



**Digital Commons@**

Loyola Marymount University  
LMU Loyola Law School

Loyola of Los Angeles Law Review

---

Volume 42  
Number 1 *Symposium: The Fifth Remedies*  
*Discussion Forum*

Article 2

---

9-1-2008

## Damages as Reconciliation

W. Jonathan Cardi

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

### Recommended Citation

W. J. Cardi, *Damages as Reconciliation*, 42 Loy. L.A. L. Rev. 5 (2008).

Available at: <https://digitalcommons.lmu.edu/llr/vol42/iss1/2>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# DAMAGES AS RECONCILIATION

*W. Jonathan Cardi\**

*One of tort law's chief aims is to repair the loss wrongfully suffered by one party at the hands of another. Yet the mechanism of repair—forced transfer of money—often leaves both parties dissatisfied. This Article explores the possibility of a tort system that includes reconciliation as one of its goals and considers the role of court-ordered damages in such a system. The Article suggests that direct efforts by courts to encourage reconciliation might ultimately further the goals of tort law, as well as produce the collateral effects of reducing administrative costs, insurance premiums, and damage verdicts.*

I have learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realised that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul.

—Gandhi<sup>1</sup>

## I. INTRODUCTION

As a young lawyer practicing in South Africa, Gandhi came to understand his role as that of a peacemaker. In his view, a lawyer's work is to reconcile parties to one another, to help each see the other's point of view, to guide the parties toward compromise, and ideally to have them part as friends.<sup>2</sup> Gandhi was apparently quite successful at facilitating reconciliation, despite working within a

---

\* Dorothy Salmon Chair and Associate Professor of Law, University of Kentucky. The author would like to thank David Partlett, Russ Weaver, and the other participants of the Emory Remedies Roundtable for their valuable contributions to this Article.

1. MOHANDAS GANDHI, AN AUTOBIOGRAPHY 112 (1983).

2. THOMAS WEBER, CONFLICT RESOLUTION AND GANDHIAN ETHICS 3 (1991). [http://www.mk Gandhi.org/conflict\\_reso/chap04.htm](http://www.mk Gandhi.org/conflict_reso/chap04.htm).

British-style adversarial legal system and no doubt despite the fact that a majority of his colleagues at bar did not share his approach.

Today, in America, Gandhi's notion of legal representation seems quaint. Our legal system does not seek reconciliation between parties to a lawsuit. Rather, it seems geared to achieve exactly the opposite. Our code of ethics counsels "zealous" advocacy above all else,<sup>3</sup> and truth and justice are reached not via compromise but through the clash of opposing arguments.<sup>4</sup> Indeed, one might reasonably wonder whether parties to an American tort suit would welcome reconciliation at all. Ours is a fiercely individualistic society, and increasingly so. Many of us do not know or care to know our neighbors, let alone the face at the other end of a fender bender. Our lives are built around competition and a rights-based entitlement philosophy<sup>5</sup> that leads us more likely to cite Kant (if metaphorically) than to focus on amicable settlement and the restoration of social balance.

Our legal system—and this Article focuses specifically on the tort system—does offer some concessions toward reconciliation. Judges often postpone trial proceedings in light of potentially fruitful settlement negotiations. Some courts also require (by statute or local rule) supervised mediation before setting a trial date.<sup>6</sup> But the core of tort law—tort doctrine, its corresponding enforcement mechanisms, and its underlying goals—does not embrace reconciliation as a primary end.<sup>7</sup> Rather, tort law is typically

---

3. See MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980) ("A lawyer should represent a client zealously within the bounds of the law."); see also MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1 (1983) ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause . . . . The law, both procedural and substantive, establishes the limits within which an advocate may proceed.").

4. Dean Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147, 147 (2002).

5. See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 150–95 (1977).

6. See KATHRYN VAN WEZEL STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 859 (2000) ("Several states, including Texas, Florida, and California, require parties to engage in mandatory mediation before they can obtain a trial in certain types of civil cases."); see also Marilyn Peterson Armour & Mark S. Umbreit, *The Paradox of Forgiveness in Restorative Justice*, in HANDBOOK OF FORGIVENESS 492 (2005) (explaining that in the criminal context, Victim Offender Mediation (VOM) programs, Victim Offender Reconciliation Programs (VORP), and Victim Offender Mediated Dialogue (VOMD) are increasingly used as a means of voluntary restorative justice).

7. See DAVID G. AUGSBURGER, CONFLICT MEDIATION ACROSS CULTURES 193 (1992) (asserting that litigation is "an alienating and estranging foray into a public forum that adjudicates but does not mediate [or reconcile], concludes but does not connect, and coerces but does not

associated with a mix of corrective justice and instrumental goals. According to some, tort law is primarily (or even exclusively) concerned with providing legal enforcement of an individual's moral obligation to repair a loss wrongfully inflicted on another.<sup>8</sup> This obligation is not typically understood to encompass a duty to reconcile. To others, tort law is merely a tool used by the state to achieve goals such as the efficient spreading of loss, risk reduction, or the regulation of industrial versus individual interests.<sup>9</sup> Although reconciliation might not be conceptually inconsistent with these traditional aims,<sup>10</sup> it is generally regarded as a personal rather than a legal matter, or at least as outside the pragmatic reach of the law.

Nonetheless, Gandhi's approach to law might deliver to tort victims and wrongdoers something that is missing from the current order—a richer sense of justice, wholeness, and closure that many participants report lacking at the close of legal proceedings.<sup>11</sup> In addition, reconciliation might serve as the key to a number of confounding correlative problems. Perhaps tort law's failure to embrace reconciliation explains its insufficient ability to deter risky behavior.<sup>12</sup> Perhaps the corresponding refusal by parties to compromise results in higher administrative costs and damage verdicts, and consequently in higher insurance premiums.<sup>13</sup> Perhaps

---

resolve the dispute or the pain of the disputants"); see also Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 856 (2003) ("Courts, however, are not concerned with emotional harmony" but with "adjudicating rights, rather than on repairing relationships . . . ." (quoting Jonathan Cohen, *Advising Clients to Apologize*, 72 S. Cal. L. Rev. 1009, 1042 (1999))).

