IESE Business School
University of Nava rra

Occasional Paper
OP-180
October, 2010

GETTING BUSINESS OFF STEROIDS

Maximilian B. Torres

IESE Occasional Papers seek to present topics of general interest to a wide audience.

IESE Business School – University of Navarra
Av. Pearson, 21 – 08034 Barcelona, Spain. Phone: (+34) 93 253 42 00 Fax: (+34) 93 253 43 43
Camino del Cerro del Águila, 3 (Ctra. de Castilla, km 5,180) – 28023 Madrid, Spain. Phone: (+34) 91 357 08 09 Fax: (+34) 91 357 29 13

GETTING BUSINESS OFF STEROIDS

Maximilian B. Torres [1]

Abstract

Culture is to organization as character is to person. Each guides the activity of the entity that possesses it – the organization or the person – as if by default. These "defaults," however, are dynamic, changing and alterable, rather than fixed. Character and culture depend upon one another. And, both hinge on freely selected means to one end or another: excellence or victory. This essay applies these concepts to relatively recent events in business and sport to illustrate the common workings of character and culture in these different fields of endeavor. It proposes a decision-making tool for operating on personal character and organizational culture.

Keywords: character, culture, decision-making, sports.

[1] Assistant Professor of Law at Ohio Northern University Pettit College of Law in Ada, Ohio and Visiting Professor of Business at IESE Business School in Barcelona, Spain.

NOTE: This chapter was prepared for "*Doing Well And Good: The Human Face of The New Capitalism*", Ed. Friedland, J., Information Age Publishing Inc., Ethics in Practice Series, Chapter 1, pages 3-29, 2009.

GETTING BUSINESS OFF STEROIDS

Introduction

The present publication heralds a "new capitalism" with a "human face." The "old" has lavished society with wealth and prosperity beyond the wildest dreams of a Smith or a Marx, but at a cost many fear is not sustainably affordable.[1] This chapter proposes a simple *decision-making tool* in the form of *three questions* upon which to construct a political economy grounded in the nobler part of a person – beyond fear and greed, while cognizant of them. This task is crucial, for ultimately it is the activity of persons (i.e., *personal action*) taken collectively which engenders, bolsters and foments sustainable prosperity on the one hand or social calamity on the other. It analogizes problems in business to problems in sport, specifically the use of performance-enhancing drugs in Major League Baseball, and argues that corrupt human behavior in every activity is rooted in: 1) a *personal* selection of inapposite *ends*; 2) the consequent misidentification of *values,* and 3) the embrace of misidentified values resulting in 4) potentially destructive, personal *character* habits.

It is important to study social phenomena from the perspective of what occurs within an individual person because, as the scholars following the classics taught, *agere sequitur esse*: "doing follows being," or what you *do* comes from what you *are*. Problematic actions such as "cooking the books," shredding documents in anticipation of litigation or taking steroids proceed from bad habits (vicious character) in otherwise-normal people. Recent problems in business and sport – *personal* first, *social* derivatively – are manifested as "cheating" and

---

[1] Though this chapter will not directly address the crisis that engulfed Wall Street, the financial sector and, indeed, the world's credit and capital markets in Fall '08, the analysis, descriptions and prescriptions contained herein apply equally to it. At bottom, the credit crisis of '08 which threatened to plunge the global economy into a prolonged, severe recession and perhaps depression is the result of an ethical problem, imprudence, manifest in the reckless leveraging of home mortgages by house purchasers who couldn't afford them, lending institutions that issued them without performing due diligence, regulators that coerced lenders into making them, investment bankers that tranched, packaged and sold them without ascertaining their true risk or even value, and investors who jumped into securities backed by them without researching what they were buying.
Separately, perennial concerns regarding unfairness and economic inequality continue to resonate as evidenced by the award of 2008's Nobel Prize in Economic Sciences to Princeton economist, Paul Krugman. While he was ostensibly awarded the Nobel for scholarly research on international trade and economic geography, the ideas concerning political economy for which he is popularly known are diffused regularly through the editorial page of *The New York Times* and in bestselling books. In his recent manifesto he offers an argument for redistributive programs, and a trenchant critique of free-market economics and conservative politics. *See*, Paul Krugman, *"The Conscience of a Liberal,"* (W. W. Norton) (2007).

"fraud," which are grounded in a pursuit of *victory* and the choice of values (or *goods*) proper to it to the neglect of *excellence* and its goods. "Steroids" are simply the preferred mode of cheating in contemporary sports and serve as a metaphor for problems in the world of business.

The Recent Past

Is there a more infamous chieftain in the pantheon of fallen idols than Ken Lay of Enron? Lay transformed a sleepy natural gas pipeline company, El Paso Natural Gas, into a cutting-edge energy trader and "new economy" miracle: "the world's leading integrated electricity and natural gas company." He eventually handed over the reins of Enron to Harvard MBA Jeff Skilling, the man behind the "crooked E's" mark-to-market (read, "hypothetical") accounting, a key ingredient of Enron's "success," however illusory.[2] Lay, Skilling and chief lieutenant CFO Andy Fastow were hailed as visionaries for unleashing creativity and innovation in ways previously unknown in the energy business, or nearly any business for that matter.[3] Each man scaled the pinnacles of success and enjoyed media accolades, lavish compensation and the power of a pulpit reserved for *winners* and *leaders* of companies whose common stock beguiles Wall Street. In 2001 the company, then the 7th largest firm in the United States,[4] dissolved in a mist of fraudulent accounting and obfuscatory transactions utilizing special purpose entities (SPE's). Once Enron's true financial position came to light, Fastow, the architect of the fraud, was convicted under the securities laws and sentenced to five years in a federal penitentiary,[5] a lenient sentence granted in return for his cooperation with the prosecutions of Lay and Skilling. Both men were convicted in May of 2006.[6,7] Juror Wendy Vaughan commenting afterwards said "I wanted very badly to believe what they were saying... There were places in the testimony I felt their character was questionable."[8] Skilling is presently seeking to overturn his 24-year sentence on appeal.[9] Poignantly, Ken Lay died of an apparent heart attack in July of 2006 while on an Aspen, Colorado respite before filing an appeal.[10] He was 64 years old.

Enron's collapse was followed shortly by the discovery of an $11 billion accounting fraud at telecom giant WorldCom involving rank violations of generally accepted accounting principles (GAAP).[11] The company inflated earnings by capitalizing line costs (an operating expense) thereby illicitly spreading costs into future periods and minimizing their impact on current results. Its bankruptcy in 2002 surpassed Enron's as the largest evisceration of shareholder wealth in history up to that time.[12] Enron and WorldCom's auditor, