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Responsibility, Repair and Redistribution in the Wake of the Financial Crisis

Amy J. Sepinwall

University of Pennsylvania, sepin@wharton.upenn.edu

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Abstract

Who bears responsibility for the financial crisis? The list of possible culprits is unmanageably long and at times internally inconsistent, as it includes subprime mortgages and over-zealous mortgage originators; risk-happy investment bankers and the ineffectual ratings agents who rubber-stamped the bankers' exotic products; and neoconservatives hell-bent on deregulation along with liberal politicians cowering before entities they allowed to become too big to fail.¹ Nonetheless the question of responsibility seems to demand an answer not only for purposes of arriving at lessons that might avert a future crisis but also for answering a second question that seems a natural corollary of the first—viz., who bears responsibility for funding the bailouts necessitated by the financial crisis? More specifically, who in the United States bears responsibility for funding the bailouts undertaken by the U.S. government?

Disciplines

Banking and Finance Law | Business Law, Public Responsibility, and Ethics | Corporate Finance | Economic Policy | Finance | Finance and Financial Management | Law | Legal Studies | Organizational Behavior and Theory | Real Estate

Responsibility, Repair and Redistribution in the Wake of the Financial Crisis

AMY J. SEPINWALL*

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INTRODUCTION

Who bears responsibility for the financial crisis? The list of possible culprits is unmanageably long and at times internally inconsistent, as it includes subprime mortgagees and over-zealous mortgage originators; risk-happy investment bankers and the ineffectual ratings agents who rubber-stamped the bankers' exotic products; and neoconservatives hell-bent on deregulation along with liberal politicians cowering before entities they allowed to become too big to fail.¹

* Assistant Professor, Department of Legal Studies and Business Ethics, Wharton, University of Pennsylvania. B.A., McGill University, 1997; M.A., McGill University, 1999; J.D., Yale Law School, 2004; Ph.D., Philosophy, Georgetown University, 2010. For very helpful comments and suggestions, I am grateful to participants in the Georgetown Institute for the Study of Markets and Ethics' symposium, "The Ethics of Bailouts and Government Support of Corporations: Public Benefit or Crony Capitalism?," especially to Jason Brennan and John Hasnas. And, for excellent research assistance, I am indebted to Jonelle Lesniak. © 2013, Amy J. Sepinwall.

1. See, e.g., Eli Lehrer, *Subprime Borrowers: Not Innocents: Pro: Willing Customers*, BLOOMBERG BUSINESSWEEK (Mar. 2008), http://www.businessweek.com/debateroom/archives/2008/03/subprime_borrowers_not_innocents.html#share ("A simple look at the blunt reality reveals that borrowers themselves should assume primary responsibility for the current subprime crisis. Millions of borrowers, all over the country, knowingly signed mortgage contracts they cannot now afford to honor."); George Benston, *Subprime Borrowers: Not Innocents: Con: Collaborative Fiasco*, BLOOMBERG BUSINESSWEEK (Mar. 2008), http://www.businessweek.com/debateroom/archives/2008/03/subprime_borrowers_not_innocents.html#share ("the mortgage salespeople and real-estate brokers who both misled borrowers and falsified the applications to get mortgages the borrowers could not repay . . . should be prosecuted."); Leslie Marshall, *Greed Caused the Subprime Mortgage Crisis, Not ACORN*, U.S. NEWS & WORLD REPORT (Oct. 16, 2009), <http://www.usnews.com/opinion/articles/2009/10/16/greed-caused-the-subprime-mortgage-crisis-not-acorn>; *Lesson One: What Really Lies Behind the Financial Crisis?*, KNOWLEDGE@WHARTON (Jan. 21, 2009), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2148> (describing Jeremy Siegel's comments blaming the crisis on financial firms on Wall Street that held large quantities of risky, mortgage-related assets on borrowed money); Rachelle Younglai & Sarah N. Lynch, *Credit Raters Triggered Financial Crisis: Panel*, REUTERS, Apr. 13, 2011 (describing a Senate report blaming the ratings agencies for unduly inflating the ratings of mortgage-backed securities);

Nonetheless the question of responsibility seems to demand an answer not only for purposes of arriving at lessons that might avert a future crisis but also for answering a second question that seems a natural corollary of the first—viz., who bears responsibility for funding the bailouts necessitated by the financial crisis? More specifically, who in the United States bears responsibility for funding the bailouts undertaken by the U.S. government?

To the extent that the question of responsibility for funding the bailout tracks all and only those individuals and entities that culpably precipitated the crisis, the question is misguided. I want to argue that the answer to the question of responsibility for funding the bailout is broader than typically thought, and this is so in two respects. First, while commentators are inclined to focus on culpable constituents—like bankers, regulators, lenders and borrowers—I shall contend that one can locate blameworthiness, and so liability to pay, in large swaths of the American public, which embraced an ethos of easy money that fundamentally fueled much of the reckless speculating that caused the collapse. Second, even though many Americans did not find themselves caught up in the easy money ethos, all Americans may be made to pay, just in virtue of their shared membership in the polity that allowed the crisis to occur. The central claim of this paper is, then, that we may justify Main Street's bailing out of Wall Street on a theory of shared responsibility that has been overlooked.

