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FOREWORD

The Crisis without a Face: Emerging Narratives of the Financial Crisis

ADAM J. LEVITIN*

We are now in the second year of a global financial crisis unparalleled in recent memory. The crisis still lacks a universally accepted name,¹ and is still far from over, even if we might be hopeful that the most acute phase is behind us. Yet it is already apparent that the financial crisis will occupy a major place in scholarly and policy discussions about the economy, financial institutions, consumer credit, and regulation and the role of government in general for years to come.

Three major questions will emerge from this crisis. The first is what went wrong (or put slightly differently, who is to blame). The second will be an evaluation of the government and market's handling of the crisis. And the third will be what the crisis has wrought.

Already, attempts are being made to answer these questions. Scholarly evaluations of crisis management in general have emerged,² and the reports of the Congressional Oversight Panel have provided a critical policy analysis of federal responses to the crisis.³ The crisis has

* Associate Professor of Law, Georgetown University Law Center. Thanks to William Bratton, Anna Gelpern, and Saule Omarova for comments and Michael R. Shaheen for research assistance.

1. Brian Stelter, *No Question We're in a Financial Pickle. What Do We Call It?*, N.Y. TIMES, Dec. 12, 2008, at B8; Catherine Rampell, "Great Recession": A Brief Etymology, N.Y. TIMES, Mar. 11, 2009, <http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology/?scp=4&sq=%22great%20recession%22&st=cse>.

2. See, e.g., Steven M. Davidoff & David Zaring, *Big Deal: The Government's Response to the Financial Crisis* (Jan. 29, 2008), available at <http://ssrn.com/abstract=1306342>.

3. The author served as Special Counsel for Mortgage Affairs for the Congressional Oversight Panel. The Panel was created by the Emergency Economic Stabilization Act section 125, and is charged with providing Congress with monthly reports on the use of Troubled Asset

also engendered thinking about how government should respond to crises in general.⁴ For the ultimate question of the impact of the crisis, it is still too early to answer with anything more than speculation. How or when this crisis will be resolved and what the state of financial institutions, regulatory structures, and civic culture will be as a result remains unknown

Although the crisis is itself still not over, yet attempts are already being made to autopsy the economy.⁵ The question of what went wrong is a topic that will occupy scholars and pundits for decades to come. Already, though, some basic narratives have emerged: poor monetary policy,⁶ deregulation,⁷ bad regulation,⁸ innovation run amok,⁹ and greed.

Relief Program funds and efforts to address the foreclosure crisis, as well as a regulatory reform report. See CONG. OVERSIGHT PANEL, *ASSESSING TREASURY'S STRATEGY: SIX MONTHS OF TARP* (Apr. 7, 2009), available at <http://cop.senate.gov/documents/cop-040709-report.pdf>; CONG. OVERSIGHT PANEL, *ACCOUNTABILITY FOR THE TROUBLED ASSET RELIEF PROGRAM* (Jan. 9, 2009), available at <http://cop.senate.gov/documents/cop-010909-report.pdf>.

4. See, e.g., Anna Gelpern, *Financial Crisis Containment*, 41 CONN. L. REV. (forthcoming 2009); Eric Posner & Adrian Vermuele, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008* (Univ. of Chi. Law & Econ., Olin Working Paper No. 442; Univ. of Chi., Pub. Law Working Paper No. 248; Harv. Pub. Law Working Paper No. 08-50), available at <http://ssrn.com/abstract=1301164>; Kenneth Ayotte & David A. Skeel Jr., *Bankruptcy or Bailouts?* (Univ. of Penn. Inst. for Law & Econ. Res. Paper No. 09-11; Nw. Law & Econ. Res. Paper No. 09-05), available at <http://ssrn.com/abstract=1362639>; Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 213-34 (2008).