8. See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 570 (2003).

9. See, e.g., Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 180–201 (2004) (describing commonly ascribed tort goals).

10. See *infra* Part III and accompanying notes.

11. See generally E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990) (reporting on an empirical study of tort litigants evaluating their experiences with the courts and their satisfaction with the outcome of their cases).

12. See generally Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (questioning the ability of tort law to deter dangerous conduct).

13. Cf. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 487–88 (1986) (comparing Japanese and American cultural approaches to certain injuries—including defamation, insult, degradation, and the loss of status—and asserting that apologies often correspond with lower damages awards). I do not mean to imply that liability insurance premiums are high exclusively or even primarily due to exaggerated tort verdicts. In fact, the cause of spikes in insurance premiums remains unclear. See, e.g., Matthew Parrott, *Is Compulsory Court-Annexed Medical Malpractice*

tort participants' failures at self-reliance lead to a problematic overreliance on experts.<sup>14</sup> And perhaps our failure as lawyers to embrace Gandhi's notion of the law is what leads the public to its general loathing of lawyers and its dissatisfaction with the tort system.

This Article explores the possibility of a tort system that includes reconciliation as one of its goals and considers the role of court-ordered damages in such a system. Part II defines the scope of reconciliation advocated in this Article and considers the role of reparation in reconciliation. Part III notes reconciliation's central part in mediation and examines the reasons underlying the divergent aims of mediation and litigation. Part IV discusses the possibility of state-encouraged reconciliation and then proposes some ideas for reform in this regard.

## II. THE ROLE OF REPARATION IN RECONCILIATION (AND VICE VERSA)

Several years ago, a mother accompanied her son and his Boy Scout troop to a shooting range for a lesson in firearms safety and marksmanship. While an instructor at the range demonstrated the workings of his pistol with the boy, the gun discharged, killing the boy instantly before his mother's very eyes. The boy's parents did not seek criminal prosecution, nor did they sue the instructor for negligence. Instead, on the following day, the boy's parents forgave the remorseful instructor and invited him to sit at their side during the boy's funeral. They explained that although the death of their son was nearly unbearable, the prospect of harboring anger and resentment toward another in relation to that death was only more so.<sup>15</sup>

---

*Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution*, 75 *FORDHAM L. REV.* 2685, 2708 (2007) (suggesting that although the true cause of the medical malpractice insurance crisis is unclear, likely causes include "cyclical pricing and investment practices of insurance companies" (citing Heather Brann, *Utah's Medical Malpractice Prelitigation Panel: Exploring State Constitutional Arguments Against a Nonbinding Inadmissible Procedure*, 2000 *UTAH L. REV.* 359, 359 (footnote omitted) (2000))). If tort verdicts are higher than they might otherwise be, however, such a difference seems likely to translate in some fashion into higher insurance premiums.

14. See WEBER, *supra* note 2, at 4.

15. This story was related to the author by a friend of the boy's family.

This astonishing story seems to embody the kind of reconciliation that Gandhi contemplated when he spoke of a desire to bring about a reunification or friendship between parties “riven asunder” by the events that gave rise to legal action.<sup>16</sup> One definition of *reconcile* in *Webster’s Dictionary* mirrors at least an aspect of Gandhi’s sentiment: “to win over to friendliness; cause to become amicable.”<sup>17</sup> This is not the sense in which the term *reconciliation* is used in this Article, however. It is not the function of the state to concern itself with friendship and amicability. Among other things, such aims would likely exceed the state’s police power and offend basic norms of liberty and privacy.

Nonetheless, the reconciliation sought by the Boy Scout’s parents hints at something that is within the reach of the law. The most immediate goal of a tort remedy is to make the victim whole, to return the victim as near as possible to his or her pre-tort condition.<sup>18</sup> Tort victims are often harmed physically, emotionally, and financially, and each of these harms is, with some constraints, compensable in damages. But a tort victim is also harmed in a social sense.<sup>19</sup> Upon the Boy Scout’s death, one imagines that his parents felt betrayed by the firearms instructor and, as a result of that betrayal, felt that their sense of place and safety within the social fabric was shaken. Each of us, when subject to wrongdoing, feels a schism with the offending person and often with the greater community. Tort theorists account for this social harm as one of several justifications for a state-imposed remedy—that is, tort as a form of personal and social retribution,<sup>20</sup> or as a corrective return to the pre-tort equilibrium between tortfeasor and victim.<sup>21</sup> Social harm

---

16. See *supra* notes 1–2 and accompanying text.

17. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1612 (Barnes & Noble Books, 1996).

18. Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 775 (1985).

19. See, e.g., JEFFRIE G. MURPHY, GETTING EVEN, FORGIVENESS AND ITS LIMITS 35 (2003) (“When I am wronged by another, a great part of the injury . . . is the insulting or degrading message that has been given to me by the wrongdoer: the message that I am less worthy than he is, so unworthy that he may use me merely as a means or object in service to his desires and projects.”).

20. See generally Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177 (2006) (discussing the role of retributive justice in tort law).

21. See ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56–83 (1995) (describing Aristotle’s original notions of “corrective justice”).

is not compensable as a sum of damages, however, nor is it addressed by any other remedy.<sup>22</sup> Even if damages were available for social harm, money is particularly unsuited for such repair.<sup>23</sup> Reconciliation is a way of repairing such injury, a means of making the tort victim whole.

