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Erin O'Connor

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# APOLOGY AND THICK TRUST: WHAT SPOUSE ABUSERS AND NEGLIGENT DOCTORS MIGHT HAVE IN COMMON

ERIN ANN O'HARA\*

## INTRODUCTION

Legal scholars are paying increasing attention to the relationship between apology and legal disputes. Common legal analysis focuses on formal legal disputes and their resolution. Consequentialist scholars focus on how the legal rules applied to resolve disputes affect the way that actors behave, while others focus on using legal rules to promote procedurally and substantively just outcomes. Apology forms a very interesting link between *ex ante* behavioral incentives and *ex post* legal disputes and their resolution. Put differently, many legal disputes only come forward in the absence of an apology, and apologies are now commonly thought to substitute for at least partial compensation. Why do injured victims feel so strongly about receiving an apology? And why are they sometimes quite quick to forgive wrongdoers after a simple heartfelt apology? Why are apologies so universally administered, and what social function do they serve? These questions are beginning to be explored by legal and other apology scholars.<sup>1</sup>

When a widespread behavioral phenomenon is observed, behavioral biologists and evolutionary psychologists use evolutionary theory to attempt to understand why the behavior might have been adaptive in the environments in which we evolved. An understanding of the situations in which the behavior might be adaptive can help us to understand both (1) the contexts in which we are likely to observe

\* Professor of Law, Vanderbilt University. Special thanks to Claire Hill, James Blumstein, Oliver Goodenough, David Hyman, Owen Jones, Jeffrey Shoенblum, Charlie Silver, and Michael Vandenberg, and to participants at the Chicago-Kent College of Law symposium, for helpful comments and suggestions. I also thank Julie Reed for valuable research assistance. This project was supported by a research grant from Vanderbilt Law School.

1. In addition to the sources cited *infra*, see Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000); Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001).

relatively more (or less) of the behavior, and (2) our need to attempt to discourage behaviors that have evolutionary origins but are no longer adaptive. The first use of evolutionary theory is positive and predictive, while the latter is normative. This Article attempts to utilize evolutionary theory for both purposes: to further our understanding of the evolutionary function of apology and to identify modern contexts in which victims are overinclined to forgive wrongdoers. The Article uses evolutionary theory to argue that victims of both spouse abuse and physician negligence are among those who are overinclined to forgive.

If substantive justice cannot be achieved without providing a legal remedy to those wronged, then excessive forgiveness can circumvent those legal mechanisms in potentially problematic ways. Moreover, to the extent that we count on legal liability to ensure optimal behaviors, we might worry about the ways in which wrongdoer apologies can dampen those incentives. For these reasons, the apology link is worth exploring, and evolutionary theory can help lawyers to better understand the role of the apology link in the chains of efficiency and justice. Part I of this Article briefly explores the connection between apology and forgiveness and evolutionary theory, and Part II offers some initial thoughts about the ways in which the law can help overcome excessive forgiveness.

## I. VICTIM EMOTIONS FROM AN EVOLUTIONARY PERSPECTIVE

Much of contemporary legal analysis now at least implicitly rests on an economic model of behavior.<sup>2</sup> The rational actor model probably has more explanatory and predictive powers than any competitor models of human behavior. It has severe limits in the context of suit and settlement decisions, however, because disputes and their resolution are often profoundly influenced by emotional considerations. No economist would deny the presence or importance of human emotions, but their amorphous, unquantifiable nature makes them difficult to incorporate into mathematical models. Disputants' emotions are left for psychologists to ponder, while the economists generate suit and settlement models based on tried and true "expected value" principles. Unfortunately, these models often prove both descrip-

2. See Richard A. Epstein, *Law and Economics: Its Glorious Past and Cloudy Future*, 64 U. CHI. L. REV. 1167, 1173 (1997) ("The analysis of most private law subjects is so heavily influenced by economic thought that it is difficult to think of how a scholar of torts, contracts, corporations, or restitution could proceed in ignorance of the basic principles of the area.").

tively and predictively quite weak. The point here is not that dispute resolution is completely uninformed by an economic framework, but rather that the economic framework often cannot be successfully utilized in the area of dispute resolution without a more careful specification of disputants' emotion-driven preferences than economists are typically comfortable generating.

Psychology can help to identify and explain victim emotions and the cognitive biases that victims manifest. Because both emotions and cognitive biases can conflict with one another, however, strong theoretical underpinnings of these emotions must be identified in order to better understand which psychological phenomena are likely to influence behavior in given conflict settings. Behavioral biology is developing to the point where it can help to provide this theoretical basis on which to proceed. This Part builds on my previous effort to draw a connection between behavioral biology and apology,<sup>3</sup> and it proceeds to explore situations where victims can forgive too easily. This introduction provides a brief description of the ideas underlying behavioral biology.

To a natural scientist, the economists' failure to capture and therefore predict dispute resolution behaviors stems at least in part from a misunderstanding of the human brain. The brain, like the rest of our physical anatomy, is subject to evolutionary pressures over time.<sup>4</sup> Natural and sexual selection work across generations to increase the frequency of those heritable traits that tend to increase reproductive success relative to other traits.<sup>5</sup> These evolutionary pressures are not forward looking. Rather, traits that are adaptive in the environment where the brain develops become increasingly common in each generation where that environment persists. If the environment changes, creating new selection pressures, it can take many generations before the old selected trait is replaced by a new one.<sup>6</sup> Our very basic brain functions are millions of years old, and those brain

3. Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002).

4. See Owen D. Jones, *Law and Behavioral Biology* (Oct. 27, 2003) (unpublished manuscript at 5, on file with author, forthcoming in MICH. L. REV.); Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1164-68 (2001) [hereinafter *Time-Shifted Rationality*].

5. Jones, *Law and Behavioral Biology*, *supra* note 4 (manuscript at 20 & n.27); see generally JOHN ALCOCK, *ANIMAL BEHAVIOR: AN EVOLUTIONARY APPROACH* (6th ed. 1998); TIMOTHY H. GOLDSMITH & WILLIAM F. ZIMMERMAN, *BIOLOGY, EVOLUTION, AND HUMAN NATURE* (2001).

6. Jones, *Time-Shifted Rationality*, *supra* note 4, at 1167-68.

functions that are uniquely human are thousands of years old.<sup>7</sup> Any valid model of human behavior must therefore take into account emotions, cognitive thought processes, and behavioral tendencies that would have been adaptive, on average, in this environment of evolutionary adaptation, or “EEA.”<sup>8</sup>

Central to biological theory is the proposition that reproductively successful humans maximize genetic utility rather than the economists’ individual utility:

To the extent that people and other animals often behave as if they were rational maximizers of individual utility, it is partly because their information processing pathways have been honed by natural selection, the most relentlessly economizing force in the history of life, and partly because maximizing individual utility is often epiphenomenal to maximizing genetic utility.<sup>9</sup>

To the extent that individual and genetic utility diverge, however, biological theory predicts that we are more likely to see behaviors that enhance or maximize genetic utility. Moreover, we are more likely to see individuals exhibiting predispositions toward behaviors that were adaptive in the EEA than we are to see behaviors that are fitness or utility enhancing today.

Insights from evolutionary theory can be used to help understand some of the emotions bound up in disputes and their resolution. From a game theoretic perspective, moralistic aggression deters defections, but the punishment costs of defection can be minimized through apology and forgiveness. Apologies are often incredibly powerful and emotionally quite valuable to victims. In fact, I will suggest here that the effects of apology on victims are too powerful in some contexts. Put simply, victims of some transgressions too often forgive their wrongdoers in ways that either harm the victims or create risks of harm to others. In these contexts, private law alone cannot function efficiently. Here I briefly discuss the two most prominent examples—spouse abuser and doctor apologies—and suggest that evolutionary theory might help us understand why apologies can be problematic in these particular contexts.

7. See RICHARD WRANGHAM & DALE PETERSON, DEMONIC MALES: APES AND THE ORIGINS OF HUMAN VIOLENCE 43, 227 (1996) (*Homo sapiens* is only about 150,000 to 230,000 years old while the start of the genus *Homo* was 2 to 2.5 million years ago).

8. Jones, Law and Behavioral Biology, *supra* note 4 (manuscript at 22); see generally Leda Cosmides, *The Logic of Social Exchange: Has Natural Selection Shaped How Humans Reason? Studies with the Wason Selection Task*, 31 COGNITION 187, 189 (1989).

9. Jones, Law and Behavioral Biology, *supra* note 4 (manuscript at 21).

Before proceeding with the analysis, however, a few caveats about the behavioral biological approach are in order. First, evolutionary biologists concern themselves with “ultimate” rather than “proximate” causes of emotions, cognitive processes, and behavior.<sup>10</sup> For biologists, the proximate causes of these phenomena explain how they manifest themselves, whereas the ultimate causes of these phenomena explain why they are observed.<sup>11</sup> For example, the proximate causes of sexual jealousy include observing a sex partner with an attractive potential mate as well as the neurochemical reactions in the brain that generate heightened attention, fear, lowered self-confidence, etc. The ultimate causes of sexual jealousy, by contrast, focus on the reasons humans experience this jealousy. Humans experience sexual jealousy to prepare themselves to respond to threats against their abilities to sexually monopolize their mates. Humans who experience this jealousy (at least in moderate doses) are likely more reproductively successful than those who do not. Nothing in behavioral biological theory requires that a sexually jealous person be aware of the ultimate cause of his behavior. Indeed, he need not be consciously interested in sexual reproduction as a goal. For biologists, it only matters that the phenomenon—here sexual jealousy—in fact serves the function—here relative reproductive success.<sup>12</sup>

As Owen Jones notes:

[U]ltimate causation analysis will be more useful in some contexts than in others. In many cases, we may feel that our existing understanding of a phenomenon, even if that understanding extends only to proximate causes, is sufficient for our purposes. But often, when we are puzzled about human behavior, an inquiry into ultimate causation will prove a useful complement to existing efforts to understand and predict the behavior.<sup>13</sup>

10. For a discussion of the distinction between proximate and ultimate causation in biology, see TIMOTHY H. GOLDSMITH, *THE BIOLOGICAL ROOTS OF HUMAN NATURE: FORGING LINKS BETWEEN EVOLUTION AND BEHAVIOR* 6–10 (1991).

