

## WORKING PAPER

### Regret, Remorse and Accidents: Where the New Apology Laws Go Wrong

By Jeffrey S. Helmreich

#### ABSTRACT

Apologies have proven dramatically effective at resolving conflict and preventing litigation. Still, many injurers, particularly physicians, withhold apologies because they have long been used as evidence of liability. Recently, a majority of states in the U.S. have passed “Apology Laws” designed to lift this disincentive, by shielding apologies from evidentiary use. However, most of the new laws protect only expressions of benevolence and sympathy (such as “I feel bad about what happened to you”). They exclude full apologies, which express regret, remorse or self-criticism (“I should have prevented it,” for example). The laws thereby reinforce a prevailing legal construal of apologies as partial proof of liability. This paper argues that the new laws and the prevailing legal practice thereby misread apologetic discourse in a crucial way. Drawing on developments in ethical theory, I argue that full, self-critical apologies do not imply culpability or liability, because they are equally appropriate for innocent, non-negligent injurers. Neither the statement nor the act of an apology is probative of liability, each for separate reasons, and that suggests their admission up to now has been premised on a mistake. The paper closes with a proposed means of protecting apologies from evidentiary use, beyond the “Apology Laws,” which is modeled on Rule 409 of the Federal Rules of Evidence.

## Regret, Remorse and Accidents: Where the New Apology Laws Go Wrong

By Jeffrey S. Helmreich

Recent years have seen an explosion in public examples of the power of apologies to resolve conflicts and avoid litigation.<sup>1</sup> Legal practice, however, has been slow to accommodate the trend. Until recently, apologies were routinely admitted to prove liability, which tended to discourage injurers from apologizing to their victims.<sup>2</sup> In the past two decades, however, a new wave of legislation has swept the U.S., reaching other countries, as well, designed to counter this evidentiary disincentive. Beginning in 1986, a growing number of states have adopted what have been called “apology laws,” protective measures designed to encourage or at least protect inadvertent injurers in apologizing to their victims, by expressly ensuring that at least some of their apologies cannot be used against them in litigation.<sup>3</sup>

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<sup>1</sup> See, for example, Boothman, R.C., Blackwell A.C., Campbell D.A. Jr., Commiskey E., and Anderson S., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, J HEALTH LIFE SCI. LAW. 2009 Jan; 2(2) 1:25-59 (disclosing the results of a study by the University Michigan Health System which found that apologies reduce the instance of malpractice suits by more than 200%); Kevin Sack, *Doctors Say I'm Sorry Before 'See You in Court*, THE NEW YORK TIMES (May 18, 2008); See also MICHAEL S. WOODS AND JASON I. STARR, *HEALING WORDS: THE POWER OF APOLOGY IN MEDICINE* (2007). Less dramatic, but still significant results, have been found by hospitals in Colorado and health insurance companies nationwide. See, e.g., Lucinda Jesson and Peter B. Knapp, *My Lawyer Told Me to Say I'm Sorry: Lawyers, Doctors, and Medical Apologies*, 35 WILLIAM MITCHELL L. Rev. 2 (2009). Public apologies have also recently helped resolve long-standing political and group conflict. AARON J. LAZARE, *ON APOLOGY* (2005), esp. pp. 5-11.

<sup>2</sup> See *infra*, notes 13-16.

<sup>3</sup> States with this sort of protective apology legislation include, for example, Arizona, ARIZ. REV. STAT. ANN. § 12-2605 (2005); Connecticut, CONN. GEN. STAT. ANN. § 52-184d (2010); Florida, FLA. STAT. § 90.4026 (2010); Georgia, GA. CODE ANN. § 24-3-37.1 (2010); Iowa, IOWA CODE § 622.31 (2010); and Vermont, VT. STAT. ANN. TIT. 12 § 1912 (2010); among 32 others. For a summary of the emergence of these reforms, see Jonathan R. Cohen, *Legislating Apology: the Pros and Cons*, 70 U. CINCINNATI L. Rev. 819 (2002). Cohen's is the seminal article discussing this development -- and the source to which the present paper is most indebted on this topic and the admissibility of apologies generally. For a critical evaluation of the state measures, see Lee Taft, *The*

Most of these measures, nevertheless, stop short of protecting full apologies. In particular, they deny protection to expressions of remorse, guilt, and self-criticism, such as “I’m sorry for taking such bad care of you.” They protect only expressions of good will, such as sympathy (“I’m sorry about what happened to you.”) and benevolence (“I want to help you recover.”). If one apologizes solely by expressing these sorts of neutral sentiments, the new laws provide that the words will not be used in court to prove liability. If, on the other hand, one speaks self-critically to the victims of one’s accidental harms – “I should have found a way to stop this,” or “I’m so sorry I let this happen” – the utterances enjoy no special protection. That is, in part, because most of the laws are tailored not only to protect apologizers, but to preserve probative evidence of liability. The new laws therefore deny protection to self-critical expressions such as “It was my fault,” or “I should not have done that.”

In declining to protect these self-critical statements the new state reforms suggest that such statements are probative of liability, a reading they share with prior evidentiary practice. This reading effectively takes sides in a moral debate about the meaning and role of apologies generally. Is it proper, even required, to apologize for harming victims blamelessly? Can we apologize sincerely if we believe we did nothing wrong? The current practice in evidence law, and especially the bulk of the new “apology laws,” suggests that doing so would misrepresent us as culpable or liable. The suggestion is that expressing guilt, remorse or self-criticism implies that one did something blameworthy.

This paper argues that such a reading misunderstands apologies. Drawing on developments in moral theory, I will attempt to show that apologies and related expressions of

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*Commodification of Apology*, 109 YALE L.J. 1135 (2000). See also Anne Underwood, *Experiments in Tort Reform*, THE NEW YORK TIMES (October 13, 2009).

guilt, remorse and self-criticism – such as “I should never have let that happen” – do not, in fact, imply admissions of liability. They do not even imply that anything wrong was done at all. Two reasons, in particular, will be presented. One is that a guilty or self-critical stance is appropriately directed even at one’s innocent, non-culpable inflictions of harm. From a moral point of view, in fact, that is the most appropriate reaction in such cases, or so I will argue. Therefore, apologies that express self-criticism, guilt, or remorse do not imply an admission of liability, and both traditional legal practice and the new state reforms err in treating them as such. Second, apologizing is an appropriate moral remedy even for blameless harms. There are sound moral reasons to apologize to those one harms innocently, which resemble the reasons to offer aid or compensation. Such offers are protected by the federal rules of evidence and analogous state rules; for the same reasons, it will be argued, apologies should enjoy protection, as well. I conclude with a simple suggestion for how such protection can be incorporated into legal practice, thereby improving upon the recent legislative efforts to protect and encourage apologies.

The paper proceeds in four parts. Part I analyzes the status of apologies as evidence under current legal practice and the new state reforms known as “apology laws.” Part II constitutes the critique of the state measures and, consequently, the legal practice that they leave in place. First, it exposes their failure to protect self-critical expressions, such as “I regret what I allowed to happen,” or “I should have done better,” which reflects a reading of such statements as partial admissions of liability. Second, I argue that this reading is mistaken, because expressing self-criticism and even guilt does not imply actual guilt or culpability. Rather, such expressions reflect the speaker’s sense of having misused her efforts to avoid something, namely harming others, which moral agents are deeply invested in avoiding. Part III treats two notable objections

to these arguments. Finally, Part IV proposes that legislative protection of apologies be expanded beyond the new state measures to include self-critical remarks, along with nonverbal acts of apology otherwise admissible as circumstantial evidence. The proposal is modeled on Rule 409 of the Federal Rules of Evidence and its state analogues.

## I. The Background: Evidence, Chill and the Power of Apology

### a. Apologies as Evidence

Apologies have long been admitted to prove negligence liability. I use the term “apologies” here to refer to statements uttered by an injurer or wrongdoer to her victim with the intention that they be understood as apologies, or else as expressions of remorse or regret over something the speaker did. Typically these statements include the phrase “I’m sorry,” as in “I’m sorry I injured you.” But they need not involve such familiar locutions: statements such as “I’ve been meaning to tell you how awful I feel about what I did to you” could be just as plausibly read as statements of regret or remorse, and may even be understood as apologies, as well. They, too, qualify as apologies for purposes of this paper.

Notice that apologies, as described here, are uttered between the parties directly, rather than as testimony in court. Ordinarily, out-of-court statements are inadmissible hearsay. Apologies, however, tend to be admitted as instances of an exception to the hearsay rule, known as “opposing party admissions.”<sup>4</sup> By “admissions” the Federal Rules of Evidence and analogous state rules do not mean an outright confession of an element of liability. Rather, the term refers to any statement that is “inconsistent with the party’s position at trial.”<sup>5</sup> The exception is meant

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<sup>4</sup> See, e.g., FED. R. EVID. 801(d)(2). See also Cohen (2000), *supra* note 3.

<sup>5</sup> CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE (1999) at 138.

to include statements that would be admissible as testimony, but which the party against whom they are offered need not subject to cross-examination or swearing in, because they are the party's own statements. Hence they are admitted despite having been uttered out of court.

As instances of such "admissions," courts have allowed into evidence out-of-court utterances by doctors to the patients they harmed, such as "this is a terrible thing I have done...I'm sorry"<sup>6</sup> or "I'm sorry, [I] made a mistake and ...it never happened before."<sup>7</sup> Similarly, a Starbucks manager's apology to a customer, after apparently watching her get burned by spilled coffee, was admitted to prove the store's possible negligence.<sup>8</sup> A Colorado doctor's alleged post-operative statement that he was "sorry about your father's situation" was deemed admissible and even described as a concession of fault.<sup>9</sup>

While courts in these and other cases treat apologies as *admissible* to prove liability, that hardly shows they are ever *sufficient* to do so. One court did, in fact, reason that they could be decisive evidence of liability,<sup>10</sup> but most found only that they can contribute to a finding of negligence together with further evidence.<sup>11</sup> In fact, in cases where apologies were offered as the *sole* evidence of liability, without an accompanying admission of negligent conduct, courts have mostly ruled that the evidence is insufficient as a matter of law.<sup>12</sup>

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<sup>6</sup> Greenwood v. Harris, 362 P.2d 85, 88 (Okla.1961).

