

THE RESTATEMENT OF THE OBVIOUS: OR, WHAT'S RIGHT GOT TO DO WITH IT? REFLECTIONS ON A BUSINESS ETHIC FOR OUR TIMES*

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Abstract

An essay on business ethics in the United States of America, written after more than a trillion dollars have gone missing should be easy enough to write. It could be a call to moral clarity or to legal compliance or to the remembrance of times past and corresponding historical norms. A troubling reflection, however, leads to a troubling suggestion. What if American law really is no longer grounded in morality or history and what if the positive law leaves holes that, divorced from morality and history, cannot reasonably be covered?

In American law, there is a problem of substance, there is a problem of process, and there is a problem of norms and name-calling. To make matters worse, there appears no clear way to work American law out of this situation. Moral realism as defined in Appendix One of this Essay is proposed as a way out of the impasse. It is non-proprietary, non-sectarian, non-antiquarian; it is not neo-anything.

This essay is written from the standpoint of moral realism. Lies are wrong; some of them are illegal. If committed deliberately, willfully, impudently, obstinately, and with delight or in public or in the presence of others, who are likely to be provoked, the illegal ones are especially serious because they are particularly harmful to the common good. While it may be considered impolite or even shocking to base notions of comparative moral guilt upon an expressly articulated, and by no means private moral standard, upon what else might those moral notions be based, and how else expressed? Perhaps they would be based on some widely shared cultural norms (which, exactly?), and expressed by a commonly recognized cultural spokesperson (who, exactly?). This essay proposes a restatement of the obvious to answer those questions.

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I. INTRODUCTION

Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh.¹

— Abraham Lincoln

Suppose, hypothetically, that Anthony Fastdraw, the chief financial officer of a well-known energy and trading company, has accepted a plea bargain including 10 years in jail for himself and, as part of the package, 5 months in jail for his wife, with arrangements for one of them to be able to stay home with their young children.² Based on anecdotal evidence, some people think that these sentences are too light, while others think they are substantial.

Meanwhile, suppose the president of another company is standing trial on an indictment that is widely understood to allege that her chief offense was claiming she was innocent of insider trading. The theory proceeds in the following steps: (1) Mary Smith is an iconic figure, (“*I am the brand,*” she is reported to have said) (2) as Mary’s public esteem goes up, the value of the stock of the company with which Mary is associated (Mary Smith, Inc.) also goes up; (3) when Mary’s public esteem goes down, the value of the stock of Mary Smith, Inc. also goes down; (4) when Mary is investigated for insider trading with respect to an unrelated company, Clones, Inc., her reputation is called into question causing the stock of Mary Smith, Inc. to decline; (5) when Mary publicly declares herself not guilty of illegal insider trading with respect to the Clones,

¹ Abraham Lincoln, Second Inaugural Address, Mar. 4, 1869 (probably quoting *Luke 17:1* (which, continuing and in the King James Version says: “It were better for him that a millstone were hanged about his neck, and he cast into the sea, than that he should offend one of these little ones.” *Luke 17:2.*)) (subsequent Bible quotations in this essay will be to the translation of the New International Version).

² These and other hypotheticals are loosely based upon events reported in the newspapers with respect to the current wave of corporate scandals. It seems, on the one hand, almost too coy to pretend, but on the other hand, a decent respect for real persons in respect of events presently unfolding compels this strategy. In addition, the device of the hypothetical permits the author to create and emphasize certain points for analytical emphasis, not under the same constraints that would arise in reporting from real life. In this essay, therefore, all disguised names must be left that way and treated as true hypotheticals. This essay is a reflection piece. What it reflects, among other things, is the difficulty of communicating multivariable events, especially in the decreasing presence of commonly shared moral, empirical, and historical norms. Rather than complicate things even further, this essay attempts, by way of the hypothetical, occasionally to define a particular problem with a relative clarity that may or may not be so clearly displayed in the real events as they unfold and then to share that common view with the reader. It should go without saying, and so the author will say it: one would hope that none of those indicted or under investigation did what they are accused of doing, but if they did, that they are punished as the offenses deserve; and one would hope that none of the prosecutors are carried away by bad motives or bad judgment, or if they were, that the guilt of those under their investigation is such that the result still approximates rough justice.

Inc. stock her reputation is rehabilitated, somewhat, and for a time, in the minds of whomever believed her, thereby causing the stock of Mary Smith, Inc. to regain some of its prior loss or to decline at a slower rate; and (6) it is also alleged that Mary tampered with emails before being interviewed by a government investigator or that she otherwise obstructed the investigation.

The metaphorical comparisons to street crime abound. So, if an armed robber were to hold up a liquor store . . . then, what exactly? (a) Is it that the robber should be met with the full force of the prosecutor's office, and the same should happen to white collar criminals (but how much more force is there to apply, and isn't that exactly what is being applied, at least in these hypotheticals)? (b) Is it that the armed robber's wife would be charged under an indictment carrying a possible 37 year sentence so she could plead out in a deal to convict the gunman, and the same should happen to the hypothetical Mr. Fastdraw? Or (c) is it that, if the armed robber were observed wiping fingerprints off the gun, he would be charged with obstruction, instead of with the holdup, and the same should happen to Ms. Smith? Or (d) is it that, if the investigators "knew" the gunman were guilty of the holdup, but couldn't prove it, the gunman would be charged with, say, felony copyright infringement in respect of unlicensed downloaded MP3 files found on his computer, and the same sort of analysis should apply to Ms. Smith (being "known" to be guilty of insider trading, but which might be difficult to prove, why not just convict her of claiming her innocence if, by design or effect, that claim directly or indirectly affects the value of a security—or does this go too far)?

The metaphors are useful. Among other things, they help to squelch any maudlin sympathy for any of the accused. Under the metaphor, the armed robber is guilty. Under the hypotheticals, we are entitled to suppose that Mr. Fastdraw is guilty, and that Ms. Smith might be guilty. If there is to be any sympathy at all, it is to be for the rule of law and for fundamental fairness. This essay will suggest that, *if* there is a breakdown of consensus as to the moral, empirical, and historical norms upon which our laws are based, neither white collar crime nor street crime are the chief of our problems. This essay will further suggest that if there is to be a solution, it might be the enactment of new laws in addition to new measures that simply double and redouble the penalties.

Let there be no doubt: lies are wrong and some of them are illegal. Those that are morally wrong but not illegal carry their own penalty. Those that are illegal deserve prosecution. Those that are illegal are especially serious when made by persons who should know better, who have greater experience, who are eminent for their profession, gifts, place, or office, and who are likely to be an example to others. They are especially serious if they are made willfully, impudently, obstinately,

and with delight against the common good of all or many; or if they are made in public or in the presence of others, who are likely to be provoked as a result.³

This essay takes popular culture seriously, including its academic side. Consider two points of view:

First,

the fact that [the postmodern man] doubts everything really gets in the way when he wants to denounce anything. For a denunciation implies a moral doctrine of some kind; and the [postmodern man] doubts not only the institution he denounces, but the doctrine by which he denounces it. . . . As a politician, he will cry out that war is a waste of life, and then, as a philosopher, that all life is a waste of time. A Russian pessimist will denounce a policeman for killing a peasant, and then prove by the highest philosophical principles that the peasant ought to have killed himself. . . . The man of this school goes first to a political meeting, where he complains that [some men and women] are treated as if they were beasts; then he takes his hat and umbrella and goes on to a scientific meeting where he proves that they practically are beasts.⁴

Second,

Wisdom calls aloud in the street, she raises her voice in the public squares; at the head of the noisy streets she cries out, in the gateways of the city she makes her speech: "How long will you simple ones love your simple ways? How long will you mockers delight in mockery and fools hate knowledge?"⁵

An essay on business ethics in America, written after more than a trillion dollars have gone missing should be easy enough.⁶ It could be a call to moral clarity, or to legal compliance, or to the remembrance of

³ This characterization does appear to describe the seriousness of the true circumstances surrounding a number of real corporate scandals. Though this list of aggravating factors comes fairly straight from the Westminster Larger Catechism (WLC), question 151, where it has to do with sin ("What are those aggravations that make some sins more heinous than others?"), the analogy to comparative seriousness of crimes would seem useful. Westminster Larger Catechism, *reprinted in* THE WESTMINSTER CONFESSION OF FAITH 109 (3d ed., Comm. for Christian Educ. & Publ'ns 1990). The WLC, published circa 1647, was not unknown in England and in the English colonies that became the United States, and it is not unknown today. The version referenced herein is also reprinted as part of "The Spirit of the Reformation Study Bible." SPIRIT OF THE REFORMATION STUDY BIBLE (2003). If it is impolite or even shocking to be basing notions of comparative moral guilt upon an expressly articulated, and by no means private moral code, upon what else might those moral notions be based and how else expressed? Perhaps they would be based on some widely shared cultural norms (which, exactly?), and expressed by commonly recognized cultural spokesperson (who, exactly?) This essay explores precisely those questions.

⁴ G.K. CHESTERTON, ORTHODOXY 41 (3d ed. 1959).

⁵ *Proverbs* 1:20-22.

⁶ *Cf.* JOHN MICKLETHEWAIT & ADRIAN WOOLRIDGE, A FUTURE PERFECT xxii (2003) ("But when the market loses more than a trillion dollars in a single month, as it did in July 2002, it is hard not to ask serious questions about the way the system works.").

times past and corresponding historical norms. But a troubling reflection leads to a troubling suggestion. What if American law really is no longer grounded in morality or history, and what if the positive law leaves holes which, divorced from morality and history, there is no basis for covering?

Suppose for a moment that there is a problem, but that it is not only or even mainly a problem of business ethics. What if, instead, it is a problem deeply rooted, and having expected consequences that most people would want to avoid if they could. Suppose we were then, not to lament, and neither to condemn nor look for solutions in the past, but simply to take part with those contemporary moral realists who are contributing to a solution? That is what this essay will do.

But what is the problem? For a working hypothesis, consider the expression: nothing is true and so what if it is. Consider also its corollary: what about *so what* don't you understand?⁷ In a weaker form, there is a sense that something might be true, but no way of knowing what it is or what to do about it. In another weaker form, there is a skeptical posture assumed for the sake of argument, teaching, or scientific, linguistic, or other critical investigations, but the posture is so long maintained that it appears permanent, substantive and not confined to method. For working purposes and to avoid temporal adjectives like "modern" or "postmodern," let us call the stronger form "nihilism" and the weaker forms "sophism" or practical nihilism.

Next, let us suppose for some extended period of time, some Americans have been informed by nihilism and sophism, as authoritatively articulated by many among them. Finally, let us suppose some of our best and brightest, many of whom are engaged in business or in the active practice of law, have actually taken these ideas semi-seriously. They have, in short, become exactly what they thought the nihilist and sophist have urged them to become, not expert investigators coolly detached from the experiment, but wholly ungrounded nihilists in attitude and belief yet possessed of great intelligence, energy, and opportunity. Now, it appears the nihilist and the sophist turn upon their own disciples, and want not only to punish them but also to lecture them, with the goal of making them more *ethical*.

What, then, would a reflective essay look like? Would it simply scold? It certainly should scold. Would it also say that our best and brightest should have known that law professors and judges were only kidding when they denied any brooding omnipresence, chaffed under the dead hand of the past, or boldly pointed toward the great mystery of reality? It should, because without a moral or a normative historical

⁷ Compare this with the "Sir" the Philosopher will give him to understand, "it is improbable that you are not mistaken; but why insist on the truth?" FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 24 (Walter Kaufman trans., 1966).

grounding and without even a useful empirical basis, there is nothing to the law, and the best and brightest know that.

This essay is, therefore, written from the moral realism viewpoint. Moral realism asserts that lies are wrong, that some of them are also illegal, and that there are enduring cultural norms to back this up.

Moral realism is grounded in (1) in a positive law tradition, (2) in a natural law tradition (including also an empirical side, and every other insight that is based upon reason and observation), and (3) in a normative historical tradition. Moral realism claims all three, in cooperation and in good order. Moral realism has bad news and good news for business. The bad news is that some people ought to go to jail. The good news is that some people ought to go jail and these people and others might actually improve from the moral lesson taught by that unpleasant discipline even though no one likes to administer the punishment and no one likes to receive it.

When law is understood as moral realism, the country has much to gain and nothing to lose but its cynicism. Moral realism challenges the incoherence of the nihilistic system that has enslaved American law for too long. But is moral realism tilting at windmills? Is this some imaginary nihilism or contrived sophism? There is one way to find out. This essay makes the experiment of painting, if you will, with paints of many hues. The moral realist must know whether there is anything that is obvious enough to serve as a shared common ground, and to find out, there must be an experiment.

This essay begins with an experiment in the restatement of the obvious. Then, it reviews common notions or legends in the law. Next, it catalogs various offenses charged against *business*. Then, it suggests some modest proposals to improve the current law. Then, almost as an epilog, this essay meaningfully discusses *business ethics*. Finally, this essay concludes that the law has a known moral basis, a positive formulation, is predictable, and is grounded in discernable memory and imagination.