11. Jones, *Time-Shifted Rationality*, *supra* note 4, at 1161–63.

12. In this sense, biological theory is similar to economic theory. Economic theory assumes that individuals engage in productive activities in order to maximize their profits. It may be the case that a baker loves to make pies and opens a bakery to enjoy the satisfaction of making pies all day. He may care not a whit about whether his baking generates a profit. If he does generate a profit, however, he is more likely to be able to continue to enjoy making pies all day. Over time, those bakers who fail to generate profits are driven out of business. The profits may not consciously motivate this particular baker, but they are a necessary prerequisite to continuing his operations. The behavioral assumption that his actions are motivated to generate profits is therefore descriptively useful despite his conscious decision making.

13. Jones, *Time-Shifted Rationality*, *supra* note 4, at 1164.

Second, behavioral biology predicts that humans will be predisposed toward certain cognitive processes, emotions and behaviors. These predispositions have the effect of biasing behavioral patterns, but they do not determine the behavior of any particular individual.<sup>14</sup> The greater the selection pressure on a given behavioral response to a particular context, the more strongly the behavioral response is predicted.<sup>15</sup> For example, most humans who have not consumed food for more than a few hours will begin to focus their energies on obtaining food to consume. Failure to consume food for too long leads to death, so we can assume hunger is a fairly useful drive. Although I will argue that evolutionary theory provides useful insights into the phenomena of apology and forgiveness, predispositions toward apology and forgiveness are likely less universal and less likely to produce those behaviors than is the predisposition to search for food when hungry.

Third, some of the phenomena discussed in this Article are subject to considerable individual and cultural variation. Apology and forgiveness come easily for some and are difficult for others.<sup>16</sup> Some cultures promote apologetic behaviors and encourage forgiveness to try to strengthen the behavioral predispositions.<sup>17</sup> However, the fact that culture plays an important role in some of these phenomena does not contradict a biological explanation. The old nature-nurture dichotomy is now widely understood to be false.<sup>18</sup> Both nature and nurture play a vital role in virtually all behaviors. Some genes fail to express themselves without a facilitative environment, and many of our cultural practices are chosen to strengthen (or weaken) our genetic predispositions.<sup>19</sup> Biological theory, however, can tell us something about the marginal influence of proposed cultural practices on

14. Owen D. Jones, *On the Nature of Norms: Biology, Morality, and the Disruption of Order*, 98 MICH. L. REV. 2072, 2091–92 (2000) (book review).

15. Cf. Jones, *Time-Shifted Rationality*, *supra* note 4, at 1191–92 (arguing that law will have relatively small marginal effects on behavior as its adaptive value in the EEA rises).

16. See, e.g., Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis Into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999) (exploring gender differences surrounding apology and their policy implications).

17. See Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986) (contrasting Japanese and American uses of apology).

18. See MATT RIDLEY, *NATURE VIA NURTURE: GENES, EXPERIENCE, AND WHAT MAKES US HUMAN* 3 (2003) (“For more than 50 years sane voices have called for an end to the debate. Nature versus nurture has been declared everything from dead and finished to futile and wrong—a false dichotomy.”).

19. See *id.* at 6 (describing genes as “both cause and consequence of our actions”).



behavioral predispositions. A ban on romantic expression is much less likely to be successful than a ban on purple shoes, for example.

Are there evolutionary functions served by apology, forgiveness and victim emotions? Section A of this Part situates these phenomena in a simple game theoretic framework. Section B discusses the strategic use of apology, and Section C identifies circumstances in which victims may be apt to forgive too easily. Part II will discuss the implications of the analysis for legal efforts to regulate harmful behaviors.

### A. *Apology and Forgiveness Economize on Punishment Costs*

The analysis begins where most elementary game theoretic analyses begin—with the Prisoner's Dilemma.<sup>20</sup> The basic insight underlying the Prisoner's Dilemma, which is ubiquitous in legal problems, is that selfish individuals can have difficulty precommitting themselves to cooperate. Cooperation makes people better off, but individuals are often tempted to enjoy the benefits of others' helpful acts while cheating with one's own efforts. Reputation, iterative plays, and legal sanctions all help to bolster cooperative behavior, and often the players themselves can employ mechanisms to discourage cheating. Nevertheless, defection often remains a possibility.

Evolutionary theory can help to elucidate some common human preferences and behaviors related to cooperation and defections. Unlike the completely individualistic *Homo economicus*, the prototypical human in evolutionary theory is seeped in social relationships. Anthropologists have found no evidence of humans living in isolation.<sup>21</sup> Indeed, it is not at all clear that humans could survive without the cooperation of others to hunt, rear offspring, and protect against animal and human predators. It therefore makes sense that some of our evolved cognitive mechanisms and emotions would work to elicit cooperation and discourage defections in others. After all, individuals who were successful at eliciting cooperation from others presumably were more likely to survive, thrive, and rear offspring.

Moreover, it seems likely that certain evolved human predispositions help us to reap the benefits of cooperation. All of the primates,

20. For a basic treatment of the Prisoner's Dilemma paradigm, see ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); CHARLES J. GOETZ, *CASES AND MATERIALS ON LAW AND ECONOMICS* 8–35 (1984); ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 27–30 (1989).

21. PAUL H. RUBIN, *DARWINIAN POLITICS: THE EVOLUTIONARY ORIGIN OF FREEDOM* 7 (2002) (stating that “[h]ominids . . . have always been social creatures”).

including humans, have affiliative tendencies. We all have the capacity to remember our previous interactions and to communicate our desires for help. Humans form friendships, families, coalitions, business partnerships, and societies. Furthermore, we seem to possess an optimism bias that in the right contexts allows us to trustingly take the initial step toward forming these relationships and cooperating with one another.<sup>22</sup>

Because this cooperation is exploitable, however, humans simultaneously evolved brain mechanisms to both keep track of trade and detect cheating. Moreover, Leda Cosmides, an evolutionary psychologist, has demonstrated that people are remarkably good at detecting cheating behavior by others.<sup>23</sup> Other studies indicate that people are significantly better than chance at detecting defection.<sup>24</sup> The two brain mechanisms work together to enable humans to remain vigilant about the possibility of defection. Awareness of cheating is not alone enough to discourage defections, though, so alongside these brain mechanisms we developed an emotional precommitment to punish perceived defections. Experimental subjects have consistently exhibited a willingness to incur real costs to punish those who defect, free ride, or behave unfairly.<sup>25</sup>

Evolutionary theorists are not surprised to hear that humans take a punitive stance toward cheating. John Maynard Smith, a geneticist, created a game between passive cooperators, or Doves, and

22. Karen S. Cook & Robin M. Cooper, *Experimental Studies of Cooperation, Trust, and Social Exchange*, in *TRUST AND RECIPROcity: INTERDISCIPLINARY LESSONS FROM EXPERIMENTAL RESEARCH* 209, 227–31 (Elinor Ostrom & James Walker eds., 2003) (discussing social contexts in which trust and reciprocity are facilitated).

23. Cosmides, *supra* note 8.

24. See generally Bella M. DePaulo et al., *Humans as Lie Detectors*, 30 *J. COMM.* 129 (1980); Miron Zuckerman et al., *Verbal and Nonverbal Communication of Deception*, 14 *ADVANCES EXPERIMENTAL & SOC. PSYCHOL.* 1 (1981); Linda Mealey et al., *Enhanced Memory for Faces of Cheaters*, 17 *ETHOLOGY & SOCIOBIOLOGY* 119 (1996).

25. See Elizabeth Hoffman et al., *On Expectations and the Monetary Stakes in Ultimatum Games*, 25 *INT'L J. GAME THEORY* 289, 300 (1996) (finding subjects willing to give up profits to punish those who take too large a share of the total dollar amount to be distributed); see also Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 *AM. ECON. REV.* 980 (2000) (finding that subjects heavily punished free riders in public goods experiments). Apparently, female capuchin monkeys react negatively to their perceptions of unfair treatment as well. A recent article in the journal *Nature* describes a study where female capuchins initially were willing to perform trades with experimenters in return for cucumbers, but when they saw that other capuchins were receiving higher-valued grapes for the same trade, cooperation rates by capuchins receiving cucumbers fell to sixty percent. Nicholas Wade, *Genetic Basis to Fairness, Study Finds*, *N.Y. TIMES*, Sept. 18, 2003, at A-27. Actually, “[i]n the original paper, the term ‘dove’ was changed at the last minute to ‘mouse’ in deference to George Price’s religious sensibilities.” MATT RIDLEY, *THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* 271 n.6 (1997).

aggressive defectors, or Hawks, to illustrate how cooperation, defection, and punishment coevolve.<sup>26</sup> When a Hawk encounters a Dove, the former easily defeats the latter. When two Hawks encounter one another, they are both badly wounded. When two Doves encounter one another, however, they both receive benefits. Natural selection, Smith argued, should result in an evolutionarily stable strategy, one in which no animal using the strategy could be made better off by following a different strategy.<sup>27</sup> When the game is played repeatedly, the Hawks initially thrive at the expense of the Doves. Eventually the population of Doves decreases, however, and the Hawk population begins to decline as Hawks mostly encounter one another. A successful strategy is one in which Doves act like Doves when they encounter other Doves but switch to Hawk behavior by retaliating when they encounter Hawks.<sup>28</sup>

The emotional urge to retaliate, which has been labeled “moralistic aggression” by biologists,<sup>29</sup> is often quite powerful.<sup>30</sup> Moralistic aggression by victims involves feelings of anger, an emotion that has the effect of providing the motivation to follow through on spiteful urges.<sup>31</sup> Feelings of anger are triggered when one perceives that her goals have been thwarted by another’s blameworthy actions,<sup>32</sup> and they serve to bias her attention to the situation that has elicited the

26. J. Maynard Smith & G. R. Price, *The Logic of Animal Conflict*, NATURE, Nov. 2, 1973, at 15.

27. J. Maynard Smith, *Optimization Theory in Evolution*, 9 ANN. REV. ECOLOGY & SYSTEMATICS 31 (1978). The evolutionarily stable strategy is similar to the Nash equilibrium, which is achieved when each player’s individual strategy is optimal given that the other players use their own equilibrium strategies. John Nash, *Non-Cooperative Games*, 54 ANNALS MATHEMATICS 286 (1951).