<sup>7</sup> Senesac v. Associates in Obstetrics & Gynecology, 141 Vt. 310, 449 A.2d 900, 903 (Vt. 1982).

<sup>8</sup> Becton v. Starbucks Corp. 491 F. Supp. 2d 737, 741, 747; 2007 U.S. Dist. LEXIS 43235 (2007), citing Fed. R. Evid. 801(d)(2) on admissions of party opponents (at 741). See also Woods V. Zeluf, 2007 UT App 84; 158 P.3d 552; 574 Utah Adv. Rep. 26; 2007 Utah App. LEXIS 99 (doctor's statement that he "missed something" and "shouldn't have done" it admissible to prove negligence); Wickoff v. James, 159 Cal.App.2d 664, 324 P.2d 661 (1958) (doctor's statement that "I sure made a mess of things" could ground juror's inference of negligence).

<sup>9</sup> Fognani v. Young, 115 P.3d 1268; 2005 Colo. LEXIS 120 (2005).

<sup>10</sup> Fognani, at 1267-8.

<sup>11</sup> See, supra, notes 6-9.

<sup>12</sup> See, e.g., Senesac, supra note 16; Sutton v. Calhoun, 593 F.2d 127 (10th Cir. 1979); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (Cal. 1972); Phinney v. Vinson, 158 Vt. 646, 605 A.2d 849 (Vt. 1992).

## B. Chilling Effect on Apologies

The tendency to admit apologies into evidence, though perhaps not in fact devastating to the apologizer's case, seems to deter the practice of apologizing. A survey of physicians revealed that the overwhelming majority want to apologize when their treatment results in injury but refrain from doing so out of fear their contrition will be used against them in civil trials.<sup>13</sup> They are aided in this reticence by the advice they receive from legal and ethical consultants who serve the hospitals that employ them and their insurers.<sup>14</sup> Physicians have long been encouraged not to apologize, so as to avoid contributing to incurring their own liability judgments.<sup>15</sup> The risk of adverse evidentiary use is apparently sufficient to advise, at the very least, caution in speaking to the victim of one's injury. One reason, at least in the medical context, is the fear that insurance companies will be less likely to extend coverage to clients who adversely affect their chances of

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<sup>13</sup> See Thomas H. Gallagher, Amy D. Waterman, Alison G. Ebers, Victoria J. Fraser and Wendy Levinson, *Patients and Physicians' Attitudes Regarding the Disclosure of Medical Errors* 289 JOURNAL OF AMERICAN MEDICINE 1001 (2003). One physician who participated in the study put it: "You would love to be just straightforward. 'Gosh, I wish I had checked that potassium yesterday.' I was busy, I made a mistake, I should have checked that. I can't believe I wouldn't do that. I will learn from my mistake and I will do better next time, because this is how we learn as people." But if you say that to a patient, which you would like to be able to say, honestly, as just another human being, is that we have this whole thing, they wait to cash in [through a lawsuit]." At 1003.

<sup>14</sup> Lola Butcher, *Lawyers Say 'Sorry' May Sink You in Court*, THE PHYSICIAN EXECUTIVE (Mar/April 2006) at p. 20–23. See e.g., Kevin Quinley, *'Sorry Works' –or Does It?* 25:3 MED.MALPRACTICE LAW AND STRATEGY 3 (Dec. 2007) (warning practitioners of the insurance coverage risks in "so-called apology programs"); Marthadra J. Beckworth, *Admissibility of Statements of Condolence or Apology*, PHYSICIANS LIABILITY INS. COMPANY (2006) (noting that there "is a fine line between an expression of condolence and an admission" and that this fact should "give one pause before meeting with the patient or the family to offer condolences"), via web at <http://www.plicook.com/sites/plico/uploads/images/4Q06%20newsletter.pdf>.

<sup>15</sup> Anna C. Mastroianni, Michelle M. Mello, Shannon Sommer, Mary Hardy, and Thomas H. Gallagher, *The Flaws In State 'Apology' And 'Disclosure' Laws Dilute Their Intended Impact On Malpractice Suits*. 29 HEALTH AFF. 91611 (September, 2010). "Lawyers and insurance carriers have traditionally advised clients to avoid expressions of sympathy, explanations, and admissions of fault to patients out of concern that such statements could be used in litigation... Worries about stimulating rather than ameliorating litigation persist. One group of scholars recently described disclosure as "an improbable risk management strategy." At 91612.

prevailing in a lawsuit, even if only to the extent of contributing slightly to the available evidence against them.<sup>16</sup> Apart from insurance coverage, the mere fact that an apology is usable as evidence seems to lead some legal advisors to discourage them on the grounds that contributing in any way to adverse litigation – giving a potential plaintiff any information that would be valuable in a lawsuit – encourages such lawsuits or fails to discourage them.<sup>17</sup> In addition, the context of choosing one’s words to avoid lawsuits is in itself incompatible with the concessionary, open, self-deprecating mindset characteristic of the apologetic stance.<sup>18</sup> Once the possibility of evidence is considered, the apologetic context is constrained, if not corrupted. In short, the available data suggests that admitting apologies at all discourages them to a degree that is disproportionate to their actual probative value.

### C. Apologies Prevent Long Legal Battles

Yet, just as there is reason to think evidentiary admissibility discourages apology, separate evidence suggests that apologizing would be legally advantageous – if people could overcome their fear of playing into their opposing litigants’ hands. Various studies suggest that apologies can prevent lawsuits from being filed altogether, and increase the likelihood and speed of settlement for those that do arise. For example, one British study found that many plaintiffs

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<sup>16</sup> Kevin B. O'Reilly, 'Sorry.' *Why is it So Hard for Doctors to Say?* AMERICAN MEDICAL NEWS (Posted Feb. 1, 2010), via web at <http://www.ama-assn.org/amednews/2010/02/01/prsa0201.htm> (quoting Steven I. Kern, senior partner at Kern Augustine Conroy & Schoppmann, specializing in physician clients: "If [the apology] becomes an admission that's usable in a malpractice case, it could affect the ability to defend the case. Most insurance companies say that if you as the insured do something that affects our ability to defend the case, we're not going to cover it. Going out and saying 'I'm sorry' not only is going to adversely impact any ability to defend the case, but may well relieve you of that insurance coverage.").

<sup>17</sup> J.S. Weissman , C.L. Annas, A.M. Epstein, E.C. Schneider, and Kirle B. Clarridge, *Error Reporting and Disclosure Systems: Views from Hospital Leaders*, 293 JOURNAL OF AMERICAN MEDICINE 11 (2005). 1359–66. Via web at <http://jama.ama-assn.org/content/293/11/1359.full>. In addition, one malpractice lawyer interviewed for this paper emphasized his stand against letting his clients apologize as follows: "Why give the enemy even one tiny gram of TNT if I could give them none?"

<sup>18</sup> See, for example, Taft, *supra* note 3, and Gallagher, et al, *supra* note 8.

who sued their doctors said they would not have done so had they received an apology and an explanation for their injury.<sup>19</sup> The University of Michigan Health Service reported that their per case payments decreased by 47% and the settlement time dropped from 20 to 6 months since the introduction of their 2001 “Apology and Disclosure Program,” which mandated apologies to patients who complained of being injured while under the UMHS care.<sup>20</sup> Similar, though slightly less dramatic results were found at the University of Colorado Medical Center.<sup>21</sup> Furthermore, Jennifer Robbenholt surveyed a large number of participants asked to consider themselves in a set of hypothetical “simulated cases,” varying only by whether an apology was offered and its type (remorseful, merely sympathetic, full or partial). She found that an overwhelming majority (73%) were inclined to accept a settlement offer when a “full apology” was offered, as compared with only half the participants when there was no apology involved.

The empirical research is still at an early stage. It is small, and, except for the Michigan study and a handful of others, it is mostly limited by a dependence on reactions to hypothetical scenarios. It also does not shed much light on exactly what about an apology causes people to respond more positively to settlement offers and even to refrain from suing in the first place.<sup>22</sup>

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<sup>19</sup> Charles Vincent, M. Young and A. Phillips, *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 THE LANCET 1609, 1612 (1994) (reporting a British study that found 37% of families and patients bringing suit may not have done so had there been a full explanation and apology); Francis H. Miller, *Medical Malpractice Litigation: Do the British Have a Better Remedy?*, 11 AM. J.L. & MED. 433, 434-35 (1986) (commenting on the much greater role of apology and significantly lower incidence of malpractice suits in England than in the U.S.).

<sup>20</sup> Richard C. Boothman, Amy C. Blackwell, Darrell A. Campbell, Jr., Elaine Commiskey, and Susan Anderson, *A Better Approach To Medical Malpractice Claims? The University Of Michigan Experience*, 2:2 JOURNAL OF HEALTH LIFE SCIENCE LAW (2009) 125 .

<sup>21</sup> Lucinda Jesson and Peter B. Knapp, *My Lawyer Told Me to Say I'm Sorry: Lawyers, Doctors, and Medical Apologies*, 35 WILLIAM MITCHELL L.R. 2 (2009).

