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Tort Reform through the Backdoor: A Critique of Law & Apologies

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Tort Reform through the Backdoor: A Critique of Law and Apologies

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In this Article we show how the biggest tort reform of the last decade was passed through the backdoor with the blessing of its staunchest opponents. We argue that the widely-endorsed apology law reform—a change in the national legal landscape that privileged apologies—is, in fact, a mechanism of tort reform, used to limit victims' recovery and shield injurers from liability. While legal scholars overlooked this effect, commercial interests seized the opportunity and are in the process of transforming state and federal law with the unwitting support of the public.

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INTRODUCTION

> "Capping malpractice payments . . . would do nothing to prevent unsafe practices or ensure the provision of fair compensation to patients . . .
>
> Apology offered by a health care provider during negotiations shall be kept confidential and could not be used in any subsequent legal proceedings"
>
> – Hillary Clinton & Barack Obama[1]

Why do large commercial interests—insurance companies, manufacturers, hospitals—pledge millions of dollars to lobby for laws that encourage apologies? What may explain this very recent interest of commercial firms in the virtue of apologies? Why did tort reformers come to adopt the rhetoric of regret, consilience, and penance? And how did the largest tort reform of the last decades passed *with the blessing of its staunchest opponents?*

Tort reform is a highly contentious social agenda. It is based on a belief that litigation is inherently biased in favor of plaintiffs and must therefore be reined-in by measures such as damage caps and screening panels.[2] Opponents of tort reform dispute this basic premise; they worry that limitations on liability would unduly deprive accident victims of much-needed compensation and would encourage negligent and reckless behavior. The political pendulum slowly swings between these two positions.

In recent years, tort reformers have found a new and powerful platform to advance their position, one that allowed them to strike a major victory in their war against what they perceive as excessive liability. Apology laws; laws designed to privilege apologies made by injurers, making them inadmissible at trial. By co-opting the rhetoric and discourse on apologies and the law—independently developed by ethicists, dispute resolution specialists, and legal theorists—they found a way into the hearts of legislators and the public. This maneuver has been so effective that even long-standing opponents of tort reform, such as President Barack Obama, express support for these reforms.[3] In only two decades, 36 states have adopted apology laws and there is currently a strong push to expand apology

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[1] Hillary Rodham Clinton & Barack Obama, *Making Patient Safety the Centerpiece*, 354 N. ENG. J. MED. 2205, 2205 (2006).

[2] *See infra* section I.B.

[3] *See infra* section I.C.

law reform to the federal level and other area of law.[4]

This Article argues and demonstrates that despite appearances, apology laws *are* de-facto tort reform. Looking beyond the virtuous rhetoric, the effect of apology laws on commercial actors is similar to that of damages caps.[5] At the heart of our argument is the overlooked claim that apology laws undercut the deterrent effect of tort liability.[6] We base our argument on tort theory as well as research in psychology, economics, sociology, and marketing. We contend that apology laws encourage strategic apologies by commercial actors who do not express a real commitment to avoid future wrongdoing. Commercial apologies exploit the human tendency to forgive, which has myriad psychological, social, and evolutionary reasons. For any of these reasons, victims forgive and settle for a fraction of the value of their claims, foregoing hundreds of thousands of dollars in compensation. Because commercial actors can anticipate in advance that they will pay victims low amounts, they have less of an incentive to invest in precautions that would prevent accidents in the first place. In other words, *apologies dilute deterrence*, making it better to be sorry than safe. We further argue that new market solutions and new trends ''professionalize'' and facilitate the tender of apologies by commercial actors, thus greatly amplifying their harmful effects.[7]

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[4] *See e.g.*, Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J. L. ECON. 365 (1999) (calling to use shaming and apologies as a substitute to criminal sanctions); Chandler Farmer, *Striking a Balance: A Proposed Amendment to the Federal Rules of Evidence Excluding Partial Apologies*, 2 BELMONT L. REV. 243 (2015) (calling to create federal apology laws); Lauren Gailey, *"I'm Sorry" as Evidence? Why the Federal Rules of Evidence Should Include a New Specialized Relevance Rule to Protect Physicians*, 82 DEF. COUNS. J. 172 (2015); Michael B. Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 SAN DIEGO L. REV. 137 (2009). *See also infra* note 77 and accompanying text.

[5] Indeed, to the economist, apologies are a puzzle as ''they must be regarded as *cheap talk*'' as ''the only thing that is relevant is the expected magnitude of penalties.'' Murat C. Mungan, *Don't Say You're Sorry Unless You Mean It: Pricing Apologies to Achieve Credibility*, 32 INT. REV. L. ECON. 178, 178 (2012). For this reason, Mungan proposes that a special penalty will be levied on those who apologize. *Id.*, at 179. Our approach here is broader and we acknowledge the cost of delivering an apology, although we believe that it is much smaller for commercial actors.

[6] *See infra* section II.A.

[7] We also explain that even if apologies are not merely strategic, *i.e.*, they have a real cost for the injurer, they may be socially undesirable. The reason, which we explain in

The policy implications of our argument flow from understanding the democratic gap inherent in these laws, as well as their potential harmful implications for victims' safety and welfare. Because our points here were overlooked and avoided public scrutiny or scholarly analysis, we believe that as a first measure, all planned future expansions of these laws—to more states, the federal level, and other areas of law—should be suspended. The effect of these laws on safety must be carefully evaluated, especially in the context of medical malpractice where apologies are becoming institutionalized and streamlined. Public discourse should internalize the homomorphism of apology laws and tort reform and judge them accordingly. Finally, judges should be made aware of the side effects of apologies and learn to approach them with greater caution in commercial settings.

Our argument explains, among other things, why we suddenly witness deep interest from commercial actors in the virtues of apologies in the context of private law.[8] These reformers realized that by using the uncontroversial rhetoric of apologies and penance they can mobilize legislators from both parties. Hence, the support of apology laws by commercial interest should not be viewed as a commendable fusion of social and moral norms with business practices, but rather a self-interested decision with potentially harmful social effects.

To provide a sense of the magnitude of the effect commercial apologies have on victims, it is useful to consider the results of studies done on payments to victims in states that enacted apology laws.[9] These studies, concentrating on hospitals, show a reduction of as much as 60% in payments to victims. This translates to a reduction of $32,000-$65,000 in legal payouts per case,[10] which for many victims marks the difference between

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greater detail in Section II.A.2, is that damages payments are transfers between individuals which are, largely, socially neutral. Apologies, per this assumption, have real costs. While it would be undesirable to replace a costless transfer with a costly action, injurers may nonetheless do so, especially if they are encouraged by law.

[8] We do not address in this paper the topic of public apologies or those made by states, which raises distinct issues, see MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998); and Michael R. Marrus, *Official Apologies and the Quest for Historical Justice* (Munk Centre, Occasional Paper III 2006).

[9] *See infra* section II.C.

[10] *See* Benjamin Ho & Elaine Liu, *What's an Apology Worth? Decomposing the Effect of Apologies on Medical Malpractice Payments Using State Apology Laws*, 8 J. EMPIR. LEG. STUD. 179, 192 (2011) ($32,665); Benjamin Ho & Elaine Liu, *Does Sorry Work? The*

being able to afford proper treatment for their accidents or suffering from disability and poverty. For firms, on the other hand, the costs of apologies are relatively marginal, and there is a large consensus that apologies are cost-saving devices that can cut down costs by millions of dollars in regulatory fines, judgments, and public outrage.[11]

The Article has three Parts. In Part I we explore the unexpected camaraderie of ethicists and tort reformers. We show how the legal apology movement was co-opted by the tort reform lobby to successfully effect tort reform across the nation. Part II grounds apologies in tort theory and explains how apologies can undermine deterrence in commercial settings. Our theoretical analysis suggests that the problem is most acute if apologies are cheap to produce and have a strong effect on victims. We then survey recent developments in commercial apologies that show that commercial apologies have indeed become cheaper and are highly effective. Part III examines the theoretical and policy implications of these developments. We argue that the evidence in support of apology law reform is weak and while much empirical evidence is needed, the existing evidence is consistent with the concern that apology laws undermine liability. After a brief conclusion, an Appendix details our analysis using a formal economic model.

Impact of Apology Laws on Medical Malpractice, 43 J. RISK UNCERTAIN. 141 (2011) ($58,000-$73,000 for severe cases, $16,989-$24,017 for less severe cases, but -$3,132-$431 for insignificant cases, suggesting a potential increase in payouts for those cases). *See also* Benjamin J. McMichael et al., *Sorry is Never Enough: The Effect of State Apology Laws on Medical Malpractice Liability Risk*, manuscript (2016) https://www.owen.vanderbilt.edu/faculty-and-research/upload/Apology-Paper-032516.pdf ($65,000).

[11] *See e.g.*, Erin O'hara O'Connor, *Organizational Apologies: BP as a Case Study*, 64 VAND. L. REV. 1957, 1977-1979 (2011) (discussing the role and effect of corporate apologies).

I. STRANGE BEDFELLOWS: OF ETHICISTS AND TORT REFORMERS

In recent decades, legal scholars from distinct disciplines—ethicists, dispute resolution experts, and sociologists—have formed a movement that challenged the traditional approach of the law to apologies. This Part tracks the rise of this movement and its internal discourse. It then shows how the rhetoric developed by this movement was co-opted by commercial interests who lobbied for apology laws in state legislatures. These attempts were immensely successful, and this part concludes by documenting the change in the legal landscape.

A. Apologies in Legal Scholarship

In the early 90s, a movement of loosely formed "Legal Apologists" started to gain traction.[12] The Legal Apologists critiqued the resolution of conflict by the legal system for being overly abrasive to the relationship of the parties. Instead, they argued that apologies can provide an effective and wholesome solution to disputes. Despite the perception that apologies are private and informal acts, they argued that the law has an important facilitative role.[13] In their view, the law should encourage individuals to apologize or, at the very least, not stand in the way of those who wish to apologize.

The Legal Apologists claimed that apologies have a wide-array of benefits. When an individual is wronged, an apology by the responsible party may acknowledge the harm done to the victim and the victim's

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[12] *See* Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, 487-88 (1986) (arguing that incorporation of apologies into the American legal culture would reduce litigation and repair relationships); Aviva Orenstein, *Apology Excepted: Incorporating A Feminist Analysis Into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 247 (1999) (advocating legal protection of apologies); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999). (Explaining the benefits to clients from apologies). On the trend, see Aaron Lazare, *The Healing Force of Apology in Medical Malpractice and Beyond*, 57 DEPAUL L. REV. 251, 251 (2008) ("Beginning in the early 1990s, there was a surge of academic and public interest in apologies.").

[13] *See, e.g.*, Cohen, *supra* note 12, at 1011 ("Although a physician may wish to tell a patient when he has made a mistake, lawyers often order doctors to say nothing."); *See also* Farmer, *supra* note 4, at 249 (calling apologies "legally dangerous").

agency;[14] reduce feelings of anger and aggression by the victim;[15] control the attribution of fault to the responsible party;[16] and start the process of healing.[17] As a consequence, apologies are said to mend the social fabric

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[14] *See* AARON LAZARE, ON APOLOGY 107 (2004) (considering acknowledgment of harm as the foundation of an apology); Michael C. Jones, *Can I Say I'm Sorry?: Examining the Potential of an Apology Privilege in Criminal Law*, 7 ARIZ. SUMMIT. L. REV. 563, 567 (2014) (by apologizing "[t]he offender acknowledges the harm he caused").

[15] *See* Erin A. O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1124 (2002) ("In the face of a heartfelt apology, victims, . . . report feeling a near instantaneous erosion of anger and pain.); Ken'ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERS. SOC. PSYCHOL. 219 (1989) (testing empirically the effects of apologies on victim's aggression, finding soothing effects).

[16] Psychologists find that apologies have a paradoxical effect. On the one hand, apologies imply guilt and responsibility but on the other hand, experiments consistently find that apologies reduce the attribution of fault to the wrongdoer and increase the belief that the wrong happened for reason outside the wrongdoer's control, See Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERS. SOC. PSYCHOL. 742, 745, 749 (1982) (finding that children attribute less responsibility to apologizing transgressors); and Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. Pers. 281, 308 (1991) ("confession alter perceptions of the confessor's moral character and causal attributions for the negative action."). On the paradox, see Jennifer K. Robbennolt, *Apologies and Reasonableness: Some Implications of Psychology for Torts*, 59 DEPAUL L. REV. 489, 492 (2010).

[17] *See* LAZARE, *supra* note 14, at 263 (listing the healing properties of apologies); Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQUETTE L. REV. 295, 297 (2007) (arguing that victims of crimes find "emotional restoration" and a "re-established sense of security" when receiving apologies). *See also* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 90 (2004) (apologies "heal offenders, victims, and communities. Remorse and apology would teach offenders lessons, vindicate victims, and encourage communities to welcome wrongdoers back into the fold"); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1273-74 (2006); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1176-77 (1997) (arguing that apologies can be viewed as a form of compensation as they heal part of the harm).

torn by the transgression,[18] restore prior relationships;[19] and facilitate negotiation.[20] Importantly, the apology expresses a reestablished obligation to refrain from future transgressions.[21]

For the Legal Apologists, all these advantages link to one

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[18] NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY 13 (1991) ("An apology thus speaks to an act that cannot be undone but that cannot go unnoticed without compromising the current and future relationship of the parties, the legitimacy of the violated rule, and the wider social web in which the participants are enmeshed." He also argues that apologies serve to reaffirm the victim's membership in the community.); Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44(3) SOCIAL PSYCHOLOGY QUARTERLY 271, 354 (1981) (noting that by apologizing the offender "reaffirms the values of the rules that have been broken"); Erving Goffman, *On Face-Work*, 18 PSYCHIATRY 213, 220 (1955) (the apology is intended to "correct for the offense and reestablish the expressive order"). *See also* Samul Oliner, *Altruism, Apology, Forgiveness, and Reconciliation as Public Sociology*, *in* HANDBOOK OF PUBLIC SOCIOLOGY 375, 380 ("Through genuine apology and forgiveness, harmony may be restored").

[19] *See* Orenstein, *supra* note 12, at 241 ("apologies can transform individuals and regenerate relationships."). According to equity theory, individuals strive to a sense of equity in their relationship which is disturbed by wrongdoing. The sense of imbalance is reported to create anxiety, *see generally* Brad R.C. Kelln & John H. Ellard, *An Equity Theory Analysis of the Impact of Forgiveness and Retribution on Transgressor Compliance*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 864 (1999). Apologies are found to restore the sense of equity by demonstrating that the offender suffers too, See Robbennolt, *supra* note 16, at 492 and the sources cited there. *See also* Kish Vinayagamoorthy, *Apologies in the Marketplace*, 33 PACE L. REV. 1081, 1105 (2013) (arguing that the apology "reminds the transgressor of the value of the relationship") (citations omitted).