28. This strategy is known in Axelrod’s computer simulations as “tit-for-tat.” AXELROD, *supra* note 20.

29. E. Donald Elliott, *Law and Biology: The New Synthesis?*, 41 ST. LOUIS U. L.J. 595, 609 (1997).

30. Moralistic aggression is not confined to humans, as illustrated by the interaction between three chimpanzees in a colony at the Arnhem Zoo in the Netherlands. Puist, a large adult female, supported Luit, one of the dominant males, in chasing Nikkie, another male. Later, when Nikkie behaved threateningly toward Puist, Puist held out her hand toward Luit in an apparent request for return support. When Luit failed to assist Puist, she barked furiously while chasing and then hitting Luit. FRANS DE WAAL, *CHIMPANZEE POLITICS: POWER AND SEX AMONG APES* 207 (1982); *see also* Frans B. M. de Waal, *Food Sharing and Reciprocal Obligations Among Chimpanzees*, 18 J. HUM. EVOLUTION 433 (1989).

31. See Timothy Ketelaar & Gerald L. Clore, *Emotion and Reason: The Proximate Effects and Ultimate Functions of Emotions*, in COGNITIVE SCIENCE PERSPECTIVES ON PERSONALITY AND EMOTION 355, 369 (Gerald Matthews ed., 1997) (discussing anger as emotion that provides the motivation to follow through on threats).

32. *Id.* at 367.

emotion.<sup>33</sup> Anger also has the effect of simultaneously motivating us to punish and of seriously dampening our receptivity to the costs of punishment.<sup>34</sup> Anger therefore works to bind us to the long-term strategy of deterring defections rather than the short-term strategy of avoiding punishment costs.<sup>35</sup> This interference with “rational thought” tends to further our self interest because it helps us to retain our resources and our social status within groups, and it helps the group to prevent infiltration by Hawks.

Notice how the evolutionary theory complements and enriches the economist’s use of game theory. Economists predict that one deters defections with punishment, and evolutionary theory provides a methodologically consistent bridge between the economics and psychological literatures by explaining why and how victim anger can work to promote cooperation in a society. The evolutionary theory, coupled with knowledge from psychology, also helps to explain how victims precommit themselves to retaliate against defections.

The victim’s precommitment strategy of revenge, if always acted on, can prove unnecessarily costly, however, because not all defections entail threats to one’s life, livelihood, or social status. People defect for several different reasons, including accident, oversight, misunderstanding, need, temptation, indifference, and just plain meanness. Some defections warrant punishment, but others do not. Moreover, threats to social status can be undone if the transgressor recants his defection and/or the other members of society affirm the victim’s status by denouncing the transgressor’s acts. Threats to material resources can be reversed by restitution or reparation efforts. In these circumstances, the material and psychological resources necessary to retaliate are more appropriately rechanneled into alternative productive activities.

Apology and forgiveness work together also to help temper the costs of moralistic aggression. According to apology experts, an effective apology requires (1) identification of the wrongful act; (2) expression of remorse and regret for having committed the act; (3) promise to forbear from committing the wrongful act in the future;

33. *Id.* at 387.

34. *Cf. id.* at 379 (“[T]he unpleasantness and distress of not being angry is a cost against not doing something about it (reacting only to immediate incentives). The way to turn off this unpleasantness is to seek retribution or restitution and to right the wrong.”).

35. ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 83 (1988).

and (4) offer of repair.<sup>36</sup> Some of these elements can be implicit in an apology, and a victim may ultimately forgive even without an apology and/or without requiring the apologizing transgressor to actually proceed with reparations.<sup>37</sup> In the face of a sincere and timely apology, however, many victims find their anger dissipates quite rapidly.<sup>38</sup> Moreover, some transgressors actually feel an urge to apologize to their victims, even when they know that the apology can be used against them.<sup>39</sup>

Effective apologies work in a wonderfully paradoxical way. By embracing and then rejecting the wrong, a transgressor admits that he has transgressed while simultaneously proclaiming that he is a cooperator.<sup>40</sup> Apologies can be difficult, however, because they require a type of self-humiliation. To be effective, the transgressor must place himself in a morally inferior position vis-à-vis the transgressor in a symbolic gesture that has the effect of reviving the victim's perception of his own status. The greater the harm inflicted on the victim, the more victims seem to demand apologies.<sup>41</sup> At the same time, the shame and humiliation felt by the transgressor in the apology process likely increases with the severity of the harm inflicted. Often counteracting the shame and humiliation is a strong urge on the part of the offender to try to ameliorate any harm that he has caused the victim, and the greater the harm, the greater this offsetting urge.<sup>42</sup> Heartfelt apologies therefore can have the effect of restoring the victim's status,

36. O'Hara & Yarn, *supra* note 3, at 1132–39 (summarizing definitions of several apology scholars as expressing four basic elements); *see also* Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 337, 340–41 (2002) (stating that essential elements of apology include “(i) an expression of remorse or regret, such as ‘I’m sorry’; (ii) an overt acceptance of responsibility for the harmful act; (iii) some type of offer of compensation, repair, or restitution; and (iv) a promise to avoid such behavior in the future”) (citing other apology scholars).

37. In fact, one of the powerful effects of apology is that it often turns a wrongful act into a mere misfortune of life. Many victims seriously reduce their compensation demands or forgive them altogether when they receive what they perceive to be a sincere apology. *See* Steven Keeva, *Does Law Mean Never Having to Say You're Sorry*, A.B.A. J. Dec. 1999, at 64, 65 (estimating that 30 percent of medical malpractice cases could be avoided with a simple apology); Levi, *supra* note 1, at 1167 (stating that apology can often move parties closer together).

38. O'Hara & Yarn, *supra* note 3, at 1123–24.

39. *Id.*

40. *See* NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 26 (1991) (discussing both apology and forgiveness as means of separating act from nature of offender).

41. Petrucci, *supra* note 36, at 352.

42. *Id.* at 354 (citing empirical studies and stating that “[w]ith an increased sense of responsibility and when the victim experiences serious consequences, offenders may be more motivated to apologize to the victim”).

and if accepted, the transgressor's status as well. But to restore the status of the transgressor, the transgressor must first place himself in a very vulnerable position and hope that the victim and/or third parties show the mercy necessary to resurrect his status.<sup>43</sup>

This revival of the victim's status, coupled with at least an implicit offer to repair and a promise to forbear from transgressions in the future, signals to the victim, often subconsciously, that his anger is no longer serving an important function. In short, apologies can have the effect of removing the preexisting, present, and future threats to the victim, making retaliation an unnecessary strategy. In these cases, victim anger often dissipates and forgiveness, typically coupled with reconciliation,<sup>44</sup> is successful. Forgiveness is an admittedly nebulous concept, and scholars seem to have difficulty agreeing on a single definition.<sup>45</sup> For my purposes, forgiveness is the victim's overcoming of those negative and hostile feelings that help to foster the urge for further retaliation.<sup>46</sup> Individuals who develop the emotional frame-

43. See TAVUCHIS, *supra* note 40, at 18 (“[W]hen we apologize . . . we stand unarmed and exposed, relying, in a manner of speaking, on our moral nakedness to set things right.”).

44. Because forgiveness is a psychological event internal to the victim, it is technically possible for forgiveness to occur without reconciliation. See Robert D. Enright & Bruce A. Kittle, *Forgiveness in Psychology and Law: The Meeting of Moral Development and Restorative Justice*, 27 FORDHAM URB. L.J. 1621, 1623 (2000) (distinguishing forgiving from condoning, forgetting and reconciling). Moreover, reconciliation need not always involve “a sincere and honest conversation about forgiveness.” Everett L. Worthington, Jr., *Is There a Place for Forgiveness in the Justice System?*, 27 FORDHAM URB. L.J. 1721, 1725 (2000). Because this Article focuses on the means by which an offender can facilitate the victim's forgiveness, reconciliation and forgiveness will often be used interchangeably.

45. See, e.g., Enright & Kittle, *supra* note 44, at 1622–23 (“People, upon rationally determining that they have been unfairly treated, forgive when they willfully abandon resentment and related responses (to which they have a right), and endeavor to respond to the wrongdoer based on the moral principle of beneficence, which may include compassion, unconditional worth, generosity, and moral love.” (quoting Joanna North, *Wrongdoing and Forgiveness*, 62 PHIL. 499 (1987))); Dennis M. Cariello, *Forgiveness and the Criminal Law: Forgiveness Through Medicinal Punishment*, 27 FORDHAM URB. L.J. 1607, 1608 (2000) (“Forgiveness is the voluntary cancellation of an obligation created by conduct, whether purposeful or negligent.”); Worthington, *supra* note 44, at 1721 (“Forgiveness involves super-imposing emotions of empathy, compassion and other-oriented altruistic love (or even romantic love) on top of “hot” anger at the transgression or “cold” unforgiveness emotions.”); David M. Lerman, *Forgiveness in the Criminal Justice System: If it Belongs, Then Why Is it So Hard to Find?*, 27 FORDHAM URB. L.J. 1663 (2000) (adopting a definition from the unpublished work of Robert Enright: “willingness to abandon one's right to resentment, negative judgement [sic], and indifferent behavior toward one who unjustly injures us”).

46. Under this definition of forgiveness, a victim no longer desires that the transgressor be punished out of a desire for revenge. It is possible, however, that a victim would nevertheless think punishment is appropriate for rehabilitative, educational, or deterrent purposes. Alternatively the victim could think that punishment is necessary in order for a transgressor to pay a debt owed to society. Cf. Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1603 (2000) (arguing that “victim's forgiveness may have no bearing on society's demand for punishment” or victim's view of

work necessary for the effective use of apology and forgiveness are thus placed at a competitive advantage relative to those individuals who must incur the full costs of moralistic aggression.<sup>47</sup>

### B. *Strategic Apologies and the Role of Transgressor Emotions*

Apology and forgiveness thus explained introduce a potential tension in the evolutionary framework. After a transgression, both victim and transgressor may prefer reconciliation to retaliation, but *ex ante* the possibility of conciliation can erode the deterrent effect of the threat to retaliate. A truly strategic person knows that he can get away with defection with a simple apology.<sup>48</sup> If victims feel compelled to forgive in the face of apology, then forgiveness has the potential to become maladaptive.

In fact, victims are often quite discriminating in their responses to apology. The nuances of apology matter a great deal to a judgment of the apology's sincerity.<sup>49</sup> Victims scrutinize everything from context to word choice and order, timing, elaborateness, eye contact, breath, body posture, facial expressions, tone of voice, and pace of speech.<sup>50</sup> In fact, where sincerity is important, written apologies alone are typically much less effective than face-to-face communication.<sup>51</sup> Simple apologetic gestures may suffice for very slight harms, but a more

appropriateness of punishment); Cariello, *supra* note 45, at 1609 (arguing that although society forgives, "medicinal punishment" may nevertheless be appropriate).