The term *reconcile* has evolved from the Latin word *reconciliare*, which means “to make good again” or “repair.”<sup>24</sup> In addition to the definition previously mentioned, *Webster’s* defines the modern term as “to cause (a person) to accept or be resigned to something not desired,” “to compose or settle,” and “to bring into agreement or harmony.”<sup>25</sup> These definitions begin to capture the sense in which this Article considers reconciliation. Ultimately, reconciliation consists of letting go of the negative emotions associated with another—emotions such as pain, anger, resentment, and vindictiveness. More immediately, reconciliation is a reparation of the social rift created by wrongful behavior, a correction of the marred social equilibrium. It redresses both the harm felt by the tort victim and the guilt, remorse, and alienation often felt by the tortfeasor.<sup>26</sup> Reconciliation is, in many cases, a return of each party to his or her pre-tort state of mind with regard to the other and to society generally.

---

22. Although a jury might take social harm into account when assigning an award for emotional damages, most jury instructions explain emotional damages in terms of pain and suffering, psychological illness, or general grief for corporeal loss. See, e.g., Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DEPAUL L. REV. 399, 399 (2006) (explaining that the typical emotional harm award is “meant to compensate for things like the physical pain and suffering that goes along with a physical trauma, the emotional harm that can come from an injury to one’s self or a loved one, the disappointment or embarrassment arising from one’s changed appearance or altered abilities to engage in pleasurable activities and favorite pastimes as a result of an injury, the harm to one’s dignity or one’s health from being wrongly injured by another, and so on”). Of course, social harm of a different type is compensable—the harm to reputation caused by defamation and the analogous harms inherent in invasion-of-privacy torts. Ingber, *supra* note 18, at 819.

23. Cf. Daniel Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 182 (2000) (“In a limited sense, damages for tangible loss undo the harm; damages for intangible loss cannot make a similar claim.”).

24. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY, *supra* note 17, at 1612.

25. *Id.*

26. Cf. Armour & Umbreit, *supra* note 6, at 492 (“[The related concept of forgiveness] can release the victim from the negative power of the crime, raise the offender back to the status of a human being, facilitate the offender’s reintegration into the community, restore the victim’s peace of mind, and potentially contribute to the victim’s mental and physical health.” (citations omitted)).

In fleshing out this concept further, it is helpful to consider what reconciliation is not. To reconcile is not to deny, forget, or excuse a wrongdoer's conduct or the fact that harm occurred. Reconciliation also does not imply or require any release from accountability. In fact, as noted below, reconciliation is typically not possible without acceptance of responsibility by the wrongdoer.<sup>27</sup> Nor does reconciliation, as it is conceived in this Article, require the resumption of trust or any personal relationship with the other party going forward. This latter understanding departs from common intuitions and many psychological explanations of the concept.<sup>28</sup> Reconciliation in the tort context, however, must be unique. Its focus must be to repair social harm, not to foster positive relations. Because the parties to a tort suit typically did not know one another *ex ante*, reconciliation might simply result in the resumption of the parties' relationship as fellow citizens going their separate ways.<sup>29</sup> Where parties did have a preexisting relationship, reconciliation might lead to a return to closer ties, but it need not. Reconciled parties might instead settle for an amicable, but not intimate, association or no association at all.<sup>30</sup>

Reconciliation, as articulated in this Article, is similar to forgiveness, a term also frequently used to refer to a letting go of the negative emotions of anger and vindictiveness parties may feel toward one another.<sup>31</sup> The concepts are not identical, however.

---

27. See *infra* Part II.D.

28. See, e.g., Caryl E. Rusbult et al., *Forgiveness and Relational Repair*, in HANDBOOK OF FORGIVENESS, *supra* note 6, at 187 (“[R]econciliation, [is] defined as the resumption of pretransgression relationship status. . . . [T]he two most important considerations in understanding reconciliation center on restoring *commitment* . . . and *trust* . . . .”) (emphasis in original).

29. It is interesting to note that in the restorative justice context, one study showed that 18 percent of participants were willing (or had already begun) to have additional social contact with one another. Armour & Umbreit, *supra* note 6, at 496.

30. One might argue that such a “reconciliation” would not constitute a complete repair of the harm done by the tort. Even if this is true, such is the point at which the law’s desire to compensate must reach its limit. This author would counter, however, that one might experience a healing of social harm without a return to the trust, admiration, and special bond that is friendship.

31. See, e.g., MURPHY, *supra* note 19, at 13 (defining forgiveness in this way); Michelle Cardy et al., *Self-Esteem Moderates the Response to Forgiveness Instructions Among Women with a History of Victimization*, 41 J. PERSONALITY RES. 804, 805 (2007). The precise meaning of *forgiveness* is a matter of much debate in psychological and philosophical literature. See, e.g., Julie Juola Exline et al., *Forgiveness and Justice: A Research Agenda for Social and Personality Psychology*, 7 PERSONALITY & SOC. PSYCHOL. REV. 337, 338–40 (2003). Nonetheless, most psychologists concur that “forgiveness involves a conscious decision—while acknowledging the



Forgiveness is primarily an internal state, often closely associated with one's moral virtues.<sup>32</sup> Although reconciliation often follows the adoption of a certain internal state, its focus is predominantly social. Thus, one might achieve some level of reconciliation with another in the absence of forgiveness.<sup>33</sup> One might also forgive without engaging in the social act of reconciliation.<sup>34</sup>

Several elements provide the groundwork for reconciliation of the type contemplated here. Although these elements are not in all cases prerequisites to reconciliation, they are likely found where parties have reconciled. And even with the presence of each of these elements, reconciliation might not take place. Ultimately, reconciliation is the product of self-determination and of effective communication between parties. Tort law cannot impose such a result; it can only influence the conditions from which reconciliation might spring. These conditions are as follows:

#### *A. Resolution of the Dispute*

In the legal context, some dispute resolution is necessary before reconciliation is possible. Resolution may take the form of compromise and settlement, or it may consist of a trial verdict. The importance of this element lies in its finality and its effect as social validation of the victim's claim.

