

Securities Fraud, Recidivism, and Deterrence

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Legal scholars have expended considerable energy on the study of high-level securities fraud violators—Ken Lay, Bernie Ebbers, Dennis Kozlowski, etc. There has been little attention, however, to the perpetrators of “retail” securities fraud—the con artists who sell bogus stock over the Internet, orchestrate elaborate pump-and-dump schemes, and create a never-ending array of purportedly “risk free” investment opportunities. Collectively, and in a cruel mockery of capitalism, these offenders extract hundreds of millions dollars from investors each year.

In this article, Professor Barnard examines this group of offenders, focusing particularly on those who recidivate—often moving from state to state and scheme to scheme, with little interruption from the law enforcement community. She hypothesizes that offenders in this group, much like sex offenders, may be “hard wired” to engage in fraudulent behavior. Even if that is not the case, however, these offenders present a much greater risk to the public than the current SEC enforcement regime contemplates. She proposes a series of new enforcement strategies to deal with this predatory population.

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I. INTRODUCTION

This Article is about people who commit securities fraud—men and women (though mostly men) who prey upon victims by selling them securities through materially misleading sales techniques. The frauds they commit are not the systemic, organizational frauds that command the attention of the popular press. Rather, these offenders engage in “retail” securities fraud—sales made to investors on a one-on-one basis and schemes (like “pump-and-dump” schemes) designed to induce individual trades. Retail securities fraud costs investors hundreds of millions of dollars each year.¹

This Article focuses on the population of offenders who engage repeatedly in retail securities fraud—securities fraud recidivists. Many of these offenders move from state to state and scheme to scheme over decades. Sometimes they engage in face-to-face schemes but increasingly they are conducting their frauds over the Internet. Securities fraud recidivists often thwart the best efforts of the Securities and Exchange Commission (SEC) to detect and deter them.

The securities fraud recidivists of particular interest here are those who have engaged in three, four, or even more fraudulent schemes—they are career con artists. Over the course of their careers, they have adapted to new technologies, new sales techniques, and multi-continent financial arrangements. They are smart, personable, crafty, and cruel.

I will make two points in this Article: (1) securities fraud recidivists are not merely economic opportunists—some of them may have an

1. *See, e.g.*, SEC v. Lane, SEC Litig. Rel. 20393, 2007 SEC LEXIS 2879 (Dec. 11, 2007) (noting the granting of an asset freeze in a case involving a pyramid scheme that raised over \$132 million); SEC v. May, SEC Litig. Rel. 20366, 2007 SEC LEXIS 2682 (Nov. 20, 2007) (announcing action against a defendant who raised \$250 million through the sale of worthless stock); SEC v. Global Online Direct, Inc., SEC Litig. Rel. 20359, 2007 SEC LEXIS 2585 (Nov. 6, 2007) (noting settlement of a case involving a Ponzi scheme that raised \$45 million); SEC v. Kelly, SEC Litig. Rel. 20267, 2007 SEC LEXIS 1105 (Sept. 5, 2007) (announcing action against 26 defendants in a \$428 million securities fraud scheme); SEC v. Roberts, SEC Litig. Rel. 20264, 2007 SEC LEXIS 1950 (Aug. 31, 2007) (announcing emergency action to halt a \$50 million Ponzi scheme); SEC v. Secure Investment Services, Inc., SEC Litig. Rel. 20255, 2007 SEC LEXIS 1897 (Aug. 24, 2007) (announcing action in a case involving a \$25 million Ponzi scheme); SEC v. AmeriFirst Funding, Inc., SEC Litig. Rel. 20236, 2007 SEC LEXIS 1781 (Aug. 9, 2007) (noting entry of a preliminary injunction and asset freeze in a case involving \$55 million in fraudulent securities sales); SEC v. AOB Commerce, Inc., SEC Litig. Rel. 20196, 2007 SEC LEXIS 1549 (July 16, 2007) (noting the filing of an emergency action to halt a \$45 million Ponzi scheme); United States v. Resteiner, SEC Litig. Rel. 20170, 2007 SEC LEXIS 1415 (June 28, 2007) (describing sentencing of defendant in criminal case who orchestrated a \$30 million fraudulent investment scheme); SEC v. Conway, SEC Litig. Rel. 20145, 2007 SEC LEXIS 1244 (June 6, 2007) (describing sentencing of defendant who defrauded investors of \$20 million).

inherent psychopathology that compels them to defraud others and to recidivate after being caught and (2) the current law-enforcement mechanisms for dealing with these recidivists—a series of fines, occupational bars, and “obey-the-law” injunctions—are inadequate to curb the harms that securities fraud recidivists inflict.

This Article will unfold as follows: first, I will tell the stories of three securities fraud recidivists and their interactions with the SEC.² Then, I will lay out some background information about con men generally.³ Con men appear in every culture and in many guises. They also share many common characteristics: general intelligence; verbal agility; narrative imagination and the ability to craft a fraud “script”; improvisational skills; a keen sensitivity to their victims’ desires and changing levels of trust; “nerve” and “coolness”; “larceny sense”; business acumen; charm; believability; and, perhaps above all, a keen appreciation of human greed and the ability to encourage and exploit their victims’ worst impulses.

I will then turn to the problem of deterrence. The most common response to retail securities fraud is a civil enforcement action brought by the SEC. In most of these cases, the sanctions are quite modest—disgorgement of proceeds, a civil penalty, an injunction, and sometimes an occupational bar.⁴ Often, a defendant will receive two, three, or even more sequential civil sanctions before the Department of Justice initiates criminal prosecution.⁵ Many times, defendants elude criminal prosecution altogether.

I will then suggest that many individuals who engage in securities fraud—and especially securities fraud recidivists—may be “hard-wired” to engage in fraudulent schemes. Recent neuroscientific studies support this position.⁶

2. See *infra* Part II.

3. See *infra* Part III.

4. See *infra* Part IV.

5. The record holder for civil sanctions is likely to be Marshall Zolp, who has been enjoined *five* times in SEC proceedings, each time for a different fraud. See, e.g., SEC v. New Energy Corp., SEC Litig. Rel. 18712, 2004 SEC LEXIS 1019 (May 14, 2004) (noting entry of a permanent injunction against Zolp under the alias Marcelino Colt in the Central District of California); SEC v. Laser Arms. Corp., SEC Litig. Rel. 11346, 1987 SEC LEXIS 2676 (Feb. 3, 1987) (same in the Southern District of New York); SEC v. Zolp and Emervac Corp., SEC Litig. Rel. 9831, 1982 SEC LEXIS 191 (Dec. 9, 1982) (same in the Southern District of California); SEC v. Great Bison Toy Corp., SEC Litig. Rel. 9688, 1982 SEC LEXIS 1515 (June 9, 1982) (same in the Northern District of Illinois); SEC v. Sparks Industries, Inc., SEC Litig. Rel. 9584, 1982 SEC LEXIS 2258 (Feb. 16, 1982) (same in the Northern District of Georgia). Zolp is currently serving six years in prison for his role in the latest of these frauds. See SEC v. New Energy Corp., SEC Litig. Rel. 19670, 2006 SEC LEXIS 952 (Apr. 26, 2006).

6. See *infra* Part III.E.

I will suggest specifically that many securities fraud recidivists suffer from Antisocial Personality Disorder (APD).⁷ People with this disorder are often highly manipulative and always remorseless. They are unlikely to be deterred by monetary penalties or injunctions. They may not even be deterred by incarceration.⁸

I will end with a prescription for dealing with securities fraud recidivists.⁹ First, I propose a “one bite” rule at the SEC in which securities fraud recidivists are not offered a second (or third) civil sanction, but are quickly referred to the Department of Justice for criminal prosecution. Second, I propose a Securities Fraud Recidivist Task Force that will focus on the identification and punishment of securities fraud recidivists. Third, I propose some form of monitoring following the identification of first offenders whose conduct and history suggest a likelihood of recidivism. Orwellian as it may seem, this kind of monitoring is a legitimate function of the SEC. Fourth, I propose a user-friendly registry, in which securities fraud recidivists can more easily be identified by prospective investors. Fifth, I propose some Congressional additions to the available list of securities fraud sanctions. Finally, I propose an ongoing research agenda, by which emerging knowledge about brain structure and neuroscience can be applied to the universe of securities fraud recidivists. This type of knowledge is now infusing many forms of legal inquiry.¹⁰ With hundreds of millions of dollars at stake, we need to know much more about securities fraud recidivists.

II. THREE ILLUSTRATIONS

To understand the typical life-pattern of a securities fraud recidivist, let us begin with the story of Frank J. Custable, Jr. Early in his career, Custable was accused of sales-tax fraud as a used car dealer.¹¹ He then, perhaps surprisingly, secured a license to sell securities.

From July, 1989, through November, 1990, Custable engaged in unauthorized trades in five separate customer accounts at his firm. He

7. *See id.*

8. *See, e.g.,* Steven Syre, *Convicted Three Times of Fraud, Promoter Faces New Questions*, BOSTON GLOBE, Mar. 1, 2007, at E1 (tracing the career of Robert DiIanni, who had been “sent to prison three different times over securities frauds involving millions of dollars” and was found, upon completion of his most recent sentence, engaged in new schemes).

9. *See infra* Part VI.

10. *See, e.g.,* O. Carter Snead, *Neuroimaging and the “Complexity” of Capital Punishment*, 82 N.Y.U. L. REV. 1265, 1290-91 (2007) (describing the recent use of neuroscience in both civil and criminal cases).

11. Dave Schneidman, *Car Dealers Indicted in Sales-Tax Fraud*, CHI. TRIB., June 24, 1986, at Chicagoland 3.

also made fraudulent misrepresentations to his customers and then apparently bullied them into paying for the unwanted stock. The National Association of Securities Dealers (NASD) censured Custable, barred him from associating with NASD member firms, and fined him \$100,000. The SEC sustained the NASD's action.¹²

Custable then turned to a new way of making money. From January, 1993, through June, 1994, he "[sold] notes secured by mobile homes and limited partnership interests in [these] notes, by cold-calling the public[,] thereby raising at least \$639,464 from the sale of 59 notes to investors located in at least three states."¹³ His sales pitch was full of material misrepresentations.¹⁴

Illinois regulators filed a civil suit against him, seeking restitution.¹⁵ The SEC also initiated an enforcement action against him. Custable consented to a settlement enjoining him from violating the antifraud provisions of the federal securities laws in the future (this is known as an "obey-the-law" injunction).¹⁶ He also agreed to disgorge \$324,970.¹⁷ The court later imposed a \$60,000 civil penalty.¹⁸ When Custable failed to pay the civil penalty, the U.S. District Court found him liable for civil contempt.¹⁹

A few years later, Custable resurfaced with a new scheme involving the sale of penny stocks. The scheme "involved at least seven different penny stocks and generated at least \$4.3 million in ill-gotten gains."²⁰

12. In re Custable, Exchange Act Release No. 32,801, 54 S.E.C. Docket 1808 (Aug. 25, 1993).

13. SEC v. Custable, SEC Litig. Rel. 14131, 1994 SEC LEXIS 1948 (June 22, 1994).

14. See *id.*

[He told] investors that the notes [were] secured by liens on real estate when, in fact they [were] secured by personal property in the form of mobile homes; that the notes [were] liquid, offered at a discount and seasoned when, in fact, they [were] not; and that the loan-to-value ratio of the notes [was] no higher than 75% when, in fact, in most cases it [exceeded] 100% and [ranged] as high as 325%. The omissions include[d] [his] failure to tell investors that the mobile homes [were] not sufficient collateral for such notes in that they [were], among other things, old and in very poor condition and that [Custable had an] extensive disciplinary history with securities regulators. [Custable continued] to engage in such activities in Illinois despite the State's recent action barring [him] from selling securities in Illinois.

Id.

15. *The Ticker*, CHI. SUN-TIMES, Jan. 12, 1994, at 49.

