

Dispute Resolution & New Governance: Role of the Corporate Apology

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In the wake of the Great Recession,¹ the public increasingly expects to see corporations express proper contrition for their errors.² Likewise, corporate leaders,³ policy makers,⁴ and scholars⁵ have long recognized

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1. The “Great Recession” is a term of art increasingly used among legal scholars, which refers to the period beginning with the financial collapse of 2008 to the present.

2. Frank Rich, *No One Is to Blame for Anything*, N.Y. TIMES, Apr. 10, 2010, <http://www.nytimes.com/2010/04/11/opinion/11rich.html?sudsredirect=true>. Arguing that there is a singular lack among those credited with the financial collapse of 2008 to take responsibility, Rich quotes Alan Greenspan:

I was right 70 percent of the time, but I was wrong 30 percent of the time,” said Alan Greenspan as he testified last week on Capitol Hill. Greenspan—a k a the Oracle during his 18-year-plus tenure as Fed chairman—could not have more vividly illustrated how and why geniuses of his stature were out to lunch while Wall Street imploded. No doubt he applied his full brain power to that 70-30 calculation. But the big picture eludes him. If the captain of the Titanic followed the Greenspan model, he could claim he was on course at least 70 percent of the time too.

Id. See also Andrew Martin & Micheline Maynard, *For Bankers, Saying ‘Sorry’ Has Its Perils*, N.Y. TIMES, Jan. 12, 2010, <http://www.nytimes.com/2010/01/13/business/13blame.html?hp>. Describing the level of anger directed at those considered responsible for the financial collapse of 2008, Martin and Maynard quote Michael Useem, a professor of management at the Wharton School of Business, who argues that “[t]he level of anger in this public in general is extremely high against those who led Wall Street into the abyss, in part because they never stepped forward to apologize for the mess they made.” *Id.*

3. *A Stitch in Time: How Companies Manage Risks to Their Reputation*, ECONOMIST, Jan. 17, 2008, at 12, 13 fig.5. In responding to the query: “[w]hat are the main business benefits to your organi[z]ation of having a defined corporate-responsibility policy?” business leaders provided a range of responses, such as “[h]aving a better brand reputation, . . . [m]aking decisions that are better for our business in the long term, . . . [b]eing more attractive to potential and existing employees, . . . [m]eeting ethical standards required by customers,” and “[h]aving better relations with regulators and lawmakers . . .” *Id.*

4. Stefano Zamagni, *Religious Values and Corporate Decision Making: An Economist’s Perspective*, 11 FORDHAM J. CORP. & FIN. L. 573, 581 (2006) (arguing that consumers who use their purchasing power to express moral sentiments motivate policymakers to seek corporations that are more socially responsible).

that corporations can and should be more responsive to public expectations of ethical corporate behavior.⁶ But the traditional means through which multiple stakeholders attempt to harmonize corporate behavior with these expectations,⁷ the modern corporate social responsibility (CSR) movement, is unlikely to incentivize ethical corporate behavior.⁸

5. See Thomas W. Dunfee & David Hess, *Getting From Salbu to the "Tipping Point": The Role of Corporate Action Within a Portfolio of Anti-Corruption Strategies*, 21 NW. J. INT'L L. & BUS. 471 (2001) (considering improved corporate behavior in the context of corruption in international business); Timothy L. Fort, *The Times and Seasons of Corporate Responsibility*, 44 AM. BUS. L.J. 287 (2007) (suggesting that corporate focus on profitability puts people, businesses, and the free market at risk); Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215 (2001) (contributing to dialogues about community, corporate ethics, and the generation of potent moral norms); Don Mayer, *Corporate Citizenship and Trustworthy Capitalism: Cocreating a More Peaceful Planet*, 44 AM. BUS. L.J. 237 (2007) (considering links between corporate behavior and peaceful, sustainable societies); Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261 (2001) (making the concept of corporate social responsibility useful by drawing insights from legal and economic theory). See generally Thomas W. Dunfee & Timothy L. Fort, *Corporate Hypergoals, Sustainable Peace, and the Adapted Firm*, 36 VAND. J. TRANSNAT'L L. 563 (2003) (using the language of "hypergoals" to highlight universal principles that govern a wide range of organizations). Dunfee and Fort's work considers how corporations can achieve sustainable peace. *Id.* at 563.

6. GEORGE CHENEY, JULIET ROPER & STEVE MAY, *THE DEBATE OVER CORPORATE SOCIAL RESPONSIBILITY* 3–7 (Steve May, George Cheney & Juliet Roper eds., 2007).

7. See Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L L. 452, 463–66 (2008); see also CHENEY, ROPER & MAY, *supra* note 6, at 4 (discussing the underlying policy priorities of the modern corporate social responsibility (CSR) movement and explaining that conversations about unchecked corporate power are central to conversations about how to "probe in an informed and systematic way the potentials for positive social change in, through, and around the modern corporation"); John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 37–38 (2005) (describing CSR as "a complex communication network among public and private actors," which, "[a]t its best, promises a corporate decision-making process in which managers think and talk openly about social and environmental issues and then tell the world what they did and why").

8. Part of this unlikelihood stems from the traditional debate between those arguing that corporations should engage in CSR because they ought to do good for goodness' sake and those viewing such arguments, by their own nature, as being inherently lost in translation if not linked with the corporate bottom line. See M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571 (2009) (characterizing the philosophical underpinnings of the CSR movement as based on the view that corporations have a moral duty to do good for others, even at the expense of the bottom line); see also David P. Baron, *A Positive Theory of Moral Management, Social Pressure, and Corporate Social Performance*, 18 J. ECON. & MGMT. STRATEGY 7, 1–4 (2009) (arguing that one of the principles underlying the CSR movement is that corporations have an abstract "moral duty" to do good); Elizabeth F. Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?*, 26 YALE L. & POL'Y REV. 367, 399 (2008) (explaining the reason why certain corporations do not engage in CSR). Brown argues that some corporations do not engage in CSR partly because following CSR principles is more expensive than not and these added costs cannot always be passed along to the consumer. *Id.* Moreover, Brown argues that "[p]art of those added costs are the costs associated with increased risk of litigation that corporations adopting codes that embody CSR principles face." *Id.*; see also Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 835 (2008) (characterizing CSR as

The modern CSR movement advocates improved corporate behavior. The movement asks corporations to broaden relationships with multiple stakeholders⁹ and to conform to society's rules—those embodied in both law and ethical custom.¹⁰ In recent years, CSR has focused on corporate governance as a means through which CSR precepts may be incorporated into business decision-making processes.¹¹

Decrying the modern CSR movement as being effectively co-opted by corporate marketing strategies,¹² critics argue that the movement is now little more than an elaborate public-relations charade whereby corporations perform certain prescribed rituals while continuing to conduct business as usual.¹³ Corporate America's disregard of the public's desire for ethical corporate behavior is evident in the area of corporate dispute resolution.¹⁴ Though the argument may seem counterintuitive on first

profit-centric). Kerr explains that since the effects of CSR on the bottom line have become quantifiable, the law supports, if not requires, corporate managers to investigate and consider whether CSR can impact the bottom line. *Id.* at 839. Kerr further argues that a corporate manager who does not consider such linkages could be considered derelict in her duty. *Id.*

9. See *supra* note 7 and accompanying text.

10. See CHENEY, ROPER & MAY, *supra* note 6.

11. See *supra* note 7 and accompanying text.

12. See S. PRAKASH SETHI, SETTING GLOBAL STANDARDS: GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS (2003) (regarding the marketing benefits from CSR and the widespread practice of insufficient or inconsistent implementation); Ruth V. Aguilera et al., *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 ACAD. MGMT. REV. 836, 838 (2007) ("Some companies introduce CSR practices at a superficial level for window-dressing purposes. . . ."); Joe W. (Chip) Pitts, III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL'Y 334, 377 (2009) (finding credible the critiques that consider "CSR as, at best, toothless and marketing-oriented, and at worst a malevolent strategy to co-opt or render powerless the critical forces hoping to tame corporations with the more meaningful constraints of law"); see also Betsy Atkins, *Is Corporate Social Responsibility Responsible?*, FORBES, Nov. 28, 2006, http://www.forbes.com/corporatecitizenship/2006/11/16/leadership-philanthropy-charity-leadcitizen-cx_ba_1128directorship.html (detailing the disingenuousness of CSR campaigns). Atkins writes "[T]here are practical reasons why corporations should cloak themselves in the politically correct rhetoric of social responsibility. . . . [B]ut marketing should not be confused with significant deployments of corporate assets." *Id.*; see also Gill, *supra* note 7, at 462 (arguing that CSR "has become a business-sensitive, if not business-driven practice"). Gill notes that many critics consider the original social change motives of CSR to have been effectively subordinated to corporate marketing strategies. *Id.*

13. See *supra* note 12 and accompanying text.

14. For an overview of dispute resolution theory and practice, see generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION (1994); GARY KLEIN, SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS (1999); Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 6–28, 77–110 (2000); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of 'Good Mediation'?*, 19 FLA. ST. U. L. REV. 47 (1991); Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOTIATION J. 217 (1995); Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1 (1997); Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69

impression, the use of corporate apologies is both good business and good ethics.

