



Alabama Law Scholarly Commons

Articles

Faculty Scholarship

2016

Tort Reform through the Back Door: A Critique of Law and Apologies

Yonathan A. Arbel

University of Alabama - School of Law, yarbel@law.ua.edu

Yotam Kaplan

Follow this and additional works at: https://scholarship.law.ua.edu/fac_articles

Recommended Citation

Yonathan A. Arbel & Yotam Kaplan, *Tort Reform through the Back Door: A Critique of Law and Apologies*, 90 S. Cal. L. Rev. 1199 (2016).

Available at: https://scholarship.law.ua.edu/fac_articles/495

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Alabama Law Scholarly Commons.

TORT REFORM THROUGH THE BACK DOOR: A CRITIQUE OF LAW AND APOLOGIES

YONATHAN A. ARBEL & YOTAM KAPLAN*

In this Article, we show how the biggest tort reform of the last decade was passed through the back door 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.

TABLE OF CONTENTS

INTRODUCTION	1200
I. STRANGE BEDFELLOWS: OF ETHICISTS AND TORT REFORMERS	1203
A. APOLOGIES IN LEGAL SCHOLARSHIP	1203
B. TORT REFORM	1208
C. HOW TORT REFORMERS FOUGHT AND WON THE APOLOGY BATTLE IN STATE LEGISLATURES	1211
II. COMMERCIAL APOLOGIES: THEORY AND PRACTICE	1215
A. A THEORY OF APOLOGIES	1215
1. The Goals of Tort Law and Apologies	1215

*. Yonathan Arbel is a Visiting Assistant Professor, Villanova University School of Law; Yotam Kaplan is a Private Law Fellow, Harvard Law School. We wish to thank Janet Freilich, Meirav Furth, Oren Bar-Gill, Yehonatan Givati, John C.P. Goldberg, Patrick Goold, Kobi Kastiel, Louis Kaplow, Murat Mungan, Steven Shavell, Yahli Shereshevsky, Henry E. Smith, Kathryn Spier, and Gabriel Teninbaum for insightful comments and discussions. We are also thankful for the suggestions of the participants in the Fellows Colloquium at the John M. Olin Center for Law, Economics, and Business at Harvard Law School. Generous financial support was provided by the Project on the Foundations of Private Law at Harvard Law School.

2. A Unified Theory of Apologies in Tort Law	1220
B. COMMERCIAL APOLOGIES IN PRACTICE	1224
1. Delegation and Specialization	1225
2. Professionalization and Training	1226
3. Diffusion of Responsibility	1227
4. Corporate Culture	1229
C. EFFECTIVENESS OF COMMERCIAL APOLOGIES	1230
III. CRITICAL ANALYSIS AND POLICY IMPLICATIONS	1233
A. BETTER SORRY THAN SAFE	1233
B. THE PARADOX OF EXCESSIVE APOLOGIES	1235
C. APOLOGY AS DISCLOSURE	1236
D. THE DEFICIT OF APOLOGY DEFICIT	1238
E. POLICY IMPLICATIONS	1239
CONCLUSION	1241
APPENDIX: A MODEL OF LIABILITY FOR ACCIDENTS WITH APOLOGIES	1243

INTRODUCTION

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 few decades pass *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 damages caps and screening panels.¹ 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

1. See *infra* Part I.B.

specialists, and legal theorists—they found a path into the hearts of legislators and the public. This maneuver has been so effective that even long-standing opponents of tort reform, such as former President Barack Obama, expressed support for these reforms.² In only two decades, thirty-six states have adopted apology laws, and there is currently a strong push to expand apology law reform to the federal level and to other areas of law.³

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.⁴ In other words, we make the overlooked claim that apology laws undercut the deterrent effect of tort liability.⁵ We base our argument on tort theory as well as research in psychology, economics, sociology, and marketing. We contend that apology laws facilitate and encourage strategic apologies by commercial actors—apologies that do not express a real commitment to avoid future wrongdoing. Instead, commercial apologies exploit the human tendency to forgive, a tendency with 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 be exposed to limited liability if they apologize, they will 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. This problem is exacerbated in light of new market trends that “professionalize” and facilitate the tender of apologies by commercial actors, thus greatly amplifying their

2. See *infra* Part I.C.

3. See, e.g., Chandler Farmer, *Striking a Balance: A Proposed Amendment to the Federal Rules of Evidence Excluding Partial Apologies*, 2 BELMONT L. REV. 243, 264 (2015) (calling for the creation of 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, 180 (2015); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 367 (1999) (calling for the use of shaming and apologies as a substitute to criminal sanctions); Michael B. Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 SAN DIEGO L. REV. 137, 148–49 (2009). See also *infra* note 76.

4. Indeed, to the economist, apologies are puzzling: “they must be regarded as *cheap talk*,” and “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’L REV. L. & ECON. 178, 178 (2012). Mungan argues that wrongdoers benefit from apologizing, as it relieves their guilt, which suggests that a special penalty will be levied on those who apologize. *Id.* at 179. See also Murat C. Mungan, *A Note on the Effects of State-Dependent Benefits on Optimal Law Enforcement*, 6 REV. L. & ECON. 97, 98 (2010) (noting that certain individuals feel a relief of their guilt after being punished). Our focus on commercial apologies suggests a lesser role for relief of guilt than in Mungan’s analysis.

5. See *infra* Part II.A.

potential harmful effects.⁶

The policy implications of our argument span three domains. First, the argument highlights a democratic gap in apology laws, inviting greater, and more informed, public scrutiny of the discussion over these laws, either in the context of pending attempts to expand these laws or in the context of repealing them. The public should start viewing apology laws as homomorphous with tort reform. Second, our argument suggests that consumer and patient safety may be in jeopardy due to the use of apologies, and we believe scholars should suspend their support of these laws and focus on establishing their actual effect on patient safety. 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 are suddenly witnessing deep interest from commercial actors and tort reformers in the virtues of apologies in the context of private law.⁷ These reformers realized that by using the uncontroversial rhetoric of apologies and penance they can mobilize legislators from both sides of the political aisle. Hence, the support of apology laws by commercial interests should not be viewed as a commendable fusion of social and moral norms with business practices, but rather as 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 illuminating to consider the results of studies done on payments to victims in states that enacted apology laws.⁸ 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–\$73,000 in legal payouts *per case*,⁹ which, for many victims, marks the difference between being able

6. Our analysis does not assume that all commercial apologies are merely strategic. *See infra* Part II.A.2.

7. We do not address in this paper the topics of public or state apologies, which raise distinct issues. For more on these issues, see generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); Michael R. Marrus, *Official Apologies and the Quest for Historical Justice*, 6 J. HUM. RTS. 75 (2007).

8. *See infra* Part II.C.

9. *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. EMPIRICAL LEGAL STUD. 179, 192 (2011) (showing a reduction of \$32,665 per case); Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141, 143, 161 (2011) [hereinafter Ho & Liu, *Does Sorry Work?*] (showing a reduction of \$58,000–\$73,000 for severe cases and \$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, R. Lawrence Van Horn & W. Kip Viscusi, *Sorry Is Never Enough: The Effect of State Apology Laws on Medical Malpractice Liability Risk* (Dec. 10, 2016) (unpublished manuscript), <https://papers.ssrn.com/sol3/papers.cfm?>

to afford proper treatment for their accidents and suffering from disability and abject 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 which can cut down operational costs by millions of dollars in regulatory fines, judgments, and public outrage.¹⁰

The Article has three Parts. In Part I, we explore the unexpected camaraderie between 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 still 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.

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 of 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 lobbying 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 1990s, a movement of loosely formed “Legal Apologists” started to gain traction.¹¹ The Legal Apologists critiqued the resolution of

abstract_id=2883693 (reaching findings similar to those offered by Ho and Liu).

10. See, e.g., Erin O’Hara O’Connor, *Organizational Apologies: BP as a Case Study*, 64 VAND. L. REV. 1957, 1977–79 (2011) (discussing the role and effect of corporate apologies).

11. See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1019–23 (1999) (explaining the benefits of apologies to clients); Aviva Orenstein, *Apology Excepted:*

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 operating outside of the law, they argued that the law has an important facilitative role.¹² 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 agency,¹³ reduce feelings of anger and aggression by the victim,¹⁴ control the attribution of fault to the responsible party,¹⁵ and start the process of healing.¹⁶ As a consequence, apologies are said to mend the social fabric

Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It, 28 SW. U. L. REV. 221, 247 (1999) (advocating for legal protection of apologies); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 487–88 (1986) (arguing that the incorporation of apologies into the American legal culture would reduce litigation and repair relationships). Regarding 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.”).

12. See, e.g., Cohen, *supra* note 11, 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 3, at 249 (calling apologies “legally dangerous”).

13. See AARON LAZARE, ON APOLOGY 107 (2005) (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) (noting that in restorative justice, “[t]he offender acknowledges the harm he caused [and] apologizes”).

14. See Erin Ann O'Hara & Douglas Yarn, Note & Comment, *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. PERSONALITY & SOC. PSYCHOL. 219, 221 (1989) (testing empirically the effects of apologies on victim's aggression and finding soothing effects).

15. 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 reasons outside the wrongdoer's control, See Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742, 745, 749 (1982) (finding that children attribute less responsibility to apologizing transgressors); Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY 281, 308 (1991) (“confession[s] alter perceptions of the confessor's moral character and causal attributions for the negative action.”). On the paradox, see Jennifer K. Robbenolt, *Apologies and Reasonableness: Some Implications of Psychology for Torts*, 59 DEPAUL L. REV. 489, 492 (2010).