<sup>22</sup> Of course, there is isolated anecdotal evidence that goes further. One victim of inadvertent, arguably blameless, harm by a doctor felt an apology showed him respect and honor. Rachel Zimmerman, *Doctors' New Tool to Fight Lawsuits: Saying 'I'm Sorry.'* THE WALL STREET JOURNAL (May 18, 2004) at A1.

But it does seem to suggest that apologies are mutually beneficial to injurer and victim, inspiring victims to reconcile and sparing injurers the standard legal price of the harm they wrought. That, together with the moral benefits of apologizing – people who wrong others have an ethical duty to apologize, and apologies can justify forgiveness – count in favor of lifting the evidentiary deterrent.

#### D. The Apology Laws

To that end, a growing number of states have sought to encourage apologies by protecting them from use as evidence. It was reported that the current wave of apology legislation – which has already swept through 37 states and inspired similar versions in Canada and Australia – was set off in part by a single person’s adverse experience. Former Massachusetts state senator William L. Saltonstall prevailed upon his successor, State Senator Robert C. Buell, to draft the Massachusetts apology law in 1986 some years after his daughter was killed in a car accident and the driver failed to apologize or even express regret over the harm he admitted causing.<sup>23</sup> Saltonstall had heard from an intermediary that the driver would have apologized, but “dared not” out of fear that it would be used against him as tort evidence. Buell sought to reverse this chilling effect of evidence law.<sup>24</sup>

Indeed, the dozens of state apology laws passed in the last two decades were drafted in part to encourage apologies by removing or mitigating – in a highly publicized way – the admissibility of apologies to prove liability.<sup>25</sup> Most of the laws do not go all the way to outright

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<sup>23</sup> Taft, *supra* note 3, at 1150-51.

<sup>24</sup> *Id.*

<sup>25</sup> California’s law, 1160, began as Assembly Bill 2804, introduced by then State Senator Quentin Copp (now a judge), on the grounds that many lawsuits arise “from anger, which in turn, results from a failure of another party to express regret or sympathy.” William K. Bartels, *The Stormy Seas Of Apologies: California Evidence Code*

exclusion, however. They preserve the admissibility of more incriminating apologies, such as “Sorry I negligently injured you,” while protecting other sorts of apologetic expressions, such as “I’m sorry about what happened.” Some, however, protect all apologies in certain contexts.

The laws mainly divide along two different dimensions. First, they protect – by rendering inadmissible – either “partial” or “full” apologies, as they have been categorized in the literature. A partial apology is one that does not involve the apologizer’s admission that he or she was at fault in bringing about the harm suffered. For example, saying “I’m sorry about what happened” does not assert or imply that the speaker caused harm. Such an expression, then, would constitute a “partial” apology. Second, the apology laws apply either to healthcare contexts alone, or to all contexts – that is, accidental harms inflicted by *any* potential defendant in a civil suit. This section focuses mainly on the first divide: between partial and full apologies.

Of the laws that protect partial apologies, some specify outright that they deny protection to “admissions of fault,” while others simply describe the apologies they protect in such terms as to make clear they could not involve statements admitting fault.

Typical of the former group is Florida’s statute:

The portion of statements, writings, or benevolent gestures *expressing sympathy or a general sense of benevolence* relating to the pain, suffering, or death of a person involved

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*Section 1160 Provides A Safe Harbor For Apologies Made After Accidents.* 28 W. ST. U. L. REV. 141 (2001) at 143. Thus the new law was intended to stem lawsuits by encouraging apologies. The Massachusetts law was also apparently introduced to encourage apologies, though not necessarily with the primary aim of reducing lawsuits. Other states expressly include these sorts of motivations in their codification of apology laws. For example, both Georgia and South Carolina preface their laws with the following observation: “The General Assembly finds that conduct, statements, or activity constituting voluntary offers of assistance or expressions of benevolence, regret, mistake, error, sympathy, or apology between or among parties or potential parties to a civil action should be encouraged and should not be considered an admission of liability.” O.C.G.A. § 24-3-37.1 (2010).

in an accident and made to that person or to the family of that person shall be *inadmissible* as evidence in a civil action. A *statement of fault*, however, which is part of, or in addition to, any of the above *shall be admissible* pursuant to this section [emphasis added].<sup>26</sup>

Typical of the latter group is Iowa's exception:

“In any civil action for professional negligence, personal injury, or wrongful death or in any arbitration proceeding for professional negligence, personal injury, or wrongful death against a person...that portion of a statement affirmation, gesture, or conduct *expressing sorrow, sympathy, commiseration, condolence, compassion, or a general sense of benevolence* that was made by the person to the plaintiff, relative of the plaintiff, or decision maker for the plaintiff that relates to the discomfort, pain, suffering, injury, or death of the plaintiff as a result of an alleged breach of the applicable standard of care is *inadmissible* as evidence” [emphasis added].<sup>27</sup>

Notice that on either formulation, an apology is protected if it amounts to an expression of good will – like sympathy, benevolence or compassion – toward the victim, even if it implies nothing about the apologizer's role in the injury. This observation is confirmed by the historical notes to the California statute, which is almost identical to Florida's, illustrating how to distinguish between protected and unprotected apologies. A protected “expression of sympathy or benevolence” would be a driver's remark, addressed to someone whose car she rammed in an

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<sup>26</sup> FLA. STAT. § 90.4026 (2010).

<sup>27</sup> IOWA CODE § 622.31 (2010).

accident, that “I’m sorry you were hurt” or “I’m sorry that your car was damaged.” Under California’s apology law (and those of most other states), these statements would not be admissible. On the other hand, the statement, “I’m sorry you were hurt, the accident was all my fault,” or “I’m sorry you were hurt, I was using my cell phone and just didn’t see you coming,” are partly admissible. The portions of the statements containing the apology (“I’m sorry you were hurt”) would be inadmissible; any other expression acknowledging or implying fault (“I was using my cell phone” or “[it] was all my fault”) would continue to be admissible, as the advisory notes put it, “consistent with present evidentiary standards.”<sup>28</sup>

In contrast, other laws protect all apologies, provided they occur in certain contexts, primarily that they be uttered by a health care professional to a patient.<sup>29</sup> For example, Arizona’s statute provides:

In any civil action that is brought against a health care provider . . . any statement, affirmation, gesture or conduct *expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence* that was made by a health care provider or an employee of a health care provider to the patient, [or] a relative of the patient . . . and relates to the discomfort, pain, suffering, injury or death of the patient as the result of an unanticipated outcome of medical care is inadmissible as

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<sup>28</sup> CAL. ASSEMBLY COMMON JUDICIARY, HISTORICAL NOTES TO CAL. EVID. CODE § 1160 (West Supp. 1995).

<sup>29</sup> See, for example, the statues passed by Georgia, O.C.G.A. § 24-3-37.1 (2010); South Carolina (nearly identical to Georgia’s), S.C. CODE ANN. § 19-1-190 (2010); Arizona, ARIZ. REV. STAT. § 12-2605 (2010); Colorado, COLO. REV. STAT. ANN. § 13-25-135 (2010); and Connecticut, CONN. GEN. STAT. ANN. § 52-184d (2005).

evidence of an admission of liability or as evidence of an admission against interest [emphasis added].<sup>30</sup>

Other statutes in this category do not explicitly protect admissions of liability per se, but grant protection to admissions of fault,<sup>31</sup> or blanketly to any explanation of how an injury occurred, provided it is offered in good faith, even where the explanation amounts to an admission of an error.<sup>32</sup>

As noted, laws that employ such broad apology protection are distinctly in the minority. The decisive majority of the new laws are of the “partial” variety, protecting only apologies that admit nothing incriminating. In this they reflect two competing interests: protecting apologizers and preserving a patient’s right to utilize probative evidence of liability. Consider, for example, a medical injury after which a doctor says “I’m so sorry I was derelict, drinking on the job when I should have been taking due care to protect you from harm.” Most state apology laws would offer no protection to such a statement, except perhaps not counting the “sorry” as a further admission in its own right. One reason is that the doctor’s remarks factually confirm his liability, and there is scarcely better evidence of liability than expert admissions by the liable party. A doctor is considered both expert, as to the standard of care, and an authority on her own behavior. Many states understandably want to preserve such statements as proof of liability. Yet they also seem aimed at harnessing at least some of the apparent power of apologetic statements to heal grievances and resolve disputes. Admitting expressions of sympathy and benevolence – “I feel

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<sup>30</sup> ARIZ. REV. STAT. ANN. § 12-2605 (2005).

<sup>31</sup> CONN. GEN. STAT. ANN. § 52-184d (2010).

<sup>32</sup> VT. STAT. ANN. TIT. 12 § 1912 (2010). See also the identically worded statutes of Georgia, Ga. Code Ann. § 24-3-37.1 (2010), and South Carolina (S.C. CODE ANN. § 19-1-190 (2010), protecting expressions of “mistake” and “error” by healthcare providers.

so sorry about what you suffered,” for example – seems to serve this balance, inasmuch as it involves elements of apology (“I’m sorry”), but lacks anything that could constitute a probative admission of liability. The majority of states that passed apology laws appear, then, to have found a compromise between the two competing aims.

## II. The Gap in the New Laws: Self-Criticism

It is understandable that most states sought to avoid such broad protection of apologies as to exclude from evidence outright admissions of liability. Less clear is whether, to serve this evidentiary end, they needed to restrict protection quite as much as they did. What prompts the question is that the “partial” nature of most apology laws comes at a considerable price: they protect only expressions and utterances that are entirely uncritical of having caused or allowed harm. One can utter a statement such as “I feel awful for you,” without taking any negative view of what one did to harm or to fail to prevent harming someone else.