The contention that apologies can play a central role in dispute resolution is one apparent even to an eight-year-old.¹⁵ An advocate of apologies in corporate dispute resolution and the founder of the Sorry Works! Coalition, Doug Wojcieszak,¹⁶ describes a hospital's unapologetic behavior following the medical-malpractice-induced death of his brother as the catalyst for his work in advocating corporate apologies:

(2005); Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994); Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986); and Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997).

15. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 33, 45–46 (1982) (arguing for an increased use of mediation among lawyers and discussing its lack of use resulting in a capacity for deafness to “ordinary good sense,” and arguing that mediation can lead to novel solutions, such as an apology, which could actually be in a client's best interest (citing John D. Ayer, *Isn't There Enough Reality to Go Around? An Essay on the Unspoken Promises of Our Law*, 53 N.Y.U. L. REV. 475, 489–90 (1978))). Riskin offers an interesting anecdote from Professor Kenney Hegland:

In my first year Contracts class, I wished to review various doctrines we had recently studied. I put the following:

In a long term installment contract, Seller promises Buyer to deliver widgets at the rate of 1000 a month. The first two deliveries are perfect. However, in the third month Seller delivers only 999 widgets. Buyer becomes so incensed with this that he rejects the delivery, cancels the remaining deliveries and refuses to pay for the widgets already delivered. After stating the problem, I asked, “If you were Seller, what would you say?” What I was looking for was a discussion of the various common law theories which would force the buyer to pay for the widgets delivered and those which would throw buyer into breach for cancelling the remaining deliveries. In short, I wanted the class to come up with the legal doctrines which would allow Seller to crush Buyer.

After asking the question, I looked around the room for a volunteer. As is so often the case with the first year students, I found that they were all either writing in their notebooks or inspecting their shoes. There was, however, one eager face, that of an eight year old son of one of my students. It seems that he was suffering through Contracts due to his mother's sin of failing to find a sitter. Suddenly he raised his hand. Such behavior, even from an eight year old, must be rewarded.

“OK,” I said, “What would you say if you were the seller?”

“I'd say, ‘I'm sorry.’”

Id.; see also Bruce W. Neckers, *The Art of the Apology*, 81 MICH. B.J. (6) 10, 11 (2002); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 493 (1986).

16. The Sorry Works! Coalition is a grassroots organization comprised of physicians, insurers, patients, attorneys, hospital administrators, and researchers. The Coalition pursues three central goals: (1) educate the public and stakeholders about the power of disclosure and apology; (2) serve as an organizing force and central clearinghouse for information on full-disclosure methods; and (3) lobby for the development of the Sorry Works! programs across the nation. THE SORRY WORKS! COALITION, <http://www.sorryworks.net> (last visited Apr. 2, 2010). The Sorry Works! Coalition website is a comprehensive source for all issues and developments involving the role of apology in dispute resolution. *Id.*

After the funeral and all the relatives and friends went home, my parents went back to the hospital seeking answers “What happened? Why did it happen? Can the processes be improved so it never happens again?” These were all questions my parents . . . had. But the door was unceremoniously slammed in their face. Meetings were promised, but did not transpire. Even the surgeon who was so honest the night [my brother] died told my parents: “Look, our legal counsel has instructed me not to speak with you any further. You will have to leave.”¹⁷

Wojcieszak goes on to describe the dispassionate “deny and defend” ethos promulgated by defense attorneys¹⁸ as precisely what triggered his successful lawsuit against the hospital.¹⁹ Indeed, medical malpractice survey research suggests that victims desire apologies, and that some victims would have forgone litigation if the hospital had offered an apology.²⁰ Similarly, anecdotal evidence reveals parties who would have forgone litigation if they received an apology,²¹ settlement negotiations unraveling over the issue of an apology—even after the parties agreed on damages,²² plaintiffs who would have preferred an apology as part of a

17. DOUG WOJCIESZAK, JAMES W. SAXTON & MAGGIE M. FINKELSTEIN, *SORRY WORKS!: DISCLOSURE, APOLOGY, AND RELATIONSHIPS PREVENT MEDICAL MALPRACTICE CLAIMS* 5 (2007).

18. See, e.g., Doug Wojcieszak, John Banja & Carole Houk, *The Sorry Works! Coalition: Making the Case for Full Disclosure*, 32 JOINT COMM’N J. ON QUALITY & PATIENT SAFETY 344, 347 (2006) (“The old axiom of ‘deny and defend’ is a tried-and-failed risk management strategy because it increases patients’ and families’ anger and tendency to file lawsuits. It sends a message of ‘Come and get us.’”).

19. *Who is Sorry Works!?: Doug Wojcieszak*, SORRY WORKS!, <http://www.sorryworks.net/default/who-is-sorry-works/douglas-wojcieszak> (last visited Oct. 13, 2010).

20. See Thomas H. Gallagher et al., *Patients’ and Physicians’ Attitudes Regarding the Disclosure of Medical Errors*, 289 J. AM. MED. ASSOC. 1001, 1001, 1005–06 (2003) (finding that patients emphasized a desire to receive an apology following a medical error); Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 J. AM. MED. ASS’N, 1359, 1361 (1992) (noting that twenty-four percent of families filed claims “when they realized that physicians had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them”); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (finding that thirty-seven percent of respondents said that they would not have sued had there been a full explanation and an apology, and fourteen percent indicated that they would not have sued had there been an admission of negligence); Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES INTERNAL MED. 2565, 2566 (1996) (“[Ninety-eight percent of respondents] desired or expected the physician’s active acknowledgement of an error. This ranged from a simple acknowledgement of the error to various forms of apology, [and that patients] were significantly more likely to either report or sue the physician when he or she failed to acknowledge the mistake.”).

21. See *supra* note 15 and accompanying text.

22. See Carl D. Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation*, 17 MEDIATION Q. 265, 274 (2000) (describing negotiations stalling “over the plaintiff’s demand for an apology, even after the sides had agreed on the damages to be paid!”) (emphasis omitted).

settlement,²³ and occasions where a failure to apologize provoked litigation by adding insult to injury.²⁴ Given the good ethics of the corporate apology, and that the modern CSR movement is unlikely to advance good corporate ethics, a “New Governance”²⁵ approach is the best framework through which to create incentives for corporate apologies.

New Governance is policyspeak for a contemporary approach to reform that encourages dialogue about regulatory principles from the perspectives of industry, CSR advocates, and shareholders.²⁶ There is no

23. See Piper Fogg, *Minnesota System Agrees to Pay \$500,000 to Settle Pay-Bias Dispute*, CHRON. HIGHER EDUC., Jan. 31, 2003, <http://www.utsystem.edu/news/clips/dailyclips/2003/0126-0201/HigherEd-CHE-Minnesota-013103.pdf> (describing a class-action plaintiff’s disappointed reaction to the settlement: “I want an apology,” she said, “and I’m never going to get it.” (internal quotation marks omitted)).

24. Mary Ann Mariano’s comments about her sexual harassment and wrongful termination suit against the city of Highland, Florida are particularly of note. See Mel Melendez, *Highland Will Pay Ex-Official \$500,000*, SUN-SENTINEL, Aug. 2, 2000, http://articles.sun-sentinel.com/2000-08-02/news/0008020144_1_highland-beach-mariano-sexual-harassment. After accepting a settlement, Mariano stated that “[h]onestly, it’s never been about the money If they had taken my concerns seriously, I wouldn’t have had to go to court. All I wanted was a public apology.” *Id.* Another example of the practical value of an apology is seen by the statement of a lead plaintiff, which appears in the book, *A Civil Action*, an account of a civil suit in Massachusetts by families who alleged that toxic waste unlawfully dumped by two factories caused leukemia in their children. JONATHAN HARR, *A CIVIL ACTION* (1995). The lead plaintiff in the case, Anne Anderson, exclaimed to the attorney in the case that she “wasn’t after money” and rather, wanted an executive from one of the factories “to come to her front door and apologize.” *Id.* at 452. See also Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1010–11 (1999); Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 243 (1999).

25. While New Governance theory is complex and its terminology and taxonomies are often contested, a core element in virtually all formulations is the idea of the social and public good that may be achieved through private–public associations and networks animated by a series of new regulatory frameworks and forms. See generally Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE* 145 (Jacint Jordana & David Levi-Faur eds., 2004) (exploring theoretical approaches to regulation and providing a foundation for New Governance scholarship).

26. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004). Characterizing the inclusive and dynamic nature of New Governance approaches, Lobel explains:

Rather than oppositional, [this approach] aims for an appreciative positive stance, pulling together disparate ingredients and synthesizing elements from opposing schools of thought. Through new governance approaches, contemporary thinkers can bring together in their research unlikely pairs, such as privatization and democratic theory. The theory itself is thus reflexive, in the sense that it calls for integration in legal practice and correspondingly exemplifies hybridization in the academic field. Indeed, the theoretical basis for [this] vision mirrors its practical application in its inclusive spirit.

Id. at 449; see also Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 5 (2008); Helen Hershkoff & Benedict Kingsbury, *Crisis, Community, and Courts in Network Governance: A Response to Liebman and Sabel’s Approach to Reform of Public Education*, 28 N.Y.U. REV. L. & SOC. CHANGE 319, 321–24 (2003); David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability*

single model of New Governance, rather a series of evolving models that have been developed and tried in various industries around the globe.²⁷ The underlying policy priority of New Governance is that corporate governance mechanisms, if they are to be responsive to public expectations of good corporate ethics, must have greater flexibilities built into them. Moreover, those flexibilities ought to be animated by goals for outcomes—not processes.²⁸ While there is minimal overlap between the dispute resolution and New Governance literatures,²⁹ both fields rely on many of the same assumptions about how to encourage collaborative ends. Namely, both envision a flexible, problem-solving dynamic. In dispute resolution, this flexible dynamic could be achieved through the careful consideration of skills.³⁰ In New Governance, the same could be achieved through the careful consideration of institutional design.³¹

In one application of New Governance theory, Professor Edward M. Epstein considers what factors may induce corporations to become “Good Companies,” ideal companies³² that are responsive to public ex-

through Transparency, 17 BUS. ETHICS Q. 453, 455 (2007); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 173–75 (2004); Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 323, 328 (Gráinne de Búrca & Joanne Scott eds., 2006). See generally Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498 (2004); THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon ed., 2002); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 345–56 (1998); Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

27. See *supra* note 26 and accompanying text.

28. See *supra* note 26 and accompanying text. See generally Edwin M. Epstein, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L.J. 207 (2007).

29. See generally Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503 (2008) (characterizing the dearth of overlap between these two bodies of scholarship as counterintuitive given that both rely on similar underlying policy priorities).

30. See Scott R. Peppet & Michael L. Moffitt, *Learning How to Negotiate*, in THE NEGOTIATOR’S FIELDBOOK 615 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006). Discussing the modus operandi of those engaged in dispute resolution, Scott Peppet and Michael Moffitt argue that they should

search for underlying interests and potentially value-creating trades rather than take arbitrary haggling positions; explore the other side’s perspective through listening and empathy even if you discover you disagree with it; build a working relationship with the other side; manage your emotions to engage productively in the conversation rather than suppressing or ignoring feelings, etc. The message in most negotiation courses today is that learning to negotiate requires learning to collaborate and problem-solve with others, despite severe differences.

Id. at 616.

31. See *supra* note 26 and accompanying text.

32. See Epstein, *supra* note 28, at 212–13.

pectations of ethical corporate behavior.³³ In particular, he describes six factors—law, affinity-group regulation, self-regulation, ethical precepts, the media, and an engaged civil society—as “modes of social control”³⁴ that encourage corporations to engage in socially responsible behavior.³⁵ Epstein’s work provides a practical framework that allows scholars to engage in a systematic reconsideration of ways to incentivize the best corporate behavior.

Although Epstein effectively describes the modes of social control that function as catalysts for good corporate ethics, his contention that each mode must be used individually to incentivize good corporate ethics robs the framework of the flexibility it needs to scrutinize a narrower set of goals. I propose an alternative framework that incorporates Epstein’s modes but maintains the flexibility needed to make the framework effective. Part I of this Article summarizes Epstein’s New Governance framework and his insights about the Good Company. Part II integrates Epstein’s New Governance framework with the use of the corporate apology. Part III briefly analyzes Epstein’s findings, suggests modifications to Epstein’s New Governance framework that would lend it greater flexibility, and positions the modifications in the context of New Governance scholarship. The Article concludes by affirming Epstein’s approach to the Good Company and offering final reflections about fostering Good Companies in the context of dispute resolution between corporations and individuals.

I. A NEW GOVERNANCE FRAMEWORK

In *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*,³⁶ Epstein cogently analyzes the externalities³⁷ linked with the management of corporations.³⁸ Noting the

33. *Id.* (arguing that CSR is inherently insufficient in achieving the Good company). Epstein provides his own framework and describes corporations, by virtue of their economic and political power, as the most efficient proxies through which his framework can encourage the actualization of the Good Company. *Id.*

34. *Id.* at 210–12.

35. *Id.* at 220 (discussing the desire for more socially responsible corporations).

36. See Epstein, *supra* note 28.

37. CSR is often viewed by scholars as a means to reduce negative corporate externalities. Geoffrey Heal, a Columbia Business School professor, similarly holds this view, defining CSR as “a programme of actions taken to reduce externalized costs or to avoid distributional conflicts.” Geoffrey Heal, *Corporate Social Responsibility: An Economic and Financial Framework*, 30 THE GENEVA PAPERS 387, 387 (2005).

38. See Epstein, *supra* note 28, at 207–08 (discussing the nature of the corporation).

Early on, it became apparent that these companies, trusts, and enterprises, in addition to being highly effective structures for developing complex industrial economies, were very significant social, political, and cultural institutions—individually and collectively—

evolution of the corporate form from organizations exclusively dedicated to the public good³⁹ to the modern corporation, Epstein considers discussions of CSR to be the natural outgrowth of this evolution.⁴⁰ In this age of the modern corporation, Epstein examines what factors, or modes of social control, may galvanize the realization of the Good Company.⁴¹ Epstein defines six modes of social control in descending order of importance: law, affinity-group regulation, self-regulation, ethical precepts, the media, and an engaged civil society. Individually and in combination, the modes are fundamental to the actualization of the Good Company.⁴² These modes of social control effectively operate as a New Governance framework. Each mode will be described, in turn, below.

First, Epstein selects law as the most important mode. But he expresses skepticism about the law's ability to incentivize good corporate ethics because law, he argues, often articulates the least common denominator of socially acceptable behavior.⁴³

Second, Epstein defines affinity-group regulation as standards of behavior established by members of a specific profession, such as law or medicine.⁴⁴ Those corporations, operating under seriously administered affinity-group regulations, can be encouraged to be responsive to public expectations of good corporate ethics.⁴⁵

Third, self-regulation, unlike affinity-group regulation, pertains to the voluntary adherence to standards set by nongovernmental organizations (NGOs) concerned with specific issues,⁴⁶ such as encouraging corporate apologies.⁴⁷ These standards often establish baselines that allow corporations to act in the public interest without experiencing competitive disadvantage.⁴⁸

possessing considerable power and profoundly affecting all aspects of society from the local to the global.

Id.

39. *Id.* at 216 (arguing that the notion of corporations having a responsibility to serve the public interest is rooted in the fact that the earliest corporations were designed to meet certain public service objectives, such as building "turnpikes, railroads, and canals . . . and [stimulating] the growth of essential industries"). Epstein further argues, "It is ironic that modern society is only now returning to recognition of these societal objectives of corporate enterprise." *Id.*

40. *Id.* at 207 ("[I]t is the emergence of large scale business organizations in the last third of the nineteenth century within Europe and the United States that gave rise to concerns about corporate social responsibility . . .").

41. *Id.* at 210.

42. *Id.* at 212.

43. *Id.* at 210.

44. *Id.* at 210–11.

45. *Id.* at 211.

46. *Id.*

47. See *supra* note 16 and accompanying text.

48. See Epstein, *supra* note 28, at 211.

Fourth, Epstein characterizes ethical precepts as beliefs derived from religion, humanistic philosophy, social customs, mores, and traditions.⁴⁹ If one considers law as the least common denominator of the social contract,⁵⁰ ethical precepts operate above this common denominator and often inform the creation of the law.

Fifth, because it is often the first source of information about corporate wrongdoing, a vigilant and responsible media, Epstein argues, is central to promoting Good Companies.⁵¹ Critical media coverage can hold corporations accountable for illegal or unethical behavior.⁵² Alternatively, favorable media coverage can result in increased business activity through the cultivation of corporate goodwill and serve as a catalyst for the actualization of Good Companies.⁵³

Finally, Epstein argues that an engaged civil society is a mode of social control that can encourage socially responsible behavior from corporations.⁵⁴ While successful examples exist,⁵⁵ direct citizen action is not always effective in fostering the Good Company.⁵⁶

As noted earlier,⁵⁷ Epstein considers the CSR movement alone as inept at achieving the Good Company. This view, Epstein explains, is based not on any belief in the inherent malevolence of the corporate form, but rather on recognition of the structures that define the contemporary business environment—structures that corporations and their managers must abide by.⁵⁸ Epstein argues that an increasingly competitive globalized economy, driven by the Anglo-American modus operandi of short-term profit maximization,⁵⁹ encourages corporations to disregard the public's desire for ethical corporate behavior.⁶⁰ In this context, corporations are neither inherently good nor bad, but are manifestly able to

49. *Id.*

50. *Id.* at 211–12.

