

There are many types of apologies—private or public, individual or group. Apologies can come from someone directly and personally responsible (such as a harasser or a negligent driver) or a moral predecessor-in-interest (such as a national leader apologizing for prior wrongs committed by her country or a parent apologizing for her

83. See *Blocking the Schoolhouse Door: George Wallace Clears His Conscience*, J. BLACKS IN HIGHER EDUC., Winter 1996/1997, at 67-68.

84. See *Mea Culpa and All That*, ECONOMIST, June 21, 1997, at 19.

85. See *Germany Admits Guilt Over Guernica*, N.Y. TIMES, Apr. 28, 1997, available in 1997 WL 7995314.

86. Roger Cohen, *France Confronts Its Jews, and Itself*, N.Y. TIMES, Oct. 19, 1997, available in 1997 WL 8007916.

87. See *Mea Culpa*, supra note 84.

88. See, e.g., Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 74 TEX. L. REV. 1, 35 (1995); Jonathan M. Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 24 UCLA L. REV. 863, 886 (1987).

89. See *Paula Jones May Have Nixed a Clinton Settlement Offer*, CHI. TRIB., June 11, 1998, available in 1998 WL 2865715. Paula Jones ultimately relented and accepted \$850,000 from President Clinton to settle her harassment claim, without an admission of wrongdoing. See James A. Brenner & Neil A. Lewis, *Clinton to Pay \$850,000 to Settle Jones Claim of Sexual Harassment*, N.Y. TIMES, Nov. 14, 1998, at A6.

child's behavior). Timing is crucial. After a critical time period, apologies are rarely acceptable; but apologies can also come too soon before the offended party is ready to hear them and forgive.⁹⁰

Apologies are tricky to define. In his book, *Mea Culpa*, Nicholas Tavuchis discusses the "mysteriously potent, symbolic act" that is the apology.⁹¹ According to Tavuchis an "apology has two fundamental requirements: the offender has to be sorry and has to say so."⁹² At their most "authentic," apologies are a "form of self-punishment that cut[] deeply because we are obliged to retell, relieve, and seek forgiveness for sorrowful events that have rendered our claims to membership in a moral community suspect or defeasible."⁹³ 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.⁹⁴

I wrestled with the question of whether a mere admission of error without expression of contrition would fit under my proposed excep-

90. See Aaron Lazare, M.D., *Go Ahead Say You're Sorry*, PSYCHOL. TODAY, Jan.-Feb. 1995, at 78 ("Timing can also doom an apology."); NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 87-88 (1991). Stephen B. Goldberg and his colleagues stated that:

Timing is a critical element. The expression of regret must come soon after the injury, or at least soon after the injured person voices his or her grievance. Once the respondent has taken the alternative path of denying responsibility (and perhaps even hurling countercharges), an apology is much more difficult to elicit, or even if given, to be accepted.

Stephen B. Goldberg et al., *Saying You're Sorry*, 3 NEGOTIATION J. 221, 223 (1987); see also *How to Say You're Sorry When You Don't Really Mean It and He Started It Anyway*, REDBOOK, Nov. 1991, at 72 ("An apology should be timely and enthusiastic or it's worthless.") [hereinafter *How to Say You're Sorry*].

91. TAVUCHIS, *supra* note 90, at 2.

92. *Id.* at 36. In this Article the words offender, tortfeasor, and wrongdoer will all be used to describe the person who committed the act prompting an apology. The terms victim and offended party will refer to the person or group receiving an apology.

93. *Id.* at 43 ("A good apology also has to make you suffer. You have to express genuine soul-searching regret for your apology to be taken as sincere.").

94. See *id.* at 36; Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y. REV. 461, 469-70 (1986) (listing the criteria: "1. the hurtful 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 good relations in the future").

tion.⁹⁵ From a utilitarian perspective, any admission of contrary facts may provide the injured party with helpful information. This is particularly true, as we will see, in the case of medical malpractice, where information about the harm is vital to the patient. Nevertheless, given the human benefits of a full apology (of which admission of wrong is only one element), I propose restricting the proposed exception to apologies that include statements of contrition as well as the surrounding factual statements.⁹⁶ Explanations alone, without expressions of remorse or self-blame, are not enough.⁹⁷

Apologies that do not accept blame but express sympathy present another critical issue.⁹⁸ For example, if I say to a friend, "I'm so sorry about your father's death," it is obviously not a confession to murder, but rather an expression of connectedness, sympathy, and support. These "sympathy apologies" do not fit into my definition of true apologies, but they are nonetheless highly desirable and deserve legal protection. Such expressions of support reinforce a sense of community and serve as tonics to loneliness and alienation.⁹⁹ Regrettably, because many people fear that a statement of sympathy will be mistaken for an assumption of culpability, they do not issue them.¹⁰⁰ In fact, the state of Massachusetts has addressed this issue specifically by enacting a law providing that "gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident . . . shall be inadmissible as evidence of an admission of liability in a civil action."¹⁰¹

Even when an apology purports to accept responsibility, a question may arise concerning the declarant's sincerity and true accept-

95. Special thanks to Professor Harry Pratter who raised and discussed this point with me.

96. See, e.g., TAVUCHIS, *supra* note 90, at 8 (stating that "apologies require much more than admission or confession of the unadorned facts of wrongdoing or deviance").

97. See *How to Say You're Sorry*, *supra* note 90, at 79.

98. See Kathleen Kelleher, *Sorry May Not Be the Hardest Word*, L.A. TIMES, Nov. 25, 1996, at E3 ("'I'm sorry' doesn't necessarily mean—in the literal sense—'I goofed.' It often serves as a verbal nod of acknowledgment that something regrettable has occurred without assigning blame, or it is used as a mutual face-saving device."); Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 J. DISP. RESOL. 116, 116 ("Another reason some people say 'I'm sorry,' however, is to express sympathy or concern, even when they have done nothing wrong.").

99. See *infra* notes 106-09 and accompanying text.

100. See *infra* notes 197-98 and accompanying text.

101. MASS. GEN. LAWS ANN. ch. 233, § 23(D) (West Supp. 1998) ("Admissibility of benevolent statements, writings or gestures relating to accident victims," discussed briefly in Goldberg et al., *supra* note 90, at 222).

ance of blame.¹⁰² Need apologies be genuine? 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.¹⁰³ But for an apology to be successful, the wrongdoer must perform a credible job of faking regret, if not contrition.¹⁰⁴ For the same reason, although apologies can be written, they are most effective and affecting when delivered orally. Part of facing up to the wrong is actually facing the human being wronged. The emotion of true contrition is hard to fake in person and has a powerful effect on the injured party.

Clearly, apologies resonate with religious overtones.¹⁰⁵ When we apologize, we begin in a morally inferior position that resembles religious supplication; as with Judeo-Christian prayer, the offender finds herself in the "unsettling position of seeking unconditional pardon precisely in the context of our being categorically unworthy."¹⁰⁶ In this respect, an apology resembles the religious confession. It has aspects of martyrdom and self-mortification. After confession and receiving absolution, the offender is able to return to the prior state of grace.

On a personal level, apologies can transform individuals and regenerate relationships.¹⁰⁷ On a societal level, apologies are a force that "maintain some modicum of social equilibrium," whether they are about grand political events or a simple "sorry" for an inadvertent jostle.¹⁰⁸ From an anthropological perspective, apologies illustrate im-

102. This brings to mind the so-called apology of then-Senator Bob Packwood to the women who accused him of sexual misconduct: "Am I sorry? Of course. If I did the things that they said I did." *Packwood Says Diary Has Inaccuracies*, DALLAS MORNING NEWS, Sept. 11, 1995, available in LEXIS, Nexis Library (quoting former Senator Packwood's appearance on CBS's television news show, *Face the Nation*).

103. Hence Oscar Wilde's observation concerning "the luxury [of] self reproach," whereby an offender engages in showy self-flagellation to preempt criticism or anger. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 110 (Penguin Books 1983) (1891). Wilde wrote: "There is a luxury in self-reproach. When we blame ourselves we feel that no one else has the right to blame us. It is the confession, not the priest, that brings absolution." *Id.*

104. As liberal Democratic Representative Barney Frank, an openly gay politician who was recently called "Barney Fag" by conservative Republican Representative Dick Armey, explained: "Very often, the apology is not sincere . . . but you still want it." Hollis L. Engley, *Sorry, But I'm Sorry*, GANNETT NEWS SERVICE, Apr. 11, 1995, available in 1995 WL 2894516.

105. Tavuchis describes an apology as a "secular remedial ritual." TAVUCHIS, *supra* note 90, at 13.

106. *Id.* at 34.

107. *See id.* at 6-7.

108. *Id.* at 5.

portant facets of our moral culture and demonstrate the complexity of intricate social relationships. From a sociological perspective, they help establish the social notions of deviance and conformity.¹⁰⁹ Apologies validate our relationships, reinforce shared group norms, and serve as a means for continued participation in a moral community.¹¹⁰

In an odd way apologies also demonstrate something unique about our species. The ability to feel remorse and to offer forgiveness are two quintessentially human (and in fact highly valued) traits. The power of words and gestures to erase or at least ease pain, anger, and indignation makes apologies a fascinating, uniquely human subject for study.¹¹¹

The benefits of apology are more than "merely" psychic or restorative of relationships. Apologies can generate tangible, practical benefits. They serve as a type of "social lubricant,"¹¹² helping our society to become more civil and less angry and violent.¹¹³ Furthermore, when issued promptly and sincerely, apologies can substitute for costly litigation. Whereas the offended party might have sued, instead the party accepts the apology of the person who caused the harm. The conflict is resolved less expensively and in a more satisfying manner than courtroom adversity could achieve, particularly because creative solutions in addition to financial compensation can be

109. See Janet Holmes, *Sex Differences and Apologies: One Aspect of Communicative Competence*, 10 APPLIED LINGUISTICS 194, 210 (1989). Holmes states that "'by observing what people apologize for, we learn what cultural expectations are with respect to what people owe one another' and we also learn 'about the rights and obligations that members of a community have toward one another" *Id.* (citations omitted). Apologies are not, however, necessarily conservative, static forces. They can also serve to confirm the justice of a progressive cause (such as apologies to previously ill-treated minority groups). Apologies can serve the purpose of redefining social norms and can serve as acts "of submission to a shifting hierarchical order." John O. Haley, Comment, *The Implications of Apology*, 20 L. SOC'Y REV. 499, 503 (1986).

110. See Florian Columas, *Poison to Your Soul: Thanks and Apologies Contractively Viewed*, in CONVERSATIONAL ROUTINE: EXPLORATIONS IN STANDARDIZED COMMUNICATION SITUATIONS AND PREPATTERNED SPEECH 84 (Florian Columas ed., 1981) ("Apologies indicate the speaker's willingness to conform to conventional rules and social expectations.").

111. "[A]n investigation of apology is not only worthwhile in its own right but affords a unique and fruitful perspective for readdressing the basic sociological questions of membership, deviance, and conformity." TAVUCHIS, *supra* note 90, at 14.

112. Wagatsuma & Rosett, *supra* note 94, at 461.

113. As Judith Martin (a.k.a. Miss Manners) instructs:

People who boast that they 'never apologize, never explain,' or who claim that 'love is never having to say you're sorry' ought to be ashamed of themselves and admit it and ask forgiveness. Now that the duel is illegal, the apology is the only way left to settle many disputes without getting blood on the sofa.

JUDITH MARTIN, MISS MANNERS' GUIDE TO EXCRUCIATINGLY CORRECT BEHAVIOR 474 (1982).

woven into the reconciliation.¹¹⁴ Even when an apology alone cannot settle a dispute entirely, the apology serves to reduce tensions and facilitate negotiations.¹¹⁵ Conversely, failure to apologize can exacerbate tensions, add indignation, and magnify the injury.¹¹⁶ It is the final insult. As one woman, who sued her HMO for pressuring her doctor to perform an angiogram so quickly that he punctured a main artery while performing it, emphasized: "I don't remember anybody saying, 'I'm sorry.'"¹¹⁷

Undoubtedly, apology is inherently a relational concept.¹¹⁸ Apologies remediate acts "that cannot be undone but that cannot go unnoticed without compromising the current and future relationship of the parties, the legitimacy of the violated rule, and the wider social web in which the participants are enmeshed."¹¹⁹ Between individuals, apologies "acknowledge a shift in human relationships, and a yearning to return to the previous balance."¹²⁰

The dynamics of apology are complex because the power relationships between the parties are in flux. As one commentator observed, apologies operate as "an exchange of shame and power between the offender and the offended."¹²¹ The wrongdoer gets forgiveness and peace; the injured party gets dignity and perhaps reparation. An apology helps the wrongdoer by palliating feelings of guilt,

114. See Stephen E. Seckler, *Expanding the Use of ADR in the Workplace*, MASS. L. WKLY., Mar. 24, 1997, at B5 ("People don't always want money; sometimes they just want an apology," says Leonard Marcus, who directs a conflict-resolution program in medical malpractice at the Harvard School of Public Health.).

115. See Goldberg et al., *supra* note 90, at 221.

116. See Ray McEachern, *Malpractice Laws That Favor Physicians*, INDIANAPOLIS STAR, Jan. 7, 1998, available in LEXIS, Nexis Library (letter to the editor recounting suicide of a friend and asserting that the "doctor who injured her and then denied it should never sleep well again with this on his conscience. A simple apology from him and she might well be alive still."); cf. Marc Davis, *Court Records Offer Insight into Bizarre Jewish Mother Probe*, VIRGINIAN-PILOT AND LEDGER-STAR, Oct. 27, 1996, available in 1996 WL 10867485 (describing an erroneous IRS raid and seizure of property and noticing that: "In the end, there were no criminal charges. Five months after it began, the investigation was over, without even an apology.").

