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The Immorality of Denial

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The Immorality of Denial

Jonathan R. Cohen*

This Article is the first of a two-part series critically examining the role of lawyers in assisting clients in denying responsibility for harms they have caused. If a person injures another, the moral response is for the injurer actively to take responsibility for what he has done. In contrast, the common practice within our legal culture is for injurers to deny responsibility for harms they commit. The immoral, in other words, has become the legally normal. In this Article, Professor Cohen analyzes the moral foundations of responsibility-taking. He also explores the moral, psychological, and spiritual risks to injurers who knowingly deny responsibility for harms they have caused.

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Not everything that is faced can be changed, but nothing can be changed until it is faced.1

I. INTRODUCTION

Somewhere between childhood and adulthood, our society, in part through our legal system, dismantles one of life’s most basic moral lessons. If a child injures another, good parents will teach that child to take responsibility for what he has done. If an adult injures another and goes to a lawyer, the usual focus is on precisely the reverse: denial. The goal is to avoid responsibility or, if that is not possible, to minimize liability. To see how morally bizarre this common practice is, imagine instead that the adult injurer were to see a minister or psychologist. It is nearly axiomatic that such professionals would try to help the injurer face what he has done and take responsibility for it. The benefits to the injured party notwithstanding, from the viewpoint of the injurer’s moral and psychological development, embracing responsibility for harms one has caused is critical. Indeed, it is hard to imagine a more basic ethical dictate or psychological prescription than voluntarily assuming responsibility when one has harmed another. Yet our legal system typically encourages denial. The immoral has become the normal. Although frequently, but not always, denial benefits injurers economically, this path of moral regression poses significant psychological and spiritual risks for injurers.

This Article is the first of a two-part series, and it may be useful to provide an overview of the entire argument. My overall enterprise is to critically examine the practice of lawyers assisting clients in denying responsibility for harms they have caused. This Article explores the foundational moral question, “What are the ethical obligations of a person who injures another?”2 In response, I argue that injurers have a moral obligation to take responsibility for harms they commit. Further, I argue that, possible economic benefits notwithstanding, those who deny responsibility for such harms face significant psychological and spiritual risks. In the second part of this series, the

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1. Although commonly attributed to the author James Baldwin, to the best of my knowledge, there is no specific text indicating Baldwin made this statement. See, e.g., Taunya Lovell Banks, Exploring White Resistance to Reconciliation in the United States, 55 Rutgers L. Rev. 903, 964 n.1 (2003) (attributing this statement to Baldwin). Baldwin did write, “To defend oneself against a fear is simply to insure that one will, one day, be conquered by it; fears must be faced.” James Baldwin, The Fire Next Time 26-27 (1995).

2. By “person” I include “legal persons” such as corporations, though sensitivity is needed regarding differences between individual and organizational “persons.” See infra note 59 and accompanying text.
focus switches from the client to the lawyer. There I argue that, given the psychological and spiritual risks posed by denial, lawyers should discuss more often with clients the possibility of responsibility-taking. I also address aspects of our legal and social cultures that may help support the practice of legal denial. These include economic incentives encouraging denial, dispute resolution mechanisms encouraging denial, the role of legal education in training lawyers to be complicit in denial, and broader aspects of social construction supporting legal denial, such as cultural individualism and social denials of structural injustices like conquest and racism.

A few words about the scope and approach of the overall project may be in order at the outset. In terms of scope, I will focus on civil cases rather than criminal cases. This is not because the concept of responsibility-taking has no place in criminal law, but because criminal law implicates distinct issues. These include the Fifth Amendment right against self-incrimination and related concerns about inquisitorial examination and coerced confessions, the gravity of human liberty (as reflected in the different burdens of proof in criminal versus civil cases), and the State, rather than the injured person, as a party to criminal cases. Furthermore, different legal ethics rules (e.g.,


governing prosecutors\(^6\)) and, most fundamentally, different rationales occur in the civil versus criminal settings.\(^7\) Thus, I caution against carrying, by rote, arguments made here concerning the civil setting into the criminal realm.\(^8\)

In terms of approach, the arguments presented here and in the follow-up work are examined through the individualistic framework of what is often called “zealous advocacy.”\(^9\) It is not my goal to provide a critique of that framework or, in the main, to argue against denial based upon social reasons such as the costs of denial to the injured party and to society.\(^10\) I do this for several reasons. First and foremost, properly understood, nothing within the concept of zealous advocacy precludes conversations between lawyers and clients about responsibility-taking. Indeed, the reverse is true: devoted lawyers, who wish to serve their clients as best they can, should consider

6. See Model Rules of Prof’l Conduct R. 3.8 (2001) (setting forth the responsibilities of a prosecutor). Comment 1 provides, “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” Id. R. 3.8 cmt. 1.

7. Though some resist such distinction, many legal ethics scholars view the criminal and civil settings as quite different. Compare, e.g., Stephen L. Pepper, The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities, 1986 Am. B. Found. Res. J. 613, 621-22 (resisting differentiation), with Murray L. Schwartz, The Zeal of the Civil Advocate, in THE GOOD LAWYER: LAWYER’S ROLES AND LAWYER’S ETHICS 150, 156 (David Luban ed., 1983) [hereinafter THE GOOD LAWYER] (supporting differentiation). For a debate on the matter, see generally William H. Simon, The Ethics of Criminal Defense, 91 MICH. L. REV. 1703 (1993), and David Luban, Are Criminal Defenders Different?, 91 MICH. L. REV. 1729 (1993). Overall, I support the view that legal ethics should be tailored for different aspects of legal practice, both in terms of subject area (e.g., criminal versus civil) and activity (e.g., advocacy versus negotiation). I also agree with the concern that visions of the need for zeal by defense attorneys conducting trials mistakenly dominates our thinking about legal ethics in other domains. See Carrie Menkel-Meadow, The Limits of Adversarial Ethics, in ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION 123, 128 (Deborah L. Rhode ed., 2000); Murray L. Schwartz, The Professionalism and Accountability of Lawyers, 66 CAL. L. REV. 669, 670-71 (1978) [hereinafter Schwartz, Professionalism].

8. See infra text accompanying notes 186-188.

9. Despite some softening of language with the adoption of the Model Rules in 1983 [compare Model Rules of Prof’l Conduct R. 1.3 (2001) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”), with Model Code of Prof’l Responsibility EC 7-1 (1979) (“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. . . .”)], the language of zealousness still remains in the commentary to the Model Rules. See Model Rules of Prof’l Conduct R. 1.3 cmt. 1 (2001) (“A lawyer should act with . . . zeal in advocacy upon the client’s behalf.”). Fundamentally, irrespective of the exact language of these rules, the model of the lawyer as “zealous advocate” remains deeply entrenched in both the legal and public mind.

10. The discussions of denial’s costs to the injured party and to society, as well as the possible need for multiplied or punitive damages, are exceptions to this. See infra text accompanying notes 65-68, 171.
discussing responsibility-taking with clients. (Note that I write consider. Whether to engage in such a discussion depends on the particulars of the case.) Second, whether one is a defender or a critic of the zealous advocacy framework,11 historically speaking, it is a very robust framework that has dominated the U.S. legal mindset for over two hundred years.12 Hence, I see some merit to working “within” its


12. See Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239, 1244 (1991) (tracing the historical development); see also Leonard L. Riskin, Mediation and Lawyers, 43 OHIO ST. L.J. 29, 43-48 (1982) (describing the continuing dominance of the adversarial paradigm as the lawyer’s “standard philosophical map”). The U.S. debate over the lawyer as zealous advocate traces back to the dialogues of David Hoffman and George Sharswood in the early to mid-1800's. See THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT 60-63 (1981); Hazard, supra, at 1249-50. To see the resilience of the paradigm, consider that, to this day, probably the most famous description of legal ethics is the image of the unyielding zealous advocate painted by Lord Brougham in the 1821 English trial of Queen Caroline almost two hundred years ago:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

FREEDMAN, supra note 11, at 9 (quoting 2 Trial of Queen Caroline 8 (1821)).
structure rather than in simply hoping for its replacement. Third, even if one adopts an alternative approach to legal ethics, such as conceptions of legal ethics calling for (1) a more public-minded role for lawyers, (2) more independent ethical judgment by lawyers, (3) tailored ethical norms that fit different functional tasks and dispute resolution processes, or (4) greater sensitivity to institutional and sociological change within the practice of law (e.g., the growth of large law-firm practice), it is hard to imagine that service to the client will not remain a central value of legal ethics. Hence, the claim that discussions of responsibility-taking can be a form of client service should survive under alternative ethical conceptions. Put differently, if the claim can be made for sometimes talking about responsibility-taking with clients within the ethic of zealous advocacy, that claim

13. Most of the conceptions of legal ethics described below have elements of several of these categories and should not be narrowly "pigeon holed."


15. See, e.g., LUBAN, supra note 11, at 160 (calling for a "moral activism," whereby a lawyer tries to "influence the client for the better"); SHAFFER, supra note 12, at 21 (commenting on integrating moral conversations, especially those derived from Christian ethics, into legal practice); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 26, 44 (1994) (claiming lawyers should discuss moral issues with the clients and concern themselves with the client's character); David Luban, The Adversary System Excuse, in THE GOOD LAWYER, supra note 7, at 83-85 (critiquing the ethics of "nonaccountability" of lawyers for their clients' ends); cf. GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 147 (1978) ("A legal advisor should be reticent about incorporating morals . . . into his advice. . . ").


17. See, e.g., DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 1-3 (2000) (challenging the American Bar Association to incorporate legal ethics into determining professional responsibilities); ZITRIN & LANGFORD, supra note 11, at 59 (arguing that economic interests, especially in large law firms, have caused lawyers to lose their moral compass); Rhode, supra note 11, at 591-92 (discussing the need for considering legal ethics within institutional context).
should survive, if not be buttressed, under most alternative visions of lawyering.

Yet before the lawyer’s role in fostering denial can be properly addressed, the position of the injurer (or client) must be understood. Often discussions of legal ethics, also called professional responsibility, place the cart before the horse. The analysis typically begins with a question like, “What are the ethical obligations of an attorney?” The attorneys, however, are the secondary figures. The primary players in the drama are the clients. The secondary players are their agents, the attorneys. Accordingly, the first set of questions to address are those of client ethics. One might call this realm “client responsibility” in contrast to “professional responsibility.” This Article addresses a basic question from that realm: “What are the ethical obligations of a person who injures another?” To answer this question, let us begin with an example in which the proper response can be seen not in the affirmative, but in the negative.

II. DENIAL AS MORAL FAILURE

A. Looking in the Mirror

When I was a boy of six or seven, I learned in school to sign—not print—my name. Enthused by ego and mischief, I decided to do it, with a crayon all over the wallpaper in a bathroom in our basement! Now one can see traces of the young criminal mind at work, for what was noteworthy was how I did it. One of the four walls was composed of a large mirror. Looking into that mirror, I practiced signing my name backwards on the other three walls. In perhaps twenty or so minutes of glee, I had covered the room.

My mother arrived home later that day. She soon discovered the bizarre, indecipherable markings on the wallpaper. She immediately called my only sibling, David, and me to the bathroom. “Who did this?” she demanded. “Not me,” I said, “I didn’t do it, he did it.” “Not me,” he said, “Jonathan did it.” My mother stood perplexed for a minute or so, but then, alas, turned her head toward the mirror. What had seemed random scribblings took the shape of my name repeated across the wall.

18. Focusing on lawyers’ ethics without first considering client ethics can quickly lead one astray. Consider partisanship, a principal theme of lawyers’ ethics. While it may be proper for a lawyer to disregard the interests of people other than her client, that is no basis for asserting that it is proper for clients to disregard the interests of others.
Needless to say, I was punished, more specifically, grounded. "Grounded" was the term that was used, and it was a fitting one at that. If I recall correctly, my punishment was that, except for school, I was not allowed to go beyond our yard, including visiting friends' homes, for two weeks. By restricting the physical ground I could occupy, I was also given a moral grounding or foundation. The interesting question is, for what should I have been punished?¹⁹

Ruining the bathroom wallpaper was certainly a serious offense. However, the more serious offense was that I lied to my mother about it. My denial was a moral failure. It hid the truth, breached the family trust, and put my brother at risk of punishment. Writing on the wallpaper was a mischievous act, but lying to my mother when specifically asked raised a much graver issue of character. Time alone would probably have diminished my impulse to commit small acts of mischief; whereas, responsibility-taking and honesty are character traits that one must pursue throughout life.

B. Varieties of Denial

It is helpful to draw several distinctions when examining denial and other forms of responsibility avoidance. First, it is worth distinguishing between two basic meanings of denial.²⁰ External denial involves asserting to another that one is not responsible for something, as with my statement to my mother that I had not defaced the wallpaper. External denial is the conscious disavowal of an allegation. The "denials" of civil procedure pleadings fall squarely into this category.²¹ While we often think of blameworthy cases of external denial in which a person who knows he is in fact guilty asserts his innocence, external denials can also be praiseworthy, as when an innocent person denies a false charge.

Intrapsychic denial involves a form of cognitive distortion in which a person's conscious mind is unwilling to face an aspect of

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¹⁹. Misbehavior, especially children's misbehavior, of course implicates issues other than punishment. More significant, usually, are identifying the roots of the problem (e.g., the child's desire for parental attention) and alternative ways of addressing those roots (e.g., positive forms of parental attention).

²⁰. Compare Webster's definitions of "denial": (1) an "assertion that an allegation is false" and (2) "a psychological defense mechanism in which confrontation with a personal problem or with reality is avoided by denying the existence of the problem or reality." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 333 (11th ed. 2004).

