

# STRIKING A BALANCE: A PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE EXCLUDING PARTIAL APOLOGIES

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## INTRODUCTION

It has long been understood that an apology can have extraordinary emotional and psychological benefits for both the recipient and the person giving the apology.<sup>1</sup> In recent years, many practical results of apologizing

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1. See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85, 87 (2004); Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 *CLEV. ST. L. REV.* 545, 545 (2000).

have been realized as well.<sup>2</sup> In politics, apologies are frequently given by leaders in the wake of a wrongdoing or scandal.<sup>3</sup> While many of these apologies are undoubtedly sincere, they may also serve the dual purpose of preventing further media scrutiny. As recently as February 2014, President Obama issued a handwritten apology to a professor after making a statement in a speech that devalued art history majors.<sup>4</sup> While such apologies may not work in every political context, in this case the President's personal touch was effective, leading the professor to reverse course from her previous criticisms.<sup>5</sup>

Additionally, in the legal context an apology can serve as a useful tool in civil litigation. A sincere apology can help promote judicial economy by unlocking stalled settlement negotiations.<sup>6</sup> Moreover, when an apology is offered at earlier stages in a negotiation, such a statement can help ensure that impasse is avoided altogether.<sup>7</sup>

Jurisdictions differ in their treatment of apologies; in some locations, apologies can even be legally dangerous as the statement may be admissible evidence at trial to establish liability or to prove some other element of an offense.<sup>8</sup> This potential liability leads many attorneys and insurance companies to encourage their clients to avoid apologizing following an accident.<sup>9</sup> Take, for example, a scene from the popular television show *Parks and Recreation*, in which beloved civil servant Leslie Knope attempts to apologize to a friend, Andy, after he was injured in an accident caused by the city.<sup>10</sup> Before Leslie is able to speak with Andy, she is discouraged from apologizing by the city attorney.<sup>11</sup>

**Attorney:** Hi, Scott Braddock, city attorney.

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2. See Brent T. White, *SAY YOU'RE SORRY: COURT-ORDERED APOLOGIES AS A CIVIL RIGHTS REMEDY*, 91 CORNELL L. REV. 1261, 1269 (2006) (citing Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997)).

3. See Robert R. Weyeneth, *The Power of Apology and the Process of Historical Reconciliation*, 23 THE PUBLIC HISTORIAN 9, 12 (2001).

4. The President stated, "[a] lot of young people no longer see the trades and skilled manufacturing as a viable career, but I promise you, folks can make a lot more potentially with skilled manufacturing or the trades than they might with an art-history degree." Geoff Earle, *Obama Apologizes to Art Teacher for Mocking Art-History Degrees*, NEW YORK POST (Feb. 18, 2014), available at <http://nypost.com/2014/02/18/obama-apologizes-to-art-teacher-for-mocking-art-history-degrees/>.

5. *Id.* The professor later indicated on her Facebook page that she loves Obama and now feels badly about the whole incident. *Id.*

6. See Bolstad, *supra* note 1, at 569.

7. See *id.*

8. Jeffrey S. Helmreich, *Does 'Sorry' Incriminate? Evidence, Harm and the Protection of Apology*, 21 CORNELL J.L. & PUB. POL'Y 567, 568-69 (2012).

9. See Jennifer K. Robbennolt, *Apology-Help or Hindrance?*, 10 No. 3 DISP. RESOL. MAG., Spring 2004, at 33, 33 [hereinafter *Apology*].

10. *Parks and Recreation: Kaboom* (NBC television broadcast Oct. 22, 2009).

11. *Id.*

**Leslie:** Hey Scott, I didn't know that you were friends with Andy.

**Attorney:** I never met him. What I do know is that he could sue us at the drop of a hat. I mean, right now he is the most dangerous man in [the city].

**Leslie:** Is that all you lawyers think about? Lawsuits, and laws, and legalese?

**Attorney:** Yes.

**Leslie:** You can relax. All I'm going to do is go in and just say, "We're so sorry, it's entirely our fault."

**Attorney:** No, no, no. You can't say any of that. It admits liability. You can't say "I'm sorry," or "I apologize." It implies guilt.

**Leslie:** That's insane, I have to apologize. Andy was the victim . . .

**Attorney:** Can't say victim.

**Leslie:** . . . of an extremely unfortunate situation.

**Attorney:** Can't say "unfortunate" and you can't say "situation."

**Leslie:** I can't say the word "situation?"

**Attorney:** No it implies there was a situation.<sup>12</sup>

While this fictional example may be slightly hyperbolic, the advice given by the attorney above does not differ greatly from that of real attorneys in many situations, many of whom fear that the statement will be admitted as proof of liability.

One situation in which an attorney may advise a client against apologizing is when an incident gives rise to a federal civil suit. Currently, the Federal Rules of Evidence do not contain a provision specifically providing evidentiary protection for apologies. While some apologies may be excluded under Rule 408, which protects certain conduct or statements made during compromise negotiations, this rule contains a variety of limitations and, as a result, many apologetic statements are admissible as evidence.<sup>13</sup>

Recognizing the benefits of apologizing and the legal danger of doing so, a number of states have adopted legislation and rules providing evidentiary protection for apologies made by those who have caused another individual harm in certain situations.<sup>14</sup> These statutes take on a variety of forms and offer different levels of protection. The majority of these state statutes provide evidentiary protection for expressions of a general sense of sympathy or benevolence, i.e. "partial apologies."<sup>15</sup> Such

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12. *Id.*

13. FED. R. EVID. 408; Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 188 (2000).

14. Jennifer K. Robbenolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 354–56 (2008).

15. See Edward A. Dauer, *Apology in the Aftermath of Injury: Colorado's "I'm Sorry Law"*, 35 COLO. LAW. 47, 47 (2005). For partial apology statutes that apply only in the context of medical malpractice see ALASKA STAT. § 09.55.544 (2014); DEL. CODE ANN. tit. 10, § 4318 (2014); D.C. CODE § 16-2841 (2014); IDAHO CODE ANN. § 9-207 (2014); LA.

statutes protect statements like, “I am sorry this happened to you.”<sup>16</sup> Several states have created statutes that go further and extend protection to fault admitting statements, i.e. “full apologies,” in the limited context of medical malpractice.<sup>17</sup> Unlike partial apology statutes, these state statutes also protect statements like, “I’m sorry that *I did this* to you.”<sup>18</sup>

Scholars and commentators are divided as to their treatment of these approaches.<sup>19</sup> Some argue that the law should not provide any evidentiary protection for apologies because such protection will exclude evidence probative of fault, discourage apologies, and undermine the sincerity of these apologies.<sup>20</sup> Others argue that U.S. law will be enriched by the protection of apologies, specifically “full apology” statements, because such statements promote judicial economy by encouraging settlement.<sup>21</sup> These commentators argue that a full apology is much more likely than a partial apology, or no apology, to facilitate settlement because

