White-Collar Crime and the Recession: Was the Chicken or Egg First?

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INTRODUCTION

The recent news media is filled with continual stories of white-collar crimes.¹ One finds a growing list of Ponzi schemes,² mortgage frauds,³ and financial-institution crimes.⁴ It cannot go unnoticed that Bernard Madoff defrauded thousands of investors

† Professor of Law, Stetson University College of Law. Thanks go to research assistant Christina L. Kimball.

¹ See, for example, Associated Press, 26 Arrested in Three States in Medicare Fraud Schemes, NY Times A33 (Dec 15, 2009) (discussing arrest of twenty-six in a $61 million Medicare fraud crackdown); Zachary Kouwe, Lawyer Pleads Guilty to Selling Insider Tips, NY Times B3 (Dec 11, 2009) (discussing an insider-trading ring that has implicated thirty people thus far). See also Ellen S. Podgor, In the News and Around the Blogosphere (White Collar Crime Prof Blog 2010), online at http://lawprofessors.typepad.com/whitecollarcrime_blog/news (visited Sept 9, 2010) (compiling links to news stories in newspapers and on blogs that are related to white-collar crime).

² See, for example, Michael Pollick, Ponzi Convictions Are Weightier Now, Sarasota Herald-Trib A1 (Dec 20, 2009) (discussing the increased sentences for Ponzi schemes because of the increased number being noticed); Michael Pollick, Has the Gulf Coast Become a Ponzi Haven?, Sarasota Herald-Trib A1 (Sept 21, 2009) (discussing different Ponzi schemes that have occurred in Florida); Leslie Wayne, The Mini-Madoffs, NY Times B1 (Jan 28, 2009) (discussing different Ponzi schemes that have been discovered in the aftermath of the Madoff scheme).


in what is considered one of the largest personal frauds in United States history. The public, outraged by white-collar crime, has applauded sentences that far exceed typical sentences issued in the past, with many first-time offenders receiving double-digit sentences. Equally persuasive evidence that white-collar crime is a significant issue is the growing list of corporate crimes. An expanding list of companies have entered into deferred and non-prosecution agreements with the government to minimize their exposure in a post-Arthur Andersen world.

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8 See Testimony of Assistant Attorney General Lanny Breuer at 7 (cited in note 3). Assistant Attorney General Lanny A. Breuer, in a recent report to the Senate Judiciary Committee, noted that the Department of Justice had “obtained approximately 1,300 corporate fraud convictions, including convictions of more than 200 corporate executives or presidents, more than 120 vice presidents, and more than fifty chief financial officers” since 2002. See also Mark Filip et al, Report to the President—Corporate Fraud Task Force (DOJ 2008), online at http://www.justice.gov/archive/dag/cftf/corporate-fraud2008.pdf (visited Sept 9, 2010) (providing descriptions of various corporate crimes prosecuted by the Department of Justice, Federal Bureau of Investigation, Department of Labor, and other agencies). But see Matt Ackermann, SEC Settlements Fall for Second Year (OnWallStreet Dec 7, 2009), online at http://www.onwallstreet.com/news/SEC-settlements-survey-2664906-1.html (visited Sept 9, 2010) (noting that SEC settlements declined by 6.98 percent in 2009 to 626, the lowest annual number of settlements since 2002, when the Sarbanes-Oxley Act was implemented).

9 See, for example, Wallace Witkowski, Beazer Settles with North Carolina, Feds (Wall St J Marketwatch July 1, 2009), online at http://www.marketwatch.com/story/beazer-settles-with-north-carolina-feds (visited Sept 9, 2010) (discussing the $7.5 million contribution that Beazer will make as part of a deferred prosecution agreement with the government); US Department of Justice Press Release, Novo Nordisk Agrees to Pay $9 Million Fine in Connection with Payment of $1.4 Million in Kickbacks Through the United
In addition to white-collar crime being at the forefront of the daily press, the media is filled with stories about our troubled economy.\(^1\) One finds unemployment figures that far surpass figures of five or ten years ago\(^2\) and economists are united in designating the recent past as a period of recession.\(^3\)

Although the existence of high-profile white-collar crime and the economic recession are areas of recent concern, the correla-

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\(^1\) Companies are amenable to paying large sums of money as fines to avoid the possibility of an indictment that can have huge collateral consequences, such as the demise of the company, as was seen following the Arthur Andersen LLP prosecution. See *Arthur Andersen LLP v United States*, 544 U.S. 696 (2005). See also Ellen S. Podgor, *Educating Compliance*, 46 Am Crim L Rev 1523, 1524 n 9 (2009) (discussing the example of Arthur Anderson, which risked going to trial and did not survive, despite a later decision in favor of the company by the Supreme Court).