5. E.g., RICHARD POSNER, *A FAILURE OF CAPITALISM: THE FINANCIAL CRISIS OF 2008* (2009); ROBERT J. SHILLER, *THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT* (2008); MARK ZANDI, *FINANCIAL SHOCK: A 360° LOOK AT THE SUBPRIME MORTGAGE IMPLOSION, AND HOW TO AVOID THE NEXT FINANCIAL CRISIS* (2008); PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2008)

6. E.g., *id.*; John B. Taylor, *How Government Created the Financial Crisis*, WALL ST. J., Feb. 9, 2009, at A19; see also Symposium: *Did the Fed Cause the Housing Bubble?*, WALL ST. J., Mar. 26, 2009, <http://online.wsj.com/article/SB123811225716453243.html>; but see Jeffrey Rogers Hummel & David R. Henderson, *Did Greenspan Cause The Housing Bubble?*, FORBES.COM, Apr. 17, 2009, <http://www.forbes.com/2009/04/17/greenspan-housing-bubble-opinions-contributors-fed.html> (arguing monetary policy did not cause the crisis).

7. E.g., Robert Kuttner, *The Bubble Economy*, AM. PROSPECT, Sept. 24, 2007, at 20; Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, *Systemic Risk through Securitization: The Result of Deregulation and Regulatory Failure*, 41 CONN. L. REV. 493, 499-500, 514-17 (2009) (noting Congressional deregulation of the mortgage market in the 1980s and deregulation by preemption by federal regulatory agencies); but see David Leonhardt, *Washington's Invisible Hand*, N.Y. TIMES, Sept. 28, 2008, at MM32 (noting problems with blaming the Gramm-Leach-Bliley Act for the financial crisis).

8. E.g., Peter J. Wallison, *Cause and Effect: Government Policies and the Financial Crisis*, FIN. SERV.'S. OUTLOOK (Amer. Enter. Inst. for Pub. Pol'y. Res., Washington, D.C.), Nov. 2008, <http://www.aei.org/publication29015>; Peter J. Wallison, *The True Origins of This Financial Crisis*, AEI ON THE ISSUES (Amer. Enter. Inst. for Pub. Pol'y. Res., Washington, D.C.), Feb. 19, 2009, www.aei.org/publication29419; Another 'Deregulation' Myth, WALL ST. J., Oct. 18, 2008, at A12.

9. E.g., Anna Gelpern & Adam Levitin, *Rewriting Frankenstein Contracts: The Workout Prohibition in Residential Mortgage-Backed Securities*, 82 S. CAL. L. REV. (forthcoming 2009).

These narratives are by no means exclusive explanations of the crisis; they are often complementary.

This foreword briefly reviews the emerging narratives of the financial crisis, situates the articles in this issue in the context of the emerging narratives, and concludes with some thoughts about the difficulties in narrating the financial crisis.

A. *The Narratives of the Financial Crisis*

1. EASY MONEY LOOKING FOR TROUBLE

The first narrative of the crisis is a story of easy money seeking out trouble.¹⁰ As the story goes the Federal Reserve's monetary policy of low interest rates and a surplus of investment funds from overseas (particularly Asia) encouraged greater borrowing. Low interest rates caused investors looking for high rates of return moved to riskier investments. Retail investors jumped into direct real estate investment, purchasing homes as investments, and institutional investors galloped into subprime mortgage-backed securities and other structured products.

There was, no doubt a flood of easy money in the period following the bursting of the Internet bubble in 2000 due in part to the Federal Reserve keeping interest rates low. But the easy money narrative is clearly incomplete. It does not explain why the crisis took the form it did.¹¹ It does not tell us why it was a mortgage bubble, rather than another investment bubble that formed. It does not tell us why the mortgage bubble formed in the United States (and to a lesser degree the UK, Ireland, and Spain). And it does not tell us why a mortgage bubble in the United States precipitated the worldwide financial crisis, whereas the Internet bubble of the late 1990s only caused a minor recession and did

10. See JOHN TAYLOR, GETTING OFF TRACK: HOW GOVERNMENT ACTIONS AND INTERVENTIONS CAUSED, PROLONGED, AND WORSENE THE FINANCIAL CRISIS (2009) (arguing the fed's low-interest rate policy was the primary cause of the crisis); cf. Alan Greenspan, *The Fed Didn't Cause the Housing Bubble*, WALL ST. J., Mar. 11, 2009, at A15 (arguing global imbalances depressing long-term rates was the primary cause); see also Posting of Tyler Cowen to Marginal Revolution, *Did the Gramm-Leach-Bliley Act Cause the Housing Bubble?*, <http://www.marginalrevolution.com/marginalrevolution/2008/09/did-the-gramm-l.html> (Sept. 19, 2008, 06:48 EST) (arguing GLBA played no role in bubble and ensuing crisis).

11. The expectation before 2007 was that there would be a United States currency crisis caused by the unwinding of global imbalances, brought on by China moving to reduce its position in U.S. Treasury securities. See, e.g., Brad Setser & Nouriel Roubini, *How Scary is the Deficit? Our Money, Our Debt, Our Problem*, 84 FOREIGN AFFAIRS July/Aug. 2005 at 194 (2005); Paul Krugman, *Will There be a Dollar Crisis?*, 22 ECON. POL'Y 435, 438-447 (2007); Nouriel Roubini & Brad Setser, *Will the Bretton Woods 2 Regime Unravel Soon? The Risk of a Hard Landing in 2005-2006*, presented at the Federal Reserve Bank of San Francisco and University of California at Berkeley Symposium, "Revived Bretton Woods System: A New Paradigm for Asian Development?," (Feb. 4, 2005) (unpublished manuscript, available at <http://www.frbsf.org/economics/conferences/0502/Roubini.pdf>).

not lead to major financial institution failure. The easy money narrative is certainly part of the story, but it cannot stand alone.

2. REGULATORY NARRATIVES

There are two narratives that place regulation at the center of the story. One is a deregulatory narrative. As it goes, there was a conscious, ideologically-driven policy of deregulation—the removal safeguards that ensured financial institution safety-and-soundness and consumer protection. Commonly cited examples are the erosion of the separation between commercial banking and commerce (including speculative investment), which was the cornerstone of post-Depression bank regulation, and federal banking agencies' preemption of state consumer protection laws without substitution of equivalent federal protections.

The other regulatory narrative is one of the problems created by poorly designed regulation, rather than the removal or lack of regulation. It points to specific, arguably ill-conceived regulations enacted as part of a conscious, ideological-driven agenda to regulate away “free market” choice or to leverage self-regulation.¹² The most common version of this argument focuses on the Community Reinvestment Act, which, some claim forced financial institutions to make risky loans.¹³

The deregulatory and bad regulatory narratives can be complementary—an emphasis on industry self-regulation or private regulation is a form of deregulation. Alternatively, these narratives are complementary because poor statutory regulatory architecture can lead to agency capture and agency-driven deregulation at the behest of regulatees.¹⁴

3. FRANKENSTEIN INNOVATION

Innovation run amok takes a Tory view of the crisis. It sees the crisis as driven by innovations in financial products that the market and regulators did not understand: subprime and exotic mortgage products, securitization, credit default swaps and other derivatives. In this view, innovation outran both the market and regulation. Evaluations of financial products' risk are largely based on the products' historical performance of financial products. Because these products were relatively new and untested, they entailed a host of poorly understood risks. As a

12. The use of quotation marks around “free market” is to emphasize that the free market is a Platonic ideal; there is no market that is not shaped by regulation, either directly or indirectly. Government involvement in one market affects investment tradeoffs between markets. The very existence of government, which requires some sort of regulation and taxation to fund itself, means that markets exist along a continuum of levels of government involvement, rather than on a binary free/regulated divide.

13. See, e.g., Wallison, *supra* note 8.

14. See Simon Johnson, *The Quiet Coup*, ATLANTIC, May 2009.

result, market exposures to these products were larger than they should have been and there was no regulatory framework to protect the market.

4. GREED

The greed narrative is more generalized. It implies, however, that some or all parties involved in the financial crisis understood the risks involved in their transactions, but didn't care because they were blinded by greed. Thus, everyone involved in the underwriting of risky financial products (including mortgages) was willing to arrange deals selling risky products because they had fee-based business models, and the credit risk was sold to someone else. (Of course, often it was sold to these underwriters investment affiliates.) Investors were so thirsty for yield that they overlooked what in hindsight were glaringly obvious risks in their investments. And homeowners greedy for larger McMansions (or eager to keep up with their neighbors) bought larger houses than they could afford based on teaser interest rates without regard for the long-term consequences.

Greed, of course, is an element of the other narratives: with low interest rates, greed sent institutional investment funds racing for high yield investments like subprime mortgage-backed securities and sent consumers flooding into the housing marketplace. And greed fueled deregulation, as regulation places constraints on what might be otherwise more profitable (even if societally less desirable) business practices. Likewise, greed fueled innovation, as financial engineers sought to create ever more profitable products.

The narratives of the crisis exist in both a scholarly and a political realm, and legal academia is a field that sits uncomfortably on the divide between pure scholarship and policy advocacy. For example, a version of the deregulatory theme is championed by those who wish to see greater regulation as a policy matter (generally Democrats), whereas a version of the bad regulatory trope is trumpeted by those who wish to see deregulation (generally Republicans).

The greed meme has different politics; it is neither Left nor Right per se. Instead, is used to blame those who profited in the run-up to the crisis (but of course not everyone greedy profited), especially financial institution executives, speculators, be they house-flippers or investors,¹⁵ or people who bought more house than they could afford, hoping the market would continue going up. The implication of this narrative is

15. On speculators, see generally Lynn A. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 DUKE L.J. 701 (1999); Thomas Lee Hazen, *Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance*, 24 ANN. REV. BANKING & FIN. LAW 434 (2005).

that these individuals do not merit assistance from the federal government, but should be left to face the consequences of their decisions. When deployed against Wall Street, this is often an argument of the Left; when deployed against homeowners, it is usually an argument of the Right.

Alternatively, the greed narrative is used to cast such generalized blame as to make the blame meaninglessly banal. Greed is human nature, after all, so what were we to expect? This line of pseudo-Calvinist argument nearly removes human agency from the crisis.

B. *The Narratives in the Articles in this Volume*

The articles in this volume each contribute to the burgeoning literature on the crisis and advance our understanding of the crisis by elaborating on different narrative threads. Saule T. Omarova's article, *The Quiet Metamorphosis: How Derivates Changed the "Business of Banking,"*¹⁶ will be viewed as a classic case study on the process of deregulation. To date, arguments about deregulation have focused on legislative enactments, like the Gramm-Leach-Bliley Act,¹⁷ the Depository Institutions Deregulation and Monetary Control Act of 1980,¹⁸ the Garn-St. Germain Depository Institutions Act of 1982 (including the Alternative Mortgage Transaction Parity Act),¹⁹ or on judicial decisions, like the Supreme Court's notorious ruling in *Marquette National Bank*²⁰ that had the effect of eviscerating state usury laws,²¹ the primary method of consumer credit regulation. More recent scholarship has come to recognize that a great deal of deregulation occurred through quiet, unglamorous actions by regulatory agencies, through self-arrogation of preemption authority.²² In a compelling and nuanced article, Professor Omarova demonstrates another path to deregulation, as she shows how the opinion letters of the Office of Comptroller of the Currency incrementally and

16. 63 U. MIAMI L. REV. 1041 (2009).

17. Kuttner, *supra* note 7.

18. *See generally*, McCoy *et al.*, *supra* note 7; John Atlas & Peter Dreier, *The Conservative Origins of the Sub-Prime Mortgage Crisis*, AM. PROSPECT, Dec. 18, 2007, http://www.prospect.org/cs/articles?article=the_conservative_origins_of_the_subprime_mortgage_crisis.

19. *See generally* McCoy *et al.*, *supra* note 7; Paul Krugman, *Reagan Did It*, N.Y. TIMES, June 1, 2009, at A21.

20. *Marquette Nat'l Bank of Minn. v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

21. Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. (forthcoming 2009); Thomas Geoghegan, *Infinite Debt: How Unlimited Interest Rates Destroyed the Economy*, HARPER'S, Apr. 2009, at 31; Howell E. Jackson & Stacy A. Anderson, *Can States Tax National Banks to Educate Consumers About Predatory Lending Practices?*, 30 HARV. J. L. & PUB. POL'Y 831, 836 (2007).

22. *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 288–93 (2004); Levitin, *supra* note 21; McCoy *et al.*, *supra* note 7.

discretely undermined the antiquated statutory framework for the regulation of national banks and permitted national banks to expose themselves to speculative risks that are fundamentally inconsistent with the safety and stability needed in depositary institutions.