Apologies, however, seem essentially to express self-critical states. Psychologists identify several main components of apologies – admission of responsibility, expression of remorse, promise of forbearance, and offer to repair – and found that each one contributes to the apology’s effectiveness.<sup>33</sup> Note that at least two of the four (admitting responsibility and expressing remorse) imply a self-critical view of the harm done.<sup>34</sup> And while one study apparently found that the “apology laws,” as they stand today, have reduced legal conflict and enabled speedier

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<sup>33</sup> Steven J. Scher and John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTICS 127, 134-36 (1997), at 132.

<sup>34</sup> I say “at least two” because promise of forbearance could be read to imply that what was done should not have been done, and that is why it will not happen again.

settlement, the study examines all the state measures as a whole, lumping those that protect full apologies (10 states) with the partial laws under consideration here.<sup>35</sup> Moreover, the most recent study that does consider the effects of different types of apologies on legal conflict found that the type of apology matters considerably, particularly with respect to whether it involves self-criticism. Jennifer Robbenholt's study simulating apologies and settlement offers found that partial apologies, including "I am so sorry that you were hurt. I really hope that you feel better soon," were substantially less likely to elicit agreement to settle than full apologies ("I am so sorry that you were hurt. The accident was all my fault. I was going too fast and not watching where I was going until it was too late.").<sup>36</sup> In fact, they encouraged fewer settlements – with a larger "unsure" group – than offering no apologies at all.<sup>37</sup> The implication appears to be that expressing self-criticism helps make an apology more effective in resolving conflict.

Self-critical apologies, in other words, have value. Still, the laws are tailored to reflect a competing value, as well. As noted earlier, a victim has a strong interest in the incriminating admissions of her injurer, including when they accompany or come embedded in an apology. A doctor who tells her patient "I'm sorry I negligently injured you" may have provided the only

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<sup>35</sup> The extremely valuable and creative study by Benjamin Ho and Elaine Liu explored the relationship between the passing of apology laws and time to settlement using two different methodological techniques (survival analysis and difference-in-difference). Benjamin Ho and Elaine Liu. *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*. Public working paper on file with author, via web at <http://forum.johnson.cornell.edu/faculty/ho/Ho-Liu-Apologies-and-Malpractice-nov15.pdf>. Their study is less instructive on the effects of the quality or extent of apology, however, inasmuch as it treated all the laws (36 at the time) as a whole. There was a single reference in a footnote to a preliminary test (an F-test), done before the study began, to assess whether there appears to be a difference worth investigating between the effects of partial and full apologies. *Id.* at 5, fn3. But no measure they might have used to detect the difference was cited, and, more importantly, the authors characterize partial and full apologies differently from in the instant paper; there, fully half the apology laws treated here as "full" (protecting full apologies) are considered partial, including Utah, Illinois and Vermont. While they do not use words like "admissions of fault" or "liability" in their statutes, those states explicitly protect both apologies and concomitant "explanations" or descriptions of what happened – which could include an account admitting or implying negligence. For that reason this author, unlike Ho and Liu, would group them in the full category, and therefore cannot infer much from their comparison of the two groups.

<sup>36</sup> Jennifer K. Robbenholt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 484 n112 (2003).

<sup>37</sup> *Id.* at 484-6.

reliable evidence of her liability – evidence on which the patient may depend for livelihood and compensation for an injury that incapacitated him. And, as has been argued separately, excluding such evidence also has threatening implications for the value and integrity of apologies as a practice. If an apology may involve admissions of fault and liability and nevertheless remain shielded from the trial process, the apologizer seems insincere, admitting responsibility in one context and, seemingly, denying it in another.<sup>38</sup> In short, there are well-settled reasons not to protect apologies that admit or imply liability.

These sorts of considerations would seem to advise in favor of admitting self-critical apologies, including such expressions as “I should have acted differently,” or “I made a horrible mess of things” – *if* such expressions count as admissions of liability. That is, if a speaker’s remorseful, regretful or otherwise self-critical statements admitted or implied that she was negligent, and therefore liable, they arguably should be admitted into evidence. As it happens, current legal practice and most of the new apology laws *do* construe them as such. Specifically, courts tend to treat self-critical apologies (such as “I’m sorry I messed up”) as admissions of negligence, or at least as claims that, in some way, contradict or undermine the party’s position that she is innocent in the harm done.<sup>39</sup> I now turn to the reasons why I take this to be a misreading of these sorts of expressions.

The core of my argument against this construal of self-critical apologies – which reads them as admitting or implying liability – lies in showing that even innocent injurers have reason

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<sup>38</sup> That is not to say the inference of insincerity is justified. Many apologizers may be in no position to compensate their victims and, in any event, they may legitimately expect that the liability likely to be imposed on them following litigation would be excessive. They may, in other words, admit and be willing to take moral responsibility but not necessarily the extent of legal responsibility they expect to be assigned. Thus they may seek to fulfill their moral duty to apologize but have good reasons to resist legal liability.

<sup>39</sup> See McCormick, *supra* note 5.

to be self-critical about the harms they inflicted. That thesis is not obvious; on the contrary, self-criticism seems plainly inappropriate after truly innocent behavior.<sup>40</sup> Others argue that while some sort of negative reaction is appropriate for innocent injuries, it falls short of self-criticism.

That is roughly Bernard Williams's view, in his account of "agent regret."<sup>41</sup> He introduces a truck driver, who – through no fault of his own, including no negligence – accidentally runs over a child who had quickly crawled into the street, hidden from view. Although everyone on the scene, including the handful of spectators gathered at the roadside, properly regards the accident as tragic and horrible, the driver alone feels what Williams calls "agent regret." He feels a special sort of negative reaction on account of being the one who inflicted the damage, even if he did so blamelessly. Williams describes this negative, self-directed "agent regret" as natural and appropriate. He even says there would be something wrong with an injurer who did not experience it. But he stops short of concluding that it is morally justified. Instead, according to Williams, "anything which is the product of happy or unhappy *contingency* is no proper object of moral assessment."<sup>42</sup> Thus while the driver might feel bad about the outcome, presumably wishing he had not hit the child, he would have no reason to add moral self-criticism to his negative reaction.

Non-critical forms of agent regret could include being upset at having become part of a horrible event. Presumably the driver shares the bystanders' revulsion at what happened. But unlike them, he has the added cost of being a central player in it. His life story is now indelibly

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<sup>40</sup> That is in contrast to a wrongdoing, for which it is uncontroversial that self-criticism or guilt is appropriate. But see, for a contrary view, Gilbert Harman, *Guilt-Free Morality*, 4 OXFORD STUDIES IN METAETHICS 203 (2009).

<sup>41</sup> Id. Earlier descriptions of the phenomenon may be found, in an obviously very different context, in Maimonides, *Laws of Repentance*, in MOSES MAIMONIDES, R. TOUGER (Ed.), MISHNE TORAH 4 (1987).

<sup>42</sup> Id at 20.

tarred by a link to a tragic death. For that reason, perhaps, he regrets what he's done, beyond the feeling of sympathy and revulsion he shares with the bystanders.

Another version of agent regret, which also stops short of self-criticism, is proposed by Harry Frankfurt.<sup>43</sup> Since the driver should not be held *morally* responsible for what he did, on the grounds that there is no objective basis for criticizing his intent or conduct, Frankfurt finds no basis for him to feel guilty or morally self-critical about the death he caused. Instead, Frankfurt argues, he would naturally feel something closer to embarrassment over his connection to something awful. Frankfurt compares this state of mind to someone afflicted with a horrible disease who, through no fault of his own, infects a large population.<sup>44</sup> He could be quite “horrified” and embarrassed in a “deeply shattering” way at what turned out to be the inadvertent products of his own body's operations. But Frankfurt draws a sharp line between this negative reaction and guilt or moral criticism: the diseased man has no basis to negatively assess himself morally. Nothing he did is worthy of criticism.

For present purposes, what is worth scrutinizing in these views is their shared reliance on a key assumption, namely that moral self-criticism is appropriate only upon finding oneself guilty, in fact. Against this view, I propose that there are, rather, multiple kinds of moral self-criticism, at least one of which does not involve blaming oneself or taking oneself to be guilty or culpable. Yet such a critical reaction remains, unlike embarrassment or shame (as in Frankfurt's account), uniquely moral. Put differently, one can appropriately *feel* guilty, or take a morally self-critical view of one's past behavior, without *finding* oneself guilty. The rest of this section will be devoted to constructing what this sort of self-assessment might be, and why it is

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<sup>43</sup> Harry Frankfurt, *Inadvertence and Moral Responsibility*, THE AMHERST LECTURE IN PHILOSOPHY (via web at [www.amherstlecture.org](http://www.amherstlecture.org), 2008).

<sup>44</sup> Id at 13.

appropriate in the case of blamelessly harming other people. Its appropriateness, in turn, shows that apologizing self-critically for harming another person does not imply culpability in the event. To read apologies as implying fault is, then, a mistake -- a mistake which dominates current legal practice and the new reforms.

The discussion proceeds in two steps. First, I will argue that moral agents are deeply invested in not harming other people. Second, I will argue that this investment grounds a negative view about their *past* inflictions of harm, including blameless harms. This view of one's past harmful behavior, though it does not involve self-blame, justifies a morally self-critical stance. On this understanding, guilt may be an appropriate response to blamelessly harming another. It is, moreover, this self-critical stance that apologies for blameless harms can meaningfully express or imply.

#### A. Moral Agents are Deeply Invested in Not Harming Others

The first step begins with an observation: moral agents go to considerable lengths to avoid harming others. All but the negligent engage in an elaborate set of behaviors designed to ward off the possibility of causing injury, which become more intense and urgent as that possibility grows likelier, or the injury more severe. They drive safely, watch where they walk, take precautions when operating hazardous machinery and sanitize the objects they share with others. And, perhaps more importantly, as soon as an activity they thought was safe appears likely to cause harm after all -- driving just above the speed limit on an abandoned road when suddenly a pedestrian crosses -- they immediately change course to stave off the danger, with extreme effort.