#### *B. Apology*

In order for reconciliation to occur, the wrongdoer typically must accept responsibility for the wrongful act and the resulting

---

seriousness of the wrong—to release or forego bitterness and vengeance.” *Id.* at 339 (citation omitted).

32. MURPHY, *supra* note 19, at 13; see Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1132 (2002) (“Forgiveness is a primary object of apology. It precedes apology’s ultimate object: reconciliation . . . [F]orgiveness is also an intra-psychic phenomenon of cognitive restructuring that can occur independent of both an apology and the victim’s external manifestations of forgiveness.”).

33. Outside the legal context, on the other hand, complete reconciliation may require complete forgiveness. See Ervin Staub, *Constructive Rather Than Harmful Forgiveness, Reconciliation, and Ways to Promote Them after Genocide and Mass Killing*, in HANDBOOK OF FORGIVENESS, *supra* note 6, at 445 (“Forgiveness and reconciliation can both vary in degree. The two processes seem intertwined. Some degree of forgiveness, of letting go of fear and anger, may be required for reconciliation to begin.”).

34. See MURPHY, *supra* note 19, at 14–15 (offering, as an example, the case of a battered woman who forgives her aggressor but refuses to have any further contact with him).

harm and must offer some expression of regret or remorse.<sup>35</sup> The causal association of apology with settlement and reconciliation is well documented.<sup>36</sup> In fact, apology is often a tort plaintiff's chief aim, with legal action serving only as a backstop to the wrongdoer's failure to apologize.<sup>37</sup> Apology fulfills a number of the victim's psychological needs, including "restoring self-respect and dignity, assuring victims that the offense wasn't their fault, allowing victims to feel secure that the offense won't happen again, validating the victims' experience, and evening the score."<sup>38</sup> Apology also allows the victim to identify with the offender (because everyone has experienced the pain of shame and remorse), which often creates a bond between them.<sup>39</sup> We have all experienced the "near instantaneous erosion of anger and pain" that follows a wrongdoer's sincere apology, an emotional reaction often quite unwanted and

---

35. Lee Taft, *Apology Within a Moral Dialectic: A Reply to Professor Robbenolt*, 103 MICH. L. REV. 1010, 1012 (2005) ("What elevates [apology] to a truly moral and corrective communication is the offending party's willingness to accept the consequences that flow from the wrongful act."). Taft argues that "the willingness to accept consequences [is] an act of moral courage, which can inspire healing in both the party harmed as well as in the offender." *Id.* at 1012, n.14. See, e.g., O'Hara & Yarn, *supra* note 32, at 1132. In some cases, an apology must also include assurances that the wrongful conduct will not happen again. *Id.* at 1135.

36. See generally ELAZAR BARKAN & ALEXANDER KARN, *TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION* (2006) (examining the role of apology as a social force); AARON LAZARE, *ON APOLOGY* (2004) (analyzing the power of apology to restore broken relationships); NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* (1991) (exploring apologetic discourse as a means of resolving conflicts); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999) (arguing that lawyers should discuss with their clients the possibility of apology more frequently); Suzy Fox & Lamont E. Stallworth, *How Effective Is an Apology in Resolving Workplace Bullying Disputes?*, 61 DISP. RESOL. J. 54 (2006) (reporting results of an empirical study showing that apology greatly increases the likelihood of quick and inexpensive resolution of workplace disputes); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994) (reporting empirical results in which tenants were shown to be more likely to accept settlement offers from landlords when the offer was accompanied by an apology); Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001) (arguing that apologies should be incorporated into the resolution of legal disputes); Jennifer K. Robbenolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003) (reporting a positive association between apology and settlement based on an empirical study of hypothetical settlement offers); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997) (exploring the conditions under which apologies can be effective as a resolution to a dispute).

37. E.g., O'Hara & Yarn, *supra* note 32, at 1124; Shuman, *supra* note 23, at 180.

38. Brent White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1274 (2006).

39. Armour & Umbreit, *supra* note 6, at 497.

outside our control.<sup>40</sup> Apology also serves the wrongdoer by helping to assuage guilt and restore self-image, and by opening the door to social reacceptance.<sup>41</sup> Thus, by attending to the psychological needs of both parties and by signaling a commitment to cooperation on the part of the offender, apology lays the path for reconciliation.<sup>42</sup>

### C. Communication Between the Parties

Because reconciliation is the restoration of a social equilibrium, it is helpful for the parties to communicate directly with one another.<sup>43</sup> Face-to-face interaction is not always necessary (e.g., an exchange of letters might suffice), although such meetings have proven to be an integral part of the restorative-justice movement in criminal law.<sup>44</sup> When wrongful acts and injury are tied to a voice and a face, each party is more able to identify with the other, and empathy is sometimes the result.<sup>45</sup> In the same sense, communication facilitates understanding of the other party's motivations and actions, another factor that paves the way for reconciliation.<sup>46</sup>

### D. Reparations

One of the most important preconditions to reconciliation is that the offender make tangible reparations of the victim's injury.<sup>47</sup> In the

---

40. O'Hara & Yarn, *supra* note 32, at 1124.

41. Latif, *supra* note 36, at 292-95.

42. See O'Hara & Yarn, *supra* note 32, at 1168.

43. See, e.g., Von J. Christiansen, *Ritual and Resolution: The Role of Reconciliation in the Mediation Process*, 52 DISP. RESOL. J. 66, 71 (1997) (noting that the healing power of mediation can only happen once the parties "face real human beings, not distant, demonified, exaggerated constructs").

44. See Latif, *supra* note 36, at 292-93.

45. Cf. Armour & Umbreit, *supra* note 6, at 497 ("Apology stimulates emotional dissonance and humility, which allows victims to recognize their own transgressions and respond on the basis of commonalities rather than differences.").

46. Cf. *id.* at 498 ("[E]mpathy-based forgiveness results in more forgiveness than does non-empathy-based forgiveness."); Ervin Staub et al., *Healing Reconciliation, Forgiving and the Prevention of Violence After Genocide or Mass Killing: An Intervention and Its Experimental Evaluation in Rwanda*, 24 J. SOC. & CLINICAL PSYCHOL. 297, 301 (2005) ("Understanding how the other has become a perpetrator may facilitate acceptance, but may not by itself lead to forgiving [and reconciliation].") (citation omitted).

47. See O'Hara & Yarn, *supra* note 32, at 1136 (arguing that an apology is only effective with an offer of repair); see also Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433, 438 (2006) (listing elements for a genuine apology, which include offering appropriate reparation); Shuman, *supra* note 23, at 185 (citing a Japanese study

tort context, such reparations will typically consist of money damages. Repair of the tort victim's injury is essential for two primary reasons. First, psychologists have long evaluated individuals' well-being according to a hierarchy of needs. For most people, physical health and income<sup>48</sup>—needs addressed by tort damages—exist higher in the hierarchy than does the need for social balance.<sup>49</sup> Thus, physical and financial repair must typically occur before reconciliation may follow. Second, the offering of reparations by the wrongdoer is a strong sign that apology, remorse, and the desire to reconcile are real and not manufactured. Without assurances that the offender is genuine, few victims are willing to walk the path of reconciliation.

#### *E. Acceptance of Apology and Reparations by the Victim*

Because reconciliation is a two-party endeavor, it often requires not only apology and reparations, but also an acceptance of those offerings by the tort victim.<sup>50</sup> Acceptance, as it is conceived here, is not synonymous with forgiveness. It is a purely social act. Although some level of forgiveness might accompany acceptance, acceptance might also occur without forgiveness. For example, the Boy Scout's parents might have accepted the firing instructor's apology, his remorse, and any reparations he offered, yet still may have needed time to forgive his actions. Such acceptance is important nonetheless because it is emblematic of the tort victim's desire to reconcile with

---

showing that negative emotions often did not resolve, even after apology, without accompanying reparations).

48. The importance of income is solely as a precondition to food, clothing, and shelter.

49. See generally Abraham Maslow, *A Theory of Human Motivation* (1943), reprinted in *MANAGEMENT AND MOTIVATION*, 27–41 (V.H. Vroom et al. eds., 1970) (setting forth a theory of hierarchy of needs).

50. See Christiansen, *supra* note 43, at 75 (“For healing to occur, however, ritual demands that the conciliatory gesture of the offering party be recognized, and the attempts at restoration accepted.”); James R. A. Merrick, *Justice, Forgiveness, and Reconciliation: The Reconciliatory Cross as Forgiving Justice*, 30 *EVANGELICAL REV. OF THEOL.* 292, 304 (2006) (“Ultimately, however, reconciliation is a two-way street . . . . Those who scorn and reject forgiveness reject not only the restoration of the relationship and their responsibility . . . , but also the opportunity to be transformed and reconciled.”); O’Hara & Yarn, *supra* note 32, at 1123 (“These desires to apologize and to receive forgiveness are themselves important human emotions that can enable a transgressor to overcome the conflicting emotions of shame and humiliation to press for reconciliation.”).

the offender. The act also promotes healing on the part of the victim by virtue of its altruism.<sup>51</sup>

### F. Motivation

Finally, even with all other conditions fulfilled, parties will not reconcile without sufficient motivation. Sometimes, the negative emotions and the promise of their repair provide a sufficient stick and carrot. Such negative emotions might also, however, work at cross-purposes with the need to reconcile because the very anger or shame that reconciliation is meant to cure may cause one to resist it. Thus, in some cases, additional incentives toward reconciliation prove useful. Furthermore, in the litigation context it is not only the parties that are often in need of motivation, but also their attorneys.<sup>52</sup> The rather challenging topic of motivating both the parties and their attorneys to seek mediation is addressed further in Part III below.<sup>53</sup>

## III. RECONCILIATION IN MEDIATION

Reconciliation among parties is one of the primary goals of mediation.<sup>54</sup> In Texas, for example, where mediation is mandated by statute, mediation is defined as “a forum in which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them.”<sup>55</sup> The goal of reconciliation in mediation is typically more

---

51. See Lazare, *supra* note 36 at 1 (“One of the most profound human interactions is the . . . accepting of apologies. Apologies have the power to heal humiliations and grudges . . .”).

52. See Levi, *supra* note 36, at 1188 (noting that attorneys typically impose a “certain rational calculation on every subsequent move,” putting strategy and competition ahead of the client’s need for apology and reconciliation).

53. See *infra* notes 72–78 and accompanying text.

54. See Deborah A. Schmedemann, *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, 9 INDUS. REL. L.J. 523, 594 (1987) (“‘Mediation tends to heal wounds, not just pay for bandages.’ Thus mediation holds promise as a means of reconciling—not just patching over—differences among labor, management, and employees arising under labor contracts.”); James D. Yellen et al., *Mediation Redux: Now More Than Ever Suggestions for Practitioners*, 1554 PLI/CORP 325, 337 (2006) (citing a common sample “Rules for Mediation” to explain that “[m]ediation is a process in which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them”). Reconciliation is also often the focus of international negotiation. See, e.g., Hilary K. Josephs, *The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation*, 18 EMORY INT’L L. REV. 53 (2004) (discussing the efficacy of apology in the international and comparative context).

