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# Apologies in the Marketplace

K. Vinayagamoorthy\*

## I. Introduction

Public apologies have been offered by actors as varied as individuals, churches, nations and corporations to address harms that money alone cannot address.<sup>1</sup> Some of the most famous apologies in recent decades have come from representatives of national governments who have attempted to amend past injustices by publicly acknowledging the wrongfulness of earlier government conduct. One category of these apologies concerned action undertaken by various governments during World War II.<sup>2</sup> Official government

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1. Apologies have taken many forms, including:

[O]utright apologies, requests for forgiveness, acts of repentance, expressions of regret, and payments of reparations and compensation. Apologies can be communicated in a wide range of ways, through verbal statements issued publicly, joint diplomatic declarations, legislative resolutions, documents and reports, legal judgments, pardon ceremonies, apology rituals, days of observance, reconciliation walks, monuments and memorials, even names bestowed on the landscape. Both individuals and institutions apologize for personal transgressions and for collective wrongs.

Robert R. Weyeneth, *The Power of Apology and the Process of Historical Reconciliation*, 23 PUB. HISTORIAN 9, 20 (2001).

2. AARON LAZARE, ON APOLOGY 15 (2004) (German leaders apologized to victims of Nazi rule; United States apologized for the internment of Japanese Americans during the war); Weyeneth, *supra* note 1, at 12-13 (describing

apologies have also been used to acknowledge harms suffered by citizens at the hands of their own leaders.<sup>3</sup> Religious organizations have also issued apologies for their past misconduct. Pope Benedict XVI and Cardinal Sean Brady, leader of the Irish Catholic Church, apologized to victims of sexual abuse.<sup>4</sup> Southern Baptist churches apologized to African American church members for endorsing slavery.<sup>5</sup>

Courts have also participated in using apologies to acknowledge criminal and tortious wrongdoing. Convicted defendants have been ordered to apologize as a condition of probation.<sup>6</sup> Drunk drivers were ordered to apologize through newspaper ads containing their photographs.<sup>7</sup> Three men convicted of petty crimes were ordered to make public apologies.<sup>8</sup> One court ordered convicted spouse-abusers to apologize to their wives in the presence of women's groups.<sup>9</sup> The driver responsible for killing a college track star in a car

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Japanese Prime Minister Tomiichi Murayama's apology for Japan's conduct during the war and describing French President Jacques Chirac's apology for France's deportation of Jewish persons during the war.).

3. Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 186 (2000) (former South African President F.W. de Klerk apologized in 1993 for apartheid); Xuan-Thao Nguyen, *Apologies as Intellectual Property Remedies: Lessons from China*, 44 CONN. L. REV. 883, 889 (2012) (describing apology by U.S. Congress to African-Americans for institutional slavery and the subsequent Jim Crow laws); Weyeneth, *supra* note 1, at 13-14 (U.S. President Bill Clinton's apology to the survivors and relatives of those affected by the Tuskegee Study; a national report describing the terrible deeds done to the Aboriginal population now known as the "[S]tolen [G]eneration," which culminated in Australia's "Sorry Day").

4. Rachel Donadio & Alan Cowell, *Pope Offers Apology, Not Penalty, for Sex Abuse Scandal*, N.Y. TIMES, (Mar. 21, 2010), at A6, available at [http://www.nytimes.com/2010/03/21/world/europe/21pope.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/03/21/world/europe/21pope.html?pagewanted=all&_r=0); *Ireland: Catholic Church Leader Apologizes, but Will Not Resign*, N.Y. TIMES, May 8, 2012, at A10, available at <http://www.nytimes.com/2012/05/08/world/europe/ireland-catholic-church-leader-apologizes-but-will-not-resign.html>.

5. Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 290 (2001).

6. Shuman, *supra* note 3, at 187; Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 93 (2004).

7. Shuman, *supra* note 3, at 187.

8. Latif, *supra* note 5, at 296.

9. *Id.*

crash was required to apologize in the college newspaper.<sup>10</sup> A District Attorney was ordered to write an apology letter for illegally using his opponent's criminal background information in a political race.<sup>11</sup> Apologies have also been ordered in cases involving perjury, wrongful discharge of employment, First Amendment issues, and attorney discipline.<sup>12</sup> In China, courts have also ordered public apologies as remedies in cases involving intellectual property violations.<sup>13</sup>

Apologies are not wholly unknown to the marketplace, although they tend to be rarely used.<sup>14</sup> For example, the recent financial crisis has resulted in apologies from the financial sector. John J. Mack of Morgan Stanley apologized to Congress in 2009 for his firm's involvement in the financial crisis.<sup>15</sup> Mark Whiston, CEO of mutual fund manager Janus Capital Group

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10. Nguyen, *supra* note 3, at 890.

11. *Id.*

12. *Id.* at 901.

13. *Id.* at 914.

14. See *International Business; Goldman Apologizes for Thai Bank Report*, N.Y. TIMES, Mar. 11, 1999, <http://www.nytimes.com/1999/03/11/business/international-business-goldman-apologizes-for-thai-bank-report.html> ("Goldman, Sachs & Company, the largest United States investment-banking partnership, has apologized to Thailand for an analyst's report that drove down shares of the nation's biggest bank."); Alan Cowell, *Executive Pay: A Special Report; Overseas Salaries Are Kept Hush-Hush*, N.Y. TIMES, Apr. 1, 2001, <http://www.nytimes.com/2001/04/01/business/executive-pay-a-special-report-overseas-salaries-are-kept-hush-hush.html?pagewanted=all&src=pm> (reporting that Vodafone apologized for its overly generous compensation to its chief over an acquisition); David W. Dunlap, *Scolded, Microsoft Takes Blame for Swarms of Butterfly Decals*, N.Y. TIMES, Oct. 26, 2002, <http://www.nytimes.com/2002/10/26/nyregion/scolded-microsoft-takes-blame-for-swarms-of-butterfly-decals.html> (reporting Microsoft's apology for plastering Midtown Manhattan with hundreds of plastic butterfly decals as part of Microsoft's multi-million dollar promotional campaign for its new MSN Internet service); Juan Carlos Perez, *Google Apologizes to Kenya Startup Over Dirty Business Tactics*, COMPUTERWORLD (Jan. 13, 2012, 2:55PM), [http://www.computerworld.com/s/article/9223437/Google\\_apologizes\\_to\\_Kenya\\_a\\_startup\\_over\\_dirty\\_business\\_tactics](http://www.computerworld.com/s/article/9223437/Google_apologizes_to_Kenya_a_startup_over_dirty_business_tactics) (describing Google's apology to Kenyan start-up firm Mocality, for its employees who had lied to Mocality's customers and improperly mined its data as part of an effort to undermine Mocality's operations).

15. Andrew Martin & Micheline Maynard, *For Bankers, Saying 'Sorry' Has Its Perils*, N.Y. TIMES, Jan. 13, 2010, at A1, available at [http://www.nytimes.com/2010/01/13/business/13blame.html?\\_r=0](http://www.nytimes.com/2010/01/13/business/13blame.html?_r=0).

(“Janus”), apologized for his firm’s market-timing activities with hedge fund Canary Capital Partners L.L.C.: “Our business is built on trust, and I personally apologize for any concerns we’ve caused our investors . . . Our management team holds itself accountable and we’re working hard to retain the trust and confidence of our investors and business partners.”<sup>16</sup> Janus also stated that, in addition to paying back its fees, it would pay restitution to any of its shareholders who were financially harmed as a result of its market-timing activities.<sup>17</sup> The CEO of the US division of European financial giant HSBC apologized to the US Senate for failing to maintain adequate anti-money laundering controls.<sup>18</sup>

However, despite these examples, the marketplace is better known for its absence of apologies. Even after the collapse of Wall Street, few executives offered apologies for misconduct.<sup>19</sup> Some observers have attributed heightened American rage at Wall Street to the failure of the latter’s leaders to offer apologies.<sup>20</sup> Recent research has also revealed that the top leaders of Fortune 500 companies rarely offer apologies for poor performance.<sup>21</sup> So, why don’t more corporations and their representatives apologize? In addition to the legal liability than an apology invites, the American marketplace is an “environment that generally frowns upon apologies as a sign of weakness.”<sup>22</sup> Such views may be the reason that, despite public outcry over the financial sector’s contribution to the economic crisis, Robert Diamond, the former chief executive of London’s Barclay’s Bank, told UK Parliamentarians in 2011 that the time for “remorse and apology” for banks needed to end.<sup>23</sup>

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16. *Janus Plans To Reimburse Shareholders*, N.Y. TIMES, Sept. 8, 2003, <http://www.nytimes.com/2003/09/08/business/janus-plans-to-reimburse-shareholders.html> (internal quotation marks omitted).

17. *Id.*

18. *HSBC US Executive Apologizes for Lax Controls*, FOXNEWS.COM (July 17, 2012), <http://www.foxnews.com/us/2012/07/17/hsbc-us-executive-apologizes-for-lax-controls/>.

19. Martin & Maynard, *supra* note 15.

20. *Id.*

21. *Id.*

22. *Id.*

23. Steve Slater, *No Apologies Barclays Boss Diamond Fights for His Job*, REUTERS (June 29, 2012, 12:30 PM),

This Article argues that apologies have the potential to play important roles in the marketplace. It argues that a public apology should not be reserved only for transgressions that we customarily identify as “moral wrongs.” Instead, public apologies may be equally appropriate as supplemental remedies when (a) parties place value on their relationship independent from the financial benefits they gain from exchanging with each other, (b) a contractual breach results in non-pecuniary harm to this relationship, and (c) monetary compensation alone is insufficient to address such non-pecuniary harm. Although such issues may not arise in all commercial transactions, these problems do present unique challenges for parties who rely on their relationship with each other as a foundation for exchanging.

Business relationships matter immensely in a variety of commercial settings. In these situations, parties place value on their business relationship that is independent and in addition to the pecuniary benefits they gain from exchanging with each other. First, relationships become important as businesses

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<http://in.reuters.com/article/2012/06/29/barclays-libor-diamond-idINL6E8HSKZ220120629>. However, Mr. Diamond retreated slightly from his unapologetic stance in 2012 when he issued a letter to employees apologizing for the bank’s interest-rate manipulation. Max Colchester & Sara Schaefer Muñoz, *Barclays Chief Says ‘Sorry,’ - CEO Diamond Vows New Controls in Wake of Rate Scandal; Chairman Leaves WALL ST. J.*, July 3, 2012, <http://online.wsj.com/article/SB10001424052702304211804577501971852022572.html>. Others attribute the lack of apologies to cultural attitudes rather than the nature of the marketplace. Martin & Maynard, *supra* note 15 (“American culture does not put a premium on apology ....”). While Mr. Diamond expressed more contrition in 2012, he initially declined to step down from his position. Hala Touryalai, *Barclays’ Bob Diamond: The American Defying London*, FORBES (July 2, 2012, 3:24 PM), <http://www.forbes.com/sites/halahtouryalai/2012/07/02/barclays-bob-diamond-the-american-defying-london/>. JP Morgan’s chief, Jamie Dimon, also expressed an apology but similarly declined to resign in what market observers are calling the “defiant nature portrayed by both American CEOs.” *Id.* “After massive mistakes, both were ‘very sorry’ but neither were willing to take the ultimate responsibility by stepping down. Instead both watched as other executives took the plunge on their behalf . . . .” *Id.* This attitude is contrasted with the actions of European CEOs where “there is more of [sic] pressure placed at the very top. For the British, the buck stops with the CEO. The view is you are responsible for everyone beneath you.” *Id.* Similarly, Japanese executives, such as Toyota’s Akio Toyoda, “often make wrenching public apologies for their missteps.” Martin & Maynard, *supra* note 15.

increasingly “go global” and expand into Asia and other emerging markets. The “BRIC” domestic markets of Brazil, Russia, India, and China are sites of significant expansion. They constitute 20% of global economic output and this fraction is rising, albeit at a slower rate in the post-2008 world.<sup>24</sup> According to the IMF, BRIC share of the global economy has increased by four-fold in a ten-year period.<sup>25</sup> New entrants to the BRIC markets should be aware, however, of the significant role played by relationships in commercial exchanges in these countries. In China, for example, transacting is often based on personal and social connections between the parties.<sup>26</sup> As opposed to the Western marketplace, “access to the Chinese market is conditioned by the reliance on trust relationships rather than on the enforcement of contracts . . . .”<sup>27</sup> Relationships also feature prominently in commercial transactions in India and Russia.<sup>28</sup> Consequently, the importance of relationships will continue to rise as businesses continue to court BRIC markets.

Second, relationships have also become increasingly important over the past two decades as firms shifted to “relationship marketing” that is “marketing based on interaction within networks of relationships.”<sup>29</sup>

Relationship Marketing has been particularly recommended for firms operating in BRIC countries,<sup>30</sup> or other nations with similar business values. It is also a recommended approach for small firms because extensive, formal marketing is difficult for small firms because of limited resources, small customer base, and lack of strategic planning; thus

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24. Kenneth Rapoza, *BRICs Share Of World Economy Up Four Times in 10 Years*, FORBES (July 4, 2012, 11:02 AM), <http://www.forbes.com/sites/kenrapoza/2012/07/04/brics-share-of-world-economy-up-four-times-in-10-years/>.

25. *Id.*

26. José Tomás Gómez Arias, *A Relationship Marketing Approach to Guanxi*, 32 EUR. J. MKTG. 145, 146 (1998).

27. *Id.* at 146-47.

28. *Id.*

29. See e.g., Evert Gummesson, *Return on Relationships (ROR): The Value of Relationship Marketing and CRM in Business-to-Business Contexts*, 19 J. BUS. & INDUS. MKTG. 136, 136 (2004) [hereinafter Gummesson, *Return on Relationships*].

30. Arias, *supra* note 26, at 147.

compounding the need to market by through maintaining customer relationships.<sup>31</sup> Firms that find themselves at the intersection of these factors—small and transnational—should be especially attentive to the creation, maintenance, and repair of their relationships with their business counterparts.

In commercial transactions where the relationship is independently valued, a breach can compromise the foundation of such a business relationship and make it difficult for the parties to work together again in the future. This is because successful business relationships are based on preservation of certain key relational values, such as promise keeping, commitment, conflict-management, communication, and trust between the parties.<sup>32</sup> Contract law theory has similarly recognized the importance of solidarity and relational harmony for successful exchanging.<sup>33</sup> A breach of contract compromises these relational values and, if unaddressed, will prevent the parties from moving past the breach, thereby hindering productive exchanges in the future. These consequences are among the most significant losses resulting from contractual breach in commercial transactions where business relationships have an independent and significant value to the parties. However, most legal remedies only address the pecuniary harm resulting from contractual breach because of

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31. See Grigorios Zontanos & Alistair R. Anderson, *Relationships, Marketing and Small Business: An Exploration of Links in Theory and Practice*, 7 QUALITATIVE MKT. RES. 228, 231 (2004).

32. Arias, *supra* note 26, at 149; Nelson Oly Ndubisi, *Relationship Marketing and Customer Loyalty*, 25 MKTG. INTELLIGENCE & PLANNING 98, 99-100 (2007); Tracy G. Harwood & Tony Garry, *Relationship Marketing: Why Bother?*, 7 HANDBOOK BUS. STRATEGY 107, 109 (2006).

Value is created and added in relationships in a number of ways, for example, through intangible components and more rational aspects of the delivery process, as well as the core product. Intangibles may include commitment, trust, customer orientation and empathy, experience and satisfaction, flexibility and responsiveness of the parties to one another, or even personal chemistry among individuals representing the parties.