16. SEC v. Custable, SEC Litig. Rel. 14374, 1995 SEC LEXIS 18 (Jan. 4, 1995).

17. *Id.*

18. SEC v. Custable, SEC Litig. Rel. 14965, 1996 SEC LEXIS 2794 (June 27, 1996).

19. SEC v. Custable, 1999 U.S. Dist. LEXIS 1776 (Feb. 10, 1999).

20. SEC v. Custable, SEC Litig. Rel. 18057, 2003 SEC LEXIS 756 (Mar. 31, 2003).

The SEC initiated a new enforcement action against Custable.²¹ The Commission sought a disgorgement order, a civil penalty, and a penny stock bar against him.²² Custable invoked the Fifth Amendment in responding to the SEC's complaint.²³

While the SEC matter was pending, another of Custable's businesses was the subject of a \$4.7 million default judgment in Texas.²⁴ Custable also pled guilty to obstructing justice by lying about his assets in order to avoid paying the civil penalty entered against him in 1996.²⁵ For this, he was sentenced to ten months in federal prison.²⁶

Custable was finally indicted in 2005 on charges relating to the penny stock sales.²⁷ At this point, he had been engaged in securities fraud schemes for 17 years.

Consider another story, similar in its outline but quite different in its details. In 1988, Roc G. Hatfield was the chief operating officer of a company called Centuri Mining Corp., which purported to operate a gold mine in Colombia.²⁸ The company sold unregistered securities in the United States, and misrepresented the status of Centuri's gold mining operations, the true value of the company's gold reserves, the safety of the investment, and the intended use of the offering proceeds.²⁹ Centuri's sales materials included a fabricated independent geologist's report.

The SEC brought a civil enforcement action against Centuri and its managers.³⁰ After protesting that he was a victim of an overzealous regulator and that the claims against him were a "pack of lies,"³¹ Hatfield settled the case, agreeing to disgorge his profits from the scheme.³² The court also entered an obey-the-law injunction.³³

21. *Id.*

22. *Id.*

23. *SEC Target Custable Pleads the Fifth*, STOCKWATCH, Aug. 8, 2005.

24. *PYBS: Enters Factoring Agrmnt; Lawsuit Victory for \$4.7M*, KNOBIAS.COM, May 4, 2004.

25. *Trader admits lying in lawsuit*, CHI. TRIB., June 8, 2004, at C2.

26. *SEC Target Custable Pleads the Fifth*, *supra* note 23.

27. Matt O'Connor, *Ex-trader indicted in penny stock case*, CHI. TRIB., Apr. 9, 2005, at C2.

28. *SEC v. Centuri Mining Corp.*, SEC Litig. Rel. 12195, 1989 SEC LEXIS 1483 (Aug. 3, 1989).

29. *Id.*

30. *SEC v. Centuri Mining Corp.*, SEC Litig. Rel. 11913, 1988 SEC LEXIS 2312 (Nov. 18, 1988).

31. Wendy Weyen, *SEC Lawsuit is "Lies," Company Official Says*, ST. PETERSBURG TIMES, Nov. 11, 1988, at 7C.

32. *SEC v. Centuri Mining Corp.*, SEC Litig. Rel. 12195, 1989 SEC LEXIS 1483 (Aug. 3, 1989).

33. *Id.*

A few years later, Hatfield—remarkably—had found a job as the chief executive officer of a brokerage firm that sold securities in seven states. Using a telephone “boiler room,” Hatfield promoted the sale of stock in a company called Marada Corporation. Hatfield claimed Marada had contracts with foreign governments to operate an airline, and to develop and operate hotels and casinos. Hatfield also claimed that Marada was soon to be listed on the NASDAQ. None of these representations were true.³⁴ The SEC initiated a new civil enforcement proceeding and Hatfield ultimately settled the case and agreed to the entry of a second obey-the-law injunction.³⁵ He was also barred from association with any broker, dealer, or investment adviser, and barred from engaging in the sale of any penny stock.³⁶ Hatfield was separately indicted by state authorities on charges of grand theft,³⁷ and ultimately served two years in a California prison.³⁸

In September, 2001, Hatfield launched yet another scheme in which he promoted unregistered “high-yield notes,” promising a 24-percent annual return.³⁹ The notes, issued by a company called Global Diamond Fund, Inc., were said to be secured by diamonds but were not. The SEC brought a third civil enforcement action, and this time persuaded the court to enter an asset freeze against Hatfield.⁴⁰ The SEC also sought a contempt order against him for violating the obey-the-law injunction entered against him in 1995.⁴¹

As this third civil case was proceeding, Hatfield was held in contempt for violating the asset freeze.⁴² The SEC also sought a contempt order when Hatfield failed to pay \$25,000 to one of his Marada victims.⁴³ After agreeing to a payment schedule, Hatfield reneged and

34. In re Roc G. Hatfield, Exchange Act Release No. 36,846, 61 S.E.C. Docket 711 (Feb. 14, 1995).

35. *Id.*

36. *Id.*

37. Rex Henderson, *California Grand Jury Indicts Marada Founder*, TAMPA TRIB., May 3, 1995, at 8.

38. Jane Meinhardt, *Pre-Construction Firm Owner's Past Concerns Investors*, TAMPA BAY BUS. J., June 9, 2006.

39. SEC v. Marada Global Corp., SEC Litig. Rel. 17441, 2002 SEC LEXIS 752 (Mar. 27, 2002).

40. Business Today, ST. PETERSBURG TIMES, Mar. 28, 2002, at 1E.

41. SEC v. Marada Global Corp., SEC Litig. Rel. 17441, 2002 SEC LEXIS 752 (Mar. 27, 2002).

42. SEC v. Marada Global Corp., SEC Litig. Rel. 17748, 2002 SEC LEXIS 2448 (Sept. 26, 2002).

43. SEC v. Marada Global Corp., SEC Litig. Rel.18062, 2003 SEC LEXIS 766 (Apr. 2, 2003).

was held in contempt again.⁴⁴ All in all, during the course of this case, Hatfield was held in contempt three times. The final result, though, was the entry, by consent, of another obey-the-law injunction.⁴⁵

Recently, Hatfield was found selling partnership interests in a real estate project in Tampa. The company's prospectus did not mention Hatfield's past securities violations or criminal history.⁴⁶ There was also some evidence that his new business did not really exist.⁴⁷

Of course, these days, some of the most effective securities fraud schemes are conducted over the Internet.⁴⁸ The face-to-face frauds of men like Frank Custable and Roc Hatfield may seem quaint compared to the Internet-based frauds that can generate millions of dollars in just a few days or weeks.⁴⁹

Consider the story of Lloyd Benton Sharp, a man whose fraud schemes have evolved over time. In 1983, Sharp was selling unregistered promissory notes, partnerships, and other securities using conventional solicitation methods.⁵⁰ He raised more than \$5 million from some 300 investors by means of material misstatements and omissions. The SEC brought a civil enforcement action against Sharp, and the court entered an obey-the-law injunction against him.⁵¹

Then, in 1989, Sharp was charged by Arizona regulators with violations of the state's Fraudulent Schemes and Artifices Act in connection with boiler room sales of interests in a gold mine.⁵² The Federal Trade Commission also charged Sharp with fraudulent sales in violation of the Federal Trade Act.⁵³ Sharp defaulted in that case, and, in his absence, the court entered an obey-the-law injunction against him.⁵⁴

Sharp then began offering, over the Internet, unregistered limited partnership interests in a venture claiming to grow and market paulownia trees through an entity named Pension Plans of America, Inc. ("PPA").⁵⁵

44. SEC v. Marada Global Corp., SEC Litig. Rel. 18918, 2004 SEC LEXIS 2300 (Oct. 5, 2004).

45. SEC v. Marada Global Corp., SEC Litig. Rel. 17748, 2002 SEC LEXIS 2448 (Sept. 26, 2002).

46. Meinhardt, *supra* note 38.

47. *Id.*

48. See Jayne W. Barnard, *Creative Sanctions for Online Investment Fraud*, 76 Miss. L.J. 949 (2007) (detailing some recent fraudulent schemes involving the sale of securities over the Internet).

49. See *infra* notes 141-44 and accompanying text.

50. SEC v. Sharp, SEC Litig. Rel. 10028, 1983 SEC LEXIS 1505 (June 10, 1983).

51. SEC v. Sharp, SEC Litig. Rel. 10334, 1984 SEC LEXIS 1834 (Apr. 6, 1984).

52. Arizona v. Sharp, SEC Litig. Rel. 12350, 1990 SEC LEXIS 148 (Jan. 17, 1990).

53. FTC v. Sharp, 782 F. Supp. 1445 (D. Nev. 1991).

54. *Id.*

55. In re Sharp, Exchange Act Release No. 48,071, 80 S.E.C. 1510 (June 20, 2003). According to the Commission's complaint, Sharp falsely claimed that PPA was a non-profit organization created to assist investors, particularly retirees and senior citizens, in

The SEC initiated a civil enforcement action against Sharp and he ultimately consented to the entry of an obey-the-law injunction.⁵⁶ He also agreed to pay a \$120,000 civil penalty and to be barred from associating with any broker or dealer.⁵⁷

These three stories, selected from the scores of securities fraud recidivists whose cases have been handled by the SEC in the past 10 years, share some characteristics: (1) relocation from venue to venue; (2) generation of new schemes; (3) the repeated (and obviously ineffective) use by the SEC of civil sanctions; (4) a shifting mix of civil sanctions, with an emphasis on fines and “obey-the-law” injunctions; and (5) only occasional (and often belated) criminal prosecution.

III. WHO ARE THESE PEOPLE?

Not much is known about securities fraud recidivists as no one has studied this population systematically. Still, it is possible to cobble together some sense of who these people are, what they value, and how they operate. They are, in a nutshell, thieves, liars, and career criminals. They are also successful con artists.

First, they are thieves. To understand thieves, one might look to ethnological studies of recidivist robbers, burglars, and “fences” that emphasize trade craft and associational ties.⁵⁸ Yet, securities fraud recidivists are more than just thieves. Their work involves both theft and deception. So, we might look to the many recent studies of lying and liars.⁵⁹ Every day we learn more about the ways in which liars deceive

finding safe and secure investments providing “heightened” returns. The complaint further alleged that Sharp falsely represented that the limited partnership investment was extremely safe (comparing it to “gold in Fort Knox”) and would provide a “very secure” 16% annual return because it had an “iron-clad” \$81.1 million contract with another company to purchase the matured trees. The complaint also alleged that Sharp arranged for investors to direct individual retirement account funds to the PPA investment. *Id.*

56. SEC v. Pension Plans of America, Inc., SEC Litig. Rel. 18140, 2003 SEC LEXIS 1195 (May 16, 2003).

57. *Id.*

58. See, e.g., NEAL SHOVER, GREAT PRETENDERS: PURSUITS AND CAREERS OF PERSISTENT THIEVES (1996) (describing the practices of robbers and burglars); DARRELL J. STEFFENSMEIER & JEFFREY T. ULMER, CONFESSIONS OF A DYING THIEF: UNDERSTANDING CRIMINAL CAREERS AND ILLEGAL ENTERPRISE (2005) (describing the practices of property “fences”).

59. See, e.g., CHARLES V. FORD, LIES!, LIES!!, LIES!!! THE PSYCHOLOGY OF DECEIT (1996); DAVID LIVINGSTON SMITH, WHY WE LIE: THE EVOLUTIONARY ROOTS OF DECEPTION AND THE UNCONSCIOUS MIND (2004); LYING AND DECEPTION IN EVERYDAY LIFE, (Michael Lewis & Carolyn Saarni eds., 1993); EVELIN SULLIVAN, THE CONCISE BOOK OF LYING (2001).

their victims (in many contexts), and also ways to detect deception.⁶⁰ I will discuss the particular skills involved in lying in Part III.C.2.