Omarova's article is an illustration of the banality of deregulation; it need not be through explicit, bold moves, but can also occur piecemeal in the shadows. Indeed, this surreptitious deregulation through opinion letters that were unlikely to attract the attention of anyone but national banks themselves, is particularly insidious because it was never subjected to a critical policy debate. Even if the Comptroller was correct in permitting national banks to engage in ever-expanding derivatives activities, the expansion of bank activities is troubling because it has occurred in a regulatory framework that is premised on banks *not* engaging in speculative activities. To quietly change one piece of the regulatory framework risks rendering other parts of the regulatory framework ineffective or even counterproductive.

The Comptroller, of course, did not set out in the early 1980s on with the intent of arriving at the current state of regulation; instead, the regulatory changes occurred one small step at a time, and perhaps without a full sense of the transformation that was occurring. But the willingness of the Office of the Comptroller of the Currency to keep pushing the envelope with opinion letters authorizing ever greater bank derivative activities and its practice of not publishing opinion letters denying bank requests for authorization speak to the regulatory capture of the OCC and to the larger issue capture in financial services regulation.

While Professor Omarova's article is primarily part of a deregulatory narrative, it also has strong highlight of other narrative strands. The OCC's opinion letters have enabled unchecked innovation for national banks, and banks' entry into the derivatives market is a type of Frankenstein innovation from a regulatory perspective as Professor Omarova notes, bank regulators do not understand the risk exposures from complicated derivatives transactions.²³ As a result, they have had to refer to internal risk-models at banks.

The outsourcing of regulatory control is a problem featured in Kia Dennis's article, *The Ratings Game: Explaining Rating Agency Failures in the Build Up to the Financial Crisis*.²⁴ Professor Dennis's article speaks to another line of explanatory narrative—bad regulation. The bad regulation line of narrative is most frequently showcased in thoroughly debunked claim that the financial crisis was spurred by subprime loans made to risky borrowers by financial institutions seeking to com-

23. Omarova, *supra* note 16, at 1107.

24. 63 U. MIAMI L. REV. 1111 (2009).

ply with the Community Reinvestment Act (CRA).²⁵

Professor Dennis's article features a more compelling version of the bad regulation narrative than the politically-charged attack on the CRA. Professor Dennis shows how securities regulations that attempted to leverage private ratings agencies' ratings into regulatory benchmarks ultimately backfired. The ratings agencies were incorporated into the regulatory structure as private gatekeepers without a fully understanding of their incentives, which contributed to their failure as gatekeepers.

Professor Dennis's article can also be understood as telling a deregulatory tale. The shift from public regulation to private ordering is deregulatory, even if it occurs as part of an explicit regulatory framework. And, like Professor Omarova's article, it emphasizes the dangers inherent in government using private actors as agents. Governmental attempts to leverage private actors as regulatory agents face the same agency risk problems as any private market use of agents.

Frankenstein innovation makes an appearance as well in *The Ratings Game*; the failures of the ratings agencies were not with their traditional ratings of corporate bonds, but with their ratings of new structured financial products, like subprime mortgage-backed securities and collateralized debt obligations. On some level, the ratings agencies might not have fully understood the risks inherent in these products. On the other hand, they might have understood the risks, but intentionally downplayed them in order to give the products higher ratings and ensure repeat business. Thus, the greed narrative also figures prominently in Professor Dennis's article—she argues that the failure of the ratings agencies as gatekeepers was due to an imbalanced incentive structure that rewards overly optimistic ratings. Once this incentive structure was in place, self-interest and greed took over with disastrous results.²⁶

Mitchell Crusto's article, *Obama's Moral Capitalism*,²⁷ also taps into the greed narrative. Professor Crusto takes the insights of critical legal studies and applies them to the examples of institutional rapaciousness exhibited in the build-up to the financial crisis. He argues that the response to greed should be a constitutional one—namely that there should be a constitutional protection against predatory lending. Profes-

25. See, e.g., Wallison, *supra* note 8. For a debunking of the view that the CRA had any connection to the financial crisis, see CONG. OVERSIGHT PANEL, FORECLOSURE CRISIS: WORKING TOWARD A SOLUTION, at 83–84 (Mar. 6th, 2009), available at <http://cop.senate.gov/documents/cop-030609-report.pdf>; see also *Turmoil in the U.S. Credit Markets: The Genesis of the Current Economic Crisis: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 111th Cong. 25–27 (2008) (statement of Eric Stein, Senior Vice President, Center for Responsible Lending).