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REV. STAT. ANN. § 13:3715.5 (2014); ME. REV. STAT. tit. 24, § 2907 (2014); MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (West 2014); MICH. COMP. LAWS § 600.2155 (2014); NEB. REV. STAT. § 27-1201 (2014); OHIO REV. CODE ANN. § 2317.43 (West 2014); VA. CODE ANN. § 8.01-52.1 (2013). For partial apology statutes that apply broadly see CAL. EVID. CODE § 1160 (West 2014); FLA. STAT. § 90.4026 (2014); HAW. REV. STAT. § 626-1, R. 409.5 (2014); IND. CODE § 34-43.5-1-4 (2014); MO. REV. STAT. § 538.229 (2014); N.H. REV. STAT. ANN. § 507-E:4 (West 2014); TENN. R. EVID. 409.1 (2014); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 2013); UTAH CODE ANN. § 78B-3-422 (West 2013). Note that several of these statutes do not expressly exclude statements of fault but have been interpreted by courts as doing so. See *Lawrence v. MountainStar Healthcare*, 320 P.3d 1037, 1051 (Utah Ct. App. 2014); see also *Davis v. Wooster Orthopaedics & Sports Med., Inc.* 952 N.E.2d 1216, 1218, 1220–21 (Ohio Ct. App. 2011) (holding that state statutes ambiguously prohibiting admission of statements expressing “apology” or a “general sense of benevolence” do not include prohibitions on statements of fault). The following statutes also appear to impliedly protect only partial apologies but have not yet been the subject of litigation: IOWA CODE § 622.31 (2014); MASS. GEN. LAWS ch. 233, § 23D (2014); MONT. CODE ANN. § 26-1-814 (2014); N.C. GEN. STAT. § 8C-1, Rule 413 (2014); N.D. CENT. CODE § 31-04-12 (2013); OKLA. STAT. tit. 63, § 1-1708.1H (2014); OR. REV. STAT. § 677.082 (2014); S.D. CODIFIED LAWS § 19-12-14 (2014); W. VA. CODE § 55-7-11a (2014); WYO. STAT. ANN. § 1-1-130 (2014).

16. Dauer, *supra* note 15 at 47.

17. *Id.* See ARIZ. REV. STAT. ANN. § 12-2605 (2013); COLO. REV. STAT. § 13-25-135 (2014); CONN. GEN. STAT. § 52-184d (2015); GA. CODE ANN. § 24-4-416 (2014); S.C. CODE ANN. § 19-1-190 (2014); VT. STAT. ANN. tit. 12, § 1912 (2014); WASH. REV. CODE § 5.64.010 (2014); WIS. STAT. § 904.14 (2014).

18. Dauer, *supra* note 15 at 47.

19. Compare Lucinda E. Jesson & Peter B. Knapp, *My Lawyer Told Me to Say I’m Sorry: Lawyers, Doctors, And Medical Apologies*, 35 WM. MITCHELL L. REV. 1410, 1411 (2009) (exhibiting skepticism that evidentiary rules can influence human behavior and arguing that such rules undercut the moral weight of apologies), with Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1068 (1999) (discussing the emotional and strategic benefits apologizing may bring to clients when done in a “safe” legal means) [hereinafter *Advising Clients*].

20. See Jesson & Knapp, *supra* note 19, at 1438.

21. Michael B. Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 SAN DIEGO L. REV. 137, 145 (2009).

fault-admitting, full apologies are viewed as more sincere expressions of remorse.<sup>22</sup>

This note seeks to strike a balance between these two positions by advocating for the approach adopted by a majority of states: evidentiary protection for some, but not all apologies. Such an approach, while not perfect, aligns the competing interests of encouraging the legal, psychological, and emotional benefits that accompany apologies with preserving a plaintiff's right to utilize probative evidence. By way of introduction, section one of this note briefly discusses the current legal treatment of apologies in United States jurisdictions. Section two compares the advantages of excluding apologetic statements from evidence with the disadvantages of such evidentiary protection and further describes how a balance may be achieved between these two positions. Section three seeks to incorporate this balance into the Federal Rules of Evidence by proposing an amendment to specifically grant evidentiary protection for certain apologies.

### I. THE EVOLVING TREATMENT OF APOLOGIES

The meaning of the word "apology" has changed significantly since its origins in the sixteenth century.<sup>23</sup> While today most think of an apology as including expressions of regret and sympathy, admissions of responsibility, and promises of forbearance, the term once did not confer such meaning.<sup>24</sup> The word "apology" originates from the Greek word "apologia," meaning, "to speak in one's defense."<sup>25</sup> In this original meaning, a person offering an apology was not expressing regret for his actions, but was seeking to justify his behavior and to defend himself from accusations.<sup>26</sup> In this sense, the word apology was more synonymous with "excuse" than today's typical, "I'm sorry."<sup>27</sup>

Soon after its introduction, however, the meaning of apology changed from self-justification towards implying regret.<sup>28</sup> It was first used to "describe the process of excusing oneself from the wrath of a person

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22. See generally *id.*

23. See OXFORD ENGLISH DICTIONARY 553 (2d 1989).

24. Bolstad, *supra* note 1, at 546 (citing OXFORD ENGLISH DICTIONARY 553 (2d 1989)); JAY FOLBERG, DWIGHT GOLANN, THOMAS J. STIPANOWICH & LISA A KLOPPENBERG, *RESOLVING DISPUTES THEORY, PRACTICE, AND LAW* 156 (Aspen Publishers, 2d ed. 2010).

25. Bolstad, *supra* note 1, at 546 (citing OXFORD ENGLISH DICTIONARY 553 (2d 1989)).

26. Michael Quinion, *Apology*, WORLD WIDE WORDS, <http://www.worldwidewords.org/topicalwords/tw-apo1.htm> (last modified Jan. 17, 1998). The first use of the word "apology" recorded in the Oxford English Dictionary is in the title *Apologie or Syr Thomas More, Knyght; made by him, after he had geuen ouer the Officer of Lord Chancellor of Englande*, dated 1533. *Id.* In this usage, Sir Thomas More was not regretting his actions, but was offering a justification. *Id.*

27. See *id.*

28. *Id.*

affected by one's actions" and conferred the sentiment that no offense was intended.<sup>29</sup> Then, the term shifted to embrace our modern definition and was an acknowledgement that some offense had in fact been given and was an expression of regret for such an offense.<sup>30</sup>

Presently, our society encourages apologies from an early age.<sup>31</sup> Children are taught early to "say you're sorry," in the understanding that an apology can be a powerful tool in restoring and maintaining social relationships.<sup>32</sup> However in the United States, the benefits of apologizing learned as a child are often forgotten by the time one becomes an adult.<sup>33</sup>

In fact, Americans apologize much less frequently than do members of other societies.<sup>34</sup> For instance, in Japan apologies are an integral part of the mutual interdependence and hierarchical relations that are hallmarks of Japanese culture.<sup>35</sup> Apologizing is a sign of an individual's desire to restore or maintain a positive relationship with the other party despite a temporary disruption to the relationship.<sup>36</sup> Exemplifying this belief is the Japanese practice of apologizing even when one thinks that the other party is at fault.<sup>37</sup>

The societal preference for apologies in Japan is recognized and encouraged through Japanese civil law in several ways.<sup>38</sup> First, Japan is a nation with a history of promoting the use of various methods of alternative dispute resolution.<sup>39</sup> In these non-litigation scenarios, there is little emphasis on determining fault, but rather the goal is to preserve the long-term relationship between the parties.<sup>40</sup> Second, when cases do reach litigation, "there is evidence that Japanese judges do not see the offering of an apology as an admission of liability."<sup>41</sup> Thus, apologies are freely given following an accident because parties are less worried about their statements being used as an admission of fault.<sup>42</sup>

Conversely, apologies in the United States are less frequent than in Japanese society.<sup>43</sup> Americans seem to save the most extravagant, apologetic language, words like "I beg your pardon," for those situations "which are least serious, such as when one bumps into a stranger on the

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29. *Id.*

30. *Id.*

31. Bolstad, *supra* note 1, at 547.

32. *Id.*

33. *Id.*

34. *See id.* at 545.