117. *CBS Evening News* (CBS television broadcast, Apr. 18, 1997, available in 1997 WL 5613015) (quoting Karen Springer).

118. See TAVUCHIS, *supra* note 90, at 13.

119. *Id.* at 14.

120. *Id.* at 19.

121. Lazare, *supra* note 90, at 42.

By apologizing, you take the shame of your offense and redirect it to yourself. You admit to hurting or diminishing someone and, in effect, say that you are really the one who is diminished—I'm the one who was wrong, mistaken, insensitive, or stupid. In acknowledging your shame you give the offended the power to forgive. The exchange is at the heart of the healing process.

Id.

shame, and scorn.¹²² In appropriate cases, apologies allow the wrongdoer to rehabilitate his reputation, reinstate his self-worth, and assert that the improper behavior was not intentional (thereby reaffirming as well, the traversed social norms).¹²³ Paradoxically, after the offender assumes a vulnerable stance and begs forgiveness, the balance of power shifts, and the injured party bears the burdens of belief and acceptance.¹²⁴ The person who receives the apology bears social responsibility to the offender to forgive.¹²⁵ An apology offered and accepted asserts and reinforces a vital social connection, precisely the type of interest esteemed by an ethic of care.

Perhaps a law and economics aficionada would see apology merely as a bartered exchange in which remorse and regret are exchanged for forgiveness and peace. But what is the economic value of an apology?¹²⁶ It is certainly not fungible; one cannot trade in them. The transaction is essentially about moral position and feelings.¹²⁷

122. *See id.*

123. The cultural icons, Ray and Tom Magliozzi, the hosts of the radio program *Car Talk*, responded to a letter from a woman who rightfully believed that a mechanic had neglected to tighten a lug nut, thereby placing her in grave danger of losing a tire. The following discussion ensued:

Ray: What you should expect from him is an abject and sincere apology for putting your life in danger. And I would base any decision on whether to use him again on how abject and sincere that apology is.

Tom: Right. We know that everybody makes mistakes sometimes. You get distracted, the phone's ringing, your wife just left you, two of your kids just joined the Moonies, the IRS is on your case, it's 105 degrees in the shop, and you've got a rash on your butt the size of Minneapolis. And in the midst of all that, you forgot to tighten a few lug nuts. It happens. I've been there!

Ray: The important question is do you take responsibility for it? If he tries to weasel out of it and says, "It couldn't have been me, I would never do anything like that . . . those Honda lug nuts just come off by themselves sometimes, etc.," I'd dump him and never go back, because then he's proved himself to be a bona fide sleazeball.

Tom: But if he says "Oh, my God, Elizabeth, I must have forgotten to tighten them in all the confusion that day. I'm so sorry that I did that, I'm so glad nothing happened to you; let me pay the towing bill," then I wouldn't hesitate to try him again, because he's clearly an honest guy. And even competent, honest guys make mistakes once in awhile.

Ray: Of course, if it ever happens again, then he's an honest guy who also happens to be a moron, in which case I would go to someone else. But I'd base my decision solely on the forthrightness of his response. And we're glad you didn't get hurt either, Elizabeth.

Ray & Tom Magliozzi, *An Honest Guy Can Be a Moron*, DES MOINES REGISTER, Aug. 17, 1997, available in 1997 WL 6964967.

124. *But see* TAVUCHIS, *supra* note 90, at 19. (rejecting the notion that an apology also signals a change in the relationship).

125. This does not indicate that all wrongs can be apologized for or that ill-apologizers should be forgiven. Horrific, damaging behavior may be outside the healing power of apology, and, consequently, will impart an obligation on the offeree to forgive.

126. *See, e.g.*, TAVUCHIS, *supra* note 90, at 34 (The apology therefore is "not easily explicated by elementary conceptions of reciprocity.").

127. *Cf.* Wagatsuma & Rosett, *supra* note 94, at 464.

The outcome is always unpredictable. Unlike monetary compensation, which can come from many different sources (the tortfeasor's employer, insurer, or estate), an apology can only come from the wrongdoer or some successor-in-moral-interest. To constitute a successful "transaction," emotions must enter the equation. With that understanding, apologies can serve as valuable tools in negotiation or in remediation.¹²⁸

Obviously, not everyone agrees with my assessment of the value of apology. In fact, public expression of regret—what Jean Elshtain has dubbed "contrition chic"¹²⁹ and what Russell Baker has called our national "apology binge"¹³⁰—has been subjected to derision. For instance, Art Buchwald, in discussing the CIA's failure to disclose the location of poison gas to American troops in Desert Storm wrote:

[A] nice apology should suffice. In the past, being the head of the CIA meant never having to say you're sorry The happy ending to this story is that the GIs who may have been afflicted by the Iraqi gas explosions now sleep better just knowing that the spooks in Washington feel bad.¹³¹

The insincere, politically opportune, or pointless apology is a justifiable subject for derision. But that does not make apologies ineffective or meaningless. In fact, the better question is not why some people issue insincere apologies, but rather why, given the benefits of apologies, do so many people fail to issue them at all.

There are many things that limit a person's willingness to apologize. There is a natural disinclination to admit wrong; people are concerned that they will humble themselves, and diminish their stature

The relative absence of apology in American law may also be connected to the legal system's historic preoccupation with reducing all losses to economic terms that can be awarded in a money judgement and its related tendency either not to compensate at all or to award extravagant damages for injuries that are not easily reducible to quantifiable economic losses.

Id.

128. See Goldberg et al., *supra* note 90, at 221 ("Many mediators have had one or more experiences in which an apology was the key to a settlement that might otherwise not have been attainable."). For instance, Professor Sharon Rush argues for an apology for slavery and racism as an equitable remedy. See Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 50-57 (1997) (discussing the potential healing effect of apologies).

129. Elshtain, *supra* note 77, at 12.

130. Russell Baker, *No Time for the Future*, N.Y. TIMES, Oct. 7, 1997, at A27.

131. Art Buchwald, *Apologies by the CIA's Sorry Lot*, STAR-LEDGER, Apr. 24, 1997, available in 1997 WL 8066417; see also James Dempsey, *Pols Pick Up Repentance From Jocks: Everyone May Be Sorry, But No One's That Sorry*, TELEGRAM & GAZETTE (Worcester, MA), June 20, 1997, available in 1997 WL 3711877.

vis-à-vis the persons from whom they beg forgiveness.¹³² Those who gave offense may be afraid that the apology will not be accepted. Additionally, moral cluelessness, arrogance, and self-righteousness can render a person incapable of issuing an apology.¹³³ For others, difficulty in apologizing stems from insecurity and reluctance to admit error, lest they experience shame and lose others' love and respect.¹³⁴ In the United States, apologizing is considered demeaning¹³⁵ and "unmanly."¹³⁶ In contrast, in some other cultures, notably in Japan and England, apology is an important means of communication and social relation.¹³⁷

One final and, for our purposes, important limit on apology is our litigious culture. Apologizing is very difficult precisely because to be successful, it involves genuine emotion and even self-mortification. It is "antithetical to the ever-pervasive values of winning, success, and perfection."¹³⁸ The problem is not only temperamental, but practical. We are afraid, quite rightly sometimes, that saying "I'm sorry" will qualify as an admission that will be used against us in court. We fear confusion, particularly if we wish to offer sympathy but do not feel at fault. As one group of commentators noted:

Reluctance to apologize may also be the product of formal rules of evidence which treat an apology as an admission of fault that can be used to prove wrongdoing. Thus it is commonplace for insurance companies and attorneys to advise policyholders against expressing sympathy for a person injured by the policyholder, for fear such an expression will be treated as an admission of guilt.¹³⁹

My proposal does not address the social, spiritual, and emotional impediments to apology, but renders such litigation concerns obsolete.

132. See TAVUCHIS, *supra* note 90, at 5, 14.

133. See *id.* at 67.

134. See Lazare, *supra* note 90, at 78.

135. See Goldberg et al., *supra* note 90, at 222; cf. John M. Sloop, "Apology Made to Whoever Pleases": *Cultural Discipline and the Ground of Interpretation*, 42 COMM. Q. 345, 353 (1994) (stating that the hierarchical structure of apology is evident in rap group Public Enemy's fear that apologizing for anti-Semitic remarks would "appear to be 'knuckling under' to white media").

136. An apt term for a feminist critique. See *infra* notes 153-58 and accompanying text (discussing the gendered aspects of apology).

137. See Wagatsuma & Rosett, *supra* note 94, at 461-62 (comparing the United States to Japan, and noting the prevalence of apologies in Japan); see also Columas, *supra* note 110, at 82; Lucy Broadbent, *L.A. Life*, INDEPENDENT (London), Mar. 13, 1998, available in 1998 WL 13640558) (discussing a pedestrian who was hit by a car in Los Angeles but was very "British about it," by apologizing to the anxious driver who had been entirely at fault); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1165-66, 1183 (1997).

138. Lazare, *supra* note 90, at 40.

139. Goldberg et al., *supra* note 90, at 222.

B. *The Proposal*

Because apologies are so crucial to social interaction and personal peace, it is desirable that law facilitate or, at least, not hinder the possibility of this healing ritual. But apologies have a minimal role in traditional law. Most notably, the fact of an apology is significant in a libel action.¹⁴⁰ Apologies have become more common in the quasi-legal setting of mediation.¹⁴¹ Apologies operate primarily in less formal social spheres, concern the unwritten laws of the moral community, and reinforce the unwritten moral code. Nevertheless, their existence or absence may have a profound effect on law in many disparate ways, including, most importantly, the questions whether compensation is necessary, to what degree, and how it will be obtained.

My proposal would except apologies and admissions of fault in civil cases.¹⁴² Any statement of self-blame and contrition would be inadmissible, as would be the surrounding facts. In this respect, it would be similar to Rule 408, which excludes statements surrounding the compromise negotiation. If I hit you with my car, I could apologize, and that apology would not be admissible as evidence (though other means of proving fault, such as witnesses, skid marks, physics of the collision, et al., could clearly be presented). An expression of contrition (e.g., "I'm sorry") and an acknowledgment of blame (e.g., "I ran the red light. It was my fault.") would not forestall a lawsuit, but

140. Apology can be an effective tool to avoid litigation or to encourage prompt settlement of a libel suit. According to a comprehensive study of libel cases involving the media, many plaintiffs initially contacted the defendants to ask for an apology or correction. See John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 220 (1985). Only one-fifth of libel plaintiffs reported that they were suing for money damages; instead, most plaintiffs said that their primary reason for suing was to repair their reputation or to punish the media defendant. See *id.* at 220.

Issuing an apology or retraction has always been one way for a libel defendant to mitigate damages under the common law. See BRUCE W. SANFORD, *LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION* § 12.3.1, at 479-80 (1987). Even in the absence of a state mitigation statute, a retraction or apology may be considered evidence to rebut common law malice, and it can also have an influence on the jury in subtle ways. See *id.* at 481-82; see also Wagatsuma & Rosett, *supra* note 94, at 478-79.

141. See Goldberg et al., *supra* note 90, at 221 (noting that "[m]any mediators have had one or more experiences in which an apology was the key to a settlement that might otherwise not have been attainable"). See generally Levi, *supra* note 137.

142. My thanks to Roger Park for first raising the important distinction between civil and criminal cases. See, e.g., Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 81 (1987). The complicated law of criminal admissions, including those advanced in *Miranda v. Arizona*, 384 U.S. 436 (1966), in addition to the fact that the policies of criminal law involve public welfare as opposed to compensation for personal wrong, indicates that this proposal should not apply to criminal cases.

could not in themselves be admitted as evidence of negligence or wrongdoing, even for impeachment purposes.

Currently, evidence law treats such naked apologies and statements of blame (that is, those not part of a compromise) as admissions.¹⁴³ As two advocates of apology have explained: "A crucial inhibition to a person making an apology in an American legal proceeding is the possibility that a sincere apology will be taken as an admission: evidence of the occurrence of the event and of the defendant's liability for it."¹⁴⁴

First, I will analyze the proposed exception for apologies and admissions of fault along traditional evidentiary lines. After demonstrating some of the issues and possible objections under that traditional approach, I will consider how a feminist approach enhances the analysis.

C. *Traditional Analysis*

For the traditional approach, I return to the articulated policies underlying Rules 407 and 408, beginning with the extrinsic policy of encouraging settlement.¹⁴⁵ From a utilitarian point of view, some recent, yet limited, empirical research indicates that people who receive a prompt apology are less likely to sue.¹⁴⁶ Certainly, although people say that they would be less likely to sue, it would be hard to know for sure. There is also anecdotal evidence that potential plaintiffs who are immediately well-treated by the person who caused them harm are less likely to sue.¹⁴⁷ Second, under a traditional analysis, as with Rules 407 and 408, there is also the policy against punishing dogooders.¹⁴⁸ Just as we do not want to penalize those good folks who repair or who compromise,¹⁴⁹ we might not want to punish those peo-

143. See Wagatsuma & Rosett, *supra* note 94, at 479. ("In American law, a statement that meets the standards of a sincere apology . . . might also be characterized as an admission of liability admissible against the utterer."); see also *supra* notes 41-46 and accompanying text.

144. Wagatsuma & Rosett, *supra* note 94, at 483.

145. See *supra* Part III for a discussion of the policies underlying Rules 407 and 408 and *supra* notes 74-75 and accompanying text for a discussion of the policy of encouraging settlement.