II. FIRST THINGS FIRST

A. *Things Not Right*

Here is a short roll call of corporate scandals, already outdated before this essay is published:

- (1) Adelphia Communications—a cable television company with officers accused of looting the company “on a massive scale”—the government seeks forfeiture of \$2.5 billion;
- (2) Arthur Andersen, LLP—an accounting firm charged with obstruction of justice and indicted on (and convicted of) criminal charges;

- (3) Citigroup Inc. (Salomon Smith Barney)—an investment banking company accused of issuing “overly rosy recommendations” to win business and engaging in various questionable relations or transactions with Enron and other suspect companies;
- (4) Enron Corp.—an energy and trading corporation accused of off-the-books partnerships and aggressive accounting to hide debt, inflate profits, and enrich top executives (from its five-year high in August 2000, investors lost \$64.2 billion);
- (5) Global Crossing—a telecom carrier accused of swapping capacity artificially to boost revenue (from its five-year high in December 2000, investors lost \$53.5 billion);
- (6) HealthSouth Corp.—a rehabilitation and surgery center provider accused of “massive accounting fraud, estimated at \$3 billion, to boost earnings” (from its five-year high in March 1998, investors lost \$11.6 billion);
- (7) ImClone—a biotech company with a wonder drug in development for the treatment of colorectal cancer. Mr. Waksal, its CEO and co-founder, accused of securities fraud and tipping members of his family to inside information, was sentenced to eighty-seven months in jail and ordered to pay \$4 million in fines and back taxes. The alleged tip had to do with the FDA’s refusal to review the company’s application to sell the cancer treatment. That tip allegedly gave rise to yet another tip, asserted to have been passed on to Martha Stewart through a broker who informed her that Waksal family members were selling, thereby implicating Martha Stewart in an SEC civil action of insider trading and in a criminal trial for securities fraud (relating to the motive for her claim of innocence of insider trading in ImClone stock and the effect of that claim on the price of the stock of Martha Stewart Living Omnimedia), obstruction of justice, making false statements to federal investigators and conspiracy;
- (8) Merrill Lynch—a brokerage firm accused of inflating “the Internet stock bubble for its own benefit” by writing “overly optimistic research reports about dot-com companies to thereby boost investment-banking fees”;
- (9) Qwest Communications—a phone and telecom company accused of improperly booking revenue and designing other transactions to inflate revenue;

- (10) Rite Aid—a drug store chain, several of whose officers were accused of inflating profits by \$1.6 billion and running “an elaborate coverup”;
- (11) Tyco—a conglomerate accused of erroneous accounting, while certain officers were accused of stealing more than \$170 million from the company and obtaining more than \$430 million in illegal stock sales. When defending against charges of “enterprise corruption,” some of the defendants claimed the company owed them money;
- (12) Worldcom—a long distance phone company accused of the “biggest accounting scam ever,” amounting to some \$11 billion of hidden costs and inflated profits and revenues. Its former CEO was also accused of securities fraud in Oklahoma; and
- (13) Xerox—a copier company accused of improperly “manipulating office-equipment leases to accelerate the booking of revenue and profit.”⁸

More scandals exist.⁹ Many have already resulted in convictions and fines. The numbers of those convicted and the magnitude of the fines are large and growing daily. Many of these allegations of scandal have been met with continuing strong denials and many facts remain in dispute, leading to the possibility that there are some innocent persons involved. Meanwhile, there was a bubble market, an overcapacity situation, and a market collapse—and that is just in the cycle of the 1990s boom and bust.

As to the bubble run-up, the initial public offerings (IPOs) of tech companies, especially the dot-com companies were reminiscent of the

⁸ Robert Frank et al., *Scandal Scorecard*, WALL ST. J., Oct. 3, 2003, at B1.

⁹ The “Scandal Scorecard” lists only American companies. It predated the stories about Parmalat (European company, which reportedly “has been collapsing at lightning speed” with more than €7 billion unaccounted for in a scandal “astonishing in its simplicity and amateurishness. Rather than the sophisticated financing vehicles and partnerships that Enron Corporation used, pieces of it were often little better than slapdash.” Alessandra Galloni et al., *Parmalat Inquiry Finds Basic Ruses At Heart of Scandal*, WALL ST. J., Dec. 31, 2003, at A1. And it doesn’t include the “spinning” allegations surrounding IPO allocations, nor the mutual fund problems, among others. It is fair to say that the Scandal Scorecard, serious as it is, gives only a rough estimate of the depth of the problems. See, e.g., REUTERS, *Major Accounting Scandals in the Last Three Years*, at http://www.forbes.com/home_europe/newswire/2004/01/12/rtr1207517.html (Jan. 12, 2004) (including the Parmalat scandal); REUTERS, *Ex-banker Quattrone Fined, Suspended*, MSNBC NEWS, at <http://www.msnbc.msn.com/id/3979354> (Jan. 16, 2004) (the “spinning” allegations and IPO allocations); *Mutual Fund Investigation*, at <http://www.legal-database.com/mutual-fund-investigation.htm> (last visited Feb. 26, 2004) (mutual fund problems); John Connor, *White House Warns of Increase in Debt, Risk Threat at Fannie Mae, Freddie Mac*, WALL ST. J., Feb. 5, 2002, at A2 (other problems, including at federally supported entities).

speculative excesses of the 1920s. "These highly speculative Internet operations became 'hot issues,' which quickly traded in multiples of their offering price" and then they fell.¹⁰ Add a major terrorist attack in America on September 11, 2001, two non-trivial military engagements in which America participated (Afghanistan and Iraq), and other jolts to the economy, and it is clear that causes other than business corruption contributed to the overall aggregate investor losses that coincided with the major accounting and other scandals.

Despite any other causes contributing to economic losses, this (the depth and breadth of the alleged scandals) cannot be right. This essay is a reflective piece, not a scholarly examination. Just as it appears that the public at large has conflated all of these matters under the name *Enron*, referring to more than a dozen company problems, and vastly different circumstances and allegations as though they were all one, so will this essay. More explicitly, this essay will deal with the legendary status that the Enron scandals have attained. The evidence is in faculty lounge conversations, letters to the editor, law firm conversations, among clients, and generally in the air. This is a dangerous brew from which to try to discern policy, and that is one of the points of this essay, written informally to capture the situation as it continues to unfold.

Here is a first difficulty. Perhaps some of the most egregious misconduct is hard to prove, or is within a gray area between the illegal, unwise, imprudent, or immoral. One might suppose that bubble markets are not themselves illegal, nor is selling or recommending risky investments. This leads to a second difficulty. Certainly some (or much) of the egregious misconduct was illegal, but then either (1) that conduct was so plainly and blatantly illegal that anyone could have noticed it

¹⁰ JERRY MARKHAM & THOMAS HAZEN, CORPORATE FINANCE 10 (West, 2004).

[T]he price of Scient rose from \$10 to \$133 before falling [to] \$1.81. Priceline.com stock fell from \$162 to \$1.12. Yahoo stock dropped 92 percent. Stock values at Cisco Systems were reduced by \$148 billion. Other big losers were EMC Networks, Oracle, Nortel Networks, Merck and General Electric. . . . Estimates have ranged as high as \$8.5 trillion as the market value lost on the Nasdaq during the market reverse that began in 2000.

Id. The portion of losses attributable to the bubble run up and collapse appears to dwarf the portion of losses attributable to illegal activities. That is, a rough calculation of combined losses from the illegal activities in items #1 through #13 on the Scandal Scorecard is in the order of magnitude of \$1 trillion; which is substantially less than the \$8.5 trillion high side estimate of total market loss, some portion of which total market loss must include the bubble.

Curiously, as this essay is submitted in February of 2004, the broad markets appear to have recovered at least some of their losses, and the Dow is above 10,000. Some tech companies appear to be sound, and perhaps there was some substantial technological infrastructure that was developed and built out during that boom cycle. Cisco, Oracle and Priceline appear to be "real" companies that might, in fact, have contributed to the "backbone of the Internet," the database software that powers at least some of it, and a destination site made available by means of the internet, respectively.

(and “anyone” would include not only the alleged wrongdoers, but also and especially co-workers, upper level management, boards of directors, accountants, auditors, and law firms), or (2) there was conduct that while clearly illegal was so complex that few could have noticed it, and fewer still could have said with sufficient confidence (the confidence necessary, for example, to “fire” a substantial client or even to demand a meeting with internal or external decisionmakers) that it was illegal rather than just “risky” or “aggressive.”

As to this second difficulty, take the first horn of that dilemma: anyone could have noticed. If everyone should have known about widespread corruption, one would have expected someone to have spoken up before events themselves forced the successive accounting and other scandals into the public eye. Nobody did, however, until the scandals began to surface.¹¹ Take the second horn of the dilemma: no one could have known, either because it was all so cleverly hidden, or because “aggressive accounting” is simply accounting that comes right up to the line drawn by uncertain rules that arguably permit the treatment so accorded, or because the law is so uncertain that no one can know the difference. This does not seem right either. If anyone tries to avoid the second horn of the dilemma by saying that *everyone* was being paid off, bought off, or hoodwinked, such an explanation leads back into the first horn (anyone could have known). If one tries to avoid both horns by pointing to an ordinary run of irrational enthusiasm and concluding that such events always happen during a boom time, that shady characters are attracted to the action, their malefactions being masked during the good times only to be revealed during the inevitable contraction, a question still remains. Isn’t the level of alleged wrongdoing too much to be accounted for on that basis, and did it not include both shady and non-shady types of companies and individuals? Is it that everyone is routinely crooked, and that a policeman will find a crook anywhere he shines his flashlight?

Perhaps there is a middle ground explanation. Obviously, it is a large economy. Obviously, the absence of a crash on the magnitude of the Great Depression is significant. Other scholars are exploring other leads.¹² This essay asks the question: what if there is a gap between law and morality and between law and normative history?

¹¹ This refers primarily to the scandal. To be sure “everybody” (or at least quite a few) did notice the bubble phenomena, and some began to get increasingly curious about the accounting, but apparently nobody noticed the alleged wide-spread criminality going on within the bubble as it was happening. Cf. NANCY RAPOPORT & BALA DHARAN, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 105-06 (2004)

¹² See, e.g., William W. Bratton, *Does Corporate Law Protect the Interests of Shareholders and Other Shareholders?: Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002) (posing at least five hypotheses: A. conventional market reversal,

B. Things Not Reasonable

G.K. Chesterton adverted to some of the problems of a nihilistic critique of everything that leaves nothing standing.¹³ It is not this essay's intent to catalog such problems, but it should be noticed there is at least a notion abroad that our laws are not entirely reasonable, nor are they based on historical norms. If American positive law followed its own positive law logic perhaps even such a pure positivist system would work, but it does not follow its own logic, and it does not work.¹⁴ It is unreasonable to teach business people they need not keep their promises (assuming they were contractually bound to do so in the first place) as long as they are prepared to pay the price of relatively modest damages, and then to teach them they ought not apply the same calculus to any other decision. Moral realism claims it would be more reasonable to base the law on such moral, empirical, and historical norms as might reinforce voluntary compliance with the law, rather than the opposite.

C. Things Not Nice

The moral realist can be clear: lies are wrong. Some of them are illegal. This is as it should be. Those who have done wrong should, and do, face moral consequences, and those who have committed crimes should be punished—so not only with lies, but with theft, fraud, and any other moral or legal offense. The moral realist, however, notices that if there is some conduct that is neither illegal nor immoral, and if our law is aggressively positivist and amoral, then it is neither reasonable nor right to insist that we punish that which is not illegal and that for which we have no publicly acknowledged category of right or wrong. Traditionally there is a category of the “immoral that *is* illegal” and a category of the “immoral that *is not* illegal.” Recently, there might be emerging a new category of “things not nice”—these are things not only

B. derivative speculation gone wrong, C. a den of thieves, D. Enron as a bank run, and E. a combination of them all).

¹³ See generally CHESTERTON, *supra* note 4.

¹⁴ This is, perhaps, a bold statement, or perhaps it is so clear as to require no footnote at all. Consider simply that there are any number of fundamental rights that appear to hang by a thread. Issues of life, death, marriage, and sex; matters of racial justice or preference; free speech or commercial or political speech might be thought of: whatever the right answer on any of these, it is clear that there is apparently no end of discussion after someone says that the positive law simply is what it is, or what some judge says it is. There is no consensus. These might be thought to be basic issues. If there is no consensus on these issues, is it to be wondered that there is no consensus on many other, less basic issues? Or what if we recall that many businesspeople think that they have learned from lawyers, if not from law professors, that they need not keep their promises if they are prepared to pay relatively modest damages? Could that view of the law possibly have an effect on their actions? This is, to be sure, a reflective piece, but these are the things about which reflection is appropriate.

non-illegal, but not even immoral on any coherent basis of morality. It is ironic that moral realists take a high view of morality, but include many who do not demand that everything not nice be punished as a legal offense.¹⁵ It sometimes appears that it is the most aggressive secularists, and even the nihilists and sophists, who insist on imposing awesome moral burdens upon the citizenry, at least with respect to certain things.