35. *Id.* at 553.

36. Bolstad, *supra* note 1, at 553.

37. *Id.*

38. *See id.* at 559–60.

39. *Id.*

40. *See id.* at 560.

41. Bolstad, *supra* note 1, at 559.

42. *See id.*

43. *Id.*

street.”<sup>44</sup> Additionally, consistent with the historical definitions of the word “apology,” the American apology is more likely accompanied by an excuse or explanation of why the behavior in question occurred than are Japanese apologies.<sup>45</sup> At times, American society even takes a hostile view of an apology, viewing apologies as a sign of weakness.<sup>46</sup> For example, one political scientist commented, “To apologize for substantive things you’ve done raises the white flag. There is a school of thought in politics that you never say you’re sorry. The best defense is a good offense.”<sup>47</sup>

Also, as mentioned above, unlike the Japanese legal system, apologies can be legally dangerous in many United States jurisdictions.<sup>48</sup> Such statements are ordinarily admissible in court to prove liability or another element of a claim.<sup>49</sup> This has led many lawyers to advise clients to avoid post-accident apologies in order to prevent contributing to liability judgments.<sup>50</sup> However, despite this tendency to admit apologies into evidence, there are a variety of rules, depending on the jurisdiction and circumstance that may limit the admissibility of an apology as evidence. These rules vary from no evidentiary protection for apologies under the Federal Rules of Evidence, to protection for “partial apologies” in a number of states, and, finally, protection for “fault-admitting” apologies in a few jurisdictions.

#### A. Apologies under the Federal Rules of Evidence

Under the Federal Rules of Evidence (“FRE”) little, if any, evidentiary protection is provided to apologies. On the contrary, the rules provide that apologies are generally admissible to prove the liability of the apologizer.<sup>51</sup> FRE 801(d)(2) states that admissions by a party-opponent are “not hearsay,” and, therefore, are not excluded by the rule against hearsay when offered against that party.<sup>52</sup> Thus, even though an apology fits within the classic definition of hearsay, an out of court statement offered to prove the truth of the matter asserted, it is admissible under the Federal Rules as non-hearsay.<sup>53</sup> This rule allows a party-opponent’s apology into evidence regardless of whether the apology actually “admits” anything in the course of apologizing.<sup>54</sup> Rule 801(d)(2) defines an “admission” by a party-

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44. *Id.* at 561.

45. *Id.*

46. Bolstad, *supra* note 1, at 563.

47. *Id.* (quoting Deborah Tannen, *I’m Sorry, I Won’t Apologize*, N.Y. TIMES, July 21, 1996, at 6, 34).

48. *Id.* at 559. See Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 824–25 (2002) [hereinafter *Legislating Apology*].

49. *Id.* at 824.

50. Helmreich, *supra* note 8, at 573.

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

52. *Id.*

53. *Legislating Apology*, *supra* note 48, at 824–25.

54. *Id.* at 825.

opponent as, among other things, “the party’s own *statement*, in either an individual or a representative capacity.”<sup>55</sup> Thus, an apology by a party-opponent is admissible non-hearsay regardless of whether it admits any fault.<sup>56</sup>

However, despite the general admissibility of apologies, there are several rules under the FRE that may preclude an apology from admission. FRE 501 provides that, “in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”<sup>57</sup> Thus, where an apology is made in a situation covered under a state privilege, such as mediation, and is being offered in a federal civil case not grounded on a federal question, such a statement may be excluded from admissibility.<sup>58</sup>

Additionally, and perhaps most importantly for purposes of discussion here, FRE 408 provides in part that, “Evidence of conduct or statements made in a compromise negotiation is . . . not admissible [to prove liability for or invalidity of a claim or its amount].”<sup>59</sup> Under this rule, evidence of settlement or attempted settlement of a disputed claim is inadmissible when offered as an admission of liability.<sup>60</sup> Thus, if an apology fits within the parameters of this rule, it is not admissible as evidence.

FRE 408 was created with the purpose of “encourag[ing] settlements which would be discouraged if such evidence were admissible.”<sup>61</sup> Under the common law, statements made in the course of settlement negotiations were admissible in court unless they were made in hypothetical form, preceded by the terms “without prejudice,” or so intertwined with an offer of settlement as to be inseparable from it.<sup>62</sup> As a result of the disadvantages that accompanied these required legal formalisms, such as inhibiting settlement and compromising communications, FRE 408 was created to expand the confidentiality of private statements made during settlement negotiations and to set the benchmark that settlement negotiations are inadmissible with or without such legal formalisms.<sup>63</sup>

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55. *Id.* at 824 (quoting FED. R. EVID. 801(d)(2)) (emphasis added).

56. *See* FED. R. EVID. 801(d)(2).

57. *Legislating Apology*, *supra* note 48, at 825; FED. R. EVID. 501.

58. *Legislating Apology*, *supra* note 48, at 825. The rationale underlying FRE 501 is that, in accordance with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), “federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason.” FED. R. EVID. 501 advisory committee’s notes. The advisory committee believed that in civil cases not grounded upon a federal question, there would be no such compelling reason to supersede state law. *Id.*

59. *Legislating Apology*, *supra* note 48, at 825–26 (quoting FED. R. EVID. 408).

60. FED. R. EVID. 408 advisory committee’s notes.

61. *Id.*

62. *Advising Clients*, *supra* note 19, at 1033.

63. *Id.* at 1033–34; Bolstad, *supra* note 1, at 572.



However, FRE 408 is not without its limitations, and some scholars have suggested that it has fallen short of its goal of promoting private settlements.<sup>64</sup> First, FRE 408 bars statements made during settlement negotiations from introduction at *trial*, but does not cover pre-trial discovery or administrative or legislative hearings.<sup>65</sup> An apology made during a mediation or settlement negotiation is admissible in those scenarios.<sup>66</sup> Additionally, FRE 408 does not protect a party from revealing such an apology to the public at large outside of the courtroom.<sup>67</sup> This loophole has the potential to become a significant deterrent to apologizing, especially in situations with large corporate entities who may wish to avoid negative publicity.

Second, FRE 408 only excludes the admission into evidence of conduct or statements, such as apologies, when such conduct or statements are offered, “to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction . . . .”<sup>68</sup> FRE 408 explicitly provides that such evidence is admissible, “for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”<sup>69</sup> Re-emphasizing this point, the advisory committee acknowledges extensive case law recognizing that FRE 408 is inapplicable when compromising evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim.<sup>70</sup> Therefore, if an apology is offered for one of these other reasons, it is admissible as evidence.

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64. See *Advising Clients*, *supra* note 19, at 1034.

65. Bolstad, *supra* note 1, at 572.

66. *Id.*

67. *Id.* at 573.

68. FED. R. EVID. 408.

69. *Id.* Prior to the 2006 amendment of FRE 408, compromise evidence was admissible to impeach by contradiction or inconsistent statement. See *Advising Clients*, *supra* note 19, at 1034. Thus, “if a defendant who admitted his guilt when apologizing during settlement negotiations were later to deny his guilt at trial, the earlier admission likely could be used against him for impeachment.” *Id.* at 1035. However, because “[s]uch broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements,” FRE 408 was amended to prohibit use of such evidence for this purpose. FED. R. EVID. 408 advisory committee’s notes.

70. FED. R. EVID. 408 advisory committee’s notes. See, e.g., *Athey v. Farmers Ins. Exch.*, 234 F.3d 357, 362 (8th Cir. 2000) (holding that evidence of settlement offer by insurer was properly admitted to prove insurer’s bad faith); *Coakley & Williams v. Structural Concrete Equip.*, 973 F.2d 349, 353–54 (4th Cir. 1992) (holding that evidence of settlement is not precluded by Rule 408 where offered to prove a party’s intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.*, 708 F.2d 683, 691 (7th Cir. 1985) (explaining that Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284, 1294 (6th Cir. 1997) (holding threats made in settlement negotiations were admissible because Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations).

Third, FRE 408 can only be used by parties to litigation.<sup>71</sup> Apologies made by individuals who are not parties to a case may be admitted under any circumstances without violation of FRE 408.<sup>72</sup> This lack of protection “could create serious problems for the apologizer, with the possible result of being forced to defend numerous other suits inspired by the revelation of the apology” in court.<sup>73</sup>

Finally, FRE 408 only protects apologetic conduct or statements if the conduct or statements constitute, or are made in pursuit of, a compromise to a dispute on either the validity or amount of a claim.<sup>74</sup> It is not always clear, however, as to exactly what constitutes a “compromise negotiation” and whether a dispute exists as to the validity or amount of a claim. Certainly, once a legal claim has been filed, FRE 408 will apply, but it is unclear whether a statement made before a claim has been filed will be considered “made during” a compromise negotiation of a disputed claim.<sup>75</sup> For instance, a spontaneous apology in a parking lot following a fender-bender might not qualify.<sup>76</sup> This seemingly “gray area” is a substantial limitation to any evidentiary protection afforded to apologies by FRE 408, as the issue of whether a certain statement occurred during a “compromise negotiation” is up for varying interpretations by courts in differing jurisdictions.

## B. State Apology Laws

Contrary to the “all-inclusive” Federal Rules of Evidence, states vary in their approaches to evidentiary protection of apologies. While most state rules of evidence have provisions analogous to FRE 408, a great number of states provide other mechanisms for protecting apologetic statements such as evidentiary rules and confidentiality statutes. These state rules vary in the scope of their protection and in the circumstances such protection is offered.

### i. State Rules of Evidence

As of the time of this note, thirty-seven states and the District of Columbia have enacted statutes or evidentiary rules promoting apologies by providing express evidentiary protection for such statements in some, but not all, situations.<sup>77</sup> This trend towards protecting apologies began in 1986 when Massachusetts became the first state to adopt an evidentiary rule

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71. Bolstad, *supra* note 1, at 573.

72. *Id.*

73. *Id.*

74. FED. R. EVID. 408 advisory committee’s notes.

75. *Advising Clients*, *supra* note 19, at 1035.

76. Dauer, *supra* note 15, at 50.

77. *See* statutes *supra* notes 15, 17.

specifically excluding certain types of apologetic statements from admissibility when used to prove liability in civil cases.<sup>78</sup> The Massachusetts statute provides in part:

Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.<sup>79</sup>

One issue left unresolved after the passage of this statute, however, is the scope of apologetic statements protected from admissibility.<sup>80</sup> The statute most certainly protects statements like, “I hope you feel better soon.”<sup>81</sup> However, the law is unclear as to whether it covers statements where fault is embedded within an expression of sympathy or benevolence, such as, “I’m sorry that you are hurt,” or “I am sorry that I hurt you.”<sup>82</sup>

After passage of the Massachusetts apology statute, many states followed suit creating apology rules of their own.<sup>83</sup> These state statutes resolve the question regarding the scope of protection with more clarity.<sup>84</sup> Thirty of the thirty-eight jurisdictions that have adopted apology statutes limit protection to “partial apologies.”<sup>85</sup> Under these statutes, an apology that expresses sympathy or benevolence after an accident is excluded from evidence, but portions of an apology that include an embedded admission of fault are admissible to prove liability.<sup>86</sup> Apologies containing portions that express benevolence and sympathy and portions that express fault will most likely be parsed, if possible, with the fault admitting sections admissible.<sup>87</sup>

These partial apology states vary with regard to the types of cases for which they offer evidentiary protection. Eleven states exclude qualifying apologies generally in the context of civil litigation when such statements are offered as evidence of liability.<sup>88</sup> For example, Texas adopted a statute with similar language as the Massachusetts rule, but its statute additionally provides that, “a communication . . . which also includes a statement or statements concerning negligence or culpable

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78. Runnels, *supra* note 21, at 151. *See also* *Legislating Apology*, *supra* note 48, at 827.

79. MASS. GEN. LAWS ch. 233, § 23D (2014).

80. *Legislating Apology*, *supra* note 48, at 827.

81. *Id.*

82. *Id.* at 829.

83. *See* statutes *supra* note 15.

84. *Legislating Apology*, *supra* note 48, at 830.

85. *See* Dauer, *supra* note 15, at 48; statutes *supra* note 15.

86. *Legislating Apology*, *supra* note 48, at 828–29.

87. *See id.* at 829.