26. Dennis, *supra* note 24, at 1129.

27. 63 U. MIAMI L. REV. 1011 (2009).

sor Crusto's constitutional move is unique among responses to the crisis. Rather than understanding the crisis as one of specific regulatory or market failures, he understands it as having a rights dimension. Specifically, Professor Crusto sees predatory lending as affecting a fundamental (if yet unacknowledged) right against economic exploitation. Regulation and markets exist against a backdrop of constitutional rights, and Professor Crusto aims to expand that constitutional framework.

The avocation of any new constitutional rights is an uphill battle, but Professor Crusto's proposal for constitutional changes evinces a desire to see not just regulatory changes, but a shift in cultural mores about market capitalism. The constitution, after all, is a social compact that merely enshrines rights reflecting widely held social norms. To be sure, Professor Crusto is not calling for a generic right against economic exploitation. A generalized right would be nothing more than utopian: virtually everyone is at some point an economic exploiter and exploitee. Instead, Professor Crusto sees predatory lending as a problem when the predation is focused on particularly vulnerable classes of citizens.

Whether or not one agrees with Professor Crusto's call for a constitutional right against predatory lending, the thoughts and discussions that his proposal will provoke are meritorious in and of themselves. His call for a constitutional right puts square and center issues of distributive justice and power dynamics within society. These are issues are frequently ignored by those with power because it is difficult to acknowledge distributive issues without acceding to changes in status quo distribution. Yet in the post-capitalist, regulated economy, all choices are distributional, and to ignore distributional questions is itself to make a distributional choice. The very existence of government and regulation makes distributional questions part of any policy debate.

C. *Making Sense of the Narratives*

What is one to make of these different narrative strands of the financial crisis? How is one to choose among them or how are they to be integrated? This task is beyond the scope of this foreword, other than to suggest that the crisis was very much a product of a combination of factors and to try to foist a single-factor narrative on a multi-causal process is intellectually untenable. While this might do for punditry, it will not do for more serious intellectual endeavors, and, to the credit of the articles in this issue, they do not try to force the issue. There is explanatory power to all of these broad narratives; yet none of them can be individually successful at explaining the entire financial crisis.

The competing and yet complementary narratives of the crisis also underscore an essential difficulty for any scholar who wishes to write

the story of the financial crisis: the lack of a clear protagonist or antagonist. There is no hero or villain that can guide a narrative.

To be sure, there is a cast of characters who emerge from time to time as white knights, heavies, or ingénues. There are would-be heroes like CFTC Chair Brooksley Born, who attempted unsuccessfully to regulate the derivatives market,²⁸ and the late Federal Reserve Governor Edward Gramlich, who attempted to rein in the mortgage bubble,²⁹ as well as FDIC Chair Sheila Bair, who championed efforts to address the foreclosure crisis.³⁰ The emerging narratives have would-be villains like Alan Greenspan, Phil Gramm, and Henry Paulson, all of whom are portrayed as, in varying degrees, as being ideologically driven fail to regulate, to deregulate, or to trust the market except when necessary to protect cronies. And then there are the hapless ingénue characters of Ben Bernanke, Neil Kashkari, and Timothy Geithner, who have appeared at times to be overwhelmed by events. There are certainly institutional players that can be cast in the role of the heavy: financial institutions like AIG, Bear Stearns, Citigroup, Countrywide, Goldman Sachs, IndyMac, and Lehman Brothers, and regulators like the Federal Reserve, the Office of Comptroller of the Currency, Office of Thrift Supervision, and Securities and Exchange Commission. And already the casting of these figures is being revisited. On the one-year anniversary of Lehman Brother's collapse, commentator Joe Nocera argued for a reappraisal of the roles of Bernanke and Paulson, contending that "History, I now believe, will praise their efforts in subduing the collapse."³¹

None of these characters can carry the drama themselves. For better or worse, all of these individuals and institutions were no more than bit players in a crisis that is marked by its maddening impersonality. Just as the crisis remains nameless, so too is it faceless. There is no Michael Milken or Charles Keating to be the face of the crisis. Bernard Madoff has been the greatest villain to emerge from the crisis, but he is no more than a footnote; he neither caused nor benefited from the crisis; instead, it was his undoing. Madoff's was a Ponzi scheme distinguished only by its size and longevity, not by its macroeconomic impact.