\(^2\) See, for example, Hope Yen, *Recession Pushes Income Gap Between Rich and Poor* (USA Today Online Sept 29, 2009), online at http://www.usatoday.com/money/economy/2009-09-29-income-gap-census_N.htm (visited Sept 9, 2010) (discussing who has been hit the hardest by the recession); Justin Lahart, *The Great Recession: A Downturn Sized Up*, Wall St J A12 (July 28, 2009).

tion between these two phenomena is less clear.\textsuperscript{14} As targets for causes of the economic downtown, darts are being thrown at the subprime market\textsuperscript{15} and the non-prosecution of white-collar criminality due to the increased Department of Justice (DOJ) focus on terrorism.\textsuperscript{16} A blame-game mentality can perhaps be seen, and in some cases there is merit to these allegations. After all, recent Ponzi schemes failed to be noticed until significant harm had occurred to victims.\textsuperscript{17} Additionally, corporate criminality that negatively influenced the financial market often remained undetected with no prosecution.\textsuperscript{18}

But the question remains as to whether white-collar criminality is an effect of the recession or in fact a cause of the recession. Is it that white-collar crime only becomes apparent because of the downturn in the economy, or has this criminal conduct influenced the economic realities presently being experienced?

This Article looks at the causal connection between white-collar crime and the recession, with an emphasis on the ramifications to white-collar crime detection and prosecution as a result of the economic downturn. The Article considers accountability, and how the lack of accountability factors into the recession.\textsuperscript{19} Also considered is blame, and whether the blame directed at individuals or circumstances related to white-collar crime is warranted or merely a reaction to the negative downturn in the economy.\textsuperscript{20}

\textsuperscript{14} See Andy Giegerich, \textit{White-Collar Crime Strikes Often in Times of Recession} (Portland Bus J May 25, 2009), online at http://portland.bizjournals.com/portland/stories/2009/05/25/focus4.html (visited Sept 9, 2010) (discussing how certain white-collar crimes increase during a recession); Sean P. Murphy, \textit{As Economy Falls, Fraud Reports Rise}, Boston Globe 29 (Feb 16, 1991) (noting how the recession is exposing frauds that were previously undetected and causing more fraud to occur).


\textsuperscript{16} See notes 34–41 and accompanying text.

\textsuperscript{17} See notes 29–33 and accompanying text.

\textsuperscript{18} See note 4 and accompanying text.

\textsuperscript{19} See Part I and accompanying text.

\textsuperscript{20} See Part II and accompanying text. It is important to note that assessing the effect
Finally, even though transparency now allows us to reevaluate the financial downturn, it is important to recognize that there are collateral consequences of financial crises that may affect the prosecution of white-collar crime. This Article looks at one possible factor that might decrease white-collar prosecutions—the decline of print media, and a second factor that might increase white-collar prosecutions—new legislation and funding to monitor government stimulus money. This Article concludes by noting that continued transparency is imperative to decreasing white-collar criminality.

I. ACCOUNTABILITY

It is unclear whether a lack of accountability caused the economic downturn, furthered its cause, or just increased the impact on many in society. The subprime market was out of control and because it was not sufficiently monitored there were repeated instances of fraud. In some instances, the frauds that were

of the recession on white-collar criminality and its prosecution is hindered by the statistical reporting methods used in tracking white-collar crime, most notably by the fact that there is no category called white-collar crime in the reporting of these crimes. See Ellen S. Podgor, Is DOJ “Cooking the Books” in Its Reporting of White Collar Crime? (White Collar Crime Prof Blog Nov 14, 2005), online at http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/11/is_doj_cooking.html (visited Sept 9, 2010) (discussing the problems that arise because white-collar crime is not tracked as a separate category). See also Ellen S. Podgor, The Challenge of White Collar Sentencing, 97 J Crim L & Criminol 731, 736-37 (2007) (noting that there is “a noticeable discrepancy in the way the Department of Justice (DOJ) recognizes white collar crime”).

