PART III

Apologies

8

An Incentive-based Approach to Apologies and Compensation

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We can recall several examples in which law deals with certain social phenomena without regulating them directly: the increasing relevance of corporate codes of conduct, the use of reputational sanctions in social networks, the emergence of public apologies in tort law. In the last example, we may focus on many legal implications, such as the opportunity to provide safe harbour legislation, the acknowledgment of mitigating effects on non-material damages, the idea of judge-ordered apologies. According to law and economics thought, apologies can be deemed to fall within the category of 'merit goods': they allow people to reach the difficult goal of non-material compensation, giving voice to personal feelings without having to translate them into money. This chapter shows how behavioural incentives and mediation proceedings might be more appropriate than authoritative measures in order to gain benefits from apologies.

I. Introduction

In this chapter I suggest a different way of considering apologies and compensation in relation to civil liability. Where most studies of apologies within legal systems have focused on the evidential and remedial aspects of apologies, I take an economic approach, suggesting that apologies might be considered from the point of view of incentives. As a matter of unexpected consequences of compensation law, apologies may be seen as something that comes from outside the legal system but may affect outcomes and alter what we would naturally expect from the legal system.

We can examine the legal relevance of apologies through a conceptual pyramid. At the bottom, we find courtesy and day-to-day apologies which carry out a ritual role in our society. At the top of the pyramid we put all the cases in which apologies might be considered mandatory on a legislative or judicial basis. While civil law systems normally exclude this solution due to constitutional constraints

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and procedural guarantees, other legal traditions have allowed mandatory apologies, although the point raises a strong debate, as is discussed by Robyn Carroll in Chapter 9. In certain countries, especially those influenced by collectivist ideologies or religious concerns, an apology might be treated as a legal remedy because it is strictly connected with the principle of social harmony. This means that an individual must follow traditional norms to avoid litigation and seek social appeasement as the main goal in their life. Compelling someone to apologise might sound like a reputational sanction, but in exceptional situations it could be more effective than other options.

Sometimes judges manage a case through a 'consent order' based on a settlement in which the injurer agrees to apologise publicly. A consent order complies with the principles of fair trial and the rule of law as well as helping the parties to save some of the costs of litigation and compensation monies.

All this considered, we can say that the appreciation of the legal relevance of apologies is very varied. In between the two extremes, the total rejection of the legal relevance of apologies on the one hand, and the unreserved acceptance of apologies as a legal remedy on the other, lies a third, more gradual approach, that will be considered in this chapter. Denying legal relevance to apologies lacks realism and empathy, because in some cases the existence of apologies strongly influences a legal relationship. While it cannot be ignored, an apology does not seem to be economically measurable. The unreserved acceptance of apologies as a legal remedy is attempting to render artificially something that is intrinsically spontaneous.

According to Guido Calabresi's 'law and economics' thought,[1] it is preferable in most cases to follow an incentive-based approach rather than a mandatory and coercive one (pure command) or a 'pure-market'. This recalls the Latin 'in medio stat virtus'.[2] For this reason law cannot ignore benefits flowing from apologies, but it has to be careful not to impose them directly, giving them more space and stimulus while preserving their genuine nature. For the future, it could be useful to go on developing a complete and practical view of procedural mechanisms through which apologies can be properly encouraged. This might happen, for example, by awarding exemplary damages for lack of apologies, or issuing consent orders that reduce legal expenses, or mitigating damages as a consequence of appropriate spoken apologies etc.

II. Apologies and the 'Shadow Line' of Legal Relevance

The first point I would like to discuss is the problem of the legal relevance of apologies; that is, how apologies may or may not be used within the legal system.

[1] See G Calabresi, *The Future of Law and Economics. Essays in Reform and Recollection* (Cambridge, Cambridge University Press, 2016) Ch II (on merit goods).

[2] A literal translation would be 'the virtue is in the middle'.

Consider a recent decision[3] of the Italian Banking and Financial Ombudsman (the ABF).[4] The ABF is an alternative dispute resolution system for customer complaints about banks and other financial intermediaries. A man started proceedings before the ABF, complaining that a bank had refused to accept him as a client without any valid reason. He claimed an unusual remedy, asking the ABF to settle the matter by requiring the bank to offer him a public apology. The ABF decided that the bank had no obligation to accept him as a client, as this was just an expression of its own contractual freedom. Furthermore, the ABF stated that the remedy required could never be adopted because the latter falls within the rules of courtesy and is ontologically incompatible with the rules of law. That is, they took the view that apologies were not – and could not be – part of the law.

The ABF was probably worried about the fact that due to Article 128-bis of the Consolidated Law on Banking, it is bound only by statutory law or, at least, by deontological codes of conduct.[5] This makes this legislation one of those increasingly frequent cases in which a statutory law expressly refers to soft law as a minimum standard of conduct. For example, Article 9 (Courtesy) of the European Investment Bank's Code of Conduct prescribes that:

1. Members of staff shall act in a conscientious, correct, courteous and approachable manner. In replying to correspondence, telephone calls and e-mails, members of staff shall endeavor to be as helpful as possible and to answer enquiries.
2. If an enquiry does not fall within their area of responsibility, staff shall refer members of the public to the relevant Bank department.
3. They shall offer apologies in the event of error.

According to the above-mentioned source of law provision, is this a legal obligation or only soft law? Could it be considered a binding rule or only moral suasion?

Due to the existence of the above-mentioned provision, the claim of the ontological incompatibility of law and apologies should be rejected because there is a statute or a code of conduct stating a duty to apologise for banks. But sources like codes of conduct are not easy to monitor, as they are a widespread phenomenon and normally we do not regard them as having the status of law. However, it is notable that in a globalised world their legal implications are growing rapidly. And indeed, we must immediately stress that the abovementioned provision could

[3] ABF, *Collegio di Milano, 23 settembre 2010, n 959*, Presidente Antonio Gambaro, available at www.dirittobancario.it/node/2279/pdf.