A minimum claim of this essay is that it is unreasonable for a positive law system that is uncompromisingly nihilistic or sophistical to demand criminal punishment for things that are immoral but not illegal. It would be yet more strange for such a relentlessly positivist system to demand punishment for things that are not even immoral under any coherent argument that could be made within the terms of that system. The moral realist, on the other hand, is able to engage in a directly moral discourse by integrating positive law, moral law, empirical tools, and normative history. As a result, the moral realist is (surprisingly?), the one who might stand *against* the aggressive secularist and insist that the government *not* prosecute anyone for having engaged in conduct that is not nice but also not clearly illegal or immoral. As to whether any such conduct *should* be made illegal, this essay suggests that the relentlessly positivist point of view has nothing interesting to say, but acts almost blindly, apparently assigning or urging legal guilt as moved from time to time by some sort of atavistic impulse.¹⁶ On the other hand, a moral realist would not assign legal guilt to things merely not nice, and might not even urge that the law be modified to do so. Whatever the result, the moral realist would at least look to historical norms, moral bases, and empirical evidence before coming to a conclusion. If there is any case to be made for illegality on these accepted terms, the moral realist would be a more trustworthy guide than the impulsive positivist.

¹⁵ See Craig A. Stern, *Things Not Nice: An Essay on Civil Government*, 8 REGENT U. L. REV. 1 (1997). This is not to say that Professor Stern would accept any label, but only that his article can be read to say that not even everything sinful ought to be illegal, thus, how much less should things merely not nice be criminalized.

It should be noted in passing that sometimes the “not nice” and the “immoral but not illegal” are used as synonyms. On other occasions, as suggested in this essay, they are used to signify separate categories (so it is immoral to lie, but “not nice” to say truthful but unpleasant things; it is immoral to steal, but “not nice” to compete vigorously or to bargain strongly). Though my usage might be different from Professor Stern’s the point remains: there are some things immoral or “not nice,” which are not, and perhaps should not be, illegal.

¹⁶ Perhaps it is not nice that there is no level playing field. On the other hand, perhaps it would be nice to protect the investor. It appears odd, however, in a purely positivist legal system, to turn any of those impulses or non-moral sentiments into law. Moral realism may or may not arrive at the same ultimate conclusion, but it demands that the discussion deal with the reality of positive law, natural law, empirical methods, and historical norms before reaching conclusions about legal consequences to actions.

D. Things on the Line, over the Line, and Close to the Line (What Is Our Line?)

Imagine a line between the legal and illegal. Now imagine a line between the moral and immoral. Here are two questions about those lines: as to the legal/illegal, is it the task of the citizen to get away from the line as far as possible, or is the citizen entitled to get as close to the line as possible? This is not to suppose a doubtful case, but a clear one. For example, if the speed limit is fifty-five, is the driver entitled to drive at that specific speed, or must the driver stay at forty-five or fifty, knowing that he might get pulled over if he were going fifty-three, and he should have known better, or that he was taking an "aggressive" approach to the speed limit, or that things were just too good to be legal? Or is fifty-three miles per hour a loophole in the law that he is exploiting?

As to the moral/immoral, is it the task of the lawgiver to ensure that the line of the moral coincides perfectly with that of the legal? Is it a sign of progress in the law if it more nearly comes to make the illegal correspond to the immoral? Again, this is not to suppose a doubtful case, but a clear one. Suppose it is immoral not only to lie, but not to love and not to look out for one's neighbor.

You say nothing at all to your neighbor, is this silence a lie? What if you say nothing at all, but you failed to take care of your neighbor by not disclosing something that would have been important for your neighbor to know? If you have a view of morality that cannot articulate that a lie requires a false statement, that silence is *not* normally a false statement, but sometimes, in the presence of special circumstances can constitute a lie, so that silence can be immoral—and it would seem hard for a nihilist, sophist, or even a pure positivist to articulate any such view, because they do not seem to accept the "immoral but not illegal" as a basis for sanction—are you prepared to criticize the positive law of the state if it does *not* make such silence illegal? Or if you have a view of morality that goes so far as to say that all silence harmful to your neighbor is a lie—and it would seem hard for a nihilist, sophist, or even a pure positivist to articulate any such view—are you prepared to criticize the positive law of the state if it does not go as far as you? Are you prepared to argue with your fellow citizen if he says it is by no means clear that silence is always, or in this circumstance, immoral in the first place?

If so, what might you say? Would you say of the person who stays silent in the immediately preceding paragraph that he did not commit illegal fraud because he did not say anything at all, and had no duty to do so, and there is no relevant legal category that would have required him to say anything, but—in a way that would seem unreasonable under

a positivist approach to the law—he nonetheless ought to be guilty of fraud, and ought to go to jail, and ought to have known better? Known better than what, exactly? And from whence do you derive the *ought*? If this is a moral dialog, will you admit of moral argument? If it is not a moral dialog, what is it?

Things are neither right nor reasonable. Let us reserve for the moment whether things are nice, and let us first consider whether we can deal with right and reason, history and norms, and positive law.

III. THE RESTATEMENT OF THE OBVIOUS

This is a restatement of the obvious in relation to law. Law is to philosophy as engineering is to abstract mathematics. Law exists in a particular way in a real world of people, places, relations, and things. It does business. It convinces juries beyond a reasonable doubt, by the preponderance of evidence, and by other standards. It divides, it decides, and it compels by organized force that is immediately felt. This restatement does not purport to contribute to postmodernism or any discourse of nihilism; nor does it claim that anything is obvious in semiotics, literary form criticism, analytical philosophy, or anything else, although such a restatement might be overdue.

This is also a restatement of the obvious with respect to the law. In America, for example, there are some 250 million people to govern, and they need a coherent and agreeable foundation upon which to rest the law. The principles of this restatement are obvious and appropriate if the task is to govern a free and democratic people under a rule of law. The speculative contributions of the speculators in fields outside the law are still to be gleaned. It is through the principles of this restatement, however, that any postmodern or nihilistic insights ought to be tested before any such speculations are actually applied with respect to any real law, intelligently designed to govern real people.

The method here is to list the propositions of the restatement of the obvious, arranged in sections under five topics, and then to follow the list with some observations on the various topics.

A. Topic One: Foundations of Moral Realism

1. Introduction

There are certain things people immediately and evidently know. Apart from consensual ordering, or choices among matters of indifference, these are the only things that can ever be the just foundation for compelling anyone to do anything. No one can be convinced, for example, that he (or anything else) exists, or that good is better than evil, life better than death, or for that matter, that he can know anything at all, or that there is anything whatsoever that he ought

to do—unless, of course, he already knows such things. Either these things are true, even though improvable, or not. If not, it follows then that anyone can think, believe and do whatever he likes, unless and until compelled otherwise. There is good reason to *like* these principles because they alone can compel an independent person without the sacrifice of any individuality. There is even more reason to think these principles are true, not the least because their contraries are seriously unthinkable for practical women and men. And there is yet even more reason to suppose they are the only just basis for governing free and independent women and men, because they are the only realistically non-coercive way to do so.

2. The Three Principles of Moral Realism

Moral realism has three foundational principles: (1) there is an objective reality, (2) human beings can know something about it, and (3) there are some things that everyone can, and some things that everyone ought to, do in response to what they know.

First, there is an objective reality, and it is independent of the human mind. This is immediately evident, and evidently true. It almost certainly cannot be proven and with each successive failure, it becomes more and more futile to try. One might say: "I think, therefore I think I am."¹⁷ This, however, does not advance the inquiry. If you do not know that you are, no amount of persuasion will convince you. This is the *ontological* foundation of moral realism.

Beyond being the ontological foundation of moral realism, objective reality is the only non-proprietary foundation of anything. It belongs to no one, and is the property of no man, woman, nation, clan, or tribe. It is the only thing to which anyone can submit without having been conquered or forced. It is the only thing to which all can consent without having ceded anything that reality itself does not demand.

Second, human beings can know something about reality. This is a staggeringly modest claim. This claim is to be distinguished from the claims that human beings can know everything or nothing; this *epistemological* principle of moral realism merely states human beings can know something about some things.

Finally, to those who might deem this proposition too simple: the answer is that it would be surprising if it were not so simple. There is a story that might illustrate the point. Two people are walking and as they look down they see a \$1,000 bill on the sidewalk, but neither person picks it up. Each person concludes that, if it really were a \$1,000 bill,

¹⁷ Compare this with the "cogito ergo sum" (I think, therefore I am) of Descartes.

someone else would have already picked it up.¹⁸ Implicit in this example is a rather complex understanding of knowledge, but at least sometimes the simple view is the right one, which is all that is claimed under this second heading. Indeed, even the more complex view just given does not deny that anything can be known, it simply makes a mistake in drawing a particular conclusion.

Third, there are some things women and men can do, and some things that men and women ought to do in response to what they know. That there are some things that human beings *can* do in response to what they know requires no discussion in a restatement of the obvious in relation to law (perhaps in other disciplines it can be doubted whether anybody does anything, but this restatement is not concerned with those other disciplines). People, in fact, do things all the time. Many of those things are in response to what they know, or are correlated with the knowledge they have or the opinions they hold.

The idea that there are some things human beings *ought* to do in response to what they know, requires little discussion in a restatement of the obvious in relation to law. Let us begin by saying that many people act as if this were so. They, in fact, do propose and defend laws on the basis that these laws or rules are good or better than some other proposal and they, implicitly or explicitly, claim that others ought to conform accordingly.

The principle that there are some things everyone ought to do in response to what they know is the *ethical* basis of moral realism.

3. The Content of Moral Realism: Its Opposite¹⁹

What does the list of things human beings know look like? It would include these: the (finite, physical) whole is greater than the part; things equal to the same thing are equal to one another; if equals are added to equals, the wholes are equal; if equals are subtracted from equals, the remainders are equal; nothing can both *be* and *not be* at the same time, in the same mode. What all these have in common is that they are known either immediately or as tautologies, once the terms of which the statements are composed are understood.

What else do we know? In addition to knowing things such as those just listed, there would be some techniques or devices that persons know, including the following: the square of opposition and its inferences, for example, the ability to create knowledge by the falsification of a

¹⁸ Cf. J. AYER, GUIDE TO FINANCE FOR LAWYERS 153 (Lexis 2001) (“If there is a \$5 bill on the sidewalk in your neighborhood, someone has already picked it up.”).

¹⁹ Or should that be its “contrary”? (If the reader notices, the reader is already conversant with moral realism). One would prefer no footnotes, but modesty compels the obvious note that anyone familiar with Aristotle, Euclid, and Thomas Aquinas will see the derivations.

universal negative or by falsification of a universal affirmative; and the rules of the syllogism such as, in one well known mode, all A is B; X is A; therefore, X is B (all mice are mortal, Mickey is a mouse, therefore Mickey is mortal).

The initial list is short, and the techniques are few. From these, further knowledge can be derived. The derivations of further knowledge will depend upon observation and reasoning. In short, they are mediated not immediate. Such extensions of knowledge will be no more certain than the foundations upon which they are based. The more certain a derivation, the more nearly it constitutes knowledge and the less certain, the more clearly it is opinion. Some opinions are so widely tested, soundly reasoned, and supported by such strong evidence they are treated as if they are true and are acted on with correspondingly high confidence. Other opinions are weaker, more tentatively held, and might often be acted upon with a lesser degree of confidence.²⁰

Truth means the correspondence of a statement to the reality to which it refers. Various opinions might be more or less likely to be true, and therein lies the domain of potential progress in knowledge, in any field, though this restatement remains confined to matters in relation to law. Such progress in knowledge consists in the successive testing of opinion, and the replacing of less sound opinion with more sound opinion, with the goal of arriving finally, if possible, at truth and, if not possible, then at the best opinion that can be supported. In this relation, an opinion is more sound, and to that extent better than another opinion, to the degree that it more nearly accords with the data, and to the degree that the inferences drawn from the data more nearly accord with the steps of sound reasoning.

What does the list of things that everyone *ought* to do look like? It would include the following: everyone ought to seek and to do that which is good, and everyone ought to avoid and to refrain from doing that which is not good.²¹

And there is an extension that generates additional matters, using one of the techniques that everyone already knows. This syllogism proceeds with (1) a major universal premise: everybody ought to seek and do the good, and everybody ought to avoid and refrain from the doing what is not good; (2) a minor particular premise: X is good; and (3) a conclusion: therefore, everybody should seek and do X.

²⁰ See MORTIMER J. ADLER, SIX GREAT IDEAS 39-56 (1981).

²¹ E.g., THOMAS AQUINAS, SUMMA THEOLOGICA, Part I of the Second Part, Q. 94, art. 2 ("Consequently the first principle in the practical reason is one founded on the notion of good, namely, that the good is what all desire. Hence this is the first precept of [the natural] law, that good is to be pursued and done, and evil is to be avoided. All other precepts of the natural law are based on this . . .").

The candidates for inclusion in the minor premise, in the position of X, should be common goods.²² Apart from consensual ordering, or choices among matters of indifference, there is no just basis for compelling anything else, for it is clear that anything else is a matter of taste, and other things being equal, there is no sense in arguing over, much less compelling, matters of taste. What does the list of terms for inclusion look like? It might include the following common goods (call this “list one”): life, health, food, shelter, knowledge, skill, practical wisdom, courage, temperance, justice, liberty, friendships, and love.

Or it might include the following common goods (call this “list two”): life, love, truth, dominion (property), contentment, authority, leisure, speech, and gratitude.

Where did these common goods originate? They must come either from nature or from nature’s God. The first list of universal common goods is derived from nature. Human persons are definable, at a minimum, empirically. It should be evident that all human beings need a sufficiency of food and it is everywhere observed that all human beings will die without it. If the objector closes with the further objection that moral realism is implicitly premised on the notion that life is better than death, the answer is: yes, it is.