16. See LAZARE, *supra* note 13, at 263 (listing the healing properties of apologies); Margareth Etienne & Jennifer K. Robbenolt, *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

torn by the transgression,¹⁷ restore prior relationships,¹⁸ and facilitate negotiation.¹⁹ Importantly, the apology expresses a reestablished obligation to refrain from future transgressions.²⁰

For the Legal Apologists, all of these advantages link to one overarching theme: apologies facilitate effective dispute resolution.²¹ By

(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).

17. 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.”) Tavuchis also argues that apologies serve to reaffirm the victim’s membership in the community. *See id.* at 7–8, 20–21; Bruce W. Darby & Barry R. Schlenker, *Children’s Reactions to Transgressions: Effects of the Actor’s Apology, Reputation and Remorse*, 44 BRIT. J. SOC. PSYCHOL. 353, 354 (noting that by apologizing, the offender “reaffirms the values of the rules that have been broken”); Erving Goffman, *On Face-Work: An Analysis of Ritual Elements in Social Interaction*, 18 PSYCHIATRY 213, 220 (1955) (finding that the apology is intended to “correct for the offense and reestablish the expressive order”); Roy J. Lewicki et al., *An Exploration of the Structure of Effective Apologies*, 9 NEGOT. & CONFLICT MGMT. RES. 173, 176 (2016). *See also* Samuel P. Oliner, *Altruism, Apology, Forgiveness, and Reconciliation as Public Sociology*, in HANDBOOK OF PUBLIC SOCIOLOGY 375, 380 (Vincent Jeffries ed., 2009) (“Through genuine apology and forgiveness, harmony may be restored.”).

18. *See* Orenstein, *supra* note 11, at 241 (“[A]pologies can transform individuals and regenerate relationships.”). According to equity theory, individuals strive for a sense of equity in their relationships, 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*, PERSONALITY & SOC. PSYCHOL. BULL. 864 (1999). Apologies are found to restore the sense of equity by demonstrating that the offender suffers too. *See* Robbenolt, *supra* note 15, at 492. *See also* Kish Vinayagamoorthy, *Apologies in the Marketplace*, 33 PACE L. REV. 1081, 1105 (2013) (arguing that an apology “reminds the transgressor of the value of the relationship”).

19. *See* Cohen, *supra* note 11, 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. HEALTH L. REV. 337, 339 (2015) (advocating for the use of 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) (“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.”). 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).

20. *See* Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity and Expectancies About Repeating Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291, 299 (2000); Runnels, *supra* note 3, 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 PHIL., <http://www.iep.utm.edu/apology> (last visited Sept. 4, 2017) (noting that to be considered valid, the apology must imply an intention to refrain from similar actions in the future).

21. *See* Cohen, *supra* note 11, at 1061 (“[E]ncouraging apologies to occur early on may prevent many injuries from escalating into legal disputes.”); Ebert, *supra* note 19, at 339 (noting that apologies can reduce litigation); Farmer, *supra* note 3, at 244 (“A sincere apology can help promote judicial economy by unlocking stalled settlement negotiations . . . [and] can help ensure that impasse is avoided altogether.”); 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

defusing victims' desire for vindication,²² apologies avoid disputes and encourage settlements, thus saving protracted legal proceedings with their emotional and pecuniary costs.²³

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, and once this need is met, victims express satisfaction and high willingness to settle and forego litigation.²⁴ A leading example is Jennifer Robbennolt's work. In a series of experimental studies, Robbennolt found that apologies increase victims' belief that they would win their lawsuits, but paradoxically, she also found that recipients of apologies had more favorable views of the injurer, were more willing to settle, and were more receptive to lower settlement offers.²⁵ Robbennolt also found that

means of resolving conflict and preventing litigation.”); Orenstein, *supra* note 11, at 242 (“[A]pologies can substitute for costly litigation.”); Zisk, *supra* note 19, at 390.

22. See *supra* note 16.

23. Steven Shavell and Mitchell Polinsky estimate that costs of the legal system absorb almost half of payments made by plaintiffs to defendants. A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1470 (2010) (“[F]or 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.”).

24. See Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 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 LAW & SOC'Y REV. 105, 116 (1990) (finding that the absence of doctor concern 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 that 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 Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES 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) (finding a desire for apologies in a survey of victims of sexual abuse); Piper Fogg, *Minnesota System Agrees to Pay \$500,000 to Settle Pay-Bias Dispute*, CHRON. HIGHER EDUC., Feb. 14, 2003, at A12 (“‘I want an apology,’ [a class-action plaintiff] said [in disappointed reaction to a settlement], ‘and I am never going to get it.’”); Editorial, *The Paula Jones Settlement*, WASH. POST, Nov. 15, 1998, at C6.

25. See Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 353–56 (2006); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 462 (2003) [hereinafter Robbennolt, *Legal Settlement*]. See also Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental*

victims who received an apology believed that the injurer is more likely to be careful in the future.²⁶ 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.”²⁷ In our own analysis, we found hundreds of legal articles on the issue, starting mostly in the 1990s and peaking in popularity in the 2000s.²⁸

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 “restorative justice,”²⁹ “therapeutic jurisprudence,”³⁰ and alternative dispute resolution, with special emphasis on mediation.³¹ Apologies were offered as a means of reforming diverse areas of law, such as criminal law,³² medical malpractice,³³ tort law,³⁴ and intellectual property.³⁵ It was even suggested that part of the Federal Register (“probably one of the driest publications ever printed”) should include a section for governmental apologies.³⁶

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

Approach, 93 MICH. L. REV. 107, 148–50 (1994) (finding, but with low statistical significance, that apologies affect willingness to settle).

26. See Robbenolt, *supra* note 15, at 506. For the effect of apologies outside the lab, see *infra* Part II.C.

27. Xuan-Thao Nguyen, *Apologies as Intellectual Property Remedies: Lessons from China*, 44 CONN. L. REV. 883, 891 (2012).

28. Data acquired from a Lexis Advance search, using the search terms “title(apolog*) OR summary(apolog*)” to search all Law Review and journal articles between 1984–2015. A total of 326 results were found.

29. See Bibas & Bierschbach, *supra* note 16, 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 LAW & HUM. BEHAV. 378, 379 (2015) (“[A]pology is central to restorative justice.”).

30. See Jones, *supra* note 13, at 565–68 (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).

31. See Bibas & Bierschbach, *supra* note 16, at 130–35 (advocating for a 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. & L. DIG. 55, 55–56 (2014) (discussing the effectiveness of apologies in dispute resolution); Levi, *supra* note 16, at 1165.

32. See generally Bibas & Bierschbach, *supra* note 16 (calling for a fuller integration of apologies and expressions of regret into criminal procedure).

33. See Gailey, *supra* note 3, at 177–78.

34. See, e.g., Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 188–89 (2000).

35. See Nguyen, *supra* note 27, at 886–87.

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

moral value,³⁷ that people would fake apologies and courts would be ill-positioned to verify their authenticity,³⁸ or that frequent apologies would lead victims to accept settlements that do not compensate them fully.³⁹ Despite these challenges, the movement itself is still going strong, seemingly in the belief that none of these challenges are 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 the 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 what they see as the excessive costs imposed on defendants as a result of biased litigation. They argue that doctors are motivated not only by concern for patients but also by financial

37. See, e.g., TAVUCHIS, *supra* note 17, 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 derives from the exposure of the apologizing party to the consequences of the wrongful act). Interestingly, victims may also abuse apologies by refusing to accept them, in order to use them as a basis for a lawsuit. See O'Hara & Yarn, *supra* note 14, at 1176. For a critique stating that apologies are helpful even when they do not admit blame, see Helmreich, *supra* note 21, at 609.

38. On strategic apologies, see Ebert, *supra* note 19, at 364 (“[A] wrongdoer might apologize for the wrong reasons.”); O'Hara & Yarn, *supra* note 14, 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.”); Daniel Eisenberg, *When Doctors Say, “We're Sorry,”* TIME, Aug. 15, 2005, 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 that he was not really sorry. Amanda Garrett, *Apologize or Go to Jail: Judge Orders Criminals to Say, ‘I’m Sorry,’ to Victims*, PLAIN DEALER REP., Oct. 9, 1999, at 1B. *But see* Cohen, *supra* note 11, 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 3 (advocating for apologies as shaming sanctions); Orenstein, *supra* note 11, at 223 (“Even apologies that originate from self-protection, which are not entirely sincere or fully contrite, serve a vital social purpose.”). On courts' abilities to assess apologies, see Bibas & Bierschbach, *supra* note 16; Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. 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).

39. See Levi, *supra* note 16, 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 CHAP. L. REV. 307, 309 (2011) (“[M]odern 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.”).

and reputational concerns; therefore, the specter of excessive liability negatively affects the industry and, especially, physicians who are pressured to engage in so-called “defensive medicine,” (i.e., the prescription of unwarranted tests and procedures for the sole purpose of reducing their own liability risk, sometimes to the detriment of the patient).⁴⁰ 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 goods and services). To contain these costs, tort reformers suggest a series of methods—most prominently, damages caps—that would curb the threat of excessive liability. Opponents dispute all these ideas. They challenge tort reformers to provide evidence showing that liability is indeed excessive, that defensive medicine is prevalent, or that tort reform has any positive effect on the costs or quality of healthcare.⁴¹

To be clear—and clarity is often lacking in this debate—tort reform is not about making the tort system more efficient per se.⁴² Both reformers and their opponents are open to making the system work better at a lower cost.⁴³ 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 they overly deter potential injurers, such as physicians, giving rise to “defensive medicine” practices. Therefore, their call is to cap money damages as a means of abating the over-deterrent effect of litigation.⁴⁴

40. David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 JAMA 2609, 2612 (2005) (finding in a survey of 824 physicians that 93% practice defensive medicine).

41. See, e.g., Myung-ho Paik et al., *Will Tort Reform Bend the Cost Curve? Evidence from Texas*, 9 J. EMPIRICAL LEGAL STUD. 173, 176–81, 209–211 (2012) (reviewing the literature and conducting an empirical analysis of the effect on costs).