²¹. FED. R. CIV. P. 8(b); see BLACK'S LAW DICTIONARY 391 (5th ed. 1979) (defining "denial" as a "traverse in the pleading of one party of an allegation of fact set up by the other").
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reality, as when a patient diagnosed with a terminal illness acts like there was no such diagnosis.\textsuperscript{22} It is a psychological defense mechanism, specifically, "an unconscious process whereby painful thoughts and feelings are repressed."\textsuperscript{23} Such unconscious denial is a sibling to other defense mechanisms such as repression, suppression, and rationalization.\textsuperscript{24} Grossly put, it involves cognitive distortion, namely, the unwillingness of the conscious mind to recognize an aspect of reality for the sake of emotional protection. While much post-Freudian work in clinical psychology has focused on helping patients face intrapsychic denial, over the past several decades the negative air associated with intrapsychic denial has lessened.\textsuperscript{25} Though piercing such denial remains a principal goal of much psychiatric practice, the view of denial is not now wholly negative. Increasingly a positive aspect of denial has been recognized, specifically, that denial can sometimes be, "a healthy coping mechanism by which an individual limits anxiety and maintains self-esteem and a sense of control . . . buffer[ing] an individual from unexpected, shocking news [and allowing] a person 'to collect himself' and, with time, mobilize other, less radical defenses."\textsuperscript{26}

Cases certainly exist in which both external denial and intrapsychic denial are present, as when a child molester who, for reasons of intrapsychic denial does not see his acts as molestation, denies a legal charge of molestation. Generally speaking, however, intrapsychic denial contrasts sharply with the conscious act of external denial. External denials are usually conscious responses to an existing

\textsuperscript{22} For a brief introduction and literature references, see Bruce J. Winick, Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 327, 330-33 (Dennis P. Stolle et al. eds., 2000). For a more extensive psychological analysis of intrapsychic denial, see DENIAL: A CLARIFICATION OF CONCEPTS AND RESEARCH (E.M. Edelstein et al. eds., 1989). See also DANIEL GOLEMAN, VITAL LIES, SIMPLE TRUTHS: THE PSYCHOLOGY OF SELF-DECEPTION 22 (1985) (arguing denial decreases anxiety but creates psychological "blind spots" at both the individual and social levels).

\textsuperscript{23} A CONCISE ENCYCLOPAEDIA OF PSYCHIATRY 116 (Denis Leigh et al. eds., 1977); see also AMERICAN PSYCHIATRIC GLOSSARY 57 (Jane E. Edgerton & Robert J. Campbell, III eds., 7th ed. 1994) (defining "denial" as "[a] defense mechanism, operating unconsciously, used to resolve emotional conflict and allay anxiety by disavowing thoughts, feelings, wishes, needs, or external reality factors that are consciously intolerable." (italics omitted)).

\textsuperscript{24} See IAN GREGORY, FUNDAMENTALS OF PSYCHIATRY 52-56 (1968).

\textsuperscript{25} See Joel Shanan, The Place of Denial in Adult Development, in DENIAL: A CLARIFICATION OF CONCEPTS AND RESEARCH 107, 113 (E.L. Edelstein et al. eds., 1989) ("During the last two decades, denial has come to be considered more and more a potentially adaptive mechanism in situations of extreme, unalterable stress. . .").

\textsuperscript{26} Winick, \textit{supra} note 22, at 331 (internal citation omitted).
or potential allegation, while intrapsychic denials represent unconscious operations. This Article focuses on external denial, in particular the blameworthy sort in which the injurer is either aware, or if he bothered to investigate would become aware, of having committed the injury, but nevertheless asserts his innocence. When I lied to my mother about the crayon markings, I knew full well what I was doing.

Second, there are many approaches to avoiding responsibility in addition to explicit denial. In the crayon example, my failure to take responsibility came in the form of an outright lie. I explicitly denied having committed an offense that I knew I had committed. Yet often responsibility avoidance takes more oblique and sophisticated routes. Some other common forms are obfuscation, delay, loaded processes, and avoidance and counterattack. Though this Article's central concern is ordinary civil disputes, some highly publicized disputes may help quickly illustrate these approaches.

1. Obfuscation

It is hard to think of the Clinton presidency without recalling his infamous declaration, "I never had sexual relations with that woman." No doubt coached by lawyers, Clinton—a lawyer himself—uttered a statement which he plausibly could argue was literally true, for under a very narrow construction "sexual relations" might mean solely intercourse. However, his statement was deeply misleading. Consider too his answer before a grand jury when asked if Lewinsky's assertion in her affidavit that, "there is absolutely no sex between" her and Clinton was true. Clinton responded, "It depends on what the definition of 'is' is." Often parties speak partial truths to obscure and mislead. Even if literal construction forms a legal defense to perjury, it is not a moral defense of that practice.

2. Delay

Clinton, or his attorneys, may well have expected that, given the intense scrutiny his statements would receive, obfuscation would

29. See Gerald B. Wetlaufer, The Ethics of Lying in Negotiation, 75 IOWA L. REV. 1219, 1223-24 (1990) (defining lying to include "all means by which one might attempt to create in some audience a belief at variance with one's own").
probably fail in the sense of the public accepting the truth of his statements. Yet his statements may well have succeeded as delays, that is, as attempts to “weather” the political storm and avoid impeachment. In civil litigation, a similar approach is frequently taken. Though discovery rules provide that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party,” in practice, this rule is often “trumped by tactics that call for delay, denial, obfuscation, refusal to provide and even destruction of documents.” Though it is hard to know exactly what percentage of litigators may be so characterized, legal ethicist David Boerner states, “Tendentious, narrow, and literal positions with regard to discovery are ... both typical and expected.” Consider Zitrin and Langford’s description of “The Lecture” given by a senior partner of a 225-lawyer firm to a new litigation associate on how to respond to discovery requests:

[A]round here, we simply do not give away information. If you can argue with a straight face that you don’t understand exactly what the other side means when they ask for something, then object: ‘It’s ambiguous, it’s vague, it’s too broad, it’s too narrow.’ I don’t care how you do it, just get it done. If they can’t follow through, too bad. And don’t worry too much about being sanctioned by the court. Our client will foot the bill for any fine, and most judges won’t make it more than a thousand dollars, anyway.

Recall too the words of Chief Justice Rehnquist, “Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client’s cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.”

3. Loaded Processes

Related to delay is what one might call denial through loaded processes. Some injurers construct mechanisms which, though purporting to provide redress, in fact do not. Delay is often an element of this or, more colloquially, the “runaround.” Certain customer service departments and ombuds offices fall into this category. Are

31. Zitrin & Langford, supra note 11, at 56.
32. Id. at 64 (quoting a declaration made by David Boerner).
33. Id. at 54.
the employees, trained in "active listening," there simply to make you "feel heard"—to let you vent and thus defuse your anger—or are they actually working toward effectuating remedial steps? The government too can use such loaded processes. Consider the Treaty of Guadalupe Hidalgo struck between the United States and Mexico in 1848 to transfer conquered territory north of the Rio Grande from Mexico to the United States. The Treaty provided that "property of every kind, now belonging to Mexicans ... shall be inviolably respected." In theory, former Mexicans living in California were to maintain their private property rights even though regional sovereignty had switched. The devil, however, was in the details, for the U.S. government placed on the land owner the burden of proving ownership and erected significant barriers to such proof. As Ebright writes, "This procedure transformed land grant owners into claimants who had to jump through numerous costly hoops before their property rights under the treaty were recognized." Mechanisms such as these are often effective. The hope of recovery is offered through a mechanism which, realistically speaking, turns out to be corrupt or flawed. Rather than being slain outright, justice dies a slow death by a thousand cuts. Even if the mechanism does not deceive the injured, it may assist the injurer in rationalizing, or in representing to the public, that its actions are just.

At other times, delay is not a factor, but the mechanism purported to provide justice has simply been "captured" by the injurer or his allies. Once Klan members could lynch with impunity because they knew no white jury would convict them of killing a black person. As Desmond Tutu wrote of the South African judiciary under apartheid, "[T]he judicial system gained such a notorious reputation in the black community. It was taken for granted that the judges and magistrates colluded with the police to produce miscarriages of justice." At times this capture takes subtler forms. If jury awards grow large, defendants may lobby for laws capping liability. The fullest manifestation of this
may be the doctrine of "sovereign immunity," through which the
government insulates itself against suit.41

The abuse of power often goes hand in hand with the obviation of
the mechanism purported to achieve justice, for such obviation
provides the injurer with what one might call the freedom to injure.
Though morally corrupt, perpetrators of intentional wrongs can
usually calculate accurately. Without the expectation that they would
.go unpunished, many would not do what they do. The freedom to
injure says to the injurer: fear not, for when you do commit a wrong,
you can "successfully" deny having done it. To some extent, the
freedom to injure may encourage certain unintentional injuries too.
"Don't worry about acting cavalierly," the unarticulated message may
be, "for should an accident occur, you won't be held liable."

4. Avoidance and Counterattack

A fine example of avoidance and counterattack—of attempting to
dodge the basic issue and blaming the injured—comes from the
dispute between the National Council of Women's Organizations
(NCWO) and the Augusta National Golf Club (Augusta National) over
Augusta National's failure to admit women as members. Augusta
National, located in Augusta, Georgia, is the site of the prestigious
Masters golf tournament. In theory, both men and women may
become members of Augusta National. The club's membership policy
does not have "membership restrictions based on . . . gender."42
However, as of 2002, none of the club's approximately 300 members
were female.43 Even if this did not constitute a legal wrong, most,
though not all, would probably consider it a moral failing.44 (Though
some may offer justifications for single-sex sports and social clubs,

41. See Erwin Chemerinsky, Against Sovereign Immunity, 53 STAN. L. REV. 1201,
1201 (2001) ("Sovereign immunity is an anachronistic relic and the entire doctrine should be
eliminated from American law.").
42. Clifton Brown, Augusta Answers Critics on Policy, N.Y. TIMES, July 10, 2002, at
D4.
43. Id. As of 2002, the club had fewer than ten African-American members. Id.
44. In all likelihood, Augusta National chairman Hootie Johnson did not believe the
club to be acting wrongfully. Similarly, in several of the other examples discussed above
(e.g., lynching by Klan members, the South African judiciary under apartheid, and so on)
injuries undoubtedly believed themselves to be justified. Later, I argue that injurers have a
moral responsibility to take responsibility for injuries for which they believe themselves at
fault, but not ones for which they believe themselves innocent. See infra Part IV.B.3. Hence,
I use such examples to illustrate some of the disputed dynamics of denial. Though Johnson
likely does not believe himself wrong, his response is nevertheless a denial in response to a
charge of wrongdoing.
Augusta National's own policy rejected that position.) In June 2002, NCWO chairwoman Martha Burk sent a private letter to Augusta National chairman Hootie Johnson urging the club to review its membership practices. Wrote Burk, "We know that Augusta and the sponsors of the Masters do not want to be viewed as entities that tolerate discrimination against any group, including women [and we] urge [you] to review your policies and practices ... so this is not an issue when the tournament is staged next year." Rather than attempting to refute the substance of Burk's charge (how, after all, could that be refuted?), Johnson counterattacked. He issued a public response, calling Burk's letter "offensive and coercive" and stating, "We will not be bullied, threatened or intimidated .... We do not intend to become a trophy in their display case.... There may well come a day when women will be invited to join our membership, but that timetable will be ours and not at the point of a bayonet."

Four points are worth noting. First, Johnson's response largely avoids any discussion of the critical charge in Burk's letter, namely, the failure of the club to have any women members. Rather Johnson attempts to change the subject and focus on the NCWO's behavior. Second, Johnson's counterattack contains a high level of projection. Johnson describes the NCWO as a threatening bully, seeking to make Augusta National a "trophy in their [NCWO's] display case" at the "point of a bayonet," while the reverse is true—Johnson acts like a threatening bully. Rather than seeing the club at fault, Johnson projects fault onto the NCWO. Third, one might expect that such projection would produce an escalation of conflict, which it did. Burk later responded to Johnson's statements:

I was surprised that Hootie Johnson reacted so strongly .... He obviously went ballistic. I thought the club was already leaning in the direction of adding women, and I thought that this could be a quiet

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46. Id. By describing Johnson's response as a "counterattack," I do not mean to imply that Burk's initial letter was an "attack."
47. Id. (quoting Johnson's response to Martha Burke's letter).
48. Id.
49. Unlike the crayon example where I blamed my brother, the projection here is not a specific attribution of fault. Rather, it is a more general blaming of the NCWO. Johnson cannot blame the NCWO for the absence of women at the club. He can only blame them for raising the issue. Note that Johnson's competitive war and sports terminology, not unrelated to the tournament's tradition, reflect such projection.
discussion. Obviously, maybe we will have to consider some other avenues, perhaps some of those that Hootie Johnson suggested. Fourth, is what one might call the denial mindset. This is the mental orientation of believing that one need not take responsibility when one injures another. It is reinforced, of course, by the freedom to injure.

There is an interesting question here of the interaction between social status and the denial mindset. Regardless of one's social status, taking responsibility for an injury one has committed is a humbling and difficult step, for it involves admitting one's mistakes or failings. That said, I suspect that those with higher social status—and the members of Augusta National are certainly a privileged group—typically are more accustomed to the denial mindset than those with lower social status because, as a group, they possess far greater freedom to injure. Accordingly, while psychologically healthful to all, taking responsibility when one knows one is at fault may be particularly healthful, though perhaps behaviorally atypical and difficult, for the privileged. Augusta National is a country club whose members are extremely wealthy, entirely male, and overwhelmingly white. The tournament's name, the "Masters," is telling. While "Masters" can be understood in the sense of mastery or skill at golf, white "Masters" of course ruled black slaves, and male "Masters" lorded over their wives. These negative connotations may

50. Brown, supra note 42. The ultimate fate of the protest has yet to be determined, but it seems to have significantly "fizzled." Several months after the matter became public, Augusta National unilaterally announced that it would drop its corporate sponsorship for the upcoming 2003 tournament. See Ken Ellingwood & Thomas Bonk, Everyone's Talking About the Masters—Except in Augusta, L.A. TIMES, Sept. 8, 2002, at A16. In December, a prominent club member, former CBS chief executive Thomas H. Wyman, resigned in protest of the club policy. Bill Pennington, Former Top Executive at CBS Resigns from Augusta, N.Y. TIMES, Dec. 3, 2002, at D1. Despite much advance media coverage, a protest organized by NCOW at the 2003 tournament drew only about forty protestors, and the tournament proceeded relatively uneventfully. See Dave Anderson, Can Sorenstam, at Center Stage, Inspire a Mixed U.S. Open?, N.Y. TIMES, May 25, 2003, § 8, at 11 (comparing the efforts of Annika Sorenstam and Martha Burke).