On the other hand, the very theory that would justify widespread responsibility for crisis clean up also justifies widespread responsibility to rectify numerous other social and economic ills. There are clearly compelling practical reasons for which the crisis bailout has received priority, chief among which is the widespread devastation that would have been wrought were our economy to have collapsed.² Nonetheless, we need not blithely defer rectification of these other social and economic ills in favor of the bailout efforts. Instead, their existence might guide or condition the distribution of bailout obligations, as I

Paul Krugman, *Reagan Did It*, N.Y. TIMES, Jun. 1, 2011 at A1 (blaming deregulation during the Reagan era); Mark Gongloff, *Romney's Dodd-Frank Comments Shock Bewildered Bankers*, THE HUFFINGTON POST (Oct. 4, 2012), http://www.huffingtonpost.com/mark-gongloff/dodd-frank-kiss-banks_b_1939484.html ("This canard, that Dodd-Frank essentially sets 'too big to fail' in stone forever, is one of Republicans' favorite arguments against Dodd-Frank"). See generally Susanne Craig & Ben Protess, *Everyone Was To Blame, Crisis Commission Finds*, N.Y. TIMES: DEALBOOK (Jan. 27, 2011), <http://dealbook.nytimes.com/2011/01/27/everyone-was-to-blame-crisis-commission-finds/>.

2. This is a contested view of the need for the bailout. The government sought to press the case that economic meltdown would have resulted had the bailout not occurred. See, e.g., Bush: *Bailout Plan Necessary To Deal with Crisis*, CNN.COM (Sept. 24, 2008), http://articles.cnn.com/2008-09-24/politics/bush.bailout_1_bailout-proposal-rescue-plan-mortgage-related-securities?_s=PM:POLITICS; cf. Martin Crutsinger, *Economists See Financial Bailout As Necessary*, THE HUFFINGTON POST (Sept. 20, 2008), http://www.huffingtonpost.com/2008/09/21/economists-see-financial-_n_128029.html. On the other hand, others believe that no such collapse would have occurred. See, e.g., Dean Baker, *Was the Bank Bailout Necessary?*, THE GUARDIAN (May 18, 2009), <http://www.guardian.co.uk/commentisfree/cifamerica/2009/may/18/us-economy-bank-bailout>; cf. James K. Galbraith, *A Bailout We Don't Need*, WASH. POST (Sept. 25, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/24/AR2008092403033.html> (arguing that once the big five banks had been rescued, the bailout was no longer necessary).

argue in the last part of the paper.

By arguing that the American public as a whole bears responsibility for the crisis, I do not mean to absolve key players in the financial industry from blame. Yet much of the scholarship produced in the wake of the crisis seeks to do just this. I begin, then, in Part I, by critiquing some of the explanations for the financial crisis proffered by others, not because these misidentify the crisis's causal contributions but instead because they misconstrue the moral nature of these contributions. In Part II, I turn to a more encompassing account of responsibility for the financial crisis, which seeks to draw out the ways in which many lay investors—ordinary people, not opportunistic borrowers, or predatory lenders, or Wall Street gurus—bear responsibility for the crisis, in light of their having invited, and perhaps even demanded, excessive risk-taking on the part of their financial advisors. Part III seeks to extend the account of responsibility further, by arguing that even those Americans who handled their money with the utmost of prudence may be made to contribute to the bailout funds. While Part III thereby seeks to articulate a ground upon which to hold the American people as a whole responsible for funding the bailout, Part IV argues that we may not insist upon this ground without also insisting that the populace attend to other social and economic ills. The bailout, that is, necessitates and should be accompanied by, an effort to reduce existing inequalities in wealth. Part V concludes.

I. UNCONVINCING EFFORTS TO EXCULPATE WALL STREET

A course of reading on the financial crisis reveals a curious asymmetry in our responses to Wall Street and government, respectively. Both are reported to have failed spectacularly but, in the case of Wall Street, the failure is seen as an expected lapse while, in the case of government, it is seen as a calamitous disappointment.³ In this Part, I seek to examine the arguments that might underpin this asymmetry, and argue that there is something problematic about each one.

How might one defend the claim that Wall Street, though undoubtedly causally responsible for the crisis, nonetheless bears little moral responsibility for it? One can glean from the literature four possible lines of defense.

First, there is the “Wall Street couldn’t help itself” defense. Thus, Richard Posner argues that, “although the financiers bear the primary *responsibility* for the depression, I do not think they can be *blamed* for it . . . any more than one

3. See, e.g., Mark J. Perry & Robert Dell, *How Government Failure Caused the Great Recession*, THE AMERICAN: THE ONLINE MAG. OF THE AM. ENTER. INST. (Dec. 26, 2010), <http://www.american.com/archive/2010/december/how-government-failure-caused-the-great-recession>; John B. Taylor, *How Government Created the Financial Crisis: Research Shows the Failure To Rescue Lehman Did Not Trigger the Fall Panic*, WALL ST. J. (Feb. 9, 2009), <http://online.wsj.com/article/SB123414310280561945.html>; Charles Calomiris, *Calomiris on the Financial Crisis*, LIBRARY OF ECON. & LIBERTY (Oct. 21, 2009), <http://files.libertyfund.org/econtalk/y2009/Calomirisfinancial.mp3>.

can blame a lion for eating a zebra.”⁴ In a similar vein, other commentators have portrayed traders as “intoxicated,”⁵ or beset by “animal spirits,”⁶ or genetically compelled to squander other people’s money for their own advantage.⁷ It is unsurprising, then, that for Posner, as well as many others, the lion’s share of blame resides with government, for its failure to constrain financial players who cannot be counted on to constrain themselves.