In addition to being thieves and liars, securities fraud recidivists are *career white collar offenders*. Therefore, we might look to studies of such offenders generally,⁶¹ theoretical accounts of their motives and behavior,⁶² useful statistics,⁶³ biographies and profiles,⁶⁴ and some (more or less candid) autobiographies.⁶⁵

One useful study of 155 “career” securities law violators makes clear that these offenders are mostly white men.⁶⁶ Of the group studied, 99.4 percent were white and 99.4 percent were male. Their median age was forty-four.⁶⁷ Eighty percent of these violators were married, 61.4 percent of them owned their own home, and 39.4 percent of them had at least a college degree.⁶⁸ Twenty-five percent of them had been arrested *for something* at least once before committing their first securities law violation.⁶⁹

This general portrait, while useful, especially as regards the race and gender of securities fraud recidivists, doesn’t provide a very detailed

60. See, e.g., Ursula Hess & Robert E. Kleck, *Differentiating Emotion Elicited and Deliberate Emotional Facial Expressions*, in *WHAT THE FACE REVEALS: BASIC AND APPLIED STUDIES OF SPONTANEOUS EXPRESSION USING THE FACIAL ACTION CODING SYSTEM (FACS)* 272 (Paul Ekman & Erika L. Rosenberg eds., 2d ed. 2005) (discussing some of the “markers” of deception, such as blinking, pupil dilation, change in pitch, speech errors and speech hesitations); ALDERT VRIJ, *DETECTING LIES AND DECEIT: THE PSYCHOLOGY OF LYING AND THE IMPLICATIONS FOR PROFESSIONAL PRACTICE*, Parts I, III (2000) (discussing the non-verbal indicators of deception and mechanisms for detecting them); LAURENCE R. TANCREDI, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* 121-23 (2005) (describing so-called “brain fingerprinting,” which can reveal at a high level of accuracy whether a subject is lying).

61. See, e.g., DAVID WEISBURD, ELIN WARING, & ELLEN CHAYET, *WHITE COLLAR CRIME AND CRIMINAL CAREERS* (2001) [hereinafter WEISBURD ET AL.].

62. See, e.g., NEAL SHOVER & ANDY HOCHSTETLER, *CHOOSING WHITE COLLAR CRIME* (2005); *RATIONAL CHOICE AND CRIMINAL BEHAVIOR: RECENT RESEARCH AND FUTURE CHALLENGES* (Alex R. Piquero & Stephen G. Tibbetts eds., 2002) [hereinafter *RATIONAL CHOICE AND CRIMINAL BEHAVIOR*].

63. U.S. SENTENCING COMMISSION, *MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES* (2004), http://www.ussc.gov/publicat/Recidivism_General.pdf.

64. See, e.g., STEVE MCVICKER, *I LOVE YOU PHILLIP MORRIS: A TRUE STORY OF LIFE, LOVE AND PRISON BREAKS* (2003); GEOFFREY WOLFF, *THE DUKE OF DECEPTION: MEMORIES OF MY FATHER* (1979).

65. See, e.g., JORDAN BELFORT, *THE WOLF OF WALL STREET* (2007); MARK BOROVITZ, *THE HOLY THIEF: A CON MAN’S JOURNEY FROM DARKNESS TO LIGHT* (2004).

66. WEISBURD ET AL., *supra* note 61. “Career” or “chronic offenders” were defined as those with a record of three or more arrests. *Id.* at 52.

67. *Id.* at 25, Table 1.1.

68. *Id.*

69. *Id.* at 29, Table 2.2.

picture of them. Thus, we must turn to their fourth dimension—their identity as con men.

A. *Con Men—Some Basics*

Con men have been with us from the dawn of history. Deception for profit appears in Greek mythology,⁷⁰ Biblical stories,⁷¹ Chinese folk tales,⁷² African legends,⁷³ and Dickens' novels.⁷⁴ Many of history's con men share common traits.

To begin with, all con men are manipulators. They design their actions to shape the actions of others:

Manipulators—people who score high in Machiavellianism or social adroitness—frequently tell self-oriented lies; tend to persist in lying when they are challenged to tell the truth; do not feel uncomfortable when they lie; do not find lying cognitively too complicated; view others cynically; show little concern for conventional morality; and openly admit that they will lie, cheat, and manipulate others in order to get what they want.⁷⁵

Second, con men typically exhibit highly developed cognitive skills:

Lying can be a cognitively complex task. A liar has to think of plausible answers; should not contradict him - or herself; should tell a

70. See MICHAEL FARQUHAR, *A TREASURY OF DECEPTION: LIARS, MISLEADERS, HOODWINKERS, AND THE EXTRAORDINARY TRUE STORIES OF HISTORY'S GREATEST HOAXES, FAKES, AND FRAUDS* app. III (2005) (exploring “ten classic deceptions from Greek mythology”).

71. See GENESIS 27 (recounting how Jacob deceived his father, Isaac, in order to receive a blessing intended for his brother, Esau); GENESIS 29 (recounting how Laban deceived Jacob in order to ensure that Jacob married Laban's older, less desirable daughter, Leah, rather than his younger, more beautiful daughter, Rachel).

72. See LEO TAK-HUNG CHAN, *THE DISCOURSE ON FOXES AND GHOSTS: JI YUN AND EIGHTEENTH CENTURY LITERATI STORYTELLING* 296-7 (1998) (recounting the story of a Confucian scholar who misled his neighbor into thinking his house was haunted by demons in order to purchase the house at a low price. In this cautionary tale, the Confucian scholar was found out and beaten for his deceit.).

73. See *The Foolish Boy*, in LION AND THE OSTRICH CHICKS 60 (1986) (retold by Ashley Bryan) (recounting the story of Spider Ananse, who tried to trick the young boy Jumoke out of his rightful share of gazelle meat, but was bested by Jumoke). Spider Ananse, also known as Kweku Ananse, appears in stories from Ghana, Togo, and Ivory Coast. In Nigeria, he goes by the name of Gizo. MARTIN BENNETT, *WEST AFRICAN TRICKESTER TALES*, Author's Note (1994). “Spider” stories, and tales of his come-uppance, appear throughout the volume *WEST AFRICAN FOLKTALES* (Richard Sears ed., 1991).

74. See CHARLES DICKENS, *GREAT EXPECTATIONS* (1861) (portraying Compeyson, the man who jilted Miss Havisham minutes before their wedding, as a professional swindler); CHARLES DICKENS, *DAVID COPPERFIELD* (1850) (portraying Uriah Heep as a “forger and a cheat”).

75. VRIJ, *supra* note 60, at 14-15.

lie that is consistent with everything that the observer knows or might find out; and should avoid making slips of the tongue. Moreover, they have to remember what they have said, so that they can say the same things when someone asks them to repeat their story.⁷⁶

Third, con men must have highly-refined interpersonal skills—the ability to persuade, cajole, shame, excite, calm, and continually re-focus their victims during the course of the fraud. Among other skills, they must be acutely sensitive to their victim’s state of mind:

[S]killed lying involves convincing the listener that the speaker believes what he or she is saying and has a truthful intention. A skilled liar also continuously “reads” the listener’s nonverbal behavior and, in response to “feedback” from the listener, adjusts both verbal and nonverbal communications to be more credible. This skill markedly enhances one’s capacity to manipulate other people’s beliefs and behaviors.⁷⁷

In short, con men, especially those involved in face-to-face schemes, are manipulative actors with superior cognitive and interpersonal skills. It is little wonder that they are thought to be the elite of the criminal underworld, revered for their artistry, sharpness, and guile.⁷⁸

B. *Classic Studies of Con Men*

Scholars have long been fascinated by con men. Over the years, scholars in several disciplines—including criminologists, psychologists, and linguists—have studied this group. Beginning with a benchmark American study in the 1930s and continuing through very recent neuroimaging studies, we have come to know quite a bit about the folkways and values of these men.

1. Conwell

In 1937, a con man named Chic Conwell wrote an extended essay on life in “the rackets.”⁷⁹ Conwell’s manuscript made its way into the

76. *Id.* at 26.

77. FORD, *supra* note 59, at 27; *see also* SMITH, *supra* note 59, at 105-06 (“The effective deceiver must be able to track others’ responses on a moment-to-moment basis, adjusting his or her tactics based on a steady stream of perceptual feedback.”); *id.* at 5 (“[I]t is not possible for a person to hoodwink another without keenly observing and interpreting the reactions of the other from one moment to the next.”).

78. FORD, *supra* note 59, at 158 (“Con artists are known as the aristocrats of the criminal world.”).

79. CHIC CONWELL, *THE PROFESSIONAL THIEF: BY A PROFESSIONAL THIEF* (annotated by Edwin H. Sutherland) (1937).

hands of Edwin Sutherland, the criminologist who coined the phrase “white collar crime.”⁸⁰ By interviewing other con men of the day, Sutherland was able to verify the accuracy of Conwell’s descriptions, and, by sprinkling footnotes and scholarly references throughout Conwell’s text, he was able to turn the book into a study of sociological value.

Conwell had much to say about the characteristics of con men, especially those engaged in the elaborate stock frauds typical of his era.⁸¹ According to Conwell:

[t]he con, or confidence game, has many angles, but the central principle in all true con rackets is to show a sucker how he can make some money by dishonest methods and then beat him in his attempted dishonesty. For this, it is necessary to be a good actor, a good salesman, and have good manners and a good appearance.⁸²

The principle characteristics of a successful con man, Conwell said, are “wits, front, and talking ability.”⁸³

Like any business person, a con man must be entrepreneurial and find a market for his product.⁸⁴ He then must be patient and cultivate his customer(s).⁸⁵ He must also, however, be wary of each encounter with his customer:

It is evident that one of the personal characteristics of the thief is extreme suspicion. This may be accounted for by the fact that he exists in a suspicious world. While grifting, every move he makes and every word he utters are carefully guarded to avert suspicion. The first thing in his mind in every touch is whether he is under suspicion, and, if he is capable, he has learned to determine this by a glance.⁸⁶

80. See Edwin H. Sutherland, *White Collar Criminality*, 5 AM. SOC. REV. 1 (1940).

81. CONWELL, *supra* note 79, at 61 (describing the “stock market” con in detail). These types of frauds, and frauds like the phony betting parlor in *The Sting*, don’t exist anymore. Others—Ponzi schemes, the promotion of worthless penny stocks, tips said to be based on inside information, and get-rich-quick schemes involving “can’t miss” offerings of stock—are still around.

82. *Id.* at 56.

83. *Id.* at 197-98.

84. *Id.* at 57 (“The first part of the wire racket is to pick out the sucker [the con man] want[s] to beat.”); *id.* at 70 (“Of course, we select our prospects. We look over his bank account, his family life, the way he spends his money. . . . We try to find someone who is living beyond his means, who has social ambitions, or whose wife has social ambitious which are beyond their income.”).

85. *Id.* at 56 (in complex frauds, “the sucker may be kept keyed up for several days.”).

86. *Id.* at 168-69.

The con man, of course, must not become sentimental about his victim:

In general, the professional thief does not have any attitude toward his victim. The victims are just means to an end, the possessors of wealth which the thief desires. He attempts to get the wealth without any consideration of the victim. The victims are thought of just like a fisherman thinks of a place to fish or a hunter of a place to hunt.⁸⁷

In short, Conwell concluded, working the con “[is] a business . . . much like . . . any other business.”⁸⁸ It is not a game or a contest with a winner:

It involves as much hard work as any other business. There is little thrill about it. While a job is being pulled off, there is a tense and emotional situation, and the work cannot be routine. From the start of the actual mechanics of taking off a score until it is completed, the thief is under a strain caused by suspicion, fear of a tumble . . . saying the right thing at the right time, thought of whether his partners will perform properly, retention of composure, appearance of nonchalance, hard thinking and other things. . . . It is no more thrilling than the work of the factory slave; in both there may be a feeling of work well done when it is over, but this is different from the thrill of a horse race.⁸⁹

And, at the end of a con, the con man must take care to submerge his ego. He cannot seek public recognition of his accomplishments, *e.g.*, his theft, and he must forego the pleasures of receiving positive feedback.⁹⁰ The best con men are those who are invisible and whose victims do not even realize they have been conned.