*Id.*

33. DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 29 (2003).



the American legal “system’s historic preoccupation with reducing all losses to economic terms that can be awarded in a money judgment . . . .”<sup>34</sup> When non-pecuniary harm is acknowledged, courts tend to address it with the same type of pecuniary remedy—monetary damages. This results in a “tendency either not to compensate at all or to award extravagant damages for injuries that are not easily reducible to quantifiable economic losses.”<sup>35</sup>

Monetary remedies are insufficient to address the non-pecuniary harm that businesses suffer as a result of a contractual breach or other disruption in their exchange relationships with other parties. This is because money alone cannot re-establish trust, solidarity, harmony, or the other relational values that held the parties’ relationship together. As a result of these limitations, monetary compensation alone cannot restore the full value of what the parties have lost as a result of the breach. Parties, therefore, should consider supplementing requests for traditional monetary remedies with the additional remedy of a public apology. By including apologies as part of a remedial package, parties gain access to an alternative means of addressing the non-pecuniary harm that they have suffered.

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34. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC’Y REV. 461, 464 (1986); Brooks E. Allen, *The Use of Non-pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners*, in ASA PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION 283 (Michael E. Schneider & Joachim Knoll eds., 2011) (“[T]he dominant remedy in both international commercial and investor-state arbitration is compensation, typically in the form of monetary damages.”); Shuman, *supra* note 3, at 182 (1999).

While the award of damages to compensate tangible out of pocket losses caused by another’s tortious act enjoys firm support in the case law and commentary, the award of tort damages to compensate for intangible harm such as grief, loss of consortium, and pain and suffering has been much criticized.

*Id.*

35. Wagatsuma & Rosset, *supra* note 34, at 464.; *see also* Shuman, *supra* note 3, at 182 (“[D]amages for intangible loss constitute the largest element of tort damage awards and are the most difficult to control.”).

In order to better appreciate the insufficiency of money in repairing relationships, Part I describes the benefits that an apology brings to the injured party, transgressor, and the broader community in which the parties belong. Part II explains the increasing significance of relationships to certain categories of commercial transactions and provides examples of the types of relational damage that a contractual breach can cause to these commercial relationships. Part III explains how the benefits previously described in Part I are applicable to repairing the types of commercial relational harm described in Part II. Given that relationships matter especially in transnational commercial interactions, it is therefore important to focus on the site for the resolution of transnational commercial disputes: international arbitration. International arbitration is a form of private dispute resolution in which parties submit their dispute to third-party decision-maker(s). Arbitration has become an increasingly popular choice for resolution of transnational business disputes because of the confidentiality it affords the parties, the neutrality of the decision-makers, the flexibility of the process, and the enforceability of the awards. Additionally, parties often resort to arbitration when they want to preserve their business relationship.<sup>36</sup> Part III explains how a remedy of a public apology, as a supplemental remedial tool, can aid the restoration of a positive relationship between the parties and increase the likelihood that they will work together in the future.

## II. Why Apologize: The Relational Benefits of An Apology

Apologies afford unique healing properties, which are capable of resolving injuries that monetary compensation alone is ill suited to address, such as feelings of shame, humiliation, anger, distrust, guilt, disempowerment, ostracism, and destruction of community values. In addition to addressing these individual injuries, apologies also have the potential to heal damaged relationships: the relationship between the

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36. PHILIP D. O'NEILL, JR., INTERNATIONAL COMMERCIAL ARBITRATION: CASE STUDIES AND MATERIALS EXPLORING WHERE THEORY MEETS PRACTICE 2 (2012).

victim and the transgressor, the relationships between the community with the victim and transgressor, and the relationship that the victim has with himself or herself.<sup>37</sup> An apology refers 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.”<sup>38</sup> For example, apologizing has become a central component of the “restorative justice” movement that attempts to rebuild relationships between victims and offenders and the offenders and the broader community.<sup>39</sup> In mediation sessions between victims and offenders, these parties identified an “apology as an especially ameliorative element of the mediation.”<sup>40</sup> Part A provides illustrative examples of the unique relational benefits of apologies and their potential to repair relationships between parties following the commission of some form of transgression. Part B discusses some of the main objections to employing apologies in the legal context and offers responses to these objections.

#### A. *The Many Functions of an Apology*

The following discussion provides an overview of some of the main relational benefits that apologies offer parties following the commission of some form of wrongdoing.

##### 1. Re-establishment of Moral Equality Between the Parties

One reason that parties encounter difficulties in moving past a particular transgression is because the transgression committed often results in the wronged party being treated as

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37. See LINDA RADZIK, MAKING AMENDS: ATONEMENT IN MORALITY, LAW, AND POLITICS 78 (2008); NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 13 (1991); Bibas & Bierschbach, *supra* note 6, at 111; LAZARE, *supra* note 2, at 1; Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 225 (1998); Wagatsuma & Rosett, *supra* note 34, at 472.

38. TAVUCHIS, *supra* note 37, at 13.

39. Latif, *supra* note 5, at 293.

40. *Id.*; Bibas & Bierschbach, *supra* note 6, at 116.

if he or she had lower moral status than the transgressor.<sup>41</sup> Both the transgressor *and* the victim may share this perception of asymmetrical moral status. According to “equity theorists,” “[w]hen individuals find themselves participating in inequitable relationships, they become distressed. The more inequitable the relationship, the more distress individuals feel.”<sup>42</sup> One of the most unfortunate consequences of wrongdoing is that the victim may internalize a belief in his or her own inferiority: “Being victimized can make one doubt one’s own worth. Victims of wrongdoing frequently wonder whether they somehow share the blame for the wrongful act.”<sup>43</sup>

An apology can restore the equality of moral status between the victim and the transgressor because an “apology is a gesture of respect recognizing the victim’s right not to be treated as he or she has been. When the offender apologizes, it verifies this right. It makes clear, in a public forum, that even the offender knows the victim was harmed unjustly.”<sup>44</sup>

An apology restores the parties’ relationship to a more equitable balance through a “transfer of humiliation” between the victim and the transgressor:

Apologies . . . restor[e] the victim’s dignity through a symbolic transfer of humiliation and power between the offender and victim. By apologizing, offenders admit to being immoral, insensitive, or mistaken . . . In addition, the offender, having originally abused his or her power in hurting the victim, is placed in the vulnerable position of giving the victim the

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41. See RADZIK, *supra* note 37, at 76 (describing the effects of wrongdoing on personal evaluation); Bibas & Bierschbach, *supra* note 6, at 110.

42. Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151, 153 (1973).

43. RADZIK, *supra* note 37, at 78.

44. Kathleen Gill, *The Moral Functions of an Apology*, 31 PHIL. F. 11, 16 (2000); accord Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371, 378 (2006); Erin Ann O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1144 (2002).

power to absolve the wrongdoing or not to do so.<sup>45</sup>

An apology exalts the victim as it lowers the transgressor and, in this way, “re-distributes esteem” between the parties.<sup>46</sup> By apologizing, the transgressor,—who previously placed himself above the victim by his transgression,—now humbles himself before the victim. After all, “[a]pologizing is an act of humility” and it is this humility that “contributes to restoring the dignity of the offended party.”<sup>47</sup> The apology becomes an “act of self-denigration and submission” by the transgressor that works to correct the imbalance caused by the transgressor’s disregard and violation of the victim’s status and worth.<sup>48</sup> Humility and vulnerability are necessary characteristics of an apology that is meant to re-empower the victim.<sup>49</sup> The wrongful act “makes the transgressor vulnerable” to the victim,<sup>50</sup> and a wrongful party’s “[f]ailure to convey vulnerability eviscerates the would-be apology.”<sup>51</sup> The power to absolve the transgressor re-empowers the victim, restoring the latter’s worth and placing him in a position of equality vis-à-vis the transgressor.<sup>52</sup>

The importance of humility in apologizing was illustrated in April 2010, when BP’s Deepwater Horizon rig exploded, killing eleven people and releasing over 200 million gallons of crude oil into the Gulf of Mexico.<sup>53</sup> This event is considered the

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45. Brent T. White, *Say You’re Sorry: Court-ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1274 (2006); accord Shuman, *supra* note 3, at 183; Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1137 (2000) [hereinafter Taft, *Apology Subverted*].

46. Erin Ann O’Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 CHI.-KENT L. REV. 1055, 1065 (2004); Orenstein, *supra* note 37, at 244; Walster et al., *supra* note 42, at 163.

47. LAZARE, *supra* note 2, at 116.

48. See Wagatsuma & Rosett, *supra* note 34, at 473.

49. See O’Hara, *supra* note 46, at 1065 (“Apologies . . . require a type of self-humiliation. To be effective, the transgressor must place himself in a morally inferior position vis-à-vis the transgressor in a symbolic gesture that has the effect of reviving the victim’s perception of his own status.”); Aaron Lazare, *The Healing Forces of Apology in Medical Practice and Beyond*, 57 DEPAUL L. REV. 251, 253 (2008).

50. O’Hara & Yarn, *supra* note 44, at 1134.

51. *Id.*

52. TAVUCHIS, *supra* note 37, at 18, 41.

53. Bettina Boxall, *Blowout Preventer, Pipe Faulted in Oil Spill*, CHI.

worst environmental disaster in U.S. history.<sup>54</sup> However, BP's apology had several advantages over the ones issued by Exxon over two decades earlier. Unlike the actions taken by Exxon, BP's CEO, Tony Hayward, responded immediately. He personally visited the affected beach areas where oil had washed ashore.<sup>55</sup> He delivered his apology in person instead of opting for a possibly less effective ad in print media.<sup>56</sup> The benefit of a personal apology is that the viewing public could witness and evaluate his sincerity:

Hayward delivered his apologies in person, allowing his features to indicate a sense of deep remorse: his eyes turned glassy and red, his soft facial expressions signaled regret, and his skin tone grew flush. A viewer scrutinizing Hayward's apology might well conclude that his (and therefore BP's) sense of regret was both sincere and significant and that the company was genuinely trying hard to cap the well.<sup>57</sup>

BP also stated repeatedly that it would absorb the full costs of clean-up.

However, scholars have observed that, for an apology to be truly effective, the transgressor must "place[] himself in a morally inferior position relative to the victim, express[] a willingness to do whatever it takes to resurrect himself, and bestow[] upon the victim the power to determine whether forgiveness will be forthcoming."<sup>58</sup> Actions undertaken by CEO Hayward suggested that he instead adopted a position of superiority and distance relative to the victims of the spill:

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TRIB., Mar. 24, 2011, at C15.

54. Peter Nicholas & Walter Hamilton, *\$20 Billion Claims Fund Set BP Chairman Apologizes to Obama for Spill*, ORLANDO SENTINEL, June 17, 2010, at A3.

55. Erin O'Hara O'Connor, *Organizational Apologies: BP as a Case Study*, 64 VAND. L. REV. 1957, 1983 (2011).

56. *Id.*

57. *Id.*

58. *Id.* at 1185; see Taft, *Apology Subverted*, *supra* note 45, at 1141.

Hayward's statements and conduct evoked images of a transgressor from a different social class and national/ethnic group than both the American public and the direct victims of the spill. Regarding class, Hayward's arrival on the beach in expensive business attire while expressing frustration over the time commitment associated with managing the spill suggested that he was an elite who had much better things to do than work for the welfare of the victims of his spill.<sup>59</sup>

BP's troubles were further compounded when its Swedish Chairman, Carl-Henric Svanberg, made the following statement: "[w]e care about the small people. I hear comments sometimes that large oil companies are greedy or don't care. But that is not the case at BP. We care about the small people."<sup>60</sup> The "small people" were not amused. They interpreted Svanberg's statement as distinguishing BP and its executives from the spill's victims on the basis of socio-economic class and nationality.<sup>61</sup> The effectiveness of BP's apologetic gestures only seemed to improve once BP changed its strategy to include advertisements featuring BP employees who were from the harmed areas.<sup>62</sup> According to one commentator, these spokespeople made the same pledges that Hayward had issued earlier, "but somehow these casually dressed, down-to-earth, local American citizens were able to deliver that message much more credibly."<sup>63</sup>

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59. O'Hara O'Connor, *supra* note 55, at 1986.

60. *Id.* at 1988 (quoting Associated Press, *BP Chief: "We Care About the Small People"* YOUTUBE (June 16, 2010), <http://www.youtube.com/watch?v=th3LtLx0IEM>).

61. *Id.* at 1988-89.

62. *Id.* at 1989.

63. *Id.*; see also LAZARE, *supra* note 2, at 116 ("Apologizing without humility, and even worse, by expressing arrogance or hubris, transforms the intended apology into an insult."); Taft, *Apology Subverted*, *supra* note 45, at 1141.

## 2. Restoring Trust in the Relationship

An apology re-affirms the transgressor's endorsement of important values shared between the parties and between the transgressor and the broader community.<sup>64</sup> An apology is a form of "revelatory discourse" and "is emblematic of the offender's socially liminal, ambiguous status that places him precariously mid-way between exclusion (actual or threatened) and rehabilitation."<sup>65</sup> Apologizing can also be a way for the transgressor to restore her own status in the eyes of the victim and the community. An apology can assuage fears that the transgressor will continue to operate according to her own values, as opposed to the values of the victim and the community. The transgressor's admission of responsibility helps the transgressor retain a positive moral identity despite her past wrongs.<sup>66</sup>

The relationship in need of repair is not only the relationship between the injured party and the transgressor. It is also important to acknowledge, first, that a transgression threatens the relationships between the victim and the community to which the victim and transgressor belong. For example, apologies have been introduced into the public health setting in order to address wrongs perpetrated against groups rather than isolated individuals. President Clinton apologized for the government's Tuskegee Syphilis study that denied hundreds of African-American men effective treatment for syphilis in order to study the effects of the disease.<sup>67</sup> Some

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64. LAZARE, *supra* note 2, at 125; Michael Wenzel & Tyler G. Okimoto, *How Acts of Forgiveness Restore a Sense of Justice: Addressing Status/Power and Value Concerns Raised by Transgressions*, 40 EUR. J. SOC. PSYCHOL. 401, 404 (2010); O'Hara & Yarn, *supra* note 44, at 1168 ("The apologist hopes to avoid the transgressor's ostracism by signaling that she is in fact a cooperator. The apologist often hopes to repair the damage to her reputation that occurs when third parties witness or hear about her transgression.").

65. TAVUCHIS, *supra* note 37, at 31.

66. See Gill, *supra* note 44, at 17; Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127, 129-30 (1997).

67. Weyeneth, *supra* note 1, at 13; Michal Alberstein & Nadav Davidovitch, *Apologies in the Healthcare System: From Clinical Medicine to Public Health*, 74 LAW & CONTEMP. PROBS. 151, 164 (2011).



scholars have argued that, as a consequence of the government's historic deception, modern African-American society has a strong sense of distrust towards the medical system at large.<sup>68</sup> Low participation in clinical trials and lack of support for public health campaigns are among the many effects of this distrust.<sup>69</sup> The apology offered by President Clinton, as an acknowledgment of wrongdoing and an implicit promise of future changed behavior, can therefore be seen as part of a larger effort to re-build trust between the national medical community and members of the affected sub-population.

Second, some transgressions also have the potential to threaten the relationship between the transgressor and the broader community. For example, some scholars have argued that state persecution of its citizens—such as through disappearances, torture, or murder—involves a “betray[al] . . . [of] basic trust in those who govern . . . .”<sup>70</sup> An apology may therefore be a necessary means of regaining a population's confidence in the legitimacy of its government.<sup>71</sup> Furthermore, a government apology “provides a mechanism for re-establishing the moral credibility of large organizations, which in turn provides a basis for the trust that is necessary for them to function.”<sup>72</sup> An apology's therapeutic effects on broken trust explains why, since 2001, the Inter-American Court for Human Rights (the “IACHR”) has ordered apologies in several cases.<sup>73</sup> Many of these cases concerned tragic and horrific violations of basic human rights, including allegations of torture, forced disappearances, extra-judicial disappearances, and massacre. These claims have been brought against several countries,

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68. Alberstein & Davidovitch, *supra* note 67, at 164.