The view of human agency underlying the “Wall Street couldn’t help itself defense” is deeply cynical and deeply unappealing, and I think that we have good reason to resist it. We do not, after all, readily excuse others who are swayed by circumstance to engage in wrongdoing—those who commit crimes as a result of desperate economic circumstances, for example. If Wall Street has engaged in wrongdoing, it is not at all clear that its players should be entitled to any more leniency. And even to the extent that we reduce blame in cases where an offender has acted in the heat of passion, the kind of passion motivating these criminal offenses is of a vastly different quality from that characterizing Wall Street’s purported intoxication, which persisted for multiple years and from which at least some bankers seem to have been immune.⁸

A second possible line of defense goes to the fungibility of financial players. The thought here is “if I don’t, someone else will: If I don’t originate the NINJA loan, sell the over-rated CDO, under-capitalize my firm, and so on, someone else will. If the outcome is the same no matter what I do, why should I abstain and let someone else reap the rewards?” Thus Chuck Prince, former CEO of Citigroup, exhorted: “As long as the music is playing, you’ve got to get up and dance.”⁹

This argument rests upon the crudest of consequentialist accounts. For one thing, how can any of us be certain that a refusal to participate won’t have signaling effects that lead others to refuse as well? Moreover, even if it were the case that the outcome would be the same no matter what, one might take the nonconsequentialist view, that one is judged for what one does, and not for the

4. RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 284 (2009).

5. Thus George W. Bush famously stated that Wall Street got “drunk.” See, e.g., Henry J. Pulizzi, *On Economy, Bush Faults “Drunk” Wall Street*, WALL ST. J. (Jul. 23, 2008), <http://online.wsj.com/article/SB121676977361275349.html>.

6. See generally ROBERT J. SHILLER & GEORGE A. AKERLOF, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM (2009).

7. See, e.g., *The Molecules of Mayhem: Testosterone and Taking Risks*, THE ECONOMIST (May 26, 2012), <http://www.economist.com/node/21555882> (reviewing JOHN COATES, THE HOUR BETWEEN DOG AND WOLF: RISK-TAKING, GUT FEELINGS AND THE BIOLOGY OF BOOM AND BUST (2012)).

8. See generally MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010) (profiling a handful of investment gurus who believed—correctly and to highly profitable effect, as it turns out—that the market was vastly over-valuing mortgage backed securities, and vastly under-estimating their risk).

9. See, e.g., John Cassidy, *What Good Is Wall Street*, THE NEW YORKER (Nov. 29, 2010), http://www.newyorker.com/reporting/2010/11/29/101129fa_fact_cassidy.

outcomes of what one does.¹⁰

The third argument that one might invoke to absolve the financial players in the crisis points to the relatively insignificant contribution of each one. Given the magnitude of the losses, and the number of individuals involved—from mortgage originators, to analysts, to traders, to ratings agents, to regulators, and so on—it is tempting to regard the role of any one of them as negligible.

That would be a mistake. To see why, consider an argument raised in the philosophical literature on apportioning responsibility to criminal accomplices. Suppose that I want to push my nemesis over a cliff, but that I am not strong enough to do so alone. I wait until the wind is blowing in the right direction and then, only with the wind on my side, manage to give my nemesis a push with the requisite force to pitch him over. Clearly, my responsibility is not diminished because both the wind and I were necessary to get the job done. Now imagine that it is not the wind, but a friend, who helps me get the job done. There is no good reason to reduce my responsibility relative to the amount of responsibility I bear in the first case.¹¹ Extending the argument, suppose now that it is not a person but an entire edifice that is to be tossed off the cliff, and a thousand people are required to heave it over. It follows that each of them is responsible for the edifice's destruction, and not just for 1/1000th of its destruction. So, again, if all of the market players engaged in wrongdoing, they cannot find refuge from blame by invoking the fact that they were joined by thousands of others.

A final defense of Wall Street points to the failure of government regulators to erect appropriate safeguards. On this line of argument, the deregulation of the banking industry occurring through the 1990s and early 2000s, along with the governmental push toward homeownership, incentivized undue risk-taking, with the crash as the inevitable result.¹² The underlying thought here is that it is

10. Anglo-American criminal law reflects the view that it is acts, and not outcomes, that matter, as for example in cases of accomplice liability where the accomplice's contribution made no causal difference to the crime's occurrence, *see, e.g.*, *State ex rel. Attorney General v. Tally*, 15 So. 722, 734 (1894), or again in the doctrine of attempts, *see generally* R.A. DUFF, *CRIMINAL ATTEMPTS* (1996); *but cf.* John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L.J. 1 (2002) (arguing that we should prosecute and punish attempts only if the defendant's conduct is sufficient to cause alarm to the generic citizen who witnesses the defendant; otherwise, given the risk of enforcement error, we should permit a defense of impossibility if the defendant's failure to complete the crime arose from a mistake of law or fact, and the defendant did not commit some other crime in the process). It can be found as well in cases of accomplice liability where the accomplice is convicted whether or not her contribution actually made a causal difference to the crime's occurrence. *See, e.g.*, Amy J. Sepinwall, *Failures To Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251 (2009).

11. Michael Zimmerman, *Sharing Responsibility*, 22 AM. PHIL. Q. 115 (1985).

12. *See, e.g.*, Dwyer Gunn, A "Spasmodic, Improvisational Response": Richard Posner Tackles the New Depression, FREAKONOMICS (Apr. 14, 2009), <http://www.freakonomics.com/2009/04/14/a-spasmodic-improvisational-response-richard-posner-tackles-the-new-depression/>; Richard Posner, *Capture Theory and the Financial Crisis*, THE BECKER-POSNER BLOG (June 12, 2011, 5:10 PM) <http://www.becker-posner-blog.com/2011/06/capture-theory-and-the-financial-crisisposner.html> ("I would go so far as to contend that the government is entirely to blame for the crisis . . .").

the responsibility of the populace, not the banks, to enact a legal regime that checks financiers' baser instincts and keeps moral hazard at bay.¹³ Two responses are in order. First, as others have noted, Wall Street will always stay at least one step ahead of Capitol Hill,¹⁴ as bankers develop creative ways to circumvent whatever new set of regulations Congress imposes upon them. In this way, bankers might be likened to antibiotic-resistant bacteria, forever evolving to survive and thrive in the face of the most recent remedy intended to thwart their progress.¹⁵

Second, and more fundamentally, the argument naively presumes an amount of popular will and power that is belied by current political practices and structures. Of particular note here is the role of money in politics—with individuals and corporations permitted to spend unlimited amounts of money on ads supporting political candidates who will advance their economic interests (or ads opposing political candidates who would frustrate those interests),¹⁶ and lobbyists on behalf of finance, insurance, and real estate interests spending hundreds of millions annually to curry favor with those same politicians.¹⁷ A financially favorable feedback loop results: Those with money spend it to get the legal regime that will allow them to earn still more money, some of which they spend entrenching or extending the political machinery that will further facilitate their financial objectives, and so on and so forth. The one person, one vote conceit ceases to be meaningful where political power turns so mightily on one's ability to influence politics through the power of one's purse. In short, it is

13. Cf. Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html> (expressing the sanguine view that citizens can press for constraints on profit-seeking activity by prevailing upon their legislators, and arguing that corporations ought to do whatever they can within the law to maximize shareholder returns).