55. Robert K. Wise, *Mediation in Texas: Can the Judge Really Make Me Do That?*, 47 S. TEX. L. REV. 849, 851 (2006) (citing the Texas ADR Act).

comprehensive than the concept promoted in this Article because it often encompasses a concern for the parties' future relationship.<sup>56</sup> Even with such ambition, however, mediators report frequent success in achieving some level of reconciliation.<sup>57</sup>

The rate at which cases are mediated rather than resolved in court has increased dramatically in recent decades.<sup>58</sup> Parties sometimes mediate their disputes voluntarily, but increasingly, they are compelled to do so by contract, court order, or statute.<sup>59</sup> The increased use of mediation stems largely from a desire to reduce the burden of litigation on the court system.<sup>60</sup> It also reflects both an awareness that the litigation process leaves many participants unsatisfied and a collective desire that people work out their disputes in a more constructive fashion.<sup>61</sup> In light of these general sentiments and the express objectives of mediation, the increase in court-ordered and statutorily required mediation suggests that reconciliation is already more important to our legal system than an examination of litigation alone might suggest.

The real question is why the two divergent paths. Why is reconciliation central to mediation but irrelevant to litigation? One answer is historical. America's adversarial litigation system was inherited from England and embraced by our competition-driven society.<sup>62</sup> Interparty conflict resolution has never been a formal part

---

56. Dwight Golann, *Is Legal Mediation Really a Repair Process? Or a Separation?*, 19 ALTERNATIVES TO HIGH COST LITIG. 171, 171 (2001) ("One of mediation's most valuable qualities is its reputed ability to repair broken relationships—even to bring about emotional reconciliation—between disputing parties.").

57. *See id.* at 186–87 (describing the results of an empirical study in which mediators reported achieving some form of reconciliation in approximately 47 percent of cases).

58. Wise, *supra* note 55, at 849 ("The use of alternative dispute resolution ("ADR") has increased exponentially during the last thirty years."); *see* Linda R. Singer, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 165 (2d ed. 1994) (describing an increase in mandatory mediation).

59. *See, e.g.*, Ark. Code Ann. § 16-7-101 (1995); 735 Ill. Comp. Stat. Ann. 5/2-1001A (2008); 42 Pa. Cons. Stat. Ann. § 7361 (2007).

60. *See* UNIF. MEDIATION ACT, Prefatory Note (amended 2003), 7A U.L.A. 105 (Supp. 2005) ("Mediation fosters the early resolution of disputes . . . [,] diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society.").

61. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005) ("It is the policy of this state to encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation through voluntary settlement procedures.").

62. *See generally* Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713 (1983) (describing the history and development of the adversary system).

of such a system. Indeed, quite the opposite is true—it is conflict that drives our litigation process.<sup>63</sup> Mediation arose largely as a reaction to the more caustic aspects of litigation, which include the almost warlike mentality that litigation breeds among its participants—a mentality not particularly conducive to reconciliation.<sup>64</sup>

Perhaps a more obvious explanation for the divergence stems from the nature of the remedy offered by each approach. In court, the remedy is a decision concerning liability determined by a third party (a judge or jury), followed by a forced transfer of resources from one party to another. In mediation, the remedy is a voluntary agreement between the parties, unspoiled by the threat of enforcement. Although the prospect of liability and forced transfer often nudges litigating parties toward settlement, the mediation process is much more amenable to the type of communication and cooperation that leads to reconciliation.

Neither of these explanations, however, precludes reconciliation from becoming a part of the litigation process—both indicate only that reconciliation does not naturally arise in an adversarial system. This Article does not take the position that mediation is preferable to adversarial litigation, or that the two systems ought to merge, or even that they ought to adopt the same ultimate goals. The Article does, however, urge that courts can and should embrace reconciliation as one of the law's central goals in litigation, particularly in tort cases. The following section examines the viability of the adoption of

---

63. There is no Platonic reason that the law had to develop in this way. Feminists have critiqued this aspect of the law as embodying an unduly male, rights-based approach to legal issues. See generally Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (advocating alternatives to traditional “male” legal reasoning); Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 845–46 (2004) (citing a study of women lawyers that found that “many interviewees ascribed an ‘ethic of competition’ to the still male-dominated legal culture, especially in litigation, where the adversarial system compels lawyers ‘[l]ike football players or armed warriors, . . . to compete with the serious aim of defeating the opposing side.’ . . . [Whereas] female attorneys subscribe more to an ‘ethic of care’ and ‘tend to shy away from the most adversarial arenas in the law and to gravitate toward those forms of practice that are most consultative and conciliatory’ . . . .” (quoting MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* 10–11, 128–33, 129, 150 (1994))).

64. See Symposium, *Teaching a New Paradigm: Must Knights Shed Their Swords and Armor to Enter Certain ADR Arenas?*, 1 CARDOZO ONLINE J. CONFLICT RESOL. 3, 3 (2000) (“The parties are called opponents and the process is one that takes on the characteristics of a battle. The sides frequently view themselves as warriors. . . . [T]here is still little expectation of cooperation and collaboration when engaged in the adversarial arena termed the legal system.”).

reconciliation methods by courts and explores several possible changes to the law's method of remediation in an effort to implement such an approach.

#### IV. TORT DAMAGES AS RECONCILIATION

Because reconciliation has the potential to repair social injury, its positive utility seems apparent. In the context of tort law, however, one might legitimately question the degree to which reconciliation can mix with existing instrumental and corrective justice goals. Taking the latter first, reconciliation seems to be fairly consistent with an Aristotelian account of corrective justice. Aristotle believed that the purpose of the law is to "correct" wrongs by restoring the pre-wrong equilibrium between wrongdoer and victim.<sup>65</sup> Reconciliation serves this corrective purpose to the extent that it restores the pre-tort social balance between parties. Indeed, one might argue that thus understood, corrective justice remains incomplete without some measure of reconciliation between the parties.

