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RESPONSE

BEYOND THE INEVITABLE AND INADEQUATE REGULATION OF BANKERS: A COMMENT ON PAINTER

LYMAN JOHNSON*

I. INTRODUCTION

In an otherwise stalled economy, the production of law continues apace. The summer of 2010, for example, brought us the Dodd-Frank bill,[1] which sweepingly, if unevenly, reconfigured the regulatory landscape of our nation's financial system. It is too bad that the making of law does not count in measuring Gross National Product (GNP); if it did, we would be further along the road of economic recovery than economists now report.[2]

Good lawyers know what law *cannot* do as well as what it can do. They know that law often is necessary but not sufficient to rectify certain social ills. The thoughtful and morally-reflective lawyer's voice should be heard on ways to heal social pathologies that go beyond the usual lawyerly fare of advocating, critiquing, interpreting, and (sometimes) circumventing regulation. Richard Painter has done just that in his stimulating essay on the moral responsibilities of investment bankers.[3] He does so, moreover, by treating bankers with respect rather than sneers or contempt, notwithstanding significant, industry-wide failings that nearly crippled our financial ecosystem in late 2008. Professor Painter believes bankers are capable of moral deliberation, and that they are able to make—and should habitually make—sound moral choices in carrying out the business of banking. To be sure, bankers' moral impulses may be dulled and atrophied, and continually assaulted by strong cultural and institutional forces, and they may, accord-

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1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered titles of U.S.C.).

2. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, NATIONAL INCOME AND PRODUCT ACCOUNTS GROSS DOMESTIC PRODUCT, 4TH QUARTER AND ANNUAL 2010 (ADVANCE ESTIMATE) (2010), *available at* http://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm.

3. Richard Painter, *The Moral Responsibilities of Investment Bankers*, 8 U. ST. THOMAS L.J. 5 (2010).

ingly, find it easier to play to their socially assigned role of highly paid villain. Painter, however, refuses to let bankers off the moral hook simply because now, after Dodd-Frank, they are even more heavily regulated. Instead, more than anything else, he invites bankers—and those who teach and counsel them—into a conversation many have never had before and may prefer not to: the place of morality in the high-stakes, bruising world of elite banking. To do so, he must first address the inevitable necessity for, but equally inevitable inadequacy of, government regulation of banking of the kind just witnessed with the passage of the Dodd-Frank legislation. I will begin in Part II by offering a few comments of my own on that vexing subject before turning to other observations on Painter's larger argument. Part III offers several responses to Painter's proposals and some suggestions for refining them. Part IV provides some thoughts on introducing a moral tenor into the discourse about financial markets.

II. Law's Inevitability and Inadequacy

Broadly speaking, today the public regulatory sector and the private business-financial sphere warily interact in a predictable, cyclical, and perhaps inescapably dysfunctional and co-dependent manner. The pattern goes like this: a perceived problem, originating in the private business realm, is thought to have sufficiently dire social consequences that some form of new regulation is proposed. A predictable debate ensues as to whether regulation is needed at all and, if so, as to whether the particular proposal is the right kind of regulation. So far, so good, because that is the way of democratic debate. But if and when legislation is enacted—and increasingly it is—lawmakers consider their work to be finished and, figuratively if not literally, they go home since, in their minds, the problem is now fixed. This quick-closure regulatory mindset is complicated by another feature of lawmaking. By its nature, "law" assumes that, while everything around it may change, the law itself, once adopted, will be the same tomorrow as it was yesterday, no matter what else—even if much else—may have changed. Law purports to, and must, speak timelessly and categorically. This may not be especially troublesome in a more static society and economy or with respect to a subject where social flux is minimal. It can be highly problematic, however, in our technologically advanced, internationally connected, and rapidly changing business-financial world. The fact that much of today's financial regulation—including that contained in Dodd-Frank—is produced by administrative agencies rather than Congress or state legislatures does not significantly meliorate this problem. Agency processes are cumbersome and they cannot always deftly respond to swiftly changing circumstances.