146. See *infra* notes 268-69 and accompanying text.

147. For instance, after Delta Air Lines, Flight 191 crashed, Delta sent a representative to assist the families of each passenger who was injured or died as a result of the crash. See Tom Howlett, *Delta's Care Helped Deter Suits*, DALLAS MORN. NEWS, Aug. 3, 1986, available in 1986 WL 4331186. Delta flew family members to the crash scene, provided air fare, car rental and other accommodations, including funeral arrangements, if necessary. See *id.* Fewer suits were filed against Delta because potential plaintiffs saw the airline as their friend. See *id.*

148. See *supra* notes 50, 70-72 and accompanying text.

149. See, e.g., *supra* notes 64-67 and accompanying text.

ple who are kind and polite enough to apologize. Finally, there is the issue of relevance—those who apologize are not necessarily in the wrong. They may apologize out of fear, out of a desire to placate another, or to terminate a dispute.

Evaluating my proposal under this traditional scheme, it is hard to say, on balance, whether the social benefits and issues of fairness that would prompt us to exclude apologies would justify such an exception. This would be particularly true where the potential lost evidence seems so powerful, such as when a defendant in a traffic accident admits fault and says, “Sorry, I ran the light.” Such evidence seems not only to be reliable but morally appropriate. After all, the admissions rule reflects a basic premise of evidence law—the adversary system.¹⁵⁰ The theory behind the rule of admissions emanates as much from the law of the sandbox, as from the law of rationality. Its premise is: “Ha, ha, you said it, now you’re stuck with your own admission.”

D. A Feminist Approach

The best, most convincing reasons for adopting an evidentiary exception for apologies arise out of extrinsic policy concerns best explained by feminist analysis. As noted under the traditional analysis, people may tend to sue less often when they receive an apology, but that in itself is not the most persuasive reason for encouraging apologies. The *very reasons* that people are less likely to sue—their sense of acknowledgment, feelings of dignity, connections to the wrongdoer, and participation in an important social ritual—explain the feminist advocacy of apology. Apologies are valuable for many reasons that are hard to quantify—all related to power dynamics, relationships, and practical, contextual solutions to difficult human problems. A feminist analysis provides the missing pieces, explaining more fully the benefit of apologies and why we should aspire to this “sorry” state.¹⁵¹

First, feminists worry about those whose impulse to apologize and reconcile is so strong that it is not deterred by the possibility of suit. In the case of Rule 407, a feminist might be concerned about the peo-

150. See *supra* note 46 and accompanying text.

151. Feminism is not the only form of jurisprudence outside mainstream Western culture that values apologies. In Japan, apologies are part of settlements and are intrinsic not only to settling civil cases but also to sentencing in criminal matters. See Wagatsuma & Rosett, *supra* note 94, at 462. The benefits of apology are tremendous, but if one waits for mediation or sentencing, it is often too late. See Levi, *supra* note 137, at 1186-88. Apologies are most effective on the spot, not after litigation has been threatened, when the plaintiff is not only feeling injured, but aggrieved.

ple who are so connected and concerned with others that they will repair a defect no matter what. Similarly, some people will apologize for harm they caused even if such admissions of fact or indications of contrition disadvantage them in court. Traditional evidence analysis values "good guy" behavior, and one of the rationales behind Rules 407 and 408 is to avoid punishing those who do good.¹⁵² The argument is much stronger however, from a feminist vantage point that values empathy and connection.

Furthermore, a feminist analysis would be very concerned with the gendered effect of so-called gender neutral rules, such as the admissions doctrine,¹⁵³ which currently allows statements of apology into evidence. There is much anecdotal evidence and some empirical data that the apologizers of this world—those who are empathetic, quick to accept blame, and concerned with harmony—are more likely to be women. Psycholinguist, Deborah Tannen, has studied communication in the workplace and observed that women tend to apologize more often and use apologies as a social device to smooth over difficulties or to repair relationships.¹⁵⁴ In some cases, a woman's apology is like a verbal tick, more of a ritualized gesture or speaking style than necessarily an acceptance of blame. "Women tend more than men to use apology strategies which recognize the claims of the victim."¹⁵⁵ Men, on the other hand, "learn early to act strong, independent and self-assured, and to always save face by not admitting fault."¹⁵⁶ As Deborah Tannen explained:

[A]pologizing is seen as a sign of weakness. This explains why more men than women might resist apologizing, since most boys learn early on that their peers will take advantage of them if they appear

152. See *supra* notes 50, 69-71 and accompanying text.

153. See *supra* notes 40-46 and accompanying text.

154. See Carol Lynn Mithers, *Don't Be Sorry*, LADIES HOME J., Sept. 1994, at 62.

155. Holmes, *supra* note 109, at 209.

156. Mithers, *supra* note 154, at 62. "Men do not say they are sorry for much the same reason that they do not ask directions when they are driving—they see communications as competition and they do not want to seem vulnerable." Amy Ash Nixon & Fran Silverman, *A 'Sorry' Lot: If Some Women are Apologetic, They Just Think It's Copacetic*, HARTFORD COURANT, Mar. 10, 1997, available in 1997 WL 2986316 (quoting Leslie Beebe, Professor of Linguistics and Education at Columbia University's Teachers College). Dr. L. C. Winterscheid, Associate Dean and Medical Director of the University of Washington School of Medicine in Seattle, says that "early intervention is very important—going to the patient, apologizing, explaining what happened and why, and compensating for the costs." John O. Haley, Comment, *The Implications of Apology*, 20 L. & SOC'Y. REV. 499, 505 (1986).

weak. Girls, in contrast, tend to reward other girls who talk in ways that show they don't think they're better than their peers.¹⁵⁷

Arguably, the current state of evidence law may disadvantage women who as a group tend to apologize more frequently and to apologize even when they do not believe that they have engaged in any wrongful conduct.¹⁵⁸ Often the "apology" does not literally mean that the woman believes that she has engaged in wrongful conduct; rather it is issued as a means of expressing sympathy and a means of acknowledgment of the other person's pain or difficulty.¹⁵⁹

There is actually some scholarly debate over the extent to which sex differences exist with regard to apologies;¹⁶⁰ generally, most of the study is psycholinguistic, looking at casual apologies for petty daily offenses and not major apologies for significant injuries.¹⁶¹ This in itself is significant, given the intent to which sympathetic apologies are

157. Deborah Tannen, *I'm Sorry, I Won't Apologize*, N.Y. TIMES, July 21, 1996, (Magazine), at 34.

158. See Mithers, *supra* note 154, at 62. Mithers states:

"Because men are less likely than women to apologize as an automatic way of being considerate, they may interpret what a woman says as an actual apology." And that may leave a woman in a less powerful position: She may be seen as weak or bumbling, or she may be assigned blame for things that aren't her fault. When a woman constantly uses ritual apology in a business setting, Tannen says, "she may be seen as incompetent."

Id. (quoting Tannen); see also Amy Ash Nixon & Fran Silverman, *Sorry Situation: There's a Gender Gap When it Comes to Apologies*, SEATTLE TIMES, Mar. 30, 1997, available in 1997 WL 3226224 ("Why is there such a gender gap in this sorry situation? Experts suggest men feel apologizing puts them in a one-down position, a spot they are not happy or at all comfortable in, but a spot some women may be used to.")

159. See Mithers, *supra* note 154, at 58, 62 (stating that "women's excess apologizing is simply a matter of speaking style" and that "[m]any women will say 'I'm sorry' not as a literal apology but as a way of acknowledging that something may have been difficult for the other person"); *Men and Women: Genderlects*, ECONOMIST, July 20, 1991, at 107 (reviewing DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION*, and stating that "[w]omen tend to say they are sorry more often than men do, but this should not always be taken for an apology. Sometimes they simply mean that they regret something without taking any of the blame themselves, but this is often misunderstood").

160. See Holmes, *supra* note 109, at 197 (noting "significant sex differences in the distribution of apologies"). *But cf.* Levi, *supra* note 137, at 1184-85 (stating that the "relationship between the parties' genders and the likelihood of apology is thus far undemonstrated"); Judith Mattson Bean & Barbara Johnstone, *Workplace Reasons for Saying You're Sorry: Discourse Task Management and Apology in Telephone Interviews*, 17 DISCOURSE PROCESSES 59, 79 (Roy O. Freedle ed., 1994) (noting that in telephone interviews more males used apology forms than females but explaining this anomalous result as reflecting the fact that men tend to apologize more for intrusions on others' time, whereas women apologize for intrusions on another's space, and that given the exercise, men were probably more justified in apologizing; also noting that men apologize primarily to strangers, whereas women are more likely to apologize to someone with whom they have a relationship).

161. See generally Holmes, *supra* note 109.

sometimes used as evidence against the parties who issued them.¹⁶² I am aware of no empirical evidence that gender differences exist for profound apologies for serious infractions. The disparate impact of apologies for serious offenses raises interesting questions meriting further study. One need not demonstrate a disparate impact on women, however, to apply a feminist analysis. Instead, applying the teachings and methods of feminism—the ethic of care, the attention to emotion, the focus on context, the suspicion of neutral rules, and the search for oppression or other vestiges of patriarchy—illuminates the evidence rules and offers directions for making them more humane, inclusive, and effective.

Feminists, particularly dominance feminists, screen for rules that reflect power imbalances and vestiges of oppressive sex roles. One way of looking at apologies is to perceive them as reordering the hierarchy of entitlement and power.¹⁶³ The one who apologizes humbles himself, and the recipient of the apology becomes more powerful. Dominance feminism would recognize that apologies may be a style of coping for subordinate groups—weaker groups who are acculturated to apologize, to curry favor, to ensure safety, and to reinforce the hierarchy.¹⁶⁴ The starkest feminist example is the wife who after being beaten by her husband apologizes and blames herself for provoking the attack.¹⁶⁵ Even in less dramatic and wrenching circumstances, however, women may be disproportionately disadvantaged by a system of evidence rules that protects offers to compromise claims, but ignores apologies outside legal transactions.

The most interesting insights emerge from cultural feminism. Difference feminism would focus on how apologies can work to reinforce connections between people, maintain relationships, and serve society at large.¹⁶⁶ A feminist analysis from the perspective of an ethic of care explains the benefit of apologies in ways distinct from the traditional evidence model. It values behavior that traditional evidence policy seems not to notice or care about. A feminist analysis, guided by the ethic of care, would observe that apologies address the

162. See *infra* note 297 and accompanying text (describing lawsuits against doctors who expressed sympathetic apologies).

163. See Levi, *supra* note 137, at 1178 (“By apologizing, the offender acknowledges her diminutive moral stature and asks for restorative forgiveness.”).

164. See *supra* notes 24-26 and accompanying text.

165. See Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 Nw. U. L. REV. 1032, 1042 (1996).

166. See *supra* notes 20-23 and accompanying text.

problems of three different constituencies: the injured party, the tortfeasor, and society at large.

1. The Injured Party

The injured party craves apology because apologies meet many peculiarly human needs. This extrinsic benefit—responding to the emotional needs of the wronged or injured party—is not something that evidence law traditionally values. Admittedly, people whose emotional need for acknowledgment is met are less likely to sue or to shoot up a post office, but there are other compelling reasons to care about meeting their needs. Meeting such needs is important to the type of human concerns recognized and celebrated by an ethic of care. The acknowledgment of wrongs—even without more—can be healing, by serving as validation. Apologies are the antithesis of the *Gaslight* phenomenon.¹⁶⁷ Apologies validate feelings and reassure the wronged party that he or she is not crazy or unreasonable to feel aggrieved. Instead, apologies acknowledge that the injured party was, in fact, actually wronged and deserves to be noticed. The psychological effect of such affirmation is very strong and positive.

2. The Wrongdoer

Equally interesting is the second perspective of looking at my proposed rule from the wrongdoer's point of view (which is, of course, what Rules 407 and 408 do, but only in a very truncated way). Here, I would emphasize not just the economic needs of the wrongdoer, but her emotional needs as well. An ethic of care analysis would be concerned with the anguish of the party who made the mistake—the one who ran a red light, or made a racist remark, or missed an important court deadline. An ethic of care would not presume that any of these actors merely wants to escape financial responsibility (though certainly that is an important consideration). An ethic of care would also accommodate the fact that many wrongdoers possess a strong need to exculpate guilt or, at the very least, express sympathy.

This discussion of the needs of the wrongdoer is not meant to imply that wrongdoers everywhere are just waiting for the evidentiary green light to fulfill their deepest desire to apologize. As a mother of

167. The Alfred Hitchcock film *Gaslight* features an evil husband, played maliciously by Charles Boyer, who seeks to steal his wife's fortune. The husband tries to convince his wife, played by Ingmar Bergman, that she is going crazy, in part by turning up and down the intensity of a gaslight and pretending not to notice any changes in the light. See ROBIN WOOD, HITCHCOCK'S FILMS REVISITED 317 (1989).

teenagers, I witness daily the depths of human mean-spiritedness and self-justification. I am not deceived into thinking that my proposed exception will always prompt apologies and that civility will bloom. In many cases, the tortfeasor will reject apology as an option because of pride, stubbornness, or fear that the apology will alert a potential plaintiff to the wrongdoing even though it would be inadmissible should a suit follow.¹⁶⁸ Rather than view this proposal as an incentive to apologize, I suggest it as a facilitation, allowing wrongdoers to follow their higher impulses and as protection for those who would like to apologize.

3. Society's Interest

Finally, it is worthwhile to look at the problem from a larger point of view. In our current age of public fascination with the trial *du jour*, it is beyond cavil that evidence law affects and shapes our society. We already recognize the power of evidence law to shape behavior outside the courtroom by informed participants who act in the shadow of the rules.¹⁶⁹ I think it is time that we acknowledge the true reach of our evidence rules and address the ways they may subtly reflect and shape our cultural presumptions and our out-of-court actions.

From a social vantage point, apologies are valuable for three reasons. First, they bespeak a more civil and humane society. The benefit is not merely in the absence of conflict, vengeance, or the modern equivalent of blood feuds—lawsuits. Rather, the benefit of my proposal is that our world would be a more pleasant place in which to live. 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. People who respond to incentives (evidentiary and economic) will at least not be hindered by apologizing (which coincidentally might indeed be a smart economic move). These apologies could not be used as weapons in the courtroom to portray their issuers as loose-lipped ninnies. Instead, the rules of evidence, however subtly, will promote their issuance.

Second, apologies also serve society in encouraging honest discussion of mistakes. A professional who is encouraged by colleagues, his malpractice insurer, and indirectly the evidence code to hush up er-

168. See *supra* notes 40-43 and accompanying text.

169. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1995) (regulating trial publicity and extrajudicial statements of lawyers).

rors, will not learn from his mistakes. It's hard to improve while you pretend and perhaps even convince yourself that you are perfect.

Third, and finally, apologies can set a tone for society and help us define the boundaries of acceptable conduct. When a harasser apologizes for causing pain and acknowledges that her comments were offensive, she acknowledges the feelings, needs, and sense of reality of the person she harassed. She provides herself an opportunity for healing, expiation of guilt, and learning. Perhaps most importantly, she sets the standard and articulates the parameters of respectful social discourse. By admitting fault, she tacitly promises not to engage in such behavior and is contributing to a shared understanding of how an organized society should look.

I recognize that there may be problems with apologies if they are used in lieu of fair compensation, and if rich and sophisticated actors take advantage of poor unsophisticated victims.¹⁷⁰ 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.

V. APOLOGIES IN ACTION

As a general proposition, apologies have remarkable healing power.¹⁷¹ As discussed above, they can make life better both for the victim, who feels acknowledged, and for the wrongdoer, who feels forgiven.¹⁷² Apologies connect people, validating the importance of the individual who was wronged and the relationship between the parties. This focus on feelings and interpersonal dynamics is crucial when an ongoing relationship exists between the offender and injured party.¹⁷³

Promoting apology is particularly important in the context of a professional relationship. The relationship between a professional

170. My thanks to Seth Lahn for raising this point. Cf. Fritz Wenisch, *The Hypocrisy of Official Apologies*, PROVIDENCE JOURNAL-BULLETIN, July 26, 1997, available in 1997 WL 1084419 (“If you have received apologies from big corporations, you know that they often are about as sincere as your ‘sincerely’ placed at the end of a letter to the IRS.”).

171. See, e.g., Wagatsuma & Rosett, *supra* note 94, at 461-62.

172. See *supra* Part IV.D.1-2.

173. See Goldberg et al., *supra* note 90, at 221 (“[T]o the extent that the dispute has occurred in the context of an ongoing relationship, the apology is valuable in repairing whatever harm to the relationship has resulted from the dispute.”).

and the one served (e.g., lawyer-client, clergyperson-penitent, doctor-patient) depends on personal connections as well as expert service. Such professional relationships often encompass a high degree of trust and rely on outside professionals' expertise, because laypeople are often unable to evaluate the quality of the service.¹⁷⁴

From a social perspective, we value professional relationships.¹⁷⁵ Professional relationships foster human autonomy by giving the layperson access to expert assistance beyond personal knowledge and skill.¹⁷⁶ Paradoxically, such relationships can also serve society by limiting the client or a patient's bad behavior.¹⁷⁷ The professional can service for antisocial (but not illegal) activities.¹⁷⁸ When an atmosphere of acceptance and trust exists between professional and layperson, the professional can offer advice and serve as a pressure-release mechanism, listening to clients vent and counseling them against dangerous or unwise courses of action.¹⁷⁹

As a general matter, apologies are vital to professional relationships because honesty is central to these fiduciary associations.¹⁸⁰ Apologies can cement the relationship by emphasizing the victim's importance to the professional and the professional's loyalty to the victim. Professionals who do not apologize run the risk of alienating their clients and losing their trust.

To illustrate my proposal and to elaborate on its potential benefits, I will examine the relationship between doctors and patients where the doctor has made a mistake. Part of the reason for my interest stems from the fact that medical errors—their effect on patients,

174. Several decades ago, Dean Roscoe Pound defined professionalism: "The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose." Presiding Justice Guy James Mangano, *Thoughts on Legal Professionalism*, N.Y. L.J., Feb. 10, 1997, at 1 (quoting Dean Roscoe Pound).

175. The evidentiary privileges that shield confidential communications with these aforementioned professionals indicate that our society recognizes the importance of these professional relationships. See, e.g., FED. R. EVID. 501 (providing that the "principles of the common law" of privilege shall govern witnesses in most federal actions).

176. See, e.g., Stephen L. Pepper, *The Lawyers Ethical Amoral Role: A Defense, A Problem, and Some Possibilities*, 1986 A. B. F. RES. J. 613, 617-18 (1986) (asserting that a lawyer should not impose his or her personal morality on a client but acknowledging that a "lawyer is the means to first-class citizenship, to meaningful autonomy, for the client").

177. See *id.* at 614.

178. See generally David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 A. B. F. RES. J. 637 (1986) (arguing that the law's facilitation of individual autonomy may be legally right but morally wrong).

179. See Pepper, *supra* note 176, at 613.

180. See, e.g., Albert W. Wu et al., *To Tell the Truth: Ethical and Practical Issues in Disclosing Medical Mistakes to Patients*, 12 J. GEN. INTERNAL MED. 770, 770, 772 (1997).

doctors, and on the doctor-patient relationship—have emerged as an important issue for the medical community.¹⁸¹ In addition, the doctor-patient relationship can serve as an important, if slightly unusual paradigm. Apologies are an obvious remedy when an offense was intentionally or recklessly committed, such as in libel or harassment cases.¹⁸² They are less obvious, but I will argue, equally important and potent when no offense was intended, yet errors with serious consequences arose. Finally, a feminist approach is particularly appropriate in the context of a professional relationship tending to reflect an imbalance in power. When the patient is physically and emotionally vulnerable, she must depend on the doctor for information and treatment.¹⁸³ This tends to deify the physician and infantilize the patient. Feminists have noticed, in particular, the way that this dynamic operates between male doctors and female patients (especially in obstetrics and gynecology).¹⁸⁴ Because feminist scholarship is concerned with relationships, the bond between the healer and the one to be healed is a fascinating object for study.

A. *The Extent and Effect of Malpractice*

1. The Nature of the Harm

The extent of harm inflicted by medical malpractice is staggering. A Harvard study estimated that the number of people injured or killed by medical malpractice in hospitals is the equivalent of one

181. Recently, Dr. Albert Wu urged doctors to disclose errors to their patients, to apologize, and to make every effort to repair the damage, including compensation to the patient. See generally Wu et al., *supra* note 180. See also Denise Grady, *Researchers Urge Doctors to Admit Mistakes and Apologize*, PITTSBURGH POST-GAZETTE, Dec. 14, 1997, available in 1997 WL 16585300.

182. Not all medical malpractice consists of honest mistakes; some types of negligence reflect callous indifference, such as failure to treat a dying child. See *Today* (NBC television broadcast, Jan. 12, 1998, available in 1998 WL 5260829) (reporting a doctor's failure to diagnose and promptly treat an 11-month-old baby in critical condition, which resulted in the child's death).

183. See Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 L. & SOC'Y. REV. 105, 110 (1990) ("[T]he patient/doctor connection is unique in the 'personal' bond that links the parties. The doctor is dealing with the patient's body and health and may literally hold the life of the patient in his/her hands. Obviously, this is an extremely personal matter for the patient.").

184. See Sylvia A. Law, *Silent No More: Physicians' Legal and Ethical Obligations to Patients Seeking Abortions*, 21 N.Y.U. REV. L. & SOC. CHANGE 279, 295 (1994) ("In practice, the tradition of medical paternalism is particularly strong in relation to women patients."); Patricia Peppin, *Power and Disadvantage in Medical Relationships*, 3 TEX. J. WOMEN & L. 221, 222-23 (1994) (describing the inherent imbalance in the relationship between doctor and patient and arguing that the imbalance results in a loss of "dignity and sense of self," which "undermines personal effectiveness and authentic representation of self").

jumbo jet crashing every day.¹⁸⁵ The study reviewed more than 30,000 randomly selected hospital records from New York State facilities in 1984 and estimated that, “the rate of adverse events due to negligence [was] 1.0 percent.”¹⁸⁶ Such mistakes, which account for at least 80,000 (and some would say as high as 150,000) deaths a year, have been verified through research.¹⁸⁷ The details culled from the recent headlines are as varied as they are horrifying. There was the accidental removal of a patient’s noncancerous lung;¹⁸⁸ a thirteen-year-old’s death from a punctured artery six hours after a routine appendectomy;¹⁸⁹ and the needless surgery to remove pins from a three-year-old’s arm that had already been removed, because the surgeon had failed to read the chart.¹⁹⁰

2. Absence of Self-Reporting

Not only is malpractice rampant, but most doctors do not report their errors. In one study, doctors-in-training at three large teaching

185. See *Primetime Live: Critical Condition—Hospital Mistakes* (ABC television broadcast, May 24, 1995, available in LEXIS, Nexis Library) (reporting the findings of a 1991 Harvard Study reprinted in Troyen A. Brennan, M.P.H., M.D., J.D. et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients—Results of the Harvard Medical Practice Study I*, 324 *NEW ENG. J. MED.* 370 (1991) [hereinafter *The Harvard Study*]).

186. The Harvard Study, *supra* note 185, “reviewed 30,121 randomly selected records from 51 randomly selected acute care, non-psychiatric hospitals in New York State in 1984.” *Id.* at 370. It concluded that “[t]here is a substantial amount of injury to patients from medical mismanagement, and many injuries are the result of substandard care.” *Id.* Because the study focused on the delivery of medical care, rather than just on filed malpractice suits, it captured a broad picture of malpractice, including cases unknown to the patient or for which the patient chose not to sue. See *id.* at 370-71. Approximately one in 27 hospitalizations resulted in an iatrogenic injury to the patient (labeled by the researchers as an ‘adverse event’). See Thomas B. Metzloff, *Understanding the Malpractice Wars*, 106 *HARV. L. REV.* 1169, 1177-78 (1993) (book review) (discussing *The Harvard Study*). Among those injuries, “one in four was due to negligence.” *Id.* at 1178. “From this, the study concluded that approximately one percent of all hospital admissions resulted in an injury caused by physician or hospital negligence.” *Id.*; see also Jane Goldman, *Preventing Malpractice*, (visited Oct. 29, 1998) <<http://www.medscape.com/time/hippocrates/1997/v11n.10/h1110.01.gold.html>> (discussing the findings of *The Harvard Study* and noting that only one in 50 of the one percent of patients who suffered some sort of medical negligence actually filed suit).

187. See *Primetime Live*, *supra* note 185 (detailing cases of needless surgery, grossly negligent diagnoses, and callous treatment); Sheldon P. Blau, M.D., “Whoops, We Ruptured Your Artery,” *MEN’S HEALTH*, July 1, 1997, available in 1997 WL 9732311 (reporting a doctors’ personal account of experiencing medical mistakes).

188. See Linda P. Campbell, *Doctor Loses Suit Against Lawyers*, *FORT WORTH STAR-TELEGRAM*, Apr. 30, 1998, available in 1998 WL 239430.

189. See Mike Flaherty, *Tragic Story Marks Debate Over Limits on Suing Doctors*, *WIS. ST. J.*, Oct. 15, 1997, available in 1997 WL 12294550.

190. See Sharon Course, *Needless Surgery Pin-Pointed*, *SUNDAY NEWS*, May 24, 1998, available in 1998 WL 8976824.

hospitals often failed to disclose their serious mistakes; only half told the senior physicians, and only one-quarter told the patients.¹⁹¹ Similarly, a *Journal of the American Medical Association* study asked physicians what they would do if they realized that they had accidentally administered a lethal dose of medication to an eighty-year-old man suffering from very high blood pressure.¹⁹² Fifty-five percent of the doctors said they would inform the patient's family that they inadvertently overdosed the patient.¹⁹³ But, "[a]lmost thirty percent said they'd tell the family, '[t]he patient required strong medication, and his drop in blood pressure was a known risk.'"¹⁹⁴ (Technically, the remark would be true, but it would include no mention of the negligent homicide.) More shocking, ten percent would have told the patient's family that the man was very sick and died despite the doctor's best efforts.¹⁹⁵

3. The Reasons Doctors Hesitate to Inform Patients of Errors and to Apologize

Although medical ethics manuals have long called for full disclosure to patients,¹⁹⁶ doctors who are concerned about lawsuits and their reputations often ignore their ethical duty to disclose, let alone apologize.¹⁹⁷ The main reason doctors give is that they are fearful that anything they tell a patient about a medical mistake can and will be used against them in a court of law.¹⁹⁸ They are afraid that disclosure will notify the patient, or the patient's family, that a cause of action exists; hence, any apology by the doctor will be "Exhibit A" in the subsequent lawsuit.¹⁹⁹ Currently, this understanding of the law is basically correct, though exaggerated when it comes to issuing statements

191. See Wu et al., *supra* note 180, at 770. Such mistakes include misdiagnosis, incorrect drug prescription, and surgical errors. See Grady, *supra* note 181 (discussing Dr. Wu's research).