88. *See* statutes *supra* note 15.

conduct pertaining to an accident or event, is admissible to prove liability of the communicator.”<sup>89</sup>

Additionally, eighteen “partial apology” states, and the District of Columbia, have statutes that offer protection for medical malpractice liability only.<sup>90</sup> For example, Delaware’s apology statute provides in part that:

Any and all statements, writings, gestures, or affirmations made by a health care provider or an employee of a health care provider that express apology (other than an expression or admission of liability or fault), sympathy, compassion, condolence, or benevolence . . . are inadmissible in a civil action that is brought against a health care provider.<sup>91</sup>

This statute provides evidentiary protection to a doctor who expresses his sympathy to a family in the wake of medical malpractice, but does not apply to car accidents, slip-and-fall cases, or other types of civil litigation.<sup>92</sup>

Recently, a few states have begun to provide evidentiary protection for fault-admitting or “full,” apologies.<sup>93</sup> For example, Colorado’s apology statute covers, “gestures, or conduct expressing apology, *fault*, sympathy, commiseration, condolence, compassion, or a general sense of benevolence[.]”<sup>94</sup> Unlike partial apology statutes, this rule protects a statement like, “Gosh I’m sorry I did this to you,” in addition to any general expressions of sympathy.<sup>95</sup> Notably, however, Colorado’s statute applies only to civil actions alleging liability for unanticipated outcomes in health care and to statements made by “a health care provider or an employee of a health care provider” to an alleged victim.<sup>96</sup> Arizona, Connecticut, Georgia, South Carolina, Vermont, Washington, and Wisconsin also have statutes protecting “full apologies,” but these statutes also apply exclusively to medical malpractice.<sup>97</sup>

Regardless of what litigation scenario these statutes cover or whether they cover partial or full apologies, all thirty-seven state apology statutes and rules reflect their respective state legislatures’ beliefs that

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89. TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 2013). Other states that include general partial apology statutes include California, Florida, Hawaii, Indiana, Montana, Nebraska, New Hampshire, Tennessee, Texas, and Washington. *See* statutes *supra* note 15.

90. *See* statutes *supra* note 15.

91. DEL. CODE ANN. tit. 10, § 4318(b) (2013).

92. *See id.*

93. *See* statutes *supra* note 17.

94. COLO. REV. STAT. § 13-25-135 (2014) (emphasis added).

95. Dauer, *supra* note 15 at 47.

96. COLO. REV. STAT. § 13-25-135.

97. *See* statutes *supra* note 17.

protecting some, but not all, apologies is beneficial to the judicial system and society as a whole.<sup>98</sup> In fact, as of the time of this note, no state has a statute allowing for the protection of apologies in all situations. By allowing protection for apologies in limited situations, these legislatures have achieved a balance between two competing interests: (1) encouraging apologies and (2) preserving a plaintiff's right to utilize probative evidence of liability.<sup>99</sup> This balancing approach has proven successful as the number of states with protection for some, but not all, apologies continues to grow.<sup>100</sup>

## ii. State Confidentiality Statutes

In addition to providing protection for apologies through evidentiary exclusion, many states have confidentiality statutes that provide privileges for statements made during mediation.<sup>101</sup> These privilege statutes vary significantly from state to state in several ways, however.<sup>102</sup> First, the scope of the privilege created by these statutes varies from statutes that cover all communications made during mediation, to statutes that limit the scope of information that is privileged, to only statements which are relevant to the issue being mediated.<sup>103</sup> For example, Washington and Virginia have created specific subject-matter exceptions to their privilege statutes.<sup>104</sup> Second, these privilege statutes “vary according to whose statements are covered.”<sup>105</sup> In many states the privilege applies to all mediation participants, but in other states, “only information originating with the mediator or mediation program is privileged.”<sup>106</sup>

Additionally, some states have opted against creating absolute privileges for mediation. Instead, they have allowed the courts to develop the privilege through a case-by-case analysis, in which the courts balance the costs and benefits of a mediation privilege in a specific scenario.<sup>107</sup> However, as one scholar points out, courts “have historically been loathe to expand privileges,” therefore, relying on judicial review to create such a privilege may very well be an arduous process.<sup>108</sup> Also, conflict of law issues can create problems for parties who wish to rely on mediation

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98. See Helmreich, *supra* note 8, at 578–79.

99. See *id.*

100. See Runnels, *supra* note 21, at 151.

101. See, e.g., WASH. REV. CODE § 5.60.070 (2014); VA. CODE ANN. § 8.01-581.22 (2014).

102. Bolstad, *supra* note 1, at 574.

103. *Id.*

104. *Id.* at 574 & n.276.

105. *Id.* at 574.

106. *Id.*

107. Bolstad, *supra* note 1, at 574.

108. *Id.*

privileges for apologetic statements.<sup>109</sup> Because the local law of the forum will determine whether the privilege applies, a situation could arise in which “a mediator or a party to a mediation in a state with an absolute mediation privilege is subpoenaed by a party in a state with no mediation confidentiality statute.”<sup>110</sup> Further, as discussed above, FRE 501 provides that in federal diversity cases the state’s privilege rules will apply, while in federal question cases, statements made during mediation will not be protected.<sup>111</sup>

Therefore, while mediation privileges can be trusted in some instances to prevent disclosure of apologetic statements made during mediation, the situation in many jurisdictions remains unclear and potentially risky.<sup>112</sup>

### C. Private Contractual Agreements

Finally, parties to dispute resolution procedures, such as mediation, frequently enter into confidentiality agreements through which they are able to address a variety of matters.<sup>113</sup> Unlike federal and state statutory protections, these contractual arrangements not only make statements made during mediation inadmissible in court, but can also prevent the parties from revealing these statements to the public or to other third-parties.<sup>114</sup> However, there are several weaknesses to the use of confidentiality agreements; thus, reliance on these agreements is undesirable in many situations. Courts frequently “disregard clauses within confidentiality agreements that purport to preclude a court from hearing evidence as being contrary to public policy.”<sup>115</sup> Additionally, even if a contract is enforceable, the penalties for breaching the contract may not be a sufficient deterrent to prevent someone from publicly revealing the apologetic statement if the stakes are high enough.<sup>116</sup> “Finally, contractual agreements are not binding on third parties and therefore provide no protection from claims and revelations made by those not party to the mediation.”<sup>117</sup>

## II. BALANCING THE PROS AND CONS OF APOLOGIES AS EVIDENCE

Legal scholars and commentators have reached differing conclusions as to the merits of granting evidentiary protection to

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109. *Id.* at 575.

110. *Id.*

111. *See id.*

112. Bolstad, *supra* note 1, at 576.

113. *Id.* at 573.

114. *Id.*

115. *Advising Clients*, *supra* note 19, at 1039; *see also* Bolstad, *supra* note 1, at 573.

116. Bolstad, *supra* note 1, at 573.

117. *Id.*

apologies.<sup>118</sup> While some commentators argue that the all-inclusive Federal Rules of Evidence currently provide the best strategy for maintaining a plaintiff's ability to use probative evidence, others cite the judicial economy and social benefits accompanying apologies and contend that jurisdictions should amend their rules to exclude all apologies from evidence.<sup>119</sup> Although both of these arguments certainly have their merits, this note proposes that the best approach available is the middle ground.

The benefits of the middle ground approach are exemplified in the balance that has been achieved in a growing number of state statutes that provide protection for some, but not all, apologies. Specifically, this note proposes that the most idyllic balance can be seen in those statutes that exclude expressions of general benevolence, but do not prevent statements that are clear admissions of fault from introduction into evidence.<sup>120</sup> Before further considering the merits of the partial apology balance, this note considers several foundational questions. First, should the government encourage individuals to apologize for wrongs they have caused by providing evidentiary protection for such apologies? Second, if so, what level of evidentiary protection is appropriate?