[20] *See* Cohen, *supra* note 12, at 1020 (Indignity can be a large barrier to compromise, and in many cases, an apology is needed"); Robin E. Ebert, *Attorneys, Tell Your Clients to Say They're Sorry: Apologies in the Health Care Industry*, 5 IND. HEAL. L. REV. 337, 339 (2015) (advocating apologies as a settlement strategy); Nancy L. Zisk, *A Physician's Apology: An Argument Against Statutory Protection*, 18 RICH. J.L. PUB. INT. 369, 390 (2015) (arguing that because of the "powerful empirical data suggesting that physicians can reduce their chances of being sued by communicating openly and honestly with their patients, ... the conclusion seems inescapable that physicians must disclose mistakes and admit responsibility for those mistakes."). For a general discussion of research in emotion in negotiations, see Max H. Bazerman et al., *Negotiation*, 51 ANN. REV. PSYCHOL. 279, 285-86 (2000).

[21] *See* Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity and Expectancies About Repeating Transgression*, 22 BASIC APPL. PSYCHOL. 291 (2000); Runnels, *supra* note 4, at 143-44 ("The apologetic offender will therefore be perceived as less likely to engage in similar offending behavior in the future."); Mihaela Mihai, *Apology*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (2015) http://www.iep.utm.edu/apology/ (noting that to be considered valid, the apology must imply an intention to refrain from similar actions in the future).

overarching theme: apologies facilitate dispute resolution in an effective manner.[22] By defusing victims' desire for vindication,[23] apologies avoid disputes and encourage settlements, thus saving protracted legal proceedings with their emotional and pecuniary costs.[24]

To demonstrate that these benefits are not merely theoretical, the Legal Apologists have set to prove them empirically, mostly in lab settings. The resulting studies have shown that victims of wrongful conduct report a strong desire to receive an apology, express satisfaction once this need is met, and, as a result, manifest a high willingness to settle and forego litigation.[25] A leading example is Jennifer Robbennolt's work. In a series of

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[22] *See* Cohen, *supra* note 12, at 1061 ("encouraging apologies to occur early on may prevent many injuries from escalating into legal disputes"); Farmer, *supra* note 4, at 244 ("A sincere apology can help promote judicial economy by unlocking stalled settlement negotiations . . . [and] can help ensure that impasse is avoided altogether."); Ebert, *supra* note 20, at 339 (noting that apologies can reduce litigation Jeffrey S. Helmreich, *Does "Sorry" Incriminate? Evidence, Harm and the Protection of Apology*, 21 CORNELL J.L. PUB. POL'Y 567, 567 (2012) ("Apology has proven a dramatically effective means of resolving conflict and preventing litigation");Orenstein, *supra* note 12, at 242 ("apologies can substitute for costly litigation"); Zisk, *supra* note 20, at 390 ("In light of the powerful empirical data suggesting that physicians can reduce their chances of being sued by communicating openly and honestly with their patients, ... the conclusion seems inescapable that physicians must disclose mistakes and admit responsibility for those mistakes.").

[23] *See supra* note 17.

[24] Steven Shavell and Mitchell Polinsky estimate that the costs of the legal system absorb almost 50% of payments made by plaintiffs to defendants. Steven Shavell & A. Mitchell Polinsky, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1470 (2010) ("for each dollar that an accident victim receives in a settlement or judgment, it is reasonable to assume that a dollar of legal and administrative expenses is incurred").

[25] *See* Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001 (2003) (finding that patients expressed a desire to receive an apology following a medical error); Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Prenatal Injuries*, 267 JAMA 1359, 1361 (1992) (noting that 24% of patients filed claims "when they realized that physicians had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them"); Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 L. & SOC'Y REV. 105 (1990) (finding that absence of apology motivates patients to bring suit); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (finding that 37% of respondents said that they would not have sued had there been a full explanation and an apology and 14% indicated that they would not have sued had there been an admission of negligence); Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of*

experimental studies, Robbennolt found that apologies increase victims' belief that they would win their lawsuits, but, paradoxically, that they had more favorable view of the injurer, were more willing to settle, and were more receptive to lower settlement offers.[26] Robbennolt also found that victims who received an apology believed that the injurer is more likely to be careful in the future.[27]

Armed with theory and evidence, the Legal Apologists quickly swept legal academia. As others recently noted: "In the last two decades, apology legal scholarship has become increasingly robust."[28] We found in our analysis of the literature hundreds of articles on the issue, starting mostly in the 90s and peaking in popularity in the 2000s.[29]

The ideas inspired by the movement quickly spread to other areas of law, with apologies becoming the main item on the agenda for advocates of

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Internal Medicine Patients in an Academic Setting, 156 ARCHIVES OF INTERNAL MED. 2565, 2566 (1996) (finding that 98% of respondents "desired or expected the physician's active acknowledgement of an error." And that "patients were significantly more likely to either report or sue the physician when he or she failed to acknowledge the mistake."). *See also* Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433, 442 (1998) (survey of victims of sexual abuse that finds a desire for apologies); Piper Fogg, Minnesota System Agrees to Pay $ 500,000 to Settle Pay-Bias Dispute, CHRON. HIGHER EDUC., Feb. 14, 2003, at A12 (describing class-action plaintiff's disappointed reaction to the settlement: "I want an apology," she said, "and I am never going to get it") (internal quotes omitted); Editorial, The Paula Jones Settlement, WASH. POST, Nov. 15, 1998, at C6.

[26] *See* Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333 (2006); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 462 (2003). *See also* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, *93* MICH. L. REV. 107, 148-50 (1994) (finding, but with low statistical significance, that apologies affect willingness to settle).

[27] *See* Robbennolt, *supra* note 16, at 506. For the effect of apologies outside the lab, *see infra* section II.C..

[28] Xuan-Thao Nguyen, *Apologies as Intellectual Property Remedies: Lessons from China*, 44 CONN. L. REV. 883, 891 (2012) ("In the last two decades, apology legal scholarship has become increasingly robust").

[29] Data acquired from Lexis Advance Search, Search terms: title(apolog*) OR summary(apolog*) in title or summary of all Law Review and journal articles between 1984-2015. A total of 326 results were found.

"restorative justice",[30] "therapeutic jurisprudence",[31] and alternative dispute resolution, with special emphasis on mediation.[32] Apologies were offered as a mean of reforming diverse areas of law, such as criminal law,[33] medical malpractice,[34] tort law,[35] and intellectual property.[36] It was even suggested that part of the Federal Register ("probably one of the driest publications ever printed") would include a section for governmental apologies.[37]

This account of the literature will not be complete without mentioning the internal divisions within the Legal Apologists. The most common objections are that providing legal protection to apologies would negate their moral value,[38] that people would fake apologies and courts would be ill-positioned to verify their authenticity,[39] or that frequent

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[30] *See* Bibas & Bierschbach, *supra* note 17, at 103 ("Restorativists consider apology and remorse important as part of a holistic process"); Alana Saulnier & Diane Sivasubramaniam, *Effects of Victim Presence and Coercion in Restorative Justice : An Experimental Paradigm*, 39 L. HUM. BEHAV. 378, 379 (2015). ("apology is central to restorative justice").

[31] *See* Jones, *supra* note 14, at 565-68 (2014) (surveying therapeutic justice and apologies in criminal law); *See also* Susan Daicoff, *Apology, Forgiveness, Reconciliation & Therapeutic Jurisprudence*, 13 PEPP. DISP. RESOL. L.J. 131, 153-57 (2013) (surveying the field of therapeutic jurisprudence).

[32] *See* Bibas & Bierschbach, *supra* note 17, at 130-35 (advocating greater role for mediation in criminal settings because it encourages apologies and remorse); Angela M. Eastman, *The Power of Apology and Forgiveness*, 36 VT. B.J. 55 (2014). (Discussing the effectiveness of apologies in dispute resolution); Levi, *supra* note 17, at 1165.

[33] *See generally* Bibas & Bierschbach, *supra* note 17 (calling for a fuller integration of apologies and expressions of regret into criminal procedure).

[34] *See* Gailey, *supra* note 4, at 177-78.

[35] *See e.g.*, Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000).

[36] *See* Nguyen, *supra* note 28.

[37] *See* Eugene R. Fidell, *Sorry, 71 Fed. Reg. 1 (2006)*, 8 GREEN BAG 155, 156 (2005).

[38] *See, e.g.*, TAVUCHIS, *supra* note 18, at 34 (explaining that the potential for negative repercussions is an essential part of apologies); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L. J. 1135, 1142 (2000) (arguing that the morality of apologies derive from the exposure of the apologizing party to the consequences of the wrongful act). Interestingly, victims may also abuse apologies by refusing to accept apologies in order to use them as a basis for a lawsuit, see O'Hara & Yarn, *supra* note 15. For a critique stating that apologies are helpful even when they do not admit blame, see Helmreich, *supra* note 22, at 609.

[39] On strategic apologies, see Ebert, *supra* note 20, at 364 ("a wrongdoer might

apologies would lead victims to accept settlements that do not compensate them fully.[40] Despite these challenges, the movement itself is still going strong, seemingly in the belief that none of these challenges is insurmountable—which, as we will argue, is most understandable if the literature is read as focusing on interpersonal apologies.

B. Tort Reform

Moving from the high-minded Legal Apologists and their concern with nuances of ethics, we consider the seemingly unrelated world of tort reform. Tort reformers, known mostly for their activism in medical malpractice and product liability, fight to limit the costs imposed on defendants as a result of litigation, which they believe is excessive and biased. They argue that the specter of excessive liability affects the industry and especially physicians who are pressured to engage in so-called

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apologize for the wrong reasons"); O'Hara & Yarn, *supra* note 15, at 1186 ("[A]pology can be used as a tool for organizations to strategically take advantage of individual victims' instincts to forgive in the face of apology."); and Daniel Eisenberg, When Doctors Say, "We're Sorry," TIME, Aug. 15, 2007, at 50 (observing that many believe that "[a]pology laws . . . could just usher in an epidemic of playacting."). In one case, for example, a defendant who was ordered by the court to apologize published an ad in the newspaper—later on the same day—saying he was not really sorry. Amanda Garrett, Apologize or Go to Jail, Judge Orders Criminals to Say, 'I'm Sorry,' to Victims, PLAIN DEALER, Oct. 9, 1999, at 1B. *But see* Cohen, *supra* note 12, at 1065-66 (assuaging the concern that lawyers will advise clients to strategically apologize because of their ethical obligations). Others believe that even strategic apologies serve a useful social function. *See* Kahan & Posner, *supra* note 4 (advocating apologies as a shaming sanction); Orenstein, *supra* note 12, at 223 ("Even apologies that originate from self-protection, which are not entirely sincere or fully contrite, serve a vital social purpose."). On courts' ability, S*ee* Bibas & Bierschbach, *supra* note 17, Jeffrie G. Murphy, *Well Excuse Me! -- Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. STATE L. J. 371, 376 (2006). ("[expressions of remorse] are matters about which the state is probably incompetent to judge--it cannot even deliver the mail very efficiently"); Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1564 (1997) (expressing skepticism of courts' ability to detect dishonest apologies).

[40] *See* Levi, *supra* note 17, at 1171 ("For instance, critics might ask, if a plaintiff settles because she's emotionally fulfilled by an apology, isn't she being duped out of her legal entitlement --an entitlement that the apology itself makes concrete?"); Gabriel H. Teninbaum, *How Medical Apology Programs Harm Patients*, 15 CHAPMAN L. REV. 307, 309 (2011) ("modern apology programs appear to cool their marks out as a means of preventing them from speaking to a lawyer and becoming educated about their legal rights.")

"defensive medicine", i.e., prescribing tests and procedures for the sole purpose of reducing liability risk.[41] Both the costs of liability and those of defensive medicine are then passed on to the public in the form of higher health costs (or, in other fields, in the form of higher costs of products and services). To contain these costs, tort reformers suggest a series of methods that would curb the threat of excessive liability, such as damages caps. Opponents challenge these ideas, arguing that there is no evidence that liability is excessive, that defensive medicine is prevalent, or that tort reforms have any positive effects on the costs or quality of healthcare.[42]

To be clear—and clarity is often lacking in this debate—tort reform is not about making the tort system more efficient.[43] Both reformers and their opponents are open to making the system work better at a lower cost.[44] The focal point of contention is tort reform's objective to reduce *the deterrent effect of tort liability*. Tort reformers believe that damages in litigation are too high and so *overly-deter* potential injurers, such as physicians, which is the cause of 'defensive medicine' practices. Therefore, their call is to cap money damages as means of curbing the over-deterrent effect of litigation.[45]

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[41] David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 JAMA 2609 (Finding in a survey of 824 physicians that 93% practice defensive medicine).

[42] *See, e.g.*, Myungho Paik et al., *Will Tort Reform Bend the Cost Curve? Evidence from Texas*, 9 J. EMPIR. LEG. STUD. 173, 176-81, 209-11 (2012) (reviewing the literature and conducting an empirical analysis of the effect on costs).

[43] *See generally* Carl T Bogus, *Syposium: Introduction: Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 1 (2008) (tracking the history of the tort reform movement and noting the specific political meaning of the term). *See also* Rachel M. Janutis, *The Struggle Over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943 (2006).

[44] For example, the leading Democratic legislation of the past decade, § 6801 to the Patient Protection and Affordable Care Act ("Obamacare"), explicitly endorses efficiency oriented reforms to tort law ("develop and test alternatives to the existing civil litigation system as a way of improving patient safety, reducing medical errors, encouraging the efficient resolution of disputes, increasing the availability of prompt and fair resolution of disputes, and improving access to liability insurance, while preserving an individual's right to seek redress in court.").

[45] *See, e.g.*, Michael P Allen, *A Survey and Some Commentary on Federal "Tort Reform"*, 39 AKRON L. REV. 909, 910 (2006) ("arguments about tort reform are really arguments about restricting tort recoveries in one form or another." Incidentally, the author nonetheless uses a more expansive definition); Rachel M Janutis, *The Struggle Over Tort*

In terms of political economy, the tort-reform debate pits consumers and trial attorneys against professional, commercial, and business interests.[46] These opposing camps have mapped into political parties, with Republicans being strong proponents of tort reform against the opposition of Democrats, a somewhat ironic division in light of the history of tort law.[47] Most notably, President George W. Bush has strongly favored tort reform at the Federal level, calling to cap all money damages at $250,000,[48] while President Barack Obama has been largely opposed to damage caps.[49]

Tort reform has marked significant success. According to data collected by Ronen Avraham in 2012, 21 states have a cap on non-economic

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Reform and the Overlooked Legacy of the Progressives, 39 AKRON L. REV. 943, 944 (2006) (explaining that tort reformers seek to "limit[] the availability of relief and the amount of relief in personal injury actions"); Geoff Boehm, *Debunking Medical Malpractice Myths : Unraveling the False Premises Behind "Tort Reform",* 5 YALE J. HEAL. POL'Y, L. ETHICS 357, 358 (2005) (explaining tort reform as an attempt to limit victims' rights through caps on damages). Another pillar of tort reform is the screening of frivolous lawsuits, which tort reformers believe are common. This would seem to be an attempt to make the system more efficient, but opponents view this measure as an attempt to curb *all* litigation, regardless of merit. *See* David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1086-87 (2006) (arguing that the true intent of tort reformers in this area is to make "the system less remunerative").