42. See generally Carl T. Bogus, Symposium, *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); Rachel M. Janutis, *The Struggle over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943 (2006) (using the state of Ohio as an example to argue that tort retraction is a political movement driven by economic self-interest).

43. For example, the leading Democratic legislation of the past decade, the Patient Protection and Affordable Care Act, explicitly endorses efficiency-oriented reforms to tort law, prompting states to “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.”). Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, § 6801(2), 124 Stat. 119, 804.

44. See, e.g., Michael P. Allen, *A Survey and Some Commentary on Federal “Tort Reform,”* 39 AKRON L. REV. 909, 910 (2006) (noting that “arguments about tort reform are really arguments about restricting tort recoveries in one form or another,” though the author nonetheless uses a more expansive definition); Janutis, *supra* note 42, at 944 (explaining that tort reformers seek to “limit[] the availability of relief and the amount of relief in personal injury actions”); Geoff Boehm, *Debunking Medical*

In terms of political economy, the tort reform debate pits consumers and trial attorneys against professional, commercial, and business interests.⁴⁵ These opposing camps have mapped on to 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.⁴⁶ Most notably, President George W. Bush strongly favored tort reform at the federal level, calling to cap all money damages at \$250,000,⁴⁷ while President Barack Obama was largely opposed to damages caps.⁴⁸

Tort reform has gained a foothold in many states. According to data collected by Ronen Avraham in 2012, twenty-one states have placed a cap on non-economic damages, eighteen on punitive damages, and twenty-two on total compensation.⁴⁹ Ulrich Matter and Alois Stutzer recently found that a state having Republican leadership is significantly more likely to undertake tort reform.⁵⁰ This is consistent with the findings of our own analysis, which found that out of twenty-four Republican states, nineteen had caps, whereas out of twenty-six Democratic states, only sixteen had caps (79% vs. 61%). But while tort reform has made considerable inroads, it also faces strong

Malpractice Myths: Unraveling the False Premises Behind "Tort Reform," 5 YALE J. HEALTH 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").

45. See Paul H. Rubin, *Public Choice and Tort Reform*, 124 PUB. CHOICE 223, 230 (2005) (describing the tension between the different groups); Todd J. Zywicki, *Public Choice and Tort Reform* (George Mason Univ. Sch. of Law, Law & Econ. Working Paper No. 00-36, 2000) (arguing that lawyers are pushing for expansion of tort liability). See also Janutis, *supra* note 42, at 945–46.

46. 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, 1115–19 (Jure Förlag, 2006) (identifying tort law with conservative values and suggesting that Democratic support of the tort system is a recent one); Paul H. Rubin, *supra* note 45, at 230–31 (explaining the mapping of these interests in partisan terms).

47. Remarks at the University of Scranton in Scranton, Pennsylvania, 1 PUB. PAPERS 57, 62 (Jan. 16, 2003) ("[F]or the sake of affordable and accessible health care, we need a cap on non-economic damages, of \$250,000.").

48. *Transcript: President Obama*, CBS NEWS: 60 MINUTES (Sept. 11, 2009) ("What I would be willing to do is to consider any ideas out there that would actually work . . . [but damages] caps will not do that."). In this interview, President Obama clarified a statement he gave to Congress, acknowledging the potential importance of defensive medicine. See *Address Before a Joint Session of the Congress on Health Care Reform*, 2 PUB. PAPERS 1362, 1368 (Sept. 9, 2009).

49. Ronen Avarham, *Database of State Tort Law Reforms Clever (5.1)*, TEX. L., <https://law.utexas.edu/faculty/ravraham/dstlr.php> (last visited Sept. 5, 2017).

50. See Ulrich Matter & Alois Stutzer, *The Role of Party Politics in Medical Malpractice Tort Reforms*, 42 EUR. J. POL. ECON. 17, 26–27 (2016).

opposition. First, politically, as we noted, Democratic states are traditionally averse to tort reform. Second, consumer and attorney lobbying mounts a strong opposition. And third, various courts have held damages caps unconstitutional, mostly due to concerns of their limiting effects on the right to a trial by jury.⁵¹ 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, legal, and interest-group deadlock. Realizing this, tort reformers drew a coterie of 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.⁵² With the rhetoric of the Legal Apologists and 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. Among those lobbying for apology laws, we find the same actors supporting tort reform: insurance companies, medical associations, and large companies in diverse industries.⁵³ Those actors advance their goals using the rhetoric of apologies, suppressing indications of tort reform.⁵⁴ In Madison, Wisconsin, for example, “[t]he medical lobby, supported by powerful business groups, outmaneuvered trial lawyers” and has managed to pass the “I’m Sorry Bill.”⁵⁵ This was done by

51. See Bryan J. Chase et al., *Are Non-Economic Caps Constitutional?*, DEF. COUNS. J. 154, 15–56 (2015) (reviewing the judicial battle over the constitutionality of non-economic damages caps).

52. NICK SMITH, JUSTICE THROUGH APOLOGIES: REMORSE, REFORM, AND PUNISHMENT 283 (2015) (arguing that “tort reformers often bundle apology legislation within” other tort reform measures); Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 856 (suggesting that apology laws depend on support by “insurance companies, medical associations and Fortune 500 companies”); Teninbaum, *supra* note 39, at 311 (“Industry lobbyists exerted influence on lawmakers to create special medical apology shield laws . . .”). See also Runnels, *supra* note 3, at 484–85 (noting the lobbying efforts of Sorry Works!, a coalition of physicians, insurers, hospital administrators and patients).

53. See *supra* note 52.

54. Doug Wojcieszak et al., *The Sorry Works! Coalition: Making the Case for Full Disclosure*, 32 JOINT COMMISSION J. ON QUALITY & PATIENT SAFETY 344, 344 (2006) (portraying apology laws as a “middle-ground” approach to the “medical malpractice crisis”).

55. Cary Spivak & Kevin Crowe, *Medical Lobby Is a Powerhouse in Wisconsin Capitol: ‘I’m Sorry’ Bill Latest Example of Doctors’ Clout*, J. SENTINEL (June 28, 2014, 5:00 PM), <http://archive.jsonline.com/watchdog/watchdogreports/medical-lobby-is-a-powerhouse-in-wisconsin-capitol-b99291106z1-265030841.html>.

referring to compassion rather than to tort reform: “at these difficult times, people want, need and deserve compassion.”⁵⁶ 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.”⁵⁷

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 a “safe harbor” for apologies.⁵⁸ Apologies often convey evidence of fault and are therefore admissible at trial.⁵⁹ Reformers argued, following the Legal Apologists, that using apologies as evidence of fault is wrong because it punishes the people who “did the right thing.”⁶⁰ They further argued that existing evidentiary rules intimidate physicians and other defendants, making them view apologies as “legal suicide,”⁶¹ and thus create an undue and unfair barrier to injurers apologizing.⁶² 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

56. Patrick Marley & Jason Stein, *Senate Passes Chemotherapy, Cannabis Oil Bills*, J. SENTINEL (Apr. 1, 2014), <http://archive.jsonline.com/news/statepolitics/wisconsin-senate-is-poised-to-act-on-police-custody-chemotherapy-bills-b99237082z1-253288731.html>.

57. Debra Beaulieu, *Disclosure, Apology and Offer: A New Approach to Medical Liability*, MASS. MED. SOC’Y (June 2012), <http://www.massmed.org/News-and-Publications/Vital-Signs/Back-Issues/Disclosure,-Apology-and-Offer--A-New-Approach-to-Medical-Liability>.

58. See Orenstein, *supra* note 11 (calling for safe-harbor laws); 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). The nation’s apology laws originate in Massachusetts; 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 MASS. ANN. LAWS ch. 233, § 23D (LexisNexis 2017); Taft, *supra* note 37, at 1051–52.

59. See 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 11, at 1032–36. An apology might also be inadmissible if it is implied from an offer to cover medical expenses. See 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.

60. See Cohen, *supra* note 52, at 864 (“The law should not punish people who take moral steps.”); Orenstein, *supra* note 11, 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.”).

61. Eisenberg, *supra* note 38, at 50.

62. See Robbenolt, *Legal Settlement*, *supra* note 25, 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”) (Robbenolt also notes, however, that there is no empirical research to support this perception.). See also Cohen, *supra* note 11, at 1010 (“If a lawyer contemplates an apology, it may well be with a skeptical eye: Don’t risk apology, it will just create liability.”).

apologies in mediation,⁶³ settlement procedures,⁶⁴ and the early stages of trial.⁶⁵ Finally, the third item was more institutional—providing judges with the power to mandate apologies as an additional or substitute aspect of sanctions.⁶⁶

Reformers have been extremely successful, conquering thirty-six state legislatures in only a decade.⁶⁷ Additionally, courts have seemed to internalize apology norms.⁶⁸ Some courts are said to apply these norms “with gusto,”⁶⁹ leading them to treat apologies as valid grounds for mitigating

63. See Levi, *supra* note 16.

64. See Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 292 (2001).

65. See Etienne & Robbenolt, *supra* note 16, at 299 (“[E]ncouraging apologies in earlier stages of the criminal law process may be a laudable goal . . .”); Bibas & Bierschbach, *supra* note 16, at 128–29 (advocating that the tender of an apology would lead to lenient charges, foregoing of arrests, and deferment of prosecutions).

66. Compare Latif, *supra* note 64, 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. & SOC. CHANGE 1, 50–57 (1997) (advocating an equitable remedy of apologies in civil litigation); White, *supra* note 16, at 1297 (“Requiring unrepentant officials to endure a small amount of psychological discomfort [through coerced apologies] is a small price to pay to help injured individuals.”), with Pa. Human Relations Comm’n v. Alto-Reste Park Cemetery Ass’n, 306 A.2d 881, 890 (Pa. 1973) (Pomeroy, J., 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 16, at 1178 (arguing that involuntary apology is “just talk”). See generally Nick Smith, *Against Court-Ordered Apologies*, 16 NEW CRIM. L. REV. 1 (2013) (arguing that court-ordered apologies serve little function).