[4] The ABF is regulated by Art 128-bis of the Consolidated Law on Banking (Legislative Decree No 385/1993). Participation in the ABF system is a legal obligation of banks, a condition for the exercise of banking and financial activities. Non-compliance is punishable by a fine. On the ABF, see Banca d'Italia, *The Banking and Financial Ombudsman Annual Report Abridged Version*, n 5 (2014) 5–6. See also G Alpa, 'ADR and Mediation: Experience from Italy' (2008) 19 *European Business Law Review* 5; M Pellegrini, 'Alternative Dispute Resolution Systems in Italian Banking and Finance: Evolution and Goals' in D Siclari (ed), *Italian Banking and Financial Law* (London, Palgrave Macmillan, 2015).

[5] See above, n 3.

make apologies mandatory as long as the bank has agreed to the code of conduct.[6] We shall return to this question shortly.

Another significant case in point occurred in Rome. Municipal police in the city are worried about getting little respect from citizens of Rome. People are typically very aggressive towards public officers who direct the chaotic Roman traffic. In Italy those who are reported by municipal police for contempt must write a letter of apology and pay a fine (usually around €200–250). This sanction is considered adequate to repair the damage at the pre-trial stage, thus cancelling the contempt.

In 2015, Roman municipal police decided to change their policy, and started to demand that videos of public apologies be published on YouTube, instead of a simple letter of apology.[7] The requirement was presented by the police as the only way to avoid a much more burdensome criminal trial. In fact, since insulting a public official is considered a criminal offence, those who refuse to repair the damage can be considered guilty of contempt.[8] The Heads of Police thought that a symbolic humiliation would deter people from being so disrespectful. The new procedure was criticised for bringing back mediaeval shaming sanctions like the pillory or the 'amende honorable', which some people associate with apologies. In the book *Discipline and Punish*, Michel Foucault described the amende honorable with reference to Robert-François Damiens' humiliation in front of the main door of the Church of Paris in 1757.[9] Here, the amende honorable is presented in its most violent and ancient version as a dominant technology of power.[10] Later in history, the amende honorable assumed different forms, similar to a reparatory/reconciliation tool or public apologies.[11] So the Municipal Police position aroused negative public reactions, focusing on the risk of reintroducing a sort of mediaeval practice. Some commentators have stressed that this sort of practice contrary to human dignity and should be opposed.[12]

Although the police in Rome require an apology video, the law does not provide explicitly for such a remedy. The judiciary is the only power allowed to decide about the effectiveness of reparation and thus to cancel the contempt. In doing so

[6] 'Code of good administrative behaviour for the staff of the European Investment Bank in its relations with the public', 2, available at www.eib.org/attachments/general/code_en.pdf. On codes of conduct, see EM Epstein, 'The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux' (2007) 44 *American Business Law Journal* 207; EF Brown, 'No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?' (2008) 26 *Yale Law& Policy Review* 367.

[7] See T Kington, 'Rome Traffic Police Make Drivers Apologise on YouTube to Avoid Criminal Record' *The Times*, 22 December 2017.

[8] See Art 341-bis, Codice Penale (Criminal Code).

[9] M Foucault, *Surveiller et punir* (Paris, 1975) 2; for further considerations see GJ Van Niekerk, 'Amende Honorable and Ubuntu: An Intersection of Ars Boni et Aequi in African and Roman-Dutch Jurisprudence?' (2013) 19 *Fundamina* 397; E Descheemaeker, 'Old and New Learning in the Law of Amende Honorable' (2014) 36 *University of Edinburgh School of Law Research Paper* 3.

[10] D Hansen-Miller, *Civilized Violence: Subjectivity, Gender and Popular Cinema* (Routledge, 2016) 9–11.

[11] For a more detailed discussion, see J Hallebeek and A Zwart-Hink, 'Claiming Apologies: A Revival of Amende Honorable?' (2017) 5(2) *Comparative Legal History* 194.

[12] See, for example, C Bonini, 'La gogna su YouTube: "Hai offeso i vigili? Pubblica un video di scuse"' *La Repubblica*, 20 December 2017.

it cannot rely solely on the victim's desire for revenge, although it will certainly be influenced by the preference that the victim has expressed about it. It must also take into consideration other elements, including the protection of the constitutional rights of the offender, public policy objectives and – last but not least – the possibility of the insincerity of the apologiser.

After all, begging pardon in a video which can be disseminated across the internet is not the same thing as writing a letter of repentance. To be compelled to appear in a YouTube video is a humiliating threat to one's identity and privacy, whereas writing a letter would be a less publicly humiliating means of achieving the desired result: public repentance restoring the police honour. But is the letter published? If the letter is not published then it is not public, and is vastly different from a video on YouTube. But if the letter is published by the police, then the difference between the two scenarios is not so large.

In the two cases briefly described, each complaining party was searching for a specific and highly symbolic remedy, presumably without desiring anything else. In the Italian jurisdiction we can thus observe two completely opposite conceptions. On the one hand, the ABF said that using an apology as a legal remedy is out of the question. And even worse, law and apologies would be like oil and water, in other words absolutely incompatible with each other. On the other hand, the municipal police claim that a self-humiliating video is the best solution available to cancel out contemptuous behaviour towards them. In their opinion the injurer should not be able to influence the choice of remedy. So the victim is the only one who can decide the most adequate remedy to repair the offence. Who is right? The issue seems very uncertain.

Looking at the abovementioned cases, the reputation and credibility of the parties concerned are at stake, as well as the balance of power between them, and, not least, how greatly is the public concerned by the injury. All of this might make the difference between a reasonable request for an apology and a vexatious one.