#### A. Should the Law Encourage Apologies?

The first foundational question warranting resolution is whether the law should attempt to encourage individuals to apologize by providing *any* degree of evidentiary protection. Several commentators have argued against the adoption of evidentiary exclusions for apologies based on a variety of reasons.<sup>121</sup> Among these reasons, commentators argue that “evidentiary exclusions rob apologies of their moral content and, in doing so, undermine the sincerity and . . . healing efficacy of apologies.”<sup>122</sup> In other words, by offering incentives to apologize, apologies are de-valued and less authentic. While these concerns are legitimate, the numerous benefits that apologies provide for both the apologizer and the person receiving the apology are so great that any devaluation to the apology is offset by these gains. As discussed below, the admission of apologies as evidence tends to discourage future apologies, therefore, adoption of statutes designed to promote apologies is not only wise, but should be encouraged.

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118. Compare Jesson & Knapp, *supra* note 19, at 1438 (exhibiting skepticism that evidentiary rules can influence human behavior and arguing that such rules undercut the moral weight of apologies), with *Advising Clients*, *supra* note 19, at 1068 (discussing the emotional and strategic benefits apologizing may bring to clients when done in a “safe” legal means).

119. See Runnels, *supra* note 21, at 145.

120. See statutes *supra* note 15.

121. Jesson & Knapp, *supra* note 19, at 1438–39.

122. *Id.* at 1438 (citing White, *supra* note 2, at 1261).

### i. The Benefits of Apologies

In determining whether jurisdictions should attempt to encourage individuals to apologize through evidentiary privileges and exclusions, it is first important to understand the benefits provided by such apologies.<sup>123</sup> While apologies do not affect every situation or individual equally, such statements tend to provide positive psychological, emotional, and legal outcomes for both the apologizer and person receiving the apology.<sup>124</sup>

First, apologies have the tendency to provide positive emotional and psychological consequences for both the person apologizing and the recipient of the apology by adding value to dispute resolution.<sup>125</sup> Professor Cohen, of Florida, Levin College of Law, an early advocate for the benefits of apologies, notes:

After an injury, it is easy for parties to see the world in zero-sum terms. Having been harmed, the injured party may view the offender as an adversary, and expect that what will be one side's gain will be the other side's loss. The offender may fear such hostility from the injured party, and may also adopt a zero-sum mind set. Further, post-injury negotiations, like all negotiations, inevitably involve a distributive element. Often that distributive element is quite large. For example, following a car accident, the central question may be how much compensation the defendant's insurance company will pay to the injured party.<sup>126</sup>

Professor Cohen continues by observing that, while an apology does not always eliminate these distributive elements, it can add value to the situation by creating benefits for both parties.<sup>127</sup> For example, “[i]f the parties knew one another before the injury, an apology may be an important first step toward repairing their relationship.”<sup>128</sup> Apologies may additionally “help the injured party to feel less angry and the injurer to feel less guilty” in certain situations.<sup>129</sup>

Professor Cohen also states that apology and forgiveness may offer the benefit of promoting spiritual and psychological growth.<sup>130</sup> “Within many religious and ethical systems, offering an apology for one's wrongdoing is an important part of moral behavior, as is forgiving those

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123. *Apology*, *supra* note 9, at 33.

124. Helmreich, *supra* note 8, at 574–75.

125. *See id.*

126. *Advising Clients*, *supra* note 19, at 1015.

127. *Id.* at 1015–16.

128. *Id.* at 1016.

129. *Id.*

130. *Id.* at 1021.



who have caused offense.”<sup>131</sup> Within such systems, when an individual apologizes for, rather than denies or avoids, the damage he has caused someone else, that individual becomes a better person.<sup>132</sup> Furthermore, psychologically, when an offender fails to apologize, they may suffer by harboring guilt, and when an injured party does not receive an apology, they may suffer by storing anger.<sup>133</sup>

Second, apologies can provide benefits that are largely strategic, rather than value-creating.<sup>134</sup> Namely, apologies tend to prevent long legal battles.<sup>135</sup> According to several empirical studies, if apologies are given early enough, they can help prevent lawsuits from being filed altogether.<sup>136</sup> For example, in one British study, many plaintiffs who sued their doctors said they would not have done so had they received an apology and an explanation for their injury.<sup>137</sup> While these results are certainly not universal, they suggest that in many situations, compensation or other substantive considerations may in fact be secondary to an apology and resulting forgiveness.

Additionally, an apology, even if not full or perfect, can unlock a stalled negotiation and facilitate settlement in situations where lawsuits arise. In fact, the University of Michigan Health Service (UMHS) reported that its per case payments decreased by 47% and the settlement time dropped from twenty to six months after the introduction of the “Apology and Disclosure Program,” which required that healthcare professionals apologize to patients who complained of being injured while under the UMHS care.<sup>138</sup> Another highly publicized example is the apology from basketball star Kobe Bryant during the course of rape accusations in 2004.<sup>139</sup> Whether Mr. Bryant’s apology was a genuine, benevolent gesture or the result of careful drafting and negotiation by attorneys, the result remains the same: providing an apology helped Mr. Bryant avoid criminal charges and lengthy, expensive civil litigation.<sup>140</sup>

## ii. The “Chilling Effects” of Admissibility of Apologies

The next topic to consider in determining whether jurisdictions should strive to promote apologies through evidentiary protection is the effect that the absence of protection has on an individual’s tendency to

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131. *Advising Clients*, *supra* note 19, at 1021.

132. *Id.*

133. *Id.*

134. *Id.* at 1022.

135. Helmreich, *supra* note 8, at 574.

136. *Id.*

137. *Id.* (citing Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 THE LANCET 1609, 1612 (1994)).

138. Helmreich, *supra* note 8, at 575.

139. FOLBERG ET AL., *supra* note 24, at 157.

140. *Id.*

apologize. The largest effect of admitting apologies into evidence is the deterrent factor on the practice of apologizing.<sup>141</sup> A prime example of this phenomenon can be seen by examining the unfortunate situation which led to the wave of apology legislation discussed above. The Massachusetts apology statute, the first of its kind, was passed when former Massachusetts state senator William L. Saltonstall convinced his successor, Robert C. Buell, to draft the bill after Saltonstall's daughter was killed in a car accident and the offending driver never apologized or expressed regret.<sup>142</sup> Senator Saltonstall discovered that the driver had wanted to apologize but feared that "it would be used against him as tort evidence."<sup>143</sup> "It was this chilling effect of evidence law that the former state senator and his successor sought to reverse with the new legislation."<sup>144</sup>

Such reluctance to apologize is often supported by advice that individuals receive from legal consultations.<sup>145</sup> "Many lawyers do not realize that there are legally 'safe' ways to apologize."<sup>146</sup> Furthermore, many lawyers may advise against apologizing because apologizing runs counter to their "macho" strategy of lawyering, in which the lawyer prefers to defeat their adversary in a courtroom battle rather than respond with humility.<sup>147</sup> Finally, lawyers may advise against apologizing due to loss aversion.<sup>148</sup> When faced with the option of (1) apologizing and taking a small but certain loss and (2) not apologizing and gambling with the chance of a very large loss or no loss at all, many attorneys will choose the gamble.<sup>149</sup>

Considering the range of benefits that an apology can provide, in addition to the negative effects that admitting apologies into evidence can have on the practice of apologizing, states and the federal government would be well served by creating legislation, or amending existing legislation, to promote apologies.