[46] *See* Todd J. Zywicki, *Public Choice and Tort Reform*. LAW AND ECONOMICS WORKING PAPER (2000) (arguing that lawyers are pushing for expansion of tort liability), Paul H. Rubin, *Public Choice and Tort Reform*, 124 PUBLIC CHOICE 223, 230 (2005) (describing the tension between the different groups). *See also* Rachel M Janutis, *The Struggle Over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943, 945-46 (2006).

[47] *See* Stephen D. Sugarman, *Ideological Flip-Flop : American Liberals Are Now the Primary Supporters of Tort Law*, *in* ESSAYS ON TORT, INSURANCE, LAW AND SOCIETY IN HONOUR OF BILL W. DUFWA 1105 (Jure Forlag ed., 2006) (Identifying tort law with conservative values and suggesting that the Democratic support of the tort system is a recent one), Paul H. Rubin, *Public Choice and Tort Reform*, 124 PUBLIC CHOICE 223, 230-31 (2005) (explaining the mapping of these interests in partisan terms).

[48] George W. Bush, Remarks at the University of Scranton in Scranton Pennsylvania, January 16, 2003 ("for the sake of affordable and accessible health care in America, we must have a limit on what they call non-economic damages. And I propose a cap of $250,000").

[49] CBS, 60 Minutes, September, 11, 2009 (""What I would be willing to do is to consider any ideas out there that would actually work . . . [damages] caps will not do that."). In this interview, President Obama clarified a statement he gave to the congress, acknowledging the potential importance of defensive medicine, see White House, Remarks by the President to a Joint Session of Congress on Health Care, September, 9th, 2009.

damages, 18 on punitive damages, and 22 on total compensation.[50] Matter and Stutzer recently found that Republican leadership in a state leads to a large jump in the probability that tort reform will be undertaken.[51] According to our own analysis, states that voted Republican in the 2012 election were far more likely to have some damages caps than those that voted Democratic. Specifically, out of 24 Republican states, 19 had caps, whereas out of 26 Democratic States, only 16 had caps.

Tort reform has made considerable inroads, but it also faces strong opposition. First, politically, as we noted Democratic States are traditionally averse to tort reform. Second, consumer and attorney lobby mounts a strong opposition. And third, various courts have held damages caps unconstitutional, mostly due to concerns of their limiting effect on the right to a trial by jury.[52] These challenges limit the ability of tort reformers to push forward. The difficulty of advancing their agenda through ''the front door'' has put pressure on reformers to find alternative venues for progress, ones that could sidestep the political, interest-group, and legal obstacles. Realizing this, reformers formed a new alliance with unlikely partners – the Legal Apologists.

C. How Tort Reformers Fought and Won the Apology Battle in State Legislatures

Much to the envy of legal scholars everywhere, the Legal Apologists have had a tremendous impact on policy. These ethicists and dispute resolution specialists found surprising support from the pragmatic and well-funded tort reform advocates.[53] With the rhetoric of the legal apologists and

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[50] Ronen Avarham, Database of State Tort Law Reform, Version 5.1 (Clever), https://law.utexas.edu/faculty/ravraham/dstlr.php.

[51] *See* Ulrich Matter & Alois Stutzer, *The Role of Party Politics in Medical Malpractice Tort Reforms*, 42 EUR. J. POLIT. ECON. 17 (2016),

[52] *See* Bryan J Chase et al., *Are Non-Economic Caps Constitutional?*, 1 DEF. COUNS. J. 154 (2015) (reviewing the judicial battle of the constitutionality of non-economic damages caps).

[53] NICK SMITH, JUSTICE THROUGH APOLOGIES: REMORSE, REFORM, AND PUNISHMENT 283 (2015) (Arguing that "Tort reformers often bundle apology legislation within" other tort reform measures"); Cohen, *supra* note 12, at 856 (2002) (suggesting that apology laws depend on support by "insurance companies, medical associations and Fortune 500 companies"); Teninbaum, *supra* note 40, at 311 ("industry lobbyists exerted influence on lawmakers to create special medical apology shield laws"); *See also* Runnels, *supra* note 4, at 484-85 (2011) (noting the lobby efforts of Sorry Works!, a coalition of physicians,

the lobby efforts of tort reformers, the movement struck a chord with legislators and judges across the country, prompting them to reform the law to accommodate the use of apologies.

The same supporters of tort reform back apology laws: insurance companies, medical associations, and large companies in diverse industries.[54] However, they do so using a new rhetoric, clearly differentiating between apology laws and tort reforms.[55] In Madison, Wisconsin, for example, ''[t]he medical lobby, supported by powerful business groups, outmaneuvered trial lawyers . . . and won passage of the 'I'm sorry" bill'.''[56] This lobby adopted a new rhetoric, arguing that apology laws are useful not because they curb liability but because ''at these difficult times, people want, need and deserve compassion.''[57] Similarly, in Massachusetts, various healthcare organizations lobbied for apology laws explaining this as a move towards ''a very proactive system where physicians can advocate for patients who are injured rather than being told they can't even talk to them.''[58]

Tort reformers borrowed from Legal Apologists both the means and the rhetoric to advance their goals. The most important item on the agenda of reformers was the creation of ''safe harbor'' for apologies.[59] Apologies

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insurers, hospital administrators and patients).

[54] *Id.*

[55] Doug Wojcieszak et al., *The Sorry Works! Coalition: Making the Case for Full Disclosure.*, 32 JT. COMM'N J. QUAL. PATIENT SAF. 344, 344 (2006) (portraying apology laws as a "middle-ground" approach to the "medical malpractice crisis").

[56] Cary Spivak & Kevin Crowe, 'I'm Sorry' Bill Latest Example of Doctors' Clout, June 28, 2014, JOURNAL SENTINEL.

[57] Patrick Marley & Jason Stein, "Senate Passes Chemotherapy, Cannabis Oil Bills, (Apr. 1, 2014), Journal Sentinel (quoting Sen. Leah Vukmir (R-Wauwatosa)).

[58] Massachusetts Medical Society, Disclosure, Apology and Offer: A New Approach to Medical Liability (June, 2012) http://www.massmed.org/News-and-Publications/Vital-Signs/Back-Issues/Disclosure,-Apology-and-Offer--A-New-Approach-to-Medical-Liability/.

[59] *See* Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 J. DISP. RESOL. 115, 128-29 (1996) (providing early support to apology safe harbor laws), Orenstein, *supra* note 12 (calling for safe harbor laws). The nation's apology laws originate in Massachusetts. MASS. GEN. LAWS ANN. CH. 233, § 23D (West Supp. 1998). A retired legislator's daughter was hit by a car but the driver refused to apologize because of fear of legal liability. This led to the adoption of the first apology law. *See* Taft, *supra* note 38, 1051-52 (2000).

often convey evidence of fault and are therefore admissible at trial.[60] Reformers adopted the discourse and rhetoric of the Legal Apologists, who argued that it would be wrong to punish people who "did the right thing" and apologized.[61] The Legal Apologists further argued that existing evidentiary rules make defendants fear apologies are "legal suicide"[62] and provide an undue and unfair barrier to injurers from apologizing.[63]

The second item on the reformers' agenda was the promotion of apologies in less formal settings. Both reformers and legal apologists sought to promote—for very different reasons, of course—the role of apologies in mediation,[64] settlement procedures,[65] and the early stages of trial.[66] Finally, the third item was more institutional—providing judges with the power to mandate apologies as an additional or substitute aspect of sanctions.[67]

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[60] FED. R. EVID. 801(d)(2). Federal law only protects apologies if they are made during settlement negotiations. *See* FED R. EVID. 408; Cohen, *supra* note 12, at 1032-36 (1999). An apology might also be inadmissible if it is implied from an offer to cover medical expenses, FED R. EVID. 409. The rationale for this rule is that "such payment or offer [to pay the victim's medical expenses] is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person." FED. R. EVID. 409 advisory committee's note.

[61] *See* Cohen, *supra* note 12, at 864 ("The law should not punish people for taking a moral step"); Orenstein, *supra* note 12, at 235-36 ("[A] justification for [these rules] arises from a desire to reward goodness . . . . We do not want to punish the 'blessed peacemakers[.]' We certainly do not want to disadvantage individuals who do the right thing.").

[62] Eisenberg, *supra* note 39.

[63] *See* Robbennolt, *supra* note 26, at 465 ("The conventional wisdom among legal actors has been that an apology will be viewed as an admission of responsibility and will lead to increased legal liability", although she also notes that there is no empirical research to supports this perception). Cohen, *supra* note 12, at 1010 (1999) ("If a lawyer contemplates an apology, it may well be with a skeptical eye: Don't risk apology, it will just create liability").

[64] *See* Levi, *supra* note 17.

[65] *See* Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored toward Legal Solutions*, 81 BOST. UNIV. L. REV. 289, 292 (2001).

[66] *See* Etienne &. Robbennolt, *supra* note 17, at 299 ("encouraging apologies in earlier stages of the criminal law process may be a laudable goal"); Bibas & Bierschbach, *supra* note 17, at 128-29 (advocating that the tender of an apology would lead to lenient charges, forego arrests, and deferral of prosecutions).

[67] *Cfr.* White, *supra* note 17, at 1297 ("Requiring unrepentant officials to endure a small amount of psychological discomfort [by coerced apologies] is a small price to pay to help injured individuals"), and Latif, *supra* note 65, at 311 (forced apologies "can mitigate anger, shame or educate the offender, or improve prospects for settlements"); Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. &

Reformers have been extremely successful, conquering 36 state legislatures in only a decade.[68] Additionally, courts have seemed to internalize apology norms.[69] Some courts are said to apply these norms "with gusto",[70] leading them to treat apologies as valid grounds for mitigating money damages,[71] lowering sentencing,[72] and exempting legal

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SOC. CHANGE 1, 50-57 (1997) (advocating an equitable remedy of apologies in civil litigation) with Pennsylvania Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n, 306 A.2d 881, 891 (1973) (Justice Pomeroy concurring) ("An apology is a communication of the emotion of remorse for one's past acts. To order up that particular emotion, or any other emotion, is beyond the reach of any government".); Levi, *supra* note 17, at 1178 (1997) (arguing that involuntary apology is "just talk"), Nick Smith, *Against Court-Ordered Apologies*, 16 NEW CRIM. L. REV 1 (2013) (arguing that court-ordered apologies serve little function).

[68] *See* Latif, *supra* note 65, 301 (reporting on California, Massachusetts, and Texas in 2001). Compared with 36 states today, see EBS CONSULTING, *Apology Protection Laws in 36 States Letting Physicians be Human Again*, Aug. 18, 2015, http://blog.ebs-consulting.com/apology-protection-laws-in-36-states-letting-physicians-be-human-again. *See also* Zisk, *supra* note 20, at 390 at 375 and n. 43; Ebert, *supra* note 20, at 366. The most prevalent form of apology laws is safe-harbor to expressions of sympathy and empathy (e.g., "I am sorry you were hurt"), see, e.g., MONT. CODE. ANN. §26-1-814 (providing safe harbor for a statement "expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence relating to the pain, suffering, or death of a person."), although several states provide a more robust protection and make inadmissible even liability-assuming apologies (e.g., "I am sorry I hurt you through my negligence").

[69] Judges show reluctance to allow an apologetic admission of guilt to be the sole basis for establishing the breach of a duty of care. In the medical context, see Ebert, *supra* note 20, at 349 ("the use of apologies and other extrajudicial statements made by the physician following a medical error are not alone sufficient to prove negligence."). *See also* Lashley v. Koeber, 156 P.2d 441, 445 (Cal. 1945) (physician's admission that the mistake is "all my own" is "insufficient to establish negligence"), Phinney v. Vinson, 605 A.2d 849, 850 (Vt. 1992) (Doctor's apology is insufficient to establish a breach of standard of care). *But see* Senesac v. Assocs. in Obstetrics & Gynecology, 449 A.2d 900, 901 (Vt. 1982) ("It is conceivable that in some circumstances the extrajudicial admission of a defendant physician could establish a prima facie case of negligence"). For more examples see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 634 & nn.171-72 (1996) (citing various examples of court-ordered apologies).

[70] White, *supra* note 17, at 1268-69. S*ee also* Latif, *supra* note 65, at 296-98.

[71] *See, e.g.,* Groppi v. Leslie, 404 U.S. 496, 506 n.11 (1972) (providing mitigated penalties for contempt due to an apology); Johnson v. Smith, 890 F. Supp. 726, 729 n.6 (N.D. Ill. 1995) (apology mitigated punitive damages). *See also* Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing,* 1996 J. DISP. RESOL. 115 (1996) (reviewing the legal effects of an apology).

[72] *See* U.S. Sentencing Guidelines Manual § 3E1.1, cmt. n.3 (2003) (providing a sentence reduction of two to three levels for clear demonstrations of acceptance of

liability for crimes.[73]

This fast adoption amazed many: ''Shortly after the idea of excluding apologies from admissibility into evidence was raised in academic circles . . . it rapidly spread to the policy arena''.[74] Yet, this success has not satiated reformers' appetite; they now seek to expand the scope of apology laws,[75] apply them to other areas of civil and criminal law,[76] enact them at the federal level,[77] and make them more uniform.[78] Additionally, some advocate that judges be able to compel the government to apologize in civil rights cases.[79]

Tort reformers managed an impressive feat. On the one hand, they draw on the resources and financial support of business interests that invest hundreds of millions of dollars each year to advance tort reform.[80] On the other hand, they garnered large, bipartisan support. They even swayed consumer advocates and lawyers which were willing to withdraw their traditional opposition to tort reform in this context.[81] Perhaps more

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responsibility); Bibas & Bierschbach, *supra* note 17, at 92-95 (showing how criminal law positively accounts for apologies in sentencing).

[73] *See, e.g.*, Kahan & Posner, *supra* note 4 (reporting of a judge substituting a 10 year punishment for embezzlement with an apology).

[74] Cohen, *supra* note 12, at 819. *See also* Gailey, *supra* note 4, at 178-81 (surveying the development of state apology laws).