It should be noted that the issue of legal relevance of apologies is addressed in many legal systems in ways very different from Italy.[13] According to one approach, apologies will always and inevitably be a mere act of courtesy between persons, and nothing more. However, this idea needs to be verified more thoroughly when the apologies take place within the context of a legal dispute or as an attempt to prevent potential litigation. In other words, a feasible distinction may be made between statements provided for courtesy and for purposes of good neighbourliness, and those provided for avoiding or resolving probable litigation. And I agree that there is a strong argument that it is a problem if law prevents the ordinary habits of apologising from happening. But notwithstanding the adversarial attitude of our adjudicative systems, in my view law cannot deal ordinarily with apologies that are completely inconsistent with litigation issues, so they are – in legal terms – absolutely worthless. In civil law countries we have quite a strong

[13] For further consideration, see Chapter 9 of this book, by Robyn Carroll.

separation between mere facts and juridical facts determined by the legislative power (especially civil codes).[14] But I think that similar reasoning works quite well in any jurisdiction, albeit with different boundaries fixed by customary law or case law (think about the strong legal value of certain customs in China or Japan,[15] and the judicial precedents in common law as a source of law).

On the other hand, we can find cases showing relevant legal implications. The hypothesis is that different effects can be attached to apologies according to the specific context in which they take place. In particular, apologies issued as a means for preventing or composing a potential legal dispute may be different from apologies used as a mere social habit or ritual,[16] or, to put it another way, daily occurrences that are not reasonably expected to turn into litigation, unless we want to bring to court even cases involving an involuntary push.[17] We can make such distinctions also on the basis that only in the first case can the apology definitively involve a substantial admission against interests.

According to such a method of analysis we can put at the 'base' of the pyramid an apology that conforms only to a social habit, and which is therefore without any legal significance. Conversely, we can place an apology at the 'top' of the pyramid when it is considered as a legal remedy.[18] However, the critical point is what happens in the middle of the pyramid. From a comparative perspective, I think that we can benefit from using the conceptual framework of gradual emergence of the legal meaning of apologies. This theoretical approach is borrowed from the *Durchbruchspunkte* theory by the German jurist Rudolph von Jhering since, from a literary and historical perspective, we are always dwarfs standing on the shoulders of giants (*nanos gigantum humeris insidentes*).[19] More specifically, this theory is useful in highlighting that legislators make laws for situations as they present themselves at the time, without, however, necessarily excluding other situations which have yet to arise.[20] Legislators often leave room for different interpretation

[14] JH Merryman and RP Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 2007) 71–72.

[15] For example, the essence of '*giri*' goes beyond simple social courtesy, reaching a very deep relationship of confidence in personal, social, or business relationships. See I Kitamura, 'The Role of Law in Contemporary Japanese Society' (2003) 34(4) *Victoria University of Wellington Law Review* 739.

[16] See E Goffman, *Relations in Public. Microstudies of the Public Order* (New York, 1971) 113.

[17] On apologies in social contexts, see WI Edmondson, 'On Saying You're Sorry' in F Coulmas (ed), *Conversational Routine. Exploration in Standardized Communication Situations and Prepattterned Speech* (The Hague, 1981) 273.

[18] For the concept-pyramid (*Begriffspyramide*), see GF Puchta, *Cursus der Institutionen* (Leipzig, 1841); K Larenz, *Methodenlehre der Rechtswissenschaft*, 6th edn (1991) 20–21.

[19] This concept was attributed in the 12th century to Bernard of Chartres by John Salisbury, and expresses the meaning of discovering truth by building on previous discovery. See DD Macgarry (ed), *The Metalogicon of John Salisbury: A Twelfth-century Defense of the Verbal and Logical Arts of the Trivium* (trans MacGarry, Daniel Doyle) (Berkeley, University of California Press, 1955) 167.

[20] See R von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, Teil 2, Bd. 2* (Leipzig, 1858) 359 ff. More recently see M Storme, 'Closing Comments: Harmonisation or Globalisation of Civil Procedure?' in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (The Hague, 2012) 383. On anti-formalism, see also K Tuori, *Ratio and Voluntas: The Tension between Reason and Will in Law* (Routledge, 2016) 117.

of certain facts, as legally relevant or irrelevant, according to the emerging needs of society. As testified by Julius Stone's statement about the 'dynamic responsiveness of the substantive law to the needs of social and economic development',[21] the same concept can work quite well also in common law systems, although the role of legislators and judges is traditionally different. I think also that this methodological approach (gradual emergence of legal relevance) can fruitfully be used for all the topics that share the characteristic of being borderline between legal relevance and legal irrelevance – for instance, corporate codes of conduct. To put it another way, we can specifically focus on a shadow line standing between legal irrelevance and legal relevance of apologies.

III. Compensation of Non-pecuniary Losses: The Role of Apologies

It can be argued that law is strictly connected with (if not based on) the distribution of bad things and good things to people. In fact, this distribution often happens between more than the two parties normally involved in a litigation. After all, there is a systematic and consistent way that each community has developed over time to cope with the problem of scarcity of goods and surplus of social ills. In some cases there are remedies that perfectly counteract bad things: here we can find a perfect compensation. But there are other situations in which we cannot achieve, or can only partially achieve, such a counterbalance.