This reverts to an issue of the same kind as discussed. Some things are true, but not provable. It is unlikely that anyone can prove another’s existence if the other does not already know it. It is equally unlikely that anyone can convince another that something is better than nothing, or that life is better than death if the other does not already know it, or, in short, if the other does not know that good is better than bad. If the other does not already know it, there is nothing anyone can say to that person to change his view. There is no unrealistic view taken here. There are times when death is “desired” if only for the sake of something else or times when someone may have to make do with little or nothing. The modest point being made here is simply that other things being equal, something is better than nothing, and life is better than death.

The second list comes from nature’s God. If that is not already clear, reconsider the list:²³ *life*—the goodness of life is marked by the prohibition of the worst offense against life: “Thou shalt not murder”; *love*—the goodness of love is marked by the prohibition of the worst offense against love: “Thou shalt not commit adultery”; *truth*—the goodness of truth is marked by the prohibition of the worst offense against truth: “Thou shalt not lie” under oath, to the hurt of another;

²² “Common goods” as used in this essay signify goods that are common in the sense that they fulfill common human needs. ADLER, *supra* note 20, at 82-98.

²³ The contours and phrasing of this list are generally as described by, for example, Dr. Joseph N. Kickasola in various unpublished papers at Regent University, Virginia Beach, Virginia. Any errors are mine, not Dr. Kickasola’s.

dominion (property)—the goodness of dominion over property is marked by the prohibition of the worst offense against dominion: “Thou shalt not steal”; *contentment*—the goodness of contentment is marked by the prohibition of the worst offense against contentment: “Thou shalt not covet thy neighbor’s goods or wife” (not only failing to be content, but actually feeding discontent from the goods of another).

List two continues with *authority*—the goodness of legitimate authority is marked by the affirmative ordinance to respect the first and most basic foundation of authority, the one in which love, nurture, existence, and support all ought to combine: “Honor thy father and thy mother”; and *leisure*—the goodness of leisure is marked by the affirmative ordinance to set aside ordinary cares for the enjoyment and cultivation of the most pleasurable things: “Thou shalt keep [the Lord’s day].”

List two concludes with *speech*—the goodness of speech is marked by the prohibition against the most degrading of profanities: “Thou shalt not take the name of the Lord thy God in vain”; and *gratitude*—the goodness of honoring the one true God, and the goodness of honoring the true God in the right way are marked by the prohibitions against the most serious of violations against these goods: “Thou shalt have no other gods before me”; and “Thou shalt not make for thyself any graven image.”²⁴

If it seems impertinent to include the Bible, simply consider that we already know that some things are universal common goods. If we admit that we already know this, then nature, or nature’s God, exhausts the choices of how we know. It is important to recall the moral realist’s explicit recognition of the gap between the immoral and the illegal,²⁵ and to notice that all the moral realist claims here is that there *is* a reasonable category of the moral and immoral based upon the universal and common good.

As to nature and the goods of list one, make the experiment. Human beings are empirically knowable, and in addition, each of us has immediate knowledge of at least one person.²⁶ Shall it be said there

²⁴ See *Exodus* 20:1-17 (the Ten Commandments); *Deuteronomy* 10:1-5.

²⁵ Some of the contributions of the moral realist to understanding the gap are described in the subsection (4), and especially note 29 *infra*.

²⁶ That would be each person, himself or herself. Compare C.S. Lewis, *Meditation in a Tool Shed*, in *GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS* 212-15 (Eerdmans Publishing 1983) (“looking along”) with C.S. Lewis, *Transposition*, in *THE WEIGHT OF GLORY AND OTHER ADDRESSES* 71-72 (Macmillan 1980).

[A certain kind of critic] sees all the facts but not the meaning. . . . He is therefore, as regards the matter in hand, in the position of an animal. You will have noticed that most dogs cannot understand pointing. You point to a bit of food on the floor; the dog, instead of looking at the floor, sniffs your finger. A finger is a finger to him, and that is all. His world is all fact and

really is *nothing* that is a common good? This is to deny the reality of food and of starvation for lack thereof. It is an obvious failure to notice reality. If there is a problem of simplicity or of the shortness of the list, it should be noticed this is a restatement of the obvious to serve as a foundation for law. One would hope that it would be relatively simple. It is intended to be known by, and to be acceptable to some 250 million people.

It should be pointed out that this view of moral requirements is non-proprietary. It belongs to no one. It excludes no one. It compels no one to do what anyone would not already be happy to do, if they only knew what they needed. It is also subject to progress in knowledge, just as in the case of the epistemological foundation already mentioned. Some statements about particular common goods will be more certain than others. Here is room for change, criticism, and improvement.

Finally, as to nature's God, the only other choice, make the experiment. Since this is a restatement specifically directed at American law, including foundations for positive, natural, empirical, and historical norms, read the Bible. Notice that it makes historically-based truth claims. Come to terms with the Ten Commandments, whether you already believe them or not. If you do not already believe them, do not stop there. If you are serious about governing a nation, a substantial portion of whose population does believe them, reality at least suggests that you think of history, memory, imagination, and morality and its relation to reasonable law.²⁷ At the least, notice the relationship between the universal common goods derivable from nature (list one above), and

no meaning. And in a period when factual realism is dominant we shall see people deliberately inducing upon themselves this doglike mind . . . [such a person] will regard the results of [the analysis of their experience] as truer than the experience. The extreme limit of this self-binding is seen in those who, like the rest of us, have consciousness, yet go about to study the human organism as if they did not know it was conscious. . . . [From such a point of view, there] will always be evidence, and every month fresh evidence to show that religion is only psychological, justice only self protection, politics only economics, love only lust, and thought itself only cerebral biochemistry.

Id.

²⁷ See HAROLD BERMAN, *LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* xii (2003).

Would it not be a good thing for the world today if all people believed . . . that Law—with a capital L—is founded on the divine commandment to love God and to love one's neighbor, and, more particularly, to honor authority, not to murder, not to steal, not to violate moral standards of marital relations, not to "bear false witness," and not to seek to deprive others of their legal rights. Anthropologists have shown that the last six of the Ten Commandments have counterparts in every known culture.

Id.

those given by nature's God (list two). There is a coherency. For purposes of this restatement of the obvious, that recognition is enough.²⁸

The last point, before leaving the foundations of moral realism, is explicitly to recognize the contrary. If the three foundations of moral realism do not seem obvious, think about the consequences of rejecting any one or more of them. Suppose there were no objective reality, no way to know anything about it, or nothing everyone ought to do. The consequence would be a legal system based upon nothing but force. If such a system discovers that men and women lie or steal or cheat, or commit corporate fraud, there is nothing that system can do except to increase the penalties (or to do away with them or to strike some balance to attain some measure of efficiency). If anyone were to ask why any of it matters, there would be little in the way of an answer that would win unforced assent. If instead, this restatement of the obvious were true and laws were tied to these foundations, the legal system would be working with, rather than against, reality. Finally, even if (contrary to fact) this restatement of the obvious were false, then it follows that nothing is true, and anyone could accept as true anything he likes. There is much to "like" about the restatement of the obvious, especially when it comes time to govern a free and independent people. So, one way or the other, we reach an agreement on the restatement of the obvious.

4. The Gap: [Human] Law Is Not the Same As Knowledge, Morality, or Religion

There is a law that is, in a sense, the same as morality (whether derived from nature or given by nature's God). There is also a law, however, that is distinct from either morality or religion, and there is a legitimate question what to do about that gap.

(1) There is a law that is, in a sense, the same as morality or religion. It is not uncommon to speak of moral law. In this essay, this term connotes those universal moral principles identified in the prior section on the foundations of moral realism. Those principles are based upon the common good. Additionally, it is not uncommon to speak of religious law. In this essay, this term connotes moral principles not merely identified from nature, but given by nature's God and accepted on their own terms as true. In either sense, the term "law" is applied coextensively with morality or religion. In this sense, there is no gap. This usage is significant.

(2) In another sense, there is a law distinct from either morality or religion. It is not uncommon to speak of "law" in a sense that clearly

²⁸ In other contexts, there are nice questions, but those approach the theological and are beyond the needs of this restatement, which is a restatement of the obvious with respect to [human] law.

divides the positive, coercive law of the state from any purely moral or religious principle. By *purely* moral or religious is meant a principle that is not part of the positive law of the state, but which binds, as is said, "in conscience only." It should be noted that in this sense, there is a gap. This may seem trivially obvious, but the gap is of utmost importance to any moral realist. The existence of the gap implies there is a domain, and potentially a large one, consisting of things that are claimed to be immoral as a violation of the moral law and sinful as a violation of God's law, and yet are *not* illegal.

(3) There is a legitimate question what to do about the gap. It is a fact that some people believe the gap between the illegal and the immoral should be closed, or closed as nearly as possible, and that progress (or regress) in the law is properly measured by the degree of closure. It is of first importance to notice that this view is not held only by, and perhaps not even chiefly by, overt (or covert) religionists. Many apparently irreligious or nonreligious people act as if the failure of the law to punish or to deter any number of *bad* or *not nice* actions is a serious charge against the law itself, and something to be remedied as soon as possible. What is sometimes baffling is whence, exactly, the source of the moral judgment arises, especially when voiced by a person who is not only irreligious but also denies there is any universal common good. This phenomenon is one of the many reasons this restatement is proposed. This restatement of the obvious as it relates to the law simply takes account of the fact that many people act as if closing the gap between the illegal and the immoral is of first importance. No moral realist can fail to notice this.

It is equally a fact that some people believe the existence of the gap itself is an excellence that must be preserved (or if not an excellence, then at least a necessary precaution against an otherwise overreaching, intrusive, meddling, and perhaps evil intrusion by the state into the life, liberty, property, pleasures, and whims of its citizens, or into spheres or jurisdictions not properly those of the state). It is of first importance to note that this view is held not only, and perhaps not even chiefly, by overt irreligionists. It is a fact that many (not all, but many) religious persons take this position. It is clear that many of those advocating the preservation of a gap between the illegal and the immoral have strongly held views on morality itself. Many people seek a cultural environment that will encourage (or at least not discourage) morality, but with that encouragement falling well short of compulsive legal force to impose it.

The phenomenon of a voluntarily disestablished, yet professedly Christian nation is something worthy of serious study.²⁹ Apart from

²⁹ Compare, e.g., THE WESTMINSTER CONFSSION OF FAITH (WCF), 1647 version, chapter 23 (to the effect that the civil state ought to punish blasphemy, heresy and other

America, it is possible that no other nation has ever attempted such an experiment. No moral realist can fail to notice this.

If there is any doubt about the utility as well as the truth of moral realism in the law, reconsider the desire to say something about the recent wave of corporate scandals. Without reality there is no truth; without truth there are no lies; without lies there is no fraud; without fraud there is nothing to complain about, unless as explicitly made illegal by the positive law. But that would be absurd. One of the recurring sentiments is that Enron, for example, "hired lawyers and accountants to do everything in strict compliance with the law, and yet" It is clear that the import of this sentiment is that strict compliance with the law (perhaps) still allowed Enron to get away with something that the might not be fully explainable (the anticipated legal proceedings yet to come may show whether "materiality" goes far enough), without embracing the language of moral realism. "They" at Enron "should have known better." This essay asks: what, exactly, is it they should have known, and is there anyone who will join the moral realist in standing up and telling them what it was?

It is to be wondered why the language of morality is the only language that dare not speak its name. Surely there is manifest evidence that there are certain norms, moral or otherwise, that have been violated in addition to (or perhaps instead of) any technical (or non-technical) violations of the law. Or not, depending on what the facts might show. To be sure, one could entertain the fancy that there is no truth and that everyone is free to define his own reality but only as a matter of sophisticated posturing. When the posture is amusing or useful, it might be maintained, but not otherwise. Thus, we certainly could hold business

religious offenses), *with id.*, 1787 version as adopted within America after years of debate (to the effect that the civil state ought to protect and encourage the church, but not to enforce religious laws). A reference that contains both new and old versions of WCF chapter 23 is DOUGLAS KELLY, HUGH MCCLURE AND PHILIP ROLLINSON, *THE WESTMINSTER CONFESSION: AN AUTHENTIC MODERN VERSION* 66-67, 105-07 (1992).

This tradition of voluntary institutional separation by *disestablishment-coupled-with-encouragement* is not the same as separation imagined as a "wall." At the same time, it is certainly not the same as an established church as perhaps modeled by the Puritans in New England and elsewhere in the colonies prior to 1787. It is somewhat surprising that historians have been able to find semi-hidden and long-lost letters, apparently to establish some "intention" as to church/state issues, but have failed to give the same attention to the WCF, which is not only non-secret and non-private, but provides a compelling hypothesis to explain both why churches in America have been relatively strong compared to those in, say, Europe (precisely because the American churches, as and when disestablished, were *not* state churches), and why democratic institutions in America have endured so long without having degenerated as might have been predicted (precisely because these democratic institutions were *not* wholly divorced from morality, but were influenced by a religion, and a religiously-based moral sensibility, that was both disestablished and encouraged).

men and women to a different reality than others, but that would be obviously wrong.

