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## What Use Is the Judiciary in a Financial Crisis?

### Remarks of Judge Richard D. Cudahy\*

Many years ago, Spencer Waller, who is moderating this program, helped us Seventh Circuit judges with a big *MCI v. AT&T* antitrust case.<sup>1</sup> That was one of the major instances of applying the antitrust laws to “regulated industries.”<sup>2</sup> In some respects, invoking antitrust in the case of “regulated industries” replaces the former regulators with the judiciary. In the case of *AT&T*, Judge Greene of the District Court for the District of Columbia became for about ten years the administrator of the government’s antitrust decree and, as such, the “regulator” of *AT&T*.<sup>3</sup> That’s an interesting, “different” role for the judiciary.<sup>4</sup>

Now, I want to congratulate the Law School on reaching the 100-year mark. I used to think that 100 years was an awfully long time, but after I crossed the eighty-year mark myself, the century began to shrink a little. However, the last twenty years are still the toughest. Crossing

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1. *MCI Commc’ns Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983).

2. Regulated industries have a long history of antitrust scrutiny. See Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, *passim* (2009); Stuart M. Chemtob, Special Counsel for Int’l Trade, U.S. Dept. of Justice, Speech Before Fifth International Symposium on Competition Policy and Law: The Role of Competition Agencies in Regulated Sectors (May 11–12, 2007), <http://www.justice.gov/atr/public/speeches/225219.htm>. Network industries have also been the subject of an important recent decision by the U.S. Supreme Court. See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (reducing the scope of antitrust enforcement in regulated industries).

3. *United States v. AT&T*, 552 F. Supp. 131 (D. D.C. 1982).

4. What makes this observation all the more interesting is that the judiciary typically disavows any direct role in regulating industry. See, e.g., *Chicago Prof’l Sports Ltd. v. Nat’l Basketball Assoc.*, 95 F.3d 593, 597 (7th Cir. 1996); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 669 (1962).

the century mark puts you in a very special class that gives you 100 years of experience, and that cannot be anything but a huge asset to the education you provide. You have produced 100 years of graduates who have distinguished themselves in every facet of the law, including the judiciary. These are role models for all those who come after, and there is no substitute for that. So heartiest congratulations and every good wish for 100 years more.

In considering the role of the judiciary in the twenty-first century, an interesting and timely aspect must be its function in dealing with the financial crisis with which we are presently faced.<sup>5</sup> Now, ordinarily, one does not think of the judiciary or the courts as having any special responsibilities in times of financial or economic turmoil beyond performing such unpleasant tasks as ordering the foreclosure of mortgages or receiving petitions in bankruptcy.<sup>6</sup> For the most part, judges appear to have the job, to use a medical analogy, of declaring patients dead after rigor mortis has set in. But the courts do not seem to have visible involvement with curing the diseases that killed them. Yet, even in this usual after-the-fact role, the function of judges may bear more thought than is usually accorded it.

Of course, the courts are not institutions that one thinks of turning to in times of financial crisis. Instead, one's thoughts turn to the Federal Reserve, the Treasury Department, the Securities and Exchange Commission and other like agencies that are charged in one way or another with keeping the economic system healthy and vigorous. If one thinks of the courts at all, it might be in terms of their place in the regulatory system, which is considerable.<sup>7</sup> However, that system operates more in terms of avoiding crashes than in dealing with their fall-out after they have occurred. At the moment, we have what

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5. For an interesting discussion of the causes and possible future implications of the 2008 financial crisis, see RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (Harv. Univ. Press 2009); see also Hon. Richard D. Cudahy, *The Coming Demise of Deregulation II*, 61 ADMIN. L. REV. 543 (2009).

6. This is not to suggest that these seemingly prosaic roles are without any importance, however. Indeed, Congress even seemed poised in early 2009 to amend bankruptcy law to allow judges to adjust mortgage terms. Had this amendment passed, the judiciary would have had even greater power to alleviate, or at least affect, the impact of the recession. See Elizabeth Williamson & Ruth Simon, *Plan to Cut Foreclosure Rate Clears Key Hurdle*, WALL ST. J., Jan. 9, 2009, at A1, available at <http://online.wsj.com/article/SB123144562914865337.html>; Greg Hitt, *House Centrists Prevail on Altering Mortgages in Bankruptcy*, WALL ST. J., Mar. 6, 2009, at A4, available at <http://online.wsj.com/article/SB123627573111742079.html>; Janet Hook, *Mortgage Reduction Bill Fails in Senate*, L.A. TIMES, May 1, 2009, at B1, available at <http://articles.latimes.com/2009/may/01/business/fi-cramdown1>.