21 See notes 90-102 and accompanying text.
22 See notes 103-112 and accompanying text.
23 See Conclusion.
25 See Raymond H. Brescia, Trust in the Shadows: Law, Behavior, and Financial Re-Regulation, 57 Buff L Rev 1361, 1363-64 (2009) (asserting that the trust placed by regu-
eventually prosecuted had caused enormous losses. The high loss figure may have been due in part to the length of time that these frauds had gone undetected.

The Securities and Exchange Commission (SEC) was an office with lax regulation and enforcement, and Ponzi schemers were allowed to draw in numerous individuals without scrutiny. This is apparent in examining what happened in the Madoff matter. The Inspector General’s Report titled, Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme (Madoff Report) stated that the failure to detect Madoff’s fraud was not a result of ethical improprieties or conflicts of interest. The Madoff Report noted that there was no evidence to support any finding that “any SEC personnel who worked on an SEC examination or investigation of Bernard L. Madoff Investment Securities, LLC (BMIS) had any financial or other inappropriate connection with Bernard Madoff or the Madoff family that influenced the conduct of their examination or investigatory work.” But while finding no deliberate unethical conduct, the level of competence and oversight of this regulatory body was extremely weak. The Office of Inspector General (OIG) investigation found “that the SEC received more than ample information in the form

26 See Alex Berenson and Diana B. Henriques, Look Back at Wall St. Wizard Finds Magic Had Skeptics, NY Times Al (Dec 13, 2008) (discussing the large losses suffered by Madoff investors).


30 See Madoff Report at 1 (cited in note 28).

31 Id.
of detailed and substantive complaints over the years to warrant a thorough and comprehensive examination and/or investigation of Bernard Madoff and BMIS for operating a Ponzi scheme.\textsuperscript{32} The Madoff Report further stated "that despite three examinations and two investigations being conducted, a thorough and competent investigation or examination was never performed."\textsuperscript{73}

In addition to a subprime market and lax regulation, oversight was weakened as the Federal Bureau of Investigation (FBI) focused on terrorism.\textsuperscript{34} Post-September 11th, there were agent reductions on investigations related to white-collar crime and other non-terrorism activities. The reduction in agents likely resulted in the reduced number of white-collar prosecutions.\textsuperscript{35} A 2004 Inspector General Report noted how many FBI agents were transferred from "drug, violent crime, and white-collar crime matters to terrorism-related programs."\textsuperscript{36} Where white-collar crime was a top priority of the Department of Justice in 1991, by 2003 the emphasis in the department had significantly shifted,\textsuperscript{37} including a reallocation of non-supervisory field agents. For example, in FY 2000 there were 2,460 non-supervisory field agents, and in 2003, that number had dropped to 2,303.\textsuperscript{38} It is, therefore,

\textsuperscript{32} Id.

\textsuperscript{33} Id.


\textsuperscript{35} See Paul Shukovsky, Tracy Johnson and Daniel Lathrop, The FBI's Terrorism Trade-Off (Seattle Post-Intelligencer Apr 11, 2007), online at http://www.seattlepi.com/national/311046_fbiterror11.html (visited Sept 9, 2010) ("Thousands of white-collar criminals across the country are no longer being prosecuted in federal court—and, in many cases, not at all—leaving a trail of frustrated victims and potentially billions of dollars in fraud and theft losses.").

\textsuperscript{36} FBI Reprioritization at iii (cited in note 34).

\textsuperscript{37} See Charles Anzalone, White-Collar Crime Has Become Priority of Law Enforcement, Buffalo News 1 (Apr 28, 1991) (describing how local FBI agents view white-collar crime at the biggest threat to the area); See also FBI Reprioritization at 8 (cited in note 34) (describing the refocusing of the FBI's mission in 2002, which made terrorism the top priority and white-collar crime the seventh priority); Joe Tone, Priority Shift Raises Concerns FBI's Terrorism Focus Could Hamper Local Cops, Sun Herald (Biloxi) 1 (June 17, 2002) (discussing how FBI agents are being shifted from white-collar cases to antiterrorism cases).