For their part, businesses and their lawyers accept newly-adopted laws as one more burdensome feature of their complex and dynamic market environment. Critical to their mindset, all business behavior not expressly

made illegal remains legal and, therefore, it is widely believed, entirely proper. Because lawmakers lack perfect foresight, certain legal behaviors, while still allowed under the existing regulations, will, in the future, inevitably be thought once again to have sufficiently adverse social consequences as to trigger calls for additional regulation. This Sisyphus-like pattern of problem, regulation, business response, new problem, new regulation, new business response, and so on, certainly captures the relationship between what was considered pathbreaking regulation in the Sarbanes-Oxley Act of 2002 and the even more monumental Dodd-Frank bill of 2010 and its aftermath.[4]

This recurrent regulate/respond cycle of public-private interaction has many dimensions. I will mention just two. One, for example, is that, ironically, the immediate post-regulatory period likely presents a time of potentially heightened peril as everything not prohibited is thought to be permitted, and yet at the same time, the public and regulatory guard is let down. This post-regulatory slackening calls to mind what experienced guides tell climbers who are exhilarated about successfully scaling Mount Rainier: Be careful, the trek down is more treacherous than the journey up.[5]

A second dimension is continued widespread confusion in the business world (and society at large) over the relationship between law and morality. Many citizens and business actors continue to believe—or act as if they do—that if one is obeying the law, then one is also necessarily behaving in a morally responsible manner. Rather than being seen as setting a minimum standard for participation in society or some particular activity, law compliance is wrongly equated to represent morally desirable conduct. Numerous people—including hard-charging business people without the counsel of lawyers or other advisors—then feel morally justified in "living down to the law" so to speak.[6]

Professor Painter nicely summarizes the numerous shortcomings associated with business regulation,[7] embodied by, but certainly not unique to, the Dodd-Frank legislation. He does this to set up his chief task: getting beyond a simplistic regulatory compliance mindset in banking to a more enlightened mindset of self-restraint and heightened awareness of personal moral responsibility in bankers themselves. Before turning to that subject, I

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4. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 (2006).

5. VIJAY GOVINDARAJAN & CHRIS TRIMBLE, THE OTHER SIDE OF INNOVATION: SOLVING THE EXECUTION CHALLENGE 1 (2010).

6. One of the author's former students, now an experienced lawyer, recently related a story that captures this point. He described a conversation in which a client, after learning what a particular law required, proclaimed to the lawyer that he most assuredly was going to "comply with the letter of the law." The upshot was that the client wanted his lawyer to know that by complying with the law—while implicitly communicating he would do no more—he believed he was behaving in a morally laudable manner.

7. Painter, *supra* note 3, at 6–10.

will briefly highlight three additional problems of relying exclusively on regulation as a social mechanism to fix problematic business behavior.

First, law generally is better at harm avoidance than affirmatively advancing the common good. Harm avoidance certainly is one aspect of moral conduct, but enhancing the well-being of others is a more salutary objective.[8] Moreover, the law uses the crude, if essential, instruments of constraints/sanctions and (some) incentives to accomplish its purposes; hardly the stuff of moral nuance.

Second, we need a better appreciation of the ways in which, ironically, laws might actually encourage violations and "crowd out the spontaneous workings of [moral] values."[9] Economist Paul Zak provides the following splendid example:

> [Imagine a] rule that one must pick up one's child from day care no later than a certain time of day. If this rule is violated, a teacher must stay late to watch the child, and the child may be stressed by having to wait for a parent. In a recent experiment at two day care centers in Israel, both with a rule in place that parents must pick up their children no later than 4:00 PM, one imposed a fine of $3 for each time the child was picked up late. The other simply depended on the parents' following the rule with no sanction for failing to do so. At the center that imposed a fine, parents' mind-set apparently changed; the fine seemed to remove the implicit social sanction associated with being late, because now one just had to pay a penalty. Over a three-week period, the day care center with the fine saw twice as many parents arriving late, and the proportion of latecomers remained steady thereafter (even after the fines were terminated!). The lesson here is that oversight and penalties may crowd out the good behaviors that most people, most of the time, follow.[10]

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8. The Golden Rule represents a moral breakthrough in this regard. *Matthew* 7:12 (New International Version) ("[D]o to others what you would have them do to you, for this sums up the Law and the Prophets."). This is commonly known as the "Golden Rule." LYMAN COLEMAN ET AL., SERMON ON THE MOUNT 55 (1991). Interestingly,

> [t]he negative form of this rule was widely known in the ancient world: "Do not do to others what you do not want them to do to you." Such diverse figures as Confucius and the great rabbi Hillel taught this. It is also found in Hinduism, Buddhism, as well as in Greek and Roman teachings. Jesus, however, alters this statement in a slight but highly significant way. He shifts this statement from the negative ("Do not") to the positive ("Do"). By so doing, he provided the world with one of the great (and rare) advances in moral understanding. Whereas the negative rule was fulfilled by inaction (not bothering others), the positive rule requires active benevolence (working for the good of others). The law of noninterference has become the law of love.

Id.

9. Oliver Goodenough & Monika Gruter Cheney, *Preface: Is Free Enterprise Values in Action?*, *in* MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY, at xxiii, xxiv (Paul J. Zak ed., 2008).

10. Paul J. Zak, *Values and Value: Moral Economics*, *in* MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY, *supra* note 9, at 259, 265 (citation omitted).

Additionally, in Norway, in an effort to reduce the length of hospital stays, fines were imposed on over-lengthy stays. The result, however, was longer hospital stays, as the fines served to "price out" for patients just how much additional time in the hospital would cost.[11] This behavioral phenomenon is related to the larger subject of better understanding how regulation, like the very unfettered market forces it is meant to combat, may inadvertently weaken civic virtues like honesty, trust, generosity, fairness, and reciprocity that form the critical moral infrastructure of markets. That infrastructure must not be taken for granted as "natural" or indestructible. Nor should it be systematically depleted, any more than an oil field or village commons should be exhausted; it must, like other vital resources—natural and cultural—be deliberately conserved and renewed.

Third, the regulate/respond paradigm of contemporary public-private sector interaction fails to fully grapple with the fact that there is rampant public distrust of both the government and business sectors. Public officials have fewer options for rebuilding trust because their policy choices are pretty much limited to the binary one of adopting a proposed law or not adopting it. Right now, passing laws may not be a great way to restore social trust, whereas not doing anything also is not generally considered a political career enhancer. The private sector faces a wider menu of options for restoring trust. Beyond simply complying with legal mandates, bankers and other business persons can self-regulate, either by refraining from conduct legally permitted but morally reprehensible or by more affirmatively engaging in an array of desirable conduct not legally required. Critically, however, bankers will not do so if they are not urged to, or if they do not believe it is necessary or expected of them, or if they do not know how to do so, or if they believe that in their rough and tumble culture it is simply not possible to do so and therefore it is naïve to expect otherwise. This is the important and challenging project Professor Painter takes up.

III. Inducing Bankers to Morality

Professor Painter argues that bankers must exercise self-restraint. He begins this call to morality, ironically, by appealing to banker self-interest. He contends that an "elite group that encourages conduct at the margins of legal limits is . . . likely to meet a swift demise."[12] I am not convinced of that claim. I think bankers will continue to survive and likely even flourish as long as they comply with applicable law, at least as things stand now. At a minimum, I think Professor Painter's consequentialist claim needs greater support. Beyond that, an appeal to self-interest as a way to coax more commendable conduct can be a useful beginning point and may suffice to per-

11. Tor Helge Holmås et al., *Does Monetary Punishment Crowd Out Pro-social Motivation? A Natural Experiment on Hospital Length of Stay*, 75 J. Econ. Behav. & Org. 261, 262 (2010).