69. *Id.*

70. Martha Minow, *Institutions and Emotions: Redressing Mass Violence*, in *THE PASSIONS OF LAW* 265 (Susan Bandes ed., 1999).

71. Gill, *supra* note 44, at 20. “Governments cannot function without some level of trust among the citizenry. A government that routinely violates commonly accepted moral standards undermines its own political authority.” *Id.*

72. *Id.*

73. Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 *Stan. J. Int'l L.* 279, 297-99 (2011).

including Colombia, Panama, Peru, Ecuador, Guatemala, Venezuela, Panama, and Honduras.<sup>74</sup> According to the IACHR, justice required that the government of the responsible State publicly acknowledge their liability for the violations found by the Court.<sup>75</sup> The IACHR believed that such steps were necessary in order to repair some of the damage done to the victims and to ensure the non-repetition of similar acts in the future.<sup>76</sup> The acknowledgment of wrongdoing has become one of the IACHR's most successful remedies, having been ordered in twenty-eight cases and fulfilled in at least seventeen.<sup>77</sup> These public ceremonies often require the participation of high-ranking members of State government and are made before members of the victim's family.<sup>78</sup>

### 3. Validation of Norms and Values Shared by the Parties and Broader Community

An apology may also be beneficial as a means for restoring and validating the importance of social values and norms that may have been threatened by the transgressor's actions. For instance, an individual's transgression of the community's

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74. *See id.*

75. *See id.*

76. For instance, in the case of *Heliodoro Portugal v. Panama*, the IACHR deemed it necessary for the government to publically acknowledge its wrongdoing, stating that:

[T]he Court considers it necessary, in order to repair the damage caused to the victim and his next of kin and to avoid the repetition of facts similar to those of this case, that the State conduct a public act acknowledging its international responsibility for the violations declared in this judgment. This act must refer to the human rights violations declared in the judgment. It must be conducted in a public ceremony in the presence of authorities representing the State, and of those individuals who have been declared victims in this judgment, and the State must invite the latter with sufficient notice.

*Heliodoro Portugal v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 249 (Aug. 12, 2008).

77. Antkowiak, *supra* note 73, at 297 (citation omitted).

78. *Id.* at 297-299.

norms can threaten the credibility of those norms. A transgressor's apology for violating community norms and, often, legal norms, therefore has significant benefits for the community in which the transgressor belongs. Apologies are necessary in these situations because they reinforce the rule of law when those "who violate it acknowledge that they were wrong."<sup>79</sup> In Japan, for example, "[t]he act of apologizing can be significant for its own sake as an acknowledgment of the authority of the hierarchical structure upon which social harmony is based."<sup>80</sup> Japanese culture has traditionally valued social harmony within society.<sup>81</sup> When this harmony is disrupted, an apology is required to help re-establish social harmony and order within society: "An apology is expected and given in Japan in deference to harmony in the collectivity."<sup>82</sup>

#### 4. Resolution of Disputes

A transgressor's apology can also help the parties resolve their differences amicably and in a manner that preserves the possibility of a future relationship. In particular, apologies have the potential to decrease the likelihood of litigation following the wrongful event or reduce the longevity of such litigation.<sup>83</sup> This effect of apologies on litigation should not be ignored; when an apology is not offered, victims "can become angry and vindictive, pursuing litigation at a cost that far exceeds any rational expectation of monetary award."<sup>84</sup> According to the Institute of Medicine, as many as 98,000 people die annually from medical error.<sup>85</sup> In response to such

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79. Gill, *supra* note 44, at 17; *see also* TAVUCHIS, *supra* note 37, at 13.

80. Wagatsuma & Rosset, *supra* note 34, at 473.

81. *See* Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (with Japan and the United States in Mind)*, 27 MICH. J. INT'L L. 1, 14 (2005); Wagatsuma & Rosset, *supra* note 34, at 465.

82. Lee, *supra* note 81, at 16.

83. *See id.* at 8-9.

84. O'Hara & Yarn, *supra* note 44, at 1124; *see also* Prue Vines, *Apologising to Avoid Liability: Cynical Civility or Practical Morality?*, 27 SYDNEY L. REV. 483, 483 (2005).

85. 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, 174 (2006) ("as many as 98,000"); David C. Szostak, *Apology Not Accepted: Disclosure of Medical Errors and Legal*

errors, one study found that “[p]atients ranked an apology as the most important statement that a physician can give . . .”<sup>86</sup> The importance of apologies suggests that “failing to apologize following an injury can be a deeply disrespectful act and thus becomes a second injury.”<sup>87</sup> The Hickson Study interviewed over 100 family members who had initiated claims against medical providers.<sup>88</sup> It found that twenty-four percent of the participants filed suit “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.”<sup>89</sup> Twenty percent of the participants resorted to litigation on the belief that the “courtroom was the only forum in which they could find out what happened from the physicians who provided care.”<sup>90</sup> A 1992 study of malpractice claims found that “families and patients who filed a medical malpractice lawsuit against a physician would not have done so if the physician had offered a full explanation and an apology.”<sup>91</sup> Clearly apologies are necessary because they may be the most effective method of

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*Liability*, 13 DEPAUL J. HEALTH CARE L. 367, 367 (2010) (“between 44,000 and 98,000”); Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55, 56 (2005) (“between 44,000 and 98,000”) [hereinafter Taft, *Apology and Medical Mistake*].

86. Jennifer K. Robbennolt, *What We Know and Don’t Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009, 1020 (2005) [hereinafter Robbennolt, *Health Care Disputes*]; see O’Hara, *supra* note 46, at 1079.

87. Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1019 (1998) [hereinafter Cohen, *Advising Clients*]. Another study focusing on medical malpractice mediation found that patients who have suffered medical errors desire the following: (a) an explanation of what happened, (b) an apology from the responsible party, and (c) assurances that the error would not be repeated again in the future. Jonathan R. Cohen, *Apology and Organizations: Exploring an Example From Medical Practice*, 27 FORDHAM URB. L.J. 1447, 1449 (1999) [hereinafter Cohen, *Apology and Organizations*]; see also Catherine Regis & Jean Poitras, *Healthcare Mediation and the Need for Apologies*, 18 HEALTH L.J. 31, 35-36 (2010).

88. Robbennolt, *Health Care Disputes*, *supra* note 86, at 1016 (citing Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359 (1992)).

89. *Id.* (internal quotations marks omitted).

90. *Id.* (internal quotations marks omitted).

91. Robin E. Ebert, Note, *Attorneys, Tell Your Clients to Say They’re Sorry: Apologies in the Health Care Industry*, 5 IND. HEALTH L. REV. 337, 352 (2008).

counteracting the severe humiliation that patients often experience during their interactions with the medical community.<sup>92</sup>

The experiences of a number of hospitals have further validated the importance of apologies and decreased the fear of increased legal costs. One famous example comes from the Veteran Affairs ("VA") Medical Center in Lexington, Kentucky, who, in 1987, decided to start take responsibility for its medical errors.<sup>93</sup> When an error was discovered, the hospital investigated and reported the error to the patient if the patient had suffered harm.<sup>94</sup> The hospital was so diligent about disclosure that "in several cases, the patient would likely never have learned of the error absent the hospital's voluntary disclosure."<sup>95</sup> When a patient met with the hospital, the hospital's chief of staff would apologize for the error, in addition to offering a fair settlement and possible future medical treatment.<sup>96</sup> Following the issuance of apologies, the hospital's litigation costs declined.<sup>97</sup> The costs declined so much that the hospital fell to the lowest quartile of thirty-six comparable VA hospitals for medical malpractice.<sup>98</sup> The University of Michigan hospital system also adopted a full-disclosure approach in dealing with its patients. The number of suits pending against the hospital dropped by half, saving it approximately two-million dollars per year in defense litigation costs.<sup>99</sup> The lessons from these experiences have informed the

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92. Lazare, *supra* note 49, at 264 (listing "excessive waiting times, delay or confusion in prescriptions being filled, unnecessary physical exposure, failure to have medical records kept private, and failure to communicate medical plans to other physicians").

93. Jonathan R. Cohen, *Apologizing for Errors: Ethical Corporate Conduct Can Also be Good for Business*, 6 DISP. RESOL. MAG. 16, 16 (1999).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 17-18.

98. *Id.*; see Cohen, *Apology and Organizations*, *supra* note 87, at 1449 ("The hospital has reduced its claims payments from among the highest in the 178-hospital VA system to one of the lowest.").

99. Pillsbury, *supra* note 85, at 184. Not all observers view declining legal expenses as a beneficial development. Instead, some scholars have argued that the reduction in costs for the medical profession comes at the price of patients, who are often uninformed about their legal options and rights to compensation. See Gabriel H. Teninbaum, *Medical Apology*

medical community and a number of medical facilities have similarly adopted medical apology programs.<sup>100</sup>

The receipt of an apology can also inform an injured party's choice of dispute resolution mechanism. For example, a party's choice to mediate claims instead of litigating can be influenced by whether the party received an apology from the transgressor.<sup>101</sup> In one study, 75% of plaintiffs who agreed to mediate civil claims decided to mediate in large part due to their receipt of an apology.<sup>102</sup> In another example, Toro Company ("Toro"), a lawn-care products manufacturer, abandoned its "litigate everything" attitude in 1991 in favor of mediation.<sup>103</sup> In mediation sessions, Toro's counsel expressed sympathy (although not usually admitting fault) in addition to offering a settlement.<sup>104</sup> As a result, Toro saved over seventy-five million dollars between 1991 and 1999.<sup>105</sup> The average duration of a claim (until settlement or verdict) fell from twenty-four months to four months. Other studies have observed similar beneficial effects of apologies on a victim's willingness to settle.<sup>106</sup>

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*Programs and the Unauthorized Practice of Law*, 46 NEW ENG. L. REV. 505, 508 (2011) ("A 2003 study found that ninety-six percent of apology programs do not advise patients to seek legal counsel following disclosure.").

[T]he evidence suggests that with respect to compensation, patients participating in apology programs accept significantly less money than those who do not participate. One explanation for this is that medical apology programs are open and transparent as to the injury's occurrence but not with respect to patients' need, or right, to be compensated for it.

*Id.* at 515.

100. *Id.* at 506.

101. Shuman, *supra* note 3, at 183 ("Mediators report that apologies often help to resolve disputes; parties who receive apologies are often more willing to settle than those who do not.").

102. White, *supra* note 45, at 1271.

103. Cohen, *Apology and Organizations*, *supra* note 87, at 1461.

104. *Id.*

105. *Id.*

106. See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 486-88 (2003); Cohen, *Apology and Organizations*, *supra* note 87, at 1459; Shuman, *supra* note 3, at 185. Some recent studies have found that although apologies decrease

### 5. Forgiveness & Reconciliation

Apologies can also increase the likelihood that the victim may ultimately forgive the transgressor. Forgiveness has many definitions, including “a deliberate attempt to let go of negative emotions towards the offender and refrain from causing the offender harm even if considered *deserved*.”<sup>107</sup> A victim’s forgiveness may be demonstrated by her “(a) non-negative or even positive sentiments towards the offender, (b) non-punitive or even constructive responses *vis-à-vis* the offender (e.g. comfort) and (c) non-avoidance or even active repair of the relationship with the offender.”<sup>108</sup> In terms of relational harms, forgiveness can restore the victim’s moral status and, by having the choice to forgive the perpetrator, re-empowers the victim *vis-à-vis* the perpetrator.<sup>109</sup>

The characteristics of an apology can increase the likelihood that a transgressor will be forgiven. In gauging the apology, a victim may be “receptive to the apologiser’s knowledge of his transgression, about what he is feeling as a result, and about his resolve to avoid repetition.”<sup>110</sup> The acknowledgment of wrongdoing and a commitment to act differently in the future are especially important.<sup>111</sup> If a transgressor fails to communicate these elements, or fails to do so credibly, a victim may feel justified in withholding acceptance of the apology and any resulting forgiveness.<sup>112</sup>

An apology may also enable a transgressor to forgive himself or herself. Studies of medical errors illustrate that

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litigants’ fair settlement estimates, apologies can *increase* these estimates for the litigants’ attorneys. Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 379 (“[A]pologies pushed attorneys’ aspirations and estimates of fair settlement values in a different direction than they did claimants’.”); Jennifer K. Robbennolt, *Apologies and Reasonableness: Some Implications of Psychology for Torts*, 59 DEPAUL L. REV. 489, 494 (2009).

107. Wenzel & Okimoto, *supra* note 64, at 401.

108. *Id.* at 402.

109. *Id.* at 404; *see also* O’Hara & Yarn, *supra* note 44, at 1135.

110. Paul Davis, *On Apologies*, 19 J. APPLIED PHIL. 169, 171 (2002).

111. O’Hara & Yarn, *supra* note 44, at 1137.

112. Davis, *supra* note 110, at 171; O’Hara & Yarn, *supra* note 44, at 1137.

physicians experience a range of negative emotions following the commission of a medical error.<sup>113</sup> The shame, humiliation, and guilt they experience are further compounded by cultural expectations of professional infallibility.<sup>114</sup> This combination can cause a physician who has made a mistake to engage in “cover-ups, record changing, and other forms of dishonesty”<sup>115</sup> to the extent that “mistakes fuel isolation, addiction, and suicide.”<sup>116</sup>

Apologies have particular value when the communities concerned are nations recovering from the legacy of a brutal past. Public apologies can assist with the creation of national narratives that acknowledge the commission of wrongful acts.<sup>117</sup> This acknowledgment is important when the temptation is often to deny or ignore past wrongs.<sup>118</sup> The apology makes such denial difficult. Instead, it—and the acts to which it relates—becomes part of the official history of the national community.<sup>119</sup> By ensuring that past wrongs are not ignored, apologies help achieve reconciliation between divided parties and facilitate a national community’s ability to move forward. Reconciliation is “building solidarity: forging either a collective identity, shared values or common commitments in an effort to overcome and prevent repetition of the past.”<sup>120</sup>

Perhaps the best illustration of the effect of the acknowledgment of past wrongs on national reconciliation is the experience of post-apartheid South Africa and the work of the Truth and Reconciliation Commission (the “TRC”). The

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113. Taft, *Apology and Medical Mistake*, *supra* note 85, at 89.

114. *Id.*

115. *Id.*

116. *Id.*; accord Orenstein, *supra* note 37, at 269-70.

117. White, *supra* note 45, at 1277 (“By publicly apologizing, the offender tells a narrative in which he or she committed a wrong that harmed the victim and for which the offender owes the victim an apology . . .”).

118. Minow, *supra* note 70, at 269 (“[t]he clandestine nature of torture and other human rights abuses by repressive powers doubles the pain of those experiences with the disbelief of the community and even jeopardy to the victim’s own memory and sanity.”).