Take the issue of moral and psychological harm. In this case we can only try to reduce the impact of the losses, as it is very difficult to eliminate them: so the most important thing becomes a remedy that is good at mitigating the effects of the non-economic losses or negative outcomes flowing from a wrongdoing.[22] Otherwise, such a remedy is merely one way we try to pursue the 'lesser evil'. This also implies that to choose the lesser evil is not the same thing as mechanically determining a full compensation. Rather, we should speak of a repair function. The Romans said 'Factum infectum fieri nequit': 'what was done cannot be undone'. Consider a wrong that gives a bad example to society, for example violent behaviour by a famous football player, or a concealment of proof or information by an important physician. This bad example carries social costs, which in turn raises a complex debate about the deterrence function of torts.[23] Even more so, we can only get closer to the *status quo ante* when a non-economic value has been damaged.

[21] See J Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966) 620–21. On a 'thicker idea' of the rule of law, see P Vines, 'Apologies, Liability and Civil Society; Where to from Here?' in R Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 330.

[22] J Berryman, 'Mitigation, Apology and the Quantification of Non-Pecuniary Damages' (2017) 7(3) *Oñati Socio-legal Series* 528.

[23] See for further consideration S Hershovitz, 'What Does Tort Law Do? What Can It Do?' (2012) 47(1) *Valparaiso University Law Review* 99, 108–109.

In such a case there is no way for a perfect 'restitutio in integrum' and – in my opinion – the perfect compensation cannot exist when litigation arises.

Let us take a discriminatory act that is a proper example of a tort against human dignity. The remedy could be damages. But someone could express the concern that human dignity cannot be paid for with money. It is a very good point. So what is the correct amount of damages for a non-pecuniary loss? I doubt that a court, a victim and an offender will all have the same opinion about the economic value of moral suffering, but refusing to award any compensation to the victim would be a greater evil. So at some point we ought to find a synthesis. And this is what the legal system does all the time – awards less than perfect compensation because that is better than none. Given that monetary overcompensation or under-compensation is likely, a public apology coupled with a sum of money or with the publication of the judgment may be more appropriate.

In a recent case the Delhi High Court dismissed a defamation lawsuit against *Outlook* magazine and others.[24] The Opinion suggests some interesting findings about compensation and apologies in defamation cases. But they could be valid in most cases of non-pecuniary damages. The Court affirmed:

> Compensation in monetary damages can never set the record straight or restore the damaged reputation caused by a libellous news report.

In relation to reputational damages it stated that:

> Reputation of an individual is not something which can be measured or equated in money. It is only a written apology contained in the same media which may reach the same people who may have had access to the libellous material earlier published and that alone can restore the reputation.

The Court also added in respect of the prevention of high litigation costs: 'In cases where a court does decide damages, the magnitude of the damages can bankrupt a media company or at any rate affect the financial health of the media company'. And the court finally underlined that:

> […] award of damages, particularly in large amounts, against media houses may also have a chilling effect on the media. In some cases, payment of such amount of compensation, if unable to [be] afford[ed], may compel the media to shut down or may make the media over conscious and thereby fail in its duty to report news on contemporaneous subjects of public interest.[25]

What is the benefit of a public apology over a pure compensation mechanism such as damages? Public (or private) apologies may have the advantage of avoiding

[24] *Bridgestone Corporation v Tolin Tyres Pvt Ltd*, CS (COMM) No 375/2016 www.mondaq.com/india/x/587674/Trademark/Delhi+High+Court+Takes+Strict+Action+Against+Tolin+Tyres+In+Bridgestone+V+Bridestone+Infringement+Case.

[25] Ibid.

another evil: having to go to trial. They can help the parties to join a settlement agreement. This added value should not be underestimated.[26]

The compensation function goes beyond adjudication and is only one, albeit the most important, of several functions typically attached to damages in tort law. Other important goals are deterrence, typically provided by punitive or exemplary damages; prevention and – last but not least – expressiveness.[27] The last of these is a very interesting topic. It takes place when the court focuses on sending a strong message to the public in order to protect some interests put at risk by the wrongdoing. For instance, the dissemination of apologies through a judicial order may restore some important social values in accordance with the needs and values of both society and private litigants.

One of the most curious cases I have ever seen was a case of environmental damage caused by massive oil pollution suffered by South American indigenous peoples: *Maria Aguinda v Chevron-Texaco.*[28] At the end of very complex litigation, a Tribunal of Ecuador awarded nine plus nine billion dollars (a total of $18 bn) in favour of environment and human rights groups. In this astonishing and creative judgment, which took place in a civil law country, half of the total amount was compensatory and the other half was punitive damages (*penalidad punitive*). Meanwhile the Tribunal issued an order to disseminate public apologies (*disculpas publicas*), and compliance with this order was a condition for the cancellation of punitive damages.[29] This seemed to be a sort of conditional remedy and – speaking from a civil law perspective – something similar to an 'alternative obligation'[30] when the debtor (or the obligated party) can choose between two alternative performances in order to comply with their legal duties.

In other words, the Tribunal ordered a public apology whose fulfillment by the defendant should have halved the total amount awarded. Chevron-Texaco – the oil company – chose not to apologise and appealed to the Supreme Court of Ecuador. The argument basically used for contesting the judgment was that the civil code of Ecuador does not provide any form of punitive damages at all, to say nothing of the violation of a due process clause for imposing on someone a duty to accuse himself (in latin *nemo tenetur se detegere*). At the end, the Supreme Court

[26] See JK Robbennolt, 'Apologies and Legal Settlement: an Empirical Examination' (2003) 102 *Michigan Law Review* 460; D Shuman, 'The Role of Apology in Tort Law' (2000) 83 *Judicature* 180; DL Levi, 'The Role of Apology in Mediation' (1997) 72 *New York University Law Review* 1165.

[27] For a seminal study, see M Galanter and D Luban, 'Poetic Justice: Punitive Damages and Legal Pluralism' (1993) 42(4) *American University Law Review* 1393; see also G Calabresi, 'Civil Recourse Theory's Reductionism' (2013) 88 *Indiana Law Journal* 451 and, more particularly, Hershovitz, above, n 23, 108–109.