51. See Tutu, supra note 40, at 83, 253, 269 (discussing the "denial mode" in apartheid South Africa).

52. Financially, however, taking responsibility will usually be easier for the privileged.

53. See Brown, supra note 42, (reporting that as of 2002, fewer than ten, or approximately 3%, of Augusta National's roughly 300 members were African-American). By contrast, the 2000 Census found that, in the State of Georgia, almost 29% of the population was African-American. See U.S. Census Bureau, U.S. Dept of Commerce, State Rankings—Statistical Abstract of the United States, at http://www.census.gov/statab/ranks/rank06.html (last modified June 23, 2003) (citing U.S. Census Bureau, 2002 Statistical Abstract of the United States, Resident Population by Race and State: 2000, at 26 tbl. 22)).
often be "lost" on white males, but the double entendres are far more likely to be noticed by people of color and women.\textsuperscript{54} Observe too the issues of status and control raised by Johnson's statement, "There may well come a day when women will be invited to join our membership, \textit{but that timetable will be ours} and not at the point of a bayonet."\textsuperscript{55}

Later I shall discuss further this denial mindset, but this history of masters and slaves is useful in highlighting a general aspect of it. Unlike slaves, masters, of course, possessed the freedom to injure. The master could commit primary wrongs such as selling, beating, or abusing slaves, and the (society of) master(s) could deny redress for the primary wrong. There is an important general lesson here. Theoretically speaking, denial is a possible strategy for both the powerful and the powerless. In practice, however, it is usually quite asymmetrical, that is, it is only an effective strategy for the powerful. The utility of denial often rests on the denier's power relative to the injured.\textsuperscript{56} The freedom to injure is not randomly distributed.

5. Other Forms of Avoiding Responsibility

The above approaches (obfuscation, delay, loaded processes, and avoidance and counterattack) by no means exhaust the possible ways an injurer can avoid taking responsibility. Perhaps the injurer will respond with silence and seek refuge in the thought that failing to take responsibility is a different matter from explicitly denying responsibility.\textsuperscript{57} Perhaps one has the power to suppress the question of one's accountability from even being posed.\textsuperscript{58} Perhaps one can destroy

\begin{itemize}
\item \textsuperscript{54} See Sharon E. Rush, \textit{Emotional Segregation: Huckleberry Finn in the Modern Classroom}, 36 U. Mich. J.L. Reform 305, 305-06 (2003) (noting an African-American's "muffled rage" upon reading \textit{Huckleberry Finn} as compared to Ernest Hemingway's appreciation and joy). As with other language that emotionally segregates, the dominant group may pay little attention to the impact of such language on the subordinated group(s). Such terms are like a coded language the dominant group can use to send negative messages to the subordinated group \textit{without having to admit to themselves} that such is their purpose, for such is not likely their conscious purpose, but perhaps an unconscious one. \textit{See id. at} 305-07 (discussing emotional segregation); \textit{see also} Charles R. Lawrence, III, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 Stan. L. Rev. 317, 319-28 (1987) (discussing the unconscious workings of racism).
\item \textsuperscript{55} Sheeley, \textit{supra} note 45 (quoting Hootie Johnson) (emphasis added).
\item \textsuperscript{56} I thank Berta Hernández-Truyol for this point.
\item \textsuperscript{57} Though this distinction is not entirely without merit (think, for example, of the Fifth Amendment right against self-incrimination), injurers should take care not to give it too much weight. Unlike explicit denial, silence does not involve telling an overt lie. However, when an injurer knows he is at fault, silence does represent the moral failure of not taking responsibility.
\item \textsuperscript{58} Consider, for example, a 1989 House Bill introduced, and subsequently reintroduced each year, by U.S. Representative John Conyers to establish a commission to
\end{itemize}
the physical evidence, or, better yet, prevent records of one’s activities from ever being generated. The ways of avoiding responsibility are manifold. One might hypothesize that the more sophisticated or powerful a party is, the greater the mechanisms for avoiding responsibility at the party’s disposal. As a child, I told a bold and risky lie about the crayon marks. Powerful parties usually use subtler approaches.

III. THE ETHICAL OBLIGATIONS OF INJURERS

How should a person respond to having injured, or possibly having injured, another? Consider the two basic categories of cases: (1) the person (correctly) knows that he is at fault and (2) the person is unsure of whether or to what extent he is at fault (e.g., the injurer lacks sufficient facts to determine fault, the injurer believes the injured party may have contributed to the injury, the applicable law is ambiguous, and so forth.) Other categories certainly exist, such as the person who is fully but errantly convinced of his fault. However, many, if not most, cases fit within these two basic ones.

Before discussing these two categories further, it may be helpful to mention three related topics. First, most of the discussion will focus on the more typical case in which legal and moral fault overlap, though occasionally I will discuss examples of moral fault (e.g., the crayon example) without legal fault. Second, asserting that a person is at fault is quite different from claiming that such fault can be proven in court. Even if there is insufficient evidence to convict them, both the thief who robs intentionally and the driver who injures negligently have committed moral and legal violations. Third, while the discussion below will focus on injuries committed by individual human persons, the discussion is also relevant to “legal persons” such as corporations, organizations, or governmental entities. However, while parallels exist, judgment is needed in assessing these different domains.59

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59. For example, I argue below that a person—an individual human being—who injures another but fails to take responsibility risks psychological and spiritual harm. Analogies exist to the corporate setting, but differences do too. It would seem odd to assert that an organization that fails to take responsibility for injuries it commits risks “psychological and spiritual harm.” Rather, such denial may put the employees, directors, or...
Lawyers commonly assume that most injuries are of the second type, complex and ambiguous cases in which fault cannot be easily established. Perhaps this assumption comes from a sample-selection bias of focusing on the complex cases that do go to trial. Perhaps this assumption is rooted in a warranted skepticism developed from hearing clients tell self-serving accounts, making the lawyer cautious that she has heard only half the story. Perhaps this assumption is born in the study of complex appellate case law which forms the foundation of legal education. Perhaps this assumption is simply a means of rationalizing zealous advocacy based upon the (mistaken) belief that the ambiguities of fault fully absolve a person of the need for responsibility-taking.\(^6\) Whatever the source, lawyers commonly dwell on the second category and minimize the first category of cases. This is a mistake. Often injurers do know that they are at fault for what they have done. This is true of most intentional injuries and many unintentional injuries as well. Accordingly, I will begin by discussing the first category.\(^6\) As we shall see, not only is understanding this first category analytically foundational, it is also nontrivial.

What should an injurer who knows he is at fault do? The injurer should take responsibility for the harmful act and its consequences of his own initiative. Ordinarily, the injurer should begin by apologizing.\(^6\) Next, the parties should discuss what further remedial steps might be appropriate. In the crayon example, I might have volunteered to try to scrub the crayon off the walls, have my allowance withheld to pay for new wallpaper, or do extra chores around the house. I might even have volunteered to undergo a punishment such as being grounded. In other words, I should have offered to take responsibility.

Monetary payment through withholding my allowance may have been a piece of that response, but other possible responses might have been as important, if not more important, to my mother. As mentioned, she punished me by grounding me. She also might have wanted me to make a restorative attempt at scrubbing the wallpaper or owners of the corporation, or even the corporation itself, in moral breach and trigger a loss of corporate morale. On moral responsibility within organizations, see David Luban, Moral Responsibility in the Age of Bureaucracy, 90 MICH. L. REV. 2348, 2354-55 (1992), in which the authors emphasize the risk of moral fragmentation within organizations and ethical responsibility at the level of organizational design.

\(^6\) See infra text accompanying notes 197-198.

\(^6\) Regarding the second category, see infra Part IV.B.3.

to undergo an educational process like writing an essay showing that I understood the wrongfulness of my act. Without belittling the significance of monetary compensation, injured parties often care about factors other than monetary compensation. The ordinary, one-size-fits-all legal remedy of monetary compensation cannot be presumed. Ideally, the injurer should propose a variety of remedial options to the injured party. The injured party might then select among those options or, alternatively, the parties might then have a discussion through which an agreed upon course of action is chosen.

This ethical response involves a much more active role for the injurer in constructing a remedial response than is common. When a judge or jury make an award, the injurer typically plays no role in fashioning it. In contrast, when the injurer seeks to take responsibility of his own initiative, he must think about what he has done and how to respond to it. While the power to decide whether a proposed remedial package is acceptable rests, of course, with the injured party, thinking about possible remedies is likely to be quite therapeutic for the injurer. If undertaken seriously, it forces the injurer to think empathetically about the injury he has caused another. When I misbehaved as a child, one of my mother's favorite questions was, "What do you think would be an appropriate punishment?" That question usually made me squirm far more than when a punishment was simply handed out.

Some may ask, "Does it really matter whether an injurer volunteers to take responsibility or if he is forced to by an authority? What difference does it make, for example, if a tortfeasor offers compensation or if a court forces him to pay compensation?" Consider the common case in which the essential remedy is not some creative solution but monetary compensation. Even here, the


64. Nonmonetary factors, such as apologies, may still have an important role to play. See Cohen, supra note 62, at 1047 ("Perhaps our presumption should be that apology has a role to play in most cases.").
difference is vast, for the injured, for society, and especially for the injurer.

Injured parties benefit greatly when injurers voluntarily assume responsibility. In cases in which the injurer knows he was at fault but the evidence is inadequate to prove his fault, the voluntary offer of compensation can be the difference between recovery and nonrecovery. Even when the evidence is adequate, courts sometimes make mistaken judgments. Here too the voluntary offer of compensation can be the difference between recovery and nonrecovery. In short, the voluntary offer of compensation eliminates the risk that the trial verdict will fail to achieve a fundamentally just outcome. Injured parties benefit in other ways too. When the injurer volunteers compensation, not only does compensation come much more quickly, but injured parties can eliminate or reduce their legal fees. Plaintiffs' lawyers typically receive one third of the trial award as their contingency fee. When an injurer voluntarily offers fair compensation, that cost might be eliminated (if a lawyer is not hired) or reduced. Injured parties may also save themselves the energy and worry involved in seeking recovery. The relationship with the injurer is also likely to be restored much faster. Why, after all, should the injured party choose to resume a relationship with a person who has injured them but shown no remorse? Many injuries occur in the context of prior relationships like family, employment, and community. Failing to apologize and offer to take remedial steps, like compensation after an injury, adds insult to the primary injury and can form an impenetrable barrier to restoring a good relationship.

Society also benefits when injurers voluntarily assume responsibility. Most apparently, the time of the judge, the jury, and court personnel need not be expended adjudicating cases. Responsibility-taking may also reduce the likelihood of future offenses by the offender. More subtly, but quite importantly, responsibility-taking helps establish a society rooted in morality rather than money.

65. By a fundamentally just outcome, I mean something different from a procedurally just outcome. Consider the defendant who, despite having committed an offense, successfully denies his guilt at trial, because the plaintiff has inadequate evidence to prove her case. If the trial is handled properly, that is, in accordance with the rules of civil procedure, evidence, etc., the outcome may be said to be procedurally just. However, it is not fundamentally just, for the injurer will pay no compensation to the injured. See BLACK'S LAW DICTIONARY 1281 (5th ed. 1979) (defining "substantial justice" as "[j]ustice administered according to the rules of substantive law, notwithstanding errors of procedure").

66. See Cohen, supra note 62, at 1020.

67. See infra note 169 and accompanying text.
and in concern for others rather than selfishness. It provides a path for reintegrating the offender into society. Such ethical and communitarian rationales should not be overlooked.

Failing to take responsibility profoundly—perhaps even more profoundly—affects the injurer. This is true whether or not the injurer "gets away with it," that is, whether or not an external authority forces an injurer, for example, to pay compensation. I will discuss first the case in which the injurer is held accountable and then the case in which he is not. In both instances, the interwoven moral, psychological, and economic ramifications of the injurer's failure to actively take responsibility are profound.

A. When the Injurer Is Held Accountable

There is a vast moral difference between taking responsibility on one's own initiative and being forced by a third party, such as a court, to pay compensation. The former is true responsibility, the latter mere accountability. "Mere" accountability is of course not unimportant. It is essential that those who do not accept responsibility of their own initiative be held accountable. It is, however, a morally inferior path for the injurer. As Braithwaite writes, "Passive responsibility [or accountability] is something we are held to for a past injustice. Active responsibility is the virtue of taking responsibility for
correcting in the future the injustices of the past, for taking active responsibility for restoration, particularly restoration of relationships.\textsuperscript{70}

So central is taking responsibility for one's errors to human morality that it is among the first Biblical lessons.\textsuperscript{71} After eating the prohibited fruit of the tree of the knowledge of good and evil, Adam and Eve grow ashamed and seek to hide from God.\textsuperscript{72} God then calls to Adam, "Where \textit{art} thou?"\textsuperscript{73} That question, "Where \textit{art} thou?" is often understood existentially rather than geographically, for presumably God knows where Adam is located physically.\textsuperscript{74} The question being asked is, "Where are you \textit{morally}?" True to much human behavior, Adam fails to accept responsibility directly himself. He instead blames Eve: "The woman whom thou gavest to be with me, she gave me of the tree, and I did eat."\textsuperscript{75} When then asked by God about her role, Eve, too, passes the buck: "The serpent beguiled me, and I did eat."\textsuperscript{76} For those who think in such terms, it is interesting to ask which should be labeled the "original sin": the disobedience of taking the forbidden fruit (transgression) or the failure to take responsibility through blaming another (a form of denial).\textsuperscript{77} A similar theme is 

\textsuperscript{70} Braithwaite, \textit{supra} note 68, at 254. Braithwaite describes active responsibility as a "virtue." \textit{Id}. When one has injured another, I would consider it a moral obligation.

\textsuperscript{71} \textit{See}, \textit{e.g.}, \textit{TUTU, supra} note 40, at 82-83 (commenting on the Bible's critique of denial in the Eden story). For a positive reading of Adam and Eve's behavior, see Harold S. Kushner, \textit{What Really Happened in the Garden of Eden?, in HOW GOOD DO WE HAVE TO BE: A NEW UNDERSTANDING OF GUILT AND FORGIVENESS} 16, 30 (1996) (lauding Adam and Eve's courage to opt to live in the challenging adult world of moral understanding).