14. See, e.g., Nassim Nicholas Taleb, *End Bonuses for Bankers*, N.Y. TIMES (Nov. 7, 2011), http://www.nytimes.com/2011/11/08/opinion/end-bonuses-for-bankers.html?_r=0; Daniel Gross, *Reining in Bubbles So They Won't Pop*, THE DAILY BEAST (Feb. 27, 2009), <http://www.thedailybeast.com/newsweek/2009/02/27/reining-in-bubbles-so-they-won-t-pop.html>. Cf. Daniel Gross, *Dumb Money: The villains of the financial catastrophe aren't criminals. They're morons.*, SLATE.COM (Feb. 23, 2009) http://www.slate.com/articles/business/moneybox/2009/02/dumb_money.html.

15. Cf. Simon Longstaff, *Ethics and the Global Financial Crisis*, CORP. RESPONSIBILITY INDEX, <http://corporate-responsibility.com.au/content/articles/ethics-and-global-financial-crisis> (last visited Mar. 20, 2013) (decrying "the laissez faire jungle in which self-interest mutates into the degraded forms of greed and selfishness").

16. Citizens United v. FEC, 558 U.S. 310 (2010).

17. For example, in 2007, lobbying expenses for the finance, insurance and real estate industries exceeded \$420 million. CTR. FOR RESPONSIVE POL., *Lobbying: Finance, Insurance & Real Estate, Sector Profile, 2007*, OPENSECRETS.ORG <http://www.opensecrets.org/lobby/indus.php?id=F&year=2007> (last visited Mar. 20, 2012). The insurance industry, which would include entities like AIG, spent over \$139 million on lobbying in 2007; the securities and investment industry spent \$86.8 million; real estate lobbyists spent \$80.9 million; and commercial banks spent \$40.8 million. *Id.* By contrast, the ACLU spent \$4.2 million on lobbying in 2007; the National Right to Work Committee spent \$1.44 million; Consumers Union of the United States spent \$484,000; and Public Citizen spent \$260,000 in 2007. CTR. FOR RESPONSIVE POL., *Lobbying: Misc. Issues, Industry Profile, 2007*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/indusclient.php?id=Q10&year=2007> (last visited Mar. 20, 2012).

foolhardy to rely upon Main Street to rein in Wall Street given the vastly disparate resources and clout available to each.

The foregoing might be read as an indictment of the banking industry and an apology on behalf of the American public. In fact, the truth is more nuanced: Both parties bear blame, I believe, and their responsibility may well be inter-related, as I shall now argue.

II. MAIN STREET SEEKS EASY STREET

We now know that individual bankers and banks engaged in wrongful acts that contributed to the crisis; some intended to defraud while others proceeded with a breathtaking recklessness to similar effect.¹⁸ But, for many others, the failure to appreciate and heed risk appears not to have been so much at their own behest as in the service of their clients. The risk-taking of these players could be deemed culpable only if in taking risks they had breached some duty of care. But it may well be that the standard of care that the investing public demands is so low as to not have been breached even in the trades and investments that caused the crisis. The thought here is that Wall Street is in the business of courting risk, and it is in the business of courting risk because the investing public has given it that mandate.

Individuals prefer to spend rather than save,¹⁹ and as a result demand the kind of financial alchemy that can transform one's house into a virtual ATM,²⁰ or

18. Countrywide for example overcharged customers who were desperately hanging on to their home loans, *see, e.g.*, Press Release, Fed. Trade Comm'n, Countrywide Will Pay \$108 Million for Overcharging Struggling Homeowners; Loan Servicer Inflated Fees, Mishandled Loans of Borrowers in Bankruptcy (June 7, 2010), *available at* <http://www.ftc.gov/opa/2010/06/countrywide.shtm>, and discriminated against Black and Hispanic borrowers, *see, e.g.*, Charlie Savage, *Countrywide Will Settle A Bias Suit*, N.Y. TIMES, Dec. 21, 2011, at B1, *available at* <http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html>. For the thought that many banks undertook undue and excessively risky investments, *see, for example*, David Brooks, *Greed and Stupidity*, N.Y. TIMES, Apr. 3, 2009, at A29, *available at* http://www.nytimes.com/2009/04/03/opinion/03brooks.html?_r=0 (describing accounts of the crisis faulting bankers for their over-confidence and failures to appreciate risk). Moreover, wrongdoing seems to have persisted in the aftermath of the crisis, with some banks thwarting the very relief efforts precipitated by their contributions to the housing market collapse, by "losing paperwork" or otherwise making it unduly difficult for mortgagees to receive relief to which they are entitled under the Home Affordable Modification Program (HAMP). *See, e.g.*, Arthur Delaney, *Obama Housing Program Hits Milestone: 1 Million Failed Mortgage Modifications*, THE HUFFINGTON POST (September 13, 2012, 5:23 PM), http://www.huffingtonpost.com/2012/09/13/obama-housing-hamp_n_1881972.html?utm_hp_ref=politics; Shahien Nasiripour & Arthur Delaney, *Michigan Family Says Obama Foreclosure-Prevention Program Cost Them Their Home*, THE HUFFINGTON POST (February 1, 2011, 8:53 AM), http://www.huffingtonpost.com/2011/02/01/michigan-family-says-obam_n_816684.html.