\textsuperscript{38} FBI Reprioritization at 17 (cited in note 34) (reporting the FBI's reallocation of
no surprise that the decrease in personnel working on white-collar cases would result in a decrease in white-collar prosecutions. As noted in the 2004 OIG’s report titled The Internal Effects of the Federal Bureau of Investigation’s Reprioritization, “[t]he FBI opened over 50 percent more Domestic Terrorism cases in FY 2003 than in FY 2000.” 39 This is in contrast to the fact that “the FBI opened over 50 percent fewer Organized Crime/Drug cases, 40 percent fewer Violent Crime cases, and more than 25 percent fewer White-Collar Crime cases in FY 2003 than in FY 2000.” 40 The personnel shift was felt not only with federal-level decreases, but it also trickled down to parallel and joint white-collar state investigations. 41

Only recently do we see legislation attempting to return accountability and oversight to post-September 11th levels. Most recently, the proposed FBI Priorities Act of 2009 introduced in the Senate provides for increased funding to hire new agents who would focus on investigating white-collar crime. 42 The proposed legislation acknowledges the redirection of funds to “counterterrorism and counterintelligence activities” post-September 11, 2001. 43 It also acknowledges that “[c]riminal activity, including fraud, misrepresentation, self-dealing, and insider trading may have played a role in the financial industry upheaval of 2008 and 2009.” 44 The proposed Act calls for an appropriation of “$150,000,000 for each of the fiscal years 2010 through 2014 to fund 1,000 Federal Bureau of Investigation field agents to investigate financial crimes.” 45 This is not the first time that an attempt has been made to restore law enforcement efforts beyond terrorism activities. 46

field agents in exhibit 2–7).

39 Id at 61.
40 Id at 34.
41 Id at 113–25 (noting the reductions of agents in FBI field offices that were focused on investigating white-collar crime).
43 FBI Priorities Act 2009 at § 2(2) (cited in note 42).
44 Id at § 2(3).
45 Id at § 3.
46 Senator Biden Introduces Bill to Hire 1,000 More FBI Agents to Help Fight Crime,
But even if there are successful attempts to restore funds for white-collar crime investigations and prosecutions, the downturn in the economy may prove to be an impediment to reducing white-collar crime because of reduced private sector assistance. The federal sentencing guidelines for organizations provide incentives to companies for effective programs that monitor against criminal conduct. Companies that “exercise due diligence to prevent and detect criminal conduct” \(^{47}\) through “effective compliance and ethics programs,” \(^{48}\) and that self-report and cooperate with the government when criminality does occur, receive benefits when computing the fine that will be imposed upon them. In the economic downturn, however, companies seeking to ensure corporate compliance may find themselves financially constrained by a world that requires cost-cutting, layoffs, and budget trimming. \(^{49}\) Companies may not be able to invest the funds necessary to provide the internal accountability required to assure proper oversight that would detect fraud. \(^{50}\)

II. BLAME

Retribution is sought and blame is placed in the aftermath of a financial crisis, and this one is no different. \(^{51}\) White-collar Ponzi schemers, mortgage fraudsters, and financial thieves are often targeted as the cause of the present financial downturn. \(^{52}\) As with most financial upheavals, legislation is implemented in hopes of preventing future problems or perhaps providing a political symbolism that avoids a reoccurrence. The reactive approach

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\(^{47}\) See USSG § 8B2.1 (2009).

\(^{48}\) Id at § 8C2.5(f).

\(^{49}\) See, for example, Shari A. Brown, *Shortcuts on FCPA Due Diligence Today Will Be Costly Tomorrow* (White Collar Crime Prof Blog Mar 3, 2009), online at http://lawprofessors.typepad.com/whitecollarcrime_blog/2009/03/shortcuts-on-fc.html (visited Sept 9, 2010) (discussing how companies who take shortcuts on diligence might find themselves under investigation in the next few years).

\(^{50}\) Id.

\(^{51}\) For example, issues of whom to blame were seen in discussions after the savings and loan crisis. See David A. Rosenbaum, *The Savings Debacle: A Special Report: A Financial Disaster With Many Culprits*, NY Times A1 (June 6, 1990) (discussing where to place the blame for the 1980s savings and loan crisis).