7. See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1369–80 (1998).

everyone agrees to be a severe recession following a major credit crisis.<sup>8</sup> The stock market has crashed.<sup>9</sup> The job market is hopeless.<sup>10</sup> Many people have lost their livelihood, their pension for retirement, or their money in some other form.<sup>11</sup> The horses have escaped from the barn. What can we do now to get control of them and drag them back where they belong? What can be done to recover what has been lost? In that connection, there is one thing we can be certain of: there will be many law suits. There will be an almost universal feeling that so much would not have been lost unless someone had done something wrong, or the law had been broken in some way. Someone has failed to do his duty. The ostensible purpose of the law suits will be to restore money and property to their rightful owners, but in many cases it will be evident from the beginning that the parties sued are not good for much cash and that restitution is a vain hope.

What is really driving the situation and the pervasive impulse to have recourse to the courts is a need to fix responsibility, to find out who screwed up and make them pay—at least something.<sup>12</sup> So we find that the courts, which are responsible for restoring the status quo and effecting restitution, are really fulfilling a symbolic function—assuring the victims that they have identified the sources of their woes and made the names of the miscreants into household words. A judicial disposition relieves the victims of the intolerable feeling that somehow an anonymous and impersonal system, through no fault of their own and for no good reason that they can see, has relieved them of their financial security and left them without even someone to blame. At least the courts can give them someone to blame.

And not infrequently, for good reasons and for bad, the overwhelming impulse to find a guilty perpetrator leads to criminal prosecutions as an inevitable consequence of financial debacles. So far, criminal prosecution has not played a leading role in countering the present economic and financial distress, but I feel sure that demands for

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8. See George Soros, *The Worst Market Crisis in 60 years*, FT.COM, Jan. 22, 2008, [http://www.ft.com/cms/s/0/24f73610-c91e-11dc-9807-000077b07658.html?nclink\\_check=1](http://www.ft.com/cms/s/0/24f73610-c91e-11dc-9807-000077b07658.html?nclink_check=1).

9. See *Where Have All Your Savings Gone*, ECONOMIST, Dec. 6, 2008, at 13.

10. See *Bad or Worse?*, ECONOMIST, Oct. 9, 2008, at 41; Conor Dougherty, *Soaring Job Losses Drive Stimulus Deal*, WALL ST. J., Feb. 7, 2009, at A1, available at <http://online.wsj.com/article/SB123392627601156735.html>.

11. See *Retirement Dreams Disappear with 401(k)s*, CBSNEWS.COM, Apr. 19, 2009, <http://www.cbsnews.com/stories/2009/04/17/60minutes/main4951968.shtml>.

12. See Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 123 (1996); Nicole B. Casarez, *Punitive Damages in Defamation Actions: An Area of Libel Worth Reforming*, 32 DUQ. L. REV. 667, 693 (1994) (observing that wronged private plaintiffs typically sue for damages and retribution).

prosecution will not be long in coming.<sup>13</sup> Of course, at least one criminal prosecution has already been brought—the Bernie Madoff affair<sup>14</sup>—which was an old-fashioned Ponzi scheme and not really part and parcel of the global credit crisis and attendant recession.<sup>15</sup> That Madoff should be prosecuted was about as undebatable as anything could be and required no microscopic examination of accounting methodology. But that financial disasters lead inevitably to criminal prosecution (sometimes of questionable merit) has been demonstrated time and time again in the history of the country.<sup>16</sup>

A famous example is provided here in Chicago in the aftermath of the 1929 crash.<sup>17</sup> In the 1920s, Samuel Insull was the most prominent citizen of Chicago, with the possible exception of Al Capone.<sup>18</sup> He virtually invented the electric utility business.<sup>19</sup> Later, in what proved to be his undoing, he interested himself in acquiring electric utilities around the country, bringing them together in what came to be called a utility holding company.<sup>20</sup> Insull's holding company acquired a reputation as a gilt-edged investment sold to widows and orphans, as well as affluent citizens throughout the country. Since the holding company was a pyramid, encumbered by debt at every level, it could magnify the ever-increasing revenues from sales of electricity in prosperous times but proved to be vulnerable when revenues declined, as they did for the first time in history at the bottom of the Great

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13. See Cary O'Reilly & Linda Sandler, *Judges Punish Wall Street as Regulators Just Talk About Reform*, BLOOMBERG.COM, Sept. 8, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5wZ95KdSuJQ>.