87. *Id.* at 174. Conwell uses other metaphors to describe the con man’s feelings, or lack thereof, for his victims.

[A con man must] enter into intimate association with [his victims]. This intimacy is cold-blooded. The feelings are expressed as by an actor on a stage, with calculations of the results they will produce. He is like a salesman who attempts to understand a prospective customer only as a means of breaking down sales resistance and realizing his own objective of increased sales.

Id. at 208.

88. *Id.* at 140.

89. *Id.*

90. *But see id.* at 211 (discussing the importance of recognition among “professional” thieves).

2. Maurer

The second classic study of con men was written by the distinguished linguist David W. Maurer.⁹¹ Maurer had studied the colorful language patterns of safe-crackers, pot smokers, pickpockets, moonshiners, prostitutes, and pimps.⁹² He also devoted several years of his career to conducting linguistic fieldwork among a group of American con men.

Maurer's study was largely devoted to exploring the language and mechanics of "big" cons (elaborate schemes involving the establishment of fake betting parlors or brokerage offices, the use of multiple participants, and, often, the bribery of public officials to keep the police away). It also, however, examined con men's values and techniques. Maurer focused on these men's keen sense of professionalism;⁹³ avoidance of alcohol while on the job;⁹⁴ the need to be well-read and up-to-date on cultural and other current events in order to portray themselves as respectable people with whom a mark would choose to do business;⁹⁵ their zest for innovation and new schemes,⁹⁶ and, often, their addiction to gambling.⁹⁷ Maurer's con men, like Conwell's, were technocrats in their work life—focused, skilled, and disciplined entrepreneurs.

3. Blum

A third study of con men emerged in 1972. This study, conducted by psychologist Richard Blum, was based on in-depth interviews with fourteen con men in California.⁹⁸ In addition to many rich quotes from

91. DAVID W. MAURER, *THE BIG CON: THE STORY OF THE CONFIDENCE MAN* (Anchor ed. 1999) (1940).

92. Luc Sante, *Introduction* to MAURER, *supra* note 91, at ix.

93. MAURER, *supra* note 91, at 172 ("The confidence man extends himself fully while he works; all his faculties and abilities are called into play; each mark is a new challenge to his ingenuity; and, perhaps most important, the stakes for which he plays are very high.").

94. *Id.* at 188 ("[N]o competent con man drinks on the job, and drinking with the mark is always frowned upon.").

95. *Id.* at 186 ("They must be well informed in business and financial matters, have a glib knowledge of society gossip, and enough of an acquaintance with art, literature, and music to give an illusion of culture.").

96. *Id.* at 203 ("[The con man] loves his work and is constantly experimenting to see what new angle he may develop, what technical point he can improve upon.").

97. *Id.* at 180 ("[M]ost con men gamble heavily with the money for which they work so hard and take such chances to secure.").

98. See RICHARD H. BLUM, *DECEIVERS AND DECEIVED: OBSERVATIONS ON CONFIDENCE MEN AND THEIR VICTIMS, INFORMANTS AND THEIR QUARRY, POLITICAL AND INDUSTRIAL SPIES AND ORDINARY CITIZENS* (1972).

the subjects themselves about their work, Blum's study included observations about these men's inner lives. First, "profit-making is but one of the motives to be inferred in the confidence man. Confidence men are also busy acting out their fantasied desires to be (or more accurately, to *appear to others* to be) persons of importance."⁹⁹ They also wish to be perceived as "generous, risk-taking, pleasure-loving, [and] free-and-easy" individuals.¹⁰⁰ Thus, con men must create and then sustain an attractive, often charismatic character around which to construct their stories.

According to Blum, the con men he interviewed were sociable, and took great satisfaction in talking and in being with others.¹⁰¹ They were also perceptive in their ability to assess potential victims' receptivity to their schemes, often sizing up a potential victim in just a few minutes¹⁰² and sometimes "almost instantaneously."¹⁰³ Furthermore, the typical relationship between a con man and his victim was not just a one-way street of exploitation. According to Blum, a con man plays multiple roles in the victim's life, including "antidepressant" and "fantasy machine."¹⁰⁴

[The con man] is more than a story-teller . . . for he is a magician who guides the victim into a world of pleasant dreams. Those dreams are not solely of the future, the bait of money, or joy at some later time, but are in the present, for it is in the present moment that there occurs the hope, the excitement, the dispelled loneliness and the sense of importance in association with [sic] prestigious men (the con man wearing his mask), which constitute the early returns on the victim's investment in the con man.¹⁰⁵

In many respects, these three classic studies of con men—the oldest study is now more than 70 years old—are excellent descriptions of many con men today.¹⁰⁶ Little has changed in their values and skill sets. But, it is possible to define more specifically just what skills are required for

99. *Id.* at 13.

100. *Id.*

101. *Id.* at 53.

102. *Id.* at 24-26 (describing the process of finding, selecting, approaching, and "qualifying" victims).

103. *Id.* at 51.

104. *Id.* at 60.

105. *Id.* at 17.

106. Some recent studies of con men add some interesting twists to these profiles. See, e.g., Jeffrey H. Doocy et al., *Telemarketing fraud: Who are the tricksters and what makes them trick?*, 14 SECURITY J. 7 (2001) (noting the importance to the subjects of the "power" element involved in their schemes – "impos[ing] one's will upon another person and [obtaining] a measurable financial award for doing so"); Neal Shover et al., *Crime on the Line: Telemarketing and the Changing Nature of Professional Crime*, 43 BRIT. J. CRIMINOLOGY 489 (2003) (noting the subjects' great pride in their salesmanship skills).

success in this trade. Today, through modern neuroimaging techniques, it is even possible to capture a picture of the con man's brain.

C. *The Con Man's Toolkit*

Classic con men, those involved in face-to-face schemes, need an array of specific skills to succeed. In the next few pages, I will explore those skills in some detail.¹⁰⁷ The point of this exercise is to illustrate the remarkable overlap between a con man's methods and his psychological makeup. A review of the con man's toolkit strongly suggests a biological component to the successful execution of many fraud schemes.

1. Intellectual Agility

The first prerequisite for a successful con man is to be intellectually agile. He must be good with words, capable of constructing a plausible story, capable of communicating it with a sense of sincerity (and sometimes urgency), and capable of keeping the "line" of his story in his head. All frauds require heightened literary skills.

Moreover, a con man must do more than just write and recite his lines. He must be able to compose and execute a comprehensive fraud "script."¹⁰⁸ A retail-level securities fraud must, at a minimum, include targeting the victim, building rapport, "setting the hook," extracting the cash, putting the cash out of reach, and taking steps to delay or avert detection. Elaborate frauds may also include the construction of a plausible business model, enlistment of confederates, negotiations with multiple investors, sophisticated documentation, trans-boundary transmission of funds, and sometimes relocation to avoid arrest.

Not only must the con man compose and deliver the fraud "script," he must also be able to improvise. He must have both verbal agility (the ability to shift ideas quickly in response to changing circumstances) and narrative imagination (the ability to extemporize and fill in the details of a story to give it verisimilitude). Like any good novelist, a con man must

107. The model here is STEFFENSMEIER & ULMER, *CONFESSIONS OF A DYING THIEF*, *supra* note 58, at 127-37, which identifies the necessary skills for a "criminal entrepreneur" as follows: "heart;" inventiveness; scheming; ingenuity; practical knowledge of things, language, and people; street smarts, worldly-wiseness; social skills; larceny sense (an "eye for clipping"); business skills and knowledge; trustworthiness ("being solid"); and "muscle."

108. Just as with every crime, committing a fraud involves a sequence of actions: preparation, target selection, initiation of action, completion of the scheme, exit from the setting, disposal of evidence, etc. This is known as the fraud "script." See Derek B. Cornish & Ronald V. Clark, *Analyzing Organized Crimes*, in *RATIONAL CHOICE AND CRIMINAL BEHAVIOR*, *supra* note 62, at 46.

create a compelling protagonist, an engaging plot line, and a powerful ending.

2. Skills in Deception

A second key factor in a con man's success, at least for those involved in face-to-face schemes, is the ability to lie effectively over a sustained period of time. "Lying takes a lot of effort," observes a neuroscientist involved in a study of pathological liars.¹⁰⁹ "It's almost mind reading. You have to be able to understand the mindset of the other person. You also have to suppress your emotions or regulate them because you don't want to appear nervous. There's quite a lot to do there."¹¹⁰

Often, inexperienced liars fail at this effort. They may reveal their deception by "a change in the expression on the face, a movement of the body, an inflection to the voice, a swallowing in the throat, a very deep or shallow breath, long pauses between words, a slip of the tongue, a microfacial expression, or a gestural slip."¹¹¹

These failures may be due to cognitive shortfall—failure to anticipate when it will be necessary to lie, inventing a story that is inadequate to changing circumstances, or failure to remember the story one has adopted.¹¹² Alternatively, deceit may be betrayed by one's emotions—fear of detection ("detection apprehension") or feelings of guilt ("deception guilt").¹¹³ Some liars may even unwittingly reveal their pleasure in "hooking" the victim (this is known as "duper's delight").¹¹⁴ All of these factors can cause what is known as "leakage"—subtle behavioral clues that alert the victim that something is not right.¹¹⁵ Good con men minimize leakage and maximize the credibility of their lies.

3. Skills in Building Trust

A skill closely related to the ability to deceive is the ability to project trustworthiness or "believability." An effective fraud relies on the victim's belief that the defrauder is telling a true story. There is some

109. Usha Sutliff, *Liars' Brains Wired Differently*, <http://www.usc.edu/uscnews/stories/11655.html> (last visited July 29, 2008) (quoting Adrian Raine, a leader in the study of the neuroscience of lying).

110. *Id.*

111. Paul Ekman & Mark G. Frank, *Lies That Fail*, in LYING AND DECEPTION IN EVERYDAY LIFE, *supra* note 59, at 184.

112. *Id.* at 185.

113. *Id.* at 189-94.

114. *Id.* at 194-95.

115. Of course, some victims are more sensitive than others to the presence of leakage; some are immediately put on alert while others suppress their sense of unease.

suggestion that believability may have some anatomical characteristics. That is, “some people look more honest than others and thus can lie more effectively.”¹¹⁶ It is also clear that persons lacking a conventional conscience betray their untrustworthiness less than others with a better-developed conscience. That is, they have “a decreased capacity to develop conditioned autonomic nervous system response (e.g., sweating, increased heart rate, and muscular tension) to adverse stimuli.”¹¹⁷ “Because their lies are not associated with guilt, there are fewer bodily symptoms to betray the deceit to the target of the lie.”¹¹⁸

There are several techniques involved in establishing trust. Some liars may attempt to diffuse their victim’s mistrust by modeling “‘honest behavior’ (looking the victim straight in the eyes, avoiding fidgeting and so on) as soon as they realize that they are mistrusted by the people they are trying to dupe.”¹¹⁹ A more important mechanism for building trust is the exploitation of associational ties.¹²⁰ Another is to sprinkle a story with “irrelevant or extraneous information, some of which the [victim] will know to be true and [therefore] make the story sound more convincing.”¹²¹ Another is to anticipate the victim’s skepticism or fear and defuse it. “The skillful con artist learns to disarm suspicions by bringing them up first. . . .”¹²²

Still another technique conducive to “believability” has to do with listening.¹²³ To be successful, a con man must engage a prospective victim in enough conversation to reveal the mark’s economic preferences. Engaging the victim requires patience, prompting, and (at least a simulation of) empathy. Stated another way, the con man must be willing to spend time listening to his victim’s hopes, aspirations, dreams, and desires, in order to determine the shape of his sales pitch. Then, he must build a relationship, foster confidence, and know precisely when to make the “ask.” All of these skills, of course, are the same skills

116. FORD, *supra* note 59, at 66.

117. *Id.* at 109-110.

118. *Id.* at 110 (citation omitted).

119. VRIJ, *supra* note 60, at 52.

120. *See, e.g.*, SEC v. Lukens, SEC Litig. Rel. 17218, 2001 SEC LEXIS 2311 (Nov. 2, 2001) (describing fraud by a defendant whose victims were members of his church); SEC v Focus Financial Associates, SEC Litig. Rel. 19259, 2005 SEC LEXIS 1363 (June 9, 2005) (describing fraud by a defendant who preyed on members of the Haitian-American community).

121. FORD, *supra* note 59, at 159.

122. *Id.*

123. One con man has described the importance of listening to his victims. “I’m persuasive because I understand and listen to people. I study everything about a person. No detail is too small. People love to talk, and I love to listen. Listening to a person talk is the key to being able to outwit them.” MCVICKER, *supra* note 64, at 139 (quoting Steve Russell, the subject of the book).

required of any good salesman. For con men, however, the “product” is a scam.

4. “Heart” and “Larceny Sense”

Another attribute of a successful con man is “heart”—a combination of “nerve” and “coolness.”¹²⁴ A con man must face the possibility of detection and arrest, or worse, and yet, despite these risks, must be able to carry on with his business as if nothing were at stake. The ability to do this is highly-prized in the underworld:

“Most people could never hack it” is a common statement of seasoned thieves, in reference to the dangers, risks, and physical demands inherent in a criminal lifestyle. To gain respect or to recruit associates, the thief or illegal entrepreneur must demonstrate that he has “heart.” “Heart” is a set of traits, a combination of physical and mental toughness, of courage and coolness. To have heart is to be someone who does not scare easily and who is able to perform at one’s best when the stakes are high and the risks great. The ability to keep cool, remain in control, and exercise fast-action judgments in situations that are unpredictable and suspenseful are highly valued work skills. Having these skills contributes to status and respect in the underworld for those who possess them. As with most work skills, they can become something that one is proud of.¹²⁵

A successful con man also needs “larceny sense,” a term originally coined by Chic Conwell to encompass the ability to assess risk, evaluate alternatives, and select an appropriate course of action.¹²⁶

5. Business Savvy

In addition to “heart” and “larceny sense,” a successful con man must also have some sense of business and business practices. He needs to plausibly describe why a start-up company is likely to succeed where others have failed, or to persuade his victims that a listing on the NASDAQ is imminent. He needs to identify (in order to exploit) topical themes in constructing his fraudulent schemes.¹²⁷ He may need to deal

124. STEFFENSMEIER & ULMER, *supra* note 58, at 129.

125. *Id.*

126. CONWELL, *supra* note 79, at 32.

127. *See, e.g.*, SEC v. Cyberkey Solutions, Inc., SEC Litig. Rel. 20049, 2007 SEC LEXIS 515 (Mar. 20, 2007) (describing defendants’ sales of securities in a firm alleged to have lucrative contracts with the Department of Homeland Security); SEC v. 2DoTrade, Inc., SEC Litig. Rel. 19635, 2006 SEC LEXIS 737 (Mar. 31, 2006) (describing a pump-and-dump scheme based on the company’s purported development of an anthrax-resistant compound).

with landlords, vendors, Internet service providers, and international bankers. Additionally, con men often have to manage other employees.

6. The Ability to “Read” One’s Victims

As important as all the foregoing skills, a successful con man must have an ability to recognize, encourage, and exploit his victims’ greed. With very little information, he must be able to distinguish between those targets likely to part with their money in response to an attractive investment opportunity and those who are too risk-averse to waste his time on. Victim-selection is an intuitive art.¹²⁸

Having selected his victim, a con man must then identify the buttons to push to get the victim to actually make an investment decision. This ability, too, requires sensitivity and intuition.¹²⁹ “Any lie custom-tailored to [the victim’s] psychological makeup and biases, any lie that feeds vanity, jealousy, fear of rejection, or any of the ten thousand other goblins making merry in the twisted hallways of [the victim’s brain], will be compelling in a way in which few other things are.”¹³⁰

Thus, a key to a successful fraud scheme is the identification and manipulation of victims who are particularly vulnerable to a con man’s persuasive skills.¹³¹

7. Lack of Empathy

During the course of a fraud scheme, it is important that the con man not be distracted by compassion or generosity toward his victims. The con man’s empathy deficit, in fact, is one of the ironies of a

128. See *supra* note 103 and accompanying text.

129. See MARTIN KANTOR, *THE PSYCHOPATHY OF EVERYDAY LIFE: HOW ANTISOCIAL PERSONALITY DISORDER AFFECTS ALL OF US* 104 (2006).

[One successful telemarketer] seemed to know intuitively who ached to be complimented, and would flatter them in order to “get them eating out of his hands.” Likewise, he knew who ached to be abused, and would put them down, secure in the knowledge that they would do almost anything to turn things around to get into his good graces. He was particularly adept at uncovering the loneliness of old people and how their desire to please him in order to get at least a few drops of kindness left them unprotected. In short, like most psychopathic individuals, he did not so much feel *for* others as he felt his way *into* them.

Id. (emphasis in original).

130. SULLIVAN, *supra* note 59, at 108.

131. Arguably, we all are vulnerable to being conned. “We all need manipulative con artists. They offer us all hope. They fan the flames of our fading desires and our tired imaginations. They stoke the fires of our secret, and often sinful, passions.” KANTOR, *supra* note 129, at 47. Some of us, though, are more vulnerable to manipulation than others. The ability to sort us out is one factor that distinguishes a “successful” con man from those who fail.

successful fraud—victims must sense an emotional connection with their defrauder and yet the defrauder must not feel any emotional connection with his victims. At a minimum, this principle means that a con man must view his victim as a neutral object, akin to a “fish” at the end of his line.¹³² Sometimes, con men achieve the necessary distance from their victims by convincing themselves that they are mentally superior to their victims¹³³ or that the victims are just as scheming and dishonest as their defrauders.¹³⁴

8. Lack of Remorse

A final “skill” that is essential for a successful con man is the ability to walk away from a victim without regret or remorse. To be effective, con men must rationalize or “neutralize” the harm that they do,¹³⁵ and the courts are full of fraud defendants who, even when confronted with the likelihood of a long term in prison, deny the illegality of their conduct, minimize its significance, or seek to place the blame on somebody else.¹³⁶

9. The Bottom Line

Con men exhibit the common psychological characteristics of any person engaged in a fraud—a quest for power over another person and an ability to rationalize or “neutralize” their conduct.¹³⁷ They also exhibit the specific characteristics of those who engage repeatedly in cruel acts: lack of empathy, lack of remorse, and a general lack of “conventional conscience.”¹³⁸ Con men who deal with their victims face-to-face “[are] perhaps the most seriously disturbed [of all con men] due to the requirement for often quite intimate personal betrayal.”¹³⁹ “They are an

132. *See supra* note 87 and accompanying text.

133. Grace Duffield & Peter Grabosky, *The Psychology of Fraud*, at 2 (Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice No. 199, 2001), <http://www.aic.gov.au/publications/tandi/ti199.pdf> (noting that part of the “delight” experienced by a con man is the ability to demonstrate his superiority).

134. *Id.* at 3 (noting that generating a dislike and lack of respect for the victim “makes it easier to treat them badly”).

135. *Id.*

136. *See, e.g.*, *United States v. Davis*, 458 F.3d 491 (6th Cir. 2006) (noting, in a bank fraud case, that the defendant had failed to show remorse for his crime); *United States v. King*, 454 F.3d 187 (3rd Cir. 2006) (same); *United States v. Schwartz*, 379 F. Supp. 2d 716 (E.D. Pa. 2007) (discussing the defendant’s lack of remorse in a case involving wire fraud, bank fraud and identity theft).

137. Duffield & Grabosky, *supra* note 133, at 2-3.

138. *Id.* at 4-5.

139. *Id.* at 5.

unusually sick group in terms of mental health and an unusually antisocial group in terms of lack of regard for others.”¹⁴⁰

D. Skills Required in the Internet Age

One might surmise that some of the skills discussed in Part III.C. are no longer necessary, as frauds can now succeed without any human contact between a con man and his victims. For example, a recent fraud involved so-called “auto-surfing,” in which victims made their way to a website (www.12dailypro.com) that promised to pay them to visit various other websites that were interested in building their “click count.” Victims were asked to pay a fee to join this program, and, as in any Ponzi scheme, early participants really did receive compensation for their website visits. Soon, though, the program outstripped its capacity to keep making payments, and the \$50 million scheme collapsed.¹⁴¹ The entire interaction between the defendant and her victims (some 300,000 victims worldwide) was impersonal—no visits, no phone calls, no “presentation of self.”¹⁴² Similarly, thousands of investors have purchased into spam-based pump-and-dump schemes without ever being contacted by a securities salesman.¹⁴³ Others have purchased unregistered securities based solely on what they read on a website.¹⁴⁴ Thus, some of the traditional fraud skills, such as mental agility, glibness, and the ability to mask one’s emotions, are not relevant to an Internet con man’s success. “Nerve” and “coolness” may also be unnecessary where perpetrating a fraud electronically presents little risk of pursuit or physical harm.

Other skills, though, *are* required to successfully commit an Internet fraud. Of course, these frauds require programming and website-design skills.¹⁴⁵ Frauds that involve spam e-mails,¹⁴⁶ counterfeit press releases

140. BLUM, *supra* note 98, at 50.

141. SEC v. Johnson, SEC Litig. Rel. 19579, 2006 LEXIS 433 (Feb. 27, 2006).

142. The reference is to the classic ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

143. See, e.g., SEC v. Lebed, Exchange Act Release 43307, 2000 LEXIS 1964 (Sept. 20, 2000) (describing the pump-and-dump scheme engineered by a high school student, who posted pseudonymous endorsements of stock in various Internet chat rooms, and thereby stimulated purchases of stock that netted him more than \$270,000).

144. See, e.g., SEC v. Global Online Direct, Inc., SEC Litig. Rel. 20073, 2007 SEC LEXIS 708 (Apr. 9, 2007) (describing the online sale of unregistered securities promising an effective annual return of 1,100 percent).

145. The technical skills required to establish a website and extract payment are actually some of the less demanding aspects of the job. See Tom Zeller, Jr., *Identity Thief Finds Easy Money Hard to Resist*, N.Y. TIMES, July 4, 2006, at A1. In his article, Zeller describes the career of a 20-year old man, now in prison, who was able to make thousands of dollars a day in an Internet-based identity theft scheme. The man reported that, for him, learning how to steal identities and translate that theft into profit, was easy.

or analysts' reports that look like they were issued from legitimate sources,¹⁴⁷ or that involve identity theft and hacking into victims' customer accounts,¹⁴⁸ may require a somewhat higher level of technical sophistication than comparable face-to-face schemes. But, none of these schemes are particularly complex.¹⁴⁹

In addition to the technical skills, however, Internet-based securities frauds require the same kind of story-building skills necessary to succeed in a face-to-face fraud. Creating an attractive investment scenario—a “Web portal” scheme through which investors can expect “substantial passive income,”¹⁵⁰ a scheme falsely claiming a leadership role in the ownership and development of assisted living facilities,¹⁵¹ or a scheme promising access to foreign exchange markets with special “interbank” privileges¹⁵²—all require some narrative imagination. The “fraud scripts” must also be enticing enough to stimulate investor action.¹⁵³ With Internet frauds, unlike face-to-face frauds, there is no opportunity for the con man to build trust through the use of personal charm.

Successful Internet securities frauds require two additional skills: (1) the ability to manipulate language and images to evade detection in

“The challenge was really stopping, you know? That was the hardest challenge of them all.” *Id.*

146. *See, e.g.*, SEC v. MegaMania Interactive, Inc., SEC Litig. Rel. 19369, 2005 SEC LEXIS 2315 (Sept. 9, 2005) (describing a scheme involving hundreds of thousands of unsolicited e-mails).