[75] *See, e.g.*, Matthew Pillsbury, *Say Sorry and Save: A Practical Argument for a Greater Role for Apologies in Medical Malpractice Law*, 1 S. NEW ENG. ROUNDTABLE SYMP. L.J. 171, 200 (2006) ("As for situations where apologies are admissible, courts and lawmakers across the country can learn from the strides made by their counterparts in other states [where apologies are protected]").

[76] *See, e.g.*, Jones, *supra* note 14, at 580-81(advocating an 'apology privilege' that would create a safe harbor for apologies in criminal proceedings).

[77] *See supra* note 4. *See also* Cohen, *supra* note 12, at 1061; Helmreich, *supra* note 22.

[78] *See* Zisk, *supra* note 20, at 377-78 (noting that in Iowa, chiropractors are protected, but chefs are not); *See also* Iowa Code § 622.31 (protecting only licensed professionals).

[79] *See* White, *supra* note 17 (advocating court-coerced apologies as a civil right remedy).

[80] Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. 183, 184 (2007).

[81] PUBLIC CITIZEN, MEDICAL MALPRACTICE BRIEFING BOOK 85 (2004) (suggesting apology laws as an alternative to tort reform); Pennsylvania Governor Signs Benevolent Gesture Medical Professional Liability Act (Oct. 25, 2013), CLAIMS JOURNAL (reporting that after a decade of back and forth battle between doctors and lawyers "the two professions recently changed lobbying tactics by mutually agreeing on a new reform that both sides say

remarkable is that despite his known opposition to tort reform, Barack Obama co-signed a bill he authored with Hillary Clinton that sought to establish federal apology safe harbors.[82] Democratic lawmakers seem as keen to adopt apology laws as Republican lawmakers, as evident by wide adoption in both blue and red states.[83]

In sum, apology laws are promoted using the rhetoric of virtue, improved communications, and ethics developed by legal intellectuals. What is never explicitly noted, let alone considered, is the broader effects of apology laws on incentives, harms, and other social costs. These issues are simply suppressed and instead apology laws are framed as a neutral measure that improves dispute resolution without sacrificing victims' rights. The acceptance of these laws by those who traditionally oppose tort reform thus presents somewhat of a paradox. It is our task now to show why apology laws undercut deterrence and are thus, in effect, comparable to other measures of tort reform.

II. COMMERCIAL APOLOGIES: THEORY AND PRACTICE

We have seen that tort-reformers have joined hands with legal scholars and have managed to change the law in most states. This Part first provides a theoretical framework that allows evaluating the effect of apologies on behavior. This theory highlights the importance of the cost of apologies and their effectiveness; given that, this Part considers separately both issues, showing how the costs of commercial apologies are declining while their effectiveness remains considerable.

A. A Theory of Apologies

1. The Goals of Tort Law and Apologies

The two primary goals of tort law are compensation of victims and

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will help.")

[82] *See* S.1784: National MEDiC Act, 109th Congress, 2005-2006 https://www.govtrack.us/congress/bills/109/s1784; Runnels, *supra* note 4, at 156 (discussing the bill), Clinton & Obama, *supra* note 1, at 2206 (discussing the bill).

[83] *See* Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK UNCERTAIN. 141, 144 note 5 (2011) (noting that regression analysis shows that "political composition in the State Senate and State House has no significant explanatory power on the passage of apology laws." They also find that apology laws are not correlated with other tort reforms.).

deterrence of wrongdoers; an important secondary goal is the reduction of litigation costs.[84]

Controlling the costs of disputes, and litigation in particular, has been the prominent theme in the writing of the Legal Apologists.[85] They argued that apologies help reduce litigation through the dissipation of victim's anger or need for vengeance. For the most part, the evidence seems to support this assertion, although recent empirical work casts some doubt.[86] From a cost-perspective, then, apologies seem to have a positive effect. If one approaches a case after a dispute had already arisen, it may be appealing to focus on controlling its costs. And indeed, most of the Legal Apologists are conflict resolution experts who meet disputes after they arise.[87] But tort law adopts a broader perspective, and in this view, controlling litigation costs is generally a secondary consideration.

What has been missing from the Legal Apologists' analysis is the effect of apologies on deterrence. In a fundamental oversight, the Legal Apologists have failed to account for this central goal of tort law. Thus, they have never accounted for the ex-ante effects of apologies on primary behavior, namely, how does the possibility of apologizing after the fact affect injurers' decisions to engage in harmful activities in the first place? How do apologies change the level of behavior? Would a more favorable treatment of apologies by the legal system induce or suppress accidents? Once considered, reflection reveals a tension between apologies and deterrence. To the extent that apologies reduce the cost of an accident for the injurer—which is the point just discussed—they provide the injurer with less of a reason to avoid the accident. Put differently, if apologies allow the injurer to limit exposure to liability, then the injurer has—all other things

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[84] *See generally* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 192-93 (2004); Mark A Geistfeld, *Compensation as a Tort Norm*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 65 (2013) (advancing compensation as the central goal of tort law); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) (loss spreading). *See also* Steven Shavell & A. Mitchell Polinsky, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010) (critically assessing the effectiveness of tort law in meeting these goals in the context of product liability)

[85] *See supra* note 22.

[86] *See infra* II.C.

[87] For example, Deborah L. Levi is a practicing mediator; Jennifer K. Robbennolt is an expert on dispute resolution; and Robyn Carroll is an expert on dispute resolution and mediation.

being equal—much lesser incentive to avoid the activity or to invest in precautions. This does not mean that the injurer will not care at all or that the effect of apologies is necessarily negative, but it does imply that injurers will have less incentive to take care than they would otherwise.[88]

The other primary goal, compensation, fails to provide clear guidance. The goal of compensating a victim is to restore her to her status prior to the accident, by providing her with value that is as close as possible to her loss.[89] On first blush, apologies seem to undercut this goal, because—as demonstrated by the apologists themselves—victims are willing to accept lower payments in settlements when an apology is tendered.[90] However, the Legal Apologists emphasized that victims care for much more than financial compensation and the positive emotional and expressive effect of an apology may well be more important than the payment of money. The contention here is that apologies are healing and valuable to the victim more than a monetary payment. Let us call this view the therapeutic value theory of apologies.

There are strong reasons to be skeptical of the therapeutic value theory, particularly in the context of commercial apologies. While the adherents of the therapeutic value theory argue that victims' acceptance of apologies is evidence of their value, there are several alternative, less benign, reasons why victims might accept them and forgo sometimes hundreds of thousands in compensation.[91] We cover five reasons here.

The first two reasons why a victim may be accepting an apology unwillingly has to do with pressure and manipulation. Gabriel Teninbaum recently argued, for example, that apologies are used by sophisticated commercial firms as means of beguiling victims.[92] Teninbaum highlighted certain practices of apologies used by firms that are meant to create emotional pressure on victims to accept them, a decision that the victims

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[88] Of course, it may well be that there is too much deterrence in the baseline, so the change will be favorable. However, there are many reasons to believe that the tort system is generally under-deterrent, especially given injurers ability to shield assets after an accident. *See generally* Yonathan A. Arbel, *Shielding of Assets and Lending Contracts*, 48 INT'L REV. L. & ECON. 26 (2016)

[89] Livingstone v Rawyards Coal Co (1880) 5 App Cas 25,39 ("Tort seeks to put the victim in the position he was in before the tort.")

[90] *See e.g.*, *supra* note 26.

[91] *See infra* section II.C.

[92] *See generally* Teninbaum, *supra* note 40.

will later come to regret.[93] The strategic, deliberate use of apologies by commercial firms is designed to maximize this effect and victims are employing only limited agency in their decision to accept the apology. A second reason concerns pressure that comes from sources besides the injurer itself. Pursuant to an apology, victims may still wish to sue; however, they are often subject to social or internal pressure to avoid doing so, lest they be perceived as vengeful, unrelenting, or ungrateful. Research in psychology shows that failure to accept an apology is associated with a negative perception of the victim.[94] Similarly, victims may experience an internal or social pressure (perceived or real) not to sue, due to the social norm of accepting apologies.[95]

The two other reasons are more epistemological. There is a real question as to whether people understand the meaning of commercial apologies and how they are different from interpersonal ones. When a firm apologizes through one of its proxies, is that an expression of guilt? Of whom? Given how dispersed the decisions and actions in a commercial firm are, even an apology by the CEO reflects a sliver of the actual responsibility (aside from the very general sense in which the CEO is the personification of the firm, a loaded idea by itself).[96] What does the apology say about the future? Would a commercial firm be less likely to recidivate after an

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[93] *Id.,* at 332 ("On its own, convincing an individual not to sue is no different than any other "bad" settlement. What makes this different is the appearance of a system of methods designed to dissuade patients from actually considering their rights before settling for short money.")

[94] *See* Mark Bennett & Christopher Dewberry, *"I've said I'm Sorry, Haven't I?" A Study of the Identity Implications and Constraints That Apologies Create For Their Recipients*, 13 CURR. PSYCHOL. 10 (1994). *See also* Joost M. Leunissen et al., The apology mismatch: Asymmetries between victim's need for apologies and perpetrator's willingness to apologize, 49 J. Exp. Soci. Psy. 315, 315 (2013) (''Victims of transgressions are, in turn, socialized into graciously accepting such apologies''). This is in line with the view of some economists that apologies create a "psychic cost" to suing. *See* Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK UNCERTAIN. 141, 148 (2011).

[95] Some moral philosophers believe that there exists a duty to forgive, see CHARLES GRISWOLD, FORGIVENESS: A PHILOSOPHICAL EXPLORATION, 67 (2007) (''under certain conditions it would be blameworthy not to forgive''); and Espen Gamlund, *The Duty to Forgive Repentant Wrongdoers*, 18 INT. J. PHILOS. STUD. 651 (2010) (arguing that a limited duty to forgive exists), and so it is possible that some people have a mistaken sense of duty to accept apologies, even when they are not genuine.

[96] On diffusion of responsibility in firms, see *infra* section II.B.1 and II.B.3.

apology? The meaning of this apology is an open question, and this leads us to the fourth reason which has to do with firm anthropomorphism. It is well known that people do not maintain a clear distinction between individuals and firms, tending to endow brands and firms with personality.[97] Humans have a strong tendency—potentially related to evolutionary reasons—to accept apologies from other humans.[98] The concern is that this instinctive reaction is carried over to brands and firms without proper reflection. People may intuitively interpret an apology by a firm in a similar way to how they interpret an apology by a person, much like how individuals feel that certain brands and companies are 'warm' or 'evil'—a phenomenon known as brand personification.[99]

The final flaw, and perhaps the most fundamental one, is the unrealistic magnitude of the hypothesized therapeutic effect. Even if apologies have some healing effect, there must be some limit to the size of this effect. If victims are willing to forgo small or perhaps even moderate value claims in exchange for an apology, then it may be that they engage in a conscious trade-off of pecuniary and non-pecuniary benefits, preferring the latter to the former. However, the greater the amount the victim forgoes, the less persuasive is the idea that there is a real trade-off of benefits. It is less persuasive, we think, to argue that a disabled victim of an accident prefers an apology to amounts large enough to considerably alleviate her suffering. As we shall show, the effect of commercial apologies can be measured sometimes in the hundreds of thousands of dollars, a fact that puts considerable pressure on the therapeutic value theory.[100]

Overall, we think that there is good reason to suspect the therapeutic theory of apologies, at least in commercial settings. We cannot completely overrule the possibility that victims are sophisticated and fully understand the difference between commercial and personal apologies and find them

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[97] *See* Martin Eisend & Nicola E. Stokburger-Sauer, *Brand Personality: A Meta-Analytic Review of Antecedents and Consequences*, 24 MARK LETT 205, 205 (2013) (''In their pursuit of fulfilling self-definitional needs, individuals tend to increasingly perceive brands as relationship partners.''). Brand personality is understood as ''the set of human characteristics associated with a brand'', Jennifer Aaker, *Dimensions of Brand Personality*, 34 J. MARK. RES. 347, 347 (1997).

[98] *See* Yohsuke Ohtsubo & Esuka Watanabe, *Do Sincere Apologies Need to be Costly? Test of a Costly Signaling Model of Apology*, 30 EVOL. HUM. BEHAV. 114 (2009) (considering apologies as an evolutionary adaptation).

[99] *See generally* Ronal Jay Cohen, *Brand Personification: Introduction and Overview*, 31 PSYCHOL. MARK. 461 (2010).

[100] *See infra* section II.C.

nonetheless satisfying—so satisfying that they are willing to forgo very large amounts of money in exchange for an apology. Yet, we find this possibility less probable than the other explanations proposed here. The following thought experiment might elucidate our skepticism. Consider the common victim of medical malpractice, who suffered a great harm from negligent treatment. Suppose that after the accident, she receives an apology from the hospital staff or the physician, and as a consequence, she is dropping the lawsuit. Going back in time but knowing what the patient knows now, would the patient undergo the same procedure again? If the answer is negative, then it is unlikely that the apology really mended the harm, that it genuinely compensated the victim for her loss.

Overall, we see tension between the goals of tort law. Cost-reduction is seemingly favorable to apologies whereas deterrence argues against apologies. Compensation fails to point in any clear direction, so it does not provide guidance on how to resolve the tension. To account for this complexity, we need a theory that accounts for the *combined* effects of cost-reduction and deterrence.

2. A Unified Theory of Apologies in Tort Law

To evaluate the combined effect of apologies on behavior, we extend the traditional model of accidents in tort law to account for apologies. An informal presentation follows here and the interested reader would find the formal explication in the Appendix.

In the basic model of tort liability, a potential injurer chooses whether to engage in a risky activity. The activity has some benefit to the injurer but may cause harm to the victim. The prototypical example of this model is driving and the risk of an accident to a pedestrian. An important aspect of the model is that litigation over the accident is costly. To win the case, each party has to expend resources on retaining lawyers, hiring expert witnesses, producing evidence, etc. In addition to these *litigation costs*, there are also *liability costs*, which reflect the payments the injurer would have to pay the victim if found liable (or if the parties settle). The social goal is to find rules that minimize costs.[101] On this point, it is worth emphasizing that the economic analysis does not consider the payment of *liability costs* to have any direct effect on social welfare – when a person pays an amount to another person, then the second person becomes richer (a social benefit), but this benefit is completely offset by the loss of the first person.

[101] *See supra* note 84.

To account for apologies, we add to the model the possibility that if an accident occurs, the injurer may choose to apologize. In order to do that, it is important to clearly identify the benefits and costs of apologies. On the side of benefits, the literature points out to two potentially distinct effects:[102] the victim is willing to settle more often and is demanding a lower amount in settlement negotiations.[103] The costs are those of tendering an apology, which may involve loss of face, social stature, or reputation.[104] Tendering an apology is a private cost that is borne by the injurer.