67. See Latif, *supra* note 64, at 301 (reporting on California, Massachusetts, and Texas in 2001). For a comparison with thirty-six states today, see Edward Adams, *Apology Protection Laws Letting Physicians be Human*, EBS CONSULTING (Mar. 2, 2016), <http://blog.ebs-consulting.com/apology-protection-laws-in-36-states-letting-physicians-be-human-again>. See also Ebert, *supra* note 19, at 366; Zisk, *supra* note 19, at 375 & n.43. The most prevalent form of apology laws is a safe harbor for expressions of sympathy and empathy (e.g., “I am sorry you were hurt.”). See, e.g., MONT. CODE ANN. § 26-1-814 (2017) (providing a safe harbor for statements “expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence relating to the pain, suffering, or death of a person”). 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.”). See, e.g., MASS. GEN. LAWS ANN. ch. 233, § 79L (West 2012).

68. Judges are reluctant 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 19, at 349 (“[T]he 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, 442, 445 (Cal. 1945) (finding that a physician’s admission that a mistake is “all my own” is “insufficient to establish negligence”); *Phinney v. Vinson*, 605 A.2d 849, 850 (Vt. 1992) (finding that a 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).

69. White, *supra* note 16, at 1268–69. See also Latif, *supra* note 64, at 296–98.

money damages,⁷⁰ lowering sentencing,⁷¹ and exempting legal liability for crimes.⁷² 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.”⁷³ Yet, this success has not satiated reformers’ appetite; they now seek to expand the scope of apology laws,⁷⁴ apply them to other areas of civil and criminal law,⁷⁵ enact them at the federal level,⁷⁶ and make them more uniform.⁷⁷ Additionally, some advocate that judges be able to compel the government to apologize in civil rights cases.⁷⁸

Tort reformers managed an impressive feat. On the one hand, they drew on the resources and financial support of business interests that invest hundreds of millions of dollars each year to advance tort reform.⁷⁹ On the other hand, they garnered broad bipartisan support. They even swayed consumer advocates and lawyers who were willing to withdraw their traditional opposition to tort reform in this context.⁸⁰ Remarkably, despite

70. See, e.g., *Groppi v. Leslie*, 404 U.S. 496, 506 n.11 (1972) (noting the frequency of mitigated penalties for contempt following an apology); *Johnson v. Smith*, 890 F. Supp. 726, 729 n.6 (N.D. Ill. 1995) (noting that a prompt apology mitigates punitive damages). See generally Rehm & Beatty, *supra* note 58 (reviewing the legal effects of an apology).

71. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 & cmt. 3 (U.S. SENTENCING COMM’N 2016) (providing for sentence reductions of two to three levels following clear demonstrations of acceptance of responsibility); Bibas & Bierschbach, *supra* note 16, at 92–95 (showing how criminal law positively accounts for apologies in sentencing).

72. See, e.g., Kahan & Posner, *supra* note 3, at 367 (reporting a judge’s substitution of a letter of apology for a ten-year sentence for embezzlement).

73. Cohen, *supra* note 52, at 819. See also Gailey, *supra* note 3, at 178–81 (surveying the development of state apology laws).

74. 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].”).

75. See, e.g., Jones, *supra* note 13, at 580–81 (advocating for an “apology privilege” that would create a safe harbor for apologies in criminal proceedings).

76. See Cohen, *supra* note 11, at 1061–62; Kahan & Posner *supra* note 3, at 367. See also Helmreich, *supra* note 21, at 603–04.

77. See Zisk, *supra* note 19, at 377–78 (noting that in Iowa, chiropractors are protected when they apologize, but chefs are not). See also IOWA CODE § 622.31 (2015) (making inadmissible in civil tort cases the apologies extended by licensed professionals).

78. See White, *supra* note 16, at 1273–74 (advocating the use of court-coerced apologies as a civil rights remedy).

79. Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. S183, S184 (2007).

80. PUBLIC CITIZEN, MEDICAL MALPRACTICE BRIEFING BOOK: CHALLENGING THE MISLEADING CLAIMS OF THE DOCTORS’ LOBBY 85 (2004) (suggesting apology laws as an alternative to tort reform); *Pennsylvania Governor Signs Benevolent Gesture Medical Professional Liability Act*, CLAIMS J. (Oct. 25, 2013), <http://www.claimsjournal.com/news/east/2013/10/25/238945.htm> (reporting that after a decade of back and forth battles between doctors and lawyers “the two professions recently changed

his known opposition to tort reform, then-Senator Barack Obama co-sponsored a bill with Hillary Clinton that sought to establish federal apology safe harbors.⁸¹ Indeed, Democratic lawmakers still seem as keen to adopt apology laws as Republican lawmakers, as evidenced by wide adoption in both blue and red states.⁸²

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, are the broader effects of apology laws on incentives, harms, and other social costs. These issues are simply suppressed, and 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 something 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 for evaluating the effect of apologies on behavior. This theory highlights the importance of the cost and effectiveness of apologies to the evaluation of the social desirability of apology laws; given that, this Part considers both issues separately, showing how the costs of commercial apologies are declining while their effectiveness remains robust.

A. A THEORY OF APOLOGIES

1. The Goals of Tort Law and Apologies

The Legal Apologists have over-emphasized the importance of apologies in controlling the costs of disputes and litigation.⁸³ They argue that apologies help curb litigation by dissipating victims' anger and need for

lobbying tactics by mutually agreeing on a new reform that both sides say will help.”).

81. See National Medical Error Disclosure and Compensation (MEDiC) Act, S.1784, 109th Cong. (2005); Hillary Rodham Clinton & Barack Obama, *Making Patient Safety the Centerpiece*, 354 NEW ENG. J. MED. 2205, 2206 (2006) (discussing the MEDiC Act); Runnels, *supra* note 3, at 156 (discussing the MEDiC Act).

82. Ho & Liu, *Does Sorry Work?*, *supra* note 9, at 144 n.5 (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,” and also finding that apology laws are not correlated with other tort reforms).

83. See *supra* note 21.

vengeance. In support of this view, they marshal some empirical evidence—although we note that more recent findings cast doubt on the strength of this argument.⁸⁴ These newer findings notwithstanding, the Legal Apologists argue that apologies are socially desirable as they lead to lower levels of litigation, thus saving unnecessary waste. While controlling litigation costs is advantageous, tort law takes a much broader view where litigation costs play only a secondary role. The two primary goals of tort law are compensation of victims and deterrence of wrongdoers; the reduction of litigation costs is an important, but secondary goal.⁸⁵

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. 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 also 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 being equal—much less 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.⁸⁶

Before discussing the effect of apologies on deterrence, it is important to pause and reflect on the other primary goal of tort remedies: compensation. The common understanding of the compensation goal is to restore the victim to the status quo ante—prior to the accident—by providing

84. See *infra* Part II.C.

85. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 192–93 (2004); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 499–501 (1961) (discussing the issue of loss spreading). See generally 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); Shavell & Polinsky, *supra* note 23 (critically assessing the effectiveness of tort law in meeting these goals in the context of product liability).

86. 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 generally under-deters, 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).

money damages that approximate the loss.⁸⁷ Stated this way, it is clear that apologies undercut the compensation goal because—as demonstrated by the Apologists themselves—victims are willing to accept lower payments in settlements when an apology is tendered.⁸⁸ Despite this apparent difficulty, the Legal Apologists argue that apologies are compensatory, on the theory that apologies have therapeutic value. The Legal Apologists claim that judging the adequacy of apologies with money is inadequate, as it does not capture the positive emotional and expressive effect of apologies on the victims' well-being. Some go as far as arguing that apologies can heal some of the harms inflicted by the injurer, restoring a sense of self-worth to victims who feel deprived of autonomy by the injurer's seeming disregard to their welfare.

There are strong reasons to be skeptical of the therapeutic value theory, particularly in the context of commercial apologies, and we cover five of those here. 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 sometimes forgo hundreds of thousands in compensation.⁸⁹ The first two reasons a victim may accept an apology unwillingly have to do with pressure and manipulation. For example, Gabriel Teninbaum recently documented how apologies are strategically used by sophisticated commercial firms as means of beguiling victims.⁹⁰ Teninbaum's account highlights certain apology practices used by firms that are meant to create emotional pressure on victims to accept them, a decision that the victim will later come to regret.⁹¹ The strategic, deliberate use of apologies by commercial firms is designed to maximize this effect, and victims employ only limited agency in their decision to accept the apology. A second reason concerns pressure that comes from sources besides the injurer. Pursuant to an apology, victims may still wish to sue; however, they are often subject to social or internal pressures to avoid doing so, lest they be perceived as vengeful, unrelenting, or ungrateful. Research in psychology shows that failure to accept an

87. See *Livingstone v. Rawyards Coal Co.* [1880] 5 App. Cas. 25 (HL) 39 (appeal taken from Scot.) (Blackburn, L.) ("In settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong . . .").

88. See, e.g., Korobkin & Guthrie, *supra* note 25, at 148–50.

89. See *infra* Part II.C.

90. See Teninbaum, *supra* note 39, at 309.

91. *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.").

apology is associated with a negative perception of the victim.⁹² Similarly, victims may experience internal or social pressures (perceived or real) not to sue, due to the social norm of accepting apologies.⁹³ Thirdly, the asymmetries of power between victims and companies tend to lead to under-participation of consumers in the legal process, which means that the *expected* compensation will also tend to be lower.⁹⁴

Two other reasons are more epistemological in nature. 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 only a sliver of the actual responsibility for the accident (aside from the very general sense in which the CEO is the personification of the firm, a loaded idea by itself).⁹⁵ What does the apology say about the future? Would a commercial firm be less likely to recidivate after an apology? The meaning of such an apology is an open question. This leads us to the other 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.⁹⁶ Humans have a strong tendency—potentially related to evolutionary reasons—to accept apologies from other humans.⁹⁷ The

92. 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 CURRENT PSYCHOL. 10, 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. EXPERIMENTAL SOC. PSYCHOL. 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 Ho & Liu, *Does Sorry Work?*, *supra* note 9, at 148.