19. *Cf. 25 People To Blame for the Financial Public: American Consumers*, TIME (Feb. 11, 2009), http://www.time.com/time/specials/packages/article/0,28804,1877351_1877350_1877319,00.html ("In the third quarter of 2008, Americans began saving more and spending less. Hurrah! That only took 40 years to happen. We've been borrowing, borrowing, borrowing—living off and believing in the wealth effect, first in stocks, which ended badly, then in real estate, which has ended even worse.").

20. M.P. Dunleavy, *It's Too Easy To Turn Home into an ATM*, N.Y. TIMES (Apr. 22, 2006), <http://www.nytimes.com/2006/04/22/business/22instincts.html>.

one's exceedingly modest savings into a fiscal cushion that can sustain a long, comfortable retirement. Thus, for example, roughly 1 in 5 Americans say they would rather spend today than put money away for the future.²¹ And their preference is borne out in statistics demonstrating that whereas the average American saved 9 percent of personal income in the 1980s, the average personal savings rate has dropped to almost 0 percent today.²² Fund managers are willing to oblige: They have sought out securitized products whose risks were under-rated, in order to achieve high returns consistent with their regulatory constraints. Risk, then, is the inevitable price of our preferences for consumption over savings.

These are not, in and of themselves, morally problematic preferences. But they do foreclose an overly censorious critique of Wall Street risk-taking. Contempt for greed is all too convenient when the bet turns sour if we are prepared to countenance greed when the bet pays off. To be clear, I do not mean to excuse any and every exercise of greed, or to endorse the pre-crisis incentive and compensation schemes that greased Wall Street's wheels. Some abuses are pure charlatanism, and blame for these must rest with the charlatans alone. But the financial crisis resulted not from intentional swindling so much as the internal logic of Wall Street itself. The investing public cannot disclaim responsibility for market players' missteps when it engages in an enterprise to which it lends both its financial and moral support.

There is then a genuine sense in which those of us who invest or borrow or both—which is to say the vast majority of us²³—licensed and indeed motivated many of the schemes leading to the crisis as a result of our financial predilections. For this reason, many of us share blame for the crisis. It is then not unfair to have those of us who are blameworthy pay to undo the damage we have caused. But I now want to advance a more sweeping claim—that *all* of us share responsibility for the crisis's cleanup efforts.

III. SHARED RESPONSIBILITY TO BAIL OUT

A recurring trope in the bailout literature leverages the image of a bursting dam: Federal money had to be diverted to the banks because the disaster that would have occurred otherwise would have been damaging enough to drown us

21. *Natixis Global Management Survey Explores Why Many Americans Don't Save for Retirement*, BUSINESSWIRE (March 21, 2012, 9:00 AM), <http://www.businesswire.com/news/home/20120321005428/en/Natixis-Global-Asset-Management-Survey-Explores-Americans>.

22. Massimo Guidolin & Elizabeth A. La Jeunesse, *The Decline in the U.S. Personal Saving Rate: Is It Real and Is It a Puzzle?*, 89 FED. RES. BANK OF ST. LOUIS REV. 491, 491 (2007), <http://research.stlouisfed.org/publications/review/07/11/Guidolin.pdf>.

23. Among full-time, full-year wage and salary workers ages 21–64, 54.5 percent participate in a retirement plan. CRAIG COPELAND, EMPLOYEE BENEFIT RES. INST. EMPLOYMENT-BASED RETIREMENT PLAN PARTICIPATION: GEOGRAPHIC DIFFERENCES AND TRENDS, 2010, (2011), http://www.ebri.org/pdf/briefspdf/EBRI_IB_10-2011_No363_Ret_Part.pdf. In addition, 76 percent of Americans carried some form of debt in 2008. *On Borrowed Time: Living Beyond Our Means*, ASSOCIATED PRESS, http://hosted.ap.org/specials/interactives/_business/debt_addiction/index.html?SITE=AP (last visited Mar. 20, 2012).

all.²⁴ At the same time, many are inclined to view the wrongdoing that precipitated the crisis as part and parcel of a general “crisis of ethics and values.”²⁵ The diluvian metaphor together with the indictment of all suggests that the crisis and our compelled contributions to the bailout are justly deserved: We together created and sustained a culture of iniquity, and a calamity of biblical proportions was then our due. On the other hand, some fiscally responsible citizens rage against a measure that conscripts them to remedy others’ financial irresponsibility,²⁶ claiming that the current regime privatizes wealth while socializing risk and the costs of recovery.²⁷

As with so much of the polarized rhetoric about the crisis and bailout, the truth here likely lies somewhere in the middle. It is certainly true that not all Americans took advantage of easy credit or undertook excessively risky bets. But this fact in itself does not serve to release them (us) from obligations to fund the crisis’s cleanup effort. Analogies to the wreckage from a natural disaster are instructive here. No one of us caused, let alone culpably caused, the destruction or devastation resulting from, say, Hurricanes Katrina or Sandy. Nonetheless, I do not believe that we are entitled to complain when our tax dollars go to fund the recovery efforts; instead, the associative obligations that we owe our compatriots entail, among other things, an obligation to help subsidize the costs of repairing the hurricanes’ damage.

More specifically, and as I have argued elsewhere,²⁸ what it is to be involved in a polity with others is to recognize that we have special obligations to our fellow citizens. The polity is a kind of joint project—a joint project of self-governance—and participation in a joint project entails certain obligations of loyalty to one’s fellow members. For example, members may prevail upon each other to act in the best interests of their joint project; they may demand that their fellows signal their commitment to the joint project in ritualized ways; they may expect that a member’s dissatisfaction with the course of the joint project will prompt her to seek reform rather than an immediate withdrawal from the group;

24. See, e.g., Roumeen Islam & Raj Nallari, *Of Floods and Droughts: The Economic and Financial Crisis of 2008* (The World Bank Inst. Thematic Learning Dep’t, Working Paper No. 5327, Mar. 1, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573450.