\textsuperscript{72} \textit{Genesis} 3:6-8.

\textsuperscript{73} \textit{Id}. 3:9.

\textsuperscript{74} The commentary of the eleventh-century French Biblical commentator Rashi on God's question "Where \textit{art} thou?" is particularly instructive. \textit{1 THE PENTATEUCH AND RASHI'S COMMENTARY: A LINEAR TRANSLATION INTO ENGLISH} 31 (Abraham Ben Isaiah & Benjamin Sharfman trans., 1949). ("He [God] knew where he was but [He asked where Adam was] to enter into conversation with him so that he should not be afraid to answer. So [in the case of] Cain, (Gen. 4.9); He said to him: 'Where is Abel, thy brother?'"). Both instances demonstrate the linkage between transgression and shame, and suggest the need for sensitivity in entering a dialogue with the shame-ridden offender in a way that has a chance, though by no means a certitude, of facilitating his acceptance of responsibility. \textit{See} Cohen, \textit{supra} note 3.

\textsuperscript{75} \textit{Genesis} 3:12 (emphasis omitted).

\textsuperscript{76} \textit{Id}. 3:13.

\textsuperscript{77} The Bible presents God's punishment of Adam as based upon his act of disobedience, rather than his excuse-making. \textit{See \textit{id}}. 3:17 ("And unto Adam he said, Because thou hast hearkened unto the voice of thy wife, and hast eaten of the tree, of which I commanded thee, saying, Thou shalt not eat of it: cursed \textit{is} the ground for thy sake; in sorrow shalt thou eat \textit{of} it all the days of thy life... "). However, the narrative fact that God, who presumably knows what they have done, waits until \textit{after} He hears Adam's and Eve's explanations for their acts to punish them supports the position that God wants to hear their voluntary confessions and hence that their denials are also of critical moral relevance.
echoed in the ensuing story of Cain and Abel. After Cain murdered Abel, "[God] said unto Cain, Where is Abel thy brother? And [Cain] said, I know not: Am I my brother's keeper?" Here we see both outright lying and avoidance. If transgression is the henchman, denial is the right-hand man.

The moral difference between assuming responsibility on one's own initiative rather than being forced to by an external authority—between "acting like a child" and "acting like an adult"—is also a central component of psychological development. As Piaget described, a pivotal step in children's moral development is the internalization of moral norms, namely, learning to do what is right because it is right rather than from the fear of external punishment. Kohlberg later characterized this as the transition from a premoral level characterized by "punishment and obedience" to a principled level based upon the "morality of self-accepted moral principle." Such self-initiated morality ties deeply to transcending one's ego and developing a sense of respect for other persons. When one has injured another, this means actively assuming responsibility rather than merely being held accountable.

The same holds under a feminist view of moral development, in particular with regard to the ethic of care articulated by Gilligan. Noting the oblivion to girls' experiences in Piaget's and Kohlberg's research (they studied only boys), Gilligan asked whether our understanding of the development of moral reasoning would change if both boys and girls were studied. More specifically, she asked whether the evolution of "justice reasoning" in boys, as described by Piaget and Kohlberg, painted a full enough picture. Though not restricting herself to a gender-essentialist view, Gilligan found that the growth of justice reasoning alone was too narrow an understanding

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78. Id. 4:9.
79. See J e a n P i a g e t E t A l ., T h e M o r a l J u d g e m e n t o f t h e C h i l d 402-04 (photo. reprint 1966) (Marjorie Gabain trans., 1965). Whether those who act justly do so for intrinsic reasons or out of a fear of sanction is an ancient subject. For one early treatment, see the parable of Gyges' Ring in P l a t o , R e p u b l i c 35 (G. M. A. G r u b e t r a n s ., 1992) (suggesting that, if a "just" person possessed a ring of invisibility that would guarantee that he would never be caught or punished, he would cease to act justly).
80. L a w r e n c e K o h l b e r g, 2 T h e P s y c h o l o g y o f M o r a l D e v e l o p m e n t : T h e N a t u r e a n d V a l i d i t y o f M o r a l S t a g e s , x x ix (1984).
81. C a r o l G i l l i g a n, I n a D i f f e r e n t V o i c e : P s y c h o l o g i c a l T h e o r y a n d W o m e n ’ s D e v e l o p m e n t 18 (1982).
82. Id.
83. Id. at 2.
of moral development. She explained that an ethic of care, often associated with women, was also critical:

[The justice perspective works by] judging the conflicting claims of self and others against a standard of equality or equal respect.... From a care perspective, the relationship becomes the figure, defining self and others [and] the self as a moral agent perceives and responds to the perception of need. The shift in moral perspective is manifest by a change in the moral question from “What is just?” to “How to respond?”

Moral consideration thus includes both the ethics of rights and the ethics of relationships.

When one has harmed another, the path of actively taking responsibility presents a confluence, though not a complete coincidence, of the justice-based and care-based responses. The justice-based response calls for one to internalize the legal norm that one should pay restitution. The care-based response calls for one to consider the “relationships and responsibilities” at issue. Surely this would include a level of caring for the injured party, addressing his injury-generated needs, and considering how to construct or reconstruct a good relationship between the people. A care-based response might include compensation, but need not be limited to it. For example, apologizing, which is not derived from legal “justice reasoning,” is often critical to reconstructing the relationship and may play a key role under an ethic of care. The general point is that both the ethic of justice and the ethic of care call for the injurer to actively take responsibility. In the language of the Psalms, actively taking responsibility is a place where “[m]ercy and truth are met together; righteousness and peace have kissed each other.”

This confluence underscores how ethically basic, immediate, and operationalizable is the process of taking responsibility after one has injured another. The subjects of ethics and law are commonly presented in terms of dilemmas, through difficult and ambiguous cases in which strong arguments exist for conflicting courses of action. In contrast, taking responsibility when one has injured another is a clear, simple, and fundamental ethical dictate. One does not need a graduate

87. Psalms 85:2,10 (emphasis omitted).
degree to grasp it. The moral person wants to pay for the damages he has caused: the possible economic benefit of denial is not a benefit that he would want. Further, I suspect that, as an ideal, responsibility-taking fits most ethical and religious systems and applies in widely-varying cultures. To understand this, consider the prior principle of not harming others from which the obligation to take responsibility when one has harmed another is derived.

The negative moral principle of refraining from harming others ("negative" for it prescribes what one should not do) is a, if not the, foundational tenet of many ethical and religious systems. It is found, for example, in the core emphases on the Golden Rule within Judaism, Christianity, Hinduism, and Confucianism and is taught in many other religious traditions too. For philosophers, refraining from harming others is fully consonant with Kant's categorical

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88. This is not to say that those who proclaim this ideal always follow it in practice. Think, for example, of the history of U.S. slavery. Despite the Judeo-Christian backdrop of the Golden Rule, reality could not have been more at odds with that ideal. The real test of a religious system is not the degree to which such ideals are proclaimed, but the degree to which they are actually achieved. See Steven J. Sandage et al., Seeking Forgiveness: Theoretical Context and an Initial Empirical Study, 28 J. PSYCHOL. & THEOLOGY 21, 26, 28 (2000) (finding no significant correlation between religiosity, e.g., the frequency of church attendance, and responsibility-taking).

89. THE BABYLONIAN TALMUD 50 (Michael L. Rodkinson ed. & trans., 2d ed. 1918). When asked to summarize the Torah, Rabbi Hillel answered, "What is hateful to thee, do not unto thy fellow; this is the whole law. All the rest is a commentary to this law; go and learn it." Id.

90. See Matthew 22:39-40. When asked which was the greatest of the commandments, Jesus responded first to love God and second, "Thou shalt love thy neighbour as thyself. On these two commandments hang all the law and the prophets." Id. As in the book of Leviticus 19:18, Jesus articulates the Golden Rule in "positive" terms, prescribing what one should do rather than cautioning against what one should not do. Nevertheless, the "negative" concept of refraining from harming others is undoubtedly implicit within it.

91. See THE MAHABHARATA OF KRISHNA-SWAIPAYANA VYASA 13:235 (Kisari Mohan Ganguli trans., 1883-96) ("One should never do that to another which one regards as injurious to one's own self. This, in brief, is the rule of Righteousness.").

92. When asked if there was a single word that could serve as a principle of conduct for life, Confucius replied, "Is not RECIPROCITY such a word?—what you do not yourself desire, do not put before others." THE CONFUCIAN ANALECTS 175-76 (William Jennings trans., 1895).

93. For example, the Golden Rule is also taught within Buddhism: "[H]urt not others with what pains yourself." UDANA VARGA: A COLLECTION OF VERSES FROM THE BUDDHIST CANON 27 (W. Woodville Rockhill trans., 1883); Islam: "No one of you is a believer until he desires for his brother that which he desires for himself." SUNNAH; and Taoism: "Regard your neighbor's gain as your own gain, and regard your neighbor's loss as your own loss." T'Ai SHANG KAN YING P'IEN: TREATISE OF THE EXALTED ONE ON RESPONSE AND RETRIBUTION 53 (Teitaro Sazuki & Paul Carus trans., Paul Carus ed., 1950). See generally H.T.D. ROST, THE GOLDEN RULE: A UNIVERSAL ETHIC (1986) (exploring in depth the Golden Rule in various religions and cultures).
imperative, and is quite compatible with utilitarianism as well.¹⁵ One might think, too, of the physician's credo commonly associated with, but not actually found within, the Hippocratic Oath, "First, do no harm."¹⁶

Difficult boundary questions can of course be raised about the limits of the "no harm" principle. Would self-defense justify harming another? What if by harming another one could prevent some greater harm from taking place? Important realist criticisms can also be raised as to whether those who espouse such tenets in theory actually adhere to them in practice. To what extent do different religions lead their members to follow the Golden Rule vis-à-vis their coreligionists while turning a blind eye toward harms committed against members of other religions or certain members, such as women, of their own group? However, such issues, significant as they are, should not lead one to think that the tenet of "no harm" is ambiguous or inapplicable in most circumstances. To the contrary, refraining from harming others has withstood history's test as among the most basic of moral ideals.

Observe the linkage here between the cross-cultural robustness of the principle of refraining from harming others and another cross-culturally robust principle: the need to respect the fundamental dignity of people. As Piaget wrote, "[A]uthors of the most diverse inspirations find themselves in agreement on one point ... [the] sentiment most characteristic of moral life is the feeling of 'respect.'"¹⁷

⁹⁴. See IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 30 (James W. Ellington trans., Hackett, 3d ed. 1993) (1785) ("[T]here is only one categorical imperative and it is this: Act only according to that maxim whereby you can at the same time will that it should become a universal law.").

⁹⁵. See AMARTYA SEN, ON ETHICS AND ECONOMICS 30 (1987) (referencing the "sum total" of utility, rather than just one person's). Ethical utilitarians would, ceteris paribus, generally resist harming others, as harming others decreases their utility. Rule utilitarians would most likely follow that approach. For some act utilitarians, the matter is more complex in the perverse case in which the injurer would derive more joy in seeing the injured suffer than the injured derives pain from suffering. For references to this literature, see generally Amartya Sen, Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, 6 PHIL. & PUB. AFF. 317, 317-22 (1977) and SEN, supra, at 30-31, 38-40.


⁹⁷. See, e.g., U.N. CHARTER pmbl. ("We the peoples of the United Nations ... reaffirm faith in fundamental human rights, in the dignity and worth of the human person...."); The Universal Declaration of Human Rights Preamble, G.A. Res. 217 (III)(A), U.N. GAOR, 3d Sess., 183d plen. mtg. at 135, U.N. Doc. A/810 (1948) ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world....").

Elsewhere I have suggested that, as persons, people are individuals with fundamental dignity deserving of respect. Just as the ideal of refraining from harming others is deeply and robustly cross-cultural, so too is the concept of the dignity of the person and the need to respect it. The linkage between these two concepts is not accidental: if other people are beings with fundamental dignity who deserve respect, one should refrain from harming them.

If refraining from harming others because of their inherent human dignity is a foundational ethical axiom, taking responsibility when one has harmed another is its most basic corollary. The passive form of responsibility-taking—accountability—through which courts or other authorities force injurers to make restitution is of course a basic part of most legal systems. Yet the call for active responsibility-taking by injurers also has deep cultural roots, and current support too, particularly, though not exclusively, within religious thought. Within both Judaism and Christianity, the view (though certainly not the only view in these rich religious traditions) is nearly two thousand years old that before an injurer will receive divine forgiveness, he should first reconcile himself with the injured. Regarding Judaism, consider the Mishnaic description (circa 200 CE) of the Jewish Day of Atonement, Yom Kippur, “For transgressions done between man and the Omnipresent, the Day of Atonement atones. For transgressions between man and man, the Day of Atonement atones, only if the man will regain the good will of his

99. See Cohen, supra note 35, at 760, 768.

The universality of confession would thus appear to hinge on the universality of the concept of pollution as the infringement of sacred norms. These violations of taboo produce contagion which can only be removed by rites of purification, especially public confession, by which the individual is returned to society and the existence of the group preserved.

Id.

101. For example, Robert F. Cochran, Jr., reports interviewing five Los Angeles Christian and Islamic clergy members and finding that “all would encourage those who had committed a crime to confess to the victim and to the government authorities.” Cochran, supra note 4, at 366 n.290.

102. See generally HEPWORTH & TURNER, supra note 100, at 16-38 (presenting a sociological examination of confessions within institutionalized contexts, such as criminal investigations and church rituals).
friend. A similar view is echoed in the Christian Gospel of Matthew, “Therefore if thou bring thy gift to the altar, and there rememberest that thy brother hath ought against thee; Leave there thy gift before the altar, and go thy way; first be reconciled to thy brother, and then come and offer thy gift.”

The requirement of Jewish law that the injurer’s atonement should include offering compensation was later most clearly articulated by the twelfth-century philosopher/physician Moses Maimonides. In Christian thought, we see it in systems of private penance introduced in Europe after the fifth century. Though clergy were instrumental in the confessional process and the selection of penance, “the penitential system rested ultimately on the consent of the individual offender to confess and to do penance.” Penance could include not only ritual elements, but also compensating victims and their relatives through work, payment of medical expenses, or returning property.