12. Painter, *supra* note 3, at 11.

suade certain bankers to right action. The case for morality in banking, however, requires additional arguments as well, because skeptics will persist in asking "why" they should behave as Painter urges if they reject his appeal to self-interest as a reason to change.

Painter takes up at greater length the questions of "what is responsible investment banking?"[13] and "how can bankers be made to be more responsible?"[14] In response to his first question, Professor Painter begins sketching a useful framework. The four factors he identifies seem, to Painter's credit, designed more to start a much-needed conversation than to conclusively settle the subject once and for all. One area Painter needs to address is that his four factors are probably better suited to guide decisions by those with some degree of power in the firm, rather than those deeper in the organization who may be ordered from on high to proceed in certain ways. This is not to absolve those employees of moral responsibility or to contend there are not some firm-wide and even industry-wide commonalities in thinking about banking morality. The point is that different persons at different levels in the same company face varied dilemmas and may need varied guidance in more pointedly addressing the responsibility issue.

On the "how" question, Painter again appeals to banker self-interest, first by proposing a measure of personal liability for firm debt, as in the days when many large banks were organized as partnerships,[15] and second, by seeking to influence banker conduct through compensation schemes. The liability proposal, of course, is really a reversion to regulation because it requires legal change or, at least, legal clarification of officer liability for misconduct.[16] The effect of greater personal liability on risk averseness is an unknown; perhaps it will appropriately curb risk, but perhaps it may lead to over-caution. One also wonders who would produce the liability rule for bank managers—the federal government or states? We may not have the stomach for further federal action on this front in the wake of Dodd-Frank. At the state level, inter-jurisdictional competition for chartering makes the prospect of widely adopted reform unlikely. To my knowledge, to cite a parallel reform initiative, no states are racing to match North Dakota's re-

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13. *Id.*

14. *Id.* at 12.

15. Professor Painter observes that many banking firms were formed as partnerships—with the general partners bearing personal liability for business debts—prior to the 1980s. *Id.* Some movement toward corporateness was occurring earlier. Donaldson, Lufkin & Jenrette, for example, announced in 1969 that it would go public to raise capital, while in 1970 the New York Stock Exchange acted to permit corporate membership. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 467 (rev. ed. 1995). In 1971, the Exchange itself incorporated to limit officer liability. Carol H. Falk, *Big Board Tells SEC That Incorporation Doesn't Hinder Exchange Self Regulation*, WALL ST. J., June 9, 1971, at 2.

16. Professor Painter cites to this author's 2005 article arguing that officers should face greater liability than directors and be given less protection from the business judgment rule. Lyman Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 439 (2005).

cently enacted pro-shareholder corporate statute, and one wonders how many companies are headed there (or leaving there) as a result of the new statute.[17]

Certainly, Dodd-Frank's compensation clawback provisions, the directive for the Federal Reserve Bank to develop standards prohibiting banks from paying "excessive compensation," and greater personal liability for managers who breach existing fiduciary duties are already-existing ways to do in part what Painter suggests.[18] In addition, boards of directors that truly wish to deter certain managerial conduct—perhaps at the urging of shareholders, though they may prefer pushing the moral envelope because they can hedge and go short to guard against risk—could specifically bargain in employment contracts for adherence to certain business guidelines. Directors might also deter a great deal of misbehavior through bylaws that deny indemnification and directors' and officers' (D&O) insurance coverage to officers who engage in proscribed activities.[19]

Ultimately, meaningful reform of banking must come from within banks themselves and from those who counsel and educate bankers. Industry-wide codes of conduct, becoming more "professional" à la Harvard Business School's new MBA oath,[20] and peer pressure are likely to only go so far. One possibility—perhaps this is already being done—is for a banking firm to forthrightly "signal" to its pertinent markets that it will adhere to certain stricter standards,[21] perhaps even by voluntarily doing as Professor Painter suggests and agreeing, and publicly announcing, that its managers will take on a greater measure of personal liability. Then, one can observe the results. Does banker behavior change? Does the firm gain or lose clients? The latter will tell us whether financial markets really value moral responsibility in bankers. If the market reception is hostile or cool, we will learn that the problem may not lie only with bankers, but also with those who use their services. In that event, focusing only on moral reform of the banking industry may fall short in effectuating broad change.