25. This finding emerges from a survey conducted by the World Economics Forum finding that “two-thirds of those queried think the crunch is also a crisis of ethics and values.” Tom Heneghan, *Analysis—Ethics Angle Missing in Financial Crisis Debate*, REUTERS (Mar. 4, 2010, 4:46 PM), <http://in.reuters.com/article/2010/03/04/idINIndia-46652920100304>; see also Longstaff, *supra* note 15 (“The root cause of the problem is not a failure of regulation but of ethics.”).

26. See, e.g., Joel Achenbach, *Bailout strikes many on Main Street as unfair; Sentiment poses new challenge to candidates this fall*, WASH. POST (Sept. 22, 2008), <http://www.chron.com/news/nation-world/article/Bailout-strikes-many-on-Main-Street-as-unfair-1784439.php> (“‘I’ve been financially responsible with my own money. Why should I now be responsible for the fact that you were not?’”); Chris Dollmetsch, *Main Street Pans Bailout, Says Bankers Get ‘What They Deserve’*, BLOOMBERG (Sept. 30, 2008, 12:00 AM), <http://www.bloomberg.com/apps/news?sid=a5LgXsmYi6OU&pid=newsarchive>.

27. Longstaff, *supra* note 15 (“Having privatised the upside of economic irresponsibility, we must now socialise the downside—all a result of a failure of ethics.”).

28. Amy Sepinwall, *Collective Guilt and the Reactive Attitudes*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 231 (Richard Vernon & Tracy Isaacs eds., 2011).

and so on. In addition to these general obligations, the particular nature of the joint project might entail obligations specific to it. Of particular relevance here are enhanced obligations that we come to owe our compatriots in virtue of our shared membership in the polity—special obligations, as it were.²⁹

Now, not every joint project imposes upon its members special obligations to one another or, to the extent these do arise, they may do so indirectly: Sports teammates may bear special obligations to help one another out in the locker room and on the field, because doing so advances the joint project, but participation in this joint project does not immediately entail obligations of assistance off the field and outside of the stadium. At the same time, we may anticipate that longstanding teammates do develop the kind of thick relationships that transcend the scope of the joint project, and give rise to at least some of the special obligations of friends.

Whereas the members of a sports team need not, at least at the outset, bear obligations to one another to promote the others' general well-being, participants in the project of self-governance incur just such special obligations because of the nature of the joint project this is. The project of self-governance is a scheme of social cooperation intended to make its participants better off. Among the ways it does so is through the creation of a community of individuals each of whom bears obligations to the others that he or she would not, all else being equal, bear toward outsiders. We can liken the relationship between compatriots to that obtaining between the members of an extended family, though likely significantly reduced in strength. So it is that we may be called upon to help support our compatriots when large-scale phenomena for which they bear little or no responsibility set back their interests. These obligations of support signal and solidify our commitment to one another and affirm the value that we attach to the joint project of self-governance together. In this way, contributions to hurricane clean up within our polity are not mere charity—these contributions are distinct from the money we might send to the victims of Japan's tsunami or Haiti's earthquake. Instead, they are compelled by, and they vindicate, our sense of being in the same boat, as it were.

But perhaps the analogy to storm wreckage is misguided. After all it is a matter of sheer bad luck that a hurricane strikes one coast, rather than another, or that there is a natural disaster in the first place. But the same cannot be said about the financial crisis, which was an avoidable calamity.³⁰ Insofar as those who caused the crisis could have done otherwise, and thereby averted the disaster, we might want to deny that we are obligated to help clean up their mess.

29. See generally Talbot M. Brewer, *Two Kinds of Commitment (and Two Kinds of Social Group)*, 66 J. PHIL. & PHENOM. RES. 554, 572 (2003); Michael Hardimon, *Role Obligations*, 91 J. PHIL. 333 (1994); Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189 (1997); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

30. See, e.g., Sewell Chan, *Financial Crisis Was Avoidable, Inquiry Finds*, N.Y. TIMES, Jan. 26, 2011, at A1, available at http://www.nytimes.com/2011/01/26/business/economy/26inquiry.html?_r=0.

This way of thinking overstates the extent to which a discrete set of individuals can be assigned responsibility for the crisis, given the magnitude of the devastation it wrought. It is not mere coincidence, or rhetorical flourish, or convenient demurrer that leads interested parties to cast the crisis as a perfect storm.³¹ To be sure, many, many people acted in morally substandard ways that brought the country to the brink of economic collapse. Castigation and perhaps even punishment is their due. But, for the most part, the culpable contribution of any one of them is exceedingly small relative to the magnitude of the harm that these contributions together caused.³² More specifically, the moral failings of which many are guilty—greed or improvidence or an excessive desire for leisure—are so tantalizing and so common that few of us can claim the moral purity that would be necessary to stand in judgment of our fellows.³³ We may have resisted here but have we not succumbed on other occasions? And isn't it sheer moral luck that has made it the case that our own descents into these vices didn't produce the devastating consequences of the financial crisis? Or, even if we have avoided these vices, are we so righteous as to have refrained from others, no less culpable? In short, the amount of blame properly attributable to the culpable players is relatively small, while the magnitude of harm that their wrongs produced is exceedingly large. The fact that *their* culpable conduct has led to great harm while *ours* has not may result from nothing other than bad luck, just as nothing other than bad luck may separate the hurricane sufferer from the person whom the storm has spared. Only an overly severe or merciless posture would prompt the thought that they and they alone should bear the cost of remedying this harm.