\(^{52}\) See Dominick Salvatore, *The Financial Crisis: Causes, Effects, Policies, Reforms, and Investment Strategies* 3 (GEAM Mar 2009), online at http://www.geam.com/common/newsdocs/The_Financial_Crisis-CEFRIS.pdf (visited Sept 9, 2010) (stating that a multitude of factors could have contributed to the financial crisis, including instances of fraud like the Madoff Ponzi scheme, subprime lending, and deregulation).
of passing criminal justice legislation to respond to white-collar criminality is not new. In the aftermath of the savings and loan crisis of the 1980s, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989. Likewise, following the Enron debacle, the Sarbanes-Oxley Act was passed by Congress.

But the speed of placing blame often ignores true factual information that comes from a thorough investigation of the crisis. For example, many have been quick to criticize fair value or "mark-to-market" accounting as causing or exacerbating the financial crisis. Yet, as authors Christian Laux and Christian Leuz note, empirical evidence proves otherwise. Equally improper in placing blame is to stereotype conduct into a category that may be overinclusive. This is the case when white-collar crime is stated as the cause of the economic downturn, as there is no designated category called white-collar crime in the statistical reporting process of the Department of Justice. Although the Department of Justice tracks fraud, bribery, and other offenses that might be considered forms of white-collar crime, there is no general category of white-collar crime for all these offenses. Further, the breadth of the offenses covered by

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58 White-collar crime was initially a sociological concept coined by Edwin Sutherland. See Podgor, 97 J Crim L & Criminol at 734–36 (cited in note 20) (discussing the origin of "white collar crime"). There are no set crimes as to what is included or not in the category of white-collar crime. See Ellen S. Podgor, Corporate and White Collar Crime: Simplifying the Ambiguous, 31 Am Crim L Rev 391–92 (1994) (discussing the fluctuating nature of white-collar crime).
60 Interesting questions arise here, such as whether one should include agriculture, antitrust, and food and drug crimes within the white-collar grouping. Additionally, crimes such as mail fraud under 18 USC § 1341 or § 1346 might be considered white-collar frauds, but when serving as predicate acts of RICO it might not be such an offense. See generally Podgor, 97 J Crim L & Criminol at 731 (cited in note 20) (emphasizing the need to include sociology as a factor in white-collar sentencing based on the nonviolent nature
what might be considered white-collar crime is enormous. For example, is a conspiracy offense a white-collar crime, or only when the conspiracy involves a fraud? Likewise, Racketeered Influenced and Corrupt Organization Act (RICO) cases are not classified to designate those with fraud predicates and those that might be related to non-white-collar cases such as organized crime activities.

Many argue that mortgage fraud or Ponzi schemes had a negative impact on the economy. Less vocal are allegations that bribery or Federal Food, Drug, and Cosmetic Act violations were the impetus for the economic downturn. If placing blame, it is important to recognize the breadth in white-collar crime and the fact that this grouping does not deserve retributive justice when it had little correlation to the sagging economy.

When blame is designated upon a constituency or body of law, the legislative reaction can be very pronounced. Penalties can be increased, new crimes or regulations created, and legislative money poured into rectifying what is perceived to be the problem. It is no wonder that we face overcriminalization as each legislative reaction seems timely with the crisis du jour.

of the crimes and the severe sentencing measures currently in place).

61 18 USC § 1961 et seq.


64 21 USC § 301 et seq (2006).


66 Mail fraud was once a crime that carried a maximum term of five years. It was increased to twenty years in 1990 and now carries a penalty of up to thirty years when it affects a financial institution. See 18 USC § 1341 (2009); Ellen S Podgor, Mail Fraud: Opening Letters, 43 SC L Rev 223, 263-67 (1992) (describing the increase in sentences for mail fraud by Congress in relation to RICO).

67 The increased scrutiny on health care fraud was crucial in the passage of a health care fraud statute, 18 USC § 1347 (2006).