119. See Gill, *supra* note 44, at 22; see also Weyeneth, *supra* note 1, at 32.

120. Rosemary Nagy, *Reconciliation in Post-Commission South Africa: Thick and Thin Accounts of Solidarity*, 35 CANADIAN J. POL. SCI. 323, 326 (2002).



establishment of the TRC reflected a belief that:

[R]econciliation is dependent upon the full knowledge *and* acknowledgment of atrocities on both sides of the conflict. Without reconciliation, there is a danger of renewed violence with mistrust or hatred between former opponents threatening the fragile new democracy and the possibility of permanent peace.<sup>121</sup>

Among the goals of a truth commission are to “reveal and publicly acknowledge gross human rights violations within the broader context of political conflict; to deliver a measure of accountability; to restore the dignity of victims; and to inculcate respect for human rights and the rule of law.”<sup>122</sup> On the belief that reconciliation requires truth, the TRC only granted amnesty for perpetrators of past wrongs if it found that the perpetrator’s acts were politically motivated *and* if the perpetrator disclosed all relevant facts.<sup>123</sup> Over 7,000 amnesty applications and 21,000 victim statements were submitted to the TRC.<sup>124</sup> Perhaps out of a concern for strategic choices and insincerity, the TRC did not require that amnesty applicants offer apologies for their past actions.<sup>125</sup> But the acknowledgment of past actions and truth learned makes it “now difficult for any South African to deny that torture, killings, severe ill-treatment and disappearances were committed in an effort to maintain apartheid.”<sup>126</sup>

## 6. Deterrence

Apologies also have important deterrent effects by

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121. *Id.* at 324 (emphasis added); accord James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOL. 409, 414 (2006).

122. Nagy, *supra* note 120, at 324.

123. Minow, *supra* note 70, at 270; see also Joshua Brodesky, *Truth and Reconciliation in South Africa*, 9 DISP. RESOL. MAG. 9, 9 (2003).

124. See Nagy, *supra* note 120, at 325.

125. Murphy, *supra* note 44, at 379.

126. Nagy, *supra* note 120, at 325.

discouraging the transgressor from engaging in similar conduct in the future. This is because the act of apologizing can “serve to remind the transgressor of the value of the relationship to her. It can have a transformative effect on the transgressor’s future behavior.”<sup>127</sup> A credible commitment to change is at the heart of an apology and can help comfort a traumatized victim and decrease her fear that the transgressor would harm her in the future.<sup>128</sup> The transgressor’s public acknowledgment of his or her wrongful acts “may help restore the victim’s sense of his or her own value, and gain confidence that he or she will be treated with respect in the future.”<sup>129</sup>

In the South African context, the TRC’s development of a factual record was important so that victims have “their memories corroborated, the fates of loved ones explained, and a public record of the transgressions established.”<sup>130</sup> Besides documenting the past, advocates of the TRC hoped that the factual accounting is also accompanied by an ethical self-examination of the country’s history and an individual’s participation in that history.<sup>131</sup> The hope is that such ethical evaluation will lead to a meaningful commitment to act differently in the future.<sup>132</sup>

### B. *Challenges to Apologizing*

The previous Part identified the variety of benefits that an apology can offer for the relationship between the victim and the transgressor. However, there are a number of challenges that parties may face when requesting or offering apologies. *First*, for some defendants, there is a fear that an apology may be interpreted as an admission of liability and will be used against them in subsequent legal proceedings. For example,

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127. O’Hara & Yarn, *supra* note 44, at 1136.

128. T.L. Zutlevics, *Reconciliation, Responsibility, and Apology*, 16 PUB. AFF. Q. 63, 72 (2002); see LAZARE, *supra* note 2, at 59-61; White, *supra* note 45, at 1276.

129. Gill, *supra* note 44, at 16.

130. Nick Smith, *The Categorical Apology*, 36 J. SOC. PHIL. 473, 476 (2005).

131. See Nagy, *supra* note 120, at 342.

132. See *id.*

doctors and their hospitals often fear that an apology will be viewed as an admission of liability that can expose the health care providers to increased legal risks.<sup>133</sup> Admissions by party opponents are not considered hearsay under the Federal Rules of Evidence ("F.R.E.") and can be used in a trial.<sup>134</sup> An apology made by a defendant may therefore be used against the defendant if the dispute proceeds to trial. F.R.E. 408, however, excludes evidence of a settlement offer or compromise in order to prove fault.<sup>135</sup> As a consequence, conduct or statements made during "compromise negotiations" are excluded.<sup>136</sup> Moreover, any security provided by Rule 408 is partially limited by the risk that F.R.E. 408 could allow evidence of an apology for impeachment purposes.<sup>137</sup> An apologizer who fully admitted to wrongdoing outside the courtroom could then be confronted with that admission in court if the apologizer chose to deny liability at trial.<sup>138</sup> A second limitation of F.R.E. 408 rests on the issue of when "compromise negotiations" begin and end.<sup>139</sup> On the one hand, apologies are more meaningful when provided early on and transgressors may be more likely to apologize before a claim is filed in order to discourage litigation. The problem is whether F.R.E. 408 would apply to such an "early apology" that predates litigation.<sup>140</sup>

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133. See Lazare, *supra* note 49, at 252; Robbennolt, *Health Care Disputes*, *supra* note 86, at 1009.

134. Orenstein, *supra* note 37, at 229-30.

135. *Id.*; Shuman, *supra* note 3, at 188 ("[A] relevant apology is ordinarily rendered inadmissible only if it falls under the cloak of Federal Rule of Evidence 408, or its state law equivalent.").

136. Orenstein, *supra* note 37, at 230.

137. Cohen, *Advising Clients*, *supra* note 87, at 1034-35.

138. *Id.*

139. *Id.* at 1035.

140. *Id.*; In response to these and similar fears, many states have passed laws that protect apologies from being admitted against an apologizing physician at trial. Ebert, *supra* note 91, at 346; Latif, *supra* note 5, at 310; Pillsbury, *supra* note 85, at 197; Shuman, *supra* note 3, at 190. The Massachusetts apology statute, for instance, reads:

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

Despite these concerns, and as discussed above, the experiences of at least certain health care providers have challenged these fears as they witnessed declining legal costs in spite of—or because of—their willingness to issue apologies. In addition, the “liability-admitting” dangers of apologies are reduced when, as discussed in Part III, *infra*, apologies are issued as part of a remedial award after liability has already been established.

*Second*, although the use of apologies as a remedy may address the liability concern, it gives rise to another objection that is concerned with the moral nature of apologizing. One view of apologizing is that an apology is meant to correct a moral wrong and is therefore appropriately utilized in situations where we can identify “victims” and “wrong-doers.” These situations typically involve acts of government persecution or abuse, corporate misconduct, clergy abuse, or medical error. Consequently, there is some resistance to the application of apologies to contexts where moral transgressions are not easily apparent, such as in situations of contractual breach. In these scenarios, it is not always clear which party is at fault or whether the “wrongdoing” is of a contractual, rather than a moral, nature. There are two potential responses. One response is to maintain moral symmetry by illustrating the immorality of these contractual breaches. Under some views, a contractual obligation is a promise and, as such, implicates moral duties in addition to legal obligations.<sup>141</sup> A contractual breach, therefore, is an abdication of the moral duties a promisor has assumed by entering into a contract. The promisor invited the promisee’s trust in contracting, thereby placing the promisee in a position of vulnerability and the promisor in a position of power.<sup>142</sup> By failing to live up to those

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MASS. GEN. LAWS ANN. 233, § 23D (2006). However, not all state statutes protect apologies admitting fault. See Ebert, *supra* note 91, at 357; Christopher J. Robinette, *The Synergy of Early Offers and Medical Explanations/Apologies*, 103 NW. U. L. REV. 2007, 2012 (2009).

141. For discussions of the promissory nature of contracting, see *infra* note 142-45 and accompanying text.

142. See KIMEL, *supra* note 33, at 26; CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 16 (1981) (“To renege is to abuse a confidence he was free to invite or not, and which he intentionally did

obligations, the promisor abused the trust that he invited and exploited the promisee's vulnerability.<sup>143</sup> As such, he has committed a moral wrong that he must now correct with an apology. The difficulty with this response, of course, is that not everyone sees contracting as tantamount to promising a particular performance or non-performance. Instead, under this alternative view, contracting simply involves the performance of legal obligations and does not implicate morality.

A second response, as previously discussed, is that apologies bring benefits in addition to "righting moral wrongs." For example: apologies can help a fragile democracy gain legitimacy despite a previous regime's horrific legacy; apologies may allow a victim of a past act to feel safer in the knowledge that the transgressor has meaningfully committed to act differently in the future; apologies can demonstrate that the victim, transgressor, and community ultimately share the same values. This awareness may permit the parties to re-establish a positive relationship and lead the community to re-admit the transgressor. In particular, the previous Section highlighted the benefits that apologies bring to repairing relationships. Therefore, apologies can address defects in the relationship that led to the occurrence of the wrongful act—such as a belief in the moral inequality of the parties—and it can also help the parties repair their relationship in a way that would allow them to cooperate again in the future. The recognition of these multiple non-moral benefits is important because it increases the value of an apology and broadens the scope for its application.

Apologies perform important functions in facilitating forgiveness and redemption in the wake of moral transgressions but they also do a lot more. As will be discussed further in the next Parts, these non-moral benefits demonstrate that apologies can have continuing relevance in situations that we may not recognize as involving a "moral wrong." The appropriateness of an apology is determined by the type of harm that results from a transgression rather than

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invite.").

143. KIMEL, *supra* note 33, at 26; FRIED, *supra* note 142, at 16.

the classification of the transgression as “moral” or “non-moral.” Non-pecuniary harms such as moral inequality of the parties, disempowerment of the victim, or ostracism of the transgressor are not restricted to human rights abuses or similar conduct. Instead, these same types of harm may result from very different types of transgressions. It is this spectrum of non-pecuniary harm that unifies the situations in which an apology is appropriate. When certain forms of non-pecuniary harm result from a transgression, an apology is an appropriate remedy because it can uniquely address the consequences in ways that a monetary award cannot. This is true whether the transgression is an oil spill,<sup>144</sup> a forced disappearance<sup>145</sup> or, as discussed in the next Part, a breach of contract.

*Third*, and related, critics challenge the use of public apologies in a legal context on the belief that such “compelled” apologies cannot be genuine and, as such, are meaningless.<sup>146</sup> As the product of compulsion or bargained-for-exchange, a compelled apology does not evidence the transgressor’s repentance and is insufficient to secure the victim’s forgiveness.<sup>147</sup> As such, these critics doubt that an apology can bring value in such a situation. In a comparative study of apologies in Japan and the United States, one group of scholars found that the “sincerity” of an apology had slightly different meanings in the two countries.<sup>148</sup> While Americans emphasize the importance of the transgressor’s changed heart, “the cultural assumption of social harmony would lead the Japanese to accept the external act of apology at face value and not to disturb the superficial concord by challenging the sincerity of the person apologizing.”<sup>149</sup> In Japan, an apology attempts to achieve objectives other than redemption, such as maintaining harmonious relationships and solidarity: “the external act of apology becomes significant as an act of self-denigration and submission, which of itself is the important message. Then the

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144. See discussion *supra* Part II.A.1.

145. See discussion *supra* Part II.A.2.

146. See Murphy, *supra* note 44, at 385; Robinette, *supra* note 140, at 2012-13.

147. Taft, *Apology Subverted*, *supra* note 45, at 1149.

148. Wagatsuma & Rosett, *supra* note 34, at 468-69.

149. *Id.* at 472-73.

internal state of mind of the person who tenders the apology is of less concern.”<sup>150</sup> Moreover, in the American legal context, one scholar has emphasized the difference in importance placed on sincerity in public apologies versus private apologies:

The overriding interest in public apology is “to put the apology ‘on record,’ that is, to extract a public, chronicled recantation that restores those aspects of the collectivity’s [or individual’s] integrity and honor called into question by the offense.” If a public apology accomplishes this goal, the question of sincerity is superfluous.<sup>151</sup>

In a public apology, therefore, “the message of the apology as a performative utterance takes center stage. ‘[The] public record is the apologetic fact.’”<sup>152</sup> As discussed above, apologies accomplish a range of functions in addition to facilitating redemption and forgiveness. Not all of these functions are equally dependent upon the sincerity of the apologizer. So long as some of these functions can be served, then that apology still has meaning and should not be excluded. Additionally, a party who requests that a court compel the other party to apologize is likely aware of the compromised sincerity of any such apology. However, the fact that the party still seeks an apology suggests that the apology has value and meaning separate and apart

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150. *Id.* at 473; see also Murphy, *supra* note 44, at 384 (discussing the retributive function of subjecting transgressors to the social ritual of public apologies).

151. White, *supra* note 45, at 1295 (quoting NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 71 (1991)).

152. *Id.* at 1295 (emphasis added) (quoting NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 102 (1991)).

Plaintiffs understand that when someone apologizes, he or she is likely to have some level of internal dissonance. Still, plaintiffs like to hear defendants say they’re sorry, and sometimes feel satisfaction in seeing a defendant make an apology that she did not want to make. Additionally, plaintiffs accept negotiated apologies as valuable and treasured parts of settlements, even when they know that the apology is insincere.

*Id.* at 1296.

from its sincerity, and the “[party’s] preference should be respected . . . .”<sup>153</sup>

### III. Apologies in the Marketplace

At first glance, the injuries sustained in the marketplace may appear very different from those resulting from the crimes, disasters, and other wrongdoing generally believed to warrant apologies. We are more comfortable associating apologies with these latter forms of wrongdoing because it is easier to identify “victims,” “perpetrators,” and “moral harms.” These terms can be difficult to apply when describing business interactions between two sophisticated corporate entities. The inapplicability of these concepts does not, however, preclude the appropriateness or value of apologies for addressing the injuries sustained by disputing business parties. Although the *transgressions* may be different than those generally justifying apologies in other contexts, the *harm* resulting from these injuries are not so dissimilar as to preclude their application to the commercial sphere. Instead, as the following Part demonstrates, a contractual breach also may implicate significant relational damage. These forms of non-pecuniary relational harm are important for parties who place value on their relationship independent from the pecuniary gain of exchanging. In these situations, parties want to repair their relationships in order to maintain the possibility of future exchanges. It is therefore important to recognize the non-pecuniary relational harm that prevents parties from achieving that objective. Monetary compensation alone is insufficient to address much of that relational harm. Instead, any apology offers many advantages for parties seeking to resolve their non-pecuniary, relational harm. Part A begins by discussing the importance of relationships in certain forms of commercial exchanges. Part B then describes the relational harms that potentially result when one party breaches its contractual obligations to another.

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153. Robyn Carroll & Normann Witzleb, *‘It’s Not Just About the Money’ - Enhancing the Vindictory Effect of Private Law Remedies* 37 *MONASH U. L. REV.* 216, 233 (2011); Alfred Allan, *Functional Apologies in Law*, 15 *PSYCHIATRY, PSYCHOL. & L.* 369, 372-73 (2008).



A. *The Role of Relationships in Business*

Legal scholarship has long acknowledged the importance of relationships to successful exchanges between parties. For example, relational contract theory views contracts as relations in which exchanges occur.<sup>154</sup> Contracts occur along a spectrum of human interactions.<sup>155</sup> At one end of the spectrum are the discrete transactions occurring between strangers at an isolated point in time.<sup>156</sup> According to supporters of relational contract theory, “relationalists,” these types of transactions constitute only a small fraction of all contracts.<sup>157</sup> At the opposite end of the spectrum are exchanges between parties who personally interact over long periods of time and who often share membership in some form of interactive community.<sup>158</sup> Relationships matter significantly in exchanges such as marriage, franchise agreements, employment contracts, long-term supply contracts, and professional partnerships.<sup>159</sup>

Relationships matter in several ways in the marketplace.

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154. Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 878 (2000) [hereinafter Macneil, *Relational Contract Theory*]; see Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 344 (1983) [hereinafter Macneil, *Values in Contract*]; Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 826 (2000).

155. Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175, 1177-78 (1992); Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 764 (1998); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 app. at 902-03 (1998) [hereinafter Macneil, *Classical, Neoclassical, and Relational Contract Law*]; Macneil, *Values in Contract*, *supra* note 154, at 342.

156. Macneil, *Values in Contract*, *supra* note 154, at 344; see Gudel, *supra* note 155, at 764 (“In a purely discrete transaction, there is nothing that binds the parties together or connects them with each other, except this fully articulated planning for a single, mutually beneficial exchange.”); Macneil, *Classical, Neoclassical, and Relational Contract Law*, *supra* note 155, at 856-57 (describing the nature of discrete transactions).

157. See Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569 (1985); Gudel, *supra* note 155, at 765; Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 485-87 (1985) [hereinafter Macneil, *Relational Contract: What We Do and Do Not Know*].

158. Gordon, *supra* note 157, at 569.

159. See Gudel, *supra* note 155, at 765; Speidel, *supra* note 154, at 823.

For example, relationships continually matter as firms adopt marketing strategies that privilege the development of long-term positive relationships that cultivate customer loyalty.<sup>160</sup> Relationship marketing (“RM”) “embraces markets, society and internal organization as networks of relationships, within which interaction takes place.”<sup>161</sup> According to its advocates:

At a micro level, RM is concerned with the nature of the relationships between the firm and customer that emphasises a long-term relationship that takes account of the customer’s needs and values. At a macro level, RM is used as a term to describe the relationship within which the organization engages with all stakeholders, thus the strategic issue is to establish the mix or portfolio of the relationships that is essential for the firm.<sup>162</sup>

Relationship marketing emerged as an alternative to “transaction marketing” that focuses on the management of

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160. See Jagadish N. Sheth, *The Future of Relationship Marketing*, 16 J. SERVS. MKTG., 590, 590 (2002); Maria Holmlund & Jan-Åke Törnroos, *What are Relationships in Business Networks?*, 35 MGMT. DECISION 304, 304 (1997); Harwood & Garry, *supra* note 32, at 107; Evert Gummesson, *Making Relationship Marketing Operational*, 5 INT’L J. SER. INDUS. MGMT. 5, 5 (1994) [hereinafter Gummesson, *Making Relationship Marketing Operational*]; Annika Ravald & Christian Grönroos, *The Value Concept and Relationship Marketing*, 30 EUR. J. MKTG., 19, 20 (1996); Zontanos & Anderson, *supra* note 31, at 228 (2004); Ndubisi, *supra* note 32, at, 99 (2007).

161. Gummesson, *Return on Relationships*, *supra* note 29, at 136; see also Sally Rao & Chad Perry, *Thinking About Relationship Marketing: Where Are We Now?*, 17 J. BUS. & INDUS. MKTG. 598, 599 (2002) (“A transactional exchange involves a single, short time exchange with a distinct beginning and ending . . . . In contrast, a relational exchange involves multiple linked exchanges extending over time and usually involves both economic and social bonds . . . .”) (citations omitted); Roger Palmer et al., *Relationship Marketing: Schools of Thought and Future Research Directions*, 23 MKTG. INTELLIGENCE & PLANNING 313, 316 (2005) (“To define relationship marketing is to distinguish it from the micro-economic paradigm. At its centre is the concept that customers have continuing value over and above that of individual and discrete transactions. The focus is, therefore, on the relationship rather than the transaction.”).

162. Rao & Perry, *supra* note 161, at 599 (citation omitted).

discrete transactions.<sup>163</sup> Relationship marketing is based on the belief that interaction between business parties is connected to previous and future interactions and, over time, the parties may become increasingly interdependent as their interaction grows.<sup>164</sup> Under this approach to commercial transactions, effective marketing and long-term profitability is achieved through the management of long-term and positive relationships between the parties. “It means a change in focus from products and firms as units of analysis to people and organizations”<sup>165</sup> and a shift from “customer acquisition to customer retention.”<sup>166</sup> There is a strong customer-focus involved with relationship marketing, loosely described as “putting the customer first,” or “shifting the role of marketing from manipulating the customer to genuine customer involvement,” and “attracting, maintaining and enhancing customer relationships.”<sup>167</sup>

This marketing strategy has been particularly important for small firms that lack access to the formal marketing resources of their larger counterparts.<sup>168</sup> Strong ties between start-ups and customers are especially important during the

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163. Sheth, *supra* note 1620, at 590 (explaining that as a result of intense global competition, “customer retention became the corporate focus and this resulted in the emergence of ongoing relational exchange in contrast with the one-time transactional exchange”). *Id.* (citation omitted).

164. See Holmlund & Törnroos, *supra* note 1620, at 304; Harwood & Garry, *supra* note 32, at 107.

165. Arias, *supra* note 26, at 150.

166. Sheth, *supra* note 160, at 591; Gummesson, *Making Relationship Marketing Operational*, *supra* note 160, at 6; Raval & Grönroos, *supra* note 160, at 20.

The core of relationship marketing is relations, a maintenance of relations between the company and the actors in its micro-environment, i.e. suppliers, market intermediaries, the public and of course customers as the most important actor. The idea is first and foremost to create customer loyalty so that a stable, mutually profitable and long-term relationship is enhanced.

*Id.*

167. Zontanos & Anderson, *supra* note 31, at 231; see also Ndubisi, *supra* note 32, at 99; Raval & Grönroos, *supra* note 160, at 23.

168. Zontanos & Anderson, *supra* note 31, at 231; see also Harwood & Garry, *supra* note 32, at 108.

early years.<sup>169</sup> In this vulnerable period, strong ties help a start-up develop efficient communication with its customers and thereby receive accurate information regarding performance outcomes.<sup>170</sup> Strong ties also “promote the development of trust and cognitive identification and joint problem solving, which reduce the risk of opportunism between start-ups and customers through a continuous reinforcement of their business relationship.”<sup>171</sup>

Second, the importance of relationships is further increased as Western firms turn to foreign markets in Asia and the BRIC nations, where exchanging is often premised upon close interactions and personal connections between the parties.<sup>172</sup> Global competition and technological innovation also drive the need for establishing “cooperative relationships” between business parties.<sup>173</sup> The conflation of these factors compounds the importance of relationships and such conflation is increasingly occurring in the post-2008 world. According to Secretary of Commerce, Gary Locke, “[s]mall and midsize companies’ ‘growth potential is outside the U.S.’”<sup>174</sup> The reason for this transnational focus is that 86% of “global economic growth [in] the next decade is projected to be outside the

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169. Luca Pirolo & Manuela Presutti, *The Impact of Social Capital on the Start-ups Performance Growth*, 48 J. SMALL BUS. MGMT., 197, 202 (2010).

170. *Id.*

171. *Id.* (citation omitted). However, while strong and weak ties are beneficial for economic growth during the early stage, strong ties can compromise a start-up’s innovation cycle at more developed stages. *See id.* at 217-18.

172. Arias, *supra* note 26, at 148.

173. Desiree Blankenburg Holm, et al., *Creating Value Through Mutual Commitment to Business Network Relationships*, 20 STRAT. MGMT. J. 467, 468 (1999) (explaining that “cooperative relationship development [] is becoming increasingly common in the emerging global markets, where rapid technological development demands considerable development resources. The supplying firm and the customer firm must both make strong commitments that require a long-term perspective in developing their business with each other.”); Matthias Fink & Alexander Kessler, *Cooperation, Trust and Performance – Empirical Results from Three Countries*, 21 BRIT. J. MGMT. 469 (2010).

174. Paul Davidson, *Small Businesses Look Across Borders to Add Markets*, USA TODAY (Apr. 12, 2011), available at <http://www.usatoday30.usatoday.com/money/economy/2011-04-06-small-businesses-go-international.htm>.

U.S.”<sup>175</sup> If small businesses continue to look to foreign markets, their relationships with their business counterparts (intermediaries, customers, suppliers) can prove vital to their success.

B. *The Relational Harm of Contractual Breaches*

Relational contract theory offers a number of valuable insights for the transnational alliances and partnerships that small businesses may forge in the current global economy. According to this theory, exchanges that are particularly dependent upon positive relationships between the parties succeed because of the preservation of important contract values, such as role integrity, contractual solidarity, and harmonization of relational conflict.<sup>176</sup> In these heavily relational exchanges, the norm of contractual solidarity gives rise to the importance of preservation of the relation.<sup>177</sup> Harmonization of the relational conflict involves “harmonization with the whole person” as opposed to resolution of a discrete dispute and for its own sake.<sup>178</sup> The deterioration of these norms threatens the integrity and longevity of the contractual relationship in which the exchanges occur.<sup>179</sup>

Similar insight is also reflected in the business and managerial literature. Successful relationship marketing depends on the preservation of certain fundamental relational values, such as trust, commitment (the “enduring desire to maintain a valued relationship”), promise-keeping, and conflict

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175. *Id.*

176. See Macneil, *Classical, Neoclassical, and Relational Contract Law*, *supra* note 155, at 895; Macneil, *Values in Contract*, *supra* note 154, at 361 (“The five norms of enhanced importance in ongoing contractual relations are role integrity, preservation of the relation, harmonization of relational conflict, propriety of means, and supracontract norms.”); Speidel, *supra* note 154, at 827.

177. Macneil, *Values in Contract*, *supra* note 154, at 362. The importance of a contractual relation to a party may depend on that party’s particular cultural background. See O’NEILL JR., *supra* note 36, at 2 (“[T]here is frequently less American emphasis on preserving a relationship through a dispute.”).

178. Macneil, *Values in Contract*, *supra* note 154, at 362.

179. See Barnett, *supra* note 155, at 1177 (1992); Gudel, *supra* note 155, at 778.

management.<sup>180</sup> Trust, in particular, is viewed as the “key variable in . . . international alliances”<sup>181</sup> and is defined as “confidence between the parties that the other party is reliable” and “that the parties will act with a level of integrity when dealing with each other.”<sup>182</sup> Commitment is another necessary element to successful relationship marketing and involves solidarity and cohesion between parties.<sup>183</sup> Commitment to a relationship can be calculative<sup>184</sup> (strategic) or affective (desire). Affective commitment is a party’s willingness to continue a business relationship because “it likes the partner and enjoys the [relationship],” and experiences feelings of loyalty and belongingness.<sup>185</sup>

These relational values identified in law (relational contract theory) and business (relationship marketing) provide insight into the full spectrum of harms that result from a contractual breach. A breach not only causes financial losses for the injured parties but it also has negative effects on these relational values that are necessary for continuation of the exchange relationship.<sup>186</sup> For example, when a party fails to

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180. Harwood & Garry, *supra* note 32, at 109 (“Research suggests that the key to relationship success is the presence of trust and commitment between [the] parties.”); Ndubisi, *supra* note 32, at 99-100 (“In cross-country partnerships where both physical and psychic distances are great, the foreign partner must rely heavily on the local partner for managing the partnership on daily basis.”); Rao & Perry, *supra* note 161, at 601 (“First, trust is viewed as an essential ingredient for successful relationships . . . and concerns exchange partners’ confidence and reliability. In turn, trust can lead to the commitment to a relationship . . . that results from an exchange partner exerting all his/her efforts to preserve an important relationship.”)(citations omitted).

181. Troy Heffernan, *Trust Formation in Cross-Cultural Business-to-Business Relationships*, 7 QUAL. MKT. RES. 114, 114 (2004).

182. *Id.* at 115 (citation omitted).

183. Geyskens et al., *The Effects of Trust and Interdependence on Relationship Commitment: A Trans-Atlantic Study*, 13 INTERN. J. RES. MKTG. 303, 303 (1996).

184. *Id.* at 304 (“Calculative commitment, in contrast, is the extent to which channel members perceive the need to maintain a relationship given the significant anticipated termination or switching costs associated with leaving.”).

185. *Id.*

186. See Macneil, *Classical, Neoclassical, and Relational Contract Law*, *supra* note 155 at 895; Macneil, *Values in Contract*, *supra* note 154, at 361; Speidel, *supra* note 154, at 827.

perform its contractual obligations, it has deviated from its expected role within that contractual relationship. Its failure to perform compromises the solidarity between the parties as the injured party will likely believe that it can no longer rely on the breaching party. This diminishment of trust between the parties makes it difficult for the parties to continue exchanging in the future.<sup>187</sup> In addition to an unfortunate and premature termination of the business relationship, the relational conflict between the parties may introduce feelings of resentment, anger, injustice, and humiliation. *These* are some of the non-pecuniary costs of business disputes that are neglected and often go unaddressed.<sup>188</sup> Monetary compensation alone may not be able to correct these relational wrongs. A damages award can address the financial losses suffered by the parties, but it has limited power to restore relational values, such as commitment, solidarity, harmony, and trust. But for many of the forms of exchanging described above, the loss of these relational values may constitute the real and unfortunate damage resulting from the business dispute. *This* is the damage that prevents the parties from moving forward. The discussion below describes the damage to the relational values that results from a contractual breach and the benefits that an apology offers for restoring those relational values.

In order to illustrate these types of non-pecuniary harm, consider the following hypothetical involving a standard international supply agreement between two small firms. This illustration is important in order to understand the full spectrum of harms caused by contractual breaches and the limits of monetary compensation to address these non-pecuniary forms of harm.

### 1. The Relational Contract

Company X is an American manufacturer of automotive

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187. Ndubisi, *supra* note 32, at 99 (“Trust has been defined as ‘. . . a willingness to rely on an exchange partner in whom one has confidence.’ A betrayal of this trust by the supplier or service provider could lead to defection.”) (citation omitted).

188. Wagatsuma & Rosett, *supra* note 34, at 464; Allen, *supra* note 34, at 283; Shuman, *supra* note 3, at 182.

parts. It agrees to supply electric motors to Company Y, a Turkish automobile maker, who will incorporate the motors in its new line of mid-size sedans. The agreement is a multi-year supply contract and was the product of prolonged negotiations involving several face-to face meetings of the companies' senior officers. Company Y had considered several automotive makers for this particular supply agreement. It had opted to go with Company X because the two companies had worked together previously on a similar supply agreement for Company Y's high-efficiency SUVs, and Company Y had been very satisfied with Company X's performance.<sup>189</sup>

This type of international agreement is heavily relational in several ways.<sup>190</sup> First, the agreement is of long-duration and will apply over several years. Even though the agreement is long-term, the relationship underpinning the agreement is even longer: it preceded the formation of the sedan-supply agreement and will likely continue into the future to encompass future exchanges between the parties. This leads to the second point that the parties are not strangers but are instead connected to each other in ways that extend beyond the confines of the sedan-supply agreement. Third, the motives for contracting were at least partially personal. The parties had worked together before and had been satisfied with each other's performance. Such repeated, positive interactions facilitate the growth of interpersonal trust between the

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189. Ravald & Grönroos, *supra* note 160, at 23.

In a close relationship the customer probably shifts the focus from evaluating separate offerings to evaluating the relationship as a whole. The core of the business, i.e. what the company is producing, is of course fundamental, but it may not be the ultimate reason for purchasing from a given supplier. The reason for purchasing may be simply because the customer has a relationship with this supplier...

*Id.*

190. See Macneil, *Classical, Neoclassical, and Relational Contract Law*, Appendix: *Transactional and Relational Axes*, *supra* note 155, app. at 902-03 (listing relational factors including (a) "whole person" unique and non-transferable personal involvement, (b) communication between parties is extensive and may include informal elements, (c) long-term duration, (d) gradual commencement and termination of the relations, and (e) limited specific planning of substance); Speidel, *supra* note 154, at 832-33.



parties.<sup>191</sup> It is therefore not surprising that this trust would lead Company Y to opt for Company X over the latter's competitors with whom Company X does not share such similar trust.<sup>192</sup> Fourth, and a related point, the agreement resulted from several long and personal interactions among the companies' senior personnel who may have worked together previously on the SUV-supply agreement and continue to maintain informal interactions.