14. See Diana B. Henriques, *Madoff, Apologizing, is Given 150 Years*, N.Y. TIMES, June 30, 2009, at A1.

15. See *The Madoff Affair: Con of the Century*, ECONOMIST, Dec. 18, 2008, at 28.

16. See Ashley Laurel Wilson, *Lawsuit Increase Forecasted Due to Economic Recession*, CIO.COM, Nov. 17, 2008, [http://www.cio.com/article/463817/Lawsuit\\_Increase\\_Forecasted\\_Due\\_to\\_Economic\\_Recession\\_](http://www.cio.com/article/463817/Lawsuit_Increase_Forecasted_Due_to_Economic_Recession_); Etain Lavelle, *Financial Turmoil May Lead to Wave of Lawsuits*, THE DAILY MAIL (London), Mar. 25, 2009, available at <http://www.dailymail.co.uk/money/article-1164585/Financial-turmoil-lead-wave-lawsuits.html>.

17. For a discussion of the 1929 crash, see MAURY KLEIN, *RAINBOW'S END: THE CRASH OF 1929* (Oxford Univ. Press 2001).

18. For a more in-depth exploration of Insull's history by the author, see Hon. Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L.J. 35 (2005); see also JOHN F. WASIK, *THE MERCHANT OF POWER: SAM INSULL, THOMAS EDISON, AND THE CREATION OF THE MODERN METROPOLIS* (2006).

19. See Jim Rossi, *Universal Service in Competitive Retail Electric Power Markets: Whither the Duty to Serve?*, 21 ENERGY L.J. 27, 30–31 (2000).

20. See Alan Richardson & John Kelly, *The Relevance and Importance of Public Power in the United States*, 19 NAT. RESOURCES & ENV'T 54, 55 (2005).

Depression in the early 1930s.<sup>21</sup> Then, refusal of the New York bankers to renew Insull's credit when he was desperate for cash sent his holding company into receivership, and 600,000 stockholders were wiped out.<sup>22</sup> Needless to say, the public outrage at Mr. Insull was broad and intense and far more focused than even the present anger at AIG. The public widely viewed him as dishonest and incompetent.

Insull decided not to stick around and persuade the public of its error, and he fled to Greece, a nation with which the United States did not then have an extradition treaty.<sup>23</sup> (I once met the lawyer who got the credit for advising Insull about Greece). From Greece, Insull traded pleas of innocence with threats of prosecution with the United States government for more than a year and then shipped out on a vessel bound for Istanbul.<sup>24</sup> The Turkish government proved more amenable to U.S. persuasion than the Greek government, and eventually Insull found himself aboard an American ship bound for New York.<sup>25</sup> From there he pressed on back home to Chicago, where he had been indicted for mail fraud based on the allegation that the accounting reports of his company were fraudulent and deceptive.<sup>26</sup> Numerous accountants testified against him for days and weeks on end and he eventually took the stand in his own defense. He told the story of his life: born a poor boy in London, then secretary to the great inventor, Thomas Edison, and an executive of Edison's enterprises. In fact, he eventually made his way up the business ladder in the United States too. The jury was out for only two hours and came in with a verdict of "not guilty."<sup>27</sup>

So far, the present crisis in this country has not led to a rash of criminal prosecutions patterned on Insull's case, but mounting public indignation directed at the banks and other financial institutions and intense prosecutorial interest on the part of such offices as the New York Attorney General and the Department of Justice suggests that the impoverished victims of this crash will be no less avid for vengeance than those who have gone before.<sup>28</sup> Whether the criminal prosecutions

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21. See Nidhi Thakar, *The Urge to Merge: A Look at the Repeal of the Public Utility Holding Company Act of 1935*, 12 LEWIS & CLARK L. REV. 903, 908-09 (2008).

22. See *id.*

23. See Markian M.W. Melnyk & William S. Lamb, *PUHCA's Gone: What Is Next for Holding Companies?*, 27 ENERGY L.J. 1, 4 (2006).