The downside of this approach is seen in the movement by law enforcement away from areas related to white-collar crime and into terrorism activities following September 11th.\textsuperscript{70} As financial stability now looms at the top, there is less focus on corporate misconduct—a key focus in the wake of the Enron-related problems.\textsuperscript{71} What was once designated as the corporate fraud task force has now been incorporated into a financial fraud task force.\textsuperscript{72} The reactive model typically used after a crisis provides immediacy to solving the problem, but it often does not educate for comprehensively solving future legal issues.\textsuperscript{73} In the long run, one has to wonder whether plugging the hole in the dike by solving what may seem as an immediate problem will in fact place pressure in other places that may cause additional problems.

Prosecutors understandably feel the necessity to show the public that there will be punishment for criminal conduct, and the prominence of this criminal conduct may increase the public pressure on prosecutors to proceed with investigations and indictments. Criminality that may not have been heavily prosecuted in the past may now be targeted, and statutes such as mail fraud,\textsuperscript{74} wire fraud,\textsuperscript{75} or other generic statutes that allow a wide breadth of conduct to be included as criminal, are likely to be used.\textsuperscript{76} Prosecutors may respond by using “stop-gap”\textsuperscript{77} types of

\textsuperscript{70} See notes 34–41 and accompanying text.
\textsuperscript{73} See generally Podgor, 46 Am Crim L Rev at 1532 (cited in note 10) (discussing the importance of a proactive model towards eradicating criminality).
\textsuperscript{74} 18 USC § 1341 (2006).
\textsuperscript{75} 18 USC § 1343 (2006).
\textsuperscript{76} See John C. Coffee, Jr., Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 BU L Rev 193, 201 (1991) (discussing the breadth of some statutes that permit prosecutorial discretion on whether to proceed criminally or civilly).
\textsuperscript{77} See United States v Maze, 414 US 395, 405–06 (1974) (Burger, dissenting) ("When a 'new' fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil.").
statutes and stretching these statutes to meet new forms of criminality. A consequence of this approach is that it can deprive individuals of due process rights of notice as to what will be considered criminal. Most importantly, it is easier and more constitutionally sound to eradicate criminal conduct when individuals are aware of the crime and comply with the law because they recognize that their conduct is criminal, as opposed to criminalizing activity after the fact that individuals may not have been aware of as criminal. 78

Prosecutors may also resort to “shortcut” charges to demonstrate a quick response to the criminal conduct. 79 In this regard, we see charges of obstruction of justice, 80 false statements, 81 and perjury 82 as opposed to in-depth investigation and prosecution of the actual financial frauds. The simplicity of proceeding with these “short-cut” offenses, as opposed to long grand jury investigations that review all the documents and proceed on the merits of the case, permits prosecutors to easily obtain guilty pleas and convictions. 83 This process, however, can serve to diminish holding individuals accountable for the actual crimes that were the basis of an investigation. One hardly achieves a desired deterrence when the prosecution is not premised on the conduct that is sought to be eradicated.

III. TRANSPARENCY

The recession serves as the impetus to provide a transparency that brings to light Ponzi schemes and existing frauds, 84 such as mortgage frauds 85 and financial frauds. 86 As aptly noted by

78 Obviously, this does not apply to many of the Ponzi schemers who acted with intent and knowledge that is unquestioned.

79 See Ellen S. Podgor, Arthur Andersen, LLP and Martha Stewart: Should Materiality Be an Element of Obstruction of Justice?, 44 Washburn L J 583, 584 (2005) (arguing for closer scrutiny of prosecutorial choices that are made on expediency grounds or as a “shortcut”).


83 See generally Ellen S. Podgor, White Collar Innocence: Irrelevant in the High Stakes Risk Game, 85 Chi Kent L Rev 77 (2010) (arguing that the risk of going to trial results in many more plea bargains in the context of white-collar prosecutions, thereby making the process less about innocence or guilt and more about risk aversion).

84 See Kevin McCoy, Economic troubles Reveal Ponzi Plague; Recession Forces Some Unraveling Pyramid Schemes out into the Open, USA Today B1 (Apr 17, 2009) (discussing the fact that the recession has caused numerous Ponzi and other fraud schemes to collapse and expose themselves).

85 See generally FBI’s 2008 Mortgage Fraud Report “Year in Review” (cited in note 3) (providing an update to prior reports that described the breadth and depth of mortgage-
Warren Buffet, “it’s only when the tide goes out that you learn who’s been swimming naked.” The recession also leaves many wounds and the transparency accompanying the recession allows us to examine some of these injuries.