These steps -- which all but the morally negligent make sure to take -- reflect a serious investment in not harming other people, which intensifies with either the degree or likelihood of harm. True, the investment could be higher still: imagine never driving cars or taking a single step without canvassing the environment for danger. That would amount to more than a serious investment in avoiding harm; it would be an absolute investment, crowding out others. Instead, moral agents are merely seriously invested in not injuring other people, among many other ends and investments. In fact, moral agents taking reasonable care seem, at times, to stop even considering whether they pose danger to others: once they are reassured of the safety of an activity like sitting on a park bench, for example, they may take the liberty of discounting altogether the risks they might impose. They may recline thoughtlessly on the bench, perhaps losing themselves in a book or the scent of fresh grass. That is, perhaps, until they notice that the bench leg is perched on someone's foot; at that point, they are required to change their behavior immediately. In other words, their investment in avoiding harm tracks the likelihood of a particular activity causing it; if harm is unlikely, even the non-negligent may discard it. They need not act as though preventing injury is worth the all-consuming cost of remaining vigilant even during reasonably safe, everyday activities. But that still amounts to a fairly serious investment in not harming others, one that is triggered by the first signs of danger in an otherwise safe activity.

Some argue that this investment requires an active psychological state. John Gardner, for example, points out that moral negligence, like its legal counterpart, is identified as a failure to take "due care" in order not to harm others. An essential feature of such "due care," he argues, is actually caring, in the sense of forming and maintaining an occurrent intention not to cause

harm.<sup>45</sup> Moral agents, on this view, are -- on pain of negligence -- actively intending not to harm others (as connoted by the phrase “taking care”). My claim here is weaker: moral agents may desist from the effort to avoid injuring others -- indeed, it may play no role in their occurrent psychology for long stretches -- just as long as they have no reason to regard their activities as dangerous. But the effort remains as a kind of background disposition, triggered as soon as the likelihood of harm presents itself. On either view, then, moral agents have a serious investment in preventing themselves from injuring others.

### B. Investment Against Harm Grounds Self-Criticism

This means that, in practice, a moral agent who is non-negligent is often either (a) actively taking steps to avoid harming others; or (b) not taking steps to avoid harming others on the belief that there is little or no danger of doing so. Thus when moral agents inadvertently do inflict harm, in the end, they have evidently taken insufficient steps to avoid doing so, or else mistakenly suspended those efforts on the false believe that they posed no danger. Either result amounts to a misuse of their efforts in light of what they were deeply invested in achieving. As with any human investment of resources, failure to secure the intended result is experienced more painfully the greater the investment. A physician dedicated to saving an accident victim’s life, as well as the victim’s guardian or partner, may experience her death more painfully than a stranger who happened by, even if everyone acted above reproach to try to save her. That said, even a moral agent with no special interest in the wellbeing of some stranger, whom she innocently harms, has misspent her efforts to avoid injury, or mistakenly suspended those efforts.

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<sup>45</sup> See John Gardner, *Obligations and Outcomes in the Law of Torts*, RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORE (2001), at 13 (“Taking care is an essentially intentional action. One cannot take care not to  $\Phi$  without trying not to  $\Phi$ .”). I assume that trying not to injure someone requires an occurrent intention to do so.

This view of one's past actions -- as misdirected, or misused, in light of one's serious investments -- is plainly self-critical. And it is a view that applies to the injurious behavior of non-negligent moral agents. (A negligent moral agent has a more severe basis for self-criticism). For example, Williams's truck driver -- if he was taking reasonable care to drive safely -- chose his speed, along with the amount of times he glanced at the road and at parked cars, so as to avoid harming anyone. It turned out, however, that he chose poorly (if blamelessly); he miscalculated how carefully he needed to drive to prevent danger. While it was an innocent miscalculation, it was also a misuse of his driving efforts, inasmuch as he meant them to effect a certain result (not harming or killing someone), one in which, as a non-negligent moral agent, he was deeply invested. That misuse is an object of self-criticism, one he experiences painfully, even if he does not consider himself at fault.

The same sort of stance would be directed at less violent actions than killing a child inadvertently. Suppose one calls an old acquaintance, after not seeing her for 10 years, by the name of her late and recently departed sibling. The remark sparks sadness and discomfort, and perhaps vicarious embarrassment for the speaker. But it was done innocently; the speaker had uncontrollably confused the two names in his memory, they looked alike, and someone in the room had yelled out the sibling's name in her general direction. It was a reasonable mistake, and would count as blameless. Still, long after the speaker has any contact or interaction with the acquaintance, he likely regrets what he did, bemoaning the misuse of his memory and speech. He took no extra steps to get her name right, and that led to a result he was invested in avoiding, namely saddening and embarrassing his acquaintance. Again, his view of this misfire of speech and memory is self-critical; he is profoundly displeased with his use of his own faculties, which

did not achieve the result he was deeply invested in achieving. But he does not regard blame as appropriate, nor does he assign himself guilt in the episode. He is, however, self-critical.

Self-criticism, in other words, can reflect any sort of displeasure with oneself over what one did or failed to do. When one harms another, one is likewise displeased with oneself for the misuse of efforts, or of a suspension of effort, that led to a result one was deeply invested in avoiding. Hence one has reason to be self-critical when one harms another, even blamelessly. Past efforts were misused, to bad effect.<sup>46</sup> Moreover, since the end of these efforts is moral -- not harming another person -- the self-criticism of their failure is uniquely moral. It is therefore both sensible and appropriate to feel guilty about the misuse of those efforts. It is equally appropriate to say about such efforts, "I should not have done that," or "I was supposed to do it differently," or "I messed up," or even "I failed." It is for this reason that apologizing fully for harming another person, in a way that expresses or implies moral self-criticism, is appropriate. It expresses a stance moral agents would likely take given the investments they naturally acquire as part of taking due care not to harm others.

### III. Objections

#### A. *Ought Implies Can* and Substantive Virtue Theory

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<sup>46</sup> This characterization may invite two counterexamples. First, the case of *justified harms*, in which the efforts succeeded, and are above reproach *even in hindsight* (such as an operation that caused a minor injury to save a life). In these cases, even if apologies are due, I find it less clear that they would appropriately be self-critical. Second, there is the case of recreational efforts that failed, such as games. We might try to score in basketball with ferocious intensity, while it would be appropriate to regard having failed to score with indifference afterwards. My argument, however, seems to me compatible with this observation. What matters is that *if* I may view the goal with indifference afterwards, I have the same grounds to view it as such beforehand. With games, the availability of this indifferent stance is tolerable. With morality, however, the availability of this stance would clash with an opposing attitude or stance that is required.

The argument in the last section began with a supposedly natural fact about moral agents, to wit: non-negligent moral agents are deeply invested in not harming others. This claim was used to impute to the same moral agents a self-critical view of their past harmful behavior, namely as failures or misuses of efforts to achieve a result in which they were deeply invested (or misuses of a temporary suspension of effort toward that end). They drove just a bit too fast, or failed to doublecheck something that turned out to be pivotal, or misremembered something, or spoke too soon. All of those missteps were blameless, perhaps, but they led to a failure to achieve a very important, valued result.

There are, however, familiar philosophical positions that might be seen as challenging this picture of moral agents. One is the view, sometimes attributed to Kant, that actions, not results, are the proper object of moral concern.<sup>47</sup> Therefore a moral agent can have no investment one way or the other in whether she, personally, causes harm -- only in whether she did her best to avoid it. Thus she may be very concerned to take reasonable care, in the sense of not being negligent. And in practice, this may require taking all sorts of steps meant to prevent foreseeable harms. But she may, at the same time, have no special investment in whether these steps succeed; her purpose is merely to have fulfilled her duty to take them.

This legalistic moral agent may be comparable to an obedient citizen of a state that bans negligently dirtying the sidewalks. One must take all sorts of measures to avoid causing the

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<sup>47</sup> Thomas Nagel, for example, argues that cases like Williams's, in which regret is grounded in the result of someone's actions -- rather than the actions themselves -- do not fit Kant's moral theory, which limits the reach of moral judgments to the will and its reasons or motives (such as whether the will was directing action "from a motive of duty"). Thomas Nagel, *Moral Luck*, in THOMAS NAGEL, *MORTAL QUESTIONS* (1979), at 24. Not everyone interprets Kant this way, however. Julie Tannenbaum proposes an original account of morally grounded agent regret for harming others, which I would describe as self-critical: Tannenbaum's account draws on another part of Kant's moral theory: moral agents should value and work to preserve rational agency, on her account, in light of the Kantian principle of treating humanity as an end in itself and the (Kantian) value of rational will. For that reason, they should disvalue causing harm to other rational beings. Julie Tannenbaum, *Emotional Expressions of Moral Value*, *PHILOSOPHICAL STUDIES* (2007) 132:43-57, at 53-54.

sidewalks to become dirty, within reasonable standards. The law-abiding citizen might believe in the legitimacy of state law and the duty to follow it, but have no special investment in clean sidewalks per se. Still she takes all the crucial steps -- cleans her shoes before walking; glances back along her walking path, makes reasonably sure not to spill, and stops herself when she sees she is about to smudge the walkway after all. But she remains uninvested in whether these efforts work; she's not actually a fan of clean sidewalks and happened to vote against the referendum that put the requirement in place. But she is law-abiding and believes in following the law. Perhaps, one might argue, moral agents can be this way, too: they do what they can so as to avoid negligence, but need not be invested in the results of their best efforts.