Similar reasoning might apply to modern expressions of Aristotle's basic premise. If one views tort law as a means of legal enforcement of a moral obligation to repair a wrongfully inflicted loss,<sup>66</sup> it does not seem too extravagant to suggest that a wrongdoer's moral obligation of repair includes an obligation to right a social wrong in addition to any physical, emotional, or financial wrongs. (After all, it is our common fourth-grade-playground moral obligation to apologize and make up after one has bounced another from the teeter-totter.) Pursuant to the most recent spin-off of corrective justice, known as civil recourse theory, tort law is seen as a means of empowering wronged parties to seek redress.<sup>67</sup> Primarily a descriptive theory, civil recourse does not address the proper scope of redress, but rather implies that redress is defined by the courts over time.<sup>68</sup> Thus, it seems that a civil recourse theorist might

---

65. See WEINRIB, *supra* note 21.

66. See Goldberg, *supra* note 8, at 577.

67. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 739 (2003) ("[T]he very question of whether the defendant will be held liable is a question of whether the plaintiff is genuinely entitled to an avenue of recourse—to an action—against the defendant.").

68. *Id.* at 700.



concede that courts may choose to give plaintiffs standing to seek redress for the social harm that reconciliation helps to repair.

An exhaustive analysis of reconciliation's fit with the many instrumentalist goals of tort law<sup>69</sup> is quite beyond the scope of this Article. Reconciliation likely serves many instrumentalist ends, however. In addition to helping to make tort victims whole, a tort system that embraces reconciliation might generate lower transaction costs than traditional litigation, reduce the possibility of further legal strife between the parties, and better deter future tortious behavior. This last point has been studied in the context of apology, a precondition to reconciliation.<sup>70</sup> In the criminal and corporate contexts, for example, court-ordered apology has been shown to promote specific deterrence by shaming the offender and by harnessing the psychological phenomenon known as cognitive dissonance.<sup>71</sup> Court-ordered apology has also been shown to promote general deterrence by reinforcing social norms.<sup>72</sup> Similar results have been found in the context of forgiveness (another concept related to reconciliation), the theory being that receiving forgiveness "may motivate offenders to reciprocate goodwill through improved behavior and reparations."<sup>73</sup> If such findings are accurate, then one would expect to see similar results in the context of reconciliation.<sup>74</sup>

---

69. See King, *supra* note 9 and accompanying text.

70. See generally White, *supra* note 38, at 1287 (explaining that cognitive dissonance maintains that each of us has a psychological need for our beliefs, feelings, and actions to be consistent and that if these cognitions are inconsistent, one experiences psychological pain and is motivated to return to consonance). In the context of apology, the theory is that "being compelled to apologize for wrongdoing without feeling sorry could be a first step in cognitively acknowledging wrongdoing and in adjusting one's future actions and attitudes to conform to this new belief." *Id.* at 1288.

71. *Id.* at 1288.

72. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 367-68 (1999); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1814-17 (2001).

73. Exline et al., *supra* note 31, at 340. Exline et al. cite a study by Kelln and Ellard that showed that participants who received forgiveness were more likely to comply with future related behavioral demands than those who received retribution. See *id.* at 340. Exline et al. also suggest, however, that a number of variables might cause forgiveness to backfire in some cases. See *id.* at 341.

74. See O'Hara & Yarn, *supra* note 32, at 1136 (asserting that apology and reconciliation may "increase the likelihood that the transgressor will reform her behavior").

Even if reconciliation rests easily with other common goals of tort law, a number of practical objections must be considered. First, one might argue that the law is poorly suited to tinker with the opaque workings of private, interpersonal relationships. This is a real concern, as the law has often proven unsuccessful in such undertakings.<sup>75</sup> Imposing reconciliation on parties to a tort suit might even violate constitutional privacy and First Amendment norms. This Article does not, however, advocate forced reconciliation (were such a thing even possible). Rather, it urges courts to cultivate the conditions pursuant to which parties might themselves choose to reconcile or at the very least to mitigate the aspects of litigation that hinder the efforts by parties toward reconciliation.

Nonetheless, it is possible that any move toward state-encouraged reconciliation might backfire. Reconciliation is a delicate animal, its success dependent in some measure on the spontaneous altruism of the parties involved. If courts meddle too deeply, they may quell spontaneity, and the parties may re-entrench. Even a person predisposed to reconciliation might withdraw if pushed to reconcile. Similarly, state-facilitated reconciliation might in some cases be hollow and leave parties with more, not less, disutility. There is some evidence—again, primarily in the context of apology and forgiveness—that state-enforced altruism suffers from three faults: (1) it is ineffective because it is not sincere,<sup>76</sup> (2) it undermines the moral value of genuine altruism,<sup>77</sup> and (3) it can, in some circumstances, harm victims by exacerbating their negative emotions and feelings of self-worth,<sup>78</sup> by interfering with their own

---

75. One example that comes to mind is where the law has sought to discourage divorce. *See e.g.*, RESTATEMENT (FIRST) OF CONTRACTS § 584 (1932) (barring prenuptial agreements or other contracts made in contemplation of divorce for public policy reasons). One wonders how many unhappy, not to mention abusive, relationships have been prolonged by such laws.

76. *E.g.*, White, *supra* note 38, at 1293 (“Many legal scholars have argued against compelled apologies in criminal cases and against strategic apologies in civil cases by asserting that an insincere apology is worthless.”).

77. *See* Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1147 (2000) (arguing that court-ordered apology loses its moral dimension because it is “not prompted by remorse, but rather by the incentive offered by the court to reduce the penalty imposed”).

78. *See, e.g.*, Armour & Umbreit, *supra* note 6, at 493 (“[F]or many individual victims, terms such as forgiveness and reconciliation are interpreted as devaluing their criminal victimization or as judging their legitimate anger and rage as inappropriate . . . . [T]he more one talks about these concepts, the more likely they will be heard as behavioral prescriptions, and the less likely victims will participate and have the opportunity to experience elements of *forgiveness* and *reconciliation*.”). *See generally* Cardi et al., *supra*, note 31 (presenting a study in which

moral compass, and even by increasing the likelihood that they will be re-victimized in the future.<sup>79</sup> It is important to keep each of these concerns in mind when considering the manner in which courts encourage reconciliation.