## **B. What Level of Evidentiary Protection is Appropriate?**

Therefore, if the law should encourage apologies through creating rules that exclude apologies from admission into evidence, then the question remains—what is the appropriate level of evidentiary protection for such apologies? Specifically, should such protection be extended to

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141. Helmreich, *supra* note 8, at 573. In fact, it has been noted that, "[p]erhaps, nothing discourages the use of an apology in the United States today more than the fear of liability." Bolstad, *supra* note 1, at 565.

142. Helmreich, *supra* note 8, at 575.

143. *Id.*

144. *Id.*

145. *Id.* at 573.

146. *Advising Clients*, *supra* note 19, at 1042.

147. *Id.* at 1044.

148. *Id.*

149. *Id.*

full, fault-admitting, apologies, or should the partial apology approach of the majority of states be taken?

i. Empirical Arguments for Full Apologies

A number of legal scholars have advocated protection for full, fault-admitting, apologies.<sup>150</sup> One such scholar, Professor Jennifer Robbennolt, conducted an empirical study on the role of apology in settlements that was published in 2003.<sup>151</sup> In “her study[,] participants read an accident scenario, were assigned the role of accident victim[,] and evaluated a settlement offer from the other party.”<sup>152</sup> Some offers included “full” apologies with expressions of sympathy and admissions of fault, while others included only “partial apologies” and expression of sympathy with no acceptance of responsibility.<sup>153</sup> Others included no apology at all.<sup>154</sup> Professor Robbennolt’s results indicate that when no apology was offered, 52% of participants said that they would either definitely or probably accept the offer, 43% said that they would reject it, and 5% were uncertain.<sup>155</sup> When a full apology was provided, 73% of participants said that they would accept the offer, around 13% said they would reject the offer, and 14% remained uncertain.<sup>156</sup> When a partial apology was offered, the results became much more varied. In this case, 40% of participants remained undecided as to what course of action to take, while 35% of participants were inclined to accept the offer.<sup>157</sup> Although not as low as the full apology results, the number of participants inclined to reject the offer dropped, as compared to when no apology was offered, to 25%.<sup>158</sup>

Professor Robbennolt’s results demonstrate the value apologies have in dispute resolution. Robbennolt counters the argument that evidentiary protection for apologies will negatively affect apologies by stating, “[t]here is . . . no evidence to suggest that protected apologies will be less effective or less valued by claimants than unprotected apologies.”<sup>159</sup> She continues, “[a]ccordingly, providing evidentiary protection for apologies may serve to encourage the offering of apologies . . . without

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150. See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 505 [hereinafter *Empirical Examination*]; Runnels, *supra* note 21, at 151.

151. *Id.* at 460.

152. Jesson & Knapp, *supra* note 19, at 1422 (citing *Empirical Examination*, *supra* note 150, at 484).

153. *Id.* (citing *Empirical Examination*, *supra* note 150, at 484–85).

154. *Id.* at 1423 (citing *Empirical Examination*, *supra* note 150, at 484).

155. Runnels, *supra* note 21, at 150 n.62 (citing *Empirical Examination*, *supra* note 150, at 485–86).

156. *Id.* (citing *Empirical Examination*, *supra* note 150, at 485–86).

157. *Id.*

158. *Id.*

159. *Empirical Examination*, *supra* note 150, at 504.

diminishing the value and effectiveness of apologies so offered.”<sup>160</sup> Professor Robbennolt argues, however, that current state statutes are protecting the wrong types of apologies.<sup>161</sup> She states that while the majority of current statutes protect partial apologies and those portions of full apologies that do not admit responsibility, it is the “full, responsibility-accepting, apologies that have a positive impact on settlement decision-making[.]”<sup>162</sup>

ii. The Negative Aspects of Excluding Fault-Admitting Apologies

Although it is difficult to argue with the results of Professor Robbennolt’s empirical analysis, and while full apologies most certainly provide the greatest settlement opportunities and emotional benefits, these added benefits must be considered in light of several negative aspects of evidentiary protection for fault-admitting apologies. Specifically, plaintiffs and the justice system as a whole will be disserved by prohibiting the admission of statements into evidence that are often highly probative of liability or fault. An article by Jeffrey Helmreich illustrates this point well. He writes:

Consider, for example, a medical injury after which a doctor says “I’m so sorry I delegated part of the surgery to someone I now realize was not really up to the job.” 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 behavior that could contribute to negligence, and there is scarcely better evidence of liability than expert admissions by the liable party.<sup>163</sup>

As this passage exemplifies, jurisdictions should not exclude fault-admitting statements from admission into evidence. By allowing full apology statutes to prohibit admissions of statements tantamount to a full confession, simply because the speaker uttered the magic words, “I’m sorry” before admitting liability, is dangerous policy and may significantly weaken an individual’s ability to prove their case. The dangers of such an approach are recognized by the jurisdictions that have adopted apology protection.<sup>164</sup> Over three quarters of the states that have created evidentiary protection for apologies have expressly limited such protection to situations

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160. *Id.*

161. *Id.* at 505.

162. *Id.*

163. Helmreich, *supra* note 8, at 578–79.

164. *Id.*

in which the apologizer does not admit fault.<sup>165</sup> Further, the few states that provide protection for fault-admitting apologies have minimized these dangers by reducing the scope of protection to cover only the limited context of medical malpractice litigation.<sup>166</sup>

### iii. Striking a Balance

If adoption of rules that will exclude full apologies from admission into evidence will provide a disservice to the justice system, how should legislatures capture the previously mentioned benefits apologizing can provide without running afoul of these detriments? The answer lies in the balance created by partial apologies.

First, partial apologies statutes alleviate the primary concern implicit in full apology protection—that plaintiffs will be prevented from introducing evidence probative of fault. This is because apologies that express only sympathy or benevolence are not probative of fault, or are only minimally so.<sup>167</sup> For example, the Ohio Court of Appeals has noted, “when hearing that someone’s relative has died, it is common etiquette to say, ‘I’m sorry,’ but no one would take that as a confession of having caused the death.”<sup>168</sup> Thus, by ensuring that plaintiffs are able to use the portions of apologies that express admission of fault, the law will not be harmed by excluding other sympathy-expressing portions of apologies.

Second, while partial apologies undoubtedly do not provide the level of emotional and psychological advantages that full apologies and forgiveness provide, they still generate many helpful benefits. Although some scholars have concerns that partial apology statements may be perceived as disingenuous in comparison with full apology statements,<sup>169</sup> and these concerns are legitimate, an expression of sympathy and benevolence is far better than a prohibition from offering condolences for fear that such a statement will be admitted in court. When no one offers an apology, both parties are harmed. The injured party’s anger and resentment builds, thus making him emotionally worse-off. Likewise, the would-be apologizer suffers by losing the psychological relief forgiveness brings. Protection of partial apologies is the effective middle ground between the emotional and psychological healing full apologies provide and the harms no apology protection inflicts.