On the other hand, the world and all of us might be an illusion, or a dream,³⁰ or the inhabitants of the world might be suffering a disability that is unable to be diagnosed because all of us have it. The population of the world might be oriented as if in a cave, watching a pantomime, or might be observing as if through a glass, darkly. In short, there might be nothing to know, no way to know if we know it, and no basis for any action whatsoever. Although it might be interesting to make such suggestions elsewhere, none of that works very well in the world of the law. There are after all, some 250 million Americans, and it is hard to imagine that any substantial majority will consent to be ruled by a law that is claimed to be no good, but is based upon some illusion discernible only to those whose prerogative it is to make it up. It is clear that if most people think they know anything, they think that there is a law backed by the compulsive force of the State. They think so because they run into it all the time and cannot deny it. It is obvious that some think the law is or ought to be good, and is or ought to be knowable.

This topic rests on the proposition that most people do think there is such a thing as a law backed by the compulsive force of the State, think there are some ways of knowing it, and think there are some things to do as a result of this knowledge. This restatement of the obvious now proceeds to the next topic.

B. Topic Two: Sources of Existing Law

1. Introduction

There are only three generative sources of law: (1) positive, (2) natural, or (3) historical. If there is an existing law, it must come from one of the three sources. To the extent that any law derives from two or more sources, its force is greater than if it derives from only one source. These categories do not refer to divisions of the law, such as, civil law, common law, and canon law, but to the *sources*. Regardless of division, the law must be found in one or more of those sources.³¹ In the context of this essay, "natural" also includes all of the empirical tools available at any given time.

³⁰ In the words of the poet to our young: "merrily, merrily, merrily, merrily, life is but a dream."

³¹ See Harold Berman, *Law and Logos*, 43 DEPAUL L. REV. 143, 149-53 (three sources); *id.* at 144 ("I would say that the life of the law is not logic, but Logos, and that Logos includes not only felt necessities, political and moral theories, and intuitions and convictions ('prejudices') of judges but also a spiritual faith grounded in a larger experience, both psychological and historical"); see also BERMAN, *supra* note 27, at xi-xii.

2. The Three Sources of Law

Positive law is that which commands the coercive force of the State. It is the law in the vocabulary of the legal realist. Everyone acknowledges that it exists. To some people it is all of the law that exists. No more needs to be said about it in this restatement of the obvious. It is highly consistent with the foundations of moral realism, the first topic of this restatement: positive law is an objective reality, it can be known, and it requires that something be done.

The natural law is that which informs the positive law, based upon notions of the common good, as determined or discovered by reason, animated by purpose. When it is actually enacted as part of the positive law of the State, it is said to lend to the positive law an authority that binds in conscience as well as by brute force. Even when not enacted as part of the positive law, it has served to influence conduct, even though (as long as there is a gap between the demands of the morality of the natural law and the dictates of positive law) it lacks the compulsory force of the State. For those reasons, and also because the existence of the gap often serves as a catalyst for change in the positive law, no moral realist can ignore the existence of the natural law and continue to be a faithful observer of reality. The natural law also includes at least two other aspects: the eternal and the empirical.

Eternal law is conceived as a companion or precursor of the natural law. It has been claimed as a matter of fact by a non-negligible portion of the population that the cosmos is ruled by God and is in some real sense under law. Eternal law is sometimes treated as the domain from which natural law is determined. For purposes of this essay and to maintain the minimum claims appropriate for a restatement of the obvious concerning [human] law, the eternal law is named, but discussion will focus on the natural law.

The empirical aspect of the natural law is very well known in our time. The word empirical signifies all the various aids to understanding characterized by data sampling and method, all of the law and economics contributions, all of the social science contributions, and all of the mathematical and statistical methods. It must be noted that the natural law is the only heading under which these sources belong. Certainly they are not part of the positive law. Indeed, they are offered as validations of, criticisms of, or commentaries upon the positive law, but they are not themselves law. They exist only as does the natural law, as an external authority, non-binding itself, but sometimes embodied in a positive law, and yet affording a more or less persuasive generative source of law in the same sense as does the natural law. Like natural law, all of these empirical sources claim to be derived from reason and observation, to be worthy of some authority, and to serve some purpose. Some practitioners

of the empirical law endeavor to distance themselves from the natural law, but that is surely because of differentia as to species rather than genus. The genus is, like natural law more generally, that source determined or discovered by reason and observation.

The third source of law, after positive law and natural law, is historical law. It is not simply that the law is historical but rather that the history itself might be normative. This school of thought (now neglected) has been influential and no realist can ignore it. It postulates there is a cultural norm, a shared memory of the past, not just the past as a dead hand or a bucket of ashes,³² but the past as a living and important source of current law. The possibility of imagination tied to that recollection is a true limitation on the power of law but also affords a generative source of law.

Moral realism is integrated. It takes all of reality as its domain. Since there are three sources of law, it combines all three.

Scratch almost any natural lawyer and you will eventually get at least a trace of the positivist. That is because almost every naturalist will eventually find some situation in which all that is needed is a law, any law, in respect of some matter morally indifferent. Push many positivists and you get a naturalist. This is true because many positivists will eventually lapse into language that includes the "oughts" of moral discourse, just as any naturalist would address the same subject. Discuss history and you get some of each. History is sometimes treated as a simple *is* and *is not* and then is interpreted and reinterpreted to find out simply what the positive law was, but at other times history is read to find a basis for effecting a change claimed to be for the better.

This combination is not inconsistent or self-contradictory. It is, in fact, the only integrated approach, and the only way to account for all of the facts. The power, in terms of legitimacy, of using the three together is striking.³³ Imagine a [human] law grounded in strong historical norms, clearly supported by reason for the common good, and at least within the permissible range of interpretation of standard positive law.

If, as might now be the case in America, there is some non-trivial problem of legitimacy, or at least of mutual distrust voiced by factions, parties, and major groups within the country; and if there are developments in the law being made currently without clear direction, the approach of integrated realism has much to offer. It is the only approach that is faithful to shared historical norms, to a reasonably articulated moral stance based on a universal common good, and to

³² Cf. Carl Sandburg, *Prairie*, in COMPLETE POEMS (1950) ("I tell you the past is a bucket of ashes.").

³³ See BERMAN, *supra* note 27; Berman, *supra* note 31, at 151-53 (making an explicit reference to Trinitarian theology as an integrative model for the connection of all three aspects of law: will, reason, and memory and imagination).

standard canons of interpreting the positive law. It will continue to offer means for such change as is necessary, but the determination of what *is* necessary becomes something tested and testable by strong evidence. Integrated moral realism puts propositions of law into the domain of the falsifiable, which is to say, into the domain of a rule of law rather than a rule of force.

Without positive law and at least one of these other bases, there is no legitimate compulsion, only force; but conversely, when two or three of these bases converge, there is a powerful and legitimate authority behind the force of law. If any given society wants a government under a rule of law, and wants it to be self-governing because of a large measure of voluntary acceptance, integrated moral realism is how to succeed.

It is possible simply to increase or decrease penalties as a matter of pure positive law. It is possible to admonish with spreadsheets, statistics, reasons, or sermons as a matter of pure empirical, natural, and eternal law. It is also possible to interpret, reinterpret, and urge a return to or an escape from the past, as a matter of pure historical precedent (even though the law might have diverged from historical norms). It is much more desirable, however, when the three are combined. In the most desirable case, there is a positive law that is at once consistent with empirical evidence and natural and eternal law, and at the same time in sympathy with historical norms held in the memory and imaginations of the persons subject to the law.

It might be said, on the other hand, there is no room for natural law and its empirical tools or for normative history. Positive law might be taken simply as a manifestation of experience, as expressed in the statement, "whatever is, is [period]." ³⁴ Alternatively, positive law might be taken simply as something that merely gives the appearance of intelligent design, but perhaps the positive law just "evolved" without any thought or intelligent agency at all.

Either of these suggestions might be the case if men and women, or at least some of them, did not think they were making the law. That they do think and act as if they are making the law is addressed in the next topic in the restatement of the obvious. It obvious, after all, because it is human law with which we are concerned, and we know that law is made by men and women.

³⁴ This is *not* to say, as with Alexander Pope, that "whatever is, is *right*." *Essay on Man*, reprinted in *ESSAY ON MAN AND OTHER POEMS* 53 (Dover Publ'n 1994). Instead, it is to say only that "whatever is, *is*"—a statement attributed to Parmenides. R.C. SPROUL, *THE CONSEQUENCES OF IDEAS* 21 (2000).

C. Topic Three: Making or Changing the Law

1. Introduction

Law changes over time. It appears to change by intelligent design, affected by agents intending a purpose. Though the starting point of law is the positive law, the natural law, and the historical law, it is manifestly the case that the positive law has not remained at rest, and that any particular law is subject to change and has changed. If we have changed, are changing, and will continue to change the law, it is fair to ask what criteria are appropriate. It is becoming increasingly hard to think of a *positivist* dynamic for designed change in the positive law, but there are clear criteria derived from natural and empirical sources, and equally clear criteria as a matter of historical norms. As before, we leave the speculation to the speculators, but it is possible to list the factors that people have historically understood to be relevant, and that also conform to natural reason and to empirical methods.

2. Criteria for Designed Law (the Elements of Law)

Any law that is designed, applied, made or modified should, to the extent possible, be reasonable, good, purposeful, articulate, authorized, predictable, compulsory, humane, consistent, systematic, and validated.³⁵

(1) *Is it reasonable?* A law should be reasonable, but there are limits to reason. Other things being equal, the reasonable would be preferable to the unreasonable, the arbitrary, and all that which is no more than a mere act of will or a matter of pure power.

(2) *Is it good?* A law should be good, to the extent anyone knows what is good (or might hazard a guess), or at least purposeful. The good we seek by compulsion of law is the common good. Failing that, there ought to be *some* good that can be demonstrated and explained.

As to purpose, it should be clear that to the extent it is oriented to the common good the purpose of any positive human law should be human happiness. In relation to the common good, human happiness is a term of art. It means a whole life, well lived in accordance with complete virtue (the virtues themselves being matters of common good), and accompanied by as many real goods, and by such harmless apparent goods as external providence (or, as some would say, fortune or luck) and effort may add. So taken, happiness is itself a matter having both objective and subjective dimensions for each person. As to common

³⁵ One would prefer not even to cite Thomas Aquinas, for fear of getting caught up in antiquarian debates. But it would be unwise not to acknowledge that the following list is dramatically paraphrased and updated, but is derived from Aquinas. See A Note on Sources at the end of this essay.

goods, it is universal for all; as to those individually desired but harmless apparent goods, it is to that extent different for each.³⁶

Governments can assist their citizens in their pursuit of happiness only when happiness is conceived as having both a common and a limited scope. The common good is what gives happiness its commonality.³⁷ The bounded extent of the actual need for scarce common goods (there is no need for excess food or overly expensive food) is what gives happiness its limited scope. As a matter of historical scope, the conditions of market-based accomplishments in America and some other countries have given rise to the first societies in which such happiness is a prospect available to substantial portions of their citizens. It should be remembered that the purpose of this restatement of the obvious is to lay the groundwork for a discussion of business ethics and it is not remiss to note that businesses are in large measure responsible for the happiness, to the extent happiness may be attained by external goods, of the American people, and perhaps for the rest of the world.³⁸ This is one of the reasons why the culpability of corporate wrong-doers is so great: such wrong-doing is a perversion of a great common good.³⁹

It is by way of positive laws that support life and liberty, and that encourage virtue, that men and women obtain favorable conditions to attain happiness. Positive laws also enable business associations by which women and men are able to

[1] create new wealth; [2] generate new industries and new jobs; [3] and inspire new generations who will invest for the future and sacrifice in the present, as well as to nourish workers who have confidence that their business is a noble calling, and that through it they are leading the world into a freer, more prosperous, and more virtuous future.⁴⁰

³⁶ One would prefer no citations, and there will be few or none in this section, but modesty compels the obvious note that those familiar with the common notions, or at least those of our culture, will see the derivations, including from Aristotle and Thomas Aquinas. See A Note on Sources at the end of this essay; see generally MORTIMER J. ADLER, *ARISTOTLE FOR EVERYBODY* 69-126 (1978).

³⁷ See *supra* note 36.

³⁸ Michael Novak, *The Moral Heart of Capitalism*, NAT'L REV. ONLINE, Aug. 16, 2002 (opening remarks delivered at the panel discussion on corporate responsibility at President Bush's Economic Forum in Texas); cf. JOHN MICKLETHWAIT & ADRIAN WOOLRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* xv (2003) ("The most important organization in the world is the [limited liability joint stock] company: the basis of the prosperity of the West and the best hope for the future of the rest of the world.") It is perhaps not a peculiarly Christian notion that "work is a gift from God" and not a curse. See R.C. Sproul, *The Gift of Work*, TABLETALK, July 2003, at 2 ("When we remember that work is a gift from God, then we are better able to labor *coram Deo*, before the face of God. May we do so we joyful hearts.").

³⁹ See *supra* note 3 (aggravations that make some offenses more heinous than others).

⁴⁰ Novak, *supra* note 38.

(3) *Is it articulate?* A law should be articulate, within the limits of language, time, place, and manner. It is not sensible to ask more than language can accomplish, but it would be unreasonable to accept less than can be accomplished. It ought to be possible to give an account of the law within reasonable compass.