While this stance may be coherent, there is reason to doubt that moral agents can actually maintain it in practice. True, there may be no *duty* not to harm people, and arguably no duty to be invested in not harming people; the only moral duties, perhaps, concern actions reasonably directed against causing harm. But being invested in not harming people may be essential to *success* at fulfilling the narrower duty of taking reasonable care, or of not being negligent. Adapting the methodology that Seana Shiffrin calls “substantive virtue theory,”<sup>48</sup> one can ask what it is that agents committed to a principle against negligently harming others should do, in order to realize and abide by the principle reliably. There will be other activities, goals and dispositions that they will take up and cultivate, whose importance is implied – if not outright mandated – by the principle itself. These are the “virtues” that people properly committed to a principle, or who are capable of reliably following it, will tend to manifest. For example, people who follow the principle of respecting the religions of others will likely do more than merely

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<sup>48</sup> Seana Valentine Shiffrin, *Incentives, Motives and Talents*, PHILOSOPHY AND PUBLIC AFFAIRS 38:2 (2010), pp. 113-16.

refrain from disparaging or grudgingly tolerating exotic rituals. They will need to try to appreciate these practices, even seeking to discover at least some value in them. This takes effort, but without it they are likely to become bored or impatient with bizarre practices to which they cannot at all relate. True, such self-sensitization is hardly required, explicitly, by a directive to respect the religions of others. But it is what people who accept or want to reliably follow the principle will, in all likelihood, have to do to succeed at it.

Similarly, in the case of fulfilling the duty against negligent harm, one cannot hope to succeed simply by taking the necessary steps -- all of which are aimed at the result of not causing harm -- without being invested in the result. One reason for this emerges in the differences between moral negligence and nonmoral legal duties, such as the Sidewalk Law discussed above. The duty to take reasonable care, or to avoid negligence, can be described in deceptively moderate terms: "reasonable," "ordinary care" "due care," etc. In fact, however, it involves a fairly vigorous and ongoing project of avoiding harms. This becomes evident as soon as one is confronted with a foreseeable and possibly avoidable harm: a doctor, for example, finds that after she took all the necessary measures to keep her patient safe during routine surgery, her patient is nevertheless suffering on the operating table and in grave danger. At that moment, the effort the doctor is required to take is strenuous and serious; on pain of negligence, she must urgently try to save the patient and prevent him from suffering serious harm or damage. The same holds for a safe driver whose brakes falter as he careens toward a parked car; he will be expected to slam on the breaks and spend all his energy trying to stop or detour the vehicle up to the moment before contact. Anything less would be considered monstrous. Even here, it is possible to separate the effort from investment in the result. But the extent of effort that morally required care imposes in emergency situations, on pain of negligence, seems unmanageable without a deep investment in

not harming people. The same is not true of instances in which one suddenly stands to break the law; no urgent efforts to prevent it once it is foreseeable.

These efforts, moreover, do not end once a particular harm is inflicted. A moral agent's goal is, after all, to avoid harms that she might have prevented, and that end remains in place even after she failed to achieve it in one particular episode. As a result, the failure figures into her new calculations of what can cause harm and, therefore, what can be prevented, and what is not to be done. Our success at achieving our moral ends is, in other words, an ongoing project, one which involves improving our effectiveness once we detect flaws in our past efforts.<sup>49</sup> When we fail, those same ends require that we adjust our practices to become better at fulfilling them in the future. With negligent harm, then, we start by trying to avoid all harms, and then figure the previously unavoidable injury into our new calculations: that sort of event, now within the realm of imaginable (and so more avoidable), is what we now aim to prevent next time. So it was something that we both (a) previously expended effort to prevent, or suspended the effort on the belief it would not happen; and (b) now must view as requiring more extensive effort to avoid.

Once we harm someone inadvertently, then, we take the self-critical view that we misused the efforts we had been directing at not harming him (or anyone). Our apologies, then, would naturally reflect this self-critical stance. For that reason, such apologies should not be treated as even prima facie evidence of fault or liability.

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<sup>49</sup> This point is made by Barbara Herman to explain how a moral agent who adopts the Kantian constraint that only culpably willed actions can be wrong might nevertheless have a duty to engage in moral repair after accidental harm. See Barbara Herman, *What Happens to the Consequences?* THE PRACTICE OF MORAL JUDGMENT (1993) at 102.

## B. Third Parties

Still, the reasons to view one's own behavior self-critically, even if it is blameless, run up against a powerful observation of Williams, in his discussion of the truck driver's "agent regret." Williams notes that third parties observing the accident have no grounds to criticize the driver, and can be expected to try to console him, as well. In fact, as Julie Tannenbaum points out, such consolation is appropriate.<sup>50</sup> It is perfectly in order, on this view, to tell the innocent injurers not to feel too bad, especially if they are racked with guilt. How can that be, if it is also perfectly appropriate for the injurer to take a self-critical stance and experience it painfully?

One answer is that the two stances, that of the consolers and that of the injurer, are aimed at different aspects of the injurer's behavior. His self-critical reaction focuses on his realization that he misused or misjudged his efforts to achieve something in which he was deeply invested. The consoler, for her part, does not disagree with this stance, nor does she try to dissuade the injurer of it. Her target is, rather, the pain and suffering the injurer feels as a result of taking this appropriate stance. And the stance is not, strictly speaking, identified with this feeling: indeed, as a stance on a moral position or other, it does not have a particular feel or emotional content. There is nothing in particular that it feels like to regard oneself as having misdirected one's efforts to achieve an object of deep, intense personal investment.

Moreover, it is properly regarded as unfortunate that the injurer must suffer pain and anguish as a result of a stance he is forced to take by events beyond his control. That does not mean he should take a different stance. It only means that it is right to want the *experience* of that stance to be less painful for him. As a result, consolers seek to alleviate that suffering, by

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<sup>50</sup> In Tannenbaum (2007), pp. 56-57,

focusing his attention on his innocence in the affair. What they may not appropriately say is, ‘you did something fine, ‘ or ‘morally, you should be totally indifferent about the action you took.’ Instead, their consolation is not aimed at the injurer’s appropriate moral self-criticism; it is, rather, aimed at his pain, by focusing his attention on the *limits* of the criticism to which he should subject himself. In particular, that criticism should fall short of blame. They rightly remind him of this limit as a way to alleviate his suffering over what he did, even while this reminder – and the attempt to make him feel better – remain compatible with the morally self-critical stance he should take.

#### IV. The Way Forward

##### A. Apology as Action

So far, this paper has evaluated the meanings and implications of apologetic expressions, in light of the legal practice of construing them as statements admitting some point undermining a party’s overall claim of innocence. I have tried to show that apologetic expressions -- even fully apologetic statements involving regret, remorse or self-criticism -- should not be read to admit anything even slightly probative of culpability. That is because they do not express a sentiment incompatible with blamelessness or innocence in the harm done. They are, rather, expressions of one’s self-critical stance at having misspent efforts in order to avoid a result one is deeply invested in avoiding. The self-criticism is directed at the misuse of efforts, while the intensity and displeasure, even grief, associated with it derives from the extent of investment in not harming other people. It follows that apologies can involve deeply self-critical stances, which

may be experienced as pain, remorse, even guilt, while at the same time reflecting the apologizer's awareness that she was blameless.

If that is right, then the legal practice of admitting apologies as opposing party statements is misguided. Moreover, the new Apology Laws are equally misguided, both in failing to protect self-critical expressions and in thereby implying that such expressions admit fault. Since the legal practice has long erred in admitting such statements, the new reforms -- though perhaps redundant -- seem clearly necessary to amplify a point that has gone unappreciated: apologies are not admissible evidence of liability. Yet, on this reasoning, they should be extended to include even self-critical apologies (which they fail to do). The remedy, for policy purposes, may appear to be extending the state reforms to protect more substantial apologetic expression.

Such a conclusion would be incomplete, however, for two reasons. First, some self-critical statements obviously do imply fault, for example if they include factual elements. A physician's admission that "I'm sorry I amputated the wrong limb," for example, clearly concedes a key factual element, and may be the victim's only access to the information as a means of extracting his rightful compensation. It should be noted that this worry is largely misplaced, as most of the reforms already include clauses distinguishing the apologetic statements, which they protect, from admissions of fact that may accompany them. The solution would appear to be extending the protection to self-critical statements -- "I was wrong in doing that," or "I really should have tried something else" -- without excluding incriminating admissions, such as "What I did violated my professional guidelines."

Second, and more important for present purposes, the arguments so far have dealt only with the probative value of the expressions used in apologetic discourse. They have not

addressed another element, which may be more important: the fact that one has apologized. As J.L. Austin famously noted, apologies are performative utterances; they are ways of performing a certain action, in this case the action of apologizing.<sup>51</sup> That action, however, can be divorced from the utterance or at least is not reducible to it. Consider cases in which both parties know that one has come to apologize to the other, and intends her utterance to be understood that way. But on arrival the would-be apologizer says much less than is associated even with standard apologies. For example, the late George Steinbrenner, the notoriously volatile owner of the Yankees, once fired manager Yogi Berra through a third party, stinging and deeply wounding the legendary baseball icon. More than a decade later, Steinbrenner showed up at Berra's door, took his hand and said, "I know I made a mistake in not letting you go personally. It's the worst mistake I ever made in baseball."<sup>52</sup> It was obvious to both parties that Steinbrenner's remarks, and visit, constituted an apology, even though the words used imply nothing more than that firing Berra was very unwise or practically ill-advised. Indeed, no mention of apology or the word "sorry" seemed to have been necessary. The act of apologizing is, on its face at least, separable from communicating some specific assertive content.<sup>53</sup>

That has implications for evidence law. The hearsay laws, along with exceptions deemed "admissions," apply only to expressions admitted for the "truth of the matter asserted."<sup>54</sup> But the fact that one has made some claim or other may be admitted simply as circumstantial evidence meant to establish some fact in its own right, without regard to whether the claim is true. That someone threatened another, for example, could be admissible not to establish that she will, in

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<sup>51</sup> J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962) at 66, 87.

<sup>52</sup> Aaron Lazare, *ON APOLOGY* (2004), 187-88.

<sup>53</sup> There are, however, propositions that are arguably implied or implicated by an apology, such as that the apologizer did the act for which she is apologizing, that she wishes she did not do it or did not have to do it, perhaps, and others.

<sup>54</sup> FED. R. EVID. 801(c).

fact, do what she threatened, or even that she believes she would.<sup>55</sup> Rather, it may be admitted simply to show that someone issued a threat.<sup>56</sup> Similarly, saying “I’m sorry I hurt you” may not be admissible to prove that someone hurt the victim, or even that she is sorry, but may be admissible to show that she apologized.<sup>57</sup>

In other words, the simple fact that someone apologized may have probative value in its own right. If so, everything that has been argued so far does not apply to its use as evidence for that purpose. The previous sections sought only to evaluate the meaning of certain apologetic expressions, not the fact of apologizing. Of course, it remains an empirical question whether, in fact, apologizing indicates any greater likelihood that the apologizer was culpable (than had he not apologized). Perhaps the guilty are more likely to feel duty-bound to apologize. On the other hand, they may also be more defensive and fearful of incrimination, or less concerned with duty in the first place, having flouted it already. It is, at any rate, an open question whether apologizing has probative value as circumstantial evidence, where the standard of admissibility is lower than for statements. Given that possibility, the apology reforms do not offer protection for a potential, though so far unharnessed, use of apologies as evidence of liability.

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<sup>55</sup> These both satisfy the assertion-oriented and declarant-oriented grounds, respectively, for treating statements as hearsay. Roger C. Park, McCormick on Evidence and the Concept of Hearsay: A Critical Analysis, 65 Minn. L. Rev. 423 (1980), 424.

<sup>56</sup> United States v. Burke, 495 F.2d 1226, 1231-32 (5th Cir.)

<sup>57</sup> This distinction may not bear closer scrutiny. For example, on Austin’s classical formulation, the standard form of a performative utterance is to assert that one is making the utterance: “I promise,” for promising, and, presumably, “I apologize,” for apologizing. If so, then the statement would be admitted *both* for the truth of the matter asserted *and* to establish that the speaker is apologizing. See Austin (1962) at 66. Little turns on this in the present discussion, because either version of the apology (“I apologize” or “I’m so sorry about what I did”) would be introduced not because the speaker is expressing or implying her own culpability, but because of the probability she is culpable given the fact she is employing the convention of apologizing. Thus it remains a new type of evidence, not covered by the earlier discussion of the meaning and implication of self-critical remarks.

## B. Reparatory Steps and Rule 409

If, however, we understand the evidentiary import of apologies in terms of behavior, rather than as expressions alone, they become strikingly similar to another kind of behavior already treated by the rules of evidence. Steps at moral repair, notably offering to pay or compensate the victim of one's injurious conduct, are protected from use as evidence. Under Rule 409:

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.<sup>58</sup>

Notice that the rule refers to speech acts, such as offering or promising to pay, rather than merely the act of payment. Yet it is lumped with remedial actions more generally. The advisory committee notes explain the motivation behind the rule as follows:

...the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.<sup>59</sup>

Although one can quibble with the empirical implications of "usually," the principle behind the explanation seems clear enough: these acts are motivated by a "humane impulse" and they aid the injured party.

In light of these considerations, then, it is anomalous that apologies are not included in such protection. The reason is that apologies, too, may often be made from "humane impulses,"

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<sup>58</sup> FED. R. EVID. 409.

<sup>59</sup> Id, Advisory Committee Notes.

rather than as admissions of liability, and they play an important reparatory role for the injured party, even if not in repairing physical damage. Moreover, there is no imaginable construal by which an apology is more probative of culpability than these more substantial steps at moral repair: offering to pay for the damages seems, at least, no less reflective of one's guilt in causing them than the utterance of "I'm sorry." If these remedial steps merit protection despite their probative value, because of the positive motives they reflect and the positive steps they encourage, then arguably so do apologies. That, at least, is what the rest of this section is meant to show: apologies, like offers to compensate, emanate from humane impulses and offer aid to the injured victim.

One humane impulse that justifies apologizing, even for blameless harms, can be drawn from the emerging philosophical literature on apologies and their moral function. On a leading account, the mechanism by which apologies effect moral repair involves what has been labeled the "insult" view of wrongdoing.<sup>60</sup> On this view, a wrongful act has a certain expressive function, apart from what it reveals about the offender. There is something insulting, on this view, in wronging someone.<sup>61</sup> That is not to suggest that the wrongdoer is communicating an insulting attitude or thought, or that the victim feels insulted. Rather, there is an *objective* notion of insult.

This objective notion is worth spelling out. Consider a friendship or partnership in which one person is always initiating contact, always managing the relationship. The other simply

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<sup>60</sup> The phrase comes from Adrienne Martin, in Martin, *Owning up and Lowering Down: The Power of Apology* (forthcoming in the JOURNAL OF PHILOSOPHY). But the core of the idea first appears in Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 62 (2001).

<sup>61</sup> See, e.g., Jeffrie Murphy and Jean Hampton, FORGIVENESS AND MERCY (1988); Hieronymi, *supra*.

waits, receives, goes along. The “leader” is liable to regard the other’s behavior as an insult. Of course, the other would say, “But I, too, value the relationship. I care about it too. Don’t take it personally.” But this response would be cheap, because what the “leader” finds insulting is her friend’s *behavior*, not the thoughts or feelings that may lie behind it. The behavior, we could say, *treats* her as subordinate, or as less worthy of the friendship – even if it doesn’t reveal that the friend judges her to be so. Treating someone as though she is less important, less valuable, is not the same as acting on a *belief* or *feeling* that this is the case.

On this view, the wrongful or harmful act is objectively insulting, or has an insulting implication for the victim that holds even if the offender clearly harbors no insulting attitude toward her. An apology, then, could be seen as repairing – by retracting or contradicting – the insult implied by the behavior.

It will be recalled, though, that the kinds of apologies under discussion are for inadvertent, blameless harms. It might be argued that, even construing insult objectively, there is nothing insulting about harming someone blamelessly, so apologies cannot be an appropriate mechanism for moral repair in such cases. They have nothing to repair, on this model. That response, however, overlooks an important fact about inadvertent harms. While inadvertent harms, as noted, lack the feature of being objectively insulting, in themselves, that status begins to change once the injurer – aware now of what he’s done – ignores it, acting as though nothing untoward had happened. In particular, if he inflicts the harm and makes no effort to redress or apologize for it, *that* behavior or set of behaviors – unlike the mere harmful action alone – *does* arguably constitute an objective form of insult or slight or disrespect (it doesn’t so much matter which). Harming someone and then not attempting to redress it treats the victim as though one is free to harm her in that way. And this treatment, or mistreatment, is objectively insulting and

disrespectful, even if the initial harmful behavior was not. For example, I innocently spill hot tea on a stranger and walk on as though nothing has happened, then even if the spill itself involved no mistreatment or expresses nothing insulting, my continuing behavior amounts to taking him as someone I'm free to tarnish in that way. It doesn't reveal that I think that I'm free to do so, but it *treats* him as though I am. An apology, on this model, comes to correct, by taking a stance that repudiates, the insulting implication of harming a victim and leaving it in place.

It will be recalled that Rule 409 already protects a form of redress, namely compensation, which is arguably another means of correcting the insulting implication of harming someone (even blamelessly). Why, then, extend that protection to apologies, as well? One reason is that apologies have value in moral repair over and above compensation. First, to pursue the insult model a bit further, merely compensating the victim of one's harmful behavior does not fully correct the objective insult. It could, alternatively, be seen as treating her as though she can be harmed for a price; harmed and then compensated. We see this kind of behavior most often in the way the powerful treat their subjects. Kings and governments routinely seize property or inflict harms and then, in a spell of benevolence or under the threat of legal action, pay their victims back. Yet even if they cover the physical cost, this behavior does not treat the subjects as people whom their rulers were not free to harm or relieve of property. Instead, it treats them as people one can harm and then pay at will – which is different.

Similarly, if one innocently takes a friend's coffeemaker and – again by accident – breaks it, one might redress the harm by simply showing up at the friend's door and dropping an envelope full of money without a word (save the polite greeting). This behavior would certainly be compatible with repudiating the insulting implication that one is free to harm someone or her belongings without redress. But it would also be compatible – equally compatible – with treating

another's possessions as rental items, or objects one may take, break and then pay up. In other words, harming and paying is a way of expressing *both* being unfree to harm others *and* being free to harm them for a price. Importantly, to remind the reader, I am not claiming that the psychology compatible with such behavior is what gives it its objective expressive content. I am simply using the psychological attitude reflected by certain behaviors as a heuristic for *uncovering* its objective expressive content. And using that method here, we find that harm and subsequent compensation is ambiguous: it could objectively express that the victim is fair game to be harmed and compensated.

Apology, then, unlike mere compensation, serves a distinctive moral reparatory function, by expressly repudiating the insulting implication otherwise put in place by harming someone and leaving the harm in place without full redress. Such steps are not only morally right from the point of view of the agent's conduct ("from humane impulses"), but appear to be valuable for the victims, as well. We can see this effect in individual examples. Charles Utley, a 50-year-old San Diego engineer, discovered that doctors had carelessly left a sponge inside him after surgery. Upon bringing it to the hospital's attention, he recalls, a surgeon told him: "No matter how this happened, I was the surgeon in charge; I was the captain of the ship and I was responsible and I apologize for this." An administrator at Sharpe Health Care of San Diego also apologized to him. As a result, Utley reported he was impressed and decided not to "bother hiring a lawyer." Instead, he settled directly with the hospital for an undisclosed amount which he says was far less than he might have been awarded in court. His reason, he said, was that "They honored me as a human being."<sup>62</sup>

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<sup>62</sup> Rachel Zimmerman, *Doctors' New Tool to Fight Lawsuits: Saying 'I'm Sorry,'* THE WALL STREET JOURNAL (May 18, 2004) at A1.