[28] See A Pigrau, 'The Texaco-Chevron Case in Ecuador: Law and Justice in the Age of Globalization' (2014) 1 *Revista Catalana de Dret Ambiental*, vol V, 1 and K Payne, '*Aguinda v Chevron*: The Potential Rise or Fall of Mass Toxic Tort Claims Against US Companies' (2012) 46(4) *The International Lawyer* 1067.

[29] ibid.

[30] See *Black's Law Dictionary*, 6th edn (West Publishing, 1979) defining alternative obligation as: 'An obligation allowing the obligor to choose which of two things he will do, the performance of either of which will satisfy the instrument. A promise to deliver a certain thing or to pay a specified sum of money is an example of this kind of obligation'.

decided to overrule the part of the judgment concerning punitive damages and the attached conditional remedy.

Is it possible to provide an alternative to paying punitive damages for the defendant, if he prefers to omit apologies? I have no answer. And, to borrow from Socrates: 'I know that I know nothing'. Probably an insightful question is already quite something. But as far as it goes is not enough. The Tribunal of Ecuador may have avoided being overruled by the Supreme Court, if it had constructed the type of damages differently, as an alternative to public apologies.

Since there is no rule in the civil code concerning punitive damages, they are normally precluded in civil law jurisdictions. On the contrary, non-pecuniary damages are well established as a remedy specifically focused on criminal offences. Therefore, the Tribunal should have constructed the alternative to the 'public apologies' order as non-pecuniary damage, or moral damage. Might it have prevented the overruling? Once more I would like to focus on the 'alternative remedy', by asking a question. Do compelled public apologies properly carry out a moral repair function, or do they perform a different task, or a mixed one?[31] I think that the Ecuador case is more concerned with the promotion of public awareness and acknowledgment of wrongdoing at the expense of the defendant's reputation, rather than only on the moral repair goal. Public apologies here are probably better suited to deterrence and sanction than moral compensation, although these topics are not mutually exclusive. Can we say that achieving moral compensation through apologies is an irrelevant question for law? In civil law systems (with some remarkable exceptions) this question has not yet been completely examined.[32]

IV. Law and Economics Theory and Incentive-based Approach to Apologies

A. How Incentives Work

According to Guido Calabresi, 'merit goods' are those goods that cannot be allocated through the ordinary market or through pure command structures.[33] They would be better distributed in a number of other ways to avoid the moral costs that would flow from ordinary allocation.[34]

If our attributes are converted into actions and products that are desired by society for the common good, then incentives to develop and use these attributes

[31] See P Vines, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena' (2007) 1 *Journal of Public Space* 1.

[32] For an apology legislation analysis from a common law perspective, see R Carroll et al, *Apology Ordinance (CAP. 631): Commentary and Annotations* (Hong Kong, 2018).

[33] Id est: resource allocation system essentially based on public regulation: Calabresi, above, n 1, 42.

[34] ibid.

are needed.[35] We have positive incentives, like financial rewards, and negative incentives, like sanctions.

Generally speaking, what do I mean by an incentive-based approach? As taught by Tobin[36] and remarked by Calabresi as well,[37] incentives are represented by all those norms providing benefits or sanctions aimed at inducing someone to behave in a certain way. Normally incentives try to achieve the goal of facilitating a socially desirable choice from an individual or an undertaking. There are a lot of examples and different models.

If a sportsman charged with misconduct accepts an early plea, he can often receive a reduction from the base financial sanction.[38] Another example is when government uses green incentives, granting discounts to the advantage of people who decide to install solar panels. More clearly, take the example of leniency programs: the leniency policy is deemed 'a specialized form of the prisoner's dilemma game albeit with a few appreciable differences'.[39] As in the Prisoner's Dilemma,[40] cooperation is required, and an incentive like a safe harbor is necessary.

B. Incentivisation and Safe Harbour Legislation

The prisoner's dilemma can be also recalled to explain the function of safe harbour legislation with specific reference to apologies.[41] Such laws protecting apologies have been growing in importance in the common law world since the 1986 when the first apology act was enacted in Massachussets.[42]

What does an incentive-based approach through a safe harbour law mean? It creates an incentive to apologise so that the lawyers and parties change their mind about apologies: from suspicion and fear to a welcoming attitude. Apologies are facilitated by a safe harbour in order to grant them a performative function instead of consigning them to the confession/admission role that they would have within the ordinary hearsay rule.[43]

[35] ibid.

[36] In relation to investment transactions, Tobin notes that people are willing to assume more risk only if compensated by a higher level of expected return. One can thus think of a trade-off people are willing to make between risk and expected return. See J Tobin, *Money, 2, The New Palgrave Dictionary of Finance and Money* (1992) 770–79.

[37] Calabresi, above, n 1, 76.

[38] See for example, *Tribunal AFL* (Australian Football Association, 2015) p 4.

[39] See Editorial (2010) 1 *Indian Journal of Law & Economics* XV–XVI.

[40] See R Axelrod, 'Effective Choice in the Prisoner's Dilemma' (1980) 24(1) *Journal of Conflict Resolution* 3.

[41] See also B Ho, 'Apologies as Signals: with Evidence from a Trust Game' (2012) 58(1) *Management Science* 141.

[42] JC Kleefeld, 'Promoting and Protecting Apologetic Discourse through Law: A Global Survey and Critique of Apology Legislation and Case Law' (2017) 7(3) *Oñati Socio-legal Series [online]* 455.

[43] See JR Searle, 'A Classification of Illocutionary Acts' (1976) 5 *Language in Society* 12; J Ainsworth, 'The Construction of Admissions of Fault through American Rules of Evidence: Speech, Silence and Significance in the Legal Creation of Liability' in S Tomblin et al (eds), *Proceedings of The International Association of Forensic Linguists' Tenth Biennial Conference* (Birmingham, 2012) 29.