In any event, the particular mechanism through which we provide rescue—i.e., the bailout—shores up a part of the infrastructure crucial to our joint project. In this way, contributing to the costs of the bailout does more than fulfill a special obligation to our compatriots; the obligation to contribute also reflects and reinforces the fact that our fates are tied together. We may not point

31. See, e.g., Jeffrey Friedman, *A Perfect Storm of Ignorance*, CATO POL'Y REP. (Jan./Feb. 2010), <http://www.cato.org/policy-report/januaryfebruary-2010/perfect-storm-ignorance>; Manav Tanneeru, *How a 'Perfect Storm' Led to the Economic Crisis*, CNN.COM, <http://www.cnn.com/2009/US/01/29/economic.crisis.explainer/> (last visited Mar. 20, 2013); Leon Courville, *Financial Crisis: A Perfect Storm or Regulatory Failure* (unpublished manuscript), http://www.hec.ca/iea/seminaires/120508_leon_courville.pdf.

32. This point may seem to be in tension with my earlier argument that the magnitude of one's responsibility for some jointly produced wrong does not turn on the number of people with whom one committed the wrong. The distinction lies, at least in part, at the level of intention: In the earlier discussion, each participant intended the overall wrong. Here, by contrast, each participant intends only her own contribution; she does not anticipate that her contribution will interact with the contributions of others to create the calamity that in fact resulted. And, even if her failure to anticipate the interaction is itself culpable—because reckless, or at least negligent—this is a far cry, morally speaking, from intending to bring down the whole system.

33. Cf. Joshua D. Margolis, *The Responsibility Gap*, 11 THE HEDGEHOG REV. 41, 43 (2009) (“[T]he parade of scandals from Enron to WorldCom, and on to options backdating and sub-prime excesses, all confirm how easily human beings can glide toward wrong-doing and, sometimes, even march there.”).

a finger in judgment and require our fellows to excuse us from needing to clean up “their” mess not only because doing so would offend against the relationship that obtains between us, but also because it would be counterproductive. Just as in a family or small business the profligate tendencies of one member may on occasion need to be remedied by the others (with castigation perhaps warranted but not worthwhile), so too we were required, at least when the economy was on the brink of collapse, to look to repair, and not to engage in a useless blame game.

So it is that, at least all else being equal, we do no injustice in recruiting all taxpayers to fund the bailout. But even while we are licensed in identifying a national obligation to contribute to the bailout, this is not our only national obligation, and it is precisely because we have been so forcefully conscripted to fulfill this one while others go unfulfilled that claims of unfairness have merit.

IV. BAILING AND FLAILING

We now know that wealth inequalities contributed in no small part to the economic crisis. For one thing, growing inequality led to less purchasing power for those in the lower parts of the income gradients and less aggregate demand as a result; deflation could be forestalled only by extending easy credit to those at the bottom.³⁴ Thus, by 2008, debt came to exceed GNP by 33 percent.³⁵ At the same time, as the poor became poorer, the rich became richer, amassing sums of money too vast to spend on consumption alone.³⁶ So those with surplus income went in search of investment opportunities. The financial intermediaries, seeing demand for financial products skyrocket, were compelled to come up with ever-more creative and reckless investment vehicles, “basically throwing money at anyone who would take it.”³⁷ Because the short-term returns on these investments were high, the rich grew richer still, while middle- and lower-class wages largely remained stagnant.³⁸ As others have noted, it is perhaps no coincidence that the greatest inequalities in wealth in the United States were seen in 1928, at the brink of the Great Depression, and 2007, in the lead-up to

34. U.N. DEV. PROGRAM, TOWARDS HUMAN RESILIENCE: SUSTAINING MDG PROGRESS IN AN AGE OF ECONOMIC UNCERTAINTY 188–89 (2011), http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Towards_SustainingMDG_Web1005.pdf; Stewart Lansley, *Inequality, the Crash and the Crisis. Part 2: A Model of Capitalism that Fails To Share the Fruits of Growth*, OECD INSIGHTS (June 13, 2012), <http://oecdinsights.org/2012/06/13/inequality-the-crash-and-the-crisis-part-2-a-model-of-capitalism-that-fails-to-share-the-fruits-of-growth/>.

35. Lansley, *supra* note 34. Others state that debt exceeded GDP by 100%. See, e.g., Branko Milanovic, *Two Views on the Cause of the Global Crisis—Part I*, YALEGLOBAL ONLINE (May 4, 2009), <http://yaleglobal.yale.edu/content/two-views-global-crisis>.

36. Milanovic, *supra* note 35.

37. *Id.*

38. STAFF OF JOINT ECON. COMM., 111TH CONG., INCOME INEQUALITY AND THE GREAT RECESSION 1 (2010), http://www.jec.senate.gov/public/?a=Files.Serve&File_id=91975589-257c-403b-8093-8f3b584a088c.

the global financial meltdown.³⁹

Here too, then, we can arrive at an etiology of the crisis that normalizes its immediate causes: Those who sought to invest weren't intending to dramatically disrupt the economy; nor were those who sought to serve the investors. But the inequality in wealth itself raises questions that we have not yet considered.

Traditional defenders of capitalism have recently issued statements arguing against vast wealth inequalities on *prudential* grounds. Thus, for example, Joseph Stiglitz has argued that an "economy in which *most* citizens are doing worse year after year—an economy like America's—is not likely to do well over the long haul," and he urges the wealthiest 1% to attend to the interests of the 99% not for lofty moral reasons but instead because "paying attention to . . . the common welfare [] is in fact a precondition for one's own ultimate well-being."⁴⁰ Similarly, Joseph Bower and co-authors seek to argue that income inequality poses a serious threat to market capitalism, and that government and business must seek to redress the inequality in order to stave off capitalism's demise.⁴¹

While these are compelling considerations, I want now to raise long-belabored, but apparently here overlooked, *moral* grounds for contesting significant wealth inequalities.⁴² There is the traditional thought, first articulated by John Rawls and repeated and refined by his acolytes, that many disparities in wealth result from luck—differential outcomes in the natural lottery making it the case that some possess greater shares of the powers to succeed in our society than others, and differential outcomes in the birth lottery making it the case that some of us are born into families with greater economic and political power than others.⁴³ If the determinants of wealth result from luck then we cannot be said to deserve them. And if we do not deserve the determinants of wealth then we do not deserve the greater wealth that these determinants produce.