147. *See, e.g.*, SEC v. Snyder, SEC Litig. Rel. 46108, 2002 SEC LEXIS 1619 (June 25, 2002) (describing a pump-and-dump scheme in which the defendant posted a phony news story that looked like it had come from the Bloomberg news service); SEC v. Inv. Tech., Inc., SEC Litig. Rel. 18970, 2004 SEC LEXIS 2624 (Nov. 15, 2004) (describing a scheme involving phony press releases and analysts' reports).

148. *See, e.g.*, SEC v. Marimuthu, SEC Litig. Rel. 20037, 2007 SEC LEXIS 469 (Mar. 12, 2007) (describing a scheme in which defendants, located in India, “hijacked the online brokerage accounts of unwitting investors using stolen usernames and passwords,” then purchased stock for those accounts in a pump-and-dump scheme).

149. Surprisingly, getting a list of likely victims takes no expertise. For example, “mooch lists” (lists of people who have invested in fraudulent schemes in the past) are available to anyone willing to pay for them. *See* Charles Duhig, *Bilking the Elderly, With a Corporate Assist*, N.Y. TIMES, May 20, 2007, at 1.

150. SEC v. Osterhout, SEC Litig. Rel. 19848, 2006 SEC LEXIS 2156 (Sept. 27, 2006).

151. SEC v. Todt, SEC Litig. Rel. 19272, 2005 SEC LEXIS 1421 (June 15, 2005).

152. SEC v. First Access Financial, SEC Litig. Rel. 18984, 2004 SEC LEXIS 2715 (Nov. 22, 2004).

153. Interestingly, the need to create plausible, as well as enticing, scenarios may have declined with the use of the Internet. Many successful Internet schemes involve “misrepresentations that the reasonable investor would dismiss as absurd.” Margaret V. Sachs, *Materiality and Social Change: The Case for Replacing “the Reasonable Investor” With “the Least Sophisticated Investor” in Inefficient Markets*, 81 TUL. L. REV. 473, 476 (2006).

periodic SEC “sweeps” for fraudulent offerings and (2) an instinct for when to shut the scheme down and move on.

Most importantly, perpetrators of Internet frauds, like perpetrators of face-to-face schemes, must be ruthless—willing and able to steal the money of faceless victims with no empathy and no remorse. The people who do this work well are often some of the smartest, most cunning and most heartless of offenders. And, they—like perpetrators of face-to-face frauds—may suffer from a chronic personality disorder.

E. The Con Man’s Brain

Successful con men have many skills and traits in common. Some of their skills may reflect learned behavior. Importantly, though, many of their most useful skills and traits manifest themselves in childhood. These skills and traits are unlikely to be learned, although they can be cultivated and refined. Many con men, in short, especially those who are repeat offenders, are probably “hard wired” to commit manipulative crimes. My hypothesis is that many of these offenders suffer from a serious psychopathology known as Antisocial Personality Disorder (APD).

APD is one of ten recognized personality disorders.¹⁵⁴ In general, APD appears as a “pervasive pattern of disregard for and violation of the rights of others.”¹⁵⁵ According to the American Psychiatric Association’s diagnostic guidelines, the diagnostic criteria for APD include three or more of the following items occurring after the age of fifteen:

- Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest
- Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure

154. DUANE K. DOBBERT, UNDERSTANDING PERSONALITY DISORDERS 1 (2007). A personality disorder is defined as “an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, is stable over time, has an onset in adolescence or early adulthood, and leads to distress or impairment.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR 685 (4th ed. 2000) [hereinafter DSM-IV].

155. DSM-IV, *supra* note 154, at 706. The public often uses the terms “psychopath” or “sociopath” to describe individuals with this type of behavior profile. These terms, however, are not diagnostic conditions recognized in the DSM-IV. See John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 435 n.116 (2006).

- Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations
- Lack of remorse, as indicated by being indifferent to, or rationalizing, having hurt, mistreated, or stolen from another.¹⁵⁶

“[APD] is characterized by a pattern of “socially irresponsible, exploitative, and guiltless behavior.”¹⁵⁷ The most “salient, severe, and potentially dangerous” characteristic of the pathology is a lack of remorse.¹⁵⁸

People with APD (also known as “antisocials”) are not antisocial in the vernacular sense. That is, they don’t avoid personal interactions with others but may, in fact, be highly sociable. However, they “seem to have fundamentally different emotional and biological responses from others. For example, researchers have found that subjects with APD have diminished responses to facial expressions of sadness or fear and that their response to fear is generally blunted.”¹⁵⁹ Brain imaging studies have shown that the brain structure of antisocials is different from the brain structure of “normal” persons.¹⁶⁰ Thus, APD seems to have physical, as well as psychosocial, origins.¹⁶¹

156. DSM-IV, *supra* note 154, at 706.

157. DONALD W. BLACK, *BAD BOYS, BAD MEN: CONFRONTING ANTISOCIAL PERSONALITY DISORDER* xvi (1999).

158. DOBBERT, *supra* note 154, at 60.

159. Richard A. Friedman, M.D., *Truth About Lies: They Tell A Lot About a Liar*, N.Y. TIMES, Aug. 5, 2003, at F6.

160. See Adrian Raine et al., *Reduced Prefrontal Gray Matter Volume and Reduced Autonomic Activity in Antisocial Personality Disorder*, 57 ARCH. GEN. PSYCHIATRY 119 (2000) (finding that persons with APD had 11 percent less prefrontal gray matter than control subjects, suggesting that a structural deficit may underlie the low arousal, poor fear conditioning, lack of conscience, and decision-making deficits that characterize antisocial behavior); Adrian Raine et al., *Corpus Callosum Abnormalities in Psychopathic Antisocial Individuals*, 60 ARCH. GEN. PSYCHIATRY 1134 (2003) (finding that antisocial individuals have 22.6 percent more callosal white matter volume than controls, a finding that might account for affective and interpersonal deficits).

161. Notably, APD is far more prevalent among men than among women. Antisocial Personality Disorder, Psychology Today Diagnosis Dictionary, <http://psychologytoday.com/conditions/antisocial.html> (last visited July 29, 2008). APD occurs in three percent of the male population and only one percent of the female population.

APD symptoms typically emerge in childhood¹⁶² and the behaviors associated with APD ultimately decline with age.¹⁶³ In midlife, though, a person with APD creates havoc in the lives of the people around him. Sometimes his conduct escalates to violence.¹⁶⁴ More often, he repeatedly loses jobs, torments his family through lies and broken promises, and gets in trouble with the police. Not surprisingly, the consequences of APD in a legal context can be significant.¹⁶⁵

Antisocial personality disorder is a chronic and lifelong problem.¹⁶⁶ “Though the cycle of misbehavior shifts with changes in circumstances, it remains a force throughout the antisocial’s life.”¹⁶⁷ Conventional therapies—lecturing, operant conditioning, financial penalties, shaming, and familial rejection (“tough love”)—are all ineffective in reversing the effects of APD.¹⁶⁸ According to most experts, it is nearly impossible to successfully treat APD.¹⁶⁹

Importantly, this means that a person with APD is unlikely to be deterred from wrongdoing by the threat of legal sanctions:

[Such a person’s] lack of conscience enables him to act on impulses without a second thought and then to repeat the same destructive behaviors with no regard for their consequences. While antisocials can understand the concepts of right and wrong on an intellectual level, they have no emotional connection to commonly held standards

162. Essi Viding et al., *Strong Genetic Risk for Psychopathic Syndrome in Children*, 46 J. CHILD PSYCH. & PSYCHIATRY 592 (2005) (reporting on a study of 7-year olds who already show problem behaviors and a significant lack of empathy or remorse).

163. Joshua Greene, *Cognitive Neuroscience and the Structure of the Moral Mind*, in THE INNATE MIND: STRUCTURE AND CONTENTS 342 (Stephen Laurence, Peter Carruthers, & Stephen Stich eds., 2005).

164. BLACK, *supra* note 157, at 42.

165. The nature of an antisocial’s criminal behavior is often a function of his intelligence. That is,

[t]he level of intelligence of the person afflicted with [APD] is . . . reflected in the type of behaviors that they perform. Generally speaking the higher the level of intelligence, the more covert the behavior, and in contrast, the lower the level of the intelligence of the person afflicted with [APD], the more overt the behavior. The person with lower intelligence is more apt to commit armed robbery of a convenience store without considering the presence of a surveillance camera. . . . In contrast the [antisocial] man with a higher intelligence carefully plans out his criminal activity. He is rarely impulsive and usually successful. He is good at his trade.

DOBBERT, *supra* note 154, at 56.

166. *Id.* at 54.

167. BLACK, *supra* note 157, at 35.

168. See Jessica H. Lee, *The Treatment of Psychopathic and Antisocial Personality Disorders: A Review*, <http://www.ramas.co.uk/report3.pdf> (last visited July 28, 2008).

169. BLACK, *supra* note 157, at 12 (many experts regard treatment of APD as “hopeless”).

of behavior. This conscience deficit is the root of [the disorder's] range of symptoms.¹⁷⁰

Even conviction and imprisonment may fail to change the conduct of a person with APD.¹⁷¹

If it is not already obvious, there is a significant overlap between the characteristics of a securities fraud recidivist and a person with APD: illegal behavior, repeated deception, disregard for the rights and property of others, conning for profit, and lack of remorse. The core characteristic of a successful con man—the empathy deficit—is also the core characteristic of a person with APD.

Some securities fraud recidivists may not have APD, of course, but fall instead into the category of chronic or “pathological” liar. These people lie about everything: what they ate for breakfast, where they bought their car, and who they saw at church on Sunday. Their lying is reflexive, and often pointless; that is, they lie out of habit (or compulsion) rather than to achieve any particular economic objective.¹⁷² Chronic liars are not well-understood by forensic psychologists,¹⁷³ but we do know that people who are chronic liars, like people with APD, have a different brain structure than “normal” persons and also a different brain structure than persons with APD.¹⁷⁴

It is unlikely, in my view, that many securities fraud recidivists are pathological liars.¹⁷⁵ It is more likely that some securities fraud recidivists suffer from *no* pathology but are simply economic opportunists—clever thieves. This possibility, of course, is consistent

170. *Id.* at xiii.

171. *Id.* at xi.

172. Ken Hausman, *Does Pathological Lying Warrant Inclusion in DSM?*, PSYCHIATRIC NEWS, Jan. 3, 2003, at 24 (“In pathological lying, telling lies may often seem to be an end in itself. . .”).

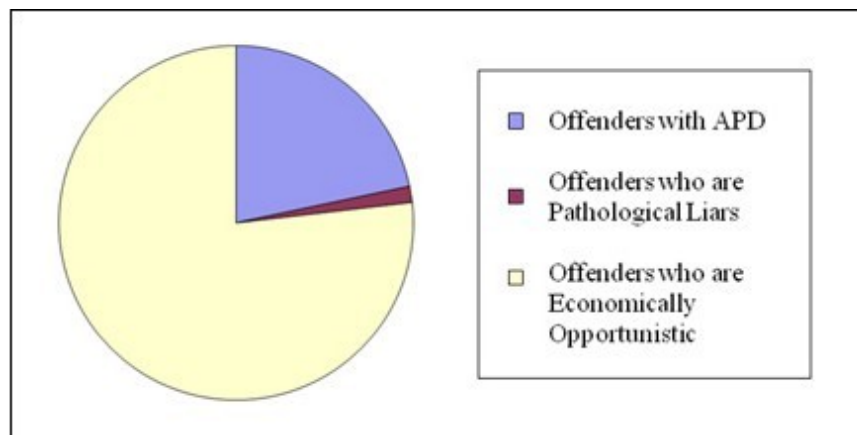
173. *Id.* (noting the “paucity of literature references and studies on pathological lying”). See also Charles C. Dike, et al., *Pathological Lying Revisited*, 33 J. AM. ACAD. PSYCH. AND THE LAW 342, 347 (2005) (“It is unknown whether pathological lying exists across cultures, whether there are different subtypes of the phenomenon, and whether pathological liars present enough predominant, consistent, and stable symptoms or symptom clusters to delineate clearly a clinical entity fit for individual classification in the DSM.”).