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17. North Dakota Publicly Traded Corporations Act, N.D. CENT. CODE § 10-35-01 (2007). It appears that only one company has been organized under the new statute, Carl Icahn's American Railcar Industries Inc. *Rail Car Maker Moves Corporate Home to N.D.*, BISMARCK TRIB., July 1, 2009, at B1.

18. Section 954 of Dodd-Frank goes beyond the clawback provision in Sarbanes-Oxley but applies only to top executives, not high-bonus traders. 15 U.S.C.A. § 78j-4 (West 2011). Section 956 directs the Federal Reserve Bank to develop compensation standards for bank holding companies and savings and loan companies. 12 U.S.C.A. § 5641 (West 2011).

19. Professor Verret has proposed these last two ideas in another context—describing how a board of directors might respond to board members nominated by shareholders via the SEC's new "proxy access" rule. *See* J.W. Verret, *Defending Against Shareholder Proxy Access: Delaware's Future Reviewing Company Defenses in the Era of Dodd-Frank* 26 (George Mason Law & Econ. Research Paper No. 10-37, 2010), *available at* http://ssrn.com/abstract=1655482.

20. MBA OATH, http://www.mbaoath.org/take-the-oath (last visited Feb. 23, 2011).

21. Michael Spence, *Signaling in Retrospect and the Informational Structure of Markets*, 92 AM. ECON. REV. 434 (2002).

IV. Altering and Opening the Discourse of Banking

Professor Painter hones in on the key prerequisite to genuine change in the ethical culture of banking when he states: "Bankers, like other business people, need to talk with each other and with the rest of society about morality . . . . [T]here needs to be a conversation about one's personal sense of ethics."[22] Painter rightly urges the value of forthrightly attending to moral issues in banking and in drawing explicitly on religious and philosophical resources in doing so. He offers a stimulating set of questions to assist in this inquiry,[23] and refers to many useful materials in the Catholic social tradition for doing so. Two verses from the Bible timelessly capture the personal moral failings lying behind, and social fallout flowing from, banking excesses. First, King Solomon's perceptive insight into the enticing lure of money: "Whoever loves money never has money enough; whoever loves wealth is never satisfied with his income."[24] Second, the Apostle Paul's first letter to Timothy captures the all-too-frequent outcome of such a fascination with wealth: "People who want to get rich fall into temptation and a trap and into many foolish and harmful desires that plunge men into ruin and destruction."[25]

At the same time, Professor Painter seems to recognize that a lack of understanding about right and wrong in banking is not, for the most part, the real problem. He states, "Like other people, bankers also know what is right and what is wrong . . . ."[26] If bankers in their beliefs are at all representative of Americans generally, many or most of them will have religious convictions as well.[27] If moral turpitude among bankers stems not from ignorance and lack of moral understanding, then what exactly is the cause and how can the culture of banking be transformed? These are hard questions, questions that Painter begins to address and which I will also briefly comment on.

A. *Obstacles*

There are numerous obstacles to having the moral conversation in banking that Professor Painter rightly seeks. First, as he recognizes,[28] bankers, like so many other business elites in the U.S., continue to wrongly believe they are under a legal duty to maximize shareholder wealth and

22. Painter, *supra* note 3, at 15, 17.

23. *Id.* at 20.

24. *Ecclesiastes* 5:10 (New International Version).

25. 1 *Timothy* 6:9 (New International Version).

26. Painter, *supra* note 3, at 15.

27. *See* Lyman Johnson, *Re-Enchanting the Corporation*, 1 Wm. & Mary Bus. L. Rev. 75, 86 nn.20–21 (2010) (noting that many people in the United States and throughout the world are religious).

28. Painter, *supra* note 3, at 16.

corporate profits. As I have argued elsewhere,[29] that is a faulty belief that, nonetheless, as a deep-seated norm, has a remarkably tight grip on the banker and manager mindset.

Second, granting that bankers may indeed know right from wrong due to an internal moral compass, they live in a hypercompetitive cultural setting that pressures them to "morally disengage."[30] As social cognition theorists describe, bankers, like other humans, wish to preserve intact their own moral self-conception and avoid self-censure.[31] Over time, a banker's immediate firm environment—especially its pay and promotion incentive structure—and the extreme money-maximizing culture of banking can gradually lead a banker to recharacterize morally blameworthy conduct as acceptable and even laudable. The longer such conduct is not sanctioned, but indeed is praised and lavishly rewarded by others, the more deeply it is reinforced as morally justified until, eventually, the banker's professional life is "disengaged" and detached from his or her inner moral convictions.[32]

Third, the dominant discourse in banking is a uni-vocal discourse of finance and money. Decisions are routinely monetized. The grammar of morality may seem as jarringly out of place in the subculture of high finance as calling balls and strikes at a football game. Convincing bankers to be bilingual—that is, adept at combining in one conversation both money and morals—presents a very tough challenge.

Fourth, there is a general skittishness about making religious arguments in our culture. This is so for a variety of reasons, the primary one being a strong social norm against invoking religion to justify policy or business positions.[33] The result is a pervasive reticence about making such arguments explicitly, and surprise and uncertainty about how to respond—if not visible cringing—when someone does attempt to make such an argu-

29. *See* Lyman Johnson, *A Role for Law and Lawyers in Educating (Christian) Business Managers About Corporate Purpose* (U. St. Thomas, Working Paper No. 08-22, 2008), *available at* http://papers.ssrn.com/abstract=1260979. Recently, however, Chancellor William Chandler seemed to endorse the position that there is a fiduciary duty to maximize profits under Delaware law. eBay Domestic Holdings, Inc. v. Newmark, No. 3705-CC, 2010 WL 3516473, at *23 (Del. Ch. Sept. 9, 2010) (explaining fiduciary duties of Delaware directors "include acting to promote the value of the corporation for the benefit of its stockholders. . . . I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . . ."). There are problems with the Chancellor's assertion—including his lack of citation of authority or reasoning for his statements—that go beyond the scope of this Comment.

30. Albert Bandura, *Moral Disengagement in the Perpetuation of Inhumanities*, 3 PERSONALITY & SOC. PSYCHOL. REV. 193 (1999).

31. *See* Lawton Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2142 (2010).

32. Bandura, *supra* note 30.

33. Lyman Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 40–45 (2006).

ment.[34] Greater boldness by speakers and greater patience and understanding by listeners are badly needed.

B. Change

One hopes, along with Professor Painter, that bankers continue to receive from childhood on into adulthood a solid grounding in moral teachings, whether rooted in religion or secular philosophy. Educational institutions, particularly business schools and law schools, need to be certain they are not contributing to the problem of an amoral mode of discourse and, indeed, they must affirmatively endeavor to rectify faulty thinking. Conventional agency theory and the neo-classical economic descriptive assumption that actors typically maximize self-interest, for example, can be misinterpreted by impressionable students as carrying a prescriptive thrust as well, leading them to believe they should, as a moral imperative, pursue only their own interests. Moreover, graduate schools need to pay more attention to emerging scholarly work on human motivation, work that is casting doubt on the baseline assumption in finance that people generally maximize self-interest rather than act with benevolence with some degree of frequency.[35] As Painter notes, schools with a religious mission—for example, the University of St. Thomas—have a special responsibility and contribution to make here.[36] Of course, this is reform over the long term, not a quick fix for today's banking ills.