51. *Id.* at 212.

52. *Id.* (noting the role of the media in exposing corporate wrongdoing). Epstein highlights the disclosures relating to the Enron scandal and suspect marketing strategies relating to major pharmaceutical companies. *Id.*

53. *Id.*

54. *Id.*

55. See generally María Elena Durazo, *Making Movement: Communities of Color and New Models of Organizing Labor*, 27 BERKELEY J. EMP. & LAB. L. 235 (2006) (describing the successful efforts of hotel worker unionization and its positive effects on the working conditions of hotel employees).

56. See Epstein, *supra* note 28, at 212.

57. See *supra* note 33 and accompanying text.

58. See Epstein, *supra* note 28, at 212–13.

59. See Claire Moore Dickerson, *Culture and Trans-Border Effects: Northern Individualism Meets Third-Generation Human Rights*, 54 RUTGERS L. REV. 865, 878 (2002) (considering the adverse effect of corporations' singular focus on short-term profit maximization on good corporate ethics); see also Epstein, *supra* note 28, at 213.

60. Epstein, *supra* note 28, at 212–213.

amplify either on a large scale.⁶¹ Accordingly, given the origin of the corporation⁶² and its singular ability to affect the public good,⁶³ Epstein posits his modes of social control as the New Governance framework by which the Good Company can be achieved.⁶⁴

II. ADAPTING EPSTEIN'S NEW GOVERNANCE FRAMEWORK TO ADVANCE THE CORPORATE APOLOGY

A. Ethical Precepts and Apology

Although useful, Epstein's discussion of the six modes is insufficiently narrowly tailored to the use of the corporate apology. To more appropriately apply the modes to corporate apologies, this Article alters their order of importance. Because the power of an apology stems from its role as an ethical act,⁶⁵ and given the interdependence of law and ethics,⁶⁶ the ethics mode will be discussed first, followed by a discussion of

61. See Epstein, *supra* note 28, at 213–14; see also *supra* note 38 and accompanying text.

62. See *supra* note 39 and accompanying text.

63. See Pitts, *supra* note 12, at 380 (arguing that corporations occupy a unique role in their ability to affect significant social change). Pitts explains that since “a relatively small number of [corporations] represent[] a large proportion of global economic activity,” successful efforts to prevail upon corporate behavior can result in a significant social impact. *Id.*; see also David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 933 (2004) (advocating the adoption of New Governance approaches and arguing that the economic and political muscle of corporations uniquely position them to significantly impact the enjoyment of human rights). Kinley and Tadaki explain that the concerted efforts of myriad entities, from workers, states, and NGOs to the corporations themselves, are needed to highlight the behavior of corporations and to hold them accountable for such behavior. *Id.* at 934. The authors further argue that since corporations habitually compartmentalize their economic interests and good ethics as distinct and unrelated aspects of their interest, corporations habitually treat concern for good ethics as a peripheral matter. *Id.* at 1022. As such, the authors call on “every individual and every organ of society” to defend the value of ethics by prevailing upon corporations to conceptualize their economic bottom line and basic ethics as fundamentally inseparable. *Id.*

64. Epstein, *supra* note 28, at 220 (discussing the desire for more socially responsible corporations, Epstein writes that he envisions “better companies, or organizations that continuously seek to perform the economic functions for which society relies upon them in a manner that optimizes the firm's utility to the diverse stakeholders affected by their actions and minimizes the deleterious effects . . . of their operations.”).

65. See Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1138 (2000) (discussing the role that an apology could have played in the settlement of a medical malpractice case in which the author, Dean of Student Life at Harvard Divinity School, represented a deceased's wife and observing that an “apology is a complicated and courageous act, one rich in moral meaning.”). Taft further observes that such an expression “can facilitate forgiveness and the kind of healing my client desired.” *Id.*

66. See Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, <https://wiki.brown.edu/confluence/download/attachments/68354379/Friedman+article.pdf> (describing the social responsibility of the corporate executive). Friedman argues that this responsibility “is to conduct business in accordance with [the shareholder's] desires, which generally will be to make as much money as possible while conforming to the basic rules of

law. A discussion of the other modes of social control in a reconfigured order of importance, concluding with self-regulation, will then follow.

In view of apology's role as an ethical precept in action, an effective apology must first be properly defined. Authors differ as to what constitutes an effective apology. For example, Aviva Orenstein, one of the first legal scholars to consider the role of apology in corporate dispute resolution,⁶⁷ explained the attributes of an effective apology:

At their fullest, apologies should: (1) acknowledge the legitimacy of the grievance and express respect for the violated rule or moral norm; (2) indicate with specificity the nature of the violation; (3) demonstrate understanding of the harm done; (4) admit fault and responsibility for the violation; (5) express genuine regret and remorse for the injury; (6) express concern for future good relations; (7) give appropriate assurance that the act will not happen again; and, if possible, (8) compensate the injured party.⁶⁸

In their pioneering 1986 article discussing the role of apology in dispute resolution,⁶⁹ Hiroshi Wagatsuma and Arthur Rossett argue that a "meaningful apology" must communicate five essential components: (1) the harmful act happened, caused injury, and was wrongful; (2) the apologizer was at fault and regrets participating in the act; (3) the apologizer will compensate the injured party; (4) the act will not happen again; and (5) the apologizer intends to work for future good relations.⁷⁰ Jonathan R. Cohen, another legal scholar in the field of dispute resolution, identifies three elements of an effective apology: "(i) admitting one's fault, (ii) expressing regret for the injurious action, and (iii) expressing sympathy for the other's injury."⁷¹ For the purposes of this Article, an apology is defined as an expression of regret that acknowledges fault, is accompa-

the society, both those embodied in law and those embodied in ethical custom." *Id.* While Friedman formulates this argument as a response to the CSR movement, he fails to consider how ethical custom and the law interact. Indeed, he fails to consider that ethical custom and the laws are, in fact, interdependent. See, e.g., Cyrus Mehri, Andrea Giampetro-Meyer & Michael B. Runnels, *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability, and Workplace Fairness*, 9 *FORDHAM J. CORP. & FIN. L.* 395, 407 (2004); see also Epstein, *supra* note 28, at 212 (arguing that "[l]aw and ethics are not, of course, mutually exclusive and legal requirements frequently derive from and incorporate ethical precepts . . . what were ethical aspirations for business behavior in one generation frequently become legal requirements in the next").

67. See generally Orenstein, *supra* note 24.

68. *Id.* at 239.

69. See Wagatsuma & Rossett, *supra* note 15, at 461, 493.

70. *Id.* at 469-70.

71. Cohen, *supra* note 24, at 1014-15.

nied by steps ensuring that the harmful act will not occur again, and is coupled with compensation for the harmed party.⁷²

As noted earlier,⁷³ an apology functions, in fact, as an ethical precept given voice through action. Therefore, when offenders apologize for tortious behavior, “the offense and the intention that produced it are less likely to be perceived as corresponding to some underlying trait of the offender.”⁷⁴ Consequently, apologies influence beliefs about the general character of the offender, and when an apology is offered, the offender is viewed as having better character.⁷⁵ The apologetic offender will therefore be perceived as less likely to engage in similar offending behavior in the future.⁷⁶ Apologies also tend to reduce negative emotions, such as anger,⁷⁷ and increase levels of more positive emotions,

72. Wagatsuma & Rosett, *supra* note 15, at 487 (arguing that “[a]n apology without reparation is a hollow form,” and discussing the centrality of compensation to an apology).

73. Epstein, *supra* note 28, at 213.

74. Seiji Takaku, *The Effects of Apology and Perspective Taking on Interpersonal Forgiveness: A Dissonance-Attribution Model of Interpersonal Forgiveness*, 141 J. SOC. PSYCHOL. 494, 495 (2001); see Edward E. Jones & Keith E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, in 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 219, 222–36 (Leonard Berkowitz ed., 1965) (describing correspondent inference theory).

75. See, e.g., Bruce W. Darby & Barry R. Schlenker, *Children’s Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742, 746–52 (1982); Bruce W. Darby & Barry R. Schlenker, *Children’s Reactions to Transgressions: Effects of the Actor’s Apology, Reputation and Remorse*, 28 BRIT. J. SOC. PSYCHOL. 353, 360 (1989); Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291, 291–92 (2000); Marti Hope Gonzales et al., *Victims as “Narrative Critics”: Factors Influencing Rejoinders and Evaluative Responses to Offenders’ Accounts*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 691, 698 (1994); Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219, 219–24 (1989); Ken-ichi Ohbuchi & Kobun Sato, *Children’s Reactions to Mitigating Accounts: Apologies, Excuses, and Intentionality of Harm*, 134 J. SOC. PSYCHOL. 5, 11 (1994); Jennifer F. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressors*, 6 ACAD. PSYCHOL. BULL. 49, 49 (1984); Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY 281, 285–86 (1991).