47. Non-human primates apparently possess a similar taste for post-conflict resolution. See generally Frans B. M. de Waal, *Reconciliation Among Primates: A Review of Empirical Evidence and Unresolved Issues*, in PRIMATE SOCIAL CONFLICT 111 (William A. Mason & Sally P. Mendoza eds., 1993); Frans B. M. de Waal & RenMei Ren, *Comparison of the Reconciliation Behavior of Stumptail and Rhesus Macaques*, 78 ETHOLOGY 129 (1988); Frans B. M. de Waal & Angeline van Roosmalen, *Reconciliation and Consolation Among Chimpanzees*, 5 BEHAV. ECOLOGY & SOCIOBIOLOGY 55 (1979); Frans de Waal & D. Yoshihara, *Reconciliation and Redirected Affection in Rhesus Monkeys*, 85 BEHAVIOR 224 (1983); Alison D. York & T. E. Rowell, *Reconciliation Following Aggression in Patas Monkeys, Erythrocebus patas* 36 ANIMAL BEHAV. 502 (1988); Karolina Westlund et al., *Post-Conflict Affiliation in Common Marmosets (Callithrix jacchus jacchus)*, 52 AM. J. PRIMATOLOGY 31 (2000).

48. Cf. Jeffrie G. Murphy, *Keynote Address: Forgiveness, Reconciliation and Responding to Evil: A Philosophical Overview*, 27 FORDHAM URB. L.J. 1353, 1359 (2000) ("If I were going to set out to oppress other people, I would surely prefer to select for my victims persons whose first response is forgiveness rather than persons whose first response is revenge.").

49. I do not mean to claim that sincerity is always important to the formal acceptance of an apology. Sometimes an insincere apology is valuable to the victim as an admission of guilt. That admission is often very useful for convincing third parties that the victim was not at fault or that the transgressor's actions should be more carefully scrutinized. The acceptance of the perceived insincere apology is unlikely to result in subjective forgiveness, however.

50. O'Hara & Yarn, *supra* note 3, at 1139-40.

51. TAVUCHIS, *supra* note 40, at 22-24.

complex apology is typically demanded for more severe harms.<sup>52</sup> And partial apologies, or apologies that do not accept blame, can actually increase the victim's spiteful feelings.<sup>53</sup>

In part, a sincere apology communicates that the transgressor feels guilt,<sup>54</sup> a point that warrants some elaboration. Guilt serves an important corrective function in humans. While people can and do think about their long-term interests, it is well known that many animals, including humans, behave as though they heavily discount the value of future rewards as compared to present ones.<sup>55</sup> Long-term relationship and reputational benefits are often larger than the short-term benefits from cheating, but a person may nevertheless discount those future benefits in favor of the present reward. In the EEA, where the preservation of goods was difficult, this preference for present consumption could be valuable at times.<sup>56</sup> In the context of relationships, however, this preference for the present reward can be destructive. Guilt in humans can thus be viewed as an evolved emotional capacity that works to counteract the preference for present rewards where they can be harmful. Rather than counting on a rational calculation to properly value the future consequences of a present choice, feelings of guilt are evoked to help transform those future costs into presently felt ones.<sup>57</sup> At the moment of choice, guilt, where effective, creates negative feelings that cause the decision maker to avoid choosing the present reward.

In the context of an apology, the transgressor's guilty feelings obviously failed to prevent the transgression. There are several possi-

52. Petrucci, *supra* note 36, at 352.

53. See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. (forthcoming 2004) (subjects in study were less inclined to settle when offered a partial apology where the offender caused severe injury and where it was clear to the victim that the offender's actions were blameworthy).

54. I distinguish between guilt and shame in the following way. Guilt has internal causes in that it is experienced when one knows that he has committed, or is thinking of committing, a transgression. Shame comes from knowing that another thinks one has committed or is contemplating committing a transgression. Under this distinction, guilt can exist without shame, for example when one knows he has committed a transgression but believes no one else knows. Shame can exist without guilt, for example when one knows that others falsely believe that he committed a transgression.

55. FRANK, *supra* note 35, at 79–80 (discussing this psychological phenomenon as “the matching law” and noting that similar decision making has been observed in pigeons, rats, cats, dogs, guinea pigs, and hogs).

56. See Ketelaar & Clore, *supra* note 31, at 372 (stating that preference for immediate over future rewards may be adaptive to some extent); Jones, *Time-Shifted Rationality*, *supra* note 4, at 1179 (“[A]verage life expectancy has skyrocketed” and “high discount rates make sense when life expectancy is short.”).

57. FRANK, *supra* note 35, at 82.



ble causes of this failure. The transgressor may not experience feelings of guilt, at least not very often. To the extent that guilt precommits us to be cooperators, “Hawks” are individuals who experience guilt very infrequently or with very low intensity. But Doves, defined as individuals who experience relatively high levels of guilt, are capable of transgressions too. If the harm was caused by mere inadvertence, for example, the transgressor likely did not focus enough on the possible harm for guilty feelings to be evoked. Sometimes other powerful emotions or drives such as rage or lust or hunger work to cancel out the guilt feelings that would otherwise be present. Alternatively, the transgressor might have felt guilt at the moment of deciding to transgress but the guilt feelings were insufficient to overcome the very large present rewards. Dove transgressors sort themselves from Hawk transgressors by showing feelings of guilt at the point of apology. Because the transgression has occurred, those feelings of guilt are accompanied by remorse.<sup>58</sup> Transgressors often also feel shameful because their admitted blameworthy wrongdoing is further exposed for negative evaluation by the victim and, often, others. These emotions—guilt, remorse and shame—signal to the victim that despite the harmful act, the transgressor is a default cooperator. Facial expression, eye contact, voice, skin color, and other facets of an apologetic gesture serve as signals of the transgressor’s emotions.<sup>59</sup>

Because undetected insincere apologies can have enormous strategic value, biologists would predict a co-evolutionary arms race between insincere transgressors’ ability to deceive victims with apologetic gestures and victims’ ability to detect transgressor insincerity.<sup>60</sup> The arms race theory helps to explain why the nuances of apol-

58. See Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1814–15 (1999) (“I can feel guilty about a moral transgression I *intend* to commit—which may indeed stop me from doing it—but I will feel repentance or remorse (as well as guilt) only when the deed is *done*.” (emphasis in original)); I. Thalberg, *Remorse*, 72 MIND 545, 546 (1963) (“We can feel guilty about *intending* to take a double portion of strawberries, but nobody ever feels remorse for his unexecuted designs.” (emphasis in original)). When a victim scrutinizes an apology for sincerity, she is in part looking for signs of remorse; see also Enright & Kittle, *supra* note 44, at 1630:

Asking for or receiving forgiveness also is a moral act, not a self-serving act to reduce one’s own sentence or receive some advantage. Advantage may come, but this should not be the primary motivation. . . . Perhaps a key to genuine acts of seeking forgiveness concern remorse. How genuinely remorseful does the offender seem to be? Does the person apologize? Does the apology seem sincere? Does the victim think it is sincere?

59. See FRANK, *supra* note 35, at 120–31 (describing telltale physiological signs of a variety of emotions).

60. Robert Trivers, *Deceit and Self-Deception: The Relationship Between Communication and Consciousness*, in MAN AND BEAST REVISITED 175, 176 (Michael H. Robinson & Lionel Tiger eds., 1991).

ogy are so important to victims' decisions to forgive. The more these nuances are outside of the conscious control of the transgressor, the more likely the apology is accompanied by a credible signal of sincerity.<sup>61</sup> Forgiving victims who can discern sincere from insincere apologies have an advantage over both uniformly generous and stingy forgivers. The discerning forgiver can minimize the *ex post* costs of moralistic aggression while simultaneously maintaining the deterrent value of potential retaliation.

This apology discussion thus far has assumed that only the victim has an interest in the apology. Third parties have an interest in the apology too, however, because others who are aware of the transgression must decide whether they themselves want to risk future interactions with the transgressor. The general reputational value of an apology is recognized in the apology literature by scholars who identify apology as a way to repair one's social identity and to deflect negative personality judgments.<sup>62</sup> To the extent that they do not themselves need to interact with the transgressor, however, we can expect third parties to scrutinize the sincerity of the apology less carefully. Put differently, third parties can be expected to carefully scrutinize the sincerity of an apology only when they expect to bear the costs of incorrectly judging the transgressor's remorse.

Choosing not to retaliate and believing that the transgressor will refrain from future transgressions are very different, and yet both victims and third parties can conflate the two. Nevertheless, a transgressor can sincerely feel guilt, shame, and remorse for the past transgression despite the fact that his promise to forbear from future transgressions lacks credibility. Some transgressors are incapable of taking appropriate care to prevent harms. Others are consumed with emotions (such as anger) or drives (such as addiction) that will routinely overcome their preventive feelings of guilt.

Moreover, a transgressor can resolve to do better in the future, and can sincerely believe that he is capable of mending his ways, but self-deception simply prevents him from seeing that future transgressions are inevitable. Robert Trivers, an influential evolutionary biologist, posited that the best way to deceive others may be to deceive oneself first. In other words, self-deception may have evolved as a

61. See FRANK, *supra* note 35, at 126 (discussing interpretational clues to sincerity).

62. See Ken-ichi Ohbuchi & Kobun Sato, *Children's Reactions to Mitigating Accounts: Apologies, Excuses, and Intentionality of Harm*, 134 J. SOC. PSYCHOL. 5 (1994); Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY 281 (1991).

mechanism to circumvent detection of deception.<sup>63</sup> Evidence of self-deception was detected in experiments using galvanic skin response. Apparently, galvanic skin response rises when one hears one's own recorded voice. Subjects were asked to answer questions and their responses were recorded and later played back. When the tapes were replayed to the subjects, they tended to deny hearing their own voice when an incorrect response was given on the tape and claimed to hear their own voice when correct responses were given. Even though subjects misidentified the voice they heard in both contexts, their galvanic skin responses indicated that their bodies did correctly react to the speakers' voices.<sup>64</sup> The suggestion, from this experiment and others, is that individuals are quite capable of simultaneously holding two contradictory beliefs about themselves, so long as one is held consciously and the other subconsciously. According to the temporary filter theory of self-deception, self-deception is an evolved cognitive strategy that enables an individual to automatically but temporarily filter out true beliefs from one's consciousness or awareness within any situation calling for the deception of others.<sup>65</sup>

In any event, at least with first transgressions, victims and third parties tend to see the apology as a commitment device for refraining in the future. However, multiple transgressions are more likely to cause the victim and third parties to separate the transgressor's remorse for past transgressions from his promise to refrain from future transgressions. The next subsection explores situations where victims too readily believe the transgressor's sincerity or the credibility of his commitment to refrain from future transgressions.

### C. *When Victims Forgive Too Easily*

The apology game, as played in real life, involves uncertainty. As victims, we assess apologies for sincerity, but often we cannot know for sure whether another's apology is genuine or strategic. We tend to follow our "gut instinct" about whether to forgive, but rarely do we actually forget the transgression. In the context of many ongoing relationships, then, the victim can judge over time (1) whether it was appropriate to forgive the transgressor, and (2) whether it was wise to resume her relationship with the transgressor. Repeat transgressions

63. ROBERT TRIVERS, *SOCIAL EVOLUTION* 415–16 (1985).

64. *Id.* at 416–18.

65. Zubair Moomal & Stephanus Petrus Henzi, *The Evolutionary Psychology of Deception and Self-Deception*, 30 S. AFR. J. PSYCHOL. 45, 46 (2000).

often indicate that reconciliation of the relationship was unwarranted. As indicated above, it may be that the apology was sincere, but the transgressor is unable to refrain from transgressing. Alternatively, the apology may have been strategically uttered. In any event, repeat transgressions do significantly affect the interpretation of apologies. In a study of how children respond to apology, for example, an apology by an offender with a good reputation was interpreted as an expression of regret. When the offender's reputation was bad, however, the apology was viewed as a way to manipulate the situation.<sup>66</sup>

Although the victim's judgment might well be fallible, presumably the victim is typically better able to judge the sincerity of an apology than are third parties. Cognitive neuroscientists are discovering that the level of neural activity that we devote to tasks is directly proportional to the reward to be earned for successfully completing that task.<sup>67</sup> In many cases, the victim alone directly suffers the consequences of misinterpreting an apology. In general, then, we might expect the victim to be better focused on the nuances of an apology than are third parties. Moreover, to the extent that the transgressor and the circumstances of the transgression are more familiar to the victim than to third parties, the victim may be better situated to interpret the appropriateness of those nuances. This assertion requires a significant caveat, however, because the subjective interpretation of an apology can involve emotional as well as cognitive factors. Unfortunately, those emotional factors can blind a victim.

The point requires elaboration. In general, the thicker the relationship between victim and transgressor, the more accurate the interpretation of the apology and the assessment of the likelihood and cost of future transgressions. For example, a wife knows a husband's personality and behavior much better than a stranger's. She therefore is better able to interpret both his spoken gestures and his shrugs, slouches, touches, and blushes. She knows whether his genuine remorse is likely to be expressed with few words or many, and whether his apologies are frequent or rare. Because she does not forget his transgressions, the previous ones can be called to mind in assessing whether his remorse is likely to lead to behavioral reform.

66. Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Transgressions: Effects of the Actor's Apology, Reputation and Remorse*, 28 BRIT. J. SOC. PSYCHOL. 353 (1989).

67. PAUL W. GLIMCHER, DECISIONS, UNCERTAINTY, AND THE BRAIN: THE SCIENCE OF NEUROECONOMICS (2003).

In contrast, the habits of casual friends and acquaintances may be less intimately known to a victim. Ironically, however, the victim might be better able to objectively assess those apologies. In the latter case, the victim's perceived need for the continuation of the relationship is lower, and, therefore, the victim is less likely to mediate her judgments by some sense of a need to forgive. No doubt we can all recall at least one event in our lives when we felt strong feelings of relief when a lover or close friend offered an explanation or apology for a perceived wrong. So desperate are we to reconcile with our loved ones that we often fail, perhaps refuse, to carefully scrutinize the explanation or apology. Put more succinctly, the benefits of forgiveness rise, all else equal, as the perceived value of the future of the relationship rises.

### 1. Domestic Violence

A somewhat similar (though perhaps more blinding) phenomenon seems to occur in spousal and girlfriend abuse cases.<sup>68</sup> After beating their victims, these men often proffer elaborate apologies in an attempt to resume their relationships.<sup>69</sup> Some victims forgive their abusers and return to their relationships despite several very severe prior beatings.<sup>70</sup> In fact, more than forty percent of women who seek aid at spouse abuse shelters return to live with their abusers.<sup>71</sup> These women are often confident that the beatings will stop. Sometimes they go so far as to blame themselves or some external source of stress for these beatings, and victims often minimize or deny the extent of the violence that they suffer.<sup>72</sup>

68. The problem is significant. An estimated 1.8 million women are beaten by their husbands annually, and an estimated 1500 women die each year as a direct consequence of spousal abuse. Caryl E. Rusbult & John M. Martz, *Remaining in an Abusive Relationship: An Investment Model Analysis of Nonvoluntary Dependence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 558, 558 (1995).

69. The honeymoon phase of this cycle of violence typically involves contrition, promises not to abuse again, exemplary behavior and poignant romantic gestures. LENORE E. WALKER, *THE BATTERED WOMAN* 65-66 (1979).

70. Kathleen O'Connell Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 MEDIATION Q. 303, 307 (1990); Ann W. Yellott, *Mediation and Domestic Violence: A Call for Collaboration*, 8 MEDIATION Q. 39, 43 (1990).

71. Rusbult & Martz, *supra* note 68, at 559.

72. See Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 255-56 ("When the abuser is a person the victim trusts, often professing love, comfort, or reassurance, the result is a dissociated coercion. To make sense of this dichotomy, the victims may psychologically minimize the violence, or believe they are to blame." (citations omitted)); Corcoran &

Domestic violence victims are a diverse group,<sup>73</sup> and generalizing about their behaviors would be both difficult and unwise. Nevertheless, studies of abuse victims' decisions to return to their abusers<sup>74</sup> indicate that, all else equal, victims are more likely to return when they perceive that they have no decent alternatives. Moreover, they are more likely to return when they have made relatively significant investments in their relationships. Thus, those who had married their abusers and had children with the abusers were more likely to return to the relationships.<sup>75</sup> In these cases, the relative benefit to remaining in the relationship is perceived to be great, not because the relationship itself has a high positive value but rather because the alternative to continuing the relationship seems catastrophic. Her judgment might be based on a clear cost-benefit calculation, but often a careful calculation is foreclosed by a strong emotional sense of commitment<sup>76</sup> to her relationship. One study of spouse abuse victims concluded that:

[q]uite apart from feelings of satisfaction, issues related to an individual's broader interdependence with a partner—issues of the degree to which an individual is committed to her relationship, having invested in it heavily and possessing only poor-quality alternatives—are importantly predictive of the decision to remain in or exit from a relationship.<sup>77</sup>

This sense of commitment may have its own evolutionary value. Commitment in general helps to signal to potential mates and trading

Melamed, *supra* note 70, at 305 (“Chronically abused women repeatedly forgive their partners, accept the blame, and believe, if they just try harder, their relationship will work out.”).

73. Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 153–54 (2003).

74. See Richard J. Gelles, *Abused Wives: Why Do They Stay?*, 38 J. MARRIAGE & FAM. 659 (1976); Joyce McCarl Nielsen et al., *Social Isolation and Wife Abuse: A Research Report*, in INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 49 (E.C. Viano ed., 1992); Douglas K. Snyder & Lisa A. Fruchtmann, *Differential Patterns of Wife Abuse: A Data-Based Typology*, 49 J. CONSULTING & CLINICAL PSYCHOL. 878 (1981); Michael J. Strube & Linda S. Barbour, *The Decision to Leave an Abusive Relationship: Economic Dependence and Psychological Commitment*, 45 J. MARRIAGE & FAM. 785 (1983); Michael J. Strube & Linda S. Barbour, *Factors Related to the Decision to Leave an Abusive Relationship*, 46 J. MARRIAGE & FAM. 837 (1984).

75. Rusbult & Martz, *supra* note 68, at 567 (study of domestic abuse victims finding that “commitment was stronger among women with greater investments in their relationships—among those who were married, had been involved for longer periods, and had children with their partners”).

76. As a psychological term, commitment refers to an individual's intention to maintain a relationship, feel psychologically attached to it, and sustain a long-term orientation to it regardless of the satisfaction that the individual derives from the relationship. *Id.* at 559.

77. *Id.* at 569.

partners that a person will not take advantage of the relationship.<sup>78</sup> Short-term goals can become subordinated to long-term interests by a predisposition to be committed to one's relationships. For females, commitment, or a refusal to think about other pair-bonding options, serves the further evolutionary purpose of reassuring their mates of their paternity of their children. The more certain a male is that his offspring are his, the more he is willing to invest in the child as well as the pair-bonding relationship with the mother. Commitment often turns out to be horribly maladaptive in the context of spousal abuse, however. In any event, this emotional commitment to the relationship seems to have the effect of mediating victims' judgments regarding both the sincerity of their abusers' apologies and the credibility of their promises to stop.

Moreover, the male spouse abuser uses a number of techniques in order to establish power and control over the actions and even thoughts of his wife.<sup>79</sup> His efforts may be the result of mate-guarding instincts taken too far.<sup>80</sup> Two prominent evolutionary psychologists, Martin Daly and Margo Wilson, provide support for this hypothesis:

When asked to identify the primary issues around which violent incidents occurred, both beaten wives and their assailants nominate "jealousy" above all else. Battered women often maintain that their husbands are not only violently jealous about their interactions with other men, but that they are so controlling as to curtail even the wives' contacts with female friends and family.<sup>81</sup>

Alternatively, a male abuser may simply abuse in order to establish a hierarchy in the marital relationship that allows him to take greater liberties with his wife than would be permitted in an egalitarian relationship. In either event, if an abuser can cause his wife to

78. FRANK, *supra* note 35 (positing emotions as mechanisms for human commitment to forgo short-term self-interests).

79. See Corcoran & Melamed, *supra* note 70, at 305 ("Abusers may want to control how the victim dresses, wears her hair, keeps house, fixes meals, whom she communicates with, what she says, and where she goes.").