174. Yaling Yang & Adrian Raine, *Prefrontal White Matter in Pathological Liars*, 187 BR. J. PSYCHIATRY 320 (2005) (noting that pathological liars have significantly less gray matter and significantly more white matter than either normal or antisocial control subjects). Yaling Yang et al., *Localisation of Increased Prefrontal White Matter in Pathological Liars*, 190 BR. J. PSYCHIATRY 174 (2007) (further detailing the distribution of white matter in pathological liars).

175. Pathological lying may be associated with a number of pathologies other than APD. These include borderline personality disorder, histrionic personality disorder, or narcissistic personality disorder. SULLIVAN, *supra* note 59, at 151.

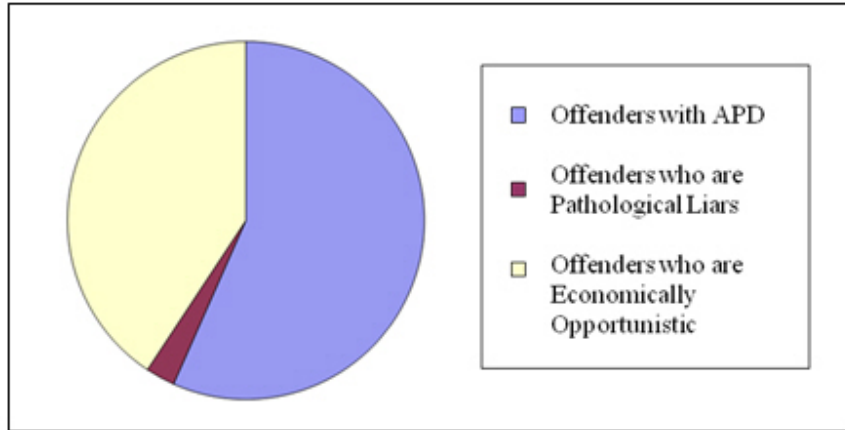
with the view of criminologists who embrace the “crime as choice” approach to white collar crime.¹⁷⁶

Let us imagine, then, the universe of securities fraud offenders. I have suggested they might fall into three categories: those suffering from APD, those who are chronic liars but do not suffer from APD, and those who have no pathology but choose to engage in fraud, sometimes repeatedly. We do not know—because we have not asked—just what the respective size of these populations might be. A fair guess, though (and it is only a guess at this point), is that, among *first offenders*, the universe of securities fraud defendants might look something like this:

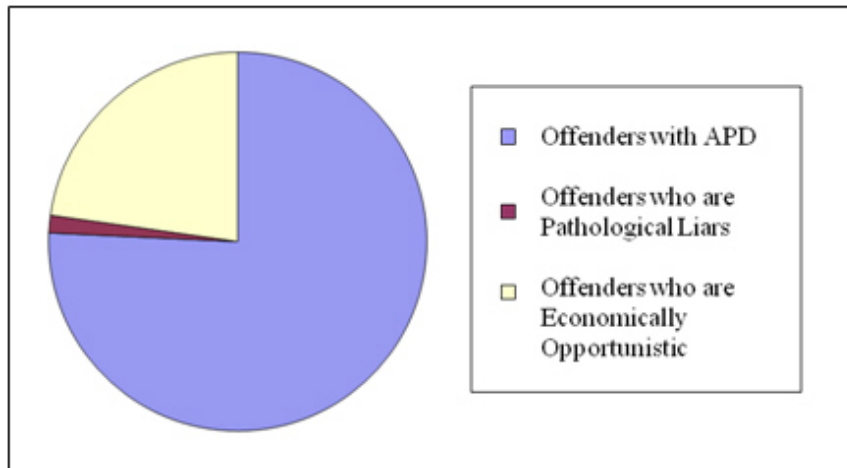


The universe of securities fraud *second offenders* might look something like this:

176. See, e.g., SHOVER & HOCHSTETLER, *supra* note 62; RATIONAL CHOICE AND CRIMINAL BEHAVIOR, *supra* note 62.



Finally, let us imagine the universe of securities law offenders who have been sanctioned at least twice for securities law violations, either in state or federal proceedings and either in civil or criminal proceedings, and then recidivate *again*. The composition of this population might look something like this:



Of course, these estimates are only speculative. Still, if I am correct, or even close to correct, a significant percentage of securities fraud recidivists, especially those with multiple frauds on their record, may suffer from APD. And, even if I am wrong, there still is a significant problem, discussed below, with the current SEC deterrence scheme.

IV. THE TRADITIONAL LAW ENFORCEMENT RESPONSE TO SECURITIES FRAUD RECIDIVISTS

Retail securities fraud is said to be a “low-risk crime” (for its perpetrators) because it is so difficult to detect and prosecute.¹⁷⁷ It is also generally a low-sanction crime. That is, retail securities fraud is usually handled strictly as a civil matter, utilizing an array of civil remedies. These include cease-and-desist orders, occupational bars, penny stock bars, “obey-the-law” injunctions, disgorgement orders, civil penalties, and occasional asset freezes.¹⁷⁸ The SEC sparingly refers its cases to the Department of Justice for criminal prosecution.¹⁷⁹

Even cases involving *recidivist* securities law violators are rarely prosecuted and often result merely in the imposition of repeated civil sanctions. We saw this scenario, of course, in the cases of Frank Custable (whom the SEC pursued three times in civil enforcement proceedings before he faced federal criminal prosecution),¹⁸⁰ Roc Hatfield (who was sanctioned three times in civil proceedings, including *after* serving time in jail for fraud),¹⁸¹ and Lloyd Benton Sharp (who has been enjoined three times but never prosecuted federally).¹⁸² We also see it with demoralizing regularity in many other cases.

One instructive case (and one of the few fraud cases involving women) is that of Carol Martino, who orchestrated a stock manipulation scheme that netted her more than four million dollars.¹⁸³ Even though Martino had once before been enjoined from violating the securities

177. SHOVER, *supra* note 58, at 57:

First, when compared to those victimized by street crimes, victims of fraud are much less likely even to be aware they have been victimized. And they are less likely than victims of street crime to report it to authorities. Believing they should have been more careful in the first place, many feel a sense of embarrassment and shame and certainly do not want others to know what has happened to them. Local-level law enforcement and prosecution generally are no match for criminals whose operations span state borders via the telephone or the U.S. mail.

178. The hierarchy of available civil remedies is more fully described in Jayne W. Barnard, *Rule 10b-5 and the “Unfitness” Question*, 47 ARIZ. L. REV. 11, 32-33 (2005).

179. See Jenni Bergal & Purva Patel, *Fraud Outruns the Feds; Investors Lose Almost \$1 Billion in Five Years*, FT. LAUDERDALE SUN-SENTINEL, July 6, 2003, at 1A (in a review of 121 securities fraud cases filed in Miami, “only about 20 percent of the SEC’s cases . . . resulted in criminal prosecutions”). A friend at the SEC suggested that this newspaper article provides meager support for the assertion that few SEC cases are referred for criminal prosecution. The SEC itself does not provide better information. Its annual Performance and Accountability Report does not make reference to criminal referrals.

180. See *supra* notes 11-27 and accompanying text.

181. See *supra* notes 28-47 and accompanying text.

182. See *supra* notes 50-57 and accompanying text.

183. See *SEC v. Martino*, 255 F. Supp. 2d 268 (S.D.N.Y. 2003), *aff’d* *SEC v. Martino*, 94 Fed. Appx. 871 (2d Cir. 2004).

laws, and barred from associating with any broker, dealer, or investment adviser,¹⁸⁴ she had continued to do both for several years. She had also been prosecuted (and jailed) for income tax evasion, and had moved her assets outside the country to foil creditors.¹⁸⁵ The result for Martino was a disgorgement order and the imposition of another obey-the-law injunction.¹⁸⁶

Yet another case involves Joel Steinger, who orchestrated the sale of viatical settlements valued at over one *billion* dollars.¹⁸⁷ Even though Steinger had a history of other securities law violations, and had consented to the entry of an obey-the-law injunction in a similar scheme only a few years before,¹⁸⁸ the SEC sought only disgorgement, a civil penalty, and a second obey-the-law injunction.¹⁸⁹ Steinger was able to settle the case by consenting to the injunction and disgorging the proceeds of the scheme.¹⁹⁰

The problem with all these cases is not only that “civil actions frequently disguise serious criminal conduct,”¹⁹¹ but also that civil sanctions may present problems of legitimacy¹⁹² and are often inadequate in terms of victim satisfaction. Most importantly, the civil sanctions available to the SEC—inconveniences, really—are unlikely to deter committed recidivists.¹⁹³ According to an informal study of securities fraud violators in Florida in 2003, twenty-five percent of them had “at

184. See 255 F. Supp. 2d at 271.

185. See *id.* at 290.

186. See *id.* at 290-91.

187. SEC v. Mutual Benefits Corp., No. 04-60573-civ-Moreno/Garber, 2004 U.S. Dist LEXIS 23008 (S.D. Fla., Nov. 10, 2004).

188. SEC v. Steinger, SEC Litig. Rel. 15729, 1998 SEC LEXIS 834 (May 1, 1998).

189. SEC v. Mutual Benefits Corp., SEC Litig. Rel. 18698, 2004 SEC LEXIS 941 (May 6, 2004).

190. SEC v. Steinger, SEC Litig. Rel. 19480, 2005 SEC LEXIS 3103 (Dec. 1, 2005). See also SEC v. Calvo, 378 F. 3d 1211 (11th Cir. 2004) (recidivist sanctioned with a disgorgement order, a civil penalty and an obey-the-law injunction); SEC v. U.S. Windfarming, Inc., SEC Litig. Rel. 19886, 2006 SEC LEXIS 2841 (Oct. 25, 2006) (recidivist sanctioned with a disgorgement order, penny stock bar, and an obey-the-law injunction); SEC v. ACI, Inc., SEC Litig. Rel. 18869, 2004 SEC LEXIS 1998 (Sept. 2, 2004) (recidivist sanctioned with a disgorgement order, civil penalty, and an obey-the-law injunction); SEC v. Rocky Mountain Energy Corp., SEC Litig. Rel. 18305, 2003 SEC LEXIS 2038 (Aug. 22, 2003) (recidivist sanctioned with an obey-the-law injunction); SEC v. Hayton, SEC Litig. Rel. 17872, 2002 SEC LEXIS 3086 (Dec. 3, 2002) (recidivist sanctioned with disgorgement order and obey-the-law injunction).

191. SHOVER & HOCHSTETLER, *supra* note 62, at 103.

192. See, e.g., SEC v. Smyth, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005) (questioning the legitimacy of obey-the-law injunctions).

193. See, e.g., Floyd Norris, *A White-Collar Criminal Adds Conviction No. 7 to His Record*, N.Y. TIMES, Mar. 13, 2002, at C11 (noting that the SEC had obtained three obey-the-law injunctions against defendant Lionel Reifler but “his career does not seem to have been affected by that.” Reifler had been “in and out of trouble for various financial crimes for most of his adult life.”).

least one previous regulatory or criminal action involving fraud or economic crime. Eleven percent had two or more such actions against them.”¹⁹⁴ Several had three or more.¹⁹⁵

Of course, it is understandable that the SEC husbands these cases for itself rather than referring them to the Department of Justice. This reluctance may be due to territorialism and a sense that the U.S. Attorneys’ offices are often not very good at prosecuting certain types of securities frauds. There also may be problems with meeting the beyond-a-reasonable-doubt standard necessary to secure a criminal conviction. Internet frauds are particularly difficult to prosecute: the detailed tracing of communications through multiple servers and the frequent involvement of offshore co-conspirators, whose testimony cannot be compelled, complicate these cases. And, recently, the FBI and federal prosecutors have been directed to focus on terrorism and drugs, not fraud.¹⁹⁶ Thus, today, these agencies simply lack the resources to pursue all but the biggest fish in the securities fraud pool.

Still, where the likelihood of recidivism is high, the SEC should recognize that something more than repeated civil sanctions may be required. In the case of *documented* recidivism, criminal prosecution will almost always be appropriate. Most of these defendants belong in jail.