Often the religious and the secular were interwoven. As the Anglo-Saxon King Ethelred proclaimed: “[H]e who henceforth in any way violates right laws of God or man, let him expiate zealously . . . as well through divine penance as through worldly correction.”

The root philosophy behind such religious atonement was often medicinal: the injurer, or his soul, would be healed through such atonement. Note, however, that healing through such active

103. THE MISHNAH: A NEW TRANSLATION 279 (Jacob Neusner trans., 1988). This view remains within Judaism to this day and is a cornerstone of the Yom Kippur liturgy. See HIGH HOLIDAY PRAYER BOOK 206 (photo. reprint 1954) (Rabbi Morris Silverman ed., 1951); GATES OF REPENTANCE: THE NEW UNION PRAYER BOOK FOR THE DAYS OF AWE 251 (Chaim Stern ed., 1978).

104. Matthew 5:23-24; see Cochran, supra note 4, at 366 n.290 (writing that the Christian tradition places a great emphasis on confession); see also HEPWORTH & TURNER, supra note 100, at 8-12 (discussing the link between conscience and confession in Christianity). See generally DAVID BELGUM, GUILT: WHERE RELIGION AND PSYCHOLOGY MEET 142-44 (1963) (advocating a more “functional ministry” in Christianity through the combination of religion and psychology, especially when guilt is the crucial element behind suffering).


107. Id. at 70.

108. Id. at 73.

109. Id. (internal quotation omitted).

110. Id. at 71; HEPWORTH & TURNER, supra note 100, at 43; James 5:16 (“Confess your faults one to another, and pray one for another, that ye may be healed.”); Psalms 32:3-4
responsibility-taking can extend beyond the injurer. The injured party, and more generally the community too, can be healed through such a step, and, equally importantly, escalations of conflict can be avoided.\textsuperscript{111} Hence, it is not surprising that the ideal of active responsibility-taking by injurers also has strong roots derived not from the religious or moral quest of the injurer but from the need to maintain social peace or order. In the West, medieval German (non-Christian) folk law, which was constructed primarily to help prevent and control blood feuds, emphasized negotiated settlements and "concepts of atonement and reconciliation drawn from the penitential" realm.\textsuperscript{112} In some more collectivist Eastern countries, like Japan, with their stress on respect and social order, such a cultural emphasis on proactive responsibility-taking continues to this day.\textsuperscript{113}

Another way to express this is to recognize the difference between \textit{causal} fault and \textit{reactive} fault.\textsuperscript{114} Causal fault asks who caused the injury.\textsuperscript{115} Reactive fault asks how the parties responded to the injury.\textsuperscript{116} The former addresses what the parties did before the injury occurred, the latter what they did afterward. The problem with "hit-and-run" driving is not just the colliding, which is usually unintentional, but with the fleeing, which is usually intentional.\textsuperscript{117}

(\textquotedblleft When I kept silence [and did not confess], my bones waxed old . . . my moisture is turned into the drought of summer.	extquotedblright) Such medicinal language resonates with the therapeutic jurisprudence and restorative justice movements we see today.

\textsuperscript{111} \textit{See} generally Braithwaite, \textit{supra} note 68, at 246 (stating that responsibility-taking can help other \textquotedblleft stakeholders\textquotedblright); Garvey, \textit{supra} note 4, at 1827 (arguing that the actual harm caused by a crime is immaterial to whether the offender must do penance, but is material to the reparations the offender must make).

\textsuperscript{112} Berman, \textit{supra} note 106, at 72-74.


\textsuperscript{114} In large part, this Article is an argument that we in the United States should pay more attention to reactive fault than we currently do. This is not to assert that we should overlook causal fault. Causal fault and reactive fault represent different domains. Attention should be given to each.

\textsuperscript{115} \textit{See} Brent Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, 56 S. Cal. L. Rev. 1141, 1195 (1983) (contrasting reactive fault with that fault which occurs at the time of the offense).

\textsuperscript{116} \textit{See} Brent Fisse & John Braithwaite, Corporations, Crime and Accountability 48 (1993); Braithwaite & Roche, \textit{supra} note 68, at 72-74; Fisse, \textit{supra} note 115, at 1195-1200.

\textsuperscript{117} Braithwaite & Roche, \textit{supra} note 68, at 72.
More generally, different cultures may emphasize different aspects of fault. As Braithwaite and Roche write, "Western criminal justice systems (such as that of the United States) are at the causal end of the continuum; Asian systems (such as that of Japan) tend to be at the reactive end."\(^{118}\)

Whether the roots be religious, secular, or, as is most common, some fusion of the two, respecting others implies both refraining from harming them and actively taking responsibility if one has. The corollary to "what is harmful to you, do not do to others" is simple: if you have harmed another, take responsibility for it. "No denial" is the logical cousin of "no harm." It is a lesson of both morality and social peace.

**B. When the Injurer Is Not Held Accountable**

The risks to the injurer of failing to take responsibility may be greatest not when an external authority holds him accountable but when he "gets away with it." Recall the message within the maxim, "crime never pays": though sometimes crime does yield material rewards, the criminal (it is hypothesized) will always pay a greater nonmaterial price. A similar theme is found in the Psalmist's claim, "A brutish man knoweth not; neither doth a fool understand this. When the wicked spring as the grass, and when all the workers of iniquity do flourish; it is that they shall be destroyed for ever...."\(^{119}\) If one paraphrases "destroyed forever" in less eschatological language, namely, as "risking lasting psychological and spiritual harm to themselves," I expect that many would accept that statement.

Now it is not my intent to defend the "crime never pays" position as a categorical view, to argue that in every case injurers who are neither held accountable nor hold themselves responsible pay a psychological or spiritual price exceeding whatever material benefit they derive. Not only do the varieties of the human psyche and the paucity of empirical psychological and (even more so) spiritual evidence make me wary of attempting to defend such a view, but, most fundamentally, a categorical defense is unnecessary for the purposes of this Article.\(^{120}\) Instead, the position I will argue is that injurers who fail

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118. *Id.*
120. A moderate amount of empirical research has examined the psychological effects of granting forgiveness; however, far less exists on the psychological effects of attempting atonement. See Sandage et al., *supra* note 88, at 22 (indicating the lack of empirical research on seeking, granting, and receiving forgiveness); Bernard Weiner et al., *Public Confession*
to take responsibility risk serious psychological and possibly spiritual harm.

Before continuing, a few words may be in order about my use of the term “spiritual harm” and the references below and elsewhere in this Article to spiritual and religious sources, for such language is atypical within U.S. legal discourse. It is not my expectation or hope that all readers will share a common view of such matters or accept differing views as equally legitimate. Take, for example, the view discussed below that a person who fails to atone for his sins risks punishment in the afterlife. Though I am a Jew, and though there are some who argue that a belief in life after death is essential to Judaism, notwithstanding the peace of mind and motivation to do what is right many derive from such beliefs, for a variety of reasons (e.g., the absence of verifiable data, the unwillingness to face death within our culture, and the of use afterlife beliefs to rationalize existing social injustices), I consider myself a skeptical agnostic toward claims of afterlife punishment for unrepentant wrongdoers—

and Forgiveness, 59 J. PERSONALITY 281, 283-86 (1991) (critiquing the lack of empirical research on the psychological effects of attempting atonement); 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, 219 (2002) (noting a shortage of scientific interest in “blameworthy transgressors); see also Cochran, supra note 4, at 332 (arguing for a literary approach to studying confession). As one might expect, because matters of faith are often defined as beginning where scientific proof ends, empirical spiritual research on this topic is even scarcer.

121. See NEIL GILLMAN, THE DEATH OF DEATH: RESURRECTION AND IMMORTALITY IN JEWISH THOUGHT 249 (1997) (arguing for a Jewish belief in the afterlife). Note, however, that the view of life after death is virtually without support in the Hebrew Bible, and dates in Jewish thought to roughly the second century BCE. Id. at 18. Yet most contemporary Jewish discourse has much more of a here-and-now focus. As Carol Christ writes, “For many modern Jews, the question of life after death is not central” CAROL. P. CHRIST, SHE WHO CHANGES: RE-IMAGINING THE DIVINE IN THE WORLD 41 (2003).

122. Though I do not expect all claims, especially spiritual claims, to be empirically verifiable, my caution increases toward those that are not.


124. Beliefs in otherworldly reward and punishment can undercut the impetus to confront injustice in this world. Similarly, beliefs about reincarnation can buttress forms of social subordination like caste systems. If the lowly station in life into which one was incarnated is a fair reward for one’s behavior in a past life, rather than seeking to overturn the system of social subordination, one may come to see (wrongly, in my view) that unjust system as just. It is not uncommon for religious beliefs to be used to justify social subordination, both within a culture (think of the “divine” right to rulership claimed by many kings) and of other cultures. See, e.g., Deuteronomy 9:1-5 (providing, arguably, a theological justification for the conquest of Canaan); see also ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990) (commenting on the medieval theory of “universal papal jurisdiction” and the “idea of a divinely mandated war” during the crusades).
particularly skeptical toward those claims made with exacting precision. 

Nevertheless, discussions of the risks of wrongdoing to the human soul or spirit—not just the human psyche—are sufficiently widespread that I think they deserve serious consideration, both because of the possibility of their truth and because, even if false, they undoubtedly inform many people’s thinking. Indeed, to understand the psyche as fully distinct from the spirit or soul may well be a mistake. Let me return now to the main argument.

Denial is an act of moral regression and as such may have profound psychological and spiritual consequences. Let me first discuss some of the psychological risks. The most salient include guilt, shame, diminished self-esteem, negative social feedback, and narcissism.

From Shakespeare’s Macbeth to Dostoyevsky’s Crime and Punishment, the view that unpunished injurers (i.e., the murderers Macbeth and Raskolnikov) will be tormented by guilt has deep literary roots. Even if punished, the injurer may still suffer from guilt. Consider the sentence God imposes on the unrepentant Cain after Abel’s murder: “[A] fugitive and a vagabond shalt thou be in the earth.” The life of injury without atonement—and for murder atonement seems near impossible—will be haunted and restless, for to atone is, as the etymology suggests, to attempt, inter alia, to make

125. For a feminist discussion of afterlife beliefs based upon process philosophy promulgated by Charles Hartshorne, see CHRIST, supra note 121, at 41-42.
126. See Cohen, supra note 3 (commenting on the lawyer’s need for sensitivity when counseling clients who may hold such religious beliefs about responsibility-taking).
127. Consider Jung’s assessment, “Among all my patients in the second half of life... there has not been one whose problem in the last resort was not that of finding a religious outlook on life.” C.G. JUNG, MODERN MAN IN SEARCH OF A SOUL 264 (W.S. Dell & Cary F. Baynes trans., Harcourt, Brace & Co. 2d ed. 1950) (1933).
128. Where an injurer not only passively fails to take responsibility but actively disclaims or denies responsibility, the psychological risks of lying should also be included. For discussions of the psychological risks of lying, see SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 25 (1978) and CHARLES V. FORD, LIES! LIES!! LIES!!!: THE PSYCHOLOGY OF DECEIT 276-83 (1996). As reflected in the premise underlying lie detector or polygraph machines, lying has been found to be a source of physiological stress for some as well. See generally DAVID C. RASKIN ET AL., VALIDITY AND RELIABILITY OF DETECTION OF DECEPTION 23 (1978) (finding validity, though not perfect accuracy, in properly administered testing); OFFICE OF TECH. ASSESSMENT, U.S. CONG., SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION—A TECHNICAL MEMORANDUM, No. OTA-TM-H-15, at 97 (Nov. 1983) (same).
129. See generally FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (David McDuff trans., Viking 1991) (1866); WILLIAM SHAKESPEARE, MACBETH. On Dostoyevsky’s treatment of guilt, see Cochran, supra note 4, at 350-72.
130. Genesis 4:12.
The psychological release found through atonement is a route to “integrity, wholeness, and authenticity.” As Carl Jung wrote, “It is only with the help of confession that I am able to throw myself into the arms of humanity freed at last from the burden of moral exile.”

When the injurer fails to take responsibility, guilt may soon translate into a sense of internal shame—the feeling not that one has committed a wrongful act but that one is oneself defective—and, ultimately, a loss of self-esteem. There has been much research documenting the human psyche’s need for self-esteem. Injurers who fail to take responsibility put their self-esteem at risk. Numerous empirical studies have found that people judge injurers who take responsibility and apologize far better than those who do not. If we so judge others, then likely at some level we so too judge ourselves when we fail to make amends. Although empirical psychological research about atonement is scarce (making the area ripe for research), one study found that benefits to injurers who take responsibility may include, “less sad[ness] and ang[er], less guilt about the transgression, and less shame about themselves.”

132. See Cochran, supra note 4, at 364.
133. JUNG, supra note 127, at 35; see ERVING GOFFMAN, RELATIONS IN PUBLIC: MISCROSTUDIES OF THE PUBLIC ORDER 113 (1972) (“[A]pologies represent a splitting of the self into a blameworthy part and a part that stands back and sympathizes with the blame giving, and, by implication, is worthy of being brought back into the fold.”).
134. See GABRIELE TAYLOR, PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT 97 (1985) (“The important feature of guilt is that the thought of the guilty concentrates on herself as the doer of the deed. Having brought about what is forbidden she has harmed herself.”).
136. See, e.g., Bruce W Darby & Barry R. Schlenker, Children’s Reactions to Apologies, 43 J. PERSONALITY & SOC. PSYCHOL. 742, 747 (1982) (presenting an empirical study supporting the hypothesis that those who apologize are evaluated more favorably than those who do not); 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, 224 (1989) (presenting an empirical study showing that when a harm-doer apologizes, the subjects of the study judged the injured person as having a better impression of the harm-doer); Weiner et al., supra note 120, at 295-96 (presenting an empirical study finding that confession alters prior opinions about the person offering the confession).
137. Witvliet et al., supra note 120, at 228. Witvliet and her colleagues’ study asked subjects to imagine how seeking forgiveness would affect them; the subjects had not committed actual offenses. Id. at 223; see Julie J. Exline & Roy F. Baumeister, Expressing Forgiveness and Repentance: Benefits and Barriers, in FORGIVENESS: THEORY, RESEARCH, AND PRACTICE 133, 137-38 (Michael E. McCullough et al. eds., 2000) (describing possible benefits to seeking forgiveness and related empirical findings).
priest's traditional response to a penitent's confession: "My brother . . . be not ashamed; for thou speakest not unto me, but unto God, before whom thou standest." Through taking responsibility one may cleanse oneself—make a "clean breast" as it were—of internal shame. I note here too the importance of authenticity to one's sense of well-being.