There is a certain appropriateness to the crisis's impersonality, as it reflects another deeper theme in understanding the crisis: the decline of

28. See, e.g., André Douglas Ponds Cummings, *Still "Ain't No Glory in Pain": How the Telecommunications Act of 1996 and Other 1990s Deregulation Facilitated the Market Crash of 2002*, 12 FORDHAM J. CORP. & FIN. L. 467, 529–38.

29. See, e.g., Greg Ip, James R. Hagerly, & Jonathan Karp, *Housing Bust Fuels Blame Game*, WALL ST. J., Mar. 19, 2008, at A1.

30. See, e.g., Damian Paletta, *FDIC's Bair Gets Nod to Stay*, WALL ST. J., Jan. 8, 2009, at A3.

31. Joe Nocera, *Lehman Had to Die So Global Finance Could Live*, N.Y. TIMES, Sept. 12, 2009, at A1.

relational finance. Financial relationships were historically relational: the creditor-debtor relationship had a face to it on both sides. Lending institutions were local, and lenders retained credit risk, which bound them to their debtors. This imposed constraints lending; creditors could not afford to be too aggressive and too greedy because when loans went bad, they were part of the impacted communities. Moreover, creditors also understood that they were part of an economic ecosystem, and over-exploitation of a locally limited borrower base in one period would diminish the value of that borrower base in later periods. Finally, when lending was local, individual lenders were dispensable; they were not so interconnected with the entire national and global economy that they were too big to fail, so they didn't suffer from the moral hazard of an implied bailout.

The financial instruments at the core of the current crisis—securitized mortgages and credit default swaps—are marked by their impersonality. Whereas the residential mortgage is traditionally a relational loan, securitization transforms it and strips it of all of its relational aspects. The beneficial owner of the securitized mortgage neither knows nor cares about the borrower, who might be on the other side of the country or the globe; so too the servicer, who manages the loan and is not looking for an on-going relationship with the borrower. Likewise, credit default swaps, a form of credit insurance, evolved from being an insurance policy taken out by a lender to an insurance policy taken out by a party with no insurable interest—a gamble on the fortune of an unrelated party's business.

The shift from personal to impersonal, from relational lending to capital markets, from Main Street to Wall Street, from local to global has meant that the crisis cannot be cabined off to one country or to one sector of the economy. Mourning this transformation is a variation of the Tory view of the crisis, but one need not mourn the loss of traditional lending to recognize that law needs to adjust to keep pace.

Financial product innovation, like most innovation, has a mixed valence—it can create new benefits, like democratized credit, but also new risks, and altered distributional effects. Unfortunately, one of the great fallacies of the recent expansion in financial innovation was the idea that innovation could dissipate risk, rather than simply redistribute it. In the end, however, it appears that there is a certain quantum of risk in finance that can never be removed, only amplified. Sales like securitization and insurance devices like derivatives cannot be guaranteed to do more than merely shift risk. Loan sales shift risk to the purchaser of the loan, while insurance on loans substitutes the credit risk of the insurer for the credit risk of the borrower. When the parties selling and

buying risk turn out to be the same ones or to be heavily interconnected in their dealings, there is no escape from the credit risk of the underlying loans. As it turned out, the very devices by which financial institutions sought to dissipate risk—securitization and credit derivatives—in fact only redistributed and amplified it.

All three articles in this volume are attempting in one way or another to deal with this situation. Professor Omarova's article highlights the need of regulators to maintain control over industries that are no longer constrained by traditional relationships and assumptions.³² Professor Dennis' article likewise emphasizes the need for an effective substitute for the constraints imposed by relational lending. Ratings agencies developed for this very purpose, in the early part of the 20th century, as corporate debt markets expanded to a national scale. Whether they can operate as effectively for consumer lending remains to be seen.³³ And Professor Crusto's article looks to change the normative background on which the entire system operates in order to account for the dangers the spring from impersonalized lending.³⁴

What the financial crisis has wrought remains to be seen, but as the articles in this volume attest, it is spurring a major and much-needed rethinking about law, institutions, and society.

32. Omarova, *supra* note 16.

33. Dennis, *supra* note 24.

34. Crusto, *supra* note 27.