80. Mate guarding is a primarily male activity, and women are ten times more likely to be abused by an intimate partner than are men. Moreover, women who are in their prime reproductive years—aged nineteen to twenty-nine—are more likely to be abused than are other women. Ver Steegh, *supra* note 73, at 149 (citing various ABA and Bureau of Justice sources). Although some of this age effect can be explained by the fact that younger women are more likely to be married to younger men, the most violent group in society, the age of the wife is a better predictor of victimization than is the age of her husband. Martin Daly & Margo Wilson, *Family Violence: An Evolutionary Psychological Perspective*, 8 VA. J. SOC. POL'Y & L. 77, 117 (2000).

81. Daly & Wilson, *supra* note 80, at 108.

think like a subordinate in a hierarchical relationship, then she is likely more willing to accept a proffered apology.

Apology in the context of hierarchies works differently from apologies in more egalitarian relationships. In a hierarchical relationship, subordinates typically are expected to offer apologies for their transgressions. The subordinate is expected to act on behalf of and at the pleasure of the dominant, and the apology works to restore the subordinate to the status of loyal agent. Apologies from dominant to subordinate, by contrast, are likely more rare.

Studies of nonhuman primate conflict resolution indicate that the willingness of dominants to initiate conflict resolution depends on the rigidity and importance of the dominance hierarchy. In Stumptail monkeys, which are strongly hierarchical, 94 percent of the observed reconciliation rituals involve subordinate reconciliation behavior by the subordinate.<sup>82</sup> In two-thirds of the reconciliation encounters, the subordinate initiates the conciliatory ritual.<sup>83</sup> In contrast, Bonobos, which are in many ways behaviorally closest to humans, typically reconcile by dominant initiation, and dominants typically start the conflict.<sup>84</sup> Chimpanzees, which are socially less hierarchical than the Stumptails but more hierarchical than humans, reconciled fifty percent of the time by dominant initiative and fifty percent by subordinate initiative. Interestingly, however, conflicts that involved potential threats to the dominant's status never resulted in dominant-initiated reconciliation.<sup>85</sup> One implication from evolutionary biology may therefore be that the more hierarchical the human setting, the greater the proportion of subordinate to dominant apologizing.

Much more important than the relative frequency of dominant and subordinate apologies for spouse abuse is the fact that apologies appear to be used much more often in hierarchical settings than in egalitarian ones. For example, Letitia Hickson's cross-cultural study of apology found that apology seems to be a more predominant dispute-resolution mechanism in hierarchical societies.<sup>86</sup> This greater frequency makes sense once we begin to see the extent to which apologies are used to reinforce the fact of hierarchy. While the subor-

82. FRANS DE WAAL, PEACEMAKING AMONG PRIMATES 163-65 (1989).

83. *Id.* at 165.

84. *Id.* at 220.

85. *Id.* at 44.

86. Letitia Hickson, *The Social Contexts of Apology in Dispute Settlement: A Cross-Cultural Study*, 25 *ETHNOLOGY* 283, 285-87 (1986).



dinate uses apology to reestablish the dominant's favor,<sup>87</sup> the dominant uses apology in lieu of other compensation. Put differently, subordinates typically are not in a position to refuse an apology or demand further recompense. To the extent that a spouse abuser can place his victim in the mindset of a subordinate, he can eliminate any glimmer of serious thought about his victim's refusing to forgive. At the same time, he can threaten to withhold his own forgiveness when he is displeased with her behavior. He has used his power to successfully instill in his victim the belief that there is a dichotomy in their payoff structures regarding the acceptance of apologies.

In the spouse abuse context, then, it seems that a generic emotional commitment, coupled by a subjective belief in the lack of desirable alternatives, can cause a woman to return to an abusive relationship. From the perspective of genetic adaptiveness, this strong homeostatic force can swamp the perhaps more rational inclination to avoid a potentially physically and emotionally painful situation. This tendency to return will be magnified when the victim comes to see herself as a subordinate to her husband in a hierarchical relationship.

## 2. Medical Malpractice

The negligent doctor context is similar to spouse abuse in that there is some evidence that victims too easily accept apology, and, I will argue, the causes of this excessive tendency to forgive may also have evolutionary roots. Before moving to that evolutionary analysis, however, some background information on physician negligence, medical malpractice claims, and doctor apologies may be helpful.

Empirical data on the relationship between malpractice claims and negligence reveals that there is apparently very little connection between a physician's negligence and malpractice suits. In a Harvard medical malpractice study, more than 31,000 New York State hospital discharges were scrutinized for evidence of adverse events, or injuries due to medical handling as opposed to the patient's underlying illness or other medical problem.<sup>88</sup> Where there was evidence of a possible

87. Cf. Orenstein, *supra* note 16, at 252 ("Dominance feminism would recognize that apologies may be a style of coping for subordinate groups—weaker groups who are acculturated to apologize, to curry favor, to ensure safety, and to reinforce the hierarchy.").

88. A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Practice Study III*, 325 *NEW ENG. J. MED.* 245 (1991); cf. Eric J. Thomas et al., *Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado*, 38 *MED. CARE* 261, 263 (2000) (defining adverse event as "an injury caused

adverse event,<sup>89</sup> physicians reviewed the medical records to determine whether in fact the patient suffered from a medical event and, if so, whether the adverse event identified was caused by negligence. In this study, as well as another, approximately one percent of hospital stays were found to involve adverse events caused by negligent medical care.<sup>90</sup> The team found that the chance that an injury caused by medical malpractice resulted in a malpractice claim was 1.53 percent.<sup>91</sup> Especially given that only half of these claimants can actually be expected to eventually receive compensation for their injuries,<sup>92</sup> malpractice claims provide only an extremely crude method of ensuring the quality of health care.<sup>93</sup>

At the same time that only a tiny fraction of negligence cases are resulting in claims, the vast majority of medical malpractice claims that are brought do not seem to expert physicians to actually involve negligent medical care. A study of 46 closed medical malpractice cases filed in New York State concluded that only 9, fewer than 20 percent, of the cases brought actually involved negligence.<sup>94</sup> Of the 37 cases deemed not to involve negligence, 16 of them, nearly half, nevertheless resulted in a settlement for the plaintiff.<sup>95</sup>

The litigation system is by no means a perfect sifter of meritorious claims, and in every area of the civil common law defendants have some incentive to offer legally undeserving plaintiffs at least a modest settlement in order to avoid the costs of a lawsuit. In the area of medical malpractice, however, the relationship between negligent harm and legal outcome seems much more dramatically skewed than

by medical management (rather than the disease process) that resulted in either a prolonged hospital stay or disability at discharge”).

89. “Injuries that either prolonged hospitalization or led to disabilities that continued after discharge were deemed to be adverse events.” Localio et al., *supra* note 88, at 245.

90. *Id.* at 246; see David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250, 253 (2000).

91. Localio et al., *supra* note 88, at 247; Studdert et al., *supra* note 90, at 254–55 (describing study of Colorado and Utah hospital discharges indicating that probability that a negative adverse event would lead to malpractice claim was 2.5 percent).

92. Localio et al., *supra* note 88, at 249. A follow up study of the claims identified in the Harvard Medical Practice Study found that of the nine medical malpractice cases deemed meritorious by the physician reviewers, only five resulted in any payment to the plaintiff. Troyen A. Brennan et al., *Relation Between Negligent Adverse Events and the Outcomes of Medical-Malpractice Litigation*, 335 NEW ENG. J. MED. 1963, 1963 (1996).

93. Localio et al., *supra* note 88, at 249.

94. Brennan et al., *supra* note 92, at 1964; see also Studdert et al., *supra* note 90, at 253 (of eighteen patients who filed medical malpractice claims, only four were deemed meritorious by the reviewing doctors).

95. Brennan et al., *supra* note 92, at 1963, 1964.

in other areas, and the cause of this skewing has baffled physicians.<sup>96</sup> One thing is certain, however. Traditional settlement theory does not explain the skew.<sup>97</sup>

One study found that the best predictor of a medical malpractice suit was bedside manner.<sup>98</sup> When patients feel that they have been treated poorly by their doctors, they blame their doctors for adverse health outcomes.<sup>99</sup> When they feel that they are treated well, they tend to overlook or minimize the adequacy of their care.<sup>100</sup> One very powerful way to have a patient feel that he or she is being treated well is to offer an apology for a negative medical outcome. Notice too how the skewing of medical malpractice claims might be explained in part by apology. If doctors are prone to apologize when they cause harm,<sup>101</sup> then meritorious claims tend to drop out of the pool. Because doctors tend not to apologize when they are not at fault for a patient's suffering, more suffering patients who have not been victimized by negligence feel mistreated, leading to a selection effect in litigation biasing cases toward nonmeritorious claims.

Without rigorous empirical testing, we cannot know for sure whether doctor apologies exacerbate the skew. Nevertheless, there is some anecdotal evidence as well as theoretical support for the notion that doctor apologies might be particularly effective at preventing medical malpractice litigation. As one doctor recently stated in a private conversation, "luckily for us, most patients will accept an apology, but it matters a lot how you give it. If you apologize in the hospital or in your office, you've got it made. It's really important to

96. Localio et al., *supra* note 88, at 249 (exploring possible explanations for failure of negligently injured patients to file claims); Brennan et al., *supra* note 92, at 1967 (suggesting that medical malpractice might be a disguised form of no-fault compensation for the permanently disabled).

97. In other words, it cannot be the case that the clearly meritorious claims are just settling quickly, because the claims data in these studies were gathered from insurers. Initiation of formal litigation was not necessary to meet the definition of a claim, and claim payment to the plaintiff did not require actual litigation. See Studdert et al., *supra* note 90, at 252 (explaining claims identification in both New York and Utah/Colorado studies).

98. Ellen Wright Clayton et al., *Doctor-Patient Relationships, in SUING FOR MEDICAL MALPRACTICE* 50 (Frank A. Sloan et al. eds., 1993) (study of nearly 200 Florida medical malpractice claims indicated that physician communication with patient is most significant factor in decision to file claim).

99. Frank A. Sloan, *Policy Implications, in SUING FOR MEDICAL MALPRACTICE, supra* note 98, at 211, 217 ("[Q]uite frequently the physician's attitude, especially in the face of an adverse outcome, was a major factor in precipitating a suit.").

100. See *id.* at 218 ("[I]mproved communication, especially in the face of an adverse outcome, should be a high priority if claims are to be avoided.").