Are apologies after an accident socially desirable? Based on the extended model, we will now argue that the injurer will tend to apologize either more or less often than is socially optimal, a point that was not fully recognized in the literature.[105] To see that, consider first the *private* incentive to apologize, the way the injurer sees it. From this perspective, the tender of the apology will involve a cost that the injurer bears, but the apology will also have a *double* benefit**—** the savings on the injurer's litigation and liability costs. If the benefits exceed the cost of apologizing, the injurer would have an incentive to apologize.

From a social perspective, the calculus is different. From this point of view, we would again count the cost of tendering the apology. However, the benefits will be very different. First, the savings on liability costs will not be counted. As noted, from the social perspective, the fact that the injurer will save money by not paying the victim the full amount is not a social benefit, as the injurer's gain is the victim's loss. At the same time, the benefit of reducing litigation costs involves a saving to both the victim and the injurer, but the injurer will only count her savings, whereas society will care about the joint savings. We see there is reason for the private incentive to apologize to diverge from the social optimum, leading the

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[102] *See infra* section II.C.

[103] Alternatively, apologies reduce payments because juries and judges are more lenient towards repentant injurers.

[104] For example, one public official preferred being sent to prison than a halfway house because he did not want to apologize, White, *supra* note 17, at 1269. *See also* Ebert, *supra* note 20, at 334-35 (discussing ego and the difficulty physicians face in admitting their professional shortcomings).

[105] For a similar argument in the broader context of litigation, see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (explaining that there would generally be too little or too much litigation because parties' private incentives to bring suit will often be too weak or too strong relative to the social optimum).

injurer to apologize too much or too little.[106]

Example 1. Suppose that an accidental poisonous leak from a nearby factory caused the victim a harm of $5,000. Further suppose that tendering an apology would cost $500, but that through this apology, the parties settle the case—thus each avoiding $200 in litigation costs. Finally, suppose that because of the apology, the victim is willing to accept a payment of $2,500, rather than the $5,000 the victim would have received in litigation. In this example, an apology will not be socially desirable, as it costs $500, but only saves $400 in litigation costs. (Recall that the $2,500 saving to the offender is equal to the victim's loss). On the other hand, by apologizing the injurer could save $2,700 (2500+ 200) at a cost of only $400, thus giving her an incentive to apologize. Since the private incentive to apologize exceeds what is socially desirable, there will be too much of an incentive to apologize.

Example 1a. Suppose now that the apology costs only $300 to tender but that it does not reduce the amount in settlement. In this case, the apology will be socially valuable, as by investing $300, a total of $400 in litigation expenses could be saved. The injurer, however, will not have an incentive to invest $300 as this will only help her save her own litigation costs of $200.

We see that the social and private incentive to apologize may diverge. We would expect there to be too many apologies under a combination of the following circumstances: apologies have a strong effect on victims' willingness to forgo parts of their claims, injurer's own litigation costs are high, and apologies are cheap. Indeed, there may also be cases where injurers will have too little incentive to apologize, in which case, apology laws would be desirable. Which of these two options is more probable has to do with one's assessment of the magnitude of the cost of tendering an apology relative to the effect of apology on the victim. The stronger the effect, or the lower the cost of apologies, the more we will be concerned with having too many apologies.

The analysis should not stop here. How would the ability to apologize affect the decision to undertake the risky activity in the first place? Tort theory recognizes that injurer's decision will be affected by how much the injurer anticipates they would have to pay should an accident occur.

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[106] Note that at this stage, we do not take into account the possibility that making the injurer pay will reduce her incentive to harm in the future. The analysis so far is made "ex-post", that is, under the assumption that an accident has already happened.

Under the standard analysis, it is suggested that if the expected payment will be equal to the harm, the injurer would have optimal incentives.[107] With a sanction equal to the harm, a factory will not produce goods with a value of $5,000 if the expected harm from a pollution-related accident exceeds $5,000. Making the factory owner pay $5,000 in the event of an accident would make sure she would only have an incentive to produce when the value of the goods exceeds $5,000.

This result changes when we consider apologies. When contemplating the possibility of an accident, the injurer would take into account several costs. If no apology is tendered, these costs include the expected costs of litigation and the costs of liability (e.g., $5,000).[108] And if the injurer decides to tender an apology, then as just analyzed, the injurer will save some of the costs of litigation and liability, but will have to pay for the apology itself. In this sense, the cost of delivering the apology can be thought of as a self-inflicted punishment. Nonetheless, the injurer does not have to apologize, and she will only do so if the apology is, on net, privately beneficial. It follows that the injurer will only apologize if she expects that to reduce her costs. This point emphasizes that the only potential effect of apologies is to *reduce* liability.

Part of this reduction in payments is benign, as apologies encourage settlement of cases that would otherwise litigate. The savings on litigation due to greater propensity to settle is thus a positive feature of apologies. But apologies do more than encourage settlements: they also reduce payments the injurer would have to make to victims. Because the injurer cares about her own private costs in the event of an accident, this reduction means that the injurer has less to worry about an accident and less interest to take precautions against such an accident. Overall, then, *apologies dilute deterrence.*

Example 2. Suppose now that a factory owner thinks about using a production technique that would save $4,000 in production costs—but will cause a harm of $5,000 from pollution to one of the neighbors. Suppose, as before, that apology costs $400 to tender and that it leads to a settlement for

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[107] *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981). *See also* Allan E. Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985) (discussing optimal remedies in the context of contract law).

[108] We are assuming, as is conventional, that liability is set to equal the harm, but not the harm plus litigation costs, See generally A. Mitchell Polinsky & Steven Shavell, *Costly Litigation and Optimal Damages*, 37 INT. REV. L. ECON. 86 (2014).

$2,500, thus saving $200 in litigation costs for both the factory owner and the neighbor. We have already noted that the factory owner will have an incentive to apologize in this case. Given that, the factory owner knows that if she decides to use this production technique, she will gain $4,000 in savings and her costs from an accident would be $2,900 (apology cost and the settlement payment). Hence, the factory owner will have an incentive to undertake the activity, pocketing the $1,100 difference. From a social perspective, however, the activity causes a harm of at least $5,000 and only has a benefit of $4,000,[109] thus making it undesirable.

Example 2a. Suppose, as in 1a, that the apology costs $300 to tender and that it does not reduce the amount in settlement. In this case, we have seen, the injurer will not apologize, hence apologies will not have any effects on behavior. More generally, if apologies are very costly to make, they will not influence behavior.

Tying the analysis together, apologies may lead to unwanted behavior when they are cheap and effective. After an accident, there may be an excessive incentive for the injurer to apologize. This concern will be most pressing when, among other things, apologies are cheap and effective in terms of their effect on victims' demands in settlement negotiations. Before an accident occurs, apologies would tend to reduce the injurer's incentive to take care, a problem that is again most pressing when apologies are cheap and effective. It should be emphasized that this does not mean that apologies are always undesirable; if the apology reduces the cost of an accident to the injurer by less than the savings it entails in litigation costs to both parties, it is desirable. However, once the effect of an apology exceeds that amount, apologies are no longer socially desirable, as the encouragement of risky behavior exceeds the value of saving on litigation costs. The main conclusion here is worth repeating: if apologies are cheap and effective (in terms of reducing the amounts victims ask for), they are undesirable.

The analysis also carries a strong normative message. The law influences the "cost" of apologies, because making them privileged reduces their downside, thus making them cheaper. The literature showed no appreciation to the notion that there is a benefit to the cost of apologies and that there may be excessive apologies. Because of that, the central theme in the literature is that apologies should unconditionally be made cheaper – an idea that should be rejected on grounds of public safety. The analysis further

[109] To be precise, the total harm given an apology is $5,800, which includes the litigation costs of both parties and the cost of tendering the apology.

suggests that there is an optimal level of cost of apologies: *to the extent that legislators can influence apology costs, they should set apology costs cheap enough to encourage apologies to reflect the savings from litigation costs, but no more than that.*

B. Commercial Apologies in Practice

For individuals, sorry may be the hardest word. But when commercial players enter the arena and the stakes are high, the balance of costs and benefits of apologies changes.[110] As the theoretical framework highlights the importance of the costs of apologies, we move now to illustrate how these costs tend to be (relatively) low or are on the decline, through four different mechanisms.

1. Delegation & Specialization

When an individual tries to render an apology, she is limited by her own abilities. If she is a bad communicator, seems insincere, or is uncharismatic, then she may easily botch the apology. She only has herself to work with; it will normally not do for her to send someone else to apologize on her behalf.[111] With commercial apologies, the situation is markedly different. Corporations, by necessity, always delegate their tasks to individuals. The ability to delegate confers on corporations an advantage in apologizing, as it allows them some leeway in the choice of the individual to tender the apology.[112] By selecting the best apologizers, a firm's apology can be made as good as its best employee. This can be crucial, as different individuals have remarkably different abilities when it comes to apologies. Here, the BP oil spill case is especially illustrative. After having recognized that the CEO apology did not go over well,[113] the company realized that its apology is ineffective because the CEO was not an American and thus was

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[110] *See, e.g.,* Yonathan A. Arbel, *Contract Remedies in Action: Specific Performance,* 118 W. VA. L. REV. 369, 398-99 (Finding that animosity plays a lesser role between commercial parties).

[111] *See, e.g.,* Holley S. Hodgins and Elizabeth Liebeskind, *Apology versus Defense: Antecedents and Consequences,* 39 J. EXPERIMENTAL SOC. PSYCHOL. 297, 310 (2003).

[112] In some cases, it may be expected that the CEO or a specific employee will make the apology. But it seems that in practice most corporate apologies are delivered various other employees, including customer representatives.

[113] *See* O'hara *supra* note 11, 1985.

not viewed as part of the affected group.[114] The company pivoted and delegated the task of apologizing to local, ethnically diverse employees, who were members of communities affected by the spill.[115] BP ran television ads featuring these employees representing the company, who clearly identified themselves as locals to the Gulf Coast area and communicated their personal grief as a result of the accident.[116]

Certain social expectations may be seen as constraining corporate leeway in delegate apology tasks, such as the expectation that the apologizing party will be the wrongdoer (say the attending physician) or that the CEO will assume residual responsibility in the spirit of President Truman's famous plaque "the buck stops here".[117] On reflection, however, this constraint leaves much slack. In many corporate settings, each action of the corporate is a composite of many different actions and decisions taken by a diffused mass. There is no natural way to assign blame to a single employee for a defective automobile coming out of the assembly line. This entails that there will not be any natural person from whom to demand the apology. Likewise, some medical procedures involve one physician, but many involve more than one, which allows the hospital to make a choice between the medical personnel. Even apologies by corporate leaders leave room for discretion, as the company can hire managers that are especially adept at apologizing and may create corporate positions that are mostly symbolic to fulfill functions such as PR, social responsibility, and apologies. Finally, Commercial entities are not even limited to their current staff. They can, and routinely do, retain specialized experts for the management of crises, such as mediators, actors, and celebrities. A company may choose to install, for example, a personable CEO in times of crisis. Likable employees have significant effect; as one medical malpractice practitioner reported patients "never sue the nice, contrite doctors. Their patients never call our offices."[118]

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[114] *Id.* at 1986.

[115] *Id.* at 1989.

[116] *Id.* at 1989; BP, BP Gulf Coast Update: Our Ongoing Commitment, YOUTUBE, https://www.youtube.com/watch?v=hoOfIR4Vk1o ("I was born here, I'm still here, and so is BP. We're committed to the gulf. For everyone who loves it and everyone who calls it home", apology presented by Iris Cross, BP Community Outreach).

[117] Harry S. Truman Library & Museum, 'The Buck Stops Here' Desk Sign, https://www.trumanlibrary.org/buckstop.htm (last visited Aug. 8, 2016).

[118] Wojcieszak et al., *supra* note 55, at 347. *See also* Bruce W. Neckers, *The Art of*

2. Professionalization & Training

To be effective, an apology needs to be, or at least appear to be, sincere. However, sincerity is never observed, only inferred – the victims cannot look into the psyche of the injurer and must rely on signals and heuristics. By studying these heuristics using modern scientific methods, a body of scholarship developed that focuses on identifying and exploiting their weaknesses. Experts have shown, for example, how injurers can structure apologies for maximal effect by leveraging in-group bias,[119] using effective language,[120] choosing the right employees for the task, [121] and timing apologies correctly.[122]

These lessons are transferred to commercial actors by specialized firms through seminars and workshops. These firms help organizations implement apologies as part of their workflow, suggest ways to streamline the process of apologies, and offer best practices.[123] One such example is Sorry Works!—an advocacy organization and a training company—claiming to have "trained thousands of healthcare, insurance, and legal professionals from coast to coast and around the world" on how to use disclosure and

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the Apology, 81 MICH. B.J. 11 (2002) (recounting the story of a client who said that an apology would substitute a lawsuit).

[119] For example, Erin O'Hara suggests that corporate wrongdoers may use local spokespeople in their apologies, to maximize effect. O'Hara, *supra* note 11, at 1986 (noting that the corporate apology was ineffective because the CEO has "thick British accent" which "probably exacerbated the negative connotations of his resentful statements because it pegged him and the company as foreign")

[120] *See, e.g.*, Ameeta Patel & Lamar Reinsch, *Companies Can Apologize: Corporate Apologies and Legal Liability*, 66 BUS. COMMUN. Q. 9, 21-22 (arguing that corporations can reap the benefits of apologies with diminished legal exposure by switching from active language—"I am sorry for hurting you"—to passive language—"I am sorry you were hurt").

[121] *See generally* Leanne Ten Brinke & Gabriella S. Adams *Saving Face? When Emotion Displays During Public Apologies Mitigate Damage to Organizational Performance*, *130* ORG. BEHAV. & HUM. DEC. PROCESSES 1 (2015) (studying the market effects of facial cues given by corporate wrongdoers).

[122] *See generally* Jochen Witrz & Anna S. Mattila, *Consumer Responses to Compensation, Speed of Recovery and Apology after a Service Failure*, 15 INT. J. SERV. IND. MANAG. 150 (2004) (studying the effects of timing on apologies).

[123] For example, many corporations have strict guidelines on complaint handling that include guidelines on apologies. *See* Christian Homburg & Andreas Fürst, *How Organizational Complaint Handling Drives Customer Loyalty: An Analysis of the Mechanistic and the Organic Approach*, 69 J. MARK. 95 (2005).

apology to combat medical malpractice suits.[124] The experience of the "3Rs Program" instituted by the physician-trust COPIC is another telling example: As part of the program, physicians are coached on effective apologies, training them on timing, structure, and content.[125]

The professionalization and training in the area of apologies give commercial actors a unique advantage. They allow these commercial actors to apologize more effectively and at a lower cost, benefitting from the accumulated knowledge and experience.