Noted here is one factor that might decrease white-collar prosecutions, and then another factor which may serve to increase these prosecutions. Looking first at a possible decrease of white-collar prosecutions is consideration of how the economy has affected the print media and how a declining print media can have a negative impact on investigative reporting that in the past played a role in uncovering white-collar criminality. Second, however, is the government bailout and its accompanying distribution of Trouble Asset Relief Program (TARP) funds that may lead to new prosecutions resulting from fraudulent conduct and mismanagement of funds that were received from the government. New institutional initiatives like the Financial Fraud Task Force provide a new emphasis on proceeding against this form of criminality; and this increased government scrutiny may also result in increased prosecutions of white-collar crimes. Whether these two occurrences, the decline of print media and increased prosecutions from fraudulent use of stimulus money, will result in a statistical wash remains to be seen.

Print media is driven by advertising. It is advertising that pays the predominant costs of the publication of newspapers.

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86 See McCoy, Recession Forces Unraveling Ponzi Schemes Into the Open, USA Today at B1 (cited in note 84) (discussing the manner in which Ponzi schemes are unearthed during a recession). See also Adam Smith, The Reasons Fraud Spikes in a Recession (Time May 20, 2009), online at http://www.time.com/time/business/article/0,8599,1899798,00.html (visited Sept 9, 2010) (noting that tough economic times lead to increased fraudulent activity and the reorganization of businesses uncovers existing fraud).


89 See generally notes 107-09 and accompanying text.


91 See Richard Perez-Pena, Newspaper Ad Revenue Could Fall as Much as 30 Percent, NY Times B3 (Apr 15, 2009) (“Newspapers count on advertising for the bulk of their revenue.”).
Three key advertising areas were significantly hurt by the economy—real estate, jobs, and sales.92 For example, the automobile industry that advertised extensively in print media suffered in the economic crisis, resulting in a decrease in their purchase of newspaper advertisements.93 Companies have merged, resulting in the consolidation of advertisements, as only one newspaper advertisement may be needed to cover the combined businesses.94 In addition to newspapers, magazines have also been hit hard by decreased advertising resulting from the recession.95

Advertising revenue is often related to circulation of the product, and a decreased circulation can result in decreased advertisements.96 The fewer subscribers, the less interest there is by advertisers to use this forum to disperse their products. Online access to news can reduce the number subscribing to print media, especially in a depressed economy.

Print media has historically played an important role in investigative reporting, including newspapers investigating key financial misconduct.97 The print media has also played an important role in uncovering white-collar crimes, especially those related to government corruption on the state and local level.98

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92 See Richard Hine, Recession Will Hit Newspapers Hardest (Gerson Lehrman Group News Feb 19, 2008), online at http://www.glgroup.com/NewsWatchPrefs/Print.aspx?pid=21861 (visited Sept 9, 2010) (discussing how classified advertisements were down in three major sectors: help wanted, real estate, and automotive); see also A Bright Spot Online for Automotive Ad Spend (Nielsenwire Apr 1, 2009), online at http://blog.nielsen.com/nielsenwire/online_mobile/a-bright-spot-online-for-automotive-ad-spend/ (visited Sept 9, 2010) (discussing what forms of advertising the automotive industry spent their money on in 2007 and 2008).
93 Id.
96 Developing Media Plans: Basic Advertising, (BusinessTown.com), online at http://www.businessstown.com/advertising/basic-media.asp (visited Sept 9, 2010) (explaining the essentials of advertising, including the correlation between media circulation and the product).
98 See Russell Wild and Margaret Engel, The Demise of Investigative Journalism (Huffington Post Mar 12, 2009), online at http://www.huffingtonpost.com/russell-wild-and-margaret-engel/the-demise-of-investigat_b_174438.html (visited Sept 9, 2010) (dis-
Between increased computerization and the recession, there has been a diminishing print media. In addition to the fact that many people now receive their news online, print newspapers across the United States are closing. Investigative reporter Laura Frank, in a two-part series, outlines many achievements of investigative reporters, while also noting the demise of this important media role.