Finally, partial apologies promote judicial economy by encouraging settlement. While some commentators may argue a half-way approach

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165. See statutes *supra* note 15.

166. *Id.*

167. *Legislating Apology*, *supra* note 48, at 834.

168. *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*, 952 N.E.2d 1216, 1220 (Ohio Ct. App. 2011) (quoting *Schaaf v. Kaufman*, 850 A.2d 655, 664 (Pa. Super. Ct. 2004)).

169. See *Empirical Examination*, *supra* note 150, at 505.

does more harm than good—observing studies such as Professor Robbennolt's, in which the acceptance rate of an offer after a partial apology was lower than an offer after no apology<sup>170</sup>—such an outlook takes a pessimistic view of the empirical research. Looking to Professor Robbennolt's study as an example, the percentage of participants who rejected the offer outright when given a partial apology (25%) was far better than when given no apology at all (50%), and not considerably lower than the rate for full apologies (13%).<sup>171</sup> Stated differently, even if a partial apology does not create an immediate settlement, it is effective at keeping the parties at the table.

But even if the results of studies like Professor Robbennolt's are accepted, and full apologies are empirically more likely to result in settlement than partial apologies, the balance achieved by partial apologies cannot be ignored. Because partial apologies also alleviate the concern that probative evidence will not be admitted and provide legal and emotional benefits that are not available absent apologies, laws that encourage partial apologies serve as an excellent compromise between full apology statutes and jurisdictions that admit all apologetic statements.<sup>172</sup>

### III. A PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE EXCLUDING "PARTIAL APOLOGIES"

Observing the successful balance between the legal, psychological, and emotional benefits that apologizing has with the detriments that protecting full apologies provides, this note proposes an amendment to the Federal Rules of Evidence that grants evidentiary protection for partial apologies. This note envisions incorporating such an amendment by borrowing language from the state evidentiary rules discussed at length above and joining these rules with current FRE 409. Rule 409 presently bars the admission of evidence regarding offers to pay or payments of medical, hospital, or similar expenses when offered as proof of the payer's (or offeror's) liability for the injury.<sup>173</sup> FRE 409 is a natural place to incorporate a partial apology amendment because an offer to pay someone's medical expenses after an accident is quite frequently accompanied by an apology. Though, the amendment will not change substantively if it is added elsewhere.

However, for purposes of this note the proposed Rule 409 would read, in its entirety, as follows:

(a) Offers to Pay Medical and Similar Expenses. Evidence of furnishing, promising to pay, or offering to pay medical,

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170. *See id.*

171. *Id.* at 485–86.

172. *See* Helmreich, *supra* note 8, at 578.

173. FED. R. EVID. 409 advisory committee's notes.

hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

(b) Expressions of Sympathy or Benevolence. The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to any loss, pain, suffering, or death of a person involved in an accident, and made, at any time, to that person or to the family of that person, shall be inadmissible as evidence of liability in a civil action.

(c) Exceptions. A statement of fault that is part of, or in addition to, any of the above shall not be inadmissible because of this Rule.<sup>174</sup>

There are several portions of proposed Rule 409 that warrant further discussion and explanation. First, the amendment specifically includes the words “at any time” to alleviate potential confusion as to the scope of the rule. While FRE 408 necessarily limits exclusion to occasions in which there is a compromise negotiation as to a disputed claim,<sup>175</sup> proposed Rule 409(b) would apply regardless of whether the expression of sympathy or benevolence occurs in mediation, at a settlement negotiation, or on the side of the highway following a traffic accident.

Second, the proposed amendment applies only in civil cases in which there has been an “accident,” and in which the benevolent statement relates to the loss, pain, suffering, or death of a person involved in the accident. Most of the state statutory provisions used to model this proposed amendment specifically define the term “accident” as “an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.”<sup>176</sup> Proposed Rule 409(b) does not contain such a definition because this definition would preclude expressions of benevolence in which a person did not either physically or emotionally suffer injury or die as a result of such injury. Specifically, the proposed amendment allows for the possibility of apologetic statements that relate to economic or proprietary harm to be excluded as well. This is further seen by the proposed amendment’s inclusion of the intentionally vague coverage of, “the portion of statements . . . relating to *any loss*.”

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174. The language of section (a) was incorporated directly from the previous Rule 409, while sections (b) and (c) were adapted from the following statutes and rule of evidence, which are virtually identical: FLA. STAT. § 90.4026 (2014); MASS. GEN. LAWS ANN. ch. 233, § 23D (2014); TENN. R. EVID. 409.1; WASH. REV. CODE § 5.66.010 (2014).

175. FED. R. EVID. 408.

176. See FLA. STAT. § 90.4026; MASS. GEN. LAWS ANN. ch. 233, § 23D; TENN. R. EVID. 409.1; WASH. REV. CODE § 5.66.010.

Third, proposed Rule 409(b) applies only to benevolent or sympathetic statements made to the person injured by an accident, or the family member of a person injured by an accident. This language envisions an apologizer not only being able to express sympathy to the one that he has directly harmed, but to those he has indirectly harmed – i.e. the family of the injured party. Once again, several states’ statutory provisions provided a list of individuals who would be included in the definition of family, but because jurisdictions may differ on who should be included in this list, this amendment is intentionally silent on this matter.<sup>177</sup>

Fourth, proposed Rule 409(b) only excludes evidence of a benevolent statement, writing, or gesture if it is being offered to prove liability. If such a statement was offered for some other reason, such as to show the affect it had on the recipient, the Rule would not prevent its admission.

Finally, as expected, proposed Rule 409(c) provides an exception for a statement of fault that is made as a part of, or in addition to any statement of benevolence or sympathy. In such a scenario, the statement of fault remains admissible. However, the portions of the statement expressing sympathy or benevolence would still be inadmissible, if such portions are capable of separation. Additionally, the exception in section (c) is listed separately from section (b) and, as such, intentionally affects section (a), the portion containing the original Rule 409. This expressly codifies a portion of original Rule 409’s advisory committee notes which reads, “A statement of liability made in conjunction with such an offer is not rendered inadmissible by Rule 409.”<sup>178</sup> This is made possible due to the compatible nature of the two provisions.

### CONCLUSION

This note’s proposed amendment to the Federal Rules of Evidence is not perfect. However, this amendment was crafted with the policies and approaches of state apology statutes in mind. Consistent with Justice Brandeis’ characterization, these states have served as a laboratory, implementing “novel social and economic experiments without risk to the rest of the country.”<sup>179</sup> In the laboratory of the states, the “partial apology experiment” has proven to be a successful balance between allowing evidence probative of fault and encouraging apologies. This success is evident by the vast number of states who followed Massachusetts lead by creating apology protection statutes of their own. In keeping with this trend of protecting some, but not all, apologies from being admitted into evidence, jurisdictions will likely continue to adopt similar protections. This note proposes that the Federal courts become one of these jurisdictions

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177. See CAL. EVID. CODE § 1160 (West 2014); FLA. STAT. § 90.4026.

178. FED. R. EVID. 409 advisory committee’s notes.

179. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).



by adopting an amendment to the Federal Rules of Evidence allowing for partial apologies.