Failing to take responsibility also poses relational risks. Most obviously, the injured party may become angry with the injurer, and the relationship may collapse. Such relational damage can in turn be a form of psychological loss for the injurer. In this regard, guilt and even internal shame, though unpleasant, can be seen as positive emotions, symptoms of a well-formed conscience that lead the injurer to the right course. More subtle is the risk of increased narcissism. Taking responsibility when one has injured typically involves some empathy. In contrast, failing to take responsibility seems likely to reinforce self-centeredness.

138. BELGUM, supra note 104, at 64 (emphasis added).
139. See, e.g., JÜNG, supra note 127, at 36 (emphasizing the "curative results" of confession). On the language of cleansing and filth, see HEPWORTH & TURNER, supra note 100, at 72, and Martha Grace Duncan, In Slime and Darkness: The Metaphor of Filth in Criminal Justice, 68 TUL. L. REV. 725, 749 (1994).
140. See Kennon M. Sheldon et al., Trait Self and True Self: Cross-Role Variation in the Big-Five Personality Traits and Its Relations with Psychological Authenticity and Subjective Well-Being, 73 J. PERSONALITY & SOC. PSYCHOL. 1380, 1380 (1997) (investigating the relationship between authenticity and character traits). See generally Kennon M. Sheldon & Andrew J. Elliot, Goal Striving, Need Satisfaction, and Longitudinal Well-Being: The Self-Concordance Model, 76 J. PERSONALITY & SOC. PSYCHOL. 482, 495 (1999) (arguing that goals must relate to "authentic" values to provide long-term energy).
141. For references, see Exline & Baumeister, supra note 137, at 137.
142. See Roy F. Baumeister et al., Personal Narratives About Guilt: Role Action in Control and Interpersonal Relationships, 17 BASIC & APPLIED SOC. PSYCHOL. 173, 173-74 (1995) (studying the functional usefulness of guilt in restoring relationships); see also BRAITHWAITE, supra note 4, at 71-75 (discussing the influence of external shame on conscience on external shame's influence on conscience).
143. See Sandage et al., supra note 88, at 27, 29-30 (concluding that narcissistic people are less likely to engage in forgiveness-seeking behavior). Sandage and his colleagues' study does not prove that injuring without taking responsibility increases narcissism; however, the negative correlation they find between narcissism and atonement is suggestive. Id.
144. There has been much discussion of the role of empathy in granting forgiveness. See Michael E. McCullough et al., Interpersonal Forgiving in Close Relationships, 73 J. PERSONALITY & SOC. PSYCHOL. 321, 322 (1997) (arguing theoretically and empirically that empathy for the offender is the "central facilitative condition leading to forgiveness"); Everett L. Worthington, Jr., The Pyramid Model of Forgiveness: Some Interdisciplinary Speculations About Unforgiveness and the Promotion of Forgiveness, in DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH AND THEOLOGICAL PERSPECTIVES 107, 107-08 (Everett L. Worthington, Jr. ed., 1998) (same); cf. Seiji Takaku, The Effects of Apology and Perspective Taking on Interpersonal Forgiveness: A Dissonance-Attribution Model of Interpersonal
Many religious writings highlight the spiritual risks of failing to take responsibility. Consider the claims found in Proverbs: "He that covereth his sins shall not prosper: but whoso confesseth and forsaketh them shall have mercy";\textsuperscript{145} Psalms: "I acknowledged my sin unto thee, and mine iniquity have I not hid. I said, I will confess my transgressions unto the LORD; and thou forgavest the iniquity of my sin";\textsuperscript{146} and Acts: "Repent ye therefore, and be converted, that your sins may be blotted out, when the times of refreshing shall come from the presence of the Lord."\textsuperscript{147} Although such claims focus on confessions made to God rather than to injured persons, the theme that injurers who do atone may obtain mercy—and conversely that those who do not risk punishment—is powerful and echoes as well in secular views of atonement.\textsuperscript{148} It is beyond the scope of this Article to detail differing religious views of the consequences to injurers who fail to take responsibility for their acts. Let me simply state that within some religious traditions, such injurers, or their souls, are deemed at risk both in this life and, for those who so believe, in the afterlife.\textsuperscript{149} For some, the question of whether to take responsibility after injury translates into nothing less than a choice between eternal life in Heaven versus eternal damnation in Hell.

IV. SOME OBJECTIONS

A. A Skeptical Response

A skeptic may argue, "But how does one know the injurer harms himself by denying? Surely he must think he benefits, for if he did not, why would he do it? You may think denial is immoral, but he may not care. Try reading less Genesis and more Nietzsche. Not everyone

\textsuperscript{145}Proverbs28:13.

\textsuperscript{146}Psalms32:5.

\textsuperscript{147}Acts3:19.

\textsuperscript{148}See, e.g., HEPWORTH & TURNER, supra note 100, at 15 (distinguishing confession as a "social activity"); REPENTANCE: A COMPARATIVE PERSPECTIVE 8 (Amitai Etzioni & David E. Carney eds., 1997) (advocating transporting "repentance from the religious to the civic realm"); Garvey, supra note 4, at 1810-24.

\textsuperscript{149}For references and discussions, see BELGUM, supra note 104, at 60-94; HEPWORTH & TURNER, supra note 100, at 66-84; Garvey, supra note 4, at 1806-10. There is significant variety in what exactly confession means (e.g., whether it is to be said to the injured party, to a priest, or privately to God) and what follows such confession in different religious traditions (e.g., Islam resists granting the clergy the power to absolve the confessor found within branches of Christianity). See HEPWORTH & TURNER, supra note 100, at 9.
who injures is—or should be, Nietzsche would claim—burdened with guilt. Consider too the psychological evidence showing that injurers' memories tend to mentally “minimize” their offenses and, further, that over time people actually come to believe the stories they tell. You might also rethink your rose-colored view of confession. It can be as much an instrument of social control as of inner atonement. If the injurer had your moral sensibilities, he probably would not have committed the injury in the first place. But having committed the injury, his approach is likely to be utilitarian. If he calculates that the economic benefit of denial outweighs the moral or psychological costs, or if his decision implicitly reveals that judgment, who are you to second-guess him?"  

150. See Friedrich Nietzsche, On the Genealogy of Morals 34, 62, 90, 140 (Walter Kaufman & R.J. Hollingdale trans., Walter Kaufman ed., 1969) (decrying the “slave” mentality/morality of guilt within the Judeo-Christian heritage). Though their normative assessment is quite different, without offering an opinion on the matter, I report that Hepworth and Turner also see distinctive Judeo-Christian aspects to guilt and confession:  

Confession ... typically presupposes a constellation of notions about the private self tormented by guilt and the private conscience exposed to self-criticism. This constellation is a specific product of Christian history. Of course, it is possible to trace these Christian assumptions back to a Jewish origin, but their full development depended on centuries of cultural and institutional development within a Christian context.  

HEPWORTH & TURNER, supra note 100, at 8-9. Further, Hepworth and Turner interpret the “full development” of Christian assumptions concerning confession as entailing “an obligation to confess controlled by an official priesthood which alone has the power of absolution and reconciliation.” Id. at 9.  

151. See Roy F. Baumeister et al., Victim and Perpetrator Accounts of Interpersonal Conflict: Autobiographical Narratives About Anger, 59 J. PERSONALITY & SOC. PSYCHOL. 994, 1001 (1990) (“Perpetrators apparently see the incident as a brief, uncharacteristic episode that has little or no relation to present circumstances.... This is consistent with the view that the perpetrator wishes to deconstruct the incident so as to deny any lasting implications of guilt or shame....”). Conversely, victims tend to mentally “maximize” incidents. See id. These self-serving memory distortions by perpetrators and victims are of approximately equal levels. See Arlene M. Stillwell & Roy F. Baumeister, The Construction of Victim and Perpetrator Memories: Accuracy and Distortion in Role-Based Accounts, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1157, 1157 (1997).  


153. See Michel Foucault, Discipline and Punish: The Birth of the Prison 38-39 (Alan Sheridan trans., 1979); HEPWORTH & TURNER, supra note 100, at 15.  


155. I use the oxymoronic phrase “implicitly reveals” because, I think, most injurers who seek to avoid paying compensation would not openly admit that they are choosing an unethical path for the sake of financial profit.
In part I agree, but mostly I disagree, with the skeptic’s response. I agree with the skeptic that the injurer who fails to take responsibility implicitly reveals that he values money over morality. Yet I disagree that the moral, and hence psychological, costs of denial are so easily dismissed, whether or not the injurer pays conscious attention to them.

As discussed above, there are few ethical principles more basic than refraining from harming others, and few corollaries so clear as taking responsibility if one does. That such a principle is so basic highlights the centrality of how one treats others in leading an ethical life. A person’s ethics are most clearly tested when there is something at stake. If a vendor works in a market where having a reputation for honesty works to his material benefit, then he need only be self-interested in a pecuniary sense to act honestly. However, if he sells in a market where being dishonest can work to his material benefit, then his ethics are tested. In light of these two factors—the ethical centrality of interpersonal relations and a key test of one’s ethics being ethical acts contrary to one’s pecuniary interests—one’s response to injuring another makes a profound statement about one’s values and character.

Some skepticism toward the skeptic’s quick dismissal of such weighty moral factors is in order.

I also disagree with the skeptic’s premise that people always choose what is in their best interests. There is a longstanding debate in economic theory as to whether, simply because a person chose a particular course of action, one can necessarily deduce that their selection was the best ex ante choice. While it is plausible, though

156. See generally Sen, supra note 95, at 1-28 (contrasting economic and ethical approaches to decision making); Cohen, supra note 35, at 769-83 (critiquing the tendency to disregard ethical considerations for materialist goals). Some have argued that corporate executives in particular have a fiduciary duty to their shareholders to disregard supra-legal ethical considerations that would lead to diminished profits. See Milton Friedman, A Friedman Doctrine-The Social Responsibility of Business Is to Increase Its Profits, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32. But cf. Amartya Sen, Does Business Ethics Make Economic Sense?, 3 BUS. ETHICS Q. 45, 45-54 (1993) (critiquing the idea that there is no need for business ethics). One basic problem with Friedman’s view is that the fact of agency (i.e., that shareholders have hired employees to do their bidding) does not provide a moral excuse for shareholders to indirectly pursue what would otherwise be unethical conduct.

157. See Wetlaufer, supra note 29, at 1234. See generally Cohen, supra note 35, at 745 (arguing that how a lawyer sees those with whom he negotiates—whether as objects or people—is critical to the lawyer’s definition of himself).

158. Conversely, one’s values and character are critical to one’s choice of whether to deny.

159. Such a premise is sometimes labeled the “weak axiom of revealed preference.” Hal R. Varian, Microeconomic Analysis 143 (2d ed. 1984). “[R]evelled preference” is a cornerstone of neoclassical microeconomic theory. Paul A. Samuelson, Consumption Theory
not indisputable, to think that people usually choose what is best for them, in some situations surely that presumption breaks down. Consider the cigarette addict who wishes to quit but succumbs to his craving for another smoke, or a teenager about to engage in unprotected sexual intercourse. It seems odd to say the cigarette addict’s “choices” are freely made, for addiction raises serious issues of self-control. As reflected in efforts and money spent on programs to stop smoking (why should a person with complete free will pay for such a program?), the addict himself may even recognize the short-term versus long-term tension. Stronger drugs like crack cocaine present the issue of diminished free will even more sharply. To claim blithely the addict’s choices serve his or her best interests seems deeply unrealistic. The same applies to the teenager about to engage in unprotected sex, though there, hormones notwithstanding, general social and psychological factors (e.g., social pressures, “proving” one’s adulthood, etc.) rather than a chemically induced loss of self-control are typically at work. Similar to the addict, the teenager may seek short-term gratification at his or her long-term expense.

In the case of denial, a similar myopia often sets in. Here, the typical immediate impulse is not sating a chemical addiction or “proving” one’s adulthood, but avoiding shame. Taking responsibility for harming another involves admitting to oneself, to that other person, and sometimes even to the world that one has erred. Though such admissions should be seen as signs of psychological strength, many injurers react differently. When I lied to my mother about the crayon markings, I was motivated at root by a sense of embarrassment. Hootie Johnson’s fear in the Masters dispute of

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*In Terms of Revealed Preference*, 15 *ECONOMICA* 243, 243 (1948). For a fine critique of the theory of “revealed preference,” see Amartya Sen, *Choice, Welfare and Measurement* 54 (1982). I suspect many psychologists would find this premise sufficiently unrealistic that they would not consider it worthy of debate. Observe that whether a choice results *ex post* in the best outcome is another matter. The issue here is whether, at the time of making the choice (*ex ante*), it appeared to be the best one.


161. Here I mean shame in the sense of public shame.
becoming a trophy in the NCWO's display case may also reflect an element of this. Taking responsibility for an injury is a humbling step and can be a difficult step for many.

Psychological research on loss aversion may also be instructive here. Both theoretical and empirical literature support the proposition that many people would rather gamble with the hope of avoiding a large loss than accept a smaller but certain loss. As Langevoort summarizes, "Although behavioral decision theory accepts risk-aversion as a characteristic in the pursuit of gains, it also argues that risk-seeking behavior is more commonplace when a person perceives the possibility of loss." When one has injured another, accepting responsibility is like taking a certain economic loss, whereas the outcome of denial is uncertain. Loss aversion may thus reinforce the shame-avoidant myopia of denial.