24. See *United States v. Insull*, 8 F. Supp. 310 (N.D. Ill. 1934).

25. See *id.*

26. See *id.*

27. See ROBERT GRANT & JOSEPH KATZ, *THE GREAT TRIALS OF THE TWENTIES: THE WATERSHED DECADE IN AMERICA'S COURTROOMS* 243 (Sarpedon 1998); David A. Skeel, Jr., *Icarus and American Corporate Regulation*, 61 BUS. LAW. 155, 156 (2005).

28. See David W. Ogden, Remarks of Deputy Attorney General at the Compliance Week

to come will be more meritorious or successful than the charges against Insull remains to be seen. But the judges and juries will have their work cut out for them.

Less than ten years ago, we were treated to a rash of criminal prosecutions arising from spectacular business failures.<sup>29</sup> These were collapses pretty much restricted to their own circumstances and not reflecting a malaise affecting the whole economy. But public indignation at the financial damage and the prominence of the alleged wrongdoers are very much the same as today. A quartet of failed or severely troubled companies, whose executives were targeted, comes to mind: Enron, Tyco, WorldCom, and Global Crossing.<sup>30</sup> Enron is, of course, the most renowned.<sup>31</sup> Fiercely touted in a booming stock market, its shares soared above the \$100 mark only to collapse into worthlessness in little more than a year. Enron, which was a strident advocate of deregulating the energy markets, gained a glowing reputation for innovation and progressive thinking.<sup>32</sup> Through its chairman, Kenneth Lay, it dabbled in politics and gained immense prestige as a political power.<sup>33</sup> But the end came in 2000 and 2001 when its accounting had to be repeatedly revised and its stock price collapsed.<sup>34</sup> Bankruptcy and criminal prosecution for the executives followed in short order. Lay and Jeff Skilling, president and chief

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Keynote Address (June 4, 2009), <http://www.usdoj.gov/dag/speeches/2009/dag-speech-090604.html> (“The appropriate role of the Department of Justice in responding to this crisis is clear: We will be relentless in our investigation of corporate wrongdoing, and will not hesitate to bring charges, where appropriate, for criminal misconduct on the part of businesses and business executives.”); Zachary A. Goldfarb, *Bank of America Pays \$33 Million to Settle Merrill Bonus Charges*, WASH. POST., Aug. 4, 2009, at A11; James Quinn, *US Inquiry into CDS Market Begins*, DAILY TELEGRAPH (London), July 15, 2009; *see also* The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (“An act to improve enforcement of mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to Federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes.”).

29. *See* Edward B. Diskant, Note, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 170–71 (2008); Pamela H. Bucy, *Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287 (2007).

30. *See* Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1435 (2007).

31. *See* CHRISTOPHER L. CULP & WILLIAM A. NISKANEN, CORPORATE AFTERSHOCK: THE PUBLIC POLICY LESSONS FROM THE COLLAPSE OF ENRON AND OTHER MAJOR CORPORATIONS (2003).

32. *See* LOREN FOX, ENRON: THE RISE AND FALL 77–97 (2003).

33. *See* Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1505 n.52 (2005); William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1279–80 (2002).

34. *See* FOX, *supra* note 32, at 6.

operating officer, were indicted and tried on securities and wire fraud charges.<sup>35</sup> Lay died before sentencing, but Skilling was sentenced to twenty-four years.<sup>36</sup> Andrew Fastow, financial vice president and designer of the balance-sheet schemes, also faced ten years.<sup>37</sup> Considering losses to investors and to employees, who lost their jobs, pensions, and much of their savings, there was a groundswell of outrage to be satisfied.<sup>38</sup>

The story at WorldCom, a telecommunications company, was very much the same.<sup>39</sup> Here there had been some quite exotic accounting, including the recording of operating expenses as capital items. The CEO was Bernie Ebbers, a likable chap, who ended up serving twenty-five years.<sup>40</sup> Again the losses involved were staggering and public taste for blood was palpable.