(4) *Is it authorized?* A law should be authorized, insofar as a measure of discretion can be balanced against accountability and can be lodged with some identifiable agent. This is an application well known to business lawyers and business scholars. The tradeoff is between discretion and accountability. Each is good, but each comes at the expense of the other. As any principal wants an agent to have discretion, but not unbounded discretion, so any principal also wants an agent to have accountability, but not so much as to instill such an excess of risk avoidance and mechanical plodding as would spoil the endeavor. If the adjustment of discretion against accountability is *the* issue in business law, so it is perhaps *the* issue of judicial legitimacy.⁴¹ When *judicial* legitimacy is mentioned, it is to assume there is some identifiable agent (the judge) with whom certain delineated discretion can be lodged.

(5) *Is it predictable?* A law should be predictable, announced in advance, or at least as might fairly (and confidently) be predicted in advance by most of those subject to the law, or by most of those learned in the law, or both. No one asks for more certainty or for more predictability than the subject matter permits, but it is fundamentally unfair for the law to be made up as it goes along. To be sure, this is a question of degree. For purposes of this restatement of the obvious in relation to law, however, it is sufficient to suppose that no one would object to the desirability of predictable law, other things being equal. Ideally, those subject to the law would be able to know what the law is. At the least, those learned in the law ought to be able to know what it is.

(6) *Is it compulsory?* A law ought to be compulsory or at least more rather than less likely to be enforced, or in any event, possible of enforcement. Many readers might have expected this criterion to have ranked higher in the list. Compulsive force is, after all, supposed by some legal realists to be the only definition of law. This factor, placed as it is, recognizes there are simply not enough constables to enforce laws that are neither understood nor embraced by the people subject to the laws. The current state of copyright in America provides an example. There is widely reported anecdotal evidence and some statistical guesses to the effect that, digital media having made near-perfect copying more widely available, easy and cheap, such copying has greatly increased. Other examples abound.

⁴¹ See STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 243 (2002) (as to the importance of the issue in business law).

(7) *Is it humane?* A law ought to be humane, recognizing that human beings are the intended subjects (objects) of the law. Even if men were angels, there might be a need for laws (perhaps to regulate how many might dance on the head of a pin, or assuming only one angel at a time per pin, who had the superior right to be there). Humankind, however, is not an intelligence unencumbered by a body, nor are humans angels. Any law that treats women and men, as if they were possessed of powers, abilities, appetites, and sensibilities other than those of men and women, would be cruelly inhumane.

(8) *Is it consistent?* A law should be, if not constant (and perhaps no law can be constant), reasonably consistent over time. Change is in itself neither good nor bad, but every change in law comes with a price. Unless a proposed change in law is more than just slightly better than what came before, the change itself, considering only the costs of learning and conforming, will cause more harm than good.

(9) *Is it systematic?* Law should be somewhat systematic, but no more systematic than sensible. Good systems tend to support memory, pattern matching, and ease of learning. Bad systems tend to obscure reality. Perhaps no system can account for all of the observed facts, and it is dangerous to let any system or theory get in the way of the reality it describes, predicts, or models.⁴²

(10) *Is it purposeful, and is it validated?* A law made or modified to accomplish a particular goal should be validated, if reasonably possible, in relation to the goal. A rich array of empirical tools exists to accomplish validation. If a law is supposed to have a particular goal, and if it is possible to measure its effectiveness in attaining that goal, the law ought to be tested and validated. Some laws, perhaps most, will not be able to be validated with complete confidence, but those that can be evaluated with a greater or lesser degree of confidence should be so evaluated.

Not coincidentally, a positive law grounded in historical norms and in the common good, as determined by reason aided by empirical tools, and embedded within a system of such laws, and which is articulated, authorized, predictable, humane, and changes only as needed, might be a good candidate for systematic development and improvement.

On the other hand, it might be the case that law just “evolves” without any intelligent design at all. Perhaps some laws have so purposelessly evolved. It is manifestly clear, however, that human agency accompanied by some measure of apparent intelligence and design is (at least) a contributing force to making and modifying a great number of laws. These criteria are guidelines for intelligent design.

The foregoing assumes that, by and large, America wants a rule of law. The possibility that the nation might actually prefer the arbitrary

⁴² See generally MORTIMER J. ADLER, *ST. THOMAS AND THE GENTILES* (1948).

rule of men and women acting according to their will, rather than according to any rule of law, has not been considered. Nor, due to its assumed unfeasibility in a nation the size of America, has the possibility of an infinitely customizable law been considered. Finally, given the heterogeneous and somewhat transient nature of many communities, the model whereby a communitarian elder might administer a law according to status, clan, and reputation within the neighborhood or community has not been considered.

This is, after all, a restatement of the obvious, and as with all other principles of moral realism, depends at least in part on a contemplation, and rejection of the contrary. The complete contrary choice would be for a law that is unreasonable; immoral, amoral or nonmoral; inarticulate and unauthorized; unpredictable but optional; inhumane; never the same and yet inflexible; unsystematic; and not validated. Of course it is unreasonable to think anyone would propose the complete contrary, but the parts seem no more appealing taken individually. That is why moral realism can assert a restatement that is obvious.⁴³

There remains, of course, the possibility that law is, if not "out there" or "over here," nowhere at all, or like a force of nature, impervious to change and not amenable to criticism. That might conceivably be the case if many people did not criticize the law, but people do act as if the law is subject to a standard, as addressed under the next topic.

D. Topic Four: Law and Justice

1. Introduction

Not only does law change, as observed under topic three, but it is also criticized. The criticism implies a deficiency, and a deficiency implies a standard against which a law is measured and found wanting. There is no good word for this standard, but "justice" is the most obvious candidate and better than any other word that comes to mind. As this essay uses the word justice, it is important to keep in mind that it is a highly equivocal word, used in more than one sense. Some of the contexts are mutually complementary, but many are mutually inconsistent.

⁴³ A method employed here is falsifying the contrary to yield the affirmative statement (pursuant to the implications of the square of opposition, falsifying the contrary yields the statement). Even as to a matter of opinion, the exercise of trying to think the contrary is still a suggestive one. Someone who opposes this restatement of the obvious might, for example, imagine setting up a booth and seeing how many passers-by would purchase a set of laws founded on principles other than those contained in this restatement.

2. Criteria for Criticizing Law: The Elements of Justice

It might be best to understand the following as a list of the various claims made for the law, and conversely, as a list of the various complaints made against the law. Anytime anyone says that a law is *wrong*, the statement is meaningless unless there is a standard outside the law. If the law is whatever is compulsory, and nothing but the compulsory, then the law simply is what it is. Under this view no standard exists outside of the law, and any complaint is simply “insignificant speech”⁴⁴ or a “category mistake” (or a realization of a power relationship, coupled with the further observation that the power is on the side of the “other”).

As said under other topics of this restatement, such concerns are best left to the speculations of the speculators. Instead, most people do complain and criticize the law according to a standard outside of the positive law itself. Not only *do* they do so, they *ought* to do so. That is how great evils, sanctioned by law, have been overthrown, sometimes without violence. They ought to do so, however, according to criteria that can be named. Let us call those various standards by the word “justice” and list the various standards, and the correspondingly varied meanings that have been claimed for justice.

(1) *Justice as paying debts.* A just law gives to each what each is due.

(2) *Justice as fairness.* A just law treats equals equally and unequals unequally in respect of a relevant criterion.

(3) *Justice as the lawful.* A just law is lawful in itself. If there is a positive law regime, subject to certain analytical constraints, it should at least follow its own rules, and both judge and citizen should obey them.

(4) *Justice as the good.* A just law is consistent with reason and with the law’s purpose. It is adapted toward the common good or at least to some good for some person or group of persons, and there is some reason for the law. This contemplates not only moral reasoning, but also any appeal to reason and observation; therefore, this view welcomes the contribution of empirical studies. Justice in this sense is a measure of whether the positive law is consistent with—or at least not contrary to—natural law and empirical methods.

(5) *Justice as the normative: historical and cultural norms.* A just law follows normative historical patterns, and would admit the

⁴⁴ Cf. THOMAS HOBBS, LEVIATHAN 34 (Richard Tuck, ed. 1996)

And words whereby we conceive nothing but the sound, are those we call *Absurd*, *Insignificant*, and *Non-sense*. And therefore if a man should talk to me of a *round Quadrangle*; or *accidents of Bread in Cheese*; or *Immaterial Substances*; or of A *free Subject* . . . I should not say he were in an *Erreur*, but that his words were without meaning; that is to say, *Absurd*.

Id. (spelling, punctuation and italics as in original).

possibility of normative history. This is a question of [human] law and human history should be allowed as a guideline against which to test the justice of any law. Common themes of continuity with and discontinuity from the past ought to be considered. Justice in this sense is a measure of whether the law follows historical norms of memory and imagination relative to the people subject to the law. If the past is not entirely a "bucket of ashes,"⁴⁵ then under what circumstances is it appropriate to think of abrogation of the past, and when is it appropriate to think of a perfection of the past? A just law ought at least to be consistent with historical norms of memory and imagination.

(6) *Justice as a construct.* Suppose that there is no "virtue" of justice, and suppose further that there is not even any intelligible concept of justice (this might be to reject any one or all of the preceding five senses of the word "justice"). It then follows that the law is nothing but a more or less coherent social construct. In this sense, justice is a measure of whether the positive law is coherent within its own discourse. It might be possible to categorize legal constructs as either benevolent (such as a "noble lie" concocted to keep folk from hurting themselves or one another, not unlike the construct of Santa Claus, used to fortify the resolution of the young and impressionable);⁴⁶ or malevolent (such as an oppressive structure so created as to perpetuate its own power by adding a faux "moral" tinge to the submission of the conquered).⁴⁷ In this sense of the word, justice might consist in providing some sort of criticism and alerting society when times have changed, when constructs that once worked have become an impediment, and when a change in construct might be in order.

(7) *Justice as the interest of the stronger.* It might be that law is always constructed in the service of power relationships, supporting the more powerful party in the relationship. In this sense of the word, justice might consist, not merely in providing some sort of criticism but serving in some sort of vanguard, laboring on behalf of those oppressed and abused by the law.

(8) *Justice and false consciousness.* Suppose law is not exactly or merely a construct consciously created by someone, but is a symptom of a false consciousness. In this sense, the law might be seen as a manifestation of, and justice the correction of, a false consciousness, much like medicine is a correction of disease. So understood, justice is put to service in the destruction of some pathology (perhaps the law), or

⁴⁵ See Sandburg, *supra* note 32.

⁴⁶ One would prefer no citations, and there will be few or none in this section, but modesty compels the obvious note that those familiar with the common notions, or at least those of our culture, will see the derivations. See A Note on Sources at the end of this essay.

⁴⁷ See *supra* note 46.

justice might be seen as the pathogen itself (so that the task of justice might be to destroy, not the law, but itself). There might be some technique by which "justice" could discern which is which: that is, by which it could tell when the patient is ill and when the patient is well.⁴⁸

(9) *Justice as the empirical.* It may be that justice is only an empirical derivation, determined by analytical methods of scientific jurisprudence. Under this view, it would be as though justice were only the constant in the social scientist's equation describing a slope of a line that fits the data points of relevant cases and other authorities previously charted. Here, justice is considered to be essentially nothing; the joker in the deck, invoked whenever necessary to explain an otherwise anomalous data point.⁴⁹

(10) *Justice as nomophobia.* In some sense justice might be nothing other than an unreasoning fear of the law, or *nomophobia*.⁵⁰ In this sense, all law is burdensome if not oppressive, and is to be opposed for no particular reason other than that it chafes. In this sense, justice is not so much a standard as what might seem to be an infantile, or adult, hatred and fear of the law. So understood justice, composed in more or less equal parts cowardice, fear, hatred, and anger is not just the measure of, but the direct enemy of the law.⁵¹

⁴⁸ C.S. Lewis explores some implications of a therapeutic world in which citizens are not *punished* (as they might be under notions of law and justice consistent with those set forth in propositions (1) through (5) of this essay), but are *cured* (as they might be under notions of law and justice consistent with those set forth in proposition (8) of this essay). Lewis, *The Humanitarian Theory of Punishment*, in *GOD IN THE DOCK*, *supra* note 26, at 293-94

If crime [or any false consciousness] is only a disease which needs a cure . . . it cannot be pardoned. . . . This means that you start by being "kind" to people before you have considered their rights, and then force upon them supposed kindnesses which no one but you will recognize as kindnesses and which the recipient will feel as abominable cruelties.

Id.

⁴⁹ *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (a promise or set of promises not otherwise enforceable because of the absence of bargain, [and hence not lawfully enforceable] will be enforceable if reasonably relied upon, but then only if "justice" [undefined in the Restatement] "requires." Or it just lets the judge make whatever law he pleases. "Justice" could have been defined for purposes of § 90 of the Restatement, even in these terms. See Thomas Folsom, *Reconsidering the Reliance Rules*, 66 N.D. L. REV. 317 (1990).

⁵⁰ Coining a word from the Greek, rendering *nomos* as law and *phobia* as an unreasonable fear. See HENRY GEORGE LIDDELL & ROBERT SCOTT, AN INTERMEDIATE GREEK-ENGLISH LEXICON 55, 867 (1985) ("*nomos*" as "anything assigned; a usage, custom, law or ordinance"; "*phob-*" as "to strike with fear; to terrify, frighten, alarm").