Even for those motivated solely by pecuniary interests, the reflexive response of denial is frequently an inappropriate ex ante response. Not only can denial increase litigation expenses, but failing to take responsibility can cause problems to fester and grow. How much easier it would have been if, early on, the Catholic Church had squarely faced problems of priests sexually abusing children. Had Bill Clinton addressed his sex/power addiction when it was raised by Paula Jones, there may never have been a Monica Lewinsky. As I have described elsewhere, it cannot be presumed that denying responsibility is in the injurer's long-term economic interest. Denied injuries can become like festering wounds, growing and spreading with time.

Conversely, admitting one's errors—and taking responsibility implies such admission—can be pivotal to avoiding future repetition. This is reflected both within popular culture (e.g., the first step to

162. See generally Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 ECONOMETRICA 263, 263 (1979) (arguing that people underweigh outcomes that are probabilities as compared to certain outcomes, thus violating the "axioms of expected utility theory"); Daniel Kahneman et al., Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, 5 J. ECON. PERSP. 193, 199-200 (1991) (expounding upon Kahneman and Tversky's theory of loss-aversion). For further references, see Chris Guthrie, Panacea or Pandora's Box?: The Costs of Options in Negotiation, 88 IOWA L. REV. 601, 609 (2003).


165. See id. at 1464.
recovery in twelve-step programs is admitting the problem\textsuperscript{166}) and in judicial thought. As one court opined, "It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault."\textsuperscript{167} We also see it in the Federal Sentencing Guidelines' reductions for a defendant who, rather than contesting the charge, "clearly demonstrates acceptance of responsibility for his offense."\textsuperscript{168} Empirical studies also suggest a possible link between responsibility-taking and reduced recidivism.\textsuperscript{169} When similar injuries can recur, denial may cause sizable long-term harm. This is of significance for even the most pecuniarily self-interested. I would note as well possible reputational benefits (e.g., in the long run, a company that "stands behind its products" may attract consumers) and strategic benefits (e.g., assuming responsibility may


\textsuperscript{167} See Gollaher v. United States, 419 F.2d 520, 530 (9th Cir. 1969).

\textsuperscript{168} U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2001); see id. § 3E1.1 cmt. app. n.1(a) ((l)(a) ("[A] defendant who falsely denies . . . relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility . . . ."); id. § 3E1.1 cmt. app. n.2 ("This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.").

\textsuperscript{169} Further research is needed concerning the linkage between responsibility-taking and reduced recidivism. See John Braithwaite, Restorative Justice and Responsive Regulation (2002) (calling for such research); Allison Morris & Gabrielle Maxwell, Restorative Conferencing, in Restorative Community Justice: Repairing Harm and Transforming Communities 173, 186-87 (Gordon Bazemore & Mara Schiff eds., 2001) (same); see also Friedrich Lösel, The Efficacy of Correctional Treatment: A Review and Synthesis of Meta-Evaluations, in What Works: Reducing Recidivism (James McGuire ed., 1995) (calling for more research on how environmental and offender characteristics affect recidivism). However, there is some empirical research from the restorative justice and victim-offender mediation literatures offering, as Braithwaite writes, "empirical grounds for optimism" that restorative justice approaches, which typically involve accepting responsibility, can reduce reoffending. Braithwaite, supra, at 69. For a recent meta-analysis supportive of that view, see William R. Nugent et al., Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis, 2003 Utah L. Rev. 137, 161-62. Nugent and his colleagues argue that when a juvenile has been adjudicated guilty, after accepting responsibility for the crime or by evidence showing guilt, it is less likely that the juvenile will engage in the new crimes. Id.; see also Lösel, supra, at 89 (confirming the positive effect of offender treatment on reduced recidivism). Note that these studies do not specifically identify the positive impact of responsibility-taking, but, in context, such an inference seems reasonable.
"innoculate" the offender against punitive damages) to taking responsibility.  

Let me be clear that I am not asserting that in every case responsibility-taking will be economically beneficial to the injurer. In many cases, responsibility-taking may well be economically costly. Indeed, under our system of ordinary compensatory damages, economically speaking, denial may at times become a nearly "no-lose" gamble. Though deeply problematic morally, denial often makes economic sense. Regardless, I suggest that, in all but extremely unusual cases, denial is an act of moral regression, and hence poses significant spiritual and psychological risks to the injurer. In some cases, particularly when long-term effects are considered, it is likely to be economically costly as well.

At its core, denying an injury one has caused is a form of lying. A key problem with lying is its contagious nature. As Sissela Bok observed:

[S]o few lies are solitary ones. It is easy, a wit observed, to tell a lie, but hard to tell only one. The first lie "must be thatched with another or it will rain through." More and more lies may come to be needed; the liar always has more mending to do.

Denial can trigger a similar process. When an organization covers up a problem, be it an internal one like sexual harassment or an external one like a defective product, not only does it risk recurrences of that specific problem, but it may set in motion various dysfunctional dynamics. Casualties may include open conversations, truth telling, and corporate morale. The organization may steadily lose its best workers as employees with integrity may leave and employees who tolerate cover-ups remain. Conversely, even if daunting at first, responsibility-taking can ultimately boost corporate morale. Injurers should also be aware of the risk of subconscious punishment-seeking:

171. When the only punishment for denial is paying what was owed (e.g., compensatory damages), injurers who are motivated solely by economic factors have a strong incentive to deny. Assume for the moment that there are no litigation costs. If the denial "succeeds," the injurer pays nothing, while if it "fails," he must simply pay what he would have paid had he admitted his fault. From the economic perspective, denial becomes a no-lose gamble. When litigation costs are introduced, the picture is made more complex, but the essential lesson remains: unless the injurer expects the economic costs of denial to outweigh the economic benefits, pecuniarily motivated injurers will be likely to deny. Given such factors, our society may wish to consider creating greater economic incentives against denial. See Cohen, supra note 3.
172. Bok, supra note 128, at 25 (internal citation omitted).
173. See Cohen, supra note 164, at 1473-75.
though the injurer (consciously) denies any wrongdoing, his subconscious mind may seek to satiate his sense of guilt.\textsuperscript{174} What to the external world may appear to be simple misfortune may in fact be rooted in a past wrong for which atonement was not made.

Viewed in a positive light, injuries are crises that provide significant \textit{learning opportunities} for injurers. Such learning may address matters beyond preventing future recurrences of the problem. Not only might facing problems of sexual abuse early on have helped the Catholic Church prevent future cases of abuse, it also might have prompted it (in theory, at least) to rethink the other subjects such as the celibacy of priests and the ordination of women.\textsuperscript{175} Recent space shuttle disasters could prompt NASA to rethink not only technical matters of engineering, but also questions of organizational design.\textsuperscript{176}

This applies to individuals as well. Even when the injury appears to be "one shot" (i.e., the likelihood of a similar future injury is minuscule), much can be learned by injurers who face what they have done. Take a minor negligence case like accidentally driving one's car into a neighbor's mailbox and knocking it over. Taking responsibility by apologizing and paying for necessary repairs might free up the driver to ask himself, "What led me to do this?" The response may be simple, such as identifying a blind spot when using the rearview mirror, or may point to broader issues, such as the need for stress reduction in his life. Taking responsibility can be essential to turning the injury into a learning experience.\textsuperscript{177} This is especially true for cases

\textsuperscript{174}. One might link such a view to Freud. \textit{See} Sigmund Freud, \textit{Writings on Art and Literature} 234, 245 (1997) ("It is a fact that large groups of criminals want to be punished. Their super-ego demands it and so saves itself the necessity for inflicting the punishment itself."). Observe, however, that Freud focused on guilt (rooted in general psychological impulses like parricide and the Oedipus complex) preceding crime, rather than on guilt following crime. Sigmund Freud, \textit{Criminals from a Sense of Guilt}, in \textit{14 The Standard Edition of the Complete Psychological Works of Sigmund Freud} 332-33 (James Strachey ed., 1957). Freud emphasized guilt's thirst for punishment as an impetus for crime. \textit{See} id.

\textsuperscript{175}. \textit{See} Michael Paulson, \textit{Crisis in the Church; Catholics Want Change, Poll Finds Seek Archbishop Open to New Ideas}, \textit{Boston Globe}, May 11, 2003, at A1 ("A plurality of local Catholics say the requirement of priestly celibacy is the primary cause of clergy sexual abuse. An overwhelming 86 percent majority of local Catholics—the highest ever in a Globe poll—say they would now support allowing priests to marry, and 80 percent, another record in Globe polling, say they would support the ordination of women as priests.").

\textsuperscript{176}. \textit{See} Excerpts from \textit{Report of the Columbia Accident Investigation Board}, \textit{N.Y. Times}, Aug. 27, 2003, at A18 ("In the [Columbia Accident Investigation] board's view, NASA's organizational culture and structure had as much to do with this accident as the external tank foam.").

\textsuperscript{177}. Consider the view of attorney Sloan Bashinsky:
of intentional injury and cases in which intrapsychic denial accompanies the external injury. Surely the injurer who wishes to grow spiritually and psychologically needs to think about why he acted the way he did.

Finally, observe that while responsibility-taking is generally psychologically and spiritually beneficial to the injurer, such benefits to the injurer do not form the moral basis for the injurer's obligation to take responsibility. As mentioned, the duty to take responsibility when one has wrongfully injured another derives from the duty to refrain from harming others. It does not derive from the instrumental spiritual and psychological benefits to the injurer. In terms of the injurer's ethics, the fact that fulfilling this moral duty can be spiritually, psychologically, and sometimes even economically beneficial to oneself is a "bonus." As I discuss elsewhere, this "bonus" turns out to be quite relevant for a lawyer's ethics, for, given the moral and psychological risks involved, a lawyer can by no means presume that the client's interests will be best served by denial.178

B. Three Further Objections

In response to the claim that injurers have a moral duty to actively take responsibility for harms they cause, some may offer further objections. Consider three such challenges. First, it may be argued that if denial after injury is the cultural norm, an injurer who follows that pattern should not be held blameworthy. Second, given the nature of the postinjury "game," fairer outcomes will result when injurers initially deny rather than take responsibility. For example, if "split-the-difference" forces drive legal settlements, denial may yield fairer results than offers of responsibility-taking. Third, in many if not most cases, fault cannot be known in advance of legal proceedings. It is the legal process that determines the complex and ambiguous questions of fault. Thus, it is proper for defendants (not injurers—one cannot know

As in medicine, about five percent of legal clients respond well to the traditional symptomatic treatment: negotiating and court battles. In the other ninety-five percent of cases, the legal problem—the symptom—may be removed, but the underlying causes continue to fester and plague clients. . . . Legal cases, like illnesses, have deeper causes and resolve more favorably when the underlying dynamics are explored and worked through before the outer symptoms are treated.

SLOAN BASHINSKY, THE HIGH LEGAL ROAD: A NEW APPROACH TO LEGAL PROBLEMS 14 (1990). Bashinsky advertises his services thus: "LAW AND SPIRIT[:] Legal problems mirror your unlearned spiritual lessons, lessons presented before and missed, lessons to be presented later if not learned now." Id. at 46.

178. See Cohen, supra note 3.
who was at fault for the injury until after the trial) to let the legal process run its course. To take responsibility immediately after the injury would be premature.

1. Cultural Norms

"What should I do if I cause a car accident? You may say that I should get out of my car and confess my failings, but my insurance company tells me to say nothing.\textsuperscript{179} The same is true if a doctor commits a mistake and goes to his hospital’s risk management board, or, more generally, when an injurer goes to his lawyer.\textsuperscript{180} If denying responsibility after the injury is the cultural norm, how can I be blamed for following it?\textsuperscript{181}

To see how extensively the amoral view of denial permeates our thinking, consider the most famous example within game theory: the "prisoner’s dilemma." The presentation of philosopher Robert Nozick is typical:

[A] sheriff offers each of two imprisoned persons [unable to communicate and] awaiting trial the following options. . . . If one prisoner confesses and the other does not, the first does not go to jail and the second will receive a twelve-year sentence; if both confess, each receives a ten-year prison sentence; if both do not confess, each receives a two-year sentence.\textsuperscript{182}

What should a prisoner do? The usual analysis is that, despite the fact that both prisoners will do better by not confessing, if he is "rational,"

\begin{table}[h]
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& Prisoner II \\
\hline
& Don't Confess & Confess \\
\hline
Don't Confess & 2, 2 & 12, 0 \\
Confess & 0, 12 & 10, 10 \\
\hline
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\end{table}

\textsuperscript{179} See Cohen, supra note 62, at 1012 n.9 ("A friend's insurance company provided him with a small, wallet-sized card titled, 'What to do when [you are] involved in a car accident.' The bottom line of the card reads, 'Keep calm, don't argue, accuse anyone, or admit guilt.'"). On the improbable risk of voiding one's insurance coverage by admitting guilt, see id. at 1025-28.


\textsuperscript{181} This objection also suggests a reliance-on-professional-advice rationale: if the professional (e.g., lawyer), who is experienced in such matters, advises the client, who is inexperienced, to deny, should not the client heed such expert advice even if it contradicts his commonsense morality? This issue is a serious one, but due to space constraints I will not pursue it here.

\textsuperscript{182} ROBERT NOZICK, THE NATURE OF RATIONALITY 50 (1993). Diagrammatically, the problem can be represented by a matrix:
each prisoner should confess, for irrespective of the other prisoner's choice, he will be better off confessing. The lesson or paradox of the dilemma is that, quite unlike Adam Smith's efficient market, individually rational or self-interested behavior makes both of the prisoners worse off than had they cooperated by remaining silent. Yet observe here the basic moral question that is not asked: Did the prisoner actually commit the crime? In the usual posing of the problem, whether the prisoner actually committed the crime is irrelevant. The decision of whether to confess or deny is seen entirely as a strategic choice. The sole focus has become that which is instrumentally useful. Confession and denial have been utterly severed from actual guilt and innocence. By contrast, the obvious moral position is that the prisoner should deny having committed the crime if he did not commit it and confess to the crime if he did commit it. What is true in the prisoner's dilemma is all too often true in our culture. Denial has become purely a matter of strategy. The moral relevance of responsibility-taking has been completely bypassed.