Tyco did not go into bankruptcy but its CEO, Dennis Koslowski, faced a twenty-five-year sentence.<sup>41</sup> Other executives went to prison as well. Loans and unauthorized compensation to executives were at the heart of the problem. Here, publicity evoked much public indignation. At Global Crossing, another telecommunications company, no one went to prison, but Gary Winnick, the chairman, had to pay \$55 million to settle a class action suit.<sup>42</sup>

Furthermore, criminal charges were brought against Richard Scrushy, the CEO of a healthcare firm in Alabama.<sup>43</sup> First, he was acquitted on accounting fraud charges<sup>44</sup> (after joining a Birmingham church, and

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35. See Kristen Crawford, *Lay Surrenders to Authorities*, CNNMONEY.COM, July 12, 2004, <http://money.cnn.com/2004/07/08/news/newsmakers/lay/>; *Skilling Indicted for Fraud*, CNNMONEY.COM, Feb. 19, 2004, <http://money.cnn.com/2004/02/19/news/companies/skilling/index.htm>.

36. See Kurt Eichenwald, *Enron Founder, Awaiting Prison, Dies In Colorado*, N.Y. TIMES, July 6, 2006, at A1; *Former Enron CEO Skilling Gets 24 Years*, MSNBC.COM, Oct. 23, 2006, <http://www.msnbc.msn.com/id/15389150/>. On October 13, 2009, the Supreme Court agreed to hear Skilling's case. See *Skilling v. United States*, 2009 WL 1321026 (U.S.) (2009).

37. See Kate Murphy & Alexei Barrionuevo, *Fastow Sentenced to 6 Years*, N.Y. TIMES, Sept. 27, 2006, at C1.

38. See John Leubsdorf, *Legal Ethics Fall Apart*, 57 BUFF. L. REV. 959, 1017–18 (2009).

39. See DENNIS R. BERESFORD ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF WORLD.COM, INC. (2003), <http://www.sec.gov/Archives/edgar/data/723527/000093176303001862/dex991.htm>.

40. See *United States v. Ebbers*, 458 F.3d 110 (2d. Cir. 2006).

41. See Grace Wong, *Kozlowski Gets Up to 25 Years*, CNNMONEY.COM, Sept. 19, 2005, [http://money.cnn.com/2005/09/19/news/newsmakers/kozlowski\\_sentence/index.htm](http://money.cnn.com/2005/09/19/news/newsmakers/kozlowski_sentence/index.htm).

42. See Almar Latour & Dennis K. Berman, *Global Crossing SEC Deal Expected*, WALL ST. J., Mar. 22, 2004, at A8.

43. See Simon Romero, *The Rise and Fall of Richard Scrushy*, *Entrepreneur*, N.Y. TIMES, Mar. 21, 2003, at C4.

44. See Greg Farrell, *Scrushy Acquitted of All 36 Charges—Ex-HealthSouth CEO Had Been*

contributing a million dollars to it, thereby allegedly tainting the jury pool<sup>45</sup>), and then convicted on bribery charges and sentenced to eighty-two months.<sup>46</sup> Thus, bankruptcy is frequently followed by corporate fraud charges, and it is an old story how this can be triggered by public indignation driven by widespread financial losses. So there is reason to believe that criminal prosecutions may be in the offing as a product of current financial problems, even though the problems may appear to be more the fruit of a stormy financial climate rather than the result of the misdeeds of an identifiable human being punishable under the criminal law.<sup>47</sup> The task of distinguishing between crime, of which there may in fact be quite a lot, and inept navigation through dangerous financial shoals that results in painful loss, will challenge the judiciary.

Of course, as I mentioned earlier, the judiciary also plays a role in the regulatory process. This is often, but not necessarily, initiated in the administrative agencies. There has been much talk about the need for more and better regulation to avoid the pitfalls that have apparently led to the current collapse.<sup>48</sup> I say “apparently” because no one seems to be entirely sure of the steps and missteps leading to the present crisis.<sup>49</sup> However, it seems to be reasonably clear that it all began with sub-prime mortgages—that is, mortgages applying less than rigorous standards and more likely than average to default—and spread from there to packages of mortgage-backed securities of unknown quality offering unknown risks as they made their way through the channels of securitization.<sup>50</sup> These processes were complicated by the massive use of credit derivatives, which were developed only recently and lacked accountability.<sup>51</sup> Merely requiring these credit derivatives to be traded on exchanges, and thereby to be accounted for, would be a substantial

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*Accused in \$2.7 Billion Fraud*, USA TODAY, June 29, 2005, at 1A.