93. Some moral philosophers believe that there exists a duty to forgive. See CHARLES GRISWOLD, FORGIVENESS: A PHILOSOPHICAL EXPLORATION 67 (2007) ("[U]nder certain conditions it would be blameworthy not to forgive . . ."); Espen Gamlund, *The Duty to Forgive Repentant Wrongdoers*, 18 INT. J. PHILOSOPHICAL STUD. 651, 651–52 (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).

94. See Yonathan A. Arbel, *Adminization: Gatekeeping Consumer Litigation*, 71 VAND. L. REV. (forthcoming 2018) (surveying the participation gap and proposing an institutional solution).

95. On the diffusion of responsibility in firms, see *infra* Parts II.B.1 and II.B.3.

96. See Martin Eisend & Nicola E. Stokburger-Sauer, *Brand Personality: A Meta-Analytic Review of Antecedents and Consequences*, 24 MARKETING LETTERS 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 L. Aaker, *Dimensions of Brand Personality*, 34 J. MARKETING RES. 347, 347 (1997).

97. See Yohsuke Ohtsubo & Esuka Watanabe, *Do Sincere Apologies Need to Be Costly? Test of a Costly Signaling Model of Apology*, 30 EVOLUTION & HUM. BEHAV. 114, 114, 120–22 (2009) (considering apologies as an evolutionary adaptation).

concern is that people instinctively interpret apologies as commitments not to recidivate—commitments that are more plausible in interpersonal settings, where apology involves some humiliation and other emotional costs, than in commercial settings, where decisions can be made much more strategically and impersonally. This is reminiscent of how people tend to view certain brands and companies as “warm,” or as “evil”—a phenomenon known as brand personification.⁹⁸

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. The contention that individuals engage in a conscious trade-off of pecuniary and non-pecuniary benefits, preferring the latter to the former, is more convincing if we find actual evidence of a trade-off, of *some* commensurability of values. But, if victims forgo amounts that are not proportional to the harm they suffered, this casts doubt on the theory that there is a real trade-off of benefits. If the victim of an accident suffers a harm that would require a very costly surgery to repair, it is not convincing to argue that they are better-off accepting an apology than the money needed to afford the surgery. In practice, we will 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.⁹⁹

Overall, the idea that apologies serve compensation goals rests on shaky grounds. This is troubling, since the contention—while superficially appealing—is actually quite strong. It asks us to believe that victims rationally decide to accept apologies, that companies do not take advantage of the emotional instability that often follows an accident, that individuals fully understand and internalize the subtle differences between interpersonal and commercial apologies, and, above all, that the value of apologies to victims is so high that they will be willing to trade an apology for money that could be used to support their actual, physical recovery. The following thought experiment perhaps captures the source of this skepticism. Consider the common victim of medical malpractice, who suffered a great harm from negligent treatment. Suppose that after the accident, the victim receives an apology from the hospital staff or the physician, and as a consequence, decides to drop the lawsuit. Going back in time but knowing what the patient knows now, would the patient undergo the same procedure again? If the

98. See generally Ronald Jay Cohen, *Brand Personification: Introduction and Overview*, 31 PSYCHOL. & MARKETING 461 (2010) (discussing the concept of brand personification).

99. See *infra* Part II.C.

answer is negative, then it is unlikely that the apology really mended the harm and fully compensated the victim for the loss, and it is more likely that other factors came to bear on the victim's decision. Seeing that compensation fails to provide support for the use of apologies, we are left with the tension between the goal of deterrence and the goal of minimizing dispute costs. 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 can 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 potential 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.¹⁰⁰ 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.

To account for apologies, we add to the model the possibility that if an accident occurs, the injurer may choose to apologize. Apologizing involves both costs and benefits. Starting with the benefits, we observe that victims, when presented with an apology, are willing to settle more often than they otherwise would. *Additionally*, victims are willing to accept lower payments in their settlement agreements (which also facilitate the higher rate of settlements).¹⁰¹ It is important to recognize that these are two *distinct* effects, as the former economizes *litigation costs* for both parties, and the latter saves on *liability costs* only to the injurer. Besides these benefits, there are costs to

100. See *supra* note 21.

101. See *infra* Part II.C.

apology, which may involve loss of face, social stature, or reputation.¹⁰² 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 in a way that diverges from the social optimum, apologizing too little or too much, a point of concern that was not fully recognized in the literature.¹⁰³ To see that, consider first the *private* incentive to apologize, from the viewpoint of the injurer. 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—saving the injurer *both* 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 markedly different. The costs remain the same as before—whatever cost is involved in tendering the apology will also reflect a cost to society. The benefit of saving on litigation costs also remains stable—society saves the costs the parties would have spent on attorneys and litigation (in fact, society also counts the savings to the victim, which the injurer will not see). What changes is the effect of *liability* costs. From a social perspective, it does not matter that the injurer saves money by paying less to the victim, as the victim sustains a loss that is exactly equal to the injurer's saving. This disagreement between the injurer's private incentive and the social point of view leads the injurer to apologize too much or too little.¹⁰⁴

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 a total of \$400 in litigation costs (recall that the offender's \$2,500 savings is equal to the victim's loss). On the other hand, by apologizing, the

102. For example, one public official preferred being sent to prison rather than to a halfway house, because he did not want to apologize. See White, *supra* note 16, at 1269. See also Ebert, *supra* note 19, at 334–35 (discussing ego and the difficulty physicians face in admitting their professional shortcomings).

103. 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, 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).

104. Note that at this stage, we do not take into account the possibility that making the injurer pay will reduce the 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.

injurer could save \$2,700 (\$2,500 + \$200) at a cost of only \$400, thus creating 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 settlement amount. In this case, the apology will be socially valuable, as by investing \$300, a total of \$400 in litigation expenses can be saved. The offender, however, will not have an incentive to invest \$300, as this will only help save their own litigation costs of \$200.

We see that the social and private incentives to apologize may diverge. We would expect there to be too many apologies under a combination of the following circumstances: (1) apologies have a strong effect on victims' willingness to forgo parts of their claims, (2) injurers' litigation costs are high, and (3) 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 decisions will be affected by how much the injurer can anticipate having to pay should an accident occur. Under the standard analysis, it is suggested that if the expected payment will be equal to the harm, the injurer would have optimal incentives.¹⁰⁵ For example, 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 it 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

105. See William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 870 (1981); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-33 (1972). See also E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1341-43 (1985) (discussing optimal remedies in the context of contract law).

litigation and the costs of liability (e.g., \$5,000).¹⁰⁶ 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 will only do so if the apology is, on net, privately beneficial. It follows that the injurer will only apologize if this is expected to reduce the injurer's 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 be litigated. The savings on litigation due to a 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 injurers care about their own private costs in the event of an accident, this reduction means that injurers have less to worry about if an accident occurs 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 one of the neighbors a harm of \$5,000 in pollution costs. Suppose also, as before, that apology costs \$400 to tender, and that it leads to a settlement of \$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 plus 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 \$4,000,¹⁰⁷ 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, as we have seen, the injurer will not apologize; hence apologies will not have any effect on behavior. More generally, if apologies are very costly to make, they will

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

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

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 shows no appreciation of the notion that there is an advantage to apologies being costly, and that we may already have 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 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 the costs and benefits of apologies changes.¹⁰⁸ 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.

108. 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).

1. Delegation and Specialization

When an individual tries to render an apology, they are limited by their own abilities. If they are bad communicators, seem insincere, or are uncharismatic, then they may easily botch the apology. Individuals only have themselves to work with, and it will normally not do to send someone else to apologize on their behalf.¹⁰⁹ With commercial apologies, the situation is very different. Corporations, by necessity, delegate their tasks to individuals. This ability to delegate confers on corporations a unique advantage, as it allows them some leeway in the choice of the individual to tender the apology.¹¹⁰ 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's apology did not go over well,¹¹¹ the company realized that its apology was ineffective because the CEO was not an American and thus was not viewed as part of the affected group.¹¹² The company pivoted and delegated the task of apologizing to local, ethnically diverse employees, who were members of communities affected by the spill.¹¹³ BP ran television ads featuring these employees representing the company, who clearly identified themselves as Gulf Coast area locals and communicated their personal grief as a result of the accident.¹¹⁴

Certain social expectations constrain the ability to delegate apology tasks, such as the expectation that the apologizing party will be related to the wrong (e.g., an attending physician) or that the CEO will assume residual responsibility, in the spirit of President Truman's famous plaque stating that "The Buck Stops Here."¹¹⁵ On reflection, however, this constraint leaves considerable slack. In many corporate settings, each action of the corporation is a composite of many different actions and decisions taken by a diffused

109. See, e.g., Holley S. Hodgins & Elizabeth Liebeskind, *Apology Versus Defense: Antecedents and Consequences*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 297, 310 (2003).

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

111. See O'Hara O'Connor, *supra* note 10, at 1985.

112. See *id.* at 1986.

113. *Id.* at 1989.

114. *Id.* See also, e.g., BP, *BP Gulf Coast Update: Our Ongoing Commitment*, YOUTUBE (Dec. 20, 2011), <https://www.youtube.com/watch?v=hoOfR4Vv1o> ("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).