In addition to the luck egalitarian objection to wealth disparities, there is a second line of critique that contests wealth inequalities because and to the extent that these co-travel with inequalities in social status and political power. On this line of argument, voiced by Elizabeth Anderson and Michael Walzer among others,⁴⁴ what is problematic about inequalities in wealth is not that

39. DAVID A. MOSS, *BANK FAILURES, REGULATION, AND INEQUALITY IN THE UNITED STATES* (2010), http://www.tobinproject.org/sites/tobinproject.org/files/assets/BankFailures_ChartwithComments_Moss.pdf; see also Louise Story, *Income Inequality and Financial Crises*, N.Y. TIMES, Aug. 22, 2010, at WK5.

40. Joseph E. Stiglitz, *Of the 1%, by the 1%, for the 1%*, VANITY FAIR, May 2011, at 2.

41. JOSEPH L. BOWER ET AL., *CAPITALISM AT RISK: RETHINKING THE ROLE OF BUSINESS* (2011).

42. See generally Xavier Marquez, *Is Income Inequality Unjust?: Perspectives from Political Philosophy*, 7 POL. Q. 61 (2011), <http://ips.ac.nz/publications/files/28ca3580530.pdf>.

43. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 74–75 (1971); RONALD DWORKIN, *SOVEREIGN VIRTUE* 70–74 (2002); G.A. Cohen, *The Currency of Egalitarian Justice*, 99 ETHICS 906 (1989), <http://www.mit.edu/shaslang/mprg/GACohenCEJ.pdf>.

44. Elizabeth Anderson, *What is the Point of Equality*, 109 ETHICS 287 (1999), <http://philosophyfaculty.ucsd.edu/FACULTY/RARNESON/Courses/ElizabethAndersonWhatIsThePointofEquality.pdf>; MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

some individuals get to enjoy finer things than others but instead that those who have fewer resources may be less capable of pressing their views about political matters, and they may be subject to the contempt of those who have more as well.

Finally, there is also a literature connecting greater relative income inequality in a given society with worse health outcomes for those at the bottom of the income gradient.⁴⁵ As one exponent of this line of argument contends, “the richer you are, or the higher your occupational status, the longer and healthier your life.”⁴⁶ The connection between inequalities in wealth and inequalities in health has been extensively studied in the United Kingdom, and it has also been found in every country in the world where it has been measured.⁴⁷ Most relevantly, and perhaps most strikingly, for all its wealth, the United States ranks 50th in the world for life expectancy, alongside the much poorer but also far more equal countries of Cuba and Costa Rica.⁴⁸

What is the implication of the critique of wealth inequality for the ethics of the bailout? As a prudential matter, government intervention aimed at shoring up the economy must attend to, and seek to diminish, existing inequalities of wealth, given that these conduce to economic instability, as we have seen. But more than this, a bailout that lines the pockets of those whom the current economic regime already favors does more than sustain a currently unjust status quo. It risks exacerbating the inequality, and waging an additional injury on the disadvantaged to boot. Their current situation already constitutes a wrong, since it results from a failure to fulfill the obligations and promise inherent in a scheme of social cooperation.⁴⁹ In the face of this failure, the zealous efforts to rescue both Wall Street and Main Street give those who cannot claim residency in either group—the most economically disempowered, that is—reason to feel especially slighted. They deserve more and better, and our bailout efforts should reflect this.

CONCLUSION

Whatever the moral responsibility of those individuals and entities that played the greatest causal role in precipitating the crisis, we cannot disclaim our obligations to contribute to its clean up. This is so for several reasons. First, most of us lent our moral and monetary support to the market structures that

45. See, e.g., Norman Daniels, *The Ethics of Health Reform: Why We Should Care About Who is Missing Coverage*, 44 CONN. L. REV. 1058, 1062–65 (2012); Richard G. Wilkinson & Kate Pickett, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* (2010). For a summary of earlier literature in this vein, see Marion Danis & Amy J. Sepinwall, *Regulation of the Global Marketplace for the Sake of Health*, 30 J. L. MED. & ETHICS 667 (2002).

46. Daniels, *supra* note 45, at 1063.

47. *Id.*; see also M. G. Marmot et al., *Employment Grade and Coronary Heart Disease in British Civil Servants*, 32 J. EPIDEMIOLOGY & COMMUNITY HEALTH 244 (1978); THE SOCIETY AND POPULATION HEALTH READER: INCOME INEQUALITY AND HEALTH xxii–xxiv (Ichiro Kawachi et al. eds., 1999).

48. Daniels, *supra* note 45, at 1062; Danis & Sepinwall, *supra* note 45, at 3.

49. Cf. IRIS MARION YOUNG, *RESPONSIBILITY FOR JUSTICE* (2011).

allowed for excessive risk-taking and thereby brought the economy to the brink of collapse. Second, even those of us who conducted our financial affairs with the utmost care likely cannot claim the kind of moral purity that would license our imposing the bailout costs exclusively on investors and borrowers. And, finally, even if we could genuinely lay claim to moral superiority, we would still have obligations to contribute to the bailout, because our shared membership in the polity demands no less. For all of these reasons, we may not rage against our conscripted involvement in the bailout.

At the same time, we can and should ensure that those who are “bailed out” include not only those who are flailing as a result of the crisis, but also those whose welfare we have neglected for too long, and whose claims on the national fisc may well be even more meritorious than are those of the bailout’s most visible targets.