192. See Robert L. Lowes, *Made a Bonehead Mistake? Apologize*, 74 *MED. ECON.* 94, May 12, 1997, available in 1997 WL 10004788 (reporting the study's results and discussing the dilemma doctor's face after making medical mistakes).

193. See *id.*

194. *Id.*

195. See *id.*

196. See *infra* notes 222-25 and accompanying text.

197. See generally Joan Vogel & Richard Delgado, *To Tell the Truth: Physicians' Duty to Disclose Medical Mistakes*, 28 *UCLA L. REV.* 52, 54-55, n.21 (1980) (recounting horrific examples from American case law where doctors failed to disclose essential information about their own negligence to patients and their families).

198. See Grady *supra* note 181.

199. See *id.*; Lowes, *supra* note 192.

of sympathy because courts do not necessarily consider them admissions.²⁰⁰

Many malpractice insurers affirmatively “‘instruct doctors not to admit fault to patients without consulting the company or their hospital’s lawyer.’”²⁰¹ 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.”²⁰² Some malpractice policy language also appears to place severe limits on what doctors can say to patients, who suffered as a result of a medical error, or their families.²⁰³ Even many of the progressive companies, who do not interfere with doctor-patient dialogue, prohibit doctors from admitting liability.²⁰⁴ Often lawyers will instruct doctors to say nothing until all the evidence is in—much later than patients and their families need to feel valued and respected, and way after panic and anger has set in.²⁰⁵ Ironically, by doing so “‘physicians may be encouraging the very thing

200. See Rehm & Beatty, *supra* note 98, at 118-19 (distinguishing between true admissions and apologizing for expressions of sympathy and noting that courts usually do not consider the latter to be admissions of fault). *But cf.* Robertson v. LaCroix, 534 P.2d 17, 22 (Okla. Ct. App. 1975) (holding that the defendant doctor’s “statement that he ‘just made a mistake and got over too far’ is more than a mere statement of mistaken judgement; it constituted an admission of negligence during the performance of the surgery”); Sheffield v. Runner, 328 P.2d 828, 830 (Cal. Ct. App. 1958) (doctor’s statement after examining the deceased that “I should have put her in the hospital” was admissible with other evidence allowing plaintiff’s case to go forward); Dees v. Pace, 257 P.2d 756, 759 (Cal. Ct. App. 1953) (admitting testimony that following the discovery of the cut in plaintiff’s bladder, the doctor stated, “‘we all make mistakes’ and said he had made a mistake”); *cf. also infra* note 298 (noting several cases where plaintiffs sued because of doctors’ apologies).

201. Grady, *supra* note 181 (quoting Mark Hatlie, a lawyer and executive director of the National Patient Safety Foundation, founded by the American Medical Association).

202. Lowes, *supra* note 192 (quoting psychiatrist Thomas G. Gutheil, a professor at Harvard Medical School).

203. See *id.* (quoting one policy that precluded the doctor or any representative from “enter[ing] into any negotiation or *discussion of any kind* with any other party or its representative, regarding any liability insured by this policy without the comment of the Company” (emphasis added)).

204. See *id.*

Far from trying to hide the truth, malpractice carriers have sound reasons for asking physicians to consult with them before they apologize to a patient about a mistake. When doctors hold themselves responsible for a poor outcome, say healthcare attorneys, anxiety and guilt often cloud their thinking. They may need an insurance company risk manager to help them coolly analyze the situation and rehearse what they’ll tell the patient.

Id.

205. To be fair, determining what is error and what is misfortune can be tricky, particularly in very sick patients. Bad outcomes do not equal mistakes, and not all mistakes or error in judgments are negligence. It is obviously reasonable for the malpractice carrier to ask the doctor to investigate before issuing a statement of self-blame.

they are trying to avoid, since avoidance erodes the doctor-patient relationship and makes the patient more likely to sue."²⁰⁶ Obviously, the picture is complicated. Recent articles, particularly from apology enthusiasts, have encouraged discourse; even medical malpractice experts concerned about liability have awakened to the potential benefits of an early apology.²⁰⁷ Yet the message is decidedly mixed, with fear of legal liability a key concern.²⁰⁸

Beyond the fear of being sued and potentially liable because of an apology, doctors are also worried about their ability to participate in health maintenance organizations, their malpractice premiums, and other less tangible assets, such as their professional reputations.²⁰⁹ Moreover, medical practice hierarchy complicates doctors' reluctance to disclose errors, especially for young medical residents who make a disproportional number of the mistakes and may fear reporting mistakes to their attending physicians.²¹⁰ In fact, doctors are so scared of liability that they often refuse to issue even a sympathetic apology, lest that sympathy be mistaken for an admission of fault.²¹¹ Legally,

206. Don Colburn, *Doctors Should Admit Mistakes, Study Says*, CLEV. PLAIN DEALER, Jan. 21, 1997, available in 1997 WL 6575333 (quoting Steven B. Hardin, M.D., assistant professor of medicine at Loma Linda University Medical School); see also *Patient Care: It's Best to Own Up*, MODERN PHYSICIAN, Dec. 1, 1997, available in 1997 WL 15486356 (citing Steven B. Hardin).

207. See Lowes, *supra* note 192.

208. See Andrew A. Oppenberg, M.P.H., *Adverse Outcomes: What Do You Do?*, CAL. PHYSICIAN, Feb. 1992, at 44 ("A simple expression of sympathy does not equate an admission of liability, it shows your true concern for the situation.").

209. In fact, one doctor who issued an apology to the family of a man whose noncancerous lung he had mistakenly removed, later sued his lawyers for negligence. See Linda P. Campbell, *Trial Opens in Case of Doctor Suing Lawyers for Malpractice*, FORT WORTH STAR-TELEGRAM, Mar. 4, 1998, available in 1998 WL 3280407. The doctor argued that his formal written apology and a videotaped deposition (excerpts from which were aired later on the CBS news broadcast, *48 Hours*, see *48 Hours: See You in Court, Lawyers Get Large Malpractice Awards For Families of Victims* (CBS television broadcast, Sept. 14, 1995), available in Lexis, Nexis Library, Scripts File), were imprudent gestures that no reasonable attorney should have encouraged. See *id.* The doctor lost the case. See Linda P. Campbell, *Doctor Loses Suit Against Lawyers*, FORT WORTH STAR-TELEGRAPH, Apr. 30, 1998, available in 1998 WL 3292430. See generally Brad Burg, *Malpractice: Doctors' Six Fatal Mistakes*, MED. ECON., Feb. 12, 1996, at 227 (describing a doctor's economic and reputational devastation after being sued, even if the claim was bogus).

210. See Lowes, *supra* note 192 (recounting a healthcare law professor's perceptions after hearing that young physicians get "cues" from administrators that they should never admit mistakes).

211. Many attorneys specifically instruct doctors not to apologize, lest the apology be mistaken for an admission of fault. See *id.* For instance, malpractice defense attorney, Jack E. Horsley of Mattoon, Ill., advises his doctor clients to lay out the facts, possibly using the "word 'inadvertent' if need be." *Id.* (quoting Horsley). Horsley further suggests that a doctor "shouldn't be apologetic or [have his] hat-in-hand," so that "[t]he patient won't resent the doctor not saying I'm sorry." *Id.* But cf. Larry Veltman, M.D., *Managing Bad Results* (visited Mar. 18, 1998) <<http://www.ama-assn.org/med-sci/npsf/veltman.html>> (discussing what to do in

of course, an admission of error and an apology for it does not necessarily indicate a doctor's breach of the duty of care, but the doctor's fear that the patient will not understand this distinction.²¹² Propagating this fear are the medical legends and cautionary tales that circulate among doctors.²¹³ One malpractice attorney told of a surgeon who received a letter from a widow asking for information explaining why her husband had died of a post-operative infection.²¹⁴ The lawyer recounted:

Without consulting anyone, the surgeon sent a sympathy card. He wrote on it that he was sorry, the situation was very unusual, and he had no explanation. To the doctor, that probably seemed kind and harmless. But to a plaintiff's attorney, it meant, If I had done this right, he wouldn't have died.²¹⁵

According to the attorney, the surgeon purportedly agreed to settle the claim for \$50,000, and the other doctors—who all neglected to send condolence cards—"got off" completely.²¹⁶ Whether this story is true, or whether the plaintiff went forward with the lawsuit is not important. Nor is the question whether a condolence card would be admissible; or if it is admissible, whether the jury would hold it against the doctor. In fact, one might suppose that apologies would humanize doctors and avoid risking the jury's ire expressed in an award of punitive damages, especially where malpractice is obvious, as with a mistaken amputation. What is important, however, is the widespread perception that the law punishes apologies.

B. Reasons for Advocating Apologies

The parties involved and society at large gain significantly when doctors inform patients and apologize for errors.

the case of an adverse outcome and stating that "it is all right to apologize to the patient for the occurrence of the event. 'I am very sorry that this happened.' (This does not mean apologize because you caused the outcome.)"

212. See Rehm & Beatty, *supra* note 98, at 115; see also *supra* notes 198-99 and accompanying text.

213. See Burg, *supra* note 209, at 227 (internal quotations omitted).

214. See *id.* at 236.

215. *Id.*

216. *Id.*

1. A Doctor's Fiduciary Duties

The doctor-patient relationship is based on trust.²¹⁷ Anything short of full disclosure is a breach of that trust.²¹⁸ From a perspective of human dignity, as well as respect for autonomy, doctors must tell patients what is going on, because most patients have no choice but to rely on their doctors for expert medical information. Even the symptoms that a patient experiences can derive from many sources, and a patient without medical training has no way of knowing which may be due to physician error.²¹⁹ Furthermore, patients may be battling the physical and psychological problems associated with fighting illness, rendering them "vulnerable, dependent, and insecure" and more likely to rely on their doctors.²²⁰

Given the dynamics of the professional relationship—i.e., the patient pays for the doctor's expertise and relies on the doctor's assumed mission to heal and advocate for the patient's best interest—it is morally abhorrent for the doctor to fail to disclose vital information merely for self-protective purposes.²²¹ A feminist analysis of the doc-

217. See Ann J. Kellett, R.N., Comment, *Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients*, 1987 MO. J. DISP. RESOL. 111, 115 (1987) ("The physician-patient relationship is predicated on trust, and lack of trust can result in poor outcomes." (citing Sommers, *Malpractice Risk and Patient Relations*, 20 J. FAM. PRAC. 299 (1985))).

218. The only exception Dr. Wu could envision was in the rare case in which it was not in the patient's best interest to know the truth. See Wu et al., *supra* note 180, at 771; see also A. J. Davis et al., *Cultural Aspects of Nondisclosure*, 3 CAMBRIDGE QTRLY. HEALTHCARE ETHICS 338 (1994) (visited Mar. 18, 1998) <gopher://gopher.mcw.edu:72/0R0-408. . .Filial%20Duty%20of %20Nondisclosure> (noting that in some cultures full disclosure of distressing medical news, especially over the objection of the patient's children was harmful to the patient and the family); cf. Vogel & Delgado, *supra* note 197, at 83-86 (discussing and refuting the argument that imposing a duty of disclosure may suggest that as a group, doctors are not to be trusted).

219. "Patients, as laypersons, are rarely in a position to determine, unaided, whether a particular injury is the result of their physicians' breaching a medical standard." Kellett, *supra* note 217, at 123 (citing R. KLEIN, COMPLAINTS AGAINST DOCTORS 50 (1973)).

220. Vogel & Delgado, *supra* note 197, at 53 n.5 (citing studies on the psychological and emotional effects of illness on patients). Patients experience "self estrangement," because patients experience a loss of control over their bodies and minds." Kellett, *supra* note 217, at 114 (citing and quoting J. KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT 209 (1984)).

221. See Vogel & Delgado, *supra* note 197, at 61 n.55 (stating that John Rawls and "[t]he Golden Rule supports a duty to disclose" mistakes to patients (citing JOHN RAWLS, A THEORY OF JUSTICE 48-49 (1971))). Some argue that medical professionals should be held to a fiduciary standard requiring doctors to disclose mistakes and misdeeds. See Gerald Robertson, *Fraudulent Concealment and the Duty to Disclose Medical Mistakes*, 25 ALBERTA L. REV. 215, 221-22 (1986) (arguing that whether or not patients ask for information, physicians must disclose errors to patients, as an outgrowth of their fiduciary duties and a corollary to their duties of informed consent; and that the failure to do so is actionable as fraudulent concealment). *But cf.* *Aufrichtig v. Lowell*, 650 N.E.2d 401, 405 (N.Y. 1995) (holding a physician liable for violating his "duty of care not to impart false information" about his patient by misrepresenting his patient's skilled

tor-patient relationship would be concerned about this imbalance in knowledge and power, and would insist on honest disclosure as the first step in making the relationship more equal and connected. The concern that feminists have with invasion and misuse of female bodies is also triggered by a concern that doctors may not be offering a full accounting of the physical actions they perpetrate on women.