3. Diffusion of Responsibility

Commercial entities enjoy a psychological advantage, as the psychological cost for the employee to deliver the apology tends to be lower than that of delivering a personal one. Psychologists argue that an effective apology requires a person to create the impression of separate parts of her personality—a past offender, who committed a wrong and is thus worthy of scorn, and a present repentant apologizer, who deserves forgiveness.[126] This is a challenging task because the more one accepts responsibility, the more she might inspire indignation, whereas assuming too little responsibility may be taken as a failure to take ownership of the wrongdoing. For a diffused commercial entity, this difficulty may be less severe, because the party apologizing and the party at fault are not necessarily the same person. We have noted above how corporate actions are a composite of many different decisions of various individuals, which dilutes the responsibility of every single actor. To the extent that the party apologizing and the victim are not the same, the dissociation makes it much easier to apologize. First, because it is always easier to admit that someone else was wrong rather than oneself,[127] and second, because the offender may be cast in a bad light

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[124] SORRY WORKS!, http://www.sorryworks.net/.

[125] *See* Teninbaum, *supra* note 40, at 317.

[126] *See generally* Peter H. Kim et al., *Removing the Shadow of Suspicion: The Effects of Apology Versus Denial For Repairing Competence- Versus Integrity-Based Trust Violations*, 89 J. APPL PSYCHOL. 104 (2004). A famous articulation of this idea is by sociologist Erving Goffman, writing: "an apology is a gesture through which an individual splits himself into two parts, the part that is guilty of an offense and the part that dissociates itself from the delict and affirms a belief in the offended rule", ERVING GOFFMAN, RELATIONS IN PUBLIC 113 (1971). On the relationship between apology and guilt, see Bruce N. Waller, *Sincere Apology Without Moral Responsibility*, 33 SOC. THEORY & PRAC. 441 (2007).

[127] Apologies are sometimes coupled with some remedial action. Here, again,

without negative implications for the image of the apologizing party.[128]

For example, when Mary Barra, GM's CEO, took office she immediately had to start apologizing for the company's faulty ignition switches incident–a horrible accident that claimed the lives of 124 individuals.[129] Barra had no personal role in the incident, and therefore she was able to apologize profusely without admitting any personal fault (or harming her reputation); indeed, she apologized so effectively that she was heaped with praise at her congressional hearing: ''God bless you, and you're doing a good job'' replied Senator Baxter to Barra's apology.[130] Even in a closer case, such as BP's oil spill, CEO Tony Hayward was not personally responsible for the explosion; the company claimed that it was mostly its subcontractors who were to blame, and even though the court found the company was grossly negligent, the blame is not rested solely with the CEO.[131]

4. Corporate Culture

Scholars studying corporate culture and crisis management argue

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commercial actors have more options than individuals. As William Benoit noted: "It may be possible to limit damage by firing one or more employees, but Hugh Grant cannot fire himself", WILLIAM L. BENIOT, ACCOUNTS, EXCUSES, AND APOLOGIES: A THEORY OF IMAGE RESTORATION STRATEGIES 48 (2015).

[128] An unexpected advantage commercial entities have is related to the standardization of apologies. It may seem that spontaneous apologies are more powerful than scripted ones. If this were the case, corporations might have been limited in their ability to control the provision of apologies. However, research shows that strict guidelines actually result in *more* effective apologies. One study finds that apologies by the call center for reservation or billing mistakes have strong and significant effect on consumer satisfaction. *See* Anna S. Mattila & Daniel J. Mount, *The Role of Call Centers in Mollifying Disgruntled Guests*, 44 CORNELL HOTEL RESTAUR. ADM. Q. 75 (2003). In another large qualitative study, researchers in the area of marketing found that corporations with stricter guidelines and rules on apologies and complaint management result in greater consumer satisfaction and sense of justice. *See* Christian Homburg & Andreas Fürst, *How Organizational Complaint Handling Drives Customer Loyalty: An Analysis of the Mechanistic and the Organic Approach*, 69 J. MARK. 95 (2005).

[129] *See* Danielle Ivory and Bill Vlasic, $900 Million Penalty for G.M.'s Deadly Defect Leaves Many Cold, N.Y. TIMES, Sept. 17, 2015.

[130] Ben Geier, *Why do Some People Love GM's CEO Mary Barra*, FORTUNE, Aug. 9th, 2014, (quoting Senator Barbara Boxer (D, CA)).

[131] Campbell Robertson & Clifford Krauss, *BP May Be Fined Up to $18 Billion for Spill in Gulf*, N.Y. TIMES, Sept. 4, 2014.

that before the 1990s, commercial apologies were seen as stigmatizing.[132] The 1990s saw a deep change in the stigma and reputational effects of commercial apologies. The reasons are complex and many explanations are offered:[133] the creation of a broader ''new culture of apology'',[134] the rise of the internet, and the introduction of relationship management strategies in the 1990s.[135] Another potential driver of these changes is the discovery in the marketing literature of the ''recovery paradox'', whereby apologizing may actually improve consumer relations relative to their level prior to the adverse incident.[136] Whatever the true explanation is, experts see a strong change in the way apologies are treated today relative to the 1990s.[137] Today the ''[c]onventional wisdom'' among scholars in business administration and branding ''holds that public apology in response to accusations of corporate misconduct is one of the most important ways to restore a company's reputation''.[138] Today the default has reversed, and it is expected that companies would apologize: if in the past only the guilty apologized, today not apologizing is a violation of consumers' expectations.[139] Moreover,

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[132] *See* LAZARE, *supra* note 14, at 7.

[133] For other explanations, see Zohar Kampf, *The Age of Apology: Evidence from the Israeli Public Discourse*, 19 SOC. SEMIOT. 257 (2009).

[134] *See* Nicolaus Mills, *The New Culture of Apology*, 48 DISSENT 113, 114 (2001); Mihai, *supra* note 21 ("A gesture formerly considered a sign of weakness has grown to represent moral strength and a crucial step towards potential reconciliation"). *See also* Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. STATE L.J. 371 (2006) (noting, and criticizing, the proliferation of apologies).

[135] *See* Jan Breitsohl et al., *Online Complaint Communication Strategy: An Integrated Management Framework for E-Businesses*, HANDB. E-BUS. STRATEG. MANAG. 907, 908 (2014); Michael Volkov, *Successful Relationship Marketing: Understanding the Importance of Complaints in a Consumer-Oriented Paradigm*, 2 PROBL. PERSPECT. MANAG. 113 (2004).

[136] *See, e.g.*, James G. Maxham & Richard G. Netemeyer, *A Longitudinal Study of Complaining Customers' Evaluations of Multiple Service Failures and Recovery Efforts*, 66 J. MARK. 57 (2002) (showing in a longitudinal study the existence of a recovery paradox, but also noting that it disappears if there are multiple adverse events).

[137] *See, e.g.*, Patel & Reinsch, *supra* note 120, 14-15 (noting that hard data is hard to find but the impression is that commercial apologies are frequently used).

[138] John G. Knight, Damien Mather, and Brianne Mathieson, *The Key Role of Sincerity In Restoring Trust In a Brand With a Corporate Apology*, *in* MARKETING DYNAMISM & SUSTAINABILITY: THINGS CHANGE, THINGS STAY THE SAME 192 (2015)

[139] *See* Sean Tucker et al, *Apologies and Transformational Leadership*, 63 J. BUS. ETHICS 195 (2006).

apologies are taken to be a sign of strength and leadership.[140] An employee would thus find the personal costs of apologizing much lower than in the past; institutions, like hospitals and insurance companies, often provide a support system, assuring the injurer an apology is the right and honorable thing to do. The increased popularity of apologies makes their social cost lower, as the reputational effect is diminished (and per the recovery paradox, actually becomes positive).

C. Effectiveness of Commercial Apologies

Commercial actors, we just argued, enjoy important advantages with respect to tendering apologies. It is, therefore, natural to doubt whether these apologies have an effect on victims. Would not individuals reject apologies in commercial settings, seeing them as strategic, profit-maximizing decisions? Would not the making of repeated apologies by the same institution adulterate their effect?

In fact, commercial apologies are highly effective. Researchers studying commercial entities in online settings puzzlingly noted after finding strong effects that it seems "as if customers do not realize that they are interacting with an employee who is paid to send apology emails and not with an individual who experiences shame when apologizing."[141] The researchers concluded their field test by noting that "[we] find that a cheap-talk apology yields significantly better outcomes for the firm than offering a monetary compensation."[142] The effectiveness of commercial apologies can be learned from their prevalence,[143] but it would be useful to look at more direct evidence, which also gives a sense of the magnitude of the effect.

The best evidence comes from the healthcare industry, which is the best-studied area of commercial apologies, due to the large stakes involved and the tragic frequency of accidents.[144] Starting in the 1990s, hospitals

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[140] *Id.* at 195 (Finding that "ethical leaders who attempt to do the right thing with their words and actions will be perceived as better leaders by followers … ethical leaders apologize."

[141] *See* Johannes Abeler et al., *The Power of Apology*, 107 ECON. LETT. 233, 235 (2010).

[142] Id., at 107.

[143] *See, e.g.*, BENIOT, *supra* note 127, at 61 (noting the pervasiveness of corporate apologies).

[144] THE NATIONAL PRACTITIONER DATA BANK,

became aware that many patients sue for emotional reasons, as they resent the lack of apology.[145] This realization led to a series of successful experiments with institutionalizing apologies.[146] An example is the pioneer program of The University of Michigan Health System. The university adopted a policy of disclosure and apology that required hospital personnel and physicians to disclose mistakes and apologize for them. A detailed before-after analysis of this program reveals significant effects. First, the monthly rate of claims (defined as requests for monetary compensation) has fallen by 36%.[147] This means that about one-third of the victims gave up their claims in their entirety. Second, the number of lawsuits has fallen by 65%.[148] Third, the cost per lawsuit has fallen from $405,921 to $228,308, a saving of $177,603 (44%). Fourth, the costs of lawsuits have not only fallen due to savings on legal costs; the hospital saved about 59% of the compensation costs it would have had to pay patients.[149]

Another example is COPIC, an insurance trust founded by physicians that designed the "3Rs Program": Recognition of the patient's harm, Response to the issue in a timely manner, and Resolution—through apology and a small offer of compensation. Looking at the data, the offers of compensation are indeed small: in most cases, no payment is made at all and in the rest, the payment is for only $5,300.[150] The program led to striking results—a reduction of 50% in the number of malpractice claims

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http://www.npdb.hrsa.gov/analysistool/ (reporting about 50,000 medical malpractice payments and adverse events in 2014).

[145] *See supra* note 25.

[146] *See, e.g.*, Steve S. Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May be the Best Policy*, 131 ANNALS OF INTERNAL MEDICINE 963 (finding financial savings in hospitals that implemented a disclosure and compensation policy). *See also* ROBERT D. TRUOG ET AL., TALKING WITH PATIENTS AND FAMILIES ABOUT MEDICAL ERROR 52–56 (2011).

[147] *See* Allen Kachalia et al., *Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program*, 153 ANN. INTERN. MED. 213, 215 (2010). *See also* Michelle M Mello, David M Studdert & Allen Kachalia, *The Medical Liability Climate and Prospects for Reform*, 312 JAMA 2146, 2149 (2014).

[148] Kachalia et al., *supra* note 147, at 215.

[149] *Id.*

[150] *See* Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, 2 J. HEALTH LIFE SCI. L. 125, 147-48 (2009). Compare with average case costs of medical malpractice lawsuits of about $300,000, see Seth Seabury et al., *Defense Costs of Medical Malpractice Claims*, 366 N. ENG. J. MED. 1354, 1354 (2012).

against COPIC physicians and a reduction in the costs of payments in settlement of 23%.[151] In one of the case records, a 66-year-old patient suffered from an error that led to the removal of part of her ureter, which required a painful invasive procedure for its treatment. The program settled the entire case by paying her $3,898 to account for her out-of-pocket expenses and, 'generously', also for her ''gardening/lawn bills''.[152] These two apology programs reduced significantly the number of compensation requests, the number of lawsuits, and, most importantly for our purposes, *the amounts paid to patients*.

Looking more broadly, economists Benjamin Ho and Elaine Liu find that commercial apologies are highly effective. The two have investigated how apology safe-harbor laws affect malpractice lawsuits. Their studies are based on the fairly innocuous assumption that apology laws increase the frequency of apologies. Because of that, if we see a change in outcomes following the legislation of an apology law, that change would be attributable to the effect of apologies. Based on this methodology, they find that a state that adopts an apology law sees a reduction of about 17% in payments for severe medical injuries,[153] which is equivalent to a reduction in payments of $58,00-73,000.[154] This is remarkable, as the averages come from all hospitals—not necessarily those who instituted an apology policy—which suggests that the real effect can be much larger. Consistent with that, a recent working paper found that apology laws lead to a reduction of $65,000 in payments to victims across all injury levels.[155]

Apologies in a commercial setting are effective beyond the medical context. In a vignette study, researchers found that consumers express greater willingness to purchase from companies which apologized in a way that was perceived as sincere.[156] In the commercial context of housing, Russell Korobkin and Chris Guthrie find that participants playing the role

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[151] *See* Boothman et al., *supra* note 150, at 147-48; Wojcieszak et al., *supra* note 55, at 346.

[152] *See* Richert E. Quinn & Mary C. Eichler, *The 3Rs Program: The Colorado Experience*, 51 CLIN. OBSTET. GYNECOL. 709, 715 (2008).

[153] *See* Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK UNCERTAIN. 141, 143 (2011).

[154] *Id.*

[155] *See* McMichael et al., *supra* note 10.

[156] *See* Denghua Yuan et al., *Sorry Seems to be the Hardest Word : The Effect of Self-Attribution when Apologizing for a Brand Crisis*, (HKIBS Working Paper Series 073-1314 (2014).

of tenants were more likely to accept a settlement offer for an infraction of landlord's duties if they were told that the landlord apologized.[157] These results seem to carry over to the market: in market settings, e-apologies led disappointed consumers to retract unfavorable reviews, at a rate much greater than when they were offered monetary settlements.[158] Moreover, firms are said to perform better in the stock market after taking responsibility for past failures.[159]

III. CRITICAL ANALYSIS AND POLICY IMPLICATIONS

The normative framework we provide in Part **Error! Reference ource not found.** demonstrates that apologies can have detrimental social

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[157] *See* Korobkin & Guthrie, *supra* note 26, at 148 (reporting a 12% increase, but note that this effect failed to reach statistical significance. Nonetheless, the size and sign of the effect are consistent with our argument).