Turning finally to 'merit goods', we can underline that intangible values like altruism are normally considered as an end in themselves that is difficult to achieve through a pure command structure ('commandification'[44]) or through a pure market-based mechanism ('commodification').

Calabresi recalls the McKean paradox, where Roland McKean explained that it would be meaningless to ask: 'How much must I offer you to get you to love me for myself quite apart from my offer?' In other words, Calabresi observes that 'if we treat altruism or beneficence as an ordinary good and try to buy it in the market rather than increasing the amount of it that is produced, as occurs with most goods, we destroy it. And, significantly, it is equally meaningless to ask, 'How can I compel you to love me, for myself alone?' That is, just as use of a pure market destroys the good it seeks to increase, so too does pure command!'[45]

These questions do not make sense. But Calabresi notes that:

> [once] the issue is put in this way, quite a few interesting things follow. While it is true that I may not be able to get you to love me for myself alone by purchasing your love in a pure market … candy helps! And while it may be true that I cannot command you to be beneficent without destroying the beneficence that I value and desire, education – a mighty powerful form of command – may bring about just the result I want.[46] Put in other words: 'Flowers help!'[47]

We can use complex modified markets and less direct and less centralised command structures to increase goods like altruism (merit goods), such as apologies, instead of doing what we do through traditional markets and command structures for most goods.

Apologies can surely be an act of courtesy. But they can also influence the feelings and decisions of people affected by an unlawful act. In this way, apologies can deeply impact the consequences of such an unlawful act. Due to their effect on mediation and settlement of the dispute they can mitigate the quantification of non-economic damages in negligence cases too.[48] In addition, apologies can be relevant for the public interest, not only for interpersonal relationships. They can help the justice system to save money. This is all very well, but it hardly suffices for our purpose.

C. Apologies as Means or Ends?

What I would like to focus on is the following question: are apologies a means or an end? As well as altruism, we can look at apologies not as a means but as an end.

[44] Id est: the tendency to treat some matters through a command and control approach.
[45] Calabresi, above, n 15.
[46] ibid.
[47] ibid.
[48] See, recently, AM Zwart-Hink, 'The Doctor Has Apologised. Will I Now Get Compensation For My Injuries? Myth and Reality in Apologies and Liability' (2017) 7(3) *Oñati Socio-legal Series* 497; DJ Kaspar and LE Stallworth, 'The Impact of a Grievant's Offer of Apology and the Decision Making Process of Labor Arbitrators: A Case Analysis' (2012) 17(1) *Harvard Negotiation Law Review* 1.

More precisely, an apology statement could be considered as a means that has to be consistent with a specific end. We are speaking of a non-economic or emotional end, because we cannot measure the impact of apologies on someone's feelings or soul in economic terms.

According to a pure command critique, we cannot impose apologies except in rare cases where an order to apologise achieves in itself (ie is independently from its author's sincerity) a remedial goal, unless we want to overburden the social costs of the defendant. Why would we ever want to overburden their social costs? It may be that an apology could raise the social costs of the defendant in a way which helps to protect the social values of the plaintiff. For example, we might stress this social awareness in cases that involve facts which affect social fundamental values, such as racism or discrimination against women.

But we have to be careful if we extend such a remedy beyond this boundary. Let us look at the example of the municipal police in Rome, who attempt to make people apologise without having any statutory basis for their attempts. Misleading people about which is the correct legal procedure to follow before the trial begins could also amount to misconduct. In fact, the municipal police behave as if they have a great power (to impose limitations on privacy and personal dignity) that they simply do not have. In the Italian criminal code, the police have only the power to propose a settlement in a restorative justice framework, nothing more. For example, it would be better to allow the alternatives of uploading a YouTube video or sending a letter of apology plus the payment of a pecuniary sanction. The police would have done better to explain the steps to be taken in a fair way and possibly leave room for alternatives. As Calabresi said, 'education is a mighty powerful form of command'.[49] The most correct way to ask for an apology video would be on the basis of fair and transparent information that this is not the only way to comply, but simply one option among others (for example a letter of apology, or a letter plus a fine). That might also help to attach the correct reparatory value to the video.

Another issue I would like to point out is the commodification problem. The phenomenon of transforming merit goods into commercial goods is called commodification. As underlined by Calabresi, merit goods are 'pearl[s] without price'. If the merit goods are apologies, in this sense they are similar to inalienable rights involving freedom of speech and freedom of silence. We cannot buy apologies, because they reasonably do not have any price. Buying an apology fundamentally destroys its inherent value, since it is an intangible good that draws its strength from the free will and genuineness of the individual, among other things

Commodification or commandification of apologies, as a merit good, creates a real risk because it causes moral externalities. In other words, it may create a lot of insincere apologies, because people will choose this solution to gain a discount in damages or sanctions, or because they are ordered to do so. But courts commodify

[49] See above, n 33.

apologies when they decide to award punitive damages against a perpetrator who refuses to apologise to the victims. They put a price on this specific choice, not on the original violation. In doing so, they look beyond compensation towards other functions like deterrence, but that turns itself exactly into a hypothesis of commodification.

Let us take the case of environmental damages caused by a corporation. Public apologies expressed spontaneously by the corporation are an end in themselves. They can create interpersonal cooperation in order to repair moral damage. Quite differently, apologies mandated by the court or established by the state become a substitute, a means to achieve some further goals like public awareness and public vindication. This is more similar to a pure command approach. Contrarily, a pure market approach is like trying to exchange apologies for money, without doing anything from a legal point of view in order to facilitate a spontaneous apology, if it is not being paid for.