Similarly, we need to appreciate that financial markets are too important to leave to only two parties: those who trade on them and government regulators. We need increasingly to understand markets as vital social, cultural, and moral institutions, not just economic phenomena. This means not only an enriched discourse and *conversation* about markets, of the type Professor Painter urges, it means a broader group of *conversationalists* as well. We need a host of additional non-governmental voices in society thoughtfully contributing to a very basic question: "What do we want markets to look like?" We not only need to hear from wise business leaders and academics, but also from professionals like lawyers, religious leaders at the national level (and also at the local level where sermons and homilies are heard by bankers every week), and from novelists (where is Tom Wolfe?) and other artists who can hold up for critical display the pathologies and

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34. Professional golfer Tom Lehman recently commented on the norm against religious talk in sports: "Players, no matter what the sport, will thank their coach, their sports psychologist, their wife, their nutritionist, but the minute they get to thanking God, it's [sic] suddenly becomes, 'Uh-oh, that's taboo.' But it shouldn't be, because God is there for them that way." John Paul Newport, *Religion and the Ryder Cup*, WALL ST. J., Sept. 11, 2010, at W10. The author went on immediately after quoting Mr. Lehman to say, "Nevertheless, it weirds a lot of people out." *Id.* In one short news article, we see both Lehman's call for greater candor and understanding, and the author's immediate resistance by invoking the response of "a lot of people." *Id.*

35. *See* Johnson, *supra* note 27, at 83, 89–91.

36. Painter, *supra* note 3 at 21.

outright strangeness of certain financial practices. The conversation sought by Professor Painter should take place in many quarters of society because it is society itself that bears the brunt of financial dysfunctions, what is termed "systemic risk," but what should more pointedly be called what it is—"social risk."

None of this, and none of what Professor Painter advocates, is a quick or easy panacea, which many may impatiently seek. Nor is it a top-down, once-and-for-all solution. Instead, it is an invitation to a moral conversation with a long guest list. We need to practice and observe the making of moral arguments with greater frequency. If we think about it, we all can probably recall a time or two—maybe many more—when someone in our presence made a moral argument, perhaps just one or two sentences long, that we never forgot and that forever altered our thinking. In my life, I vividly recall short moral arguments powerfully made by various persons, including my father, a college professor, a senior partner in my law firm, and a law school colleague. These became memorable "stories" that shaped my moral outlook and that I have shared with hundreds of my students in turn.[37] In every sector of society, including banking,[38] we need more of—and we need ourselves to be more like—these moral exemplars who unashamedly bring together morals and business to enrich and reform from within, as Painter urges, our morally-undercapitalized financial markets, something the newly revised Basel rules on money capital cannot do.[39] Such reform is not grand or done, like law reform, in one fell swoop; it is, instead, painstaking and highly local in its institutional focus. It will supplement, and not replace, legal regulation. The danger today, however, is the opposite: that reliance on law is displacing reliance on morality, in banking as elsewhere, as law increasingly is being asked to support a social load it cannot bear.

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37. It should be recalled that Christ taught by parables, not by abstract lecture. *See Mark* 4:34 (New International Version) ("He did not say anything to them without using a parable.").

38. Renowned investment banker Felix Rohatyn reveals in his 2010 memoirs how he had an awakening at a 1986 RJR Nabisco board meeting when one of the directors (William Anderson) spoke about "stakeholder" rights in connection with a proposed takeover. Andrew Ross Sorkin, *Deal Maker Looks Back and Sighs*, N.Y. TIMES, Oct. 19, 2010, at B1. Rohatyn said "[t]he issues Bill Anderson had raised at RJR's board meeting about laid-off employees, damaged communities and cutbacks in employee benefits necessitated by higher corporate debt needed to be addressed." *Id.*

39. Press Release, Basel Comm. on Banking Supervision, Group of Governors and Heads of Supervision Announces Higher Global Minimum Capital Standards (Sept. 12, 2010), *available at* http://www.bis.org/press/p100912.htm.