It is clear that as print media suffers, it is likely that there will be some effect on investigative reporting. The state and local level may be the hardest hit as print media has suffered the most in the non-national arena. In this regard we are likely to see less local and state corruption investigations by the media, and perhaps this will translate into less accountability to the public. What remains an unknown is whether online journalism will permit reporters the time and resources to offer some investigative reporting substitutes.

While the decreasing role of print media may serve to reduce the number of white-collar crime prosecutions, increased government scrutiny may actually result in a higher number of cases being brought. The government has provided substantial funds to stimulate the economy, including the establishment of the Troubled Asset Relief Program (TARP). Oversight is provided by the Special Inspector General of the Troubled Asset Relief Program (SIGTARP), and we may see white-collar prosecutions coming from this new arena.

cussing the significance of investigative journalism as society's "watchdogs").


100 See Michael Sukolove, What's a Big City Without a Newspaper?, NY Times Mag 36 (Aug 9, 2009) ("Just this year, The Rocky Mountain News perished. The Seattle Post-Intelligencer became a Web-only publication with a tiny staff. Detroit's daily newspapers are now delivered just three days a week. The Boston Globe, owned by the New York Times Company, and The San Francisco Chronicle, owned by Hearst, each went through near-death experiences as their owners won labor concessions after threatening to shutter the papers."). See also Shawn Moynihan, Editor & Publisher to Cease Publication After 125 Years (Editor & Publisher Dec 10, 2009).


102 See note 100 and accompanying text.


The October 21, 2009 report of SIGTARP notes how its investigations division "has developed into a sophisticated white-collar investigative agency." The Report also notes that "SIGTARP has opened 61 and has 54 ongoing criminal and civil investigations." The Report describes the areas of these investigations as "suspected TARP fraud, accounting fraud, securities fraud, insider trading, bank fraud, mortgage fraud," and a host of other white collar offenses. It includes crimes that are typically used in modern-day white collar cases, like money laundering. The Report also includes its role in the investigation of a Ponzi scheme that resulted in a ten year sentence to the accused. It is clear from this report that financial crimes are being investigated and prosecuted, and having a designated body focused on these crimes is an indication of renewed government interest in this form of criminality.

A second indication that financial crimes will be a top government priority is demonstrated in the creation of a Financial Fraud Task Force. President Barack Obama issued an Executive Order that establishes this task force, and the Order includes a long list of government players serving on this coordinated body. The three-fold mission of this task force includes increased cooperation between “[s]tate, local, tribal, and territorial law enforcement.” The task force also serves to provide the attorney general with advice on investigation and prosecution of a host of different financial crimes. One can only assume that


106 Id.

107 Id.

108 Id.


111 Id.

112 One of its missions is to:

[P]rovide advice to the Attorney General for the investigation and prosecution of cases of bank, mortgage, loan, and lending fraud; securities and commodities fraud; retirement plan fraud; mail and wire fraud; tax crimes; money laundering; False Claims Act violations; unfair competition; discrimination; and other financial crimes and violations (hereinafter financial crimes and violations), when such cases are determined by the Attorney General, for purposes of this order, to be significant.

Id at 60124 § 3.
coordinated efforts and increased focus on financial crimes will serve to stimulate prosecutions in this area.

CONCLUSION

Although there is uncertainty about whether white-collar criminality caused the recession, it is important that before placing blame for the economic downturn on recent frauds and Ponzi schemes, there is careful consideration of these two occurrences to truly discern whether a correlation exists. Those who are quick to place blame on white-collar criminality may motivate legislators to react with new crimes, increased sentences, or new legislation to provide increased oversight. In some cases these reactions are warranted and may prove important in diminishing future criminality. In other situations these reactions may do nothing more than add to our already overcriminalized society and may move resources from areas that may prove to be tomorrow’s problems. It is important to recognize that a redistribution of funding can have long-term consequences that might not be visible in the immediate moment.

Irrespective of whether white-collar criminality caused the recession or whether it just became visible as a result of the recession, it is clear that there will be ramifications to this area of the law as a result of the economic downturn. The ripples of the recession have had a huge impact on print media, and this could reduce the discovery of future white-collar crimes. Yet, with the government emphasis on financial fraud and fraud that may be forthcoming from the distribution of government money, one has to wonder if the number of federal financial fraud prosecutions will increase. Either way, it is important that legislators and courts use measured responses when reacting to today’s financial problems.