The following paragraphs offer several ways that courts might make reconciliation a part of the litigation landscape. The first is to recognize explicitly a separate category of damages for social harm. This recognition serves three purposes. First, it puts the norm-enhancing imprimatur of the state on the importance of social reparation.<sup>80</sup> Second, in the absence of specific repair of social harm (via reconciliation), damages provide a second-best means of making the victim whole. And third, the potential for a separate cache of damages would create specific leverage for tort victims to use in bargaining for apology and efforts toward reconciliation. The recognition of such damages would of course meet strong objections, including concerns regarding potential double recovery and the amorphous nature of social harm. Tort law has found doctrinal ways to address these concerns in the context of recovery for emotional harm, however.<sup>81</sup> Social harm would not present a qualitatively different challenge.

A second possibility is to create a formal mechanism by which a losing tort defendant has the option to offer an apology in return for a reduction in damages. It is important to condition such remittitur on the plaintiff's assessment of the apology's value and the plaintiff's willingness to accept the exchange. One potential criticism of such a mechanism is that it adds little to what the parties might otherwise bargain for in settlement negotiations. What it adds, however, is the law's endorsement of such a bargain and a formal mechanism

---

victims with high self-esteem displayed more negative affect when counseled to forgive their perpetrators).

79. See, e.g., MURPHY, *supra* note 19, at 80 (questioning the wisdom of counseling victims to forgive their transgressors because it might make them more likely to remain victims); Armour & Umbreit, *supra* note 6, at 497 ("Coerced apologies that are perceived as lacking authenticity raise concerns about re-victimization. It can also turn a potentially healing process into something mechanical and offensive. Because even weak or indirect apologies influence the willingness to forgive, it is important to recognize strong social norms that encourage victims to accept an apology, regardless of its strength." (citations omitted)).

80. Cf. White, *supra* note 38, at 1281 ("Compelled apologies not only have the power to reinforce moral and legal norms, they could also transform those norms.").

81. See, e.g., Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751, 751-52 (describing causes of action for negligent and intentional infliction of emotional distress).

pursuant to which parties might feel more comfortable in reaching an agreement. This proposal is also subject to the criticism leveled against court-ordered apologies—that it runs the risk of encouraging insincerity and pressuring otherwise unwilling victims to forgive.<sup>82</sup> Although these concerns should not be taken lightly, there is substantial evidence that “plaintiffs accept negotiated apologies as valuable and treasured parts of settlements, even when they know that the apology is insincere.”<sup>83</sup> As Dan Shuman explains, “compelling even an insincere apology and forgiveness reinforces an important social ritual and encourages wrongdoers to take responsibility for their actions; moreover, accepting an apology, even ritualistically, encourages victims to learn to forgive . . . .”<sup>84</sup> Furthermore, courts already compel or reward apologies in certain contexts.<sup>85</sup> Some states also seek to facilitate apologies by denying their admissibility as evidence of a defendant’s fault.<sup>86</sup> Again, however, the purpose of this proposal is not to compel apology or the victim’s acceptance of an apology, but merely to supply a forum and an additional incentive for reconciliation. The ultimate choice remains with the parties.

A third proposal is that in ordering the payment of tort damages, courts ought to use their equitable powers to compel delivery of payment directly from the tortfeasor to the victim. Such orders would, of course, be conditioned upon feasibility and the victim’s willingness. Also, in order to guard against the potential for further confrontation, delivery might be accompanied by an officer of the

---

82. See *supra* notes 75–79 and accompanying text.

83. White, *supra* note 38, at 1296.

84. Shuman, *supra* note 23, at 187.

85. See, e.g., Stephanos Bibas & Richard A Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 93 (2004) (citing U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.3 (2003), which authorizes judges to consider a defendant’s acceptance of responsibility when issuing sentences); Latif, *supra* note 36, at 296–98 (offering a number of examples of court-ordered apology); White, *supra* note 38, at 1269 (urging court-ordered apologies in civil rights cases and citing other scholarship urging the same in other civil contexts).

86. See, e.g., COLO. REV. STAT. § 13-25-135(1) (2003) (protecting apologies of health-care providers from being admissible as statements against interest in civil actions or arbitration proceedings brought by an alleged victim of an unanticipated outcome of medical care); OKLA. STAT. ANN. tit. 63 § 1-1708.1H (West 2004) (protecting apologies of certain health-care providers from being admissible as statements against interest in medical malpractice cases); OR. REV. STAT. § 677.082(1) (2003) (protecting apologies of any person licensed by the Oregon Medical Board from being considered admissions of liability for any purpose); see also Shuman, *supra* note 23, at 188 (discussing a Massachusetts statute that shields defendants from having their apologies used against them and incentivizes apologies to mitigate harm).

court. The purpose of compelled in-person compensation is twofold. First, it makes more immediate the reality that the victim is being compensated by the wrongdoer. Compared to compensation by check or wire transfer, the victim might feel greater satisfaction that the social imbalance has been righted, and the wrongdoer might feel a more palpable release that she has fulfilled her obligation of repair. Second, the direct contact between parties in the context of ritualistic reparation might provide an opportunity for more substantial steps toward reconciliation.

Courts might also take steps to encourage reconciliation that are not connected to the remedial process. Judges might, for example, expressly endorse the possibility of reconciliation upon the filing of a complaint and just before the commencement of trial proceedings. Courts might also encourage or even require meetings between the parties without their attorneys but in the presence of a court-appointed mediator. Finally, in an even more radical move, courts might offer parties the option of having their dispute mediated, rather than tried by a jury.

## V. CONCLUSION

This modest Article is meant to begin a discussion about the value of reconciliation in tort cases and the means by which tort remedies might encourage reconciliation. In light of the hazards involved when seeking to influence interpersonal relations, steps in this direction must be taken deliberately and with the benefit of continual study. Although a systematic overhaul of the tort system thus seems unlikely (and unwise), for courts to embrace reconciliation as an important consideration in tort cases is both possible and desirable.