In this type of agreement, the preservation of relational values are especially important. For the sedan-supply agreement to succeed and the parties' relationship to continue, it is important that role integrity is maintained so that the parties abide by their expected role in the relationship. Second, the longevity of the relationship and its expansion to include further exchanges will be dependent upon the maintenance of trust and satisfaction between the parties.<sup>193</sup> Each will need to believe that it can continue to depend on the other.<sup>194</sup> As a consequence, the solidarity that begot the second supply agreement will need to be maintained. Finally, one reason for the successful relationship is the absence, or management, of relational conflict between the parties. As discussed below, a breach of the parties' agreement threatens all these values.

## 2. The Breach

Consider a possible breach by Company X caused by its failure to provide the second delivery of electric motors to Company Y on the agreed upon schedule. One option is for Company Y to locate substitute motors on the open-market and

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191. Deepak Malhotra & J. Keith Murnighan, *The Effects of Contracts on Interpersonal Trust*, 47 ADMIN. SCI. Q. 534, 537 (2002).

192. See Dawn Iacobucci & Amy Ostrom, *Commercial and Interpersonal Relationships: Using the Structure of Interpersonal Relationships to Understand Individual-to-Individual, Individual-to-Firm, and Firm-to-Firm Relationships in Commerce*, 13 INT'L. J. OF RES. MKTG. 53, 54 (1996) ("One advantage of the extended duration of a relationship is thought to be the reduction of risk and uncertainty in one's partner's actions.") (citation omitted).

193. See Iacobucci & Ostrom, *supra* note 192, at 54.

194. Geyskens et al., *supra* note 183, at 308 ("Trust reflects a firm's confidence, positive expectations and attributions that its partner is honest and responsive to the firm's needs.").

sue Company X for losses caused by differences in price and incidental and consequential damages. Such responses are routinely justified on the grounds that “[p]eople generally enter into commercial contracts and routine labor contracts for purely economic reasons and can therefore be fully compensated with damages for injuries caused by the breach.”<sup>195</sup> But what happens when parties do not enter into commercial contracts for “purely economic reasons?” In the hypothetical described above, Company Y chose Company X because of their previous positive interactions. The supply agreement developed from prolonged and personal interactions. Company X’s breach compromised (a) the welfare of Company Y, including additional distress, production disruption, and reputational costs, and (b) its relationship with Company Y and all the attendant positive gains that had accompanied their long and positive relationship. These are among the relational costs of breaches and they cannot be similarly addressed by monetary compensation alone.<sup>196</sup> Company Y can purchase its electric motors on the open market; it cannot similarly purchase inter-firm trust. For companies like Company Y who value their business relationships, this loss of inter-firm trust and other relational values represent significant losses that must also be remedied if Company Y is to address its injuries from the breach.

### 3. Relational Harm Resulting from the Breach

*First*, the breach described above can result in the destruction of the relational values that kept the parties’ relationship together and ensured its success, such as the values of trust, commitment, role integrity, preservation of the relation, and harmonization of relational conflict. The damage to these values compromises the future relationship between the parties and constitutes the non-pecuniary relational harm that results from a contractual breach. One valuable aspect of the pre-breach interactions between Company X and Company

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195. Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68:5 VA. L. REV. 947, 949 (1982) [hereinafter Macneil, *Circles in the Sky*].

196. *Id.* at 968-69.

Y was the “special relationship” between the two parties that was characterized by informal bonds, interpersonal trust, a lack of discord, and a belief in solidarity. Such a relationship is harmed by Company X’s breach and the loss of such a relationship results in its own harms independent from the loss of economic value: “Special relationships between people, relationships the parties to which are united by bonds that do not exist between people in general, can be said to be valuable in themselves, regardless of the possibility of co-operation or the co-ordinated pursuit of various projects which are essentially external to the relationship.”<sup>197</sup>

Trust and commitment are key elements to successful business relationships.<sup>198</sup> Trust is especially important because it increases the likelihood that parties will continue to invest in relationships.<sup>199</sup> The change in trust caused by a breach is harmful not only because Company Y cannot rely on Company X to keep its obligations, but because it no longer serves the function of “promot[ing] and reinforce[ing] personal relationships.”<sup>200</sup> In other words, trust was not simply a byproduct of a positive relationship between the two parties but it was also responsible for maintaining those relationships.<sup>201</sup> The practice of promising was dependent upon trust. Keeping those promises validated that trust.<sup>202</sup> As trust grew, it deepened the parties’ relationship and gave it its particular qualities that differentiated transactions between Company X and Company Y from the routine transactions between two distant strangers. When this interpersonal trust is lost, the disappointed party may be reluctant to engage in future transactions with the party who caused that disappointment.<sup>203</sup>

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197. KIMEL, *supra* note 33, at 28.

198. See Virpi Havila et al., *International Business-Relationship Triads*, 21 INT. MKTG. REV. 172, 176 (2004).

199. *Id.* at 176.

200. *Id.* at 28.

201. See Iacobucci & Ostrom, *supra* note 192, at 54.

202. See Ndubisi, *supra* note 32, at 100; Heffernan, *supra* note 181, at 121.

203. Geyskens et al, *supra* note 183, at 308; Heffernan, *supra* note 181, at 115 (describing the emphasis on interpersonal trust in relationships in the literature on supplier and distribution networks).

It is important to note that “many business transactions occur within the context of arms-length relationships . . . and are conducted on the basis of promises made: giving someone ‘your word’ and a handshake often seals the deal.”<sup>204</sup> These relationships may be especially vulnerable to damage inflicted by “trust violations,” that occur “when evidence disconfirms the confident positive expectations regarding another’s conduct and redefines the nature of the relationship in the mind of the injured party.”<sup>205</sup> Trust violations are an important component of the non-pecuniary relational harms that flow from at least some forms of contractual breaches. When such violations occur, these “do more than inflict transaction losses on the victim; they question the very foundation of the relationship itself.”<sup>206</sup>

*Second*, the breach can result in increased costs of contracting for the breaching party and the disappointed party. One particular advantage of a successful business relationship is that it is characterized by trust, solidarity, and commitment that serve as informal guarantees of co-operation. This means that parties may not need to continually rely on lengthy and costly formal contracts every time they wish to interact with each other. The ability to rely on informal, relational guarantees of cooperation is particularly important for smaller businesses that lack the legal resources of their larger competitors.<sup>207</sup> For example, “many entrepreneurs place great emphasis on the non-contractual ‘word’—that is, the informal commitments and verbal promises—of their investors.”<sup>208</sup> Informal guarantees of cooperation, such as trust, is a particular strategic resource that small firms are in better position to cultivate, given their smaller size and frequent personal interaction with suppliers and consumers, and offers them an important competitive advantage over larger firms in

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204. Edward C. Tomlinson et al., *The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following Broken Promises*, 30 J. MGMT. 165, 166 (2004) (citations omitted).

205. *Id.* at 167.

206. *Id.*

207. Rebecca Strätling, et al., *The Impact of Contracts on Trust in Entrepreneur-Venture Capitalist Relationships*, 30 INT’L SMALL BUS. J. 811, 814 (2012).

208. *Id.*, at 816.

the global marketplace: “[a] small firm’s marketing advantage, in contrast to a large firm, is precisely these close relationships between the entrepreneur and customers.”<sup>209</sup>

However, when a breach destroys the sources of informal, relational guarantees of cooperation—such as solidarity and trust—parties may tend to prefer formalities as a guarantee of performance obligations instead of investing in relational development: “When trust is low, firms are more likely to carefully scrutinize and monitor the other partner’s behavior, to guard against the partner’s opportunism, and to incur various costs of such vigilance.”<sup>210</sup> Therefore, its trust once betrayed, Company Y may opt for heightened planning at the initial stages, preferring to anticipate contingencies with extensive and detailed terms rather than using open and flexible provisions that customarily characterize relational contracts: “[A]s relational contracts are less specific and often based on informal agreements, they are more difficult to enforce and provide contractual partners with less protection from exploitation by opportunistic behaviour.”<sup>211</sup>

In addition to preferring formal guarantees of co-operation over informal sources, Company Y may be reluctant to enter into long-term supply contracts and instead gravitate towards short and independent transactions. In other words, the effects of the breach on Company Y is to drive it towards the “discrete” end of the transactional spectrum and dissuade it from further relational contracting, even with a new partner.

*Third*, relationships between firms are ultimately relationships between people.<sup>212</sup> As a result, residual negative

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209. Zontanos & Anderson, *supra* note 31, at 231; *see also* Harwood & Garry, *supra* note 32, at 108; Pirolo & Presutti, *supra* note 169, at 202; Yvonne Brunetto & Rod Farr-Wharton, *The Moderating Role of Trust in SME Owner/Managers’ Decision-Making About Collaboration*, 45 J. SMALL BUS. MGMT. 362, 364 (2007) (“The ability to trust becomes economically valuable to a firm when it affects the SME owner/manager’s ability to act on opportunities that may emerge (from networking). The ability to share information creates a commodity that is considered valuable, increasing the potential possibilities of the firms involved.”).

210. Geyskens et al., *supra* note 183, at 308.

211. *Id.*

212. *See* Iacobucci & Ostrom, *supra* note 192, at 57 (“[R]elational researchers have demonstrated the importance of personal ties to the selection of business partners.”).

emotions experienced by the personnel of the injured businesses can also compromise a future relationship.<sup>213</sup> Relationship commitment is the willingness to continue a valued business relationship, and studies have found that “that both strong personal relationships and intensive interfirm contacts are important antecedents for commitment.”<sup>214</sup> Affective commitment, for instance, is one important source of relationship quality and arises when one party seeks to maintain and continue the business relationship because “it likes the partner and enjoys the relationship,” and experiences feelings of loyalty and belongingness.<sup>215</sup> The hypothetical breach described above endangers such affective commitment and potentially engenders negative emotions that can obstruct a future relationship between the parties.

*Fourth*, Company X’s actions also result in reputational damage to Company Y and its sphere of potential partners. Company X’s breach of its legal obligations also affects Company Y’s ability to perform its own legal obligations to its partners and customers. As a result of Company X’s breach, Company Y’s roll-out of its new products line was delayed, thereby compromising the reputation of Company Y and the success of the new products.

These are some of the significant relational harms that Company X and Company Y may experience as a result of the former’s contractual breach. These relational harms may be further compounded if we change the nature of the breach. For example, imagine that Company X chose not to supply the motors because it found that it could make more profit from selling the same shipment to a third company, Company Z. Company Z offered to pay Company X 25% more for the motors that it would have otherwise delivered to Company Y. And, because Company Z is in the process of aggressive expansion, Company X could not keep up its production requirements for

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213. See Don Peters, *Can We Talk? Overcoming Barriers to Mediating Private Transborder Commercial Disputes in the Americas*, 41 VAND. J. TRANSNAT’L L. 1251, 1266 (2008) (“As disputes emerge and grow, emotions intensify and escalate. Many, if not most, transborder business disputes engender strong emotions in the parties involved.”).

214. Havila et al., *supra* note 198, at 177.

215. Geyskens et al., *supra* note 183, at 303.

Company Z and maintain its performance obligations to Company Y. It therefore chose to supply motors exclusively to Company Z and use its increased profits to compensate Company Y for any costs associated with finding a new supplier. Such a choice also threatens a range of relational harms. For example, commitment and solidarity between the parties are also important to successful long-term ventures and relationship marketing.<sup>216</sup> A party's commitment to a relationship is manifested by "resist[ance] [to] apparently attractive short-term alternatives in favor of the expected long-term benefits of staying with existing partners."<sup>217</sup> In this second hypothetical, Company X has already proven once that it places higher value on its own individual gain as opposed to the previous solidarity between the parties and is therefore not a "committed" partner.<sup>218</sup> Compensating Company Y for its financial losses does not address this loss of commitment and solidarity. What was lost was the relational bond between the parties that was characterized by a belief that each can rely on the other.<sup>219</sup>

The premise for both these scenarios is that Company Y and Company X value their relationship to each other and this relationship serves as the foundation for their exchanging. They now confront the challenge of how to continue exchanging when their relational foundation has been compromised in the ways described above. The relational harms described in both these situations are not, of course, unique to commercial relationships. We confront similar challenges of broken trust, compromised commitment, and unlikely reconciliation in all the other spheres of human living. In these non-commercial spheres, apologies have often been utilized as a means of addressing such relational challenges.<sup>220</sup> This next Part discusses the benefits of apologies to repairing business relationships and applies such benefits to disputes submitted to international arbitration for resolution.

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216. *Id.*

217. *Id.*

218. *Id.*

219. See Tomlinson et al., *supra* note 204, at 167.

220. See *supra* Part II.

#### IV. Arbitrating Apologies

This Part describes how public apologies, as part of a remedial package, can assist parties in addressing the types of relational harm described in the previous Part. The case studies for this argument are drawn from business disputes submitted to international arbitration. International arbitration is a form of private dispute resolution by which parties agree to submit their claims to one or more arbitrators for decision. It is often the preferred forum for resolution of transnational commercial disputes and, therefore, is of particular importance for the types of relationships, and relational harms, discussed in Part II. Part A provides an overview of international arbitration and the reasons why parties to a transnational deal may prefer it over traditional litigation. Part B explains how the inclusion of a public apology as a remedy in international arbitration can address many of the non-pecuniary relational harms discussed in Part II.C. Part C discusses some of the challenges that parties may encounter with arbitrating apologies.

##### A. *International Arbitration of Business Disputes*

International commercial arbitration involves the settlement of business disputes between or among transnational parties.<sup>221</sup> These parties have agreed to submit their dispute to binding resolution by one or more arbitrators. The cases submitted to this type of arbitration often concern contractual disputes relating to the primary operating agreements between the parties.

Arbitration offers a variety of advantages for its participants.<sup>222</sup> For example, parties can exercise greater

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221. Gloria Miccioli, *International Commercial Arbitration*, AM. SOC'Y INT'L L., <http://www.asil.org/erg/?page=arb> (last visited on Oct. 7, 2013).

222. See NIGEL BLACKABY ET AL., REDFERN & HUNTER ON INTERNATIONAL ARBITRATION 31-34 (5th ed. 2009) (discussing various advantages to arbitration); MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 3-4 (2008); O'NEILL, JR., *supra* note 36, at 3-5 (discussing various benefits to arbitration such as speed, economy and cost). See generally CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2008); Bernard



control over the selection of the decision-makers who are deciding their claims.<sup>223</sup> Involvement in arbitrator selection can help assuage a foreign investor's fears over judicial bias and "home-court" advantage that may result if the claims were adjudicated before a national court where the investor has no such involvement in the selection of the dispute's decision-makers. Claimants may also prefer when the assets of their adversary party are located in another foreign jurisdiction. One of the primary advantages of international arbitration is the pro -enforceability of arbitral awards.

International arbitral tribunals are not prohibited from ordering non-pecuniary damages.<sup>224</sup> The reluctance to do so has generally resulted from parties' lack of interest in such remedies and a pragmatic concern with the enforcement of such awards.<sup>225</sup> On at least a couple of occasions, however, international arbitral panels have concluded that they possess the ability to order specific performance.<sup>226</sup> Apologies are other important non-pecuniary remedies that should be included in the arbitrators' toolbox.