115. "The Buck Stops Here" Desk Sign, HARRY S. TRUMAN LIBR. & MUSEUM, <https://www.trumanlibrary.org/buckstop.htm> (last visited Sept. 7, 2017).

mass. There is no natural way to assign blame to a single employee for a defective automobile coming off the assembly line. Similarly, there may not be any natural candidate for an apology. Likewise, while some medical procedures involve one physician or nurse, many involve more than one, which creates a natural choice space for the hospital or medical facility. (Observe that patients will not always know who was really responsible for a given action, or even know who was treating them). Even the expectation that an apology will be tendered by corporate leaders leaves room for discretion, as the company can hire managers who are especially adept at apologizing, and may create corporate positions that are mostly symbolic to fulfill functions such as public relations, 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 effects: as one medical malpractice practitioner reported, patients “never sue the nice, contrite doctors. Their patients never call our offices.”¹¹⁶

2. Professionalization and Training

To be effective, an apology needs to be—or at least appear to be—sincere. However, sincerity is never observed, only inferred; a victim must resort to extrinsic evidence and heuristics to assess the authenticity of an apology. A body of scholarship has developed around learning these heuristics and how to exploit their weaknesses. Experts have shown, for example, how injurers can structure apologies for maximal effect by leveraging in-group bias,¹¹⁷ using effective language,¹¹⁸ choosing the right

116. Wojcieszak et al., *supra* note 54, at 347. *See also* Bruce W. Neckers, *The Art of the Apology*, 81 MICH. B.J. 10, 11 (2002) (recounting the story of a client who said that an apology would substitute for a lawsuit).

117. For example, Erin O’Hara O’Connor suggests that corporate wrongdoers may use local spokespeople in their apologies to maximize effect. O’Hara O’Connor, *supra* note 10, at 1986 (noting that the corporate apology was ineffective because the CEO had a “thick British accent” which “probably exacerbated the negative connotations of his resentful statements because it pegged him and the company as foreign”).

118. *See, e.g.*, Ameeta Patel & Lamar Reinsch, *Companies Can Apologize: Corporate Apologies and Legal Liability*, 66 BUS. COMM. Q., March 13, 2003, at 9, 21–22 (arguing that corporations can reap the benefits of apologies with diminished legal exposure by switching from active language (e.g., “I am sorry for hurting you”) to passive language (e.g., “I am sorry you were hurt”).

employees for the task,¹¹⁹ and timing apologies correctly.¹²⁰

These lessons are taught to commercial actors by specialized firms through seminars and workshops. Such firms help organizations implement apologies as part of their workflow, suggest ways to streamline the process of apologies, and offer best practices.¹²¹ One such example is Sorry Works!, an advocacy organization and a training company claiming to have trained “tens of thousands of healthcare, insurance, and legal professionals around the country” on how to use disclosure and apology to combat medical malpractice suits.¹²² The experience of the “3Rs Program,” instituted by the Colorado 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.¹²³

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

3. Diffusion of Responsibility

Commercial entities enjoy a psychological advantage, both because they find apologies easier to tender and because they require a lower psychological cost for the employee, relative to an apology done in interpersonal settings. Psychologists argue that an effective apology requires a person to create the impression of separate parts of their personality: a past offender, who committed a wrong and is thus worthy of scorn; and a present repentant apologizer, who deserves forgiveness.¹²⁴ This is a challenging task

119. See generally Leanne Ten Brinke & Gabrielle S. Adams, *Saving Face? When Emotional Displays During Public Apologies Mitigate Damage to Organizational Performance*, 130 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1 (2015) (studying the market effects of facial cues given by corporate wrongdoers).

120. See generally Jochen Wirtz & Anna S. Mattila, *Consumer Responses to Compensation, Speed of Recovery and Apology after a Service Failure*, 15 INT'L J. SERV. INDUSTRY MGMT. 150 (2004) (studying the effects of timing on apologies).

121. 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. MARKETING 95, 99 (2005).

122. *Our History & Mission*, SORRY WORKS!, <https://sorryworks.net/history-and-mission> (last visited Sept. 7, 2017).

123. See Teninbaum, *supra* note 39, at 317.

124. 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. APPLIED PSYCHOL. 104 (2004) (analyzing the differing effects of apologies and denials on repairing trust after alleged violations). A famous articulation of this idea is by sociologist Erving Goffman: “An apology is

because the more one accepts responsibility, the more one 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 each 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,¹²⁵ and second, because the offender may be cast in a bad light without negative implications for the image of the apologizing party.¹²⁶

For example, when General Motors CEO Mary Barra took office, she immediately had to start apologizing for the company's faulty ignition switches—a horrible scandal that had claimed the lives of 124 individuals.¹²⁷ Barra had no personal role in the incident, and, therefore, she was able to profusely apologize 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 Barbara Boxer to Barra’s apology.¹²⁸ Even in a closer case, such as BP’s oil spill, CEO Tony Hayward did not bear full personal

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 generally Bruce N. Waller, *Sincere Apology Without Moral Responsibility*, 33 *SOC. THEORY & PRAC.* 441 (2007).

125. Apologies are sometimes coupled with some remedial action. Here again, commercial actors have more options than individuals. As William Benoit noted, “[i]t may be possible to limit damage by firing one or more employees, but Hugh Grant cannot fire himself.” WILLIAM L. BENOIT, *ACCOUNTS, EXCUSES, AND APOLOGIES: A THEORY OF IMAGE RESTORATION STRATEGIES* 48 (2015).

126. 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 found that apologies by a call center for reservation or billing mistakes had strong and significant effects on consumer satisfaction. See Anna S. Mattila & Daniel J. Mount, *The Role of Call Centers in Mollifying Disgruntled Guests*, 44 *CORNELL HOTEL & RESTAURANT ADMIN. Q.*, Aug. 2003, at 75, 77–80. In another large qualitative study, researchers in the area of marketing found that corporations with stricter guidelines and rules on apologies and complaint management produced greater consumer satisfaction and increased their sense of justice. See Homburg & Fürst, *supra* note 121, at 95.

127. See Danielle Ivory & Bill Vlasic, *\$900 Million Penalty for G.M.’s Deadly Defect Leaves Many Cold*, *N.Y. TIMES* (Sept. 17, 2015), <https://www.nytimes.com/2015/09/18/business/gm-to-pay-us-900-million-over-ignition-switch-flaw.html>.

128. Ben Geier, *Why Do Some People Love GM’s CEO Mary Barra?*, *FORTUNE* (Aug. 9, 2014), <http://fortune.com/2014/08/09/some-people-love-barra>.

responsibility 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 itself grossly negligent, blame did not rest solely with the CEO.¹²⁹

4. Corporate Culture

Scholars studying corporate culture and crisis management have tracked a sea change in the degree of stigma attaching to commercial apologies, with the stigma quickly declining in recent years.¹³⁰ The reasons are complex and many explanations are offered,¹³¹ including the creation of a broader “new culture of apology,”¹³² the rise of the Internet, and the introduction of relationship management strategies in the 1990s.¹³³ 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.¹³⁴ Whatever the true explanation is, experts see a strong shift in the way apologies are treated today relative to the 1990s.¹³⁵ 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.”¹³⁶ The default has reversed, and it is expected that companies

129. Campbell Robertson & Clifford Krauss, *BP May Be Fined Up to \$18 Billion for Spill in Gulf*, N.Y. TIMES (Sept. 4, 2014), <https://www.nytimes.com/2014/09/05/business/bp-negligent-in-2010-oil-spill-us-judge-rules.html>.

130. See LAZARE, *supra* note 13, at 7.

131. For other explanations, see generally Zohar Kampf, *The Age of Apology: Evidence from the Israeli Public Discourse*, 19 SOC. SEMIOTICS 257 (2009).

132. See Nicolaus Mills, *The New Culture of Apology*, 48 DISSENT 113, 114 (2001); Mihai, *supra* note 20 (“A gesture formerly considered a sign of weakness has grown to represent moral strength and a crucial step towards potential reconciliation.”). See also Murphy, *supra* note 38, at 372 (noting, and criticizing, the proliferation of apologies).

133. See Jan Breitsohl et al., *Online Complaint Communication Strategy: An Integrated Management Framework for e-Businesses*, in HANDBOOK OF STRATEGIC E-BUSINESS MANAGEMENT 907, 908 (Francisco J. Martinez-López ed., 2014); Michael Volkov, *Successful Relationship Marketing: Understanding the Importance of Complaints in a Consumer-Oriented Paradigm*, 2 PROBS. & PERSP. MGMT. 113, 116–118 (2004).

134. See, e.g., James G. Maxham III & Richard G. Netemeyer, *A Longitudinal Study of Complaining Customers’ Evaluations of Multiple Service Failures and Recovery Efforts*, 66 J. MARKETING 57, 67–68 (2002) (showing in a longitudinal study the existence of a recovery paradox, but also noting that it disappears if there are multiple adverse events).

135. See, e.g., Patel & Reinsch, *supra* note 118, at 14–15 (noting that hard data is difficult to find, but the impression is that commercial apologies are frequently used).

136. John G. Knight et al., *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, 192 (Leroy Robinson, Jr. ed., 2015).

will apologize; if in the past only the guilty apologized, now *not* apologizing is a violation of consumers' expectations.¹³⁷ Moreover, apologies are taken to be a sign of strength and leadership.¹³⁸ Even employees find that the personal costs of apologizing are much lower than in the past; institutions, like hospitals and insurance companies, often provide a support system, assuring the injurer that apologizing is the right and honorable thing to do. The increased popularity of apologies lowers their social cost, 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 for what they are—strategic, profit-maximizing decisions? Would not the making of repeated apologies by the same institution adulterate their effect?