2. Support for the Doctor's Professional Obligations

Related closely to the doctor's fiduciary duties are the doctor's professional obligations. By disclosing and apologizing, a doctor is able to fulfill the physician's ethical responsibility of being truthful and loyal. According to the *American College of Physicians Ethics Manual*, doctors should tell patients about errors "if such information significantly affects the care of the patient."²²² Similarly, the American Medical Association's (AMA's) *Principles of Medical Ethics* state that a physician "must report an accident, injury or bad result stemming from his or her treatment."²²³ And,

[t]he AMA's Council on Ethical and Judicial Affairs states: "Situations occasionally occur in which a patient suffers significant medical complications that may have resulted from the physician's mistake or judgment. In these situations, the physician is ethically required to inform the patient of all facts necessary to ensure understanding of what has occurred."²²⁴

Furthermore, this duty should not be tempered by the physician's self-interest. The AMA's Council on Ethical and Judicial Affairs provides that "[c]oncern regarding legal liability which might result following

nursing needs to her insurance carrier). Vogel & Delgado argue in favor of a duty to disclose medical mistakes, asserting that it would put additional pressure on medical and governmental agencies to police doctor behavior and yet would not be as intrusive as the duty imposed on psychotherapists to warn third parties of a patient's dangerousness. See Vogel & Delgado, *supra* note 197, at 72-73 (discussing a psychotherapist's "duty to warn third parties who he or she believes the patient is likely to harm" (citing *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 347-48 (1976))).

222. Wu et al., *supra* note 180, at 770 n.6 (quoting AMERICAN COLLEGE OF PHYSICIANS, AMERICAN COLLEGE OF PHYSICIANS ETHICS MANUAL 117:947-60 (3rd ed. 1992)).

223. *Id.* at 770 & n.5 (citing AMERICAN MEDICAL ASSN., PRINCIPLES OF MEDICAL ETHICS § 4 (1957)). The first principle set forth in the 1996 edition of the *American Medical Association's Principles of Medical Ethics* is that a "physician shall be dedicated to providing competent medical service with compassion and respect and dignity." American Medical Assn., *Principles of Medical Ethics* (visited Sept 17, 1998) <<http://www.ama-assn.org/ehitic/pome.html>>. The second principle is that a "physician shall deal honestly with patients and colleagues and strive to expose those physicians deficient in character or competence, or who engage in fraud or deception." *Id.* Arguably, both principles require doctors to inform patients of mistakes in order to improve the competence of care, and the respect and dignity of their patients.

224. Wu et al., *supra* note 180, at 770 & n.7 (citations omitted).

truthful disclosure should not affect the physician's honesty with a patient.'"²²⁵

A lawyer-like reading of these ethical cannons indicates that medical ethics do not require disclosure of all mistakes and do not always specify to whom mistakes must be reported.²²⁶ Furthermore, the resultant harm must be "significant" and tangible,²²⁷ and thus appears limited to physical rather than psychological harms. Many times doctors feel trapped when they commit errors that cause substantial harm. As one medical ethicist explains, the question of what to tell the patient "makes doctors squirm Conceal a mistake, and you violate your professional ethics. Admit a mistake, and you may give a patient ammo for a malpractice suit."²²⁸ The benefit of my proposal is that it disarms the patient sufficiently to encourage a peaceful overture by the physician.

3. Benefits to the Patient and the Patient's Family

On a purely practical level, the patient may need disclosure in order to receive prompt and appropriate treatment to remedy the doctor's error.²²⁹ A patient will be more likely to follow through with

225. *Id.* at 774 (citation omitted).

226. Many have raised serious questions whether doctors are sufficiently committed to enforcing these professional standards. "Traditionally, state medical boards have been reluctant to address physician incompetence." See, e.g., Frank A. Sloan et al., *Medical Malpractice Experience of Physicians: Predictable or Haphazard?*, 262 JAMA 3291, 3297 & n.11 (1989) (citing R.P. Krusserow et al., *An Overview of State Medical Discipline*, 257 JAMA 820, 820-24 (1987)); see also Vogel & Delgado, *supra* note 197, at 58-60 & n.41 (discussing the medical profession's ineffective self-regulation stating that "the profession's advice to its members on minimization of legal liability often seems to proceed from the premise that the objective should be . . . to . . . forestall lawsuits, and the secondary objective [should be] . . . to reduce bad medical malpractice." (quoting 1 D. LOUISSELL & H. WILLIAMS, *MEDICAL MALPRACTICE* ¶ 6.02 (1977 & Supp. 1979))); Kristina Brenneman, *State Seen Too Easy on Doctors*, PATRIOT LEDGER, Apr. 13, 1998, available in 1998 WL 8083139; Brian C. Mooney, *The Patients Left Behind: Doctors with Dubious Records Start Fresh in Other States*, BOSTON GLOBE, Oct. 5, 1994, available in 1994 WL 6003943 (detailing horrific and repeated negligence by doctors, who the medical community continued to protect and made secret settlements without ever admitting fault). Increasingly, doctors have been criminally charged for their medical mistakes—arguably a sign of the growing frustration with the medical profession's failure to self-regulate. See, e.g., Maura Dolan, *Judge Acquits Rural Doctor of Murder of Infant Patient*, L.A. TIMES, Feb. 21, 1998, at A1 ("Medical associations complain that in recent years prosecutors have begun charging physicians criminally for medical errors.").

227. See Wu et al., *supra* note 180, at 771 ("We argue that the physician has an obligation to disclose mistakes that cause significant harm.").

228. Lowes, *supra* note 192.

229. Examples include: post-operative care for potential complications arising out of a punctured stomach, or counseling for a patient whose sterilization operation was unsuccessful. See Vogel & Delgado, *supra* note 197, at 62; Robertson, *supra* note 221, at 215.

treatments if she understands why they are necessary. Even when remedial medical procedures are unnecessary, monitoring may be needed. In either case, the physician needs to inform the patient to assure full cooperation and receive informed consent.²³⁰

Of equal importance to the ethical, legal, and practical benefits, disclosure may often assist the patient psychologically. For example, a patient would not despair if her recuperation after surgery was slowed by physician error, but instead would see the problem for what it is, a temporary setback.²³¹ Disclosure of this information allays anxiety and forestalls discouragement.

A doctor's apology can be healing in a spiritual sense as well. The patient feels not only more secure in her ultimate recovery, but more secure that someone is truly caring for her and that she will receive straight answers and caring treatment. Even if the patient died, her family would have a sense that their loved one mattered to the doctor and to the medical establishment that accidentally killed her.

A physician's withdrawal and retreat into silence after a tragic error can be maddening. Not understanding the loss of a loved one adds to the family's suffering. The father of Denise Verbeek, an otherwise healthy twenty-seven-year-old who inexplicably deteriorated after a purportedly successful knee surgery, explained his frustration about receiving bills from the hospital, but no apology.²³² Mr. Verbeek stated: "'People talk about the blue wall of silence. The hospital has a white wall of silence, . . . [a]nd this is life and death.'"²³³ The father demanded a full explanation and wanted the state to root out such failures in patient care.²³⁴ Similarly, a distraught mother who sued a doctor after he made a surgical error that killed her child explained: "'It isn't the money . . . ' The hospital has already agreed to settle for \$150,000 [the legal limit of medical malpractice liability in Wisconsin]. 'I want my day in court. I want to hear them tell me what went wrong. I want to hear them admit guilt and tell me they're

230. See Wu et al., *supra* note 180, at 771.

231. As Dr. Wu explains:

Disclosure of a mistake may also prevent the patient from worrying needlessly about the etiology of a medical problem. For example, a patient who was prescribed too much warfarin resulting in excessive anticoagulation suffered a gastrointestinal bleed. Telling patients about such mistakes may resolve their uncertainty about the cause of their condition, possibly allowing them to feel better by explaining that recurrence would be unlikely.

Id.

232. See Roni Rabin, *Wondering Why*, NEWSDAY, Aug. 11, 1995, at A7.

233. *Id.*

234. See *id.*

sorry.”²³⁵ The mother’s need for explanation and disclosure was poignant. Interestingly, she also needed some assurance that her child mattered to the doctor, and that her child’s death altered the emotional and moral balance of the doctor’s world.

In another example, a Philadelphia malpractice defense lawyer recounted a case in which an infant girl died in the hospital because she received the wrong kind of infant formula.²³⁶ At the deposition, months after her death, her father “was a basket case.”²³⁷

“It was obvious he had no idea why his daughter died. The nurses hadn’t talked to him. The doctors had ducked into the elevator. I went off the record with the man, and he tearfully said, ‘I didn’t file this lawsuit over money. I filed to find out what happened to my daughter.’ Once he uncovered the facts, and once the hospital took steps to prevent that kind of mistake from happening again, the man dropped his suit.”²³⁸

For one final example of the desperate need that patients and their families have for explanations and apologies, we can look to the hearings on a proposed settlement for harm caused by Cold War radiation experiments performed at the former Cincinnati General Hospital.²³⁹ Doctors in the study testified that they gave patients whole body radiation treatments to relieve cancer pain.²⁴⁰ But critics contend that the study was designed “to provide the military with information on how a nuclear attack might affect troops.”²⁴¹ A woman who watched her mother decline severely after receiving the whole body radiation treatment described her mother’s burned body, weakened condition, and immense pain from the procedure.²⁴² She scoffed at the proposed settlement, which would have included money, hanging a plaque inscribed with each patients’ initials somewhere on the University of Cincinnati campus, and an apology from the federal government.²⁴³ The use of the patients’ initials was proposed to appease some researchers that were concerned that if the plaque fully identified the names of those who received the radiation, it “would be a blot

235. Flaherty, *supra* note 189 (quoting Barb Schultz, whose thirteen-year-old daughter died from a punctured artery six hours after a routine appendectomy).

236. See Lowes, *supra* note 192.

237. *Id.*

238. *Id.* (quoting statement of James Lewis Griffith).

239. See Tim Bonfield, *Holdouts Call Deal Far From Adequate*, CINCINNATI ENQUIRER, Feb. 22, 1997, available in 1997 WL 5438066.

240. See *id.*

241. *Id.*

242. See *id.*

243. See *id.*

on their professional careers.”²⁴⁴ One family member asserted: “My mother had a name. Her name was Maude Jacobs. What is this about initials? This is not about money. My greatest goal would be to see those doctors up in front of the court I want the doctors to admit they made a mistake.”²⁴⁵

Disclosure alone is not enough to heal the breach caused by a medical error.²⁴⁶ Information alone, though useful, is more meaningful and more acceptable if offered in the context of remorse and regret. From a strictly physical vantage point, disclosure may remedy the potential physical harm and address classic legal concerns with autonomy. But a feminist approach to the relationship, recognizing that the harm done by a doctor’s error affects a vital connection between doctor and patient, demands more. The patient needs to know that the doctor is sorry because that validates the relationship and the significance of the patient. Apologies, because they are personal and emotional, provide a remedy that traditional tort law simply cannot provide.²⁴⁷

This concern to know the facts, receive an apology, and the assurance that the loved one mattered to the doctors and the medical establishment, is also accompanied by the desire to make sure such tragedies do not happen again. In the largest sense, the concern that the error not be repeated reflects an ethic of care for the entire community. The motive strikes me not so much as punitive regarding the doctors, but purposeful—stemming from a desire to make some sense out of tragic and unnecessary loss, and a hope that the lessons from a loved one’s death will spare others. Obviously, if the doctors stone-wall and pretend nothing untoward took place, the family is deprived of its need to make sense of the tragedy and express its grief through positive action.

244. *Id.*

245. *Id.*

246. See David Hilfiker, M.D., *Facing Our Mistakes*, 310 *NEW ENG. J. MED.* 118, 121 (1984) (distinguishing between informing patients of mistakes by giving the patient or family a clinical description of what happened and truly confessing by saying “This is the mistake I made; I’m sorry”).

247. Cf. Levi, *supra* note 137, at 1206 (referring to Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 795-96 (1984)).

4. Benefits to the Doctor

a. *Expiating Guilt*

Negligent treatment is highly stressful for professional healers—whose primary creed since the days of Hippocrates has been “to keep the sick from harm and injustice.”²⁴⁸ Making a mistake, particularly one that takes a life, is excruciating for doctors. Dr. John Lantos described how mistakes have “come back to haunt [him] late at night.”²⁴⁹ He acknowledged that “[s]ometimes, patients have died as a result of my mistakes. Other times, my mistakes have increased their suffering.”²⁵⁰ Similarly, in a very moving article entitled *Facing Our Mistakes*, Dr. David Hilfiker offers a harrowing account of personal medical mistakes, including an abortion of a fetus (who was deeply desired by his parents), because Dr. Hilfiker mistakenly believed that the fetus had died in utero.²⁵¹ Dr. Hilfiker discussed his agony about the mistake, which he disclosed to the parents and for which they did not sue.²⁵² Dr. Hilfiker noted that many aspects of medical culture prevent doctors from acknowledging and addressing errors; most prominently, “an atmosphere of denial is created: the ‘good physician’ doesn’t make mistakes.”²⁵³ Even when the bravado of the perfection is dropped, doctors generally do not discuss the per-

248. Hippocratic Oath, reprinted in JOHN D. ARRAS & NANCY K. RHODEN, *ETHICAL ISSUES IN MODERN MEDICINE* 48 (3d ed. 1989).

249. John Lantos, M.D., *Should Doctors Tell the Truth? One Physician's Prescription for One of Medicine's Lingering Ailments*, CHI. TRIB., May 4, 1997, (Magazine), available in 1997 WL 3545492.