45. See Simon Romero, *Will the Real Richard Scrushy Please Step Forward; Race, Religion and the HealthSouth Founder's Trial*, N.Y. TIMES, Feb. 17, 2005, at C1.

46. See *Fact Sheet: Department of Justice Public Corruption Efforts*, U.S. FED. NEWS, Mar. 27, 2008, 2008 WLNR 5916347.

47. See Andrew J. Ceresney, Gordon Eng, & Sean R. Nuttall, *Regulatory Investigations and the Credit Crisis: The Search for Villains*, 46 AM. CRIM. L. REV. 225 (2009).

48. See, e.g., Tyler Cowen, *Too Few Regulations? No, Just Ineffective Ones*, N.Y. TIMES, Sept. 13, 2008, at BU7.

49. For some representative views, see POSNER, *supra* note 5; GEORGE SOROS, *THE CRASH OF 2008 AND WHAT IT MEANS: THE NEW PARADIGM FOR FINANCIAL MARKETS* (2009); PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2009); JOHN B. TAYLOR, *GETTING OFF TRACK: HOW GOVERNMENT ACTIONS AND INTERVENTIONS CAUSED, PROLONGED AND WORSENE THE FINANCIAL CRISIS* (2009).

50. See *The Economy: A Thoroughly Modern Recession*, ECONOMIST, Dec. 6, 2008, at 83; *America's Housing Market: Cracks in the Façade*, ECONOMIST, Mar. 24, 2007, at 60.

51. See *Capitalism at Bay*, ECONOMIST, Oct. 18, 2008, at 16.

regulatory move. Obviously, the technical details of regulation would have to be applied by the agencies, but the system would be undergirded by the courts and the judges, who would have the last word in the regulatory process.

In large part as a result of this financial debacle, which seems so inexplicable to everyone, we are undergoing a revolution in thinking about regulation.<sup>52</sup> Starting in the Forties and ongoing until very recently, legal thinking has been increasingly antagonistic to regulation. Deregulation has been favored wherever it could possibly be justified.<sup>53</sup> This has been the case in the so-called “regulated industries”—transportation, telecommunications, electric power, and so on.<sup>54</sup> It has also been the case in the financial industries where it played a role in the savings and loan crisis in the Eighties as well as now in the present credit crisis.<sup>55</sup> Deregulation and reliance on the market as the arbiter of all issues has been the conventional wisdom for a long time. This kind of thinking is still playing a decisive role today in preventing the nationalization of the banks.<sup>56</sup> But the present debacle is showing the deficiencies of this kind of thinking and the dangers of excessive reliance on markets in maintaining economic equilibrium. Thinking now will turn decisively to regulation for an indefinite period<sup>57</sup>—perhaps excessively, in reaction to the long swing away from it<sup>58</sup>—but there will certainly be a turn now, and it will be up to the judges, as the ultimate enforcers of the administrative state, to support the turn and at the same time prevent it from going astray.

In conclusion, I think the judiciary has important roles to play as we seek to climb out of the financial pit. First, it must preside at the various trials after the collapse—civil and criminal—that seek to put Humpty Dumpty together again and to inflict just retribution on those responsible. But the watchword here is justice, not merely revenge for its own sake. Second, the judiciary must provide firm support for the

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52. See *Government v. Market in America: The Visible Hand*, *ECONOMIST*, May 30, 2009, at 34.

53. See Kearney & Merrill, *supra* note 7.

54. See *id.*

55. See Steven L. Schwarcz, *Systemic Risk*, 97 *GEO. L.J.* 193, 243–45 (2008); David Leonhardt, *Washington’s Invisible Hand*, *N.Y. TIMES*, Sept. 28, 2008, at 32 (Magazine).

56. Cf. Steve Lohr, *U.S. Not Always Averse to Nationalization, Despites Its Free-Market Image*, *N.Y. TIMES*, Oct. 13, 2008, available at <http://www.nytimes.com/2008/10/13/business/worldbusiness/13iht-nationalize.4.16915416.html>.

57. See Cudahy, *supra* note 5; *Wall Street’s New Shape: Rearranging the Towers of Gold*, *ECONOMIST*, Sept. 12, 2009, at 10.

58. See *America’s Long-Run Growth Potential*, *ECONOMIST*, May 16, 2009, at 39 (opining that “more regulation, in finance and beyond, could deter innovation”).

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regulatory regime which will be coming into force to stabilize the economy.