76. See, e.g., Gold & Weiner, *supra* note 75, at 291–92; Ohbuchi et al., *supra* note 75, at 219–20; Orleans & Gurtman, *supra* note 75, at 52–53; Gary S. Schwartz et al., *The Effects of Post-Transgression Remorse on Perceived Aggression, Attributions of Intent, and Level of Punishment*, 17 BRIT. J. SOC. CLINICAL PSYCHOL. 293, 297 (1978); Weiner et al., *supra* note 76, at 285.

77. See, e.g., THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT’S RIGHT* 181–82 (2004) (discussing the role of anger as a catalyst for lawsuits).

The failure . . . to accept moral responsibility and apologize for [the offender’s] wrongs contributes to a burning, implacable resentment that finds its way into legal complaints. When the guilty and the responsible, the complicit and the neglectful, do not acknowledge that damage was done, do not express their regret and sympathy, and do not take account of their actions, insult is added to injury. And the resulting alchemy is lethal and toxic. Without an apology, why would anyone not resort to legal measures? The burden shifts to them to find their own means to reconcile—to stew, by themselves, without a word of compassion or repentance from the very people whom they need to hear from the most.

such as favorably viewing the offender.⁷⁸ Indeed, an illustrative example of a corporation delivering an effective apology in this vein is provided in the fallout of the 1996 Odwalla Corporation E. coli scare.

When Odwalla CEO Stephen Williamson received notice from the FDA that his company's apple juice was possibly linked to a deadly strain of E. coli, his first step was not to consult his attorney or summon the board of directors.⁷⁹ Rather, he accepted responsibility for the outbreak and ordered an immediate \$6.5 million recall of all suspected products.⁸⁰ Once the E. coli link was confirmed and illnesses were reported across the United States,⁸¹ Odwalla sales dropped 90% and stock prices fell 34%.⁸² Immediately after, Odwalla held a press briefing to discuss the linkage and share the expertise of their newly-created advisory council comprised of industry experts on food safety, microbiology, and regulatory issues implicated in the outbreak. Moreover, the company provided a forum for discussion of the implications of the outbreak on the fresh-fruit industry⁸³ and offered to pay the medical bills of those made sick by Odwalla's products.⁸⁴ The company also issued a statement expressing its sorrow over the death of a sixteen-month-old Colorado girl who experienced multiple organ failure due to an E. coli infection from apple juice, although it was unclear at the time whether an Odwalla product caused her illness.⁸⁵ Furthermore, company founder and Chairman Greg Steltenpohl visited the girl's family in addition to the other outbreak victims' families.⁸⁶ Odwalla is now the nation's leading

Id.; see, e.g., Mark Bennett & Deborah Earwaker, *Victims' Responses to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. SOC. PSYCHOL. 457, 462 (1994); Gold & Weiner, *supra* note 76, at 291-93; Ohbuchi et al., *supra* note 76, at 219-20; Takaku, *supra* note 74, at 495; Weiner et al., *supra* note 76, at 286.

78. See *supra* note 74 and accompanying text.

79. See Anni Layne, *How to Make your Company More Resilient: The Lessons Learned During Odwalla's 1996 E. coli Crisis Have Guided the Juice Company to Financial Recovery and Explosive Growth*, FAST COMPANY, Feb. 28, 2001, <http://www.fastcompany.com/articles/2001/03/odwalla.html> (examining the fallout of the Odwalla E. coli crisis).

80. *Id.*; see Nancy Brumback, *Officials Question Safety of Unpasteurized Juices*, SUPERMARKET NEWS, Nov. 11, 1996, at 35.

81. *E. Coli O157:H7 Strain in Odwalla Matches Current Outbreak*, BUS. WIRE, Nov. 5, 1996, http://findarticles.com/p/articles/mi_m0EIN/is_1996_Nov_5/ai_18833914.

82. See Layne, *supra* note 79.

83. See *Odwalla Expresses Ongoing Concern for Sick, Gratitude for Public Support*, NEWSWIRE, Nov. 3, 1996, <http://www.thefreelibrary.com/Odwalla+Expresses+Ongoing+Concern+for+Sick,+Gratitude+for+Public...-a018821116>; *Odwalla to Hold Press Briefing*, NEWSWIRE, Nov. 18, 1996, <http://www.thefreelibrary.com/Odwalla+To+Hold+Press+Briefing-a018860993>.

84. See Brumback, *supra* note 80, at 37.

85. Nancy Brumback, *E.coli Outbreak in West Claims Toddler as Victim*, SUPERMARKET NEWS, Nov. 18, 1996, at 31.

86. See Brumback, *supra* note 80, at 31.

fresh-juice distributor.⁸⁷ Reflecting on the survival and success of Odwalla, Williamson observed that

Odwalla didn't survive by accident. For fifteen years, we built a reservoir of goodwill in the Bay Area. When crisis struck, some of that goodwill drained away, but a lot of people still believed in Odwalla, partially because we never deceived or manipulated them. When things go bad, people want to look inside a company and to see whether its soul is good. Ours is.⁸⁸

While the above example properly frames the structure of what constitutes an effective corporate apology⁸⁹—and how such a responsiveness to the public's expectation of good corporate ethics may be good business,⁹⁰ some corporations may find little in this argument to be availing. Indeed, due to the risk that an apology may leave corporations

87. See Layne, *supra* note 79.

88. *Id.*

89. See Lee Taft, *On Bended Knee (With Fingers Crossed)*, 55 DEPAUL L. REV. 601, 615 (2006). Consistent with this Article's definition of an effective apology and treatment of an apology, per se, as an ethical precept in action, Taft refers to apology as "repentance" and argues that authentic repentance alleviates suffering because it adds this critical dimension of meaning to one who suffers. In its authentic expression, it acknowledges that a wrong has occurred and that it was not the claimant's fault. Repentance also offers compensation And, importantly, the final element of authentic repentance, restructuring, communicates that the party who committed the wrong has learned from the mistake and has effected a change in behavior or practice so that others will not be similarly harmed. Restructuring was the nonmonetary element that was of critical importance to [his] clients because, to the extent it served as a catalyst for change, it injected meaning into what might otherwise have been senseless tragedy. Knowing that others will not be similarly harmed matters.

Id.

90. This rationale was followed in the landmark case for corporate apologies, namely, the 1982 Tylenol scare, where a still-unidentified individual injected cyanide into Tylenol capsule bottles. After seven people died from ingesting the poison-laced capsules, Johnson & Johnson CEO, James Burke, delivered a sweeping apology to the public within hours of the first news of deaths and before the corporation was fully aware of where the cyanide originated. The first element of Burke's apology was to announce an immediate recall of all Tylenol capsules on the shelves nationwide. Burke then encouraged customers to return their Tylenol bottles in exchange for a voucher so that their customers would not risk injury. See Sarah Kellogg, *The Art and Power of the Apology*, WASH. LAW., June 2007, http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/june_2007/apology.cfm. The second part of the company's response was the decision by Johnson & Johnson to re-engineer Tylenol's product packaging to make their bottles tamper-proof. This comprehensive apology, which demonstrated that the company would do the right thing, created immediate, widespread, and lasting goodwill for Johnson & Johnson. Indeed, after settling with several families, Tylenol regained 70% of its market share within six months of the crisis, and it remains a trusted brand today. See, e.g., Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, 57 DISP. RESOL. J. 27, 82–83 (2002) (detailing the actions taken by Johnson & Johnson to address the Tylenol public relations crises).

open to liability,⁹¹ corporations may view these arguments as little more than a naive expectation for them to do good for goodness' sake. The corporate fear of the legal risks entailed in an apology, however, is justified.

B. Law and Apology

Epstein rightly expresses skepticism as to the law's ability to incentivize good corporate ethics. Indeed, regarding how courts may treat the corporate apology,⁹² the Federal Rules of Evidence effectively function

91. See ROSENBAUM, *supra* note 77, at 199 (referring to the offer of an apology as "moral behavior"). Rosenbaum laments the chilling effect that Federal Rule of Evidence 408 has on this behavior:

You do the right thing, and in the eyes of the law, you get punished. In the immediate aftermath of an accident, human beings shouldn't be thinking about how an act of human decency will later be perceived in a court of law. When a person is acting spontaneously, apologizes for his actions and shows concern, liability isn't, nor should it be, on his or her mind. The human element is furthered when attention is paid to humanity, not immunity. Yet the legal system robs this gesture of its moral force, and punishes those who bravely accept the legal pitfalls that arise from [offering an apology]. And insurance companies—the deep pockets in all of these actions, but not the entity that caused the actual harm—are focused entirely on presenting the best legal defense, which apparently is compromised if the insured says too much, or the wrong thing.

Id.

92. For an overview of the dispute resolution literature considering the proper relationship between apology and the law, see, e.g., William K. Bartels, *The Stormy Seas of Apologies: California Evidence Code Section 1160 Provides a Safe Harbor for Apologies Made After Accidents*, 28 W. ST. U. L. REV. 141, 156 (2001); Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545, 545 (2000); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 350–51 (2008); Cohen, *supra* note 24, at 1013; Fuchs-Burnett, *supra* note 90, at 27; Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 320 (2001); Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1122–23 (2002); Orenstein, *supra* note 24, at 221–23; Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 831 (2003); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 461–63 (2003) [hereinafter Robbennolt, *Apologies and Legal Settlement*]; 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, 1009–10 (2005) [hereinafter Robbennolt, *Role of Apologies*]; Michael B. Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 SAN DIEGO L. REV. 137, 139–40 (2009); Taft, *supra* note 65, at 1135–36; Wagatsuma & Rosett, *supra* note 15, at 478–79; Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1261–63 (2006); Lucinda E. Jesson & Peter B. Knapp, *My Lawyer Told Me to Say I'm Sorry: Lawyers, Doctors, and Medical Apologies*, 35 WM. MITCHELL L. REV. 1410, 1411–12 (2009); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1166 (1997); Jonathan R. Cohen, *Ethical Quandary: Advising the Client Who Wants to Apologize*, DISP. RESOL. MAG., Spring 1999, at 19; Schneider, *supra* note 22, at 265; William Bradford, "With a Very Great Blame on Our Hearts": *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 44 (2002); and Charles R. Calleros, *Conflict, Apology, and Reconciliation at Arizona State University: A Second Case Study in Hateful Speech*, 27 CUMB. L. REV. 91, 125 (1997).

as a disincentive to apologize.⁹³ Federal Rule of Evidence 801(d)(2) provides that an admission of fault by a party-opponent is “not hearsay” and, therefore, not excluded from admissibility by the hearsay rule.⁹⁴ Rule 801(d)(2) defines an admission by a party-opponent as “the party’s own statement, in either an individual or a representative capacity”⁹⁵ Consequently, even though an apology would fit the classical definition of hearsay as an out-of-court statement “offered in evidence to prove the truth of the matter asserted,”⁹⁶ the Federal Rules of Evidence treat it as non-hearsay and thus as admissible evidence.

In civil cases, which are the exclusive focus of this Article,⁹⁷ Federal Rule of Evidence 408 applies to “compromise and offers to compromise” and provides that “[e]vidence of . . . conduct or statements made in compromise negotiations” are inadmissible to prove liability for or inva-

93. See ROSENBAUM, *supra* note 77, at 186 (contextualizing the consequences of apologizing in the American judicial system). Rosenbaum laments that “[a]pologies are yet another example of the law’s forced separation between the legal and the moral. Morally we know we should apologize; legally we know that we are not obligated to, and that there may even be legal consequences to doing so.” *Id.*

94. FED. R. EVID. 801(d).

95. FED. R. EVID. 801(d)(2)(A). Rule 801(d)(2) provides that a statement is not hearsay if [t]he statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship

FED. R. EVID. 801(d)(2).

96. FED. R. EVID. 801(c).

97. There are several rationales for this. Rule 408 addresses only civil cases. As Cohen explained:

This is in contrast to most American evidence law which draws no distinction between civil and criminal cases. Further, criminal charges are brought by the state rather than the injured person. If the offender apologizes to the injured party in a civil case, this means that the defendant has apologized to the plaintiff. In a criminal case, that correspondence is severed. Criminal cases also present a risk of coerced confessions. As reflected in the Fifth Amendment right against self-incrimination, constitutional law has long been wary of the potential for the state to abuse its power and coerce confessions, both false and true.

Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 823 (2002) (footnotes omitted). As Justice Frankfurter expressed, involuntary confessions are excluded

not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 540–41 (1961) (citations omitted). In civil cases, there is typically little risk that a plaintiff will coerce a confession from the defendant, but in a criminal setting, that risk is quite real. Cohen, *supra*, at 823.

lidity of a claim or its amount.⁹⁸ The rationale for this rule is the “promotion of the public policy favoring the compromise and settlement of disputes.”⁹⁹ Therefore, an apology made during settlement negotiations generally should not be admissible to prove liability. There are, however, three significant limitations to the rule. First, an apology may be admissible to impeach a witness.¹⁰⁰ Second, the rule does not proscribe such evidence from being revealed to third parties.¹⁰¹ And third, apologies are only inadmissible if offered during “compromise negotiations.”¹⁰² All these limitations undermine the underlying policy priority

98. FED. R. EVID. 408. The rule provides in relevant part:

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority. (b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Id.

99. FED. R. EVID. 408 advisory committee’s note (citing Kenneth S. Broun, McCormick on Evidence §§ 76, 251, at 138–40, 431–44 (6th ed. 2006)); S. REP. NO. 93-1277 (1974) (“The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.”).

100. Rule 408 classifies evidence as inadmissible when used “to prove liability for, invalidity of, or amount of a claim.” FED. R. EVID. 408(a). Evidence may be offered for another purpose, such as “proving a witness’s bias or prejudice.” *Id.* Yet, courts have interpreted this language in a way to allow such evidence as admissible when used to impeach a witness. *See Cohen, supra* note 24, at 1013 (describing the impeachability inference as a loophole within Rule 408 that “may de facto swallow the rule”). The practical implication of this interpretation is that if an offender apologizes during settlement negotiations and denies doing so at trial, the apology may be deemed admissible. *Id.* at 1035. Consequently, if the reasoning behind Rule 408 is to provide parties with enough certainty so as to encourage them to speak freely without fear that their statements will be ruled admissible at trial, Rule 408 is unavailing.

101. *See Bolstad, supra* note 93, at 572–73 (arguing that Rule 408 offers “scant protection for apologies made during the course of mediation”). Bolstad contends that the revelation of an apology to third parties may result in the apologizer being forced to defend numerous other suits resulting from such revelation. *Id.* at 573.

102. This presents two problems: (1) It is not explicitly clear as to when a compromise negotiation has begun; and (2) although a sincerely apologetic offender may want to apologize immediately after the harm, Rule 408 does not clearly classify such an apology as inadmissible. FED. R. EVID. 408; H.R. REP. NO. 93-650, at 7081 (1974) (enacting a change to Rule 408 and reversing an earlier judicial practice that deemed statements offered in compromise negotiations admissible in subsequent litigation between the parties, the House Judiciary Committee notes that, “[f]or one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end”). Both of these problems effectually undermine the creation of the protected space between parties that Rule 408 considers essential to making private settlements more likely. *See Cohen, supra* note 24, at 1032–35.

that the rule contemplates.¹⁰³ Therefore, it would rarely be sound legal advice for a defense attorney to advise her client to deliver an apology that would then leave that client open to liability.

The movement to amend the law to protect apologies as a part of dispute resolution is growing.¹⁰⁴ Recognizing the value of apology, thirty-five states have enacted statutes designed to encourage apologies by providing evidentiary protections.¹⁰⁵ As state privileges, however, these statutes are not guaranteed deference in federal courts in cases involving federal causes of action. A 2004 federal district court decision, *Atteberry v. Longmont United Hospital*,¹⁰⁶ is a case in point. Noting that a state's evidentiary privilege should not be recognized or applied unless it promotes sufficiently important interests to outweigh the need for probative evidence, the court held that such a privilege does not bar discovery requests in a federal case involving pendent state jurisdiction.¹⁰⁷ Thus, defense attorneys will likely find little confidence in the reliability of state apology laws. As such, some scholars advocate the amendment of the Federal Rules of Evidence to proscribe apologies from admissibility.¹⁰⁸

103. See Cohen, *supra* note 24, at 1032–35.

104. See generally Stephen B. Goldberg et al., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 138 (5th ed. 2007); Cohen, *supra* note 24, at 1019; Orenstein, *supra* note 24, at 242–44; Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 180 (2000); Levi, *supra* note 92, at 1166. In addition to the strategic benefits of apologies for settlement, which is the focus here, a number of nonstrategic benefits of apologies in civil cases are also posited. Apologies may reduce negative emotions, repair relationships, fulfill a need to make reparations and to restore equity, make forgiveness possible, and facilitate psychological growth. Goldberg et al., *supra*, at 138; see also Cohen, *supra* note 92; Michael E. McCullough et al., *Interpersonal Forgiving in Close Relationships*, 73 J. PERSONALITY & SOC. PSYCHOL. 321, 324 (1997); Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151, 163 (1973); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 52–53 (2006); Charlotte vanOyen Witvliet et al., *Please Forgive Me: Transgressors' Emotions and Physiology During Imagery of Seeking Forgiveness and Victim Responses*, 21 J. PSYCHOL. & CHRISTIANITY 219, 228 (2002); see, e.g., Wagatsuma & Rosett, *supra* note 15, at 488 (considering the effects of amending Rule 408 to exclude apologies, they argue that “society at large might be better off and better able to advance social peace if the law, instead of discouraging apologies . . . by treating them as admissions of liability, encouraged people to apologize to those they have wronged and to compensate them for their losses”). See generally Runnels, *supra* note 92; see also FED. R. EVID. 408 advisory committee's note (discussing part of the rationale of excluding evidence of offers to compromise, the committee explains that “[t]he evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position”).