250. *Id.* Dr. Lantos described holding “court in [his] mind, replaying events, wondering whether they were honest mistakes, forgivable mistakes, or, if not, how [he] can go on.” *Id.*

251. See Hilfiker, *supra* note 246, at 118-19.

252. See *id.*

253. *Id.* at 121. Dr. Hilfiker observed that “[p]ainfully, almost unbelievably, we physicians are even less prepared to deal with our mistakes than the average lay person is. The climate of medical school and residency training, for instance, makes it nearly impossible to confront the emotional consequences of mistakes.” *Id.*

Many have noted the impediments to apology inherent in medical culture and the doctor-patient relationship. See generally Kellett, *supra* note 217. A big part of the problem is that “[p]atients, and the public in general, maintain an image of physicians that includes a ‘myth of medical perfection.’” *Id.* at 114 (quoting Press, *The Predisposition to File Claims: The Patient's Perspective*, 12 L. MED. & HEALTH CARE 53, 55 (1984)). “High technology and ‘medical miracles’ make the idea of error intolerable[,] . . . [especially when] [t]elevision programming presents an image of the selfless, warm, sensitive and perfect physician.” *Id.* at 114-15 (quoting Press, *supra*, at 55). As technology improves and specialization increases, doctors tend to focus more on body parts than on the whole person. See *id.* at 117. This fits into the larger “clash of physician’s and patient’s culture[s],” *id.* at 120, where patients present feelings of illness and a need to be made whole, and “clinical medicine looks exclusively for disease.” *id.* at 116 & n.40 (quoting Press, *supra*, at 56). Furthermore, the dynamic between doctor and patient is complex. The patient both wants to be childlike and relieved of all responsibility, which collides with the

sonal aspects of their catastrophic mistakes.²⁵⁴ Doctors need to find a solution to the emotional and spiritual traumas of making mistakes. Dr. Hilfiker advocates that

[a]t some point we must bring our mistakes out of the closet. We need to give ourselves permission to recognize our errors and their consequences. We need to find healthy ways to deal with our emotional responses to those errors. Our profession is difficult enough without our having to wear the yoke of perfection.²⁵⁵

In a survey, "physicians reported that sharing errors with colleagues, students, friends, and sometimes patients prevented isolation, and marked the beginning of grieving about and learning from the mistake."²⁵⁶ Only by apologizing, however, can the doctor expiate her guilt.²⁵⁷ Dr. Wu astutely noted that when the doctor makes a serious error, "the patient or family member may be the only person able to forgive the physician."²⁵⁸

b. Disclosure as a Means of Avoiding Litigation

Disclosure is not only the right thing to do, it is often the smart thing to do. It should come as no surprise that there is considerable medical literature devoted to how doctors can avoid getting sued.²⁵⁹ Given the vast amount of medical negligence that occurs, it is clear that most patients who are victims of malpractice do not sue.²⁶⁰ Fur-

adult desire and need "to be informed, heard, and consulted." *Id.* at 121 & n.81 (quoting J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 207 (1984)).

254. Dr. Hilfiker noted that he could not "remember a single instance in which another physician initiated a discussion of a mistake for the purpose of clarifying his or her own emotional response or deciding how to follow up." Hilfiker, *supra* note 246, at 121. Dr. Hilfiker noted that although doctors "discuss difficult cases or unfortunate results . . . these discussions are always handled so delicately in the presence of the 'offending' physician that there is simply no space for confession or absolution." *Id.* at 121.

255. *Id.* at 122.

256. Wu et al., *supra* note 180, at 772 & n.19 (citing The Quill-Williamson PR, *Health Approaches to Physician Stress*, 150 *ARCHIVES OF INTERNAL MED.* 1857-61 (1990)).

257. See Veltman, *supra* note 211. ("The physician may have feelings of guilt, worry about litigation, and often experiences great stress while dealing with the patient's situation.").

258. Wu et al., *supra* note 180, at 772.

259. See generally, e.g., Gerald B. Hickson et al., *Development of an Early Identification and Response Model of Malpractice Prevention*, 60 *L. & CONTEMPORARY PROBS.* 7 (1997) (describing techniques to head off medical malpractice claims before they are filed).

260. As researchers in the New England Journal of Medicine explain, "medical-malpractice claims are rarely made after patients are injured negligently." Troyen A. Brennan, M.D., J.D., M.P.H. et al., *Relation Between Negligent Adverse Events and the Outcomes of Medical-Malpractice Litigation*, 335 *NEW ENG. J. MED.* 1963, 1963 (1996). Medical negligence is more prevalent than the actual number of claims filed. See generally Goldman, *supra* note 186. Of those patients who have a legitimate claim against their doctors, "only a small fraction" (one in 50) pursue legal action. *Id.* When the patients did sue, there seemed to be distinct problems in the

thermore, the patterns of suits do not correlate with standard measures of technical competence.²⁶¹ In fact, "the initiation of malpractice suits correlates poorly with the actual occurrence of adverse events."²⁶²

So, what is predictive of a patient's decision to sue? Interestingly, studies reviewing medical records indicate that the decision of a patient to sue rests less on the quality of care than on the treatment by the doctor. There is general agreement that communication problems are a key factor. One study found that physicians' failure to communicate and "affronts to patients' values" correlated significantly with patients' decisions to consult lawyers about perceived problems in their care.²⁶³ "Doctors who ignore their patients or are otherwise rude to them have a way of showing up in malpractice suits."²⁶⁴ Similarly, malpractice attorneys report that more than eighty percent of

doctor-patient relationship. *See id.* Specifically, one study found that in approximately 70% of cases where a patient sued a doctor, the physician was characterized by the patient "as not caring, or delivering the news in a dysfunctional way, or not keeping people up to date, or abandoning the family or the patient." *Id.*

261. *See Sloan et al., supra note 226, at 3295-96* (finding few relationships between number of claims for malpractice and supposed indications of quality, "such as board-certification status, prestige of medical school attended, and country of medical school").

262. Brennan et al., *supra note 260, at 1963*. Furthermore, "the severity of the patient's disability, not the occurrence of an adverse event or an adverse event due to negligence, was predictive of payment to the plaintiff." *Id.*

263. Kellett, *supra note 217, at 123* (citing M. MAY & L. DEMARCO, PATIENTS AND DOCTORS DISPUTING: PATIENTS' COMPLAINTS AND WHAT THEY DO ABOUT THEM 24 (1986) (published by the Institute for Legal Studies as DISPUTE PROCESSING RESEARCH PROGRAM-WORKING PAPERS SERIES 7)).

"The doctor who wants to get in trouble after an incident of actual malpractice can do so easily. All he has to do is avoid the patient, blame the patient for the bad result, refuse to talk to the family, refuse to apologize, refuse to listen in humility to patient castigation, and then to send his bill as usual."

Id. at 124 (quoting R. BLUM, THE MANAGEMENT OF THE DOCTOR-PATIENT RELATIONSHIP 253 (1960)).

264. Goldman, *supra note 186*. As an editorial in the Journal of the American Medical Association explained: "Breakdowns in communication between patients and physicians and patient dissatisfaction are critical factors leading to malpractice litigation." Wendy Levinson, M.D., Editorial, *Physician-Patient Communication: A Key to Malpractice Prevention*, 272 JAMA 1619, 1619 (1994). There are "four types of communication problems: deserting the patient, devaluing patients' views, delivering information poorly, and failing to understand patients' perspectives." *Id.* In investigating the experiences of how physicians with high claims differ from those with average or no malpractice claims, the research revealed that "[p]hysicians who have been sued frequently are more often the objects of complaints about the interpersonal care they provide even by their patients who do not sue" and concluded that "the frequency with which physicians are sued is related in part to patients' satisfaction with interpersonal aspects of medical care." Gerald B. Hickson et al., *Obstetrician's Prior Malpractice Experiences and Patients' Satisfaction with Care*, 272 JAMA 1583, 1583, 1586 (1994).

malpractice actions are pursued by patients with some form of communication complaint.²⁶⁵

Indeed, medical literature has recently begun to emphasize the importance of training in good communication skills and expressions of care for the patient. As a general matter, a doctor who cultivates the skills of honest and open communication and respect for patients is less likely to be sued.²⁶⁶ In a study comparing the communication styles of doctors who had been sued and those who had not, those doctors who used humor and spent more time with their patients were much less likely to be sued for malpractice.²⁶⁷ Conversely, doctors who ignored their patients or were rude to them were often defendants in malpractice suits. Indeed, in a recent survey, ninety-eight percent of patients polled want their doctors to disclose mistakes, no matter how minor, and many said they would not sue if the doctors did so.²⁶⁸

In fact, as a result of recent research, primary care practitioners have been advised to improve their communication with patients—providing “longer office visits, more personal attention and more

265. See Levinson, *supra* note 264, at 1619 (suggesting that “35% were due to physician attitudes . . . , 35% were due to failure in communication, 7% were due to physician disparagement of previous care, and 5% were due to unrealistic patient expectation”).

266. See *Hey Doc, Let's Talk!*, PEOPLE'S MED. SOC'Y., (Peoples' Medical Society, Inc.), Aug. 1, 1997, available in 1997 WL 10116546 [hereinafter referred to as *Hey Doc*] (“Communication between doctors and patients not only has a direct effect on consumer understanding; it also has a direct effect on consumer behavior—including whether or not the consumer will file a malpractice suit.”). The issue of patient communication and honest dialogue is particularly acute with the advent of health maintenance organizations, which not only invade the doctor-patient relationship by limiting and dictating care, but also forbid doctors in some cases from discussing certain treatment options with patients. See David R. Olmos & Sharon Roan, *HMO 'Gag Clauses' on Doctors Spur Protest*, L.A. TIMES, Apr. 14, 1996, at A1.

267. See *Time and Humor Help Shield Physicians From Lawsuits*, MED. PRACTICE COMMUNICATOR (visited Oct. 29, 1998) <<http://www.medscape.com/HMI/MPCcommunicator/1988/v05.n02/mpc0502.14.html>>. In discussing the work of Wendy Levinson, M.D., this article noted that

[o]f the physicians who were studied, those who had never faced a malpractice suit spent an average of 18 minutes with the patients. The physicians who had faced a malpractice suit spent an average of 15 minutes with their patients. The PCPs who had not faced suits also used more humor and laughed more, were more careful to explain what they were going to do before they did it, and encouraged patients to talk.

Id. Furthermore, “‘Clinicians who communicate well with patients will see several benefits including increased patient satisfaction, better patient outcomes, increased physician satisfaction, and reduced malpractice risk,’ said J. Gregory Carroll, Ph.D., [D]irector, Bayer Institute.” *Id.*

268. See Denise Mann, *Disclosing Errors Could Lower Risk of Lawsuits*, MED. TRIB. (visited Feb. 3, 1999) <http://web1.po.com/html.med_trib/archive/FP/PAGE1A.FP.shtml> (reporting on an *Archives of Internal Medicine* study stating that 60% would sue if told of a “severe mistake” compared to 76% if they discovered the mistake themselves; only 12% would sue if told of a “moderate mistake,” compared to 20% if they discovered the mistake themselves).

feedback and more humor”—as a means of avoiding malpractice claims in the future.²⁶⁹ Certainly anecdotal evidence indicates that such treatment positively predisposes patients to their doctors and increases the likelihood that they will accept an apology.²⁷⁰

A doctor who is caught in a lie or fails to disclose a mistake is particularly vulnerable.²⁷¹ Even in cases of severe, life-threatening errors (such as failure to detect a spreading cancer), only sixty percent of hypothetical patients polled said that they would sue for malpractice if informed by the doctor of the error, as opposed to seventy-six percent who said that they would sue if they discovered the error on their own.²⁷²

Therefore, doctors should disclose errors and arguably apologize to avoid legal risks. An apology by a professional may forestall a lawsuit.²⁷³ The apology may not be a substitute for monetary compensation, but it would enhance the exchange of information and establish

269. *Hey Doc*, *supra* note 266.

270. Although there is always a danger in relying on anecdote, I feel justified in doing so because I believe that is how doctors learn *not* to apologize—by hearing horror stories and suburban legends of lawsuits against nice-guy doctors. *See supra* notes 252-53 and accompanying text. Dr. Stephen McPhee, a colleague of Dr. Wu, tells the story that he once erred in failing to order a blood test, and hence, delayed diagnosing a disease for which prompt treatment was critical. *See* Denise Grady, *Doctors Urged to Admit Mistakes*, N.Y. TIMES, Dec. 9, 1997, at F9. The patient was a lawyer, and Dr. McPhee was fearful of a lawsuit. *See id.* McPhee found that after an honest discussion and apology, his patient was understanding and forgiving. *See id.*

271. Dr. Gerald B. Hickson reported that 24% of the patients filed claims “when they realized that [their doctors] had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them.” Gerald B. Hickson, M.D. et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1359 (1992) (involving a study of patients who actually filed lawsuits). As an example, Dr. Hickson quotes one patient who stated that a pediatrician told her and her husband “that one twin had cerebral palsy. He looked at files from [the] hospital and found that the records [had been] altered.” *Id.* Certainly, if the patient will readily discover the medical error (e.g., if the wrong leg is amputated), it is better that they hear it from the doctor directly. *See* Mann, *supra* note 268 (finding that when doctors do acknowledge their mistakes, patients would be less likely to sue for malpractice than if they had uncovered the error on their own). Dr. Wu has similarly argued that patients with whom doctors have good relationships “wouldn’t think of suing.” Wu et al., *supra* note 180, at 772. But people who feel their trust has been violated feel betrayed, and a lawsuit may seem like the only way to get to the truth. *See id.* at 771. Any cover-up would probably just toll the statute of limitations. *See* Lowes, *supra* note 192.