I would like to show that a mixed and more nuanced framework could be viable for both altruism and apologies. A more subtle interaction exists between apologies and compensation. When a plaintiff expresses his preference for apologies and the defendant answers with a proper statement, this may reduce the amount of liquidated damages. The incentive-based approach can work in both directions here. One way is satisfying the victim according to their preferences; the other is reducing the uncertainties about compensatory evaluation. But it should be understood that courts must take into account the preferences expressed by the plaintiffs. If they seek apologies and obtain them, the compensation-sanction should – albeit in part – be mitigated accordingly.

On the one hand, if courts reduce damages when apologies are issued, this may encourage more people to apologise. On the other hand, if the courts raise the amount of damages when the defendant does not comply with the apology preferences, they induce people to issue apologies. So moral externalities may be reduced accordingly. In these circumstances apology can gain a more independent function (facilitating settlement of disputes) which attaches authenticity to them.

Another important lever is represented by the liquidation of judicial costs. Here too, there is evidence of the structural relevance of an incentive-based approach. A main trend of many jurisdictions is to put the burden of judicial costs of the proceedings on the losing party. But it is not clear whether refusing to apologise can be deemed relevant in such a decision.

I would like to stress this point. How much money can be saved by issuing apologies as an alternative to litigation? Reasonably issuing apologies at a pre-trial stage can create a reduction in transaction costs, and particularly in both liquidated damages and judicial costs. The assessment of costs may depend on whether or not the dispute is successfully settled through apologies and damages, rather than being decided by a judgment awarding damages to the plaintiff.

I checked on this model in a specific Italian case of defamation committed conjointly by two journalists, one of whom settled with apologies, while the other

preferred to go to trial.[50] Given the same type of wrongdoing, the total amount was more than doubled in the judgment. The additional burden accounted for approximately one third of damages and two thirds of judicial costs.

Similar conclusions can be reached when the tortfeasor refuses to make amends in defamation cases. Generally, the costs of the dispute can rise if the publication of the retraction is omitted by the injurer and a judicial order is then pursued by the defamed party.

A comparison between public apology and retraction could also be an interesting topic to explore with specific reference to their impact on compensation mechanisms. I think that in cases of defamation the consequences of an omission to publish a retraction should be more severe than the consequences of an omitted apology, because the first tends to be a core remedy while the latter is considered more incidental and ancillary. But an apology could probably add more value than a simple retraction according to its specific content. In fact, an early apology, including a retraction, can achieve full compensation even better than a simple retraction.

I would like also to underline that indemnity costs awards can work as an incentive to include apologies in settlement agreements. If one refuses an offer to settle and consequently decides to go to trial and is given a favourable judgment, the court can treat the previous refusal to apologise as a surplus of money to be paid by whoever had refused to settle. Since the judicial outcome is equal or worse than the hypothetical settlement offer, the court can decide to liquidate indemnity costs on the party that had previously refused the offer. According to this scenario, not all the circumstances of wrongdoing can be treated equally. It could be important to assess the chances of restoring a positive relationship between the parties. For example, a case involving personal and moral concerns would have to be treated differently from a case that lacks such characteristics.

V. Final Remarks

Can a court consider an omitted apology or the rejection of an offer including apologies relevant to the liquidation of damages or indemnity costs? Is it an interference with freedom of speech (freedom to remain silent) and with the rule of law that does not provide such a remedy?

I think that apologies cannot properly be treated as remedies in a technical sense, but rather as tools to facilitate mediation. Such reasoning is 'incentive-based' because pushing the parties to apologise can anticipate other remedies (for example an order to make a retraction, to publish the judgment, to pay punitive damages) without going to trial and at a lower cost. Given this framework an 'incentive-based approach' to apologies could make sense.

[50] App Milano Sez. II, 19-06-2008; for further references from a common law perspective, see also R Carroll, 'Apology as a Legal Remedy' (2013) 35 *Sydney Law Review* 325, about the case *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd* (1998) 45 NSWLR 291.

When we learn of an offence against the municipal police in Rome, we welcome the apologies of the offender. But we expect the offender to repair their wrongful act spontaneously. When we hear that the police tried to coerce, or mislead, the offender to publish apologies in a video, we may be puzzled, because a forced speech violates the fundamental right of free speech and – last but not least – it would probably lack authenticity. While some people have argued that coerced apologies have their merits, I think that only in limited cases of important narrative functions of apologies (such as restoring collective memories) will coerced apologies still have effect.

There is one big difference between the two situations: the non-coerced apology can be considered restorative as an end in itself, whereas the forced speech is like a means that can be used to achieve a different goal. In particular, such a goal could be restoring collective conscience and memory about mass violence and criminal acts against human dignity. An incentive-based approach seems to be more appropriate to pursue the goal of facilitating mediation outcomes (akin to moral compensation), whereas an approach focused on pure command is probably more suitable to reach a narrative goal (akin to deterrence).

Are apologies under safe harbour legislation admissible as a mitigating factor for damages? Generally, we can answer 'yes, they are' since an award of damages logically implies other evidence already achieved (elsewhere?). Safe harbour laws (which generally protect apologies from admissibility if they are prejudicial to the plaintiff) would not overlap with damages mitigation. Fundamentally, they are considered procedural rules, rather than substantive law.

I have tried to fix some points of reference to associate different incentives' effects with different scenarios of apology laws, and thus to apologies as well. Such an approach is based essentially on two main areas: incentives to cooperation between parties; and incentives to promote social goals of deterrence and public awareness (and indirectly compensatory goals). This is based on the assumption that the social benefits of apologising or the social costs of the omission to apologise have to be taken into account along with the private cost-benefits.