101. My colleague Ellen Wright Clayton teaches her medical students about the importance and practical significance of apologizing to patients who are harmed from the doctor's mistreatment.

have the white coat on and a stethoscope around your neck, though. If you go in there dressed as any Joe, it won't work." Assuming that this anecdote accurately characterizes the circumstances in which an apology will be effective, an evolutionary analysis of apology can help to explain why the trappings of the apology might matter so much.

Three somewhat related phenomena merge in the case of physician apology. First is the fact that physicians as caretakers invoke a sense of dependency and of trust.<sup>102</sup> We know very little about the precise era in which any particular psychological predisposition might have evolved. Nevertheless, it is likely reasonable to assume that in the relevant EEA there were no physicians, because occupational specialization is believed to have appeared later in human history.<sup>103</sup> If this supposition is correct, then sick individuals instead were forced to rely on the beneficence of nonspecialized caretakers for health assistance, and those caretakers were typically family members. Family relationships are thick-trust relationships typically characterized by the sense of commitment discussed above in the context of spouse abuse. To the extent that a caretaker was not a family member, a sick person no doubt felt fortunate to have the care and was therefore unlikely to question its adequacy. Put differently, the costs of failing to trust the caretaker were likely high relative to the costs of excessive trust because, unlike modern times, the sick individual did not have other caretakers to contract with. If so, the caregiver/patient relationship was likely more easily restored with a caregiver apology than were other relationships. To the extent that the white coat, stethoscope, positive bedside manner, and medical services environment help to evoke the image of doctor as caretaker, the presence of these factors might well encourage patients toward forgiveness in the face of apology.

Second, trust in the physician can have a powerful placebo effect on patients. Mark Hall describes the therapeutic benefits of trust:

There is very strong evidence . . . that the effectiveness of care depends on patients' confidence in its efficacy. . . . [T]he doctor himself is a placebo or a therapeutic agent, regardless of the par-

102. See Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 477 (2002) ("Trust is a defining aspect of strong caregiver relationships, one that gives them fundamental meaning and value.").

103. RUBIN, *supra* note 21, at 19 ("Apparently, there was relatively little division of labor other than by gender in evolutionary times.").

ticular technique used or its independent, biochemical effectiveness.<sup>104</sup>

Perhaps the positive feeling that a patient obtains from placing trust and confidence in the doctor helps to encourage the patient to restore his relationship with his caregiver, even in the face of negligence. If so, the trappings of the doctor status can work to facilitate acceptance of apologies.

Third, to encourage trust in our caregivers, doctors' social status is elevated. Doctors often exacerbate their dominant positions with their practice behaviors. They tend to wear ties and jackets, keep patients waiting, and generally act in an authoritarian manner toward the medical staff. They also force patients into trusting and submissive positions by directing them to disrobe, perhaps at times to a greater extent than is technically necessary. Like the therapeutic techniques of having people lean backwards into the arms of their co-workers, disrobing for examinations forces the patients to trust their doctors early and often. These techniques are no doubt successful. In fact, I can think of no other relationship in which one party develops a thick, intimate trust of another with little interpersonal interaction. Given the placebo effect of trust in one's doctor, these status-elevating techniques probably benefit most patients. To the extent that they create a sense of hierarchical submission in the patient, however, they can further exacerbate excessive forgiveness by patients.

Statistics regarding the types of patients who file malpractice claims suggest that there may be some rational limits to these presently irrational forgiveness phenomena. Although claiming rates seem low for all groups of negligently injured patients, poor and elderly individuals and those who suffered only minor disabilities are less likely to sue than are others.<sup>105</sup> Notice that, given damages measurements, these groups are less likely to garner a lucrative settlement from filing a claim. The data taken together suggest that while there are troubling muting effects from doctor apology, at some point the financial benefits to suit can grow large enough to make claim filing worthwhile.

No doubt, excessive patient trust in their doctors might well produce more social gain than harm overall. The question remains, how-

104. Hall, *supra* note 102, at 479-80.

105. Studdert et al., *supra* note 90, at 257 (patients older than 75 are significantly less likely to file despite having a meritorious claim).

ever, whether the negative effects of excessive patient forgiveness can be tempered without diminishing the trust that patients have in their doctors. The next Part turns to a discussion of that question.

## II. IMPLICATIONS OF EXCESSIVE PATIENT FORGIVENESS FOR ENCOURAGING PHYSICIAN CARE

The previous Part asserted that there were important similarities between the effects of apologies proffered by spouse abusers and negligent doctors. In the case of spouse abuse, society has responded in at least three ways to try to temper the negative effects of victim forgiveness. First, the criminal law has stepped in to displace the victim's preferences. In some states, for example, the aggressor in a domestic dispute is subject to mandatory arrest. Moreover, in all states, the prosecutor rather than the victim decides whether to prosecute.<sup>106</sup> Victim cooperation is often necessary to a successful prosecution, but placing the prosecutorial decision with the State aids deterrence by making the threat of prosecution seem more real.

Second, most communities have safe houses, or domestic violence shelters, that exist independently of and in addition to other social service agencies,<sup>107</sup> so that victims can more effectively escape their abusers. In many cities, lawyers volunteer their services to assist victims in obtaining restraining orders and divorces. The strongest domestic violence programs focus on job training and providing victims with reliable means of transportation. This assistance helps to counteract the victim's perception that the barriers to leaving her relationship are insurmountable.

Third, most mediation centers refuse to mediate criminal domestic violence cases and, in some places, civil divorce cases that involve domestic violence. Centers justify their refusal by citing the power imbalance between husband and wife where domestic violence was present, but the evolutionary analysis suggests a complementary reason for declining to mediate. Mediation is typically designed to handle those cases that are more appropriately handled by informal conciliation rather than via the formal litigation process. Domestic violence victims as a group are excessively inclined to respond to informal conciliation efforts in ways that are detrimental to their own

106. See, e.g., Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 85 (1984) (discussing prosecutorial policy in Anchorage, Alaska to deny abused women's requests to dismiss charges).

107. *Id.* at 81.

well-being. In short, domestic violence victims as a group are apt to forgive their abusers much too easily. In these cases, the formal adversarial litigation system might better serve the victims' needs.<sup>108</sup>

Nevertheless, the evolutionary analysis suggests that private litigation alone is unlikely to adequately address both abused victims' and injured patients' harms. Mediation is problematic because it works to further encourage victim forgiveness, but most victims forgive their doctors or spouses long before a formal civil dispute ever forms. In these cases, denying mediation is not sufficient.

Despite this similarity, spouse abuse and medical malpractice cases do differ significantly. First, and most obviously, spouse abuse is an intentional harm while medical malpractice involves accidental harms. The potential for overdetering doctors in the care of their patients is therefore likely much greater than the potential for overdeterrence in the context of spouse abuse.<sup>109</sup> Put differently, instituting criminal sanctions for negligent medical care might cause talented people to avoid the practice of medicine, whereas criminalizing spouse abuse is unlikely to have any deleterious effect on marriage rates. Consequently, stronger deterrent measures can be used to counter excessive domestic violence forgiveness than can be used to counter excessive patient forgiveness. Unlike spouse abuse, medical malpractice is therefore not appropriately addressed via criminal law. Much more subtle counteractive measures need to be utilized.

Moreover, spouse abusers are likely to repeat their abusive behavior if the victim resumes her relationship, whereas doctors can generally be counted on to attempt to remedy or at least minimize the effects of the harms that they negligently inflict. While there are real

108. See Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855 (1985) (arguing against use of mediation in cases of domestic violence); Lerman, *supra* note 106 (arguing that mediation of abuse cases is generally problematic and should not be resorted to except in places where law enforcement is hopelessly ineffective); Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. ILL. U. L.J. 559, 572 (2002) ("Where there is a history of domestic violence, cases simply should not be mediated."). In the context of divorce, however, there is significant disagreement over whether formal litigation or mediation is likely to better serve the interests of the victim in marriages involving domestic violence. Litigation can increase hostilities, and fleeing women are often unrepresented by lawyers and disadvantaged in custody determinations. Zylstra, *supra* note 72, at 259–60. For other arguments favoring mediation in divorce cases involving domestic violence, see Corcoran & Melamed, *supra* note 70, at 311–12; Yellott, *supra* note 70, at 42–46; see also Ver Steegh, *supra* note 73 (domestic violence victims should be given opportunity to make informed choice about preferred divorce process). In divorce cases, presumably there is less risk that the intimate relationship will resume.

109. Cf. Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741 (1993) (criminal punishment of negligent *mens rea* can overdeter socially useful behavior).

systemic concerns that result from the failure of medical malpractice liability to deter patient harms, the case for affirmative intervention into any specific doctor-patient relationship seems considerably weak. The law's response to the problem of patient overforgiveness is more likely to be indirect and regulatory in nature.

In the medical care context, the weaknesses of the liability system can be overcome with supplemental methods for monitoring the quality of doctor care. Two such monitoring mechanisms already in place are hospital peer review boards<sup>110</sup> and state licensing boards. Hospital peer-review boards are composed of physicians on the hospital's medical staff, and they review the qualifications and professional behavior of the medical staff doctors. The boards also determine whether physicians are qualified to practice at the hospital and they specify the procedures and treatments that each physician is qualified to perform.<sup>111</sup> State licensing boards determine which doctors are qualified to practice medicine in general.<sup>112</sup> However, because state licensing boards are much further removed from the daily practice of doctors, "peer review has become widely accepted as the primary means to weed out low quality [licensed] physicians."<sup>113</sup>

A physician's peers possess the expertise necessary to review the quality of the care that she renders,<sup>114</sup> but there are two reasons to worry about the reliability of their determinations. First, there is the possibility that hospitals, and their physicians, will cover up medical errors. "Absent egregious circumstances, there is no incentive for an individual medical staff peer reviewer to challenge the conduct of a colleague because, one day, the peer-review shoe may be on the other foot."<sup>115</sup> Moreover, both the physician's peers and her affiliated hospi-

110. The Joint Commission on Accreditation of Healthcare Organizations (formerly the Joint Commission on Accreditation of Hospitals), the effective gatekeeper of essential hospital accreditation, requires that the doctors themselves oversee the medical staff. James F. Blumstein & Frank A. Sloan, *Antitrust and Hospital Peer Review*, 51 LAW & CONTEMP. PROBS. 7, 10-11 (1988); see also Susan O. Scheutzow, *State Medical Peer Review: High Cost But No Benefit—Is It Time for a Change?*, 25 AM. J.L. & MED. 7, 13 (1999) (Joint Commission requires hospitals to perform peer review as prerequisite to accreditation).