272. *See id.* (discussing a study in the *Archives of Internal Medicine*, 156:2565 (1996)). The study involved questionnaires sent to 400 patients, 149 of whom responded. *See* Mann, *supra* note 268. For less serious mistakes such as a minor stroke followed by full recovery, 12% claimed that they would sue their doctor if their doctor informed them of the mistake, as opposed to 20% who would sue if they discovered the mistake themselves. *See id.*

273. As Pam Lockowitz, president of MMI Risk Management Resources, explained: “We’ve seen that patients frequently file suits because they didn’t get the whole truth from their doctor.” Lowes, *supra* note 192.

an atmosphere of trust, humanity, and compassion in which the parties could determine the cost of remedying the malpractice, without acrimony, delay, or guilt.²⁷⁴

5. Benefits to Society

Significantly, the benefits of apology do not adhere to the parties alone. Society as a whole benefits from doctors' disclosures and apologies. But apologies address only some of the systemic failures in the current malpractice scheme.²⁷⁵ Serious debates rage as to whether a malpractice "crisis" exists (which usually refers to the suing of doctors, not their negligent treatment of patients).²⁷⁶ Given the high levels of negligence and the low level of law suits, society certainly has no assurance that malpractice is weeding out technically inferior doctors, particularly because communication skills, rather than medical competence, seem to affect who gets sued.²⁷⁷

Doctors can learn from their mistakes to become better physicians and better healers.²⁷⁸ Discussing mistakes also removes some of the pressure to appear perfect.²⁷⁹ Such disclosure would promote

274. See Wu et al., *supra* note 180, at 771 & n.8 ("In the case of an injury, knowing about a mistake may allow the patient to obtain compensation for lost earnings or to pay for care necessitated by the injury, or to at least get a bill written off." (citation omitted)). *But cf.* Billy Wong Wai-Yuk, *Ombudsman Plans Payouts for Blunders*, SOUTH CHINA MORN. POST, Jan. 12, 1998, available in 1998 WL 2963707 (stating that "an apology to the complainant, no matter how gracious it is, does not seem enough for serious malpractice").

275. See Kellett, *supra* note 217, at 125 (noting that the traditional malpractice litigation system, as a dispute resolution process "fails to address the emotional injuries of patients," "inflicts emotional injuries on physicians," and does not deter physician incompetence); see also Metzloff, *supra* note 186, at 1177. In a book review of Paul C. Weiler's 1991 book, *Understanding the Malpractice Wars*, Metzloff comments that the central theme is that "as reliable system of compensation for negligently-injured patients, the malpractice litigation process fails." *Id.* Weiler asserts that "it overcompensates those with minor injuries and seriously under-compensates those with major injuries." *Id.* at 1185. From a societal vantage point, one of the basic functions of malpractice law—deterrence—is rarely accomplished by our lottery-like system in which one patient wins big, but most get nothing. Furthermore, physicians are insulated from personal liability by insurance coverage, and historically are rarely disciplined as a result of malpractice actions. See Thomas B. Metzloff & Frank A. Sloan, *Forward: Medical Malpractice: External Influence, and Controls*, 60 L. & CONTEMPORARY PROBS. 1, 2 (1997).

276. See Kellett, *supra* note 217, at 111-12 (questioning the existence of a "crisis" in medical malpractice). See generally Metzloff, *supra* note 186 (discussing the politics of the debate on medical malpractice law and the litigation explosion *vel non*).

277. See *supra* notes 259-65 and accompanying text.

278. See Wu et al., *supra* note 180, at 772.

279. See, e.g., Eugene Guazzo, M.D., *Archives of Family Medicine: The Emotional Impact of Mistakes on Family Physicians* (visited Sept. 21, 1998) <http://www.ama-assn.org/sci-pubs/journals/archive/fami/vol_5/no_9/letter_2.html>. Dr. Guazzo points out that concern about malpractice has made doctors less likely to admit mistakes and has negatively affected the practice of medicine. See *id.* The threat of suit "is the reason that we feel so constrained with one another

general trust in doctors,²⁸⁰ which would lead patients to consult doctors sooner and to earlier detections of problems. If indeed disclosure leads to an atmosphere of trust between doctor and patient and arguably fewer malpractice suits, then doctors would not need to engage in defensive medicine, be overly pessimistic, cautious, or create vast paper trails.²⁸¹ To the extent that the malpractice explosion has had an effect on doctors' willingness to practice in certain high risk areas, such as obstetrics, an apology exception would promote dialogue and allow doctors to express regret for the births of less-than-perfect infants, without worrying that in doing so they have created evidence that could be used against them in future malpractice actions.²⁸²

6. Arguments Against Disclosure

Certainly, nay-sayers will find the advocacy of disclosure and apology naive and dangerous. One doctor, who generally favors disclosure observed, "[d]isclosure isn't always benign. Forgiveness is not automatic."²⁸³ The same *New York Times* article that discussed Dr. Wu's work, which encourages doctors to disclose their mistakes, also quoted the communication director of the Physicians Insurers Association of America who claimed that asking doctors to admit error and apologize is tantamount to "asking them to commit professional suicide."²⁸⁴ Although Dr. Nancy Dickey, President of the American Medical Association, agreed that doctors should disclose mistakes, she cautioned:

The problem is that the climate of blame in this country, fueled by the litigation process, where we have to identify someone at fault who will then pay exorbitantly, makes it difficult to walk out and finger yourself If you do, you're playing roulette. The patient may say, 'Gee, doc, thanks, that took great courage and I won't take

about our mistakes, and the pity is we then have lost opportunities to learn from them and to help one another and, ultimately, our patients." *Id.*

280. See Wu et al., *supra* note 180, at 771 ("Finally, disclosure of a mistake can promote trust in physicians. Patients have a presumption of truth-telling. Thus, a patient who is not informed of a mistake may feel angry and betrayed; the patient may think that a privileged relationship has been violated.").

281. See Lantos, M.D., *supra* note 249 ("Clearly, malpractice suits change doctors' behavior. A publicized judgement [sic] in a particular case will lead doctors to perform clinical interventions that will create a paper trail that will satisfy only the malpractice attorneys.").

282. See generally Laurel Brubaker Calkins, *Who'll Deliver the Babies?*, Hous. Bus. J., July, 24, 1989, available in 1989 WL 2547489 (discussing the roles of malpractice and high insurance rates on doctors' exodus from obstetrics).

283. Lantos, *supra* note 249, at 12.

284. Grady, *supra* note 181. Another insurance provider explained: "If you have a doctor out there saying, 'Oh I did it,' it's a little hard for those of us who write the insurance." *Id.*

you to court.' But even if the patient feels that way, there will be others, family members and lawyers, who may encourage patients to change their minds.²⁸⁵

Interestingly, Mark Hatlie, a lawyer and Executive Director of the National Patient Safety Foundation, a group founded by the American Medical Association, specifically cited the rules of evidence in acknowledging that truth and apology can help a patient and the patient's family by defusing anger and polarization.²⁸⁶ But then he cautioned: "[E]very word you utter is an admission that can be used against you in a court of law."²⁸⁷

7. Examples and Inspirations

The benefit of apology is best illustrated by the rare examples of public apologies that I was able to find. A hospital in British Columbia apologized for the death of a little girl who had been treated for leukemia because of a medication error.²⁸⁸ In a voice cracking with emotion, the hospital president begged the family's forgiveness: "There are no words that can adequately communicate our apologies or regret to this girl's family There is nothing we can do to bring their child back to them and we are devastated by that knowledge."²⁸⁹ The hospital president noted that the doctor, who had been practicing medicine for more than ten years and teaching advanced pediatric oncology, also apologized to the family and reported the incident to the medical and supervisory authorities.²⁹⁰ The doctor was so shaken by the error that he stopped treating patients, but continues to work on research.²⁹¹ The hospital president promised: "We commit to [the family] and to British Columbians that we will do everything in our power to learn from this error so that such a tragedy never occurs again We must do better and honour the memory of this little girl."²⁹²

Similarly, the President of Irish Blood Transfusion Service Board, which had provided blood tainted with hepatitis C, issued an apology: "I do not think words are adequate to express the level of regret and

285. *Id.* (quoting Dr. Dickey).

286. *See* Grady, *supra* note 270.

287. *Id.*

288. *See Injection of Wrong Medication Kills Girl: 'We Must Do Better,' Hospital President Says*, *GLOBE & MAIL* (Canada), June 6, 1997, at A8.

289. *Id.*

290. *See id.*

291. *See id.*

292. *Id.*

sorrow, and I accept that, but nevertheless I believe that the beginning is to express in words, and I think the follow-up is to try and match it with actions, which, I hope, has been done”²⁹³ The blood bank made serious changes in personnel and management structure, admitting that “human error,” “misjudgment,” and “complacency” all contributed to the “terrible tragedy.”²⁹⁴

These two apologies have a number of things in common, not the least of which is that neither was made in the United States.²⁹⁵ Both explained what went wrong and took responsibility. Both recognized the victims as significant individuals with legitimate grievances. Both promised that the suffering of the injured party would not be for naught because changes would be made to prevent similar future harm to others. Interestingly, both disparaged the ability of language to convey their deep emotions.

What should an apology look like? Dr. Wu counsels that “the physician should begin by stating simply that he or she has made a mistake” and describe in nontechnical terms that a layperson can understand “the decisions that were made, including those in which the patient participated.”²⁹⁶ “[T]he physician should then express personal regret and apologize for the mistake.”²⁹⁷ Then the doctor “should elicit questions or concerns from the patient and address them.”²⁹⁸ I would add that it is important to document the steps the doctor or institution has taken to prevent such errors in the future. If preparations can be made (such as free follow-up care or forgiveness of past bills), the doctor should assure the patient or the patient’s family that these costs will be covered. The doctor should go to heroic lengths to make sure that a negligently treated patient, or worse yet, a bereaved family, does not receive a bill in the mail.

293. Eibhir Mulqueen, *Apology Is Only The Beginning, Says Counsel For BtSB*, IRISH TIMES, Feb. 5, 1997, available in 1997 WL 7370176.

294. *Id.*

295. The counsel against apologizing seem particular to the United States. In England, for instance, Dr. Christine Tomkins, Director of Professional Services for the Medical Defence Union, Ltd., the United Kingdom’s leading provider of physician indemnity, wrote in a letter to the editor of the London Times that: “A sincere and honest apology should be made, either by the doctor concerned or, if appropriate, by a senior colleague. Most instances of patient dissatisfaction never develop into a complaint or claim because the doctor gives an immediate explanation or a courteous apology.” *Letters to the Editor: Saying Sorry*, TIMES (London), Jan. 4, 1997, at 17.

296. Wu et al., *supra* note 180, at 773.

297. *Id.*

298. *Id.*

Although informing patients of errors may be good medical practice, there are cases in which an apology triggered a lawsuit, and the patient identified the apology as a significant event in prompting the suit.²⁹⁹ The hardest cases for doctors will arise when the negligence is not obvious, and apology may elicit anger and trigger a lawsuit. My proposal cannot make it in the doctor's economic best interest to disclose mistakes; it just makes such disclosure less hazardous and facilitates good medical practice without the specter of the apology being used against her.

Undoubtedly, there will be times when, because of the patient's condition, the doctor's negligence is not easily detectable. The question of disclosure is presented most starkly for the doctor when the doctor believes that she might get away with non-disclosure—such as where a fatal error mimicked a death from natural causes. Another factor that makes disclosure and apology difficult is that the doctor may be rightfully concerned about how the patient will react. These are moral issues for the doctor, which reflect deep social and anthropological questions about the nature of professional relationships and the roles of honesty and self-interest in daily life. Given all the arguments above for respecting patients, including a doctor's professional mandates to disclose, I believe doctors should inform patients of mistakes and apologize even if they think that they would not get caught, and even if they are certain that family members will indeed sue if they learn of the error. My proposal, however, does not coerce that result. Instead, my proposal allows doctors to do the right thing. Often disclosure is wise because the error is obvious (removal of the non-cancerous lung comes to mind) or because the patient is forgiving. Even when it is adverse to the doctor's "interests" as our society narrowly defines them, such an apology may be worth the risk. My proposal facilitates the doctor's moral behavior by removing the impediment of fear of making a statement admissible against him in

299. See, e.g., *Sutton v. Calhoun*, 593 F.2d 127, 127 (10th Cir. 1979) ("The basis for [plaintiff's] contention [of negligence] comes from the testimony of several members of the plaintiff's family that after the operation defendant came to them and said he had 'made a mistake,' that he should not have cut the common bile duct"); *Collins v. Baron*, 450 N.E.2d 626, 627 (Mass. App. Ct. 1983) (where plaintiffs sued in part based on an apology in which the doctor said: "I'm going to transfer you to a hospital in Boston . . . I made a mistake during the hysterectomy. I severed your ureter. It's all my fault. I'm very sorry this happened. I'm going to send you to a fine hospital for corrective surgery."); cf. *Senesac v. Associates in Obstetrics and Gynecology*, 449 A.2d 900, 903 (Vt. 1982) (holding that doctor who said that "she 'made a mistake, that she was sorry, and that it [the perforation of the uterus] had never happened before' does not [without medical testimony] establish a departure from the standard of care ordinarily exercised by a reasonably skillful gynecologist").

court. At the very least, the doctor would not be affirmatively punished for doing the right thing.

VI. CONCLUSION

My suggestions for a new exception to the evidentiary admissions rule for apologies are derived primarily from feminist insights. The true benefit of apologies stems from their effect on relationships and the hierarchical reordering that transpires when regret and forgiveness are exchanged. In the case of medical errors, apologies are healing in the fullest sense, recalibrating the power dynamics between doctor and patient and nurturing the relationship. In addition to sparking interests in apologies, I hope I have illustrated how feminist thought can contribute to scholarly inquiry by providing insights into the assumptions underlying the evidence rules and offering guidance on how to improve them.