When apologies are given unreservedly but privately, a safe harbour law may help to protect the compensatory function and moral costs savings of apologies, with specific reference to moral damages. The extension of this protection can vary according to the extension of safe harbour law (admissions of facts can be included in this protection, for example in Hong Kong).[51] Accordingly, courts could better issue a mitigating effect on non-pecuniary damages (or non-economic damages as they are called in Italy), in order to facilitate moral costs savings. Conversely, no mitigating effects of this kind would lead to a reduction in case of punitive damages or exemplary damages, unless the apology is a public one and achieves the goals of public interest (like deterrence or public awareness goals). This is because a

[51] See Carroll et al, above, n 32.

private apology can reduce only private externalities, raising only the probability of a mediation. But it can do little for social negative externalities that can be better addressed by public apologies. Otherwise, in the case of apologies including such an admission of facts (that fall outside the protection of safe harbour legislation), courts would grant a reduction on exemplary damages.

The law could be depicted as the art of a permanent balancing of goods and evils, and as a method to manage the distribution of evils among people directly or indirectly involved in a dispute. The plaintiff would need more than the pursuit of judicial truth at all costs. Sometimes he would rather give to the defendant a chance to repent and reform, before going to court. Law can provide the right incentives to strengthen empathic reconciliation, in order to give more effectiveness to the rule of law. As observed by Bingham LJ:

> parties [to mediation] will not make admissions or conciliatory gestures, or dilute their claims, or venture out of their entrenched positions unless they can be confident that their concessions and admissions cannot be used as weapons against them if conciliation [or mediation] fails and full-blooded litigation follows.[52]

According to this perspective, a clear rule protecting apologies from being regarded as admissions against interests makes sense. In my opinion, the issue cannot be left to judicial discretion. In some civil law countries like Italy, France or Germany, courts are tempted to give apologies the value of a confession – the strongest type of prejudicial evidence we have. This may be quite different from common law countries (where the discretion of juries and courts is wider and they are not bound by such strict rules about the weight of evidence).

In my opinion, without safe harbor legislation, in most civil law countries apologies may be considered as admissions against interest (ie confession, given the different conception of evidence that exist in civil law countries) only if they objectively describe facts, and not if they consist in personal opinions or expressions of benevolence aimed at preparing an offer of settlement. But in civil law jurisdictions this point is far from clear and the issue is one underestimated by scholars, legislators and – above all – by courts.

More generally, I think that settlement agreement, mediation and all such preparatory acts play a prominent role in attaching a correct legal meaning to apologies. Above all, they should prevail over the adjudicative attitude that plainly equates apologies with admissions against interests, which has sometimes been the common law approach.[53]

There are plenty of cases in which the value of apologies can be appreciated as a non-economic remedy, ie as compensation. My first impression was that it is rather strange to assert that a victim can be compensated through apologies, because the ethical point of view must be kept separate from the legal one. However, the

[52] *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] 2 WLR 721, 724.

[53] See P Vines, 'Apologies and Civil Liability in the UK: a View from Elsewhere' (2008) 12(2) *Edinburgh Law Review* 200.

reasonable argument of positivistic lawyers is: who can decide about alternative options to compensation, if not the victim? An apology becomes only cheap talk if you treat it like a legal remedy, as something similar to compensation. It may lose its peculiar moral value, becoming a matter of lawyers and adjudication, rather than a matter of ethics and empathy.

Reacting to this approach, I considered getting the ethical approach out of the way for the moment and asked myself: are we sure that apologies lack any legal meaning? Suddenly I found that there are a lot of grey areas and twilight zones to explore. Interdisciplinary methods can help us to focus on apologies and compensation without ideological bias such as the abovementioned challenge between ethicist and positivist theorists. The criticism is that the ethical perspective is used as a tool to pass tort counter-reforms. The 'Sorry works!' movement is regarded with some suspicion, as it could be a counter-movement against the principle of full compensation. This view, albeit not completely groundless, shows a hypercritical attitude especially in the work by Arbel and Kaplan that underestimates the emerging legal relevance of apologies.[54] It overlooks the reality: law is – and always will be – strictly interrelated with ethical issues. The problem is rather the balancing and nuancing of certain ethical concerns in the making of law.

So, what is the legal meaning of apologies? The question is a very challenging one: as well as being performative statements, we can detect all the characteristics of a speech act with specific legal effects. Apologies can communicate something (this is their expressive function) but at the same time they can do something that under certain circumstances deeply affects legal relationships (this is their performative function).[55] The performative function is very important in the study of legal language. If we consider apologies only as admissions against interests we underestimate their performative function, and we prevent apologies from achieving their proper goal. In other words, we prevent apologies from doing their work.

A more comprehensive approach to apologies could promote a change in litigation outcomes and a selection of efficient remedies. After all, we cannot overemphasise that it is largely a matter of interpretation and an issue to be focused on in specific contexts. Does an apology in Japan have the same meaning as in Italy? Not at all. And it is precisely because the meaning of an act is also inherent to a specific legal system, as a matter of comparative law, that the problem of the legal relevance of apologies (with its interferences with compensation) can be positively addressed if we move towards an incentive-based approach. The legal structures 'tell us a lot about what that particular society believes its incentive needs are, in comparison to how great its inequality moral costs are'.[56]

[54] See Y Arbel and Y Kaplan, 'Tort Reform through the Backdoor: A Critique of Law & Apologies' (2016–2017) 90 *Southern California Law Review* 1199. See also N Smith, *Justice through Apologies* (Cambridge, Cambridge University Press, 2014).

[55] JL Austin, *How to Do Things with Words*, The William James Lectures (Clarendon Press, 1962).

[56] G Calabresi, *The Future of Law and Economics, Essays in Reform and Recollection* (Cambridge, Cambridge University Press, 2016) 76.