One scholar has observed that:

In those instances where formal ADR techniques are employed to resolve international commercial disputes, the often occur in the context of a longstanding, mutually advantageous relationship . . . . These techniques also are often employed in

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Hanotiau, *International Arbitration in a Global Economy: The Challenges of the Future*, 28 J. INT'L ARB. 89 (2011) (discussing the challenges facing arbitration and the necessary steps to overcome them and preserve the advantages that arbitration offers).

223. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other State art. 37, cl. 2, Aug. 27, 1965, 17 U.S.T. 1270.

224. Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT'L 325, 325 (2004).

225. See *id.* at 325-28; Carole Malinvaud, *Non-pecuniary Remedies in Investment Treaty and Commercial Arbitration*, in 50 YEARS OF THE NEW YORK

CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 220 (Albert Jan van den Berg ed., 2009).

226. See Schreuer, *supra* note 224, at 327-31; Malinvaud, *supra* note 225, at 222-23.

circumstances where it is anticipated that there would be a future benefit in the continued commercial relationship or through additional transactions . . . .<sup>227</sup>

In other words, parties often resort to commercial arbitration because they value the relationship in addition to the expected gains from a particular transaction. However, the pecuniary remedies customarily awarded in international arbitration are inadequate to address the relational harm sustained. Instead, in order to address these forms of relational harm, it is important to consider the benefits of the non-pecuniary remedy of public apologies.

B. *The Benefits of Apologies for Repairing Relational Harm in Business Disputes*

As discussed above, relationships matter in a variety of business contexts and the success of these relationships is dependent upon the maintenance of certain key relational values. This Part returns to the hypothetical discussed in Part II and describes the benefits of a public apology for restoring these relational values that previously maintained the parties' relationship to each other and that were damaged as a result of Company X's breach.

1. Re-establishing Commitment Between the Parties

Apologies can offer an opportunity for the parties to re-affirm their commitments to each other and re-establish the importance of solidarity in their relationship. Comparative studies of apologies illustrate that apologies have served similar purposes in contexts where individuals place significant value on social solidarity. A number of scholars have observed that Japanese culture is generally more willing to redress wrongs with the use of apologies compared to American culture.<sup>228</sup> One explanation for this difference is that Japanese

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227. O'NEILL, JR., *supra* note 36, at 2.

228. See Wagatsuma & Rosett, *supra* note 34, at 462; Lee, *supra* note 81,

culture tends to place greater importance on values such as social harmony and solidarity.<sup>229</sup> In Japanese culture, in-group “maintenance of harmonious and smooth interpersonal relations, interdependence, and mutual trust are of utmost importance.”<sup>230</sup> An apology is used in this context to help restore these values when inter-personal relationships are threatened.<sup>231</sup> Apologizing in Japan indicates “an individual’s wish to maintain or restore a positive relationship with another person who has been harmed by the individual’s acts.”<sup>232</sup>

Although such conclusions are often presented in terms of cultural differences, an alternative interpretation of this insight is not to cast it in terms of culture but of values: apologies are particularly important when the individuals affected prioritize values such as social harmony, restoration of relationships, and solidarity. These values are generally elevated in Japan, and apologies, therefore, are important for restoring these values. However, similar values are also elevated in the context of relational contracting when the relationships between parties matter. Therefore, it may be worth exploring whether the solidarity-reaffirming function of apologizing can be similarly extended to relational contracts.

## 2. Reconciliation

A trust violation in a business relationship—such as a broken promise—can result in a trust violation that may terminate the relationship between the parties. In order to preserve the relationship, the injured party must be willing to reconcile.<sup>233</sup> Trust begins with reconciliation, and reconciliation is a situation when the parties concerned work together to rebuild the relationship and, through such a process, address the factors that caused damage to the relationship and forbear

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at 29; LAZARE, *supra* note 2, at 32-33.

229. Wagatsuma & Rosett, *supra* note 34, at 465 (“Traditional Japanese social norms emphasize harmonious interpersonal relations and group solidarity.”).

230. *Id.*

231. Lee, *supra* note 81, at 16 (“An apology is expected and given in Japan in deference to harmony in the collectivity.”).

232. Wagatsuma & Rosett, *supra* note 34, at 472.

233. Tomlinson et al., *supra* note 204, at 168.

from retribution and other associated negative feelings.<sup>234</sup>

One study examined important factors influencing an injured party's inclination for reconciliation in arms-length transactional exchange relationships in which an explicit promise was broken.<sup>235</sup> It found that an apology can greatly enhance the likelihood that an injured party will be willing to reconcile the relationship.<sup>236</sup> The sincerity of the apology, its timeliness, and the extent to which the apologizer takes full responsibility were also significant factors on party reconciliation.<sup>237</sup>

### 3. Restoration of Trust

In the business context, "business to business" ("B2B") interpersonal trust refers to a situation when "when an individual in one firm trusts another individual within a different organization."<sup>238</sup> Such trust can be an important asset for a firm because of its association with reduction in coercive tactics, greater efficiency, increased loyalty, improved performance, and contributes to the ability of an individual in one firm to trust another firm.<sup>239</sup> For smaller firms, B2B interpersonal trust can allow them to compete more effectively in the global environment by entering into strategic cooperative arrangements.<sup>240</sup>

Two dimensions of trust are especially important in the business context. The first is the perceived credibility of the other party and a belief that it can be relied upon to deliver upon its stated promise.<sup>241</sup> The second dimension of trust is a

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234. *Id.* at 167.

235. *Id.* at 166.

236. *Id.* at 181.

237. *Id.*

238. Xiaowen Huang et al., *Interpersonal Trust Formation During the Supplier Selection Process: The Role of the Communication Channel*, 44 J. SUPPLY CHAIN MGMT. 53, 55 (2008).

239. *Id.* at 53.

240. See Brunetto & Farr-Wharton, *supra* note 209, at 364.

241. Wolfgang Ulaga & Andreas Eggert, *Relationship Value and Relationship Quality: Broadening the Nomological Network of Business-to-Business Relationships*, 40 EUR. J. MKTG 311, 315 (2006); see also Shaker A. Zahra et al., *How Much Do You Trust Me? The Dark Side of Relational Trust*

belief in the other firm's benevolence and "represents the extent to which one partner is genuinely interested in the other partner's welfare and motivated to seek joint gains."<sup>242</sup> The type of trust that is damaged may depend on the nature of the breach. For example, the first hypothetical discussed a breach caused by a missed shipment and defective goods. Such a breach is more likely to threaten one party's belief in the other party's credibility rather than its benevolence and, consequently, may be corrected by credible assurances that the breaching party has taken measures to ensure that such mistakes will be avoided in the future. However, if a breach occurs along the lines of the variation of the hypothetical and is caused because one party chooses to breach in favor of a third party, then such a breach may be more likely to endanger trust in the breaching party's benevolence in addition to trust in that party's credibility. An apology can therefore serve an important signaling function that can help restore trust in the breaching party's benevolence and restore the image of trustworthiness of the breaching party.<sup>243</sup>

Keeping a contractual obligation, or failing to do so, can be an important signal to a counterparty in an emerging business relationship. Some parties may view another party's word as implicating a promise in addition to a legal obligation. In these situations, a breach of that promise threatens more than disappointed business expectations: it risks signaling features of the breaching party's moral character.<sup>244</sup> Such signals are important for firms that are attempting to gauge the trustworthiness of a new partner.<sup>245</sup> Therefore, it is important to keep in mind that the "moral signals" a breach

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in *New Business Creation in Established Companies*, 30 *ENTREPRENEURSHIP: THEORY & PRACTICE*, 541, 545 (2006).

242. Ulaga & Eggert, *supra* note 241, at 315.

243. See Eric Schniter et al., *Building and Rebuilding Trust with Promises and Apologies*, *J. ECON. BEHAV. ORG.*, 19-20 (forthcoming), <http://dx.doi.org/10.1016/j.jebo.2012.09.011>.

244. See, e.g., Seana Valentine Shffrin, *The Divergence of Contract and Promise*, 120 *HARV. L. REV.* 708, 719 (2007); Dori KIMEL, *supra* note 33, at 27.

245. See Brunetto & Farr-Wharton, *supra* note 209, at 364 ("[A]n SME owner/manager's ability to identify other trustworthy actors (SME owners/managers and government employees) who present the least risks—maximum opportunities option may be a talent that differentiates one SME owner/manager from another.").

communicates depends on whether the injured party views a contract as a promise. In these situations, it may be important to address such perceived moral wrongs with an accompanying moral remedy: an apology.

#### 4. Addresses the Reputational Costs Incurred by the Injured Party

Part I discussed how apologies can be important for a “transfer of humiliation” between the parties that re-establishes moral equilibrium.<sup>246</sup> In the interpersonal context, we recognize this as re-establishing the dignity of the person; in the transnational business context, we recognize this as redeeming the reputation of an injured party. The value of an apology as a reputation-redeeming tool is that it attributes blame to the breaching party and, as such, can spare the injured party reputational costs associated with the breach. In the hypothetical discussed above, Company Y may suffer more than just simple embarrassment. The breach compromised Company Y’s performance of its obligations to its customers and therefore caused significant reputational harm to Company Y. The breach also risks signaling to Company Y’s potential partners that it is a weaker party who can be taken advantage of in this way.<sup>247</sup>

The function of apologies as reputation-redeeming tools is most clearly illustrated in international investment arbitration. In *Ethyl Corporation v. Government of Canada*,

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246. See *supra* note 36-155 and accompanying text.

247. See O’NEILL, JR., *supra* note 36, at 2.

When Americans choose to litigate matters, one frequently cited impetus is the desire to send ‘a message to the marketplace.’ By this phrase, an American business person tends to mean that he or she will demonstrate to competitors, vendors, and customers alike an expectation that agreements will be honored; if not, then the wrongdoer will be pursued. The unstated hope and expectation associated with such an approach is that the investment in a publicly visible dispute will *deter others from pushing too far*.

*Id.* (emphasis added).

Ethyl, an American Corporation with a Canadian subsidiary, instituted arbitration against Canada alleging that the latter's restrictions on importation and transportation of gasoline additive MMT breached Canada's treaty obligations under Chapter 11 of North American Free Trade Agreement.<sup>248</sup> Ethyl was the only producer of MMT that was subjected to Canada's ban, and it argued that such a ban constituted expropriation of its investment and less favorable treatment than that accorded to local investors.<sup>249</sup> The parties ultimately settled and Canada, in addition to providing compensation and other measures, issued a public statement that MMT was not harmful.<sup>250</sup> According to Senior VP of Ethyl, Newton Perry, "The Government of Canada's clear statements on the issues of product performance and risk to human health are extremely important to Ethyl."<sup>251</sup> One potential benefit of this statement was its potential to redeem Ethyl's reputation in light of Canada's ban. According to the vice-president of Ethyl Canada, the company had sought CDN \$350 million in damages and justified the figure on the basis of "reputational damage" and the "chilling effect" of the Canadian ban that had caused other countries to reconsider their use of MMT.<sup>252</sup>

Apologies can serve similar reputation-redeeming functions when claimants request moral damages for injuries to their business reputations. *Desert Line Projects LLC v. Republic of Yemen* involved a claim for reputational damage as

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248. Ethyl Corp. v. Canada, 1997 CarswellOnt 4039 (Can. Ont.) (WL).

249. Todd Weiler, *The Ethyl Arbitration: First of its Kind and a Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187, 188 (2000).

250. Press Release, Env't Can., Gov't to Act on Agreement on Internal Trade (AIT) Panel Report on MMT (July 20, 1998), available at [http://web.archive.org/web/19981205102745/http://www.ec.gc.ca/press/mmt98\\_n\\_e.htm](http://web.archive.org/web/19981205102745/http://www.ec.gc.ca/press/mmt98_n_e.htm). According to some accounts of the events, Canada went further and issued an actual apology to Ethyl. See Weiler, *supra* note 249, at 195 n.22; Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 486 (2005).

251. Press Release, Ethyl Extra News, Ethyl Welcomes Gov't of Can. Decision (July 20, 1998), available at <http://web.archive.org/web/19990221183118/http://www.ethyl.com/news/7-20-98.html>.

252. Laura Eggertson, *Ethyl Sues Ottawa Over MMT Law: Will Force Closing of Canadian Subsidiary, Additive Maker Says in Asking for \$350-million*, GLOBE & MAIL, Apr. 15, 1997, at B4.

a result of a State's violation of its treaty obligations.<sup>253</sup> "The Claimant" was an Omani construction company that was employed by Yemen to build asphalt roads.<sup>254</sup> The Claimant was owed payment for work performed and its employees faced physical threats from local tribes and armed groups and three of its personnel were arrested.<sup>255</sup> The Claimant filed an international arbitration claim and, among other requests, asked for forty million Omani Riyals (approximately \$103 million USD)<sup>256</sup> for moral damages, including loss of reputation, that it suffered as a result of Yemen's conduct.<sup>257</sup> According to the Claimant,

[It] has suffered extensive moral damages as a result of the Respondent's breaches of its obligations under the BIT: the Claimant's executives suffered the stress and anxiety of being harassed, threatened and detained by the Respondent as well as by armed tribes; the Claimant has suffered a significant injury to its credit and reputation and lost its prestige; the Claimant's executives have been intimidated by the Respondent in relation to the Contracts.<sup>258</sup>

The tribunal also found that Yemen's conduct warranted moral damages. According to the tribunal, the prejudice suffered by the Claimant was substantial because "it affected the physical health of the Claimant's executives and the Claimant's credit and reputation."<sup>259</sup> The tribunal awarded the Claimant moral damages in the amount of \$1 million USD, considerably less

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253. *Desert Line Projects LLC v. Republic of Yemen*, ICSIC Case No. ARB/05/17, Award, ¶¶ 283-91 (Feb. 6, 2008), available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC791\\_En&caseId=C62](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC791_En&caseId=C62).

254. *Id.* at ¶¶ 1, 5-14.

255. *See id.* at ¶¶ 20, 33, 38, 166.

256. Patrick Dumberry, *Compensation for Moral Damages in Investor-State Arbitration Disputes*, 27 J. INT'L ARB. 247, 258 & n.67 (2010).

257. *Id.*

258. *Desert Line Projects*, ICSID Case No. ARB/05/17, at ¶ 286.

259. *Id.* at ¶ 290.



than the requested \$103 million USD.<sup>260</sup>

The tribunal could have justified this difference by including an apology as part of the remedy. When the Claimant requested moral damages, it placed a figure on its injuries. By denying the Claimant this requested award, the tribunal risks sending a message to the Claimant (and to Yemen) by reducing the purported value of Claimant's suffering and loss of reputation. The tribunal found itself in this situation because it relied on money alone as a means of validating the Claimant's request for moral damages. Where litigants desire validation and recognition of their injuries by means of moral damages, a reduced award may frustrate this objective. The tribunal may have awarded moral damages in order to validate the Claimant's injuries<sup>261</sup> but faced the challenge of quantifying that harm. When faced with such a dilemma, the tribunal could have used a supplementary "validation tool": an apology. By ordering Yemen to apologize to the Claimant, the tribunal could have more fully validated the Claimant's injuries without being forced to issue a larger monetary award.

The loss of reputation and other non-pecuniary harms are ideally suited for the remedy of an apology. These particular injuries challenge quantification and, consequently, are difficult to validate and recognize with only the use of monetary compensation.<sup>262</sup> Some observers have predicted that requests for moral damages will rise over the coming years.<sup>263</sup> If this indeed occurs, the relevance of apologies in international investment arbitration will only increase in the future.

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260. *Id.*

261. See Luke Eric Peterson, *The Future of Moral Damages in Investment Treaty Arbitration*, KLUWER ARB. BLOG (Apr. 14, 2009), <http://kluwerarbitrationblog.com/blog/2009/04/14/the-future-of-moral-damages-in-investment-treaty-arbitration/>.