Social norms do have their place in establishing proper behavior; however, they do not typically make what is wrong right. The fact that denial after injury is common in our society, and further that it is legitimated both implicitly through examples like the prisoner's dilemma and explicitly through professional advice, does not justify the guilty denier's wrongful act. Why our society legitimates denial after injury is an interesting question. But whatever the reason, it does not provide moral excuse. Recall Hume's critique of the naturalistic fallacy. People commonly, but mistakenly, attempt to justify what should be (the normative) based upon what is (the positive). Even if denial after injury is the common response, it remains immoral.


184. For several hypotheses, see Cohen, supra note 3.

185. See generally David Hume, A Treatise of Human Nature 525 (Ernest C. Mossner ed., Penguin Classics 1985) (1739 and 1740) (arguing that "the sense of justice and injustice is not deriv'd from nature;" rather, it arises "from education, and human conventions").
2. Substantive Fairness

Some injurers may assert that, given the “nature of the game,” fairer results will ensue if they deny, rather than admit, responsibility. “Most lawsuits settle, and ‘split-the-difference’ is the rule. Suppose I have committed $100 worth of damages. If I admit to owing $100, but the other side claims I owe $200, we’ll probably settle at $150. That is $50 more than I owe. However, if I deny responsibility and state that I owe nothing, and the other side claims $200, we’ll settle at $100, which is fair. The postinjury settlement process is basically a game, and a fairer outcome will result if I play it like everyone else does. I personally wouldn’t mind being honest, but in a system in which everyone else lies, being honest would work against me.” A criminal defendant facing severe sanctions might reason analogously. “Look, I would admit that I stole the nine videotapes worth $150 total, but if I do I’ll be sentenced to fifty years in prison. If that’s not cruel and unusual punishment, I don’t know what is.” The ‘justice’ system is more criminal than my crime. I ought to go to jail for months, not for a half-century. Given that backdrop, I am right to deny my theft. It’s a lie, but it’s the only chance for avoiding a gross injustice.”

Such second-best, “dirty hands” claims, in which deontology and teleology are in tension, must be taken seriously. Indeed, in my view, such reasoning has much force in the context of the U.S. criminal justice system, which incarcerates people, disproportionately minorities, at levels and for durations virtually unheard of throughout the world. However, before endorsing such reasoning, a caution

186. See Lockyer v. Andrade, 538 U.S. 63, 66, 70 (2003) (rejecting the appellant’s argument that a fifty-year sentence in these circumstances under California’s “three strikes” law violated the Eighth Amendment prohibition against “cruel and unusual” punishment).


188. MARC MAUER, RACE TO INCARCERATE 19-23 (1999). Commentators have written about racial and ethnic bias within the U.S. criminal justice system. See generally JUAN PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 1018-19 (2000) (pointing out the discrepancy between the abundance of articles discussing African-Americans and crime and the minimal literature discussing other racial groups and crime); SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA (1996) (arguing that almost all criminal justice issues in America involve matters of race and ethnicity). For international statistics, see MAUER, supra, at 19-23 (“In contrast to the industrialized nations to which the United States is most similar, [as of 1995, American] rates of incarceration are about 6-10 times higher in general.”). As Lawrence Friedman wrote roughly eight years ago, “[W]e are embarked today on a radical, and dangerous experiment—an experiment in fighting crime through more and more draconian measures; and through
should be raised, at least concerning civil cases. This second-best justification is not based on the position that admitting responsibility will simply be to the injurer's economic detriment. An offender wishing to respond morally to injuring wants to pay compensation. The second-best justification for denial only gains force to the extent that admission will lead the injurer to have to pay more than what is properly owed. The moral question the injurer faces is not, "will I have to pay if I admit what I have done?" Rather it is, "will I have to pay more than I should if I admit what I have done?" In other words, the issue is whether the injurer uses a moral, rather than an amoral, reference point.

It is far from clear that admitting what one properly owes is inevitably disadvantageous vis-à-vis paying what one properly owes. By making a fair offer of settlement along with his admission of responsibility, the injurer adopts a reasonable, justifiable bargaining position to which, absent persuasive argument otherwise, he should generally adhere. In the language of negotiation analytics, such an offer is a "principled" position that is likely to carry much force. If the injured party seeks a greater settlement amount, then it is appropriate for trial to ensue. However, my sense is that the opposite is most likely. Usually, the injurer's admission of responsibility coupled with a fair settlement offer will yield the cessation of hostilities rather than their escalation. Recall too the requirement under the Federal Rules of Civil Procedure that, if damages awarded at trial are less than the defendant's prior settlement offer, the plaintiff must pay the mass incarceration." Lawrence M. Friedman, Dead Hands: Past and Present in Criminal Justice Policy, 27 CUMB. L. REV. 903, 920 (1997).

189. This is not to say the injurer should be entirely inflexible, adopting Boulwarism (i.e., beginning a negotiation with a fair, but final, offer) as a negotiating style. See ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 215 (2000). Having "room to negotiate" can sometimes help yield agreement. See Russell Korobkin & Chris Guthrie, Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way, 10 OHIO ST. J. ON DISP. RESOL. 1, 11-13 (1994) (suggesting moderate initial offers may produce greater risk of impasse than extreme initial offers).

190. See ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 83 (Bruce Patton ed., 2d ed. 1991) (arguing that problem solvers should stand in a "principled position" by focusing on a problem's merits).

191. For data reflecting such readiness to settle following the defendant's acceptance of responsibility and fair compensation offer, see Cohen, supra note 164, at 1453, 1460-62 (describing rapid settlement following such offers). The experience with apology is also instructive here. As Goldberg and his coauthors describe, "[a]n apology alone is insufficient to resolve a dispute, but will so reduce tension and ease the relationship between the parties that the issues separating them are resolved with dispatch." Stephen B. Goldberg et al., Saying You're Sorry, 3 NEGOT. J. 221, 221 (1987).
defendant's costs (e.g., trial expenses) incurred after the settlement offer.\(^\text{192}\) This too provides an incentive for a plaintiff to accept a reasonable settlement offer and for a defendant making such an offer to stand firm.

3. Prematurity

The claim that it is premature for an injurer to take responsibility of his own initiative rather than awaiting a court's determination is a serious one. No doubt there are many cases in which causal fault is ambiguous, either from factual ambiguity or ambiguity in the relevant legal and moral standards, and in which investigations and legal proceedings should be undertaken before attempting to determine fault. In many cases, true or false, guilty or not guilty, liable or not liable, and to what degree, are things we only know, if at all, after a jury has told us. Recall Johnson and Boswell's famed exchange over the lawyer's role:

BOSWELL. "But what do you think of supporting a cause which you know to be bad?" JOHNSON. "Sir, you do not know it to be good or bad till the Judge determines it... An argument which does not convince yourself, may convince the Judge to whom you urge it; and if it does convince him, why, then, Sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion."\(^\text{193}\)

Note too that at times moral fault and legal fault diverge. By following their moral intuitions, some parties may quickly, but wrongly, conclude that they were at legal fault and take responsibility for that to which they are not legally obligated. I say this not to criticize such morally based responses, but to highlight the risk of misinformed choice.\(^\text{194}\)

Yet the argument against injurers taking responsibility of their own initiative should not be overstated. Taking Johnson's position to

\(^{192}\) See FED. R. CIV. P. 68 ("If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.").


its logical extreme reveals its limitations. To assert that one should never take responsibility absent a legal proceeding is absurd. Every day people take responsibility for injuring others, both within negotiated legal settlements and, as is far more common, before the shadow of litigation is even glimpsed.\textsuperscript{195} The real question is not whether it is ever appropriate for injurers to assume responsibility of their own initiative, but when it is appropriate.

To address this question of “when,” consider two basic types of cases. First are those in which fault is clear (as judged from the injurer’s viewpoint). Second are those in which fault is ambiguous.

Many cases of injury are not complex.\textsuperscript{196} Injurers do know that they are at fault, both legally and morally, for the accident. When one drives into a parked car, mistakenly administers the wrong medicine, or (especially) commits an intentional tort like theft, one can be quite confident that one is at fault. It is, of course, possible that one will be mistaken in believing oneself at fault. However, often injurers know the essential facts, and, given those facts, it is obvious, or would become so upon minimal investigation, that they have committed a moral and legal breach. This does not mean that one need instantly admit one’s fault, though of course one may. Perhaps one wants first to talk with a lawyer, either to have an independent “sounding board” or to verify that what one believes to be a legal breach is in fact a legal breach.

And what of cases in which either the facts or the applicable standards are ambiguous? The putative injurer who wants to act ethically should (1) investigate the facts and moral and legal standards and then (2) take responsibility to the extent that he believes himself at fault.\textsuperscript{197} One might label these the \textit{duty of investigation} and the \textit{duty of proportional responsibility-taking}. If one is in doubt about what one

\textsuperscript{195} Though some lawyers may, to use Mnookin and Kornhauser’s phrase, have difficulty imagining that postinjury actions can exist \textit{outside} the “shadow of the law,” many do. See Robert H. Mnookin & Lewis Kornhauser, \textit{Bargaining in the Shadow of the Law: The Case for Divorce}, 88 YALE L.J. 950, 950-52 (1979). Shadows, after all, have edges; otherwise there is simply darkness.

\textsuperscript{196} For a variety of reasons, some lawyers may mistakenly believe that such simple cases do not exist or are exceedingly rare. \textit{See supra} text accompanying notes 59-61. Some empirical evidence does exist to cast doubt on that view. \textit{See, e.g.}, William L.F. Felstiner et al., \textit{The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .}, 15 LAW & SOC’Y REV. 631, 642-43 (1980-81) (finding approximately one-third of tort injurers assumed responsibility prior to any grievance). Ultimately, however, I do not think the matter can be easily refuted or proven empirically. \textit{Let me simply state} that I have a different view.

\textsuperscript{197} Conversely, before bringing a claim, a plaintiff should have good cause to believe that his claim is not frivolous. \textit{See FED. R. CIV. P. 11(b)}. This, too, may call for a plaintiff to do some investigation before leveling a charge.
did, check one's records. If one has doubts about the law, speak to one's lawyer. These duties apply, I suggest, when one either believes or suspects that one has committed an injury, and, of course, when another has raised an accusation, there is reason for suspicion.

If the putative injurer is unsure of what happened, let him first investigate. If, following such investigation, he concludes that he is clearly responsible for one piece but unsure about some other piece, then let him at least take responsibility for the first piece. Not only is this the moral course, but it will help to focus subsequent discussions and possible legal proceedings on what they properly should be focused, namely, on issues of fact and law where there is genuine dispute. Further, generally speaking, such an approach is strategically sound if litigation ensues. If a settlement is not reached, such investigations will be useful preparation for litigation.

Let me conclude this section with two brief “epistemological” comments. First, the injurer's moral choice rests not upon whether the injured party can obtain adequate evidence to prove the injurer's fault in court, but rather upon what the injurer knows and can discover through investigation. Often injurers know what they have done, and, simultaneously, injured parties lack the evidence to prove it in court, as when a driver hits a parked car and “takes off,” leaving the parked car's owner no way of knowing who caused the damage. The moral injurer resists exploiting the lack of proof. This points to a weakness with Johnson's view that, “you do not know [a cause] to be good or bad till

198. Some may ask, if the injurer's external denial is rooted in a subconscious, intrapsychic denial, can the injurer be faulted for failing to take responsibility? Further, if the presence of intrapsychic denial is not a binary, dichotomous event, but can be found to some degree (e.g., minor rationalization) in many cases, might not that challenge apply broadly? I will not explore these matters in depth here. Let me briefly suggest that injurers may also have a duty of self-investigation, that is, to examine not just the events, but themselves carefully—to do some “soul searching” as it were. Especially given that self-serving cognitive biases exist in the context of conflict, see generally BARRIERS TO CONFLICT RESOLUTION 26-61 (Kenneth Arrow et al. eds., 1995), when an accident occurs or when a claim of one's fault has been brought, a moral agent ought to look at himself with a critical eye. As to the issue of excuse, I agree with the proposition that the greater the intrapsychic denial the more compassionately we should judge the injurer. In the extreme, this becomes a form of an insanity defense. However, even for an injurer who suffers from intrapsychic denial, his act of denial remains, in my view, a moral breach.

199. Some may fear the injurer's investigation will yield facts that, but for the investigation, would not have been discoverable by the other side—that through investigation the injurer may generate “ammunition” that will ultimately backfire against him. Observe, however, that the moral injurer wants to pay what he should appropriately pay rather than the least he can pay. See supra Part IV.B.2. Against that backdrop, the backfire risk is greatly diminished.
the Judge determines it." 200 Once the judge or jury makes its determination, technically all one knows is the judge’s or jury’s determination. One cannot assume that one knows actual guilt or innocence in fact, i.e., how the case would be decided by one fully informed of both the actual events and the law. Second, the discussion above focuses on the injurer’s (the client’s) knowledge rather than the lawyer’s knowledge. Johnson’s “epistemological demurrer”—claiming that guilt and innocence cannot be known until after legal proceedings—makes far more sense when applied, as Johnson does, to the lawyer than when applied to the client. 201 Again, we should not confuse lawyers’ ethics with clients’ ethics.

V. CONCLUSION

Taking responsibility for an injury one has caused is a fundamental moral lesson. Yet it is a lesson that members of our society commonly ignore, often with the support, if not encouragement, of lawyers. Injured parties pay a large price for this approach. Injurers pay a large price as well, for the failure to take responsibility when one has injured another is a profound act of moral regression. In this Article, I have argued that injurers have a moral obligation to actively, not passively, take responsibility for harms they commit. Externally imposed accountability is no moral substitute for internally chosen responsibility. I have also argued that, possible economic benefits notwithstanding, those who deny responsibility for harms they commit face significant psychological and spiritual risks. Even if he “gets away with it,” the injurer does so at his moral peril. Injured parties, society, and, above all, injurers would each benefit tremendously if, after injuries occur, the norm is shifted from injurers denying responsibility to embracing responsibility. The first step to that change is recognizing the problem. Whether clients and lawyers will change the roles they play in that process remains to be seen.

200. BOSWELL, supra note 193, at 40.

201. The phrase “epistemological demurrer” comes from Rhode, supra note 11, at 618, in which references to the rich debate on Johnson’s epistemological defense of lawyers’ ethics can be found.