[158] On eBay, customers can leave negative responses which can later be withdrawn if seller's feedback satisfies the consumer. A group of researchers collaborated with a very large seller and randomly modified its response to a negative review left by a customer on transactions with average value of 23.5 Euros: small monetary compensation (2.5 Euro); large monetary compensation (5 euros), and an apology, electronically delivered by one of the employees, without admitting to any legal liability and without any monetary compensation. They found that small monetary compensation yields forgiveness (i.e., retraction of the negative review) in 19.3% of the cases; doubling the amount of compensation only slightly increases forgiveness to 22.9%. The tender of apology outdid both measures, with a forgiveness rate of 44.8%. *See* Abeler, *supra* note 141, 234.

[159] Consider, for example, the Domino's 2009 crisis, when a disgruntled employee publicized a video of himself committing what we can euphemistically call "health code violations" of customers' pizzas. Soon after, Twitter was flooded with tweets deriding the company and its products. Patrick Doyle, the company's President, uploaded a response video to YouTube, in which he said that he is sickened by the act, apologized and reported corrective action. *See* Domino's President Responds to Prank Video, YOUTUBE (June 3, 2010) https://www.youtube.com/watch?v=dem6eA7-A2I. An empirical analysis of 20,773 tweets discovered that this was highly effective and the corporate brand, as reflected by tweets, was restored to its original levels, See Hoh Kim et al., *The Effect of Bad News and CEO Apology of Corporate on User Responses in Social Media.*, 10 PLOS ONE e0126358 (2015). Others in the field reflected similar appreciation of the effectiveness of this apology, and although far from being necessarily causally related, the brand is thriving. Domino's stock price is about ten times its value in 2009 . On firms' performance, see Don Chance, James Cicon, and Stephen P. Ferris, *Poor Performance and the Value of Corporate Honesty*, 33 J. CORP. FIN 1 (2015). Indeed, the return on investment in apology mechanisms was estimated by researchers as being greater than 100% in some cases. *See* Christian Homburg & Andreas Fürst, *How Organizational Complaint Handling Drives Customer Loyalty: An Analysis of the Mechanistic and the Organic Approach*, 69 J. MARK. 95, 95 (2005).

implications unless certain conditions are met. We have also shown that commercial apologies are both cheap to tender and highly effective. In light of this, we move to critically analyze the movement that transformed the law and to outline necessary policy changes in response to this reform.

A. Better Sorry than Safe

Our theoretical analysis demonstrates that apologies are socially undesirable if they are relatively cheap to tender and if they have strong effects on the amounts victims seek. When these conditions obtain, the problem is that sophisticated commercial actors would be able to anticipate, before they engage in dangerous activities, that an apology would reduce their exposure to liability for any ensuing accidents. Because of that, they would have less incentive to be careful, which may increase the level of accidents. Hence, they would find it preferable to be sorry rather than safe. Indeed, if apologies are costly to tender or only mildly effective, this concern does not arise. However, we believe our analysis above strongly suggests the possibility of a problem, as commercial apologies are likely to be both effective and cheaper to deliver in commercial settings. To illustrate, in one case, a patient was willing to settle after the apology simply because she felt the hospital took her case seriously.[160] The hospital, on the other hand, saved an approximate $3 million in liability payments in a lawsuit that, according to the hospital's estimation, was highly likely to win.[161] Of course, the apology itself had some cost, but nothing in the evidence indicates this cost was large; indeed, this case is touted for its cost-saving effect.[162]

A clear prediction that follows from our analysis is that apology laws will increase the level or severity of accidents in states that adopt them relative to non-apology laws states. This is in contrast to the hypothesis of the Legal Apologists, which stipulates that apology laws will reduce levels of litigation without a corresponding increase in the level of accidents. The implications of our prediction are disconcerting. If commercial injurers can easily escape liability, they would not have a real incentive to be safe. A food company may employ less quality assurance procedures, a hospital may order less expensive tests, and a large polluter may install fewer filters and smoke scrapers than otherwise. To assess the validity of each hypothesis, we need empirical data; unfortunately, the empirical data we

[160] Boothman et al., *supra* note 150, at 157.
[161] *Id.*
[162] *Id.*

have from the two studies on the topic is inconclusive, although it is largely consistent with our prediction.

The most rigorous analysis to date was conducted by economists Ho and Liu, who looked at the effect of apology laws on the level of disposed medical malpractice claims.[163] They find that apology laws *increase* the number of disposed claims involving severe injuries by 21-27% and that payments for severe injuries increase by 20-28%. This would seem to suggest a rise in accidents and their severity, but the problem is that the data consists only of disposed cases and the definition of disposed cases makes it hard to draw any conclusions. In fact, Ho and Liu argue that the rise is mostly attributable to the greater speed of processing claims and that over time, there are fewer claims.[164] But this conclusion is constrained by the meaning and interpretation of disposed claim, a problematic category that only includes complaints with positive money payments and so it does not include all, if not most, of the accidents or all the cases where no payment was made.[165] Another limitation is that it is possible to make unreported payments, and some hospitals seem to be doing so.[166]

Another problem is the tension between their findings and those of another, more recent working paper.[167] In this study, researchers obtained data from an insurer that accounts not only for disposed claims with positive payments, but for all claims that were filed with the insurer. Indeed, this does not account for accidents that do not result in a formal claim, but it

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[163] Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK UNCERTAIN. 141 (2011).

[164] They indeed find that over time apology law states see a significant reduction in disposed claims for non-severe injuries, but they also find an increase in the level of severe injuries, which they interpret as resulting from a staggered effect of the apology law. However, these findings are also consistent with the theory that apology laws increase the severity of accidents. *Id.* at 162.

[165] This is especially a problem, since most cases are disposed without payment, see McMichael, *supra* note 10, at 16 ("Analysis of our data indicates that excluding claims that involved no payment to a claimant results in excluding over half of all malpractice claims.")

[166] *See* Teninbaum, *supra* 40, at 316-17 (discussing rules in an apology program that are designed to circumvent reporting requirements). *See also* Amitabh Chandra, Shantanu Nundy, and Seth A. Seabury, *The Growth Of Physician Medical Malpractice Payments: Evidence From The National Practitioner Data Bank*, HEALTH TRACKING, May 31, 2005 (estimating underreporting in data of about 20% of malpractice payments).

[167] *See* McMichael, *supra* note 10.

does provide a broader approach to the issue.[168] The authors of the study find that apology laws reduce payments to patients by 82%, which is equivalent to a reduction of $65,000 in the average payment.[169] They explain this result as driven mostly by the increase of claims that do not result in payment. In other words, they find that apologies mainly increase the level of claims where no payment is made, but do not affect the level of payments in other cases. They also find, however, that claims are more likely to turn into a lawsuit under apology laws—which is clearly inconsistent with the goals of apology laws. Both these studies provide much needed insight, but they do not clearly illuminate the key variable of interest: the level of accidents. The lack of more focused research is potentially attributable to the misunderstanding of the potential negative effect of apologies on incentives, and we hope that this Article will spur future research in this area.

B. The Paradox of Excessive Apologies

At the heart of the apology law reform is the argument that injurers are wary of apologizing due to the legal ramifications of exposing themselves to liability.[170] To overcome this fear—the argument goes—apologies should be privileged, shielding injurers from the evidentiary implications of potential admission of fault. The Legal Apologists argue that privileging apologies would encourage injurers to apologize, thus leading to important benefits, most importantly, the control of litigation costs.[171]

This statement involves a potential paradox with no easy resolution. The first argument—that injurers do not apologize for fear of legal liability—assumes that unprivileged apologies *encourage litigation.* But at the same time, the main reason that Legal Apologists argue that apologies are desirable is that they encourage settlement and therefore *discourage litigation*. It is seemingly paradoxical to argue that apologies both encourage and discourage litigation. Resolving this paradox comes at a price.

For example, perhaps unprivileged apologies have disparate effect; they reduce the incentive to bring suit but increase the probability that the victim will prevail in a lawsuit by having better evidence. While coherent,

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[168] *Id.* at 10. On the other hand, their data is limited to only one specialty area, which may introduce other kind of unanticipated bias.

[169] *Id.* at 27.

[170] *See supra* notes 62-63.

[171] *See supra* note 22.

this resolution also raises problems. It is unclear why the evidentiary advantage of apologies does not entice more victims to file lawsuits. More importantly, if privileging apologies will not reduce the level of litigation but will only reduce the likelihood that the victim will prevail, then apologies lose much of their luster.

Another possibility is to argue that apologies have a heterogeneous impact on victims. Some victims will sue unless they receive an apology, so apologies would reduce litigation in their case and are thus desirable. Other victims would only sue if they receive an apology (as the apology will provide them with sufficient evidence) and for this class of victims, privileging apologies will reduce litigation costs. While coherent, this resolution is also problematic, as it omits the class of victims who would sue even in the presence of an apology. Privileging apologies will reduce the likelihood that this class of victims will prevail in litigation, and thus involves a cost.[172] Whether this cost exceeds the benefit of controlling litigation from the other group is an empirical question, which admits the possibility that apologies will be undesirable.

C. Apology as Disclosure

A recurrent narrative, especially among medical professionals, is that apologies help because they facilitate the communication of mistakes, as put by Clinton and Obama:

> Under our proposal, physicians would be given certain protections from liability within the context of the program, in order to promote a safe environment for disclosure. By promoting better communication, this legislation would provide doctors and patients with an opportunity to find solutions outside the courtroom.[173]

On this account, privileging apologies would mean that injurers would be more willing to admit their mistakes. The reason why admitting

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[172] To be clear, injurers would save a corresponding amount, as they would be more likely to prevail in litigation. However, if we make the (natural) assumption that the likelihood of prevailing at trial corresponds to the culpability of the injurer, then privileging apologies would benefit mostly with culpable injurers, thus undermining deterrence.

[173] *See* Clinton and Obama, *supra* note 1, at 2207.

mistakes is important is an instrumental one; by recognizing mistakes, the parties can learn and do better in the future.[174]

This logic may be applicable in many interpersonal settings, but it transfers poorly to a commercial environment. Before touching on this point, it should be noted that the basic assumption here – that mistakes are not divulged due to liability—is doubted by many who believe the main causes for hiding mistakes are factors such as culture and social norms,[175] and indeed, studies comparing the rate of disclosure of errors in the United States and countries with lower levels of liability for medical malpractice find no difference in error reporting in hospitals.[176] Adeeper problem is the assumption that once identified, mistakes will be corrected. In many commercial settings, learning from one's mistakes is not simple. Taking precautions will often involve investment in machinery, staff, and strict regulation. These costs can be very high—consider the cost of purchasing an MRI machine or even of standard bloodwork procedures if done on a large scale—and it will certainly be contradictory to our approach in most other areas of law to believe that actors will have sufficient incentive to internalize the costs of their actions without the threat of any legal action.[177] This inconsistency was noted by David Hyman and Richard Silver:

> [I]t is naïve to think that error reporting and health care quality would improve automatically by removing the threat of liability. . . . No statistical study shows an inverse correlation between malpractice exposure and the frequency of error reporting, or indicates that malpractice liability discourages providers from reporting mistakes.[178]

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[174] *Id.* at 2205.

[175] TOM BAKER, THE MEDICAL MALPRACTICE MYTH 97 (2005) (arguing that "you first have to prove that mistakes would be out in the open if there were no medical malpractice lawsuits. That is clearly not the case.").

[176] Amy Widman, *Liability and the Health Care Bill: An "Alternative" Perspective*, 1 CAL. L. REV. CIRCUIT 57, 59 (2010); George J. Annas, *The Patient's Right to Safety — Improving the Quality of Care Through Litigation Against Hospitals*, 354 NEW ENG. J. MED. 2063, 2065-66 (2006) (comparing with New Zealand)

[177] Clinton and Obama proposed that savings from apology programs will be used to reduce the premiums doctors pay—but this would the equivalent of transferring money from victims of accidents to physicians. They also proposed that some of the savings will be used to ''foster patient-safety initatives''. *Id.* at 2207.

[178] David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution*?, 90 CORNELL L. REV. 893, 898–99, 914 (2005)

D. The Deficit of Apology Deficit

Motivating the entire movement of the Legal Apologists is the belief in an apology deficit. The concern is that injurers have too little incentive to apologize and therefore they need encouragement. It may seem odd in retrospect, but besides anecdotal evidence, the point that there is a deficit in apologies was never proven. Do we really have a deficit of apologies? Are commercial actors shying away from apologizing?

The core problem is that even without any reform, commercial injurers should have a strong incentive to apologize. As we have noted, apologies create value to injurers by suppressing their litigiousness. If apologies are value-creating, then just like any other goods, profit-maximizing companies would seek to ''produce'' them. Indeed, given the many benefits Legal Apologists ascribe to apologies, it would be odd if companies would not provide them. The literature is in agreement that there is a marked transition among companies from the age of ''deny and defend'' to ''apologize and settle''.[179] Today, commentators agree, commercial apologies have become commonplace.[180] As early as 2002, well before most states adopted apology laws, a survey of hospital risk managers revealed that 68% would respond to a mistake with an apology, which suggests a broad appreciation of the commercial benefits of apologies.[181]

Psychiatrist Aaron Lazare conducted a casual empirical analysis to develop a basic intuition of the prevalence of commercial apologies, by looking at the discourse on apologies in the media.[182] To expand his analysis, we reanalyzed the data using a larger database. Consistent with his findings, Figure 1 illustrates the findings on the basis of a broad range of media reports acquired from the EBSCO database, which includes 25 million media articles from the relevant time period.[183] As can be seen, until

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[179] *See* Sandra Harris, Karen Grainger & Louise Mullany, *The Pragmatics of Political Apologies* 17(6) DISCOURSE & SOCIETY 715 (2006).

[180] Roy L. Brooks, *The Age of Apology*, in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE, 8–11 (1999, Roy L. Brooks, ed.).

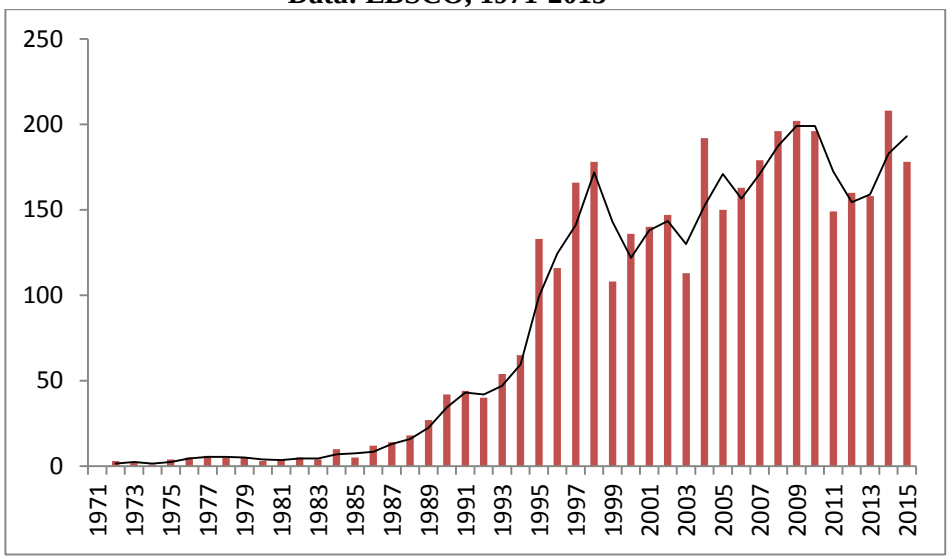
[181] *See* Rae M. Lamb, et al., *Hospital Disclosure Practices: Results of a National Survey*, 22 HEALTH AFFAIRS 73 (2003)

[182] LAZARE, *supra* note 14, at 6-7.