105. See *States with Apology Laws*, SORRY WORKS!, <http://www.sorryworks.net/default/resource-center/states-with-apology-laws> (last visited Oct. 26, 2010).

106. *Atteberry v. Longmont United Hosp.*, 221 F.R.D. 644, 646 (D. Colo. 2004).

107. *Id.* at 646–47.

108. See, e.g., Orenstein, *supra* note 24, at 247–48; Runnels, *supra* note 92, at 148. Arguing that Rule 408 should be amended to bring it in line with its underlying policy priority of encouraging parties to reach private settlement, Runnels details four specific ways in which the rule could be amended:

In response to Epstein's skepticism of the law's ability to incentivize good corporate ethics, not only are the aforementioned amendments capable of bringing Rule 408 more in line with its goal of promoting the "public policy favoring the compromise and settlement of disputes,"¹⁰⁹ but empirical evidence also suggests that apologies offered within these proposed evidentiary constraints can increase the likelihood that the apology will be accepted.¹¹⁰

C. Vigilant and Responsible Media and Apology

In an open and democratic society, Epstein considers the vigilant and responsible media mode of social control critical in ferreting out unethical—and illegal—corporate behavior.¹¹¹ Though discussed little in corporate law literature,¹¹² by shedding light on corporate malfeasance,

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- (1) defining compromise negotiations as attaching immediately after an injury; (2) rendering an apology offered during compromise negotiations undiscoverable; (3) proscribing the admissibility of such apology to impeach a witness; and (4) proscribing the revelation of such apology to third parties. Incorporating the aforementioned definition of compromise negotiations, [the] proposed Rule 408 would read:

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence made to any party, including any third party, in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority. (b) Permitted use. This rule does not require exclusion if the evidence is offered for purposes of proving an effort to obstruct a criminal investigation or prosecution.

Id.; see also *supra* note 105 and accompanying text.

109. See *supra* note 100 and accompanying text.

110. See Robbennolt, *Apologies and Legal Settlement*, *supra* note 92, at 490–91. When no apology was offered, 52% of participants indicated that they would definitely or probably accept the settlement offer, while 43% would reject it, leaving 5% uncertain. *Id.* When a partial apology (a "partial apology" is defined as an expression of remorse or regret without any admission of fault) was offered, 35% of participants were inclined to accept the offer, 25% were inclined to reject it, and 40% were uncertain. *Id.* When a full apology (a "full apology" is defined as an expression of regret that acknowledges fault and is coupled with compensation for the harmed party—a construction consistent with the definition of apology in this Article) was offered, 73% of participants were inclined to accept the settlement offer, with only 13–14% each rejecting the offer and remaining uncertain. *Id.* at 485–86.

111. See Epstein, *supra* note 28, at 212.

112. Despite pervasive references to media reports throughout corporate law scholarship, few scholars have written thorough accounts of the role of the media in corporate law. Scholars have, however, highlighted the role of the media in other areas of law. See generally Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091 (2004) (dis-

the media often initiates various corrective responses, whether judicial, legislative, administrative, or market imposed.¹¹³ Given the law's limited ability to affect good corporate governance, the media is well situated to incentivize ethical corporate behavior¹¹⁴ within a New Governance framework.¹¹⁵ Though media coverage in and of itself is unlikely to compel corporate apologies, there would not be certain corporate apologies but for the vigilance of a responsible media.

In the age of the twenty-four-hour news cycle, expanding airtime and the accompanying expanding pot of advertising dollars have created

cussing the media's role in the legislative process that ultimately led to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005); M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* 9 (1995). Arguing that books about communication and society rarely focus on law, while books about law focus on speech regulation and free expression, but little else, Katsh notes that "[s]cholars seem to view the powerful realms of law and media as distinct and independent, each having an impact on behavior and attitudes, but having little influence on each other." *Id.* See generally Michael J. Borden, *The Role of Financial Journalists in Corporate Governance*, 12 *FORDHAM J. CORP. & FIN. L.* 311 (2007) (providing a series of case studies that examine the role of the media in uncovering corporate wrongdoing).

113. See Epstein, *supra* note 28, at 212 (arguing that negative publicity can lead to the damage of company reputations, "governmental interventions, and legal liability and may result in loss of business").

114. See, e.g., Fleishman-Hillard Research & Nat'l Consumers League, *Rethinking Corporate Social Responsibility: Executive Summary*, May 2007, <http://www.efbayarea.org/documents/resources/general-resources/CSR-Executive-Summary-07.pdf>. This study was conducted as a follow-up study that was originally conducted in 2005 to measure consumer attitudes and behaviors regarding corporate social responsibility. *Id.* at 1. Furthermore, the organization tracked the role that the media and technology plays in educating consumers about corporate behavior. *Id.* After collecting and analyzing their specific data, the report revealed four themes: (1) "Americans expect corporations to be engaged in their communities in ways that go beyond just making financial contributions"; (2) "corporate America receives low marks for its CSR performance"; (3) "Americans believe that government should play a role in ensuring the social responsibility of corporations—in some industries more than others"; and (4) "[o]nline forms of communication continue to change the landscape in which consumers gather and communicate information about how well companies are being socially responsible." *Id.*

115. Michael Klausner, *The Limits of Corporate Law in Promoting Good Corporate Governance*, in *RESTORING TRUST IN AMERICAN BUSINESS* 91, 97–98 (Jay W. Lorsch, Leslie Berlowitz & Andy Zelleke eds., 2005). Klausner explains the shortcomings of corporate law and advocates an emphasis on extra-legal influences on governance, which is consistent with New Governance scholarship. *Id.* Klausner notes that professional norms are "fostered by the financial press every time they write a story that exposes bad board behavior . . ." *Id.* at 98; see also Borden, *supra* note 112, at 325–26. Borden, discussing the extra-legal role of the media in compelling corporate wrongdoers to act within ethical and legal norms, notes that

one of the functions of the press in enforcement is its role as an alternative or supplement to legal enforcement. To a degree, journalistic revelation of corporate malfeasance will in itself reduce the incidence of wrongdoing. This is accomplished in two ways. First, press coverage that brings to light a given instance of wrongdoing may actually put a stop to it. Second, in an environment of heightened and effective press coverage of fraud, would-be fraudsters will be deterred by a heightened likelihood of discovery of their actual or potential wrongdoing.

Id.

greater financial incentives for those reporters who cover important corporate topics. For example, Bethany McLean, a reporter with Fortune Magazine,¹¹⁶ spent two years researching the Enron Corporation story and ultimately signed a book-publishing deal with her co-author¹¹⁷ worth \$1.4 million.¹¹⁸ McLean is now a frequent television commentator on several news programs.¹¹⁹ Although McLean's reports did not lead to an apology from any of the convicted former Enron executives, such an enlightened self-interest can lead reporters to do well by doing good. In the current socioeconomic climate, however, the CEOs who are credited by the media with the financial collapse of 2008 are now finally offering apologies that many consider too little, too late.¹²⁰ Indeed, as this Article

116. See, e.g., Rebecca Smith & John R. Emshwiller, *Enron Prepares to Become Easier to Read*, WALL ST. J., Aug. 28, 2001, at C1; Rebecca Smith & John R. Emshwiller, *Enron Jolt: Investments, Assets Generate Big Loss—Part of Charges Tied to 2 Partnerships Interests Wall Street*, WALL ST. J., Oct. 17, 2001, at C1; Rebecca Smith & John R. Emshwiller, *Partnership Spurs Enron Equity Cut—Vehicle is Connected to Financial Officer*, WALL ST. J., Oct. 18, 2001, at C1; Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller, *Enron Transaction Raises New Questions—A Company Executive Ran Entity that Received \$35 Million in March*, WALL ST. J., Nov. 5, 2001, at A3; Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, and Now to Its Distress—Impenetrable Deals Have Put Firm in Position Where it May Lose Independence—Talks with Rival Dynegy*, WALL ST. J., Nov. 8, 2001, at A1; Rebecca Smith & John R. Emshwiller, *Running on Empty—Enron Faces Collapse As Credit, Stock Dive, and Dynegy Bolt—Energy-Trading Giant's Fate Could Reshape Industry, Bring Tighter Regulation—Price Quotes Suddenly Gone*, WALL ST. J., Nov. 29, 2001, at A1.

117. BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM* (2005).

118. Eric Celeste, *The Claim Game*, DALLAS OBSERVER, Apr. 4, 2002, <http://www.dallasobserver.com/2002-04-04/news/the-claim-game>.