111. Scheutzow, *supra* note 110, at 7, 12.

112. Randall G. Holcombe, *Eliminating Scope of Practice and Licensing Laws to Improve Health Care*, 31 J.L. MED. & ETHICS 236, 240-41 (2003). However, there is no additional certification required to practice in specialty fields. John J. Smith, *The Specialty Boards and Antitrust: A Legal Perspective*, 10 J. CONTEMP. HEALTH L. & POL'Y 195, 195 (1993).

113. Scheutzow, *supra* note 110, at 15.

114. Blumstein & Sloan, *supra* note 110, at 12.

115. *Id.* at 15; see also Gerald B. Hickson et al., *Liability, in SUING FOR MEDICAL MALPRACTICE*, *supra* note 98, at 92, 93 (stating that doctors are reluctant to publicly criticize other doctors' work, especially when they know the doctor whose work is under review).



tals may benefit financially from her future referrals, so that disciplinary actions can have the effect of financially harming the reviewers and the hospital.<sup>116</sup> In fact, although an estimated 80,000 hospital patients are killed in the United States each year as a result of medical malpractice, fewer than 1000 adverse peer review actions are reported to the National Practitioner Data Bank.<sup>117</sup> These disparate figures strongly suggest, though they cannot prove, that peer review insufficiently deters physician negligence. Finally, because peer reviewers often have the power to destroy a doctor's career by denying or revoking her hospital privileges, peer review runs the risk of being used in an anticompetitive rather than patient-regarding manner.<sup>118</sup> The problems with peer review do not seem to warrant its replacement, but they do indicate that supplemental measures to enhance quality of care may be warranted.

One supplemental measure would require the reporting of adverse events and/or medical errors to information-gathering agencies that could keep and publish records about individual doctors. In fact, reporting requirements and information dissemination are already relied on to some extent. For example, the National Practitioner Data Bank was set up by Congress to collect information about (1) adverse peer review determinations at hospitals and other health care organizations; (2) medical malpractice payments made by insurers and self-insured organizations; and (3) disciplinary actions taken by state licensing boards and professional societies.<sup>119</sup> Several states require similar reporting.<sup>120</sup> However, given that medical malpractice, peer review, and state licensing boards together likely fail to adequately deter negligence, these monitoring shortfalls inevitably translate into limitations on the effectiveness of this reporting requirement.

In addition to these reporting requirements, regulatory measures could be added that either require doctors to self-report adverse events or encourage the patients to report adverse events. In many cases, however, only the doctor and the patient (and sometimes not even the patient) are aware that an adverse event or error has occurred. Doctors have little incentive to self-report, and patients, who have less information, may not even know that a reporting agency

116. Scheutzow, *supra* note 110, at 10–11.

117. *Id.* at 15.

118. Blumstein & Sloan, *supra* note 110, at 15.

119. Scheutzow, *supra* note 110, at 36–37.

120. *Id.*

exists. Even when patients know that they have suffered from an adverse event and are aware that a reporting agency might like the information, the problem of excessive patient forgiveness ensures that as a group they will underreport medical problems. Underreporting might be alleviated by requiring that the physician's staff members report known mishaps, but then fundamental trust issues arise in the doctor's office, and doctors may be vulnerable to disgruntled staff members.

Moreover, to the extent that the reporting requirement is conceived to serve as an information-providing mechanism, it is less than clear that this information should be turned over to the patients. After all, informed consumerism in this context could well eliminate the placebo effect of retaining physician care. Put differently, patients may be less inclined to opt for medical procedures when they are aware of adverse events, and they might respond less favorably to the treatment they receive if they must worry about medical errors along the way. In short, information might help patients to avoid incompetent doctors at the expense of reduced quality health across the population.

One potentially feasible monitoring and reporting alternative might be to require managed care organizations to gather statistical data about adverse events and medical errors and to provide the aggregate data to employers. Several states have already passed laws requiring health plans to gather and synthesize data from individual patient encounters into plan-level scores that can be used to make health care coverage choices.<sup>121</sup> To explain, managed care organizations integrate the financing and provision of health care services.<sup>122</sup> Managed care organizations include Health Maintenance Organizations ("HMO's"), Preferred Provider Organizations ("PPO's"), and Independent Practice Associations ("IPA's"). Because managed care organizations attempt to control skyrocketing health care costs,<sup>123</sup> they are a popular insurance choice for employers, who organize and subsidize more than sixty percent of the nonelderly health care coverage in the United States.<sup>124</sup> If employers, who are becoming increas-

121. William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1722-23 (1999).

122. Dionne Koller Fine, *Physician Liability and Managed Care: A Philosophical Perspective*, 19 GA. ST. U. L. REV. 641, 647 (2003).

123. See Sage, *supra* note 121, at 1713 ("[H]ealth care spending rose from 5.1% to 13.5% of GDP between 1960 and 1997.").

124. *Id.* at 1740.

ingly savvy about choosing among coverage options, are given information about aggregate adverse events and/or medical error rates for doctors participating in each managed care organization, then competitive pressures might cause the managed care organizations to better monitor the quality of care provided by each doctor. Employers have already begun to move in this direction on behalf of their employees:

[P]rivate employers and employer-organized purchasing cooperatives have taken the lead in obtaining detailed disclosure from health plans and providers, even without legal mandates, and conveying it to beneficiaries. Many employers use disclosed information to select health plans for their workforce. Some corporations give employees formal explanations of the reasons for their choices; others make extensive information available to beneficiaries in addition to processing it internally.<sup>125</sup>

Granted the proposed undertaking would be more extensive, and might require regulatory intervention, but it seems that many employers would use the information to advantage their employees.

These reporting requirements might help to discipline the decisions of the managed care organizations as well as to improve the care of the physicians themselves. It is widely believed that managed care attempts to control health care costs in part by limiting their physicians' provision of medical services<sup>126</sup> and by requiring primary care physicians to perform procedures traditionally reserved for specialists.<sup>127</sup> The reporting requirement therefore could help to counterbalance managed care's incentives to provide too little or poor quality medical health care. With a reporting requirement, employers could receive more reliable information about whether they save money today by increasing the rate of poor health outcomes down the road.

This reporting proposal has several limitations, however. First, employers might not serve as reliable agents for their employees. While they may internalize some of the costs of the adverse health care of their employees, some of those costs will no doubt be externalized as employers struggle to make financial ends meet.<sup>128</sup> Perhaps this limitation can be overcome by making the statistical information available to the general public, but once again we face the potential

125. *Id.* at 1738.

126. Fine, *supra* note 122, at 647.

127. Sage, *supra* note 121, at 1750–51.

128. *Id.* at 1743 (expressing concern that group purchasers, including employers, prefer to minimize costs and residual risks rather than to maximize the quality of patient care).

that consumer information hinders rather than aids aggregate health outcomes. Unfortunately, this is an empirical question for which we have no real answers. Consumer information challenges extend beyond those of patient trust, however. An additional problem stems from the fact that patients are notoriously poor at comprehending even relatively simple health information.<sup>129</sup> The problem becomes worse for the elderly and those relatively untutored in American language and culture.<sup>130</sup> On the other hand, consumer ignorance problems alone create very little actual harm. The worst possible outcome resulting from consumer ignorance is that the vast bulk of consumers might simply ignore the disclosed information. The very potential for consumer reaction to published information can incentivize health care providers, however. For example, current state requirements that hospitals and surgeons disclose mortality rates do not seem to significantly promote public awareness of the problems, and yet their very disclosure has pressured many programs to improve their health care services.<sup>131</sup> In any event, there would be some genuine concerns about (1) whether employers or patients are the preferred recipients of medical data, and (2) whether either would use the data in a manner that would improve health outcomes.

Second, effective reporting requirements could impose a significant and perhaps unrealistic burden on the managed care organizations. The usefulness of comparative data requires that it be carefully and completely gathered. Some providers would be required to gather detailed information about the individual patients of thousands of doctors who practice under the plan.<sup>132</sup> In the extreme, very onerous reporting requirements could threaten to erode the competitive advantage of managed care organizations, assuming that reliable reporting is even feasible.

Third, the publication of adverse event statistics, if not handled carefully, risks perverse decision making about high-risk specialties within health care organizations. High-risk specialties, by definition, lead to higher rates of adverse events even when doctors take due care. To the extent that specialists in some fields would inevitably report higher mortality rates, health care providers have an incentive

129. *Id.* at 1728–29.

130. *Id.*

131. *Id.* at 1798–99.

132. *See id.* at 1723 (discussing feasibility constraints on detailed medical reporting requirements).

to minimize their affiliation with these specialists.<sup>133</sup> Unfortunately, this suboptimal number of specialists in the network can result in long-term costs to some insured individuals that they are unaware of when choosing their insurance plans. Perhaps this problem can be alleviated by devising a way to separate these services out for separate reporting—but that can add to the costs of publishing the information.

The foregoing analysis indicates that some reporting requirements can themselves create negative health outcomes to the extent that they have negative effects on patients' trust in their doctors. Nevertheless, carefully crafted reporting requirements imposed on managed care organizations could, at least in theory, help offset the reduced incentives for quality care that come from patient overacceptance of apologies. I leave to health care experts a determination about the practical feasibility of the proposal as well as the extent to which reporting requirements should substitute for other legal, policy, and professional mechanisms for ensuring the adequacy of legal care.

### CONCLUSION

As apology advocates have previously emphasized, much of the civil litigation that clogs court dockets in America today could be avoided with a simple heartfelt apology. Although sometimes difficult to offer, these expressions of remorse are profoundly powerful and valuable for humans as social animals. Nevertheless, apologies can be problematic. This Article used evolutionary theory as a tool to explore the costs of apology in two areas—spouse abuse and medical malpractice—to suggest that excessive victim forgiveness can, in some contexts, cast doubt on the effectiveness of a purely private litigation system for creating appropriate behavioral incentives. It also explored ways in which regulatory measures and criminal law can help to alleviate the distortion that apologetic behavior can create.

133. *Cf. id.* at 1741–42 (discussing pressures created by current reporting requirements on public and teaching hospitals which have higher mortality rates due to the fact that they take on sicker patients).