In practice, commercial apologies are highly effective. Researchers studying commercial entities in online settings noted puzzlingly, after finding strong effects, that “[i]t 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.”¹³⁹ The researchers summarized their field test by bemusedly remarking that “[we] find that a cheap-talk apology yields significantly better outcomes for the firm than offering a monetary compensation.”¹⁴⁰

The best evidence of the effectiveness of commercial apologies can be learned from their prevalence,¹⁴¹ but it would be illustrative to look at more systemic evidence, which also gives a sense of the magnitude of the effect. The clearest evidence comes from the healthcare industry, which is the most studied area of commercial apologies, due to the large stakes involved and the tragic frequency of accidents.¹⁴² Starting in the 1990s, hospitals became

137. See Sean Tucker et al., *Apologies and Transformational Leadership*, 63 J. BUS. ETHICS 195–96 (2006).

138. *Id.* at 195 (“[E]thical leaders who attempt to ‘do the right thing’ with their words and actions will be perceived as better leaders by followers. . . . [E]thical leaders apologize . . .”).

139. See Johannes Abeler et al., *The Power of Apology*, 107 ECON. LETTERS 233, 235 (2010).

140. *Id.* at 233.

141. See, e.g., BENOIT, *supra* note 125, at 61 (noting the pervasiveness of corporate apologies).

142. See *Data Analysis Tool*, U.S. DEP’T HEALTH & HUMAN SERVICES: NAT’L PRACTITIONER DATA BANK, <http://www.npdb.hrsa.gov/analysistool> (last visited Sept. 7, 2017) (reporting about 50,000 medical malpractice payments and adverse events in 2014).

aware that many patients sue for emotional reasons, as they resent the lack of apology for errors.¹⁴³ This realization led to a series of successful experiments with institutionalizing apologies.¹⁴⁴ 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-and-after analysis of this program reveals significant effects. First, the monthly rate of claims (defined as requests for monetary compensation) fell by 36%.¹⁴⁵ This means that about one-third of the victims gave up their claims entirely. Second, the number of lawsuits fell by 65%.¹⁴⁶ Third, the cost per lawsuit fell from \$405,921 to \$228,308, a saving of \$177,603 (44%). Fourth, the costs of lawsuits fell not only due to savings on legal costs: the hospital saved about 59% of the compensation it would have had to pay patients.¹⁴⁷

Another example is COPIC, the physician-founded insurance trust 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 \$5,300.¹⁴⁸ The program led to striking results—a reduction of 50% in the number of malpractice claims against COPIC physicians and a 23% reduction in the costs of payments in settlement.¹⁴⁹ In one of the case records, a sixty-six-year-old patient suffered from an error that led to the removal of part of her ureter, treatment of which required a painful invasive procedure. 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.”¹⁵⁰ These apology programs reduced

143. See Gallagher et al., *supra* note 24, at 1001.

144. See, e.g., Steve S. Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May Be the Best Policy*, 131 ANNALS INTERNAL MED. 963, 964–66 (1999) (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).

145. See Allen Kachalia et al., *Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program*, 153 ANNALS INTERNAL MED. 213, 215 (2010). See also Michelle M. Mello et al., *The Medical Liability Climate and Prospects for Reform*, 312 JAMA 2146, 2149 (2014).

146. Kachalia et al., *supra* note 145, at 215.

147. *Id.*

148. 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). But see Seth Seabury et al., *Defense Costs of Medical Malpractice Claims*, 366 NEW ENG. J. MED. 1354, 1354 (2012) (showing average case costs of medical malpractice lawsuits of about \$300,000).

149. See Boothman et al., *supra* note 148, at 147–48; Wojcieszak et al., *supra* note 54, at 346.

150. See Richert E. Quinn & Mary C. Eichler, *The 3Rs Program: The Colorado Experience*, 51

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. They investigated how apology safe-harbor laws affect malpractice lawsuits, assuming that changes in outcomes in the apology-immunizing states are attributable to these laws. 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,¹⁵¹ equivalent to a per-payment reduction of \$58,000–73,000.¹⁵² This is remarkable, as the averages come from all hospitals—not necessarily those which instituted an apology policy—suggesting that the real effect is probably 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.¹⁵³

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 apologize in ways perceived as sincere.¹⁵⁴ In the commercial context of housing, Russell Korobkin and Chris Guthrie found that participants playing the role of tenants were more likely to accept a settlement offer compensating for a landlord's infraction of duties if they were told that the landlord apologized.¹⁵⁵ These results seem to carry over to the market: in market settings, electronically-delivered apologies led disappointed consumers to retract unfavorable reviews at a rate much greater than when they were offered monetary settlements.¹⁵⁶ Moreover, firms are said to perform better

CLINICAL OBSTETRICS & GYNECOLOGY 709, 715 (2008).

151. See Ho & Liu, *Does Sorry Work?*, *supra* note 9, at 143.

152. *Id.*

153. See McMichael et al., *supra* note 9, at 5.

154. See Denghua Yuan et al., *Sorry Seems to Be the Hardest Word: The Effect of Self-Attribution When Apologizing for a Brand Crisis*, (H.K. Inst. of Bus. Studies Working Paper Series, No. 073-1314, 2014).

155. See Korobkin & Guthrie, *supra* note 25, at 148 (reporting a 12% increase; although this effect failed to reach statistical significance, the size and sign of the effect are nevertheless consistent with our argument.).

156. On eBay, customers can leave negative responses, which can later be withdrawn if a seller's feedback satisfies the consumer. A group of researchers collaborated with a very large seller to randomly modify the seller's response to negative reviews left by customers on transactions with an average value of €23.50, offering (1) small monetary compensation (€2.50); (2) large monetary compensation (€5); or (3) an electronically-delivered apology from one of the seller's employees, without admitting any legal liability and without offering monetary compensation. They found that small monetary compensation yielded forgiveness (i.e., retraction of the negative review) in 19.3% of the cases, and doubling the amount of compensation only slightly increased the forgiveness rate to 22.9%. The tender of an apology

in the stock market after taking responsibility for past failures.¹⁵⁷

III. CRITICAL ANALYSIS AND POLICY IMPLICATIONS

The normative framework we provided in Part II.A.2 demonstrates that apologies can have detrimental social 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. Conversely, 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 more effective and cheaper to deliver in commercial settings. To illustrate, in one case, a patient was willing to settle after the apology simply because

outperformed both measures, generating a forgiveness rate of 44.8%. See Abeler, *supra* note 139, at 234.

157. Consider, for example, the 2009 crisis at Domino's Pizza, when a disgruntled employee publicized a video of himself committing what we can euphemistically call "health code violations" on 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 apologized, said that he was sickened by the act, and reported corrective action. See Swifftalon, *Domino's President Responds to Prank Video*, YOUTUBE (Apr. 18, 2009), <https://www.youtube.com/watch?v=dem6eA7-A2I>. An empirical analysis of 20,773 tweets discovered that this action was highly effective, and that the corporate brand, as reflected by tweets, was restored to its original level. 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 1, 13 (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 now trades for more than twenty times its 2009 price, adjusted for dividends and splits. See *Domino's Pizza, Inc.*, YAHOO! FIN., <https://finance.yahoo.com/quote/DPZ/history?period1=1236927600&period2=1504767600&interval=1mo&filter=history&frequency=1mo> (last visited Sept. 7, 2017). On the relationship between firms' performance and corporate honesty, see generally Don Chance et al., *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 Homburg & Fürst, *supra* note 121, at 95.

she felt the hospital took her case seriously.¹⁵⁸ The hospital, on the other hand, saved an approximate \$3 million in liability payments in a lawsuit that, according to the hospital's estimation, the patient was highly likely to win.¹⁵⁹ 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.¹⁶⁰

A clear prediction that follows from our analysis is that apology laws will increase the frequency or severity of accidents in states that adopt them relative to non-apology law states. This is in contrast to the hypothesis of the Legal Apologists, which stipulates that apology laws will reduce levels of litigation without a concomitant increase in the level of accidents. If our hypothesis is correct, its implications are disconcerting. We would expect apology law states to see a reduction in precautionary investments, with food companies spending less on quality assurance, hospitals ordering fewer tests and hiring less staff, and polluters investing less in smoke scrubs. To assess the validity of each hypothesis, we need empirical data; unfortunately, the empirical data we 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 Ho and Liu, who looked at the effect of apology laws on the level of disposed medical malpractice claims.¹⁶¹ They found that apology laws *increase* the number of disposed claims involving severe injuries by 21–27%.¹⁶² This would seem to comport with our hypothesis of an increase 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.¹⁶³ 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 claims, a problematic category that only includes complaints with positive money payments. Thus, it does not include all, or even most, of the accidents

158. Boothman et al., *supra* note 148, at 157.

159. *Id.*

160. *Id.*

161. See Ho & Liu, *Does Sorry Work?*, *supra* note 9, at 141.

162. See *id.* at 158 tbl.5.

163. See *id.* at 143 (“Given that the . . . data set only consists of claims with positive payouts, it does not contain information on open claims nor closed claims without payments.”).

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 laws. However, these findings are also consistent with the theory that apology laws increase the severity of accidents. *Id.* at 162.

or cases where no payment was made.¹⁶⁵ Another limitation is that it is possible to make payments without reporting them, and some hospitals seem to be doing so.¹⁶⁶

Another problem is the tension between Ho and Liu's findings and those of Benjamin McMichael's more recent working paper.¹⁶⁷ In the latter 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. This does not account for accidents that do not result in a formal claim, but it 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 volume 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 of 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

165. This is especially a problem, since most cases are disposed without payment. See McMichael et al., *supra* note 9, 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* note 39, at 316–17 (discussing rules in an apology program that are designed to circumvent reporting requirements). See also Amitabh Chandra et al., *The Growth of Physician Medical Malpractice Payments: Evidence from the National Practitioner Data Bank*, W5 HEALTH AFF. 240, 242 (2005), <http://content.healthaffairs.org/content/early/2005/05/31/hlthaff.w5.240.full.pdf> (estimating underreporting in data of about 20 percent of malpractice payments).