⁵¹ One imagines, on Freud's view of it, a quaint Victorian upper middle class home of an evening with mother and father sitting before the fireplace, the little boys peacefully playing or reading—in fact better understood as the little nippers plotting to kill the big guy and take his woman, and frustrated by all the laws that stand in their way. See A Note on Sources at the end of this essay.

(11) *Justice as the other-than-lawful.* It is often supposed that both “law” and “justice” refer to matters to which a person is entitled. Assume a class of things to which someone is *not* entitled. This class might include mercy, or grace, as well as at least some forms of love or charity. If there is such a thing as a gift, it would seem to be outside the usual domain of law or justice. And yet there is a sense in which the word “justice” is attached to a criticism of the law, in which it seems the law is being criticized for not being something other than lawful. So if ever there is a criticism of the law for not giving things to people who make no claim to them of right, then there might be an instance when “justice” is being used in this sense of the word.

(12) *Justice as process or jurisdiction.* Justice may be a process, or may be jurisdictional. In this sense, justice is some kind of method, perhaps content-neutral. Accordingly, there might be techniques by which laws can be measured against a standard of process or jurisdiction even if there is no agreement or consensus about the content.

(13) *Justice as social or economic opportunity or results.* Justice might be used in the expressions “social justice” or “economic justice,” and in either usage to connote opportunity or results. Perhaps each of these usages can be reduced to one (or more) of the preceding twelve, but the frequency with which they occur suggests they might deserve their own heading in this restatement. So understood, the law is criticized for not creating either the conditions or results desired.

It is a fact, apparent to everyone and emphasized by the moral realist, that women and men criticize the law. If the law is nothing but force, or if it is nothing but taste, the criticisms would amount to nothing but force against force, will against will, or taste against taste. But if there is something like a standard involved, it must be on the foregoing list or must be something very like the foregoing list. Under this topic of the restatement, the moral realist is simply taking account of the many senses in which the word “justice” might be used.

It is worth saying more about the observation of justice as the other-than-lawful (item 11 above). There are some criticisms of the law that are implicit under that view. One criticism is as follows: suppose a law is criticized for not simultaneously being law and something else distinct from law. If justice, for example, is simply that to which we are entitled, then why should there be any legal claim to that to which we are *not* entitled? This sort of complaint implicitly acknowledges that justice is something, but not everything. If justice is that to which a person is entitled, then love (and its Latin-based equivalent “charity”) is, to the extent it is in the nature of a gift, something to which a person is not entitled. So also with grace, mercy, and any other unmerited gift. This is also true with other things *nice* but not part of the law.

It is worth observing that the sheer number of senses in which the word "justice" is used does not render the term meaningless, only highly loaded because so highly equivocal. It might be useful to pose the question whether it is possible to organize the various meanings of the terms. One solution is to realize that the various senses of justice are different, but not all of them are mutually exclusive. The first four or five, for example, work well together as four or five dimensions of a unified whole. Justice, that is, includes paying debts, being fair, obeying the positive law, and acting in accordance with natural law, and considering the possibility of normative history.

Others on the list also have their own mutual coherency. If, for example, the principles of moral realism are denied and it is maintained that only a fool or a weakling obeys the law because the law is a nothing but force applied by the more powerful against the less powerful and justice is nothing but a malevolent construct imposed in the interest of the strong to enslave the weak, then the purpose of justice is to overthrow (or, when possible to violate or ignore) the law.⁵² Moreover, under this view it becomes necessary to account for the person subject to the law who seems content. Then the notion of a false consciousness arises: the apparently happy subject (whether in the guise of a happy slave or worker or spouse or citizen or child) must be supposed to believe sincerely, but wrongly, that obedience to the ruler (whether in the disguise of master, boss, dominant spouse, police officer, or parent) is good and disobedience is bad. Under these views, justice is understood to be the enemy of the law in a greater degree, and the task of justice under this view is not only to overthrow the law, but to liberate people from their false consciousness. It should be asked whether there is any basis for awakening out of a false consciousness, which leads back to a parallel kind of normative view, in which some sort of scientific history is seen to have a directed, if not providential, nature, or in which evolution is seen to have no direction at all but urges organisms blindly onward (to replace, apparently, one state of blindness with another state, equally blind). Thus, if the principles of moral realism are denied, it seems a short step to pure *nomophobia*, which suggests that all law is bad because it interferes, thereby provoking anger and hatred.

Faced with such observations as these, some persons might, before throwing up their hands, or as a matter of first importance, suppose that justice might be a content-neutral check on process, or jurisdiction, confining various powers to their proper spheres. Other persons might

⁵² One would prefer no citations, and there will be few or none in this section, but modesty compels the obvious note that those familiar with the common notions, or at least those of our culture, will see the derivations. See A Note on Sources at the end of this essay.

concentrate on using justice to enforce opportunities or results in society and in economic relations.

This is a restatement of the obvious. In the domain of justice, the restatement has just set forth a catalog of senses in which the word justice is used. It might be objected that the list ought simply to exclude some of the views that appear most inconsistent with the principles of moral realism, but not so. Moral realism is an inclusive rather than an exclusive understanding. Claiming that there is an objective reality, that human beings can know it, and that there is something that every human being ought to do, moral realism is able to judge among the various senses in which the word justice is used. For the purpose of this essay, it is sufficient merely to catalog them. The moral realist does not turn a blind eye to any part of reality, but claims that this catalog has included those things that can be said about justice. Whether the moral realist agrees with all of them or not is a different matter. What is sought at this point in this essay is agreement that there are terms for "justice" that everyone can acknowledge, because it is obvious to do so.

But what about duty, equity, and other things nice or "nice"? Some suggestions follow.

As to duties (and rights): Law creates duties because it creates obligations and obligations are duties. Law in this context means the positive law, which compels a duty. Morality based on universal common goods also creates a duty. In this context, whatever one ought to do is a duty, regardless of whether one is compelled by any positive law. This essay has already discussed the gap between positive law and morality, but one should notice and distinguish the gap between positive law based on legal duty and moral law based on moral duty. It is very likely that the source of *rights* cannot be the positive law because the right/duty relationship under positive law is one of correlatives. If there is an obligation imposed by positive law, there is a duty; and if there is anyone entitled to enforce that duty, that person has the correlative right.⁵³ There is no generating force in positive law alone, however, which is why the moral realist (and everybody who claims a right outside of the positive law⁵⁴) looks to another source of right. For the moral realist, moral duties imply moral rights.

⁵³ See WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 36 (1964) (the several pairs of "jural opposites" and "jural correlatives" and the "right-duty" relationship among the correlatives).

⁵⁴ Some of those non-moral realists who look to replace the positive with the positive just look from one positivist regime to another, as, for example, when someone might look to international positive law to replace American positive law. If the attempt were based on a search for universal common goods under natural law terms, or even empirical methods, it might be more likely to succeed. It is, in any event, not entirely wise to ignore different historical norms that might be present in one, but alien or even hostile to the other.

As to equity: Equity is a softening of the law. Equity answers to some of the legal principles set forth under topic three. There it was noted that law should be humane, not overly systemized, and applied to accomplish its purpose or end, which is human happiness. Moreover, it was observed that authorized law combines a measure of discretion with a measure of accountability. A combination of these principles is sufficient to imply equity in the sense of a relaxation of the rigors of the law in certain cases. This equity is not unbounded. As a matter of moral realism, equity depends upon a moral or an empirical basis, and it might well answer to the historical norms of a people or nation. On the other hand, equity might answer to God, in a determinate way based upon an historical written revelation and commentary. One thing that equity would not be expected to do would be to run in reverse. It should not be expected that equity would *increase* the measure of legal obligations, but would relax such obligations.

To the extent that equity should increase legal burdens, it is a reverse equity and no equity at all.⁵⁵ An irony of American law is its tendency toward reverse equity in the apparent name of sympathy: a promisor under no legal obligation to perform a promise might be required, as an equitable device, to keep the promise despite such lack of obligation. A person under no legal obligation to speak the truth might be placed under an equitable obligation to do so.

What is happening under this “backwards” or reverse equity is either that the actor is being placed under a moral obligation that is *more* demanding than the legal obligation (but the judge is perhaps embarrassed to admit to being good, assuming the judge imagines it would be good if the gap between the legal and the immoral were closed), or that the actor is being acted upon in a certain sense unjustly. The sense of injustice is this: if the positive law already determined the extent of obligation, then the aspect of justice that consists in obeying the law means the actor is entitled to demand that the judge follow the law and demand from the state itself that it require from the actor no more than the law requires. And if the law is measured by fairness, then the actor is entitled to be treated like any other person not obligated in the situation (if all persons were required in like situations to perform, then it should be noticed that the law has changed, not that equity is being done). Reverse equity is a curious thing.

The approach of moral realism is the only approach that explicitly enables rational discussion of competing claims to *justice*. It is one that notices also that sentiment is good in its place, which may be the place of

⁵⁵ *Luke* 11:46 (“And you experts in the law, woe to you because you load people down with burdens they can hardly carry, and you yourselves will not lift one finger to help them.”).

love, or kindness, or even of morals and law itself, but also notices that such sentiment is nonetheless different from law. It might be a lovely sentiment to protect, say, the investor, or the consumer, or the poor, or the oppressed, or for that matter, any of *us*, but against whom or what? Without some positive law, or some natural law dependent upon universal common goods, empirical observations, or historical norms, nobody can know what that means. If the sentiment is bound up in positive law, natural law, or historical norms, then the sentiment can inform a law, but not otherwise.

These thoughts lead to such questions of language and meaning as may be included in a restatement of the obvious relating to the law.

E. Topic Five: Law and Language

1. Introduction

Consider the case, Johnny and the Cow: if we call a tail a leg, how many legs does a cow have? (a) five, (b) one (and only one), (c) four, (d) all of the above, (e) none of the above, (f) whatever you want it to be.

2. Reserved

This essay is not the place to present a discussion of language. But in a restatement of the obvious in respect of law, it ought to be clear that language is important. There might be more than a few readers who have more or less agreed with what has come before, but are doubtful about the topic of language.

Lawyers, and especially business lawyers, are directly aware of the *power* of language: they create “entities” essentially out of nothing but words, and endow them with attributes of personality (or at least the law seems to do so).

Lawyers, especially those who deal with intellectual property, are directly aware of the significance of speech, and even of expressions that some analytical philosophers might have found “insignificant”: intellectual property lawyers deal with incorporeal, intangible “property” rights all the time (and at least the law seems to treat these as if they were significant things).

Lawyers, at least those who are moral realists, are directly aware that the same word (for example, “justice”) is able to signify different states, but is also able to communicate an intelligible *concept* that has an objective nature.

Most significantly, the lawyer has a direct appreciation of the importance of dealing with “Johnny and the Cow” question as given in the introduction to this topic. For example: if we call “misappropriation” a kind of deceit or manipulation, is it really so? (a) yes, and it is one of the bases for establishing illegal insider trading, (b) no, it is not, and to

this extent some portion of insider trading lore is unreasonable, (c) it doesn't make any difference because neither "deceit" nor "manipulation" have any particular meaning anyhow (except generally to include things that are "bad" and undisclosed, and misappropriation is certainly "bad" and if it is to be effective, undisclosed), (d) all of the above, (e) none of the above, or (f) whatever you want.

The moral realist notices that language is important. If there are categories: fraud, theft, misappropriation, violation of agency or other fiduciary duty, and special statutory or regulatory categories—and *if* these categories have distinct elements under the positive law, different reasons, purposes, and ends as a matter of natural law or empirical observation; and independent historical and cultural developments, norms and expectations—and *if* these categories are treated as if they were wholly nominal, blended into one another, and ill-defined or non-defined, it would not be surprising if great mischief might follow.

On the one hand, members of a society, thinking that all information asymmetries are illegal as some species of "fraud" or "deceit" (or "something"), and noticing that everybody else, and especially the professionals, have substantial information advantages, will conclude that "everyone" is doing "it" and that the whole "system" is hopeless corrupt and hypocritical. On the other hand, certain professionals will "know better" than most that some of their advantages are perfectly legal, and yet wonder exactly when (or why) they might cross some line and find themselves considering the possibility of substantial jail time. Of course certain situations are clear, but this essay is raising the possibility of some unclear circumstances.

It seems that there would be general support, under topic five of the restatement of the obvious, for the proposition that language in the law means something that is not wholly conventional. The next section of this essay will address some of the verbal categories most pertinent to the business scandals.