Utley is apparently not alone in being willing to trade compensation for an apology. As noted in Part I, studies show that plaintiffs who sued their doctors say they would not have done so had they received an apology.<sup>63</sup> Moreover, apologies seem to reduce lawsuits or bring them to a speedier close.<sup>64</sup> Even if these incidents do not necessarily show that apologies are preferable to compensation as means of healing the victims (obviously not in the case of graver injuries), they illustrate that apologies play a distinctive reparatory role, apart from mere compensation. While compensating the victim may repair some of the physical damage, and even some of the disrespectful implications of having inflicted harm, it falls short of the manner in which apologies can honor and respect victims as people who may not be injured with impunity.

### C. Toward a Solution

We can see, then, that apologies share key elements with the acts, including the speech acts, protected by existing rules of evidence: they proceed from a humane impulse, namely the intention not to treat the victim as one who may be harmed; they imply no admission of fault, as there is reason to apologize even for blameless harms; and they aid the victims (in ways that compensation alone does not).

Another feature of Rule 409, in particular, would also be a useful guideline for protecting apologies from evidentiary use. The notes of the advisory committee make clear that :

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<sup>63</sup> Vincent, et al (1994), supra note 24 (reporting a British study that found 37% of families and patients bringing suit may not have done so had there been a full explanation and apology); See also Jennifer K. Robbenholt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 484 n112 (2003).

<sup>64</sup> Richard C. Boothman, Amy C. Blackwell, Darrell A. Campbell, Jr., Elaine Commiskey, and Susan Anderson, *A Better Approach To Medical Malpractice Claims? The University Of Michigan Experience*, 2:2 JOURNAL OF HEALTH LIFE SCIENCE LAW (2009) 125 .

Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

Recall that one motivation for limiting the protection of apologies was that they may involve or accompany factual admissions of great probative value, such as conceding that a certain action was taken, or an important standard violated. To preserve that value, any protection of apologies would need to exclude admissions of factual elements of the tort or crime in the case.

That may not be so easy to do, in practice. One might worry that the distinction between self-critical expressions (“I should have behaved differently,” or “I should not have treated the patient that way”) and factual admissions of fault is rarified. Unlike offers to pay, these allegedly non-factual remarks verge on claims about one’s competence or compliance with acceptable standards, which do, in fact, bear on culpability. This worry does not, however, appear to be worth the benefit of admitting evaluative statements about one’s own behavior. The reason is that even when courts have admitted such personal evaluations, they proved to have limited probative value, much for the reasons just stated. Thus, a surgeon’s apologizing for having done an “inadequate resection” and for failing to do better,<sup>65</sup> a doctor’s admission that he “made a mistake,”<sup>66</sup> and a homeowner’s statement that an accident on his premises was “my fault”<sup>67</sup> were

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<sup>65</sup> *Phinney v. Vinson*, 605 A.2d 849 (Vt. 1992).

<sup>66</sup> *Senesac v. Assocs. in Obstetrics & Gynecology*, 449 A.2d 900 (Vt. 1982)

<sup>67</sup> *Trulove v. Jones*, 271 Ga. App. 681, 610 S.E.2d 649 (2005)

taken as evidence of personal standards of conduct, rather than as proof of objective negligence. If a rule of evidence like Rule 409 were to automatically render such statements inadmissible, there would likely be little cost in probative evidence – particularly if factual admissions as to causation were preserved.

And, as noted earlier, self-critical expressions such as “I did something terrible” or “I feel so guilty about what I did” do not indicate culpability. By themselves they merely reflect a moral agent’s sense of having failed to direct his best efforts in a manner that actually yielded the result in which he was deeply invested: not harming another person. While this sentiment is compatible with regarding oneself culpable and at fault, it is equally compatible with taking oneself to be morally blameless. Such expressions, too, like the speech acts they reflect, could be protected in an expanded version of Rule 409, or a legislative reform modeled upon it.

The focus on rules of evidence is not meant to rule out state reforms, instead, as means of protecting self-critical expressions, including apologies, both as statements and as speech acts. Indeed, it is far more realistic to expect that such reforms, rather than a rule of evidence, might be amended to include expressions of self-criticism, and to extend beyond expressions to the act of apologizing itself. And like Rule 409, the state reforms already contain language separating admissions of factual elements of liability from purely apologetic expressions.<sup>68</sup> The preceding discussion of the rule was meant only to bring out a more general point: that apologetic statements and actions are worth protecting even in the case of full, self-critical apologies, because as statements they imply nothing incriminating and as actions they are valuable means

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<sup>68</sup> For example, the Apology Law of Washington D.C. provides: An expression of sympathy or regret ... is inadmissible as an admission of liability. Nothing herein shall preclude the court from permitting the introduction of an admission of liability into evidence. D.C. Code § 16-2841 (2010).

of moral repair of a sort that is already protected from use as evidence. For these reasons, evidence law should make more explicit room to protect full, self-critical apologies.

## **Conclusion**

For all their limitations, the new “Apology Laws” mark a significant step in harnessing the value of apologies for legal benefit. They draw the attention of lawyers and jurists to a development that can potentially transform legal culture and practice, namely the power of apologies to resolve conflict and settle claims. They also explicitly undermine the fear of legal reprisal that might otherwise discourage injurers from showing their victims that they care, feel bad about what happened, and want to help. Finally, the new reforms shatter any lingering dogma among legal advisors that their clients should never cede ground to their victims, even if only to say they sympathize. For these reasons, the new state measures merit significant appreciation and attention.

At the same time, the decisive majority of these reforms read as though there are only two types of apologies: spineless expressions of sympathy and benevolence, on the one hand, and outright admissions of fault, on the other. The prevailing legal practice of admitting apologies, which predated and continues alongside the “Apology Laws,” vindicates the same claim. The implication is that full apologies, which express displeasure or self-criticism about one’s own behavior, admit at least some fault in the outcome. A large portion of this paper was

devoted to refuting that contention. Drawing on the work of moral theorists such as Bernard Williams and Harry Frankfurt, I tried to show that there are grounds to be self-critical, deeply and painfully so, even for harming someone without fault. The thesis was that even blameless injurers, if they are not negligent, are often deeply invested in not harming people, expending much effort to reduce the danger they pose to others. Consequently, they view their injurious conduct as failed attempts to avoid an outcome they were deeply invested in avoiding. That, I tried to show, grounds a self-critical view of blameless harms, one that is aptly expressed by guilty or remorseful apologies, without implying any culpability.

In sketching this account of how innocent injurers may take a self-critical stance, this paper dealt in a somewhat idealized model. The picture offered here focused on several features of moral agency that grounded, or warranted, a certain stance toward one's harmful behavior, even when it was blameless. The account was not, however, an attempt to capture fully the actual psychology of people who innocently harm others. There is arguably much more that can be said about their moral anguish. To follow an idea of Herbert Morris's, moral agents may deeply value the welfare of others and, consequently, they may feel guilty about damaging something they so cherished.<sup>69</sup> Or else they may be so invested in avoiding particular harms that the goal is experienced as a duty, which one must fulfill on pain of guilt and moral reprobation.

Something similar can be said about the account offered in the final part, describing a benefit that victims derive from receiving an apology from their blameless injurers. There, too, I dealt with a moral feature of harming others that made sense, abstractly, of the need to apologize fully even for blameless harms. It may, nevertheless, vastly under-describe the grievance actually

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<sup>69</sup> Herbert Morris, *Nonmoral Guilt*, in FERDINAND SCHOEMAN, ED., *RESPONSIBILITY, CHARACTER AND THE EMOTIONS* (1987), at 226.

experienced by victims of inadvertent harms, and the pleasure or relief they would get from hearing their injurers apologize. Much can be gained, therefore, from further empirical study of the human experience of blamelessly harming another, or suffering harm at the morally clean hands of someone else. The results will inevitably enrich and transform the theoretical moral account that was attempted here. If the legal protection of apologies ever approaches the level proposed in the final section of this paper, there will be greater opportunity to observe some of those experiences and learn from them. At the very least, they will be better served by the law of evidence.

## State Apology Laws in the U.S. by Protection Category – 2010<sup>70</sup>

<u>Protects Only Not Self-Critical</u>	<u>Self-Critical but not Fault</u>	<u>Protects Admissions of Fault</u>
California	DC	Arizona (HCP)
Delaware (HCP)		Colorado (HCP)
Florida		Connecticut (HCP)
Idaho		Georgia (HCP)
Indiana		Illinois (HCP)
Iowa (HCP)		Oregon (HCP)
Louisiana (HCP)		South Dakota (HCP)
Maine (HCP)		South Carolina (HCP)
Maryland (HCP)		Utah (HCP)
Massachusetts		Vermont (HCP)
Missouri		
Montana (M)		
Nebraska (HCP)		
New Hampshire (M)		
North Dakota (HCP)		
Ohio (HCP)		
Oklahoma (HCP)		
Tennessee		
Texas		
Virginia (HCP)		
West Virginia (HCP)		
Washington		
Wyoming (HCP)		

(M) refers to apology laws that apply only to medical treatment; (HCP) refers to laws that apply only to apologies by healthcare professionals.

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<sup>70</sup> There are 37 state apology laws altogether, incl. Hawaii, North Carolina, Oregon, which protect “apology” generally, but without defining it in a way that places it clearly in one of these categories.