262. Malinvaud, *supra* note 225, at 209.

263. Peterson, *supra* note 261; see, e.g., Claimant's Notice of Arbitration at ¶ 76(7), *Chevron Corp. et al. v. Republic of Ecuador*, (Sept. 23, 2009) (requesting "[a]n award of moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's outrageous and illegal conduct.").

### 5. Reaffirms Informal Guarantees of Cooperation

As discussed above, apologies can help re-establish the relational values that underpin a business relationship; particularly those values that provide for the longevity and quality of the relationship. The re-establishment of these values not only secures the continuity of the relationship but also establishes the terms on which it will continue. According to the “substitution thesis,” trust and control have an inverse relationship to each other—the more trust that is present in a relationship, the fewer formal controls that may be required (and vice versa).<sup>264</sup> Therefore, parties may not need to rely as heavily on formal controls and guarantees of cooperation when the interpersonal trust is strong. A breach by one party compromises the trust between the parties and, consequently, may lead to reliance on more formal controls in the future as a means of compensating for the damaged trust. The restoration of interpersonal trust, therefore, may reduce the need for such compensation with formal controls and thereby reduce the likelihood of extensive, detailed, and expensive contracting. Relational contracting, and the reliance on relational guarantees of cooperation rather than formal controls, can also increase one party’s perception of the other party’s trustworthiness.

### 6. Deterrence

An apology can also serve a deterrent function by discouraging a party from engaging in future breaches. Apologies, as “shaming sanctions” can deter offenders from engaging in similar conduct again precisely because of the high reputational costs associated with shaming sanctions. One scholar observed that shaming works particularly well in the business context; a context characterized by the close-knit communities that place a high value on the reputation of its members.<sup>265</sup>

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264. See Malhotra & Murnighan, *supra* note 191, at 534-35; Strätling et al., *supra* note 207, at 817.

265. See Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 966-67 (1998). “[F]or top-level managers

An apology is an invitation to assess the full-scope of harm that one has caused. Offering an apology could encourage Company X to acknowledge, both to itself and to Company Y, the significant relational harms that its actions have caused. Such acknowledgment may alter Company X's calculus for similar breaches in the future and deter it from engaging in similar conduct by "remind[ing] the transgressor of the value of the relationship."<sup>266</sup>

The potential deterrence value of an apology is especially significant in arbitration where arbitrators lack the usual tools for deterrence, such as ordering imprisonment. At first glance, the potential deterrence value of the apology may appear to only benefit Company X's sphere of future partners rather than Company X itself. However, the value of Company X's self-deterrence is that it is spared from being subjected to the alternative community sanctions or penalties that also serve deterrence functions. An apology is Company X's affirmation that it now endorses the relational values that it previously violated. It signals that Company X is once again willing to live according to such values and that it is safe and predictable to cooperate with this party again.

C. *Objections to the Remedy of Apologies in International Arbitration*

Despite the value of public apologies in redressing commercial transgressions, parties and arbitrators should be aware of certain challenges.

1. Risk of Over Use and Dilution of Apologies

Critics of compelled or "strategic" apologies worry that such use of apologies reduces the significance of these particular acts. The concern is that broad application of an apology to a variety of situations threatens to undermine those

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and members of their social class, fear of being shamed before their family members and peers may even exceed the fear of criminal prosecution, exposure to civil lawsuits, or other forms of officially imposed sanctions." *Id.* at 967 (citation omitted).

266. O'Hara & Yarn, *supra* note 44, at 1136.

qualities that make an apology special. However, the value of an apology is not undermined by applying it to a wide variety of transgressions. Instead, the risk of over-use occurs when the apologies are ordered without consideration of whether the necessary non-pecuniary harm is present. Apologies, though appropriate in the commercial context, may not be appropriate for all disputes. In situations where there is no evidence of non-pecuniary relational harm that an apology can address, an arbitrator should refrain from ordering an apology in that context. One set of such excluded transactions relates to exchanges at the “discrete” end of the transactional spectrum: isolated, spot transactions between strangers who will never interact again in the future. In these circumstances, the transacting parties do not rely as heavily on a relationship as a basis for their exchange. As such, relational values such as solidarity, trust, and harmony are less necessary for their exchange and it is not as important to restore these values because it is unlikely that the parties will exchange together in the future. The lack of damage to the relational values, therefore, suggests that an apology would be less appropriate in these circumstances.

## 2. Power of the Arbitrators to Award Apologies

Non-pecuniary damages are not excluded from international arbitration.<sup>267</sup> Instead, international arbitral practice supports the practice of including non-pecuniary remedies, such as specific performance and declaratory relief, independently or together with an award for monetary compensation.<sup>268</sup> Declaratory relief, in particular, has been singled out as “a useful device especially where the parties have a continuing relationship and want to resolve the dispute between them without the risk of damaging their

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267. See Schreuer, *supra* note 224, at 325.

268. See *id.* See generally Sigvard Jarvin, *Non-Pecuniary Remedies: The Practice of Declaratory Relief and Specific Performance in International Commercial Arbitration*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 169-71 (Arthur W. Rovine ed., 2007).

relationship.”<sup>269</sup> Several factors can improve the success of non-pecuniary relief in arbitration.<sup>270</sup> First, non-pecuniary relief may be more successful when it is specifically requested by a party. This is because a claimant’s request for non-pecuniary relief serves a signaling function between the parties. In this instance, the law is the medium and the arbitration process is the site for communication of relational harm in a manner that allows the parties to save face. By requesting an apology, the claimant (a) communicates to the respondent the relational consequences of the breach, and (b) identifies a form of remedy that the claimant has indicated to be necessary in order for the relational damage to heal. Therefore, the arbitration process serves as the forum for a conversation between the parties that may not take place otherwise when relational harm cannot benefit from the neutral and respectable discourse of the law.

Second, non-pecuniary relief may be more successful when it is provided for in an applicable arbitration clause or, at least not excluded in the applicable contract or investment treaty.<sup>271</sup> Some arbitration institutions, such as the American Arbitration Association, specifically provide arbitrators with the authority to award non-pecuniary relief.<sup>272</sup> In addition to clarifying the power of arbitrators to order such relief, broad arbitration clauses or permissive arbitral rules also provide notice to the parties that breaches of their agreements may implicate non-pecuniary remedies, such as apologies. Such language may improve the foreseeability that the arbitrators may, if requested by the claimant, ask more from the respondent than simply the payment of money. A party’s agreement to such an arbitration clause or acceptance of an arbitral institution with such rules indicates that party’s awareness, and even acceptance, that non-pecuniary remedies

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269. *Id.* at 167-68.

270. *See* Allen, *supra* note 34, at 307-08.

271. Jarvin, *supra* note 268, at 176 (“U.S. courts have upheld arbitration awards that require injunctive or equitable relief, provided that the parties’ agreement or the institutional rules that it incorporates supply some basis for inferring such authority.”) (citation omitted).

272. *Id.* at 177; David Ramos Muñoz, *The Power of Arbitrators to Make Pro Futuro Orders*, in *ASA PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION* 104 (Michael E. Schneider & Joachim Knoll eds., 2011).

may be included in the arbitrator's toolbox. It can also trigger the parties' awareness regarding the damages that will be remedied in the arbitration. The inclusion of non-pecuniary remedies in the arbitration clause or the arbitral rules signals that non-pecuniary harm could potentially be an issue in any resulting arbitration. Parties could address this explicitly with a broad arbitration clause that permits the arbitrators to remedy relational harm, among other forms of injury. Finally, non-pecuniary relief is more likely to be granted when it is permitted under the applicable substantive law.<sup>273</sup>

### 3. Compliance with Apology Awards

It is also advisable to order apologies in situations where there is a greater likelihood of voluntary compliance by the parties. Voluntary compliance with a non-pecuniary award is more likely "[i]f the parties to the arbitration are repeat commercial players that regularly interact."<sup>274</sup> Parties often resort to arbitration in order to preserve ongoing business relationships that have independent value to the parties concerned.<sup>275</sup> As a result, when one party signals its desire for an apology in its request for relief, the other party may be willing to provide the apology if it similarly values a future relationship. Additionally, "[r]eputational considerations and bargaining power may also play a role—especially in investor-state arbitration, where a host State's failure to comply with an award could send a negative message to the investment community."<sup>276</sup>

When voluntary compliance is less likely to be forthcoming, arbitrators can encourage compliance through a bifurcation of the proceedings. One advocate of non-pecuniary remedies has argued that arbitral tribunals should consider

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273. Jarvin, *supra* note 268, at 176 ("[T]he question of whether an arbitral panel is empowered to order specific performance is rarely an issue in international arbitration as most domestic laws empower an arbitral panel to award specific performance.") (citation omitted); Muñoz, *supra* note 274, at 99-100.

274. Allen, *supra* note 34, at 301.

275. See O'NEILL, JR., *supra* note 36, at 2.

276. Allen, *supra* note 34, at 301.

first issuing a partial award for non-pecuniary relief or some combination of non-pecuniary and pecuniary relief.<sup>277</sup> If the respondent does not comply with the order for non-pecuniary relief by a certain deadline, the arbitrators can then factor in that non-compliance when they issue a final award on damages.<sup>278</sup> Under this approach, arbitrators would issue a partial award on liability and relief, including an apology. If the respondent does not provide the requested apology in the timeframe set by the arbitrators, that non-compliance would be factored into the arbitrators' final award on damages.<sup>279</sup> The difficulty with this approach is the challenge of quantification of the apology and placing a "damages" amount on the respondent's non-compliance. An alternative approach, therefore, is for the arbitral panel to award monetary compensation and an apology during the first stage, but withhold ruling on costs and fees until after gauging the respondent's compliance.

Achieving compliance in the ways described above may be preferable to seeking enforcement of an apology award in national courts.<sup>280</sup> First, one of the strongest advantages of international arbitration is the enforceability of the awards

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277. *Id.* at 304.

278. *Id.*

279. This approach is comparable to the approach taken by the Ecuadorian courts with respect to the demand for an apology from oil giant Chevron. Chevron was fined nearly \$9 billion for environmental damage. Roger Alford, *Ecuador Court Fines Chevron \$8.6 Billion*, KLUWER ARB. BLOG (Feb. 15, 2011), <http://kluwerarbitrationblog.com/blog/2011/02/15/ecuador-court-fines-chevron-8-6-billion/>. In addition, Chevron also faced the prospect of a substantial, increased fine if it failed to comply with the court's order to apologize. See *Ecuador; Chevron Will Not Apologize for Pollution, Even to Save \$8.5 Billion*, N.Y. TIMES, Feb. 3, 2012, at A7, available at [http://www.nytimes.com/2012/02/04/world/americas/ecuador-chevron-will-not-apologize-for-pollution-even-to-save-8-5-billion.html?\\_r=0](http://www.nytimes.com/2012/02/04/world/americas/ecuador-chevron-will-not-apologize-for-pollution-even-to-save-8-5-billion.html?_r=0); *Summary of Judgment Entered in Aguinda et al. v. Chevron Corp., CHEVRON TOXICO 1* (Feb. 14, 2011), available at <http://chevrontoxico.com/assets/docs/2011-02-14-summary-of-judgment-Aguinda-v-ChevronTexaco.pdf> (explaining that the court "would grant an additional, punitive award amounting to 100% of the base judgment, which Chevron could avoid by publicly recognizing its misconduct in a measure of moral redress").

280. See generally Troy E. Elder, *The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes*, 13 ARB. INT'L 5 (1997).

that is recognized in treaties such as the ICSID Convention<sup>281</sup> or the New York Convention.<sup>282</sup> However, Article 54 of the ICSID Convention, for example, requires that “[e]ach Contracting State . . . recognize an award rendered pursuant to this Convention as binding and enforce the *pecuniary* obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”<sup>283</sup> One issue that may confront litigants and arbitrators is whether a remedy of a public apology falls within the scope of this language and whether State parties are similarly required to recognize and enforce a public apology.<sup>284</sup>

Second, although the New York Convention obligates Contracting States to recognize and enforce arbitral awards, the Convention provides a few grounds on which a national court of a Contracting State can refuse to enforce an arbitral award. One such basis is public policy where a court finds that “recognition or enforcement of the award would be contrary to the public policy of that country.”<sup>285</sup> If a national court finds that compelling a party to apologize violates its nation’s public policy, then that may provide a basis for the court’s refusal to recognize and enforce that award. In the United States, for example, courts may refuse to enforce an arbitral award

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281. See *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, in ICSID CONVENTION, REGULATIONS AND RULES 7 (2006), [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf). [hereinafter *Convention on the Settlement of Investment Disputes*].

282. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) requires Contracting States to recognize and enforce foreign arbitral awards. See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. III, July 6, 1958, 330 U.N.T.S. 3.

283. *Convention on the Settlement of Investment Disputes*, *supra* note 281, at 27-28 (emphasis added).

284. Jarvin, *supra* note 268, at 178; Schreuer, *supra* note 224, at 324. One scholar has observed that Article 54’s restriction to pecuniary obligation was not due to a desire to restrict arbitral awards only to this category of remedies, but followed from the concern with the arbitrator’s ability to enforce non-pecuniary awards if the parties chose not to comply. *Id.* Despite this difficulty, arbitrators have ordered specific performance in particular cases and should therefore consider the use of apologies as well. See generally Malinvaud, *supra* note 225, at 221-23.

285. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. V(2)(b), July 6, 1958, 330 U.N.T.S. 3, 40.



compelling an apology because of concerns with free-speech protections.<sup>286</sup>

### V. Conclusion

This Article illustrated how the remedy of public apologies has value for disputes between business parties. Although the transgressions claimed in international commercial arbitration are very different from the types of transgressions customarily warranting the use of apologies, similar non-pecuniary relational harm is implicated in both types of situations because there is an injured party who confronts the challenge of trusting again. This party may also struggle with perceptions of its subordinate status and the negative emotions that such a perception evokes. There is also a transgressor burdened with the responsibility of redeeming its image in the eyes of the party it has wronged and the community to which it belongs. It faces the prospect of condemnation or ostracism if it cannot convince these parties that it has changed sufficiently to abide by the community's norms once again and desist from future transgressions.

The most similar feature resulting from these various transgressions, however, are the broken relationships: the relationship between a doctor and her patient; the relationship between a government and its people; and the long-standing relationship between a business and its transnational partner. A transgression that compromises the trust in these relationships prevents such parties from maintaining their bonds with each other. Money cannot restore this trust. Judges, arbitrators, and litigants should recall this limitation in fashioning remedies for business relationships that have broken down. Apologies offer a way for the transgressor to reaffirm those values that made the relationship between the parties strong. This reaffirmation restores the foundation for continued exchanges in the future. The quality of these relationships extends beyond the economic value of the transactions engaged therein. It encompasses the familiarity of the parties, a record of past positive interactions, the prospect

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286. Robinette, *supra* note 140, at 2013; Cohen, *Advising Clients*, *supra* note 87, at 1018; Nguyen, *supra* note 3, at 901.

of future mutual gain, and a reliance on informal guarantees of cooperation. These qualities are endangered in the face of contractual breach. The relational harm caused by a breach, and the necessity of an apology, only grows further if the relationship deepens, such as contracting that occurs between close friends.<sup>287</sup> Non-pecuniary harm requires non-pecuniary remedies, and the offer of a public apology can be an effective way for parties to restore relational contract values and move past the breach.

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287. See ETHAN J. LEIB, *FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP – AND WHAT THE LAW HAS TO DO WITH IT* 238 (2011).