[183] The Methodology consisted of search results for apology or sorry or related

the 90s, apologies were hardly considered in the media. But starting in the 90s, there has been a growing interest that persists till today.

Figure 1: Apologies in Print: Mentions by Year
Data: EBSCO, 1971-2015



Overall, the consensus in the literature on the "age of apologies" is well reflected in this analysis. While this does not amount to a rigorous analysis of the topic, it does suggest that the apology deficit may not exist.

E. Policy Implications

The on-going tort reform through apology laws is politically and legally problematic. There are currently calls to further expand the ambit of apology laws,[184] and to encourage mediators and arbitrators, judges, and juries to account for them.[185] If past success and momentum are any

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words in title or subject terms, restricted to magazines, newspapers, reviews and trade publications, in the English language, between 1971 and 2015. A total of 4967 results were located, which, after removing duplicates, was narrowed to 3747. Permalink to results: http://search.ebscohost.com/login.aspx?direct=true&db=aph&bquery=(TI+apology)+OR+(SU+apology)+OR+(TI+sorry)+OR+(SU+sorry)&cli0=LA99&clv0=Eng&type=1&site=ehost-live&scope=site (gated). To account for a potential bias due to the fact that more media is produced today than in the past, we validated our findings by limiting search to the New York Times, the Economist, New York Times Magazine, and the New Yorker – all existing prior to 1971.

[184] *See* Runnels, *supra* note 4, at 148 (2009); Cohen, *supra* note 12, at 1061. *See generally* Gailey, *supra* note 4; Jones, *supra* note 14, at 580-81.

[185] *See, e.g.*, Robyn Carroll, *Apologies as a Legal Remedy*, 35 SYD. L. REV. 317 (2013).

indication, these calls are likely to be translated into legislation in the near future. Our analysis suggests that the case presented by reformists is lacking in theoretical and empirical support. There is a question whether there is an apology deficit and there is a real concern that apologies will be used to circumvent legal liability for accidents by strategic actors. Politically, we expressed the concern that apology laws have been used as a covert tort reform, avoiding public scrutiny. These issues raise a few policy implications.

First order of business is transparency. Apologies laws should be understood—and debated—in terms of tort reform. The public, advocates, and legislators, should be made aware of the social effects of apology laws. This does not mean that apology laws should never be enacted—the debate on tort reform is an active one. However, the debate should be conducted transparently, not in terms of virtue or penance, but in the more real terms of reducing compensation to victims which may or may not be excessive.[186]

Second, a moratorium should be placed on all future expansions of apology safe harbor laws. Besides the political concern, there are the social concerns. Apology laws make the tender of apologies ''cheaper'' from the viewpoint of the injurer, and the analysis demonstrates that reducing the costs of apologies can lead to socially harmful outcomes, in the form of risky behavior. The evidence we gathered suggests that this risk is real, given the effectiveness of commercial apologies and their low cost.

Third, there is a push to encourage judges and juries to show leniency in their judgments towards remorseful injurers.[187] In a sense, these

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[186] Supporters of tort reform would also benefit from a better recognition of the effect of apologies. There are many tools in the tort reformers' toolkit, such as damages caps, procedural adjustments, and panel screening of cases. Each of these tools has its own advantages and shortcomings. Compared with damages caps, for example, apology laws have the disadvantage of being impossible to calibrate. If one thinks that the true harm from a medical accident is $250,000, then a damages cap at this level could rein in courts. But the effect of apologies on victims is highly idiosyncratic and it does not allow for easy corrections. On the other hand, apology laws encourage informal settlements, and this may have merit of its own. Either way, a candid evaluation of alternatives would be prudent.

[187] *See, e.g.*, Bibas & Bierschbach, *supra* note 17, at 128-29 (advocating lenient treatment of remorseful offenders). Interestingly, a new study provides preliminary evidence suggesting that apologies have little effect on judges. *See* Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Contrition in the Courtroom: Do Apologies Affect Adjudication?*, 98 CORNELL L. REV. 1189 (2013) (finding in a vignette study that "a defendant's apology in court is generally ineffective, sometimes counterproductive, and only occasionally

initiatives are even more troublesome than the safe harbor laws, as safe harbor laws protect apologies that can prevent litigation, but this policy encourages apologies that do not even have this effect. Indeed, some have argued that there is a case for treating apologizing defendants more severely.[188] We recognize that it may seem counter-intuitive to treat remorseful and unremorseful injurers equally,[189] but it is important to remember that our discussion is limited only to commercial actors such as companies, for whom the expression of remorse is at least suspect. In sum, there should be a presumption against the preferential treatment of commercial actors who apologize during trial.

Finally, the questions we raised here touch on important social policies, but the data we currently have is limited. It will be important for policymakers to devote funds and grants for studies in this area, and perhaps there is room to use funding from Obamacare's special allotment to this end.[190]

IV. CONCLUSION

Over the last three decades, apology law reform has swept the nation. Tort reformers and commercial interests provided funding to a strong lobby that co-opted the rhetoric and discourse developed by a movement of legal scholars we called the Legal Apologists. The work of the Legal Apologists has contributed greatly to our philosophical, social, and psychological understanding of the role of apologies in both the law and in our daily lives. However, they have failed to articulate an account of apologies in commercial settings and have not considered the potentially socially harmful effects of apologies of this type. This oversight has not been lost on tort reformers, who advocated apology law reformers to effectively achieve tort reform through the backdoor.

We argued that making apologies cheaper may lead to socially harmful outcomes. To support our claims, we developed a new model for

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beneficial").

[188] Mungan argues that treating apologies more harshly helps differentiate between sincere apologies (which are meant to relieve guilt) and non-sincere apologies. *See* Mungan, *supra* note 5, at 179.

[189] For the moral argument that it is wrong for the law to treat equally repentant and unrepentant transgressors, *see supra* note 61 and accompanying text.

[190] Under The Patient Protection and Affordable Care Act § 42 USC 280g-15 grants are awarded to states for ''the development, implementation, and evaluation of alternatives to current tort litigation for resolving disputes''.

tort liability with apologies, which we used to show that injurers may have an excessive incentive to apologize if apologies are cheap and effective. Based on the evidence we gathered, we found that commercial actors professionalize and institutionalize the tender of apologies and they use them for great effect. This suggests that apologies may actively undermine deterrence and lead to risky behavior. On the basis of our analysis, we call for a moratorium on apology laws and a political and legal revaluation of the ones that currently exist. Through a transparent and honest assessment of apology laws, based on an understanding of these laws as means of tort reform, we can reach informed and democratic decisions on their desirability.

This Article should spark a much needed discussion on apologies, commercial interests, tort reform, and liability for harms. From an ethical perspective, there is still much to be said on the ethical value of apologies by incorporeal entities such as corporations. We are especially hoping that future empirical research would devote more specific attention to the relationship between apology laws and medical malpractice.

V. APPENDIX: A MODEL OF LIABILITY FOR ACCIDENTS WITH APOLOGIES

The Legal Apologists argue that apologies curb litigation. However, they have failed to consider the full implications on ex-ante behavior. In this Section we provide a model designed to articulate the implications of this distinction in terms of the social desirability of apologies, with a focus on the problem of deterrence.

To fit apologies within the framework of the incentive to take care, we take the conventional model of accidents.[191] In the model, a potential injurer chooses a level of precautions for an activity. These precautions are costly, but reduce the risk of an accident. If an accident occurs, then the injurer faces liability for the harm caused by the accident. Alternatively, the injurer may choose to apologize, which is privately costly (e.g., loss of face, humiliation, reputation, the time involved, or other psychological considerations). Making an apology affects the level of liability, because the victim may be more willing to settle, less interested in litigation, the jury may be more forgiving, or the judge less likely to attribute fault. Additionally, there are some administrative costs involved in litigation, such as the costs of operating the court.[192] Because apologies reveal information, induce settlements, and reduce the necessary expenses on trials, making one reduces the administrative cost. With this in mind, we introduce the following notation:

c: cost of precautions ($c \geq 0$);
h: harm;
q(c): probability of harm ($q(0) = 1$, $q' < 0$, $q'' < 0$);[193]
T: the injurer's choice regarding apology: T= 1 if apology is tendered, T= 0 otherwise;
a: the cost of making an apology;
s(*T*): social cost of enforcement ($s(.) \geq 0$);
l(*T*)*:* injurer's liability.

Based on our assumptions, we note that $l(0) = h$ and $s(1) < s(0)$.

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[191] *See* Steven Shavell, *Liability for Accidents, in* HANDBOOK OF LAW & ECONOMICS, 142, 143-44 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

[192] *See* Shavell, *supra* note 191, at 150.

[193] We make the conventional assumption that precautions reduce the probability of harm, but that there are diminishing marginal returns to investment in precautions.

To say, the liability for the accident, absent an apology, is equal to the harm, and the social cost of administering punishments is lower when an apology is made. Looking ex-post (after harm has occurred), we make the following argument:

Proposition 1: The private incentive to apologize diverges from the social interest in apologies. [i] Injurers will have an incentive to apologize even when it is not socially desirable, and [ii] may fail to apologize even when an apology is desirable.

Proof:

Consider first the private cost of the activity for the injurer, denoted as ϕ

$$\phi = -c - q(c)\big(Ta + l(T)\big) \tag{1}$$

That is, the injurer bears the cost of precautions. If an accident occurs, the injurer further bears the cost of apology if one is made and the costs of liability—which also depend on whether an apology was made.

The injurer will choose to apologize (T = 1) if the cost of the activity when making an apology (ϕ_1) is lower than the cost of the activity without one (ϕ_0):

$$\phi_1 < \phi_0 =$$
$$a < l(0) - l(1) \tag{2}$$

We see that an apology is only privately desirable if it reduces liability by more than its cost. The social cost of the activity is different. It consists of the harm to the victim, the cost of enforcement, and also the costs of the apology, if made:

$$\theta = -c - q(c)(Ta + h + s(T)) \tag{3}$$

Therefore, apology is *socially* desirable only if the cost from making one (θ_1) is lower than the social costs in its absence (θ_0):

$$\theta_t < \theta_0 =$$
$$a < s(0) - s(1) \tag{4}$$

This means (from 2 and 4) that the injurer will have an excessive incentive to apologize whenever:

$$s(0) - s(1) < a < l(0) - l(1) \tag{5}$$

That is, if the cost of apology exceeds it social benefits, but liability is reduced by a greater amount, the injurer will have an incentive to apologize when it is socially undesirable. Symmetrically, the injurer will

not apologize, even though an apology is socially desirable, if:

$$(6) \qquad l(0) - l(1) < a < s(0) - s(1)$$

QED

Proposition 2: If apologies are privately beneficial for the injurer: [i] the injurer will choose a level of precautions that is lower than the socially optimal level, [ii] the harms from the activity will be higher than the social optimum, and [iii] the more favorable is the treatment of apologies by the legal system, the less care and more harm injurers will create.

Proof:

The injurer chooses the level of precautions based on the expected costs of the activity, given by (1). When the injurer expects apology to be a beneficial option for her (from 2) the level of care is given by the first order condition:

$$(7) \qquad q'(c) = \frac{-1}{a+l(1)}$$

Let c^* be the solution to (7). Note that the socially desirable level of precautions, from (3), is:

$$(8) \qquad q'(c) = \frac{-1}{a+h+s(1)}$$

Comparing the two, we can see that $a + l(1) < a + h + s(1)$. To see that, recall that an apology is only made if (2) holds, i.e., $a < l(0) - l(1)$, from which follows directly that $l(1) < l(0)$. Therefore, and because $l(0) = h$, it can be shown that $l(1) < h$. It then follows that the inequality necessarily holds. Note that this is true even if the injurer would bear the social cost of enforcement $s(1)$. Even if that was the case, still $a + l(1) + s(1) < a + h + s(1)$, as long as apologies help injurers reduce liability ($l(1) < l(0) = h$). Given the concavity of q, it follows that the solution to (8) is greater than c^*.

To verify [iii], note that the greater the difference between $l(0)$ and $l(1)$ becomes (i.e., the more favorable treatment to apologizers is given by the legal system), the more the gap between optimal and actual precautions increases.

QED

Finally, we consider the possibility some injurers do not apologize, and the possibility it would be worthwhile to lower liability to encourage them to apologize.

Proposition 3: Providing preferential treatment to apologies is only socially desirable if: [i] the costs of apologies currently not rendered are lower than their benefit of reducing administrative costs, *and* [ii] the decrease in the administrative costs is not outweighed by an increase in the harms from the injurer's activity.

Proof:

A socially desirable apology will not be made only if (6) holds, so part [i] follows directly. To verify [ii], note that if (6) holds true, the injurer will not apologize, and take precautions accordingly. The cost of the activity for the injurer, from (1), would be:

$$(9) \qquad \phi = -c - q(c)\big(l(0)\big)$$

So that the level of precautions is determined by:

$$(10) \qquad q'(c) = \frac{-1}{l(0)}$$

Let c^{**} be the solution to (9). This means that the social cost of the activity if apology is not given would be:

$$(11) \qquad \theta_0 = -c^{**} - q(c^{**})(h + s(0))$$

Conversely, if apology is given, the social cost of the activity is:

$$(12) \qquad \theta_1 = -c^{*} - q(c^{*})(a + h + s(1))$$

Lowering $l(1)$ to make apology privately beneficial is socially desirable only if $\theta_0 < \theta_1$.

$$(13) \qquad -c^{**} - q(c^{**})\big(h + s(0)\big) < -c^{*} - q(c^{*})(a + h + s(1))$$

Or after rearranging, if:

$$(14) \qquad q(c^{*})(a + s(1)) - q(c^{**})s(0) < c^{**} - c^{*} + q(c^{**})h - q(c^{*})h$$

That is, apology has the benefit of reducing the administrative cost in the event of an accident. It also has a cost due to the increase in net harm from the activity, because of the diluted deterrence. The apology is only desirable if its benefits exceed these costs.

QED