167. See McMichael et al., *supra* note 9, at 5.

168. See *id.* at 10. On the other hand, their data is limited to only one specialty area, which may introduce other kind of unanticipated biases.

169. *Id.* at 27.

170. See Eisenberg, *supra* note 38, at 50; Robbennolt, *Legal Settlement*, *supra* note 25, at 465.

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 apologies *encourage litigation* (unless they are privileged). But at the same time, the main reason that Legal Apologists favor apologies is that they encourage settlement and therefore *discourage litigation*. It is seemingly paradoxical to argue that apologies both encourage and discourage litigation at the same time. Resolving this paradox comes at a price. Perhaps, for example, unprivileged apologies have a 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, 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 when they receive 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:

171. See *supra* note 21.

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 culpable injurers, thus undermining deterrence.

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 mistakes is important is presumably 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 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 The problem is the assumption that mistakes, once identified, will be corrected. In many commercial settings, learning from one's mistakes is not simple. Taking precautions often involves investment in machinery, staff, and technology. 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:

It 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

173. See Clinton & Obama, *supra* note 81, at 2207.

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. See 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); Amy Widman, *Liability and the Health Care Bill: An “Alternative” Perspective*, 1 *CALIF. L. REV. CIR.* 57, 59 (2010).

177. Clinton and Obama proposed that savings from apology programs will be used to reduce the premiums doctors pay—but this would be the equivalent of transferring money from victims of accidents to physicians. Clinton & Obama, *supra* note 81, at 2206. They also proposed that some of the savings will be used to “foster patient-safety initiatives.” *Id.* at 2207.

frequency of error reporting, or indicates that malpractice liability discourages providers from reporting mistakes.¹⁷⁸

D. THE DEFICIT OF APOLOGY DEFICIT

Motivating the entire movement of the Legal Apologists is belief in an apology deficit. The concern is that injurers have too little incentive to apologize, and they therefore need encouragement. It may seem odd in retrospect, but besides anecdotal evidence, the point that there is a deficit in apologies has never been proven. Do we really have a shortfall 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 victims' litigiousness. If apologies are value-creating, then just like any other good, profit-maximizing companies would seek to "produce" them. Given the many benefits Legal Apologists ascribe to apologies, it would be odd if companies would not provide them. Indeed, the literature is in agreement that there is a marked transition among companies from the age of "deny and defend" to one of "apologize and settle."¹⁷⁹ Today, commentators agree that 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 our findings on the basis of a broad range of media reports acquired from the EBSCO Information Services database, which includes twenty-five million media articles from the relevant time period.¹⁸³ As can

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).

179. See, e.g., Wojcieszak, *supra* note 54, at 344–45, 347.

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 (Roy L. Brooks ed., 1999).

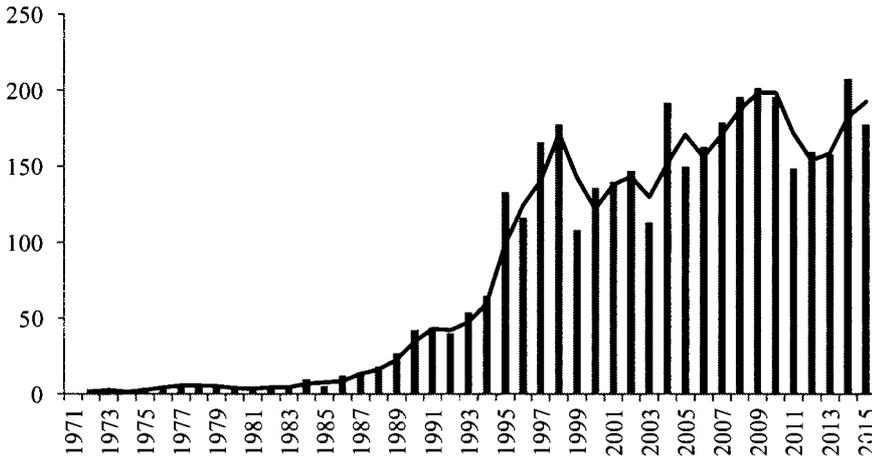
181. See Rae M. Lamb et al., *Hospital Disclosure Practices: Results of a National Survey*, 22 HEALTH AFF. 73, 77 (2003).

182. LAZARE, *supra* note 13, at 6–7.

183. Our methodology consisted of EBSCO search results for "apology" or "sorry" or related words in the title or subject terms, restricted to magazines, newspapers, reviews, and trade publications in the English language between 1971 and 2015. A total of 4,967 results were located, which, after removing

be seen, until the 1990s, apologies were hardly considered in the media. But thereafter, there has been a growing interest that persists through today.

FIGURE 1. Apologies in Print: Mentions by Year



NOTE: Data source and methodology are discussed *supra* in note 183 and accompanying text.

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

Ongoing 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 successes and momentum are any 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

duplicates, we narrowed to 3,747. Gated 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](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). To account for potential bias due to the fact that more media is produced today than in the past, we validated our findings by limiting our search to the *New York Times*, *New York Times Magazine*, *Economist*, and *New Yorker*—all of which existed prior to 1971.

184. See Cohen, *supra* note 11, at 1061; Gailey, *supra* note 3, at 176–78; Jones, *supra* note 13, at 580–81; Runnels, *supra* note 3, at 148.

185. See, e.g., Robyn Carroll, *Apologies as a Legal Remedy*, 35 SYDNEY L. REV. 317, 320 (2013).

apology deficit, and there is a real concern that apologies will be used to circumvent legal liability for accidents by strategic actors. Politically, we are concerned that apology laws have been used as a covert tort reform, avoiding public scrutiny. These issues raise a few policy implications.

The first order of business is transparency. Apology 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 that is far from being settled. However, the debate should be conducted transparently, not guised in the discourse 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 significant social concerns regarding these laws. 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 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

186. Supporters of tort reform would also benefit from 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 16, 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 et al., *Conitriion in the Courtroom: Do Apologies Affect Adjudication?*, 98 CORNELL L. REV. 1189, 1194 (2013) (finding in a vignette study that “a defendant’s apology in court is generally ineffective, sometimes counterproductive, and only occasionally 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 4, at

recognize that it may seem counterintuitive to treat remorseful and unremorseful injurers equally,¹⁸⁹ but it is important to remember that our discussion is limited only to commercial actors, 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 necessary for policymakers to devote funds and grants for studies in this area, and perhaps there is room to use funding from the Patient Protection and Affordable Care Act's special allotment to this end.¹⁹⁰

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 for apology law reforms to effectively achieve tort reform through the back door.

We argue that making apologies cheaper may lead to socially harmful outcomes. To support our claims, we develop a new model for tort liability with apologies, which we use to show that injurers may have an excessive incentive to apologize if apologies are cheap and effective. Based on the evidence we have gathered, we find that commercial actors professionalize and institutionalize the tender of apologies and use them to great effect. This suggests that apologies may actively undermine deterrence and lead to risky behavior. Based on this analysis, we call for a moratorium on apology laws and a political and legal reevaluation 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.

179.

189. For the moral argument that it is wrong for the law to treat repentant and unrepentant transgressors equally, see *supra* note 60 and accompanying text.

190. Under the Act, grants are awarded to states for "the development, implementation, and evaluation of alternatives to current tort litigation for resolving disputes." 42 U.S.C. § 280g-15(a) (2012).

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 about the value of apologies made by incorporeal entities such as corporations. We are especially hoping that future empirical research will devote more specific attention to the relationship between apology laws and the possible increase of medical malpractice.

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 they 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 or less interested in litigation, the jury may be more forgiving, or the judge may be 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 of 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 ($s(\cdot) \geq 0$);

$l(T)$: injurer's liability.

Based on our assumptions, we note that $l(0) = h$ and $s(1) < s(0)$. That is, the liability for the accident, absent an apology, is equal to the harm, and

191. See Steven Shavell, *Liability for Accidents*, in HANDBOOK OF LAW & ECONOMICS, 139, 143–44 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

192. See *id.* at 150.

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

the social cost of administering punishments is lower when an apology is made. Looking *ex-post* (after the 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 :

$$\phi = -c - q(c)(Ta + l(T))$$

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, as well as 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):

$$\begin{aligned} \phi_1 < \phi_0 = \\ (1) \quad a < l(0) - l(1) \end{aligned}$$

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:

$$(2) \quad \theta = -c - q(c)(Ta + h + s(T))$$

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):

$$\begin{aligned} \theta_1 < \theta_0 = \\ (3) \quad a < s(0) - s(1) \end{aligned}$$

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

$$(4) \quad s(0) - s(1) < a < l(0) - l(1)$$

That is, if the cost of apology exceeds its 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:

$$(5) \quad l(0) - l(1) < a < s(0) - s(1)$$

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 socially optimum, and [iii] the more the treatment of apologies is favored 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 (from 2) the level of care is given by the first order condition:

$$(6) \quad q'(c) = \frac{-1}{a+l(1)}$$

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

$$(7) \quad q'(c) = \frac{-1}{a+h+s(1)}$$

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 that 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 that some injurers do not apologize, and the possibility that 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 the 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 will take precautions accordingly. The cost of the activity

for the injurer, from (1), would be:

$$(8) \quad \phi = -c - q(c)(l(0))$$

So that the level of precautions is determined by:

$$(9) \quad q'(c) = \frac{-1}{l(0)}$$

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

$$(10) \quad \theta_0 = -c^{**} - q(c^{**})(h + s(0))$$

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

$$(11) \quad \theta_1 = -c^* - q(c^*)(a + h + s(1))$$

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

$$(12) \quad -c^{**} - q(c^{**})(h + s(0)) < -c^* - q(c^*)(a + h + s(1))$$

Or after rearranging, if:

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

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.