V. PREDICTING RECIDIVISM AMONG FIRST OFFENDERS

A fair question at this point is “how, in the absence of documented recidivism, can the SEC identify a likely recidivist?” Many securities law violators are situational offenders responding to a unique temptation or business problem and, therefore, are unlikely to become repeat offenders.¹⁹⁷ Moreover, the process of prediction is quite imprecise.¹⁹⁸

194. Bergal & Patel, *supra* note 179.

195. *Id.*

196. See Paul Shokovsky, Tracy Johnson & Daniel Lathrop, *The Terrorism Trade-Off: Focus on National Security After 9/11 Means That the Agency Has Turned Its Back on Thousands of White Collar Crimes*, http://seattlepi.nwsourc.com/national/311046_fbterror11.html (last visited July 24, 2008); Dan Eggen & John Solomon, *Justice Department’s Focus Has Shifted*, WASH. POST, Oct. 17, 2007, at A1.

197. See Barnard, *supra* note 178, at 29-30 (discussing situational offenders). In a careful study of securities law violators, fewer than 25 percent were ever again arrested for any crime. WEISBURD ET AL. *supra* note 61, at 29.

198. See Alex R. Piquero et al., *The Criminal Career Paradigm*, CRIME & JUST. 359, 470 (2003) (noting that attempts to predict recidivism have been “fraught with problems” and that it is particularly difficult to identify career criminals early in their careers); see also WEISBURD ET AL., *supra* note 61, at 135 (“[It] is difficult to predict future criminality on the basis of knowledge of the offender’s past social and criminal conduct and circumstances.”). Indeed, in many cases, the process of identifying likely recidivists is “little more than guesswork.” Barnard, *supra* note 178, at 31.

We do have some bases, however, for predicting recidivism among first offenders. Courts routinely find that (1) a pattern of wrongdoing as opposed to an isolated act; (2) lack of remorse or contrition; (3) possession of specific skills, coupled with conditions providing opportunity for harm (such as employment as an investment advisor or in a brokerage firm); and (4) recent conduct indicating an intent to recidivate, are all predictive of future misconduct.¹⁹⁹

I have suggested elsewhere that an alternative approach to the question of prediction—especially applicable to first offenders—might involve drawing a distinction between “opportunity takers” (those who engage in fraud when a sudden or unusual opportunity arises that is too good to pass up) and “opportunity seekers” (those who spend considerable time imagining and engineering fraudulent schemes).²⁰⁰ The former are less likely to recidivate than the latter.

Yet another predictor of recidivism is Antisocial Personal Disorder. As noted above, one of the definitional characteristics of APD is repeated violation of legal proscriptions dating back to childhood.²⁰¹ Indeed, offenders with APD have no desire or ability to conform their behavior to the requirements of the law. One way to predict recidivism, then, would be to “diagnose” a defendant with APD. This diagnosis might involve the administration of a paper-and-pencil test, a review of the defendant’s past conduct, interviews with the defendant and family members,²⁰² and a holistic forensic evaluation.²⁰³

VI. A PRESCRIPTION

This Article has so far traced two related themes: (1) the existence of a class of offenders, securities fraud recidivists, who make their living through the perpetration of fraud schemes and (2) the inadequacy of the current civil enforcement scheme to deter misconduct by securities fraud recidivists.

To deal with these phenomena, I offer six proposals. First, I propose a “one bite” rule for the SEC. A civil enforcement action may

199. *See, e.g.*, SEC v. Ginsberg, 362 F.3d 1292, 1304 (11th Cir. 2004) (citing the conditions for finding a likelihood of future misconduct); Lowry v. SEC, 340 F.3d 501, 505-07 (8th Cir. 2003) (same); SEC v. Blatt, 583 F.2d 1325, 1334 (5th Cir. 1978) (same).

200. Barnard, *supra* note 178, at 55.

201. *See supra* Part III.E.

202. It is unwise to rely exclusively on self-reporting by antisocials. They are as likely to deceive and manipulate an interviewer as to deceive and manipulate their victims.

203. This evaluation might employ the Psychopathy Checklist-Revised (PCL-R). This diagnostic tool is the “primary means of measuring psychopathy today.” Christina Lee, *The Judicial Response to Psychopathic Criminals: Utilitarianism Over Retribution*, 31 LAW & PSYCHOL. REV. 125, 127 (2007).

be entirely appropriate for a first offender, but, under my proposed approach, anyone who orchestrates a retail-level fraud and is sanctioned (or voluntarily accepts a civil sanction), and then shows up again at the SEC's doorstep should be referred to the Department of Justice for criminal prosecution. This policy, which would not require legislation, should be clearly stated and widely publicized by the SEC Enforcement Division. While the threat of criminal prosecution may not deter the most intractable and unrepentant defendants, it may have an impact on others with more self-control. Furthermore, because the defendant would face criminal prosecution and possible imprisonment, this proposal should satisfy some of the retributive needs of securities fraud victims.²⁰⁴

Criminal referral will not always be possible, for the reasons mentioned above (*e.g.*, evidentiary problems and lack of skilled personnel). Therefore, I propose the creation of a Securities Fraud Recidivist Task Force within the SEC Enforcement Division. This Task Force will bring together experts not only on retail-level securities frauds but also on recidivism and its psychological and behavioral components. When dealing with second-offenders in a civil enforcement context, Task Force members will be positioned to advocate the most stringent civil sanctions and ensure that they are enforced. This will include the timely pursuit of contempt citations against defendants who violate the terms of injunctions against them and the seizure of assets that result from their schemes. Recidivists should not be left in the hands of junior-level Enforcement Division lawyers or to the lawyers in the regional offices. The Enforcement staff with whom recidivists deal should be experts.

Third, I propose that the SEC Enforcement Division undertake monitoring of some securities fraud defendants after their first offense—at least those defendants who, based on psychological assessment, behavioral history, and lack of remorse or contrition can be identified as likely recidivists. Much like a probation officer, an SEC monitor would keep track of the defendant's post-sanction activities and initiate action if fraud recurs. Legislation should not be necessary to adopt this proposal; the Commission is currently empowered to seek "any equitable relief that may be appropriate or necessary for the benefit of investors."²⁰⁵ That provision should permit a judge to authorize monitoring of a defendant found liable for a securities law violation, upon a showing that the defendant fits the recidivist profile. It should also permit the

204. See Jayne W. Barnard, *Allocation for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001) (proposing mechanisms by which victim satisfaction in fraud cases might be improved).

205. 15 U.S.C.A. § 78u(d)(5) (West 2008).

Commission to condition a settlement on the defendant's agreement to permit ongoing monitoring of his actions. Some form of monitoring, whether or not the defendant agrees to it, would seem to be a straightforward act of risk management at the SEC.²⁰⁶ The problem with meaningful monitoring, of course, is cost.

Fourth, I propose that the SEC, in collaboration with the National Association of Attorneys General, the North American Securities Administrators Association, the Commodities Futures Trading Commission, and the Financial Industry Regulatory Authority, create a securities fraud registry, where prospective investors could find out if the person with whom they are doing business has a history of securities fraud, either at the state or federal level. We currently require registration of sex offenders and physicians with a disciplinary record.²⁰⁷ Though these systems are not foolproof (securities fraud defendants can always change their names, and the names of the companies whose securities they are selling), it would be inexpensive, and one more vehicle by which investors could conduct "due diligence" before parting with their money.²⁰⁸

Fifth, let us assume that the foregoing recommendations are *not* adopted. Assume further that the existing enforcement regime—sequential civil actions initiated by the SEC—continues in place. At a minimum, the Enforcement Division ought to adopt a strategy of "progressive discipline." That is, any time a recidivist is the subject of a civil enforcement action, the stakes should get higher. Specifically, the SEC should do more than just string together a series of obey-the-law injunctions. Anyone facing a second injunction should also face a significant civil penalty. It may be necessary to amend the Securities and Exchange Act in order to effectuate this recommendation. Currently, the three-tier penalty system does not include recidivism as a salient factor in determining the amount of the penalty.²⁰⁹ Recidivism should count, however, and should count heavily, in setting the terms of a civil penalty.

Finally, I propose that the SEC (perhaps in collaboration with the National Institute of Mental Health) conduct research into the securities fraud recidivists now in prison: a review of their presentence reports, interviews with them, the administration of pertinent diagnostic tests by

206. See Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 *Nw. U. L. Rev.* 1, 6 (2003) ("Certainly the state has a compelling interest in protecting its citizens from these types of crimes. Why shouldn't the state be empowered to take preventive action against any individual who is likely to wreak havoc on society?").

207. See, e.g., Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2006); Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11131 (1986).

208. For further discussion of this proposal, see Barnard, *supra* note 48, at 971-2.

209. 15 U.S.C.A. § 78(u)(d)(3) (West 2008).

trained forensic psychologists, and even brain scans, to gain a better understanding of who these people are, how they assemble their fraud “scripts,” what threats they pose, and what sanctions are most appropriate for them. Knowing more about securities law recidivists is essential to formulate an appropriate law enforcement strategy.²¹⁰ There is much work to be done.

VII. CONCLUSION

In recent years, the “lure” of securities fraud—affluent Americans eager to increase their wealth by investing in the stock market, many of whom are looking for a good deal—has given rise to an increasing amount of serious misconduct in the financial markets.²¹¹ Some of this misconduct can be traced to securities fraud recidivists—men and women who make their living by engaging repeatedly in “retail” securities fraud schemes.

It is easy to underestimate securities fraud recidivists. Americans often admire the audacity of such men, until we become their victims. We also tend to romanticize con men, recalling the great cinematic con men—Paul Newman and Robert Redford,²¹² Leonardo DiCaprio,²¹³ Richard Gere,²¹⁴ Nicholas Cage,²¹⁵ and Michael Caine.²¹⁶

In this Article, I have suggested another way to look at securities fraud recidivists. They are not just rogues or petty thieves; they are dangerous predators. Some of them, moreover, may suffer from a personality disorder, APD, that is likely to lead them to commit frauds again and again. The SEC’s current scheme of civil sanctions does not adequately address the problem of securities fraud recidivists. More aggressive thought and more considered action is the proper response to these criminals.

210. See Dean Mobbs et al., *Law, Responsibility, and the Brain*, 5 PLOS BIOLOGY 693, 696 (2007) (arguing generally that research into the links between mental illness, neurological disorder and criminal conduct is “urgently needed”).

211. See SHOVER & HOCHSTETLER, *supra* note 62, at 35 (discussing “lure”); *id.* at 167 (“[There is] reason to believe that we are witnessing a rising tide of white-collar crime in Western nations. Reasons for the increase include new forms and an expanded supply of lure, noncredible oversight, and uncertain punishment for those who commit white-collar crime.”).

212. *THE STING* (Universal Studios, 1973).

213. *CATCH ME IF YOU CAN* (Dreamworks, 2002).

214. *THE HOAX* (Miramax, 2007).

215. *MATCHSTICK MEN* (Warner Bros. Pictures, 2003).

216. *DIRTY, ROTTEN SCOUNDRELS* (Orion Pictures, 1988). Films and television series also offer appealing portraits of female con artists. They include Angelica Huston, Tatum O’Neal, and Minnie Driver. See *THE GRIFTERS* (Miramax, 1990); *PAPER MOON* (Paramount Pictures, 1973); *The Riches* (2006).

At a minimum, the Department of Justice should elevate the priority now given to the prosecution of perpetrators of securities frauds, and especially to the prosecution of securities fraud recidivists. The SEC should develop expertise regarding the nature of recidivism and create a Recidivist Task Force to put that expertise in one place. The SEC should also commit resources to monitoring likely recidivists, to interdict the harm that they can cause. State and federal law enforcement agencies should organize a registry through which investors can keep track of securities fraud offenders. And Congress should consider better-targeted sanctions to deal with this predatory population. Above all, we must learn much more about the biological and social determinants of the people who commit fraud.