119. McLean has appeared on numerous occasions on THE NEWS HOUR WITH JIM LEHRER, ENRON CEO ON THE STAND, April 17, 2006, and elsewhere.

120. Howard Kurtz, *Media Notes: Tiger Woods, Akio Toyoda and the imperfect art of the apology*, WASH. POST, Mar. 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/28/AR2010022803715.html>. Describing what he considers the deficiency of the apology offered by Toyota CEO, Akio Toyoda, in front of a congressional panel, Kurtz sets the stage:

Toyoda initially [declined] the congressional invitation even though he had repeatedly apologized for the defective cars his company has pumped out. He was likely to get pounded in the coverage after being grilled by outraged lawmakers. Once Toyoda bowed to the pressure, his PR folks shrewdly leaked his testimony a day in advance They also placed a piece [in] the Wall Street Journal . . . in which Toyoda vowed to build "the safest vehicles in the world." He did not deliver a boffo performance on the Hill; Toyoda kept consulting his staff and reading from notes as he offered mostly boilerplate answers, or pleaded ignorance, through an interpreter.

Id.; see also Editorial, *Who's Not Sorry Now?*, N.Y. TIMES, Apr. 10, 2010, <http://www.nytimes.com/2010/04/11/opinion/11sun1.html>. Arguing that the apologies offered for the financial collapse of 2008 by former Citigroup executives, Charles O. Prince III and Robert E. Rubin, did not admit any responsibility, the Editors wrote that

Mr. Prince says he "could not" foresee the impending collapse, when he could have and should have seen it coming. Certainly, others did. Mr. Rubin has said that under his employment agreement, he was not responsible for the bank's operations. But he was a to-

suggests, any apology that is not accompanied by steps ensuring that the harmful act will not occur again, and is not coupled with compensation for the harmed parties, is quite likely ineffective.¹²¹

D. Self-Regulation and Apology

Epstein defines the self-regulation mode of social control as the voluntary adherence to standards set by NGOs concerned with specific issues.¹²² These standards often establish baselines that allow corporations to act in the public interest without experiencing competitive disadvantage.¹²³ In the area of dispute resolution between corporations and individuals, the Sorry Works! Coalition¹²⁴ is the nation's foremost advocacy organization for the corporate apology.¹²⁵ The Coalition discredits the "deny and defend" ethos promulgated by defense attorneys¹²⁶ and advocates a use of apology consistent with the one advocated in this Article.¹²⁷ Accordant with Epstein's characterization of the self-regulation mode of social control,¹²⁸ the Coalition's approach to the role of apology is now gaining adherents who are realizing the economic benefits of apology. For example, in 2002, the University of Michigan Health System adopted the Coalition's approach, sharing the findings with patients and families, apologizing, and when appropriate, offering compensation. The system reports that it has cut litigation costs in half and seen the filing of new claims fall by more than 40%.¹²⁹ Although anecdotal, the

wering figure at Citi, a source of its credibility and prestige. That implies responsibility, no matter what his contract said. Add all that to the "I wasn't the only one" context of both men's comments, and their regret translates as, "We feel bad about an accident we were powerless to prevent."

Id.

121. See *supra* note 120 and accompanying text.

122. See Epstein, *supra* note 28, at 211.

123. See Epstein, *supra* note 28, at 211.

124. See *supra* note 16 and accompanying text.

125. See *supra* note 16 and accompanying text.

126. See *supra* note 18 and accompanying text.

127. *Id.* at 345 (suggesting that the elements of full disclosure are apologizing to the patient, admitting fault, providing an explanation of what happened, providing an explanation of how the hospital will prevent reoccurrence, and offering up-front compensation); DOUG WOJCIESZAK, JAMES W. SAXTON & MAGGIE M. FINKELSTEIN, *supra* note 17, at 26–65 (discussing steps to managing an adverse event, implementing an institutional disclosure policy, and apologizing).

128. See *supra* Part I.

129. Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, 2 J. HEALTH & LIFE SCI. L. 125, 137–47 (2009) (detailing empirical data that shows when doctors admit to medical error and compensate their patients quickly and fairly when such an error causes injury, the number of new medical malpractice claims decrease dramatically, resulting in significant monetary savings); see also Peter Geier, *Emerging Med-Mal Strategy: "I'm Sorry,"* NAT'L L.J., July 14, 2006, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005458743&slreturn=1&hblogin=1> (noting

Coalition's work serves as an effective "proof of concept" that may help to inform and inspire similar efforts to encourage the corporate apology.

III. REVISITING EPSTEIN'S NEW GOVERNANCE FRAMEWORK

Epstein rightly characterizes the modern CSR movement as simply unequipped to incentivize good corporate ethics.¹³⁰ Indeed, part of this deficiency is rooted in the conventional debate between those arguing that corporations ought to do good for goodness sake and those viewing such do-gooding as inherently lost in translation if not tied to the corporate bottom line.¹³¹ Irrespective of these normative debates, many critics now view the modern CSR movement as effectively co-opted by corporate marketing strategies.¹³² Epstein envisions an ethical corporation not as an organization responsive to a nebulous CSR movement but as an organization subject to certain modes of social control.¹³³

Although Epstein effectively describes the modes that function as catalysts for good corporate ethics, his contention that each mode must be used individually to incentivize good corporate ethics¹³⁴ robs the framework of the flexibility it needs to scrutinize a narrower set of goals. For instance, in the area of dispute resolution between corporations and individuals, an affinity group for corporations dealing solely with dispute resolution does not exist. Indeed, given the confounding variables that typify the controversies faced by different corporate industries, the likelihood of a corporate affinity group crafting norms of dispute resolution that apply to each industry is unlikely. Similarly, the engaged civil society mode of social control plays a more efficient role by informing a vigilant and responsible media¹³⁵ and, through the political process, electing individuals who will consider those laws that can incentivize corporate apologies.¹³⁶ Certainly, Epstein's prescribed order of importance for his modes of social control is similarly unequipped to incentivize corporate apologies.¹³⁷

A New Governance approach would emphasize function over form and link the appropriate mode(s) of social control with the specific chal-

a drop in claims against the University of Michigan despite an increase in hospital activity every year after implementing the Sorry Works! Program).

130. See Epstein, *supra* note 28, at 212–13 (contextualizing the modern CSR movement as inherently insufficient in its goal of encouraging good corporate ethics).

131. See *supra* note 8 and accompanying text.

132. See *supra* note 12 and accompanying text.

133. See generally Epstein, *supra* note 28.

134. See Epstein, *supra* note 28, at 211–12.

135. By way of example, an engaged citizen may be a whistleblower who exposes corporate malfeasance.

136. See *supra* Part II. B.

137. See *supra* Part II.

lenge facing corporations.¹³⁸ Such an approach provides a more nuanced framework with which to approach disputes as they arise and play out “on the ground.” Indeed, a context-specific adaptation of Epstein’s modes of social control creates a New Governance framework that provides a rational, systemic alternative to the “deny and defend” ethos advanced by defense attorneys—an ethos that all too often leads to avoidable lawsuits.¹³⁹

IV. CONCLUSION

In the current socioeconomic climate, the public increasingly expects to see corporations take responsibility for their actions. Reading the dispute resolution and New Governance literatures together suggests alternative perspectives from which to consider the corporate apology. In the context of dispute resolution, Epstein’s modes of social control, working in tandem with his vision of the socially responsible corporation, provide a catalyst for discussions that seek to promote ethical corporate behavior.

By applying Epstein’s vision of how corporations function within certain modes of social control to the area of dispute resolution between corporations and individuals, this Article demonstrates that his prescribed use of the framework inhibits the function the framework is intended to serve. Adapting Epstein’s framework in a manner consistent with a New Governance approach allows the flexibility needed to address the utility of the corporate apology. This Article provides this flexibility and, by considering ways to incentivize the corporate apology, posits that good ethics can be good business.

138. See *supra* note 26 and accompanying text; see also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 38–39 (1992) (arguing that the adoption of a strategy that allows the changing of regulatory instruments in light of circumstances may be the most effective approach at influencing corporate behavior).

139. See, e.g., ROSENBAUM, *supra* note 77, at 193. Characterizing the reflex of defense attorneys for “warfare,” Rosenbaum argues that

[I]lawyers reflexively resort to warfare, yet the best victory could avoid fighting altogether and has a chance of repairing relationships and preventing people from walking away as ticking bombs A sincere, artful apology defuses anger An apology makes it possible to remove the hurt and indignity that underlies the insult of almost every lawsuit.

Id. at 191. Discussing how the role of apology is viewed by attorneys as anathema to their modus operandi, Rosenbaum quotes a longtime plaintiff’s lawyer who claims to never seek apologies on behalf of his clients: “We’re in the business of redress, the business of seeking justice under the justice system. The role of the tort system is compensation, not apology.” *Id.*; see also *supra* notes 18–20 and accompanying text.