IV. A NOTE ON SOURCES (AND CONCLUDING POSTSCRIPT)

A. Note on Sources

Footnotes are useful, in their place and especially to indicate that the author is making no claim to originality, but instead is giving credit due to those prior workers who might have been original. Footnotes, however, sometimes misdirect and change the substance of the argument. It is the explicit intent of this essay to restate the obvious in the form of numbered propositions as set forth in Appendix One, and to do so in a way that is non-proprietary, non-sectarian, non-antiquarian, and not neo-anything. Here is the dilemma:

(1) On the one hand, if these propositions are obvious, it makes no sense to footnote them. Consider the proposition: the whole is greater than the part [citation]: either it is greater or it isn't. For this purpose, the citation adds nothing, and the presence of the citation (unless it is: "think about it") actually undermines the argument. At best, the citation will create a diversion: the reader wonders, is the cited source accurate, relevant, consistent with other writings by the same authority, properly balanced against competing authorities, appropriately used in context, and so on. The proposition to which the note was attached, especially if it has to do with anything remotely approaching philosophy or morality begins to look like a proprietary, sectarian, antiquarian point. That approach would be very nearly the opposite of the explicit intent of this essay: the whole is greater than a part because it *is* greater, not because anybody *says* it is (try to conceive of the contrary).⁵⁶

(2) On the other hand, if these propositions really are obvious, it would be unusual if no one else had remarked upon them. There should be (and in fact there are) dozens, if not hundreds of references. Consider the proposition: the whole is greater than the part. Should the citation be to Euclid, out of courtesy to him, and if so should it be to Euclid as perhaps quoted in a recent law review essay, or should it be taken to a standard edition?⁵⁷ For this purpose, the citation would avoid both the appearance (and the reality) of plagiarism. But once the footnotes begin they wholly ruin an essay because there is no stopping them short of book length. It would be well to have a universal disclaimer: except perhaps for the selection, order, and arrangement of preexisting source material, the author of this essay claims absolutely nothing original.

At several places, this essay uses a footnote in substantially the following form:

One would prefer no citations, and there will be few or none in this section, but modesty compels the obvious note that anyone familiar with the common notions of our culture will see the derivations. See A Note on Sources in this essay.

The sources here are largely "standard" in the sense that most readers of this essay will understand. Most law professors will readily acknowledge a body of works in their discipline that should be read

⁵⁶ This essay mentions that whole is greater than its part. Later, this essay asserts that a law that is reasonable, articulate, good, authorized, predictable, compulsory, humane, consistent, somewhat systematic and validated is better than its contrary (unreasonable, inarticulate, immoral, amoral or non-moral, unauthorized, unpredictable, optional, inhuman, inconsistent and incoherent, made up as it goes along, and not validated). If this is true, it didn't become true because somebody said it, nor does it become false because that person has died or his style has gone out of vogue.

⁵⁷ Perhaps, for example, to a Loeb edition: 1 GREEK MATHEMATICAL WORKS (THALES TO EUCLID) (Ivor Thomas trans., 1957). Maybe it could be quoted in the Greek.

within the first year or two of teaching and before attempting any scholarly work. The same is true regarding those things that are obvious in respect of American law. Those works selected here do not even represent a fraction of those, but only the most direct, and perhaps the most simplified of those dealing with the subject: Plato (nothing more than the *Republic*); Aristotle (nothing more than the *Ethics*); Aquinas (nothing more than the *Treatise on Law*); Hobbes (nothing more than the *Leviathan*); Descartes (only the *Discourse on Method*); Darwin (e.g., *The Origin of Species* and *The Descent of Man*); Freud (e.g., *Civilization and its Discontents* and *Totem and Taboo*); Nietzsche (*Beyond Good and Evil*). To this list, add some popular commentators: for example, G.K. Chesterton, C.S. Lewis, and Mortimer Adler, and add some popular sources: for example, the Bible and the *Westminster Confession of Faith*, and there is a sufficient, and a sufficiently short, list of source material.

If there is some momentary embarrassment over using simple sources, and popular commentators, a reflection on the purpose of this essay might quickly remove the concern. This essay is not rocket science: it is about those principles that are obvious enough to serve as law for 250 million Americans who should be able to understand the foundations upon which their law is built. This essay is not about semiotics, or literary form criticism, or any of scores of other interesting questions: it does not quote Derrida, Eco, Foucault, or others. If moral realism in respect of the law is based on suppositions, they are suppositions about the nature of the phenomenal as that which is perceptible, of the intelligible as that which is conceivable, and of language as that which is used to communicate.

B. Concluding Postscript

There is no claim that this essay is the first on "moral realism" or even the first in respect of the moral realism and the law. Many others use, or are referred to under, that expression (e.g., Michael S. Moore and David Brink, just to name two of many).⁵⁸ What this essay describes is a form of moral realism that can be set forth in a series of propositions ordered, arranged, and numbered for convenience of discussion. They are set forth in Appendix One to this essay as "the Restatement of the Obvious."

The imaginary Anthony Fastdraw and the imaginary Mary Smith, introduced early in this essay, are modeled on Andrew Fastow, former Chief Financial Officer of Enron, and Martha Stewart, formerly of Martha Stewart Living Omnimedia, respectively. A third hypothetical (not in this version of the essay) would have been modeled after Frank

⁵⁸ These two are prominently featured in a chapter devoted to "Moral Realism and Truth in the Law," in DENNIS PATTERSON, *LAW & TRUTH* 43-58 (1996).

Quattrone, formerly with Credit Suisse First Boston, and who had been involved in alleged “spinning” transactions. The author of this essay had intended merely to write a short essay on some of the more notorious figures of the scandals. The short essay was intended (1) to explain exactly what each of those figures was indicted for, (2) to outline the nature of their anticipated defenses, and (3) to draw some conclusions.

The author noticed the comparisons being made between these persons accused of white collar offenses and persons accused of street crime, and the near-universal urge to express comparative moral outrage. This moral outrage seemed clearly explainable on the basis of moral principles. But many of those expressing such moral outrage over the corporate scandals seem to reject moral principles expressed in areas outside of corporate scandals. As a result, the purpose of this essay changed as it was being written. The author now sees this essay as “Part One” of a more complete piece that would have returned to the opening hypotheticals and solved them: solving them would have included, for example, considering why Mary Smith/Martha Stewart was not indicted on criminal charges of illegal insider trading, and why the prosecuting attorneys might have thought it a “stretch” to do so, and then recommending some change to improve the law. But the author was not able to find a ready reference that, in a unified way, discussed (1) those things that everybody knows, much less those things that everybody knows are wrong, and that also discussed (2) our sources of law, (3) how to change or modify the law, (4) how to invoke “justice” as a standard to measure our law, or even (5) how to use language to describe the sorts of things we would like our law to cover. There were countless references that each described one or more segments of the whole, but none came to hand that connected them all under a unified approach.⁵⁹ So the author developed the version of moral realism set forth in Appendix One.

⁵⁹ In fact, much of the current literature seemed to suggest the opposite: that no one knows anything whatsoever, no one has any business expressing any moral judgments at all, that economics exists in tension, if not in conflict, with legal rules (call it the “law or economics” movement), and that all anyone remembers after graduating from law school is that damages are “just the price you pay” for breaching an enforceable promise and that there is no “brooding omnipresence” anywhere. That is, there are moments when it might seem that the “problems” with Enron’s executives were simply that they had carefully read Ronald Coase’s excellent works on the theory of the firm, went to an excellent American undergraduate college, followed by either business school or law school; and after graduating, noticed the enabling technology of the internet and began seriously unbundling the corporation while engaging in financial engineering and the practice of law, patterning themselves like the Oakland Raiders, but otherwise acting exactly as they had learned to do in the society that nurtured them. Could it possibly be that there is great fault to be shared (and make no mistake; there is great fault attributable to corporate outlaws), but that at least some part of the fault must also be borne by a society that insists upon morality in the boardroom, but which insists even more adamantly upon immorality, amorality and non-morality everywhere else?

The author uses the term “moral realism” affirmatively, in the sense that it is not reacting to anything, but is simply making its own claim. But because there is, in this essay, no parading about of the positions that seem opposed to moral realism, there was a question how to refer to various anticipated opposing positions. The author uses the expression “nihilist” and “sophist” and “positivist” intending to explore whether there is any objection to the moral realism propounded here. Those expressions seem to be the right words, and inoffensive. Of course, anyone rising to object to moral realism may disclaim any labels used in this essay. The author would hope that any objector would, however, distinctly point out and clearly state which one or more principles of moral realism he might contest (and on what grounds).

The scandal scorecard is outdated. On March 3, 2004, the *Wall Street Journal* published an update (guilty pleas and indictments in Enron and Worldcom; closing arguments in Martha Stewart’s case; opening arguments in Adelphia; continuing trial of Tyco’s former CEO and CFO; and reporting on additional guilty pleas in HealthSouth, with the trial of its former CEO scheduled for the summer). Meanwhile these page proofs for this essay are already committed: it may be just as well for some additional time to pass and for additional facts to be proven before resuming “Part Two” of this essay, which might be a future and separate piece that applies the principles of moral realism to specific problems in the law.

This essay has asserted, as directly and succinctly as reasonably possible, a series of propositions that might be taken as universally agreed upon (or widely agreeable to), and in need of no substantial defense, at least as to their most basic import. Or not. One purpose of the experiment is to elicit from the reader either a yawn of easy agreement or a shocked rejoinder that these propositions have no claim to any truth. For convenience of discussion, the author has numbered the points and it might be expected that anyone reacting to this essay would particularly point out and distinctly identify which one or more points are in dispute.⁶⁰

If American law schools can support a moral realism in America, this can be expected to help to support, as well as to improve the nation, and the world—not a bad thing to do. No doubt, everybody wants to do the same thing, but given the cacophony of voices, it seems near

⁶⁰ At the end of Appendix One, there are *additional* propositions that constitute a Christian moral realism, and which might not be obvious. They are separately set forth for the convenience of any person who might want to be a moral realist, but would prefer to keep religion out of the discussion (or, alternatively, for the convenience of anyone who would like to put religion squarely inside the discussion).

impossible to find consensus on anything.⁶¹ Moral realism provides a way to improve matters in a manner widely acceptable to everyone and best calculated to produce a coherent system of laws in a great nation, and in the world.

⁶¹ Here is an experiment. As to any one or more of the propositions advanced in the Restatement of the Obvious as expressed herein, undertake the following exercise. If you are inclined to disagree, (a) try to think the contrary, and (b) if you are still in disagreement, go ahead and rally as many as you can, expressly and clearly to your side ("all in favor of irrational, amoral, inarticulate, unpredictable, illegitimate law" vote "aye") (or, all who want autonomy, raise your hands, or not, as you think or feel best).

On the other hand, if you are inclined to agree, and think this instant piece is not only obvious but is trivial, unsubtle, or clumsy, (a) produce the single reference where it is better said, or (b) do it better yourself.

APPENDIX ONE: MORAL REALISM AND THE RESTATEMENT OF THE OBVIOUS*

This is a restatement concerning [human] law

Topic One: Principles of moral realism

- Section 101.* There is an objective reality.
Section 102. Human beings can know something about it.
Section 103. There are some things that everybody ought to do.
Section 104. The Gap. [Human] law is not the same as morality or religion.
- (1) There is a law that is the same as morality or religion
 - (2) There is a [human] law that is not the same as either
 - (3) There is a legitimate question what to do about the gap

Topic Two: Sources of existing law

- Section 201.* Positive law: the compulsive force of the state
Section 202. Natural law and other empirical sources (reason and observation; law and economics, statistical methods; moral law and conscience)
Section 203. Historical law. The possibility of normative history
Section 204. Integrated moral realism. Any [human] law is integrated to the extent it is: (1) positive, and (2) natural and empirical, or (3) historical and normative.

Topic Three: Making or changing the law

- Section 301.* Is it reasonable?
Section 302. Is it good?
Section 303. Is it articulate?
Section 304. Is it authorized?
Section 305. Is it predictable?
Section 306. Is it compulsory?
Section 307. Is it humane?
Section 308. Is it consistent over time as well as internally?
Section 309. Is it systematic?
Section 310. Is it purposeful, and is it validated?

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Topic Four: Law and justice

- Section 401.* Justice as paying debts
- Section 402.* Justice as fairness
- Section 403.* Justice as the lawful
- Section 404.* Justice as the good
- Section 405.* Justice as the normative (history and culture)
- Section 406.* Justice as a construct
- Section 407.* Justice as the interest of the stronger
- Section 408.* Justice as a correction of a false consciousness
- Section 409.* "Justice" as *nomophobia*
- Section 410.* "Justice" as other-than-lawful
- Section 411.* Justice as a process or as a jurisdictional matter
- Section 412.* Justice as the empirical
- Section 413.* Justice as social or economic opportunity or results

Topic Five: Law and language – the language of moral realism

Introduction: Consider the case, Johnny and the Cow: if we call a tail a leg, how many legs does a cow have? (a) five, (b) one (and only one), (c) four, (d) all of the above, (e) none of the above, (f) whatever you want it to be.

- Section 501.* Concepts and syntax.
 - (1) Language is not wholly conventional and subjective,
 - (2) Language is able to signify something objective.
- Section 502.* Signs and states.
- Section 503.* More on insignificant speech.
- Section 504.* Language is powerful.

APPENDIX ONE SUPPLEMENT: [CHRISTIAN] MORAL REALISM

Section 105. Christians know these things because God has revealed them not only by the illumination of the Holy Spirit, but also in creation, conscience, and the Bible.

Section 205. Christians know these things because they know that God is triune, and God acts by will, by reason, and by memory and imagination, all three in one.

Section 311. Christians are stewards of the [human] law because God is a law-giver, whose laws reflect his nature, and because God has called Christians to good works prepared in advance for us to do.

Section 414. Christians are concerned about the definition of justice because God has commanded us to act justly and, therefore, we ought to know what "justice" is.

Section 505. Christians are students of language because God reveals himself, not only by the Spirit, not only in creation, not only in conscience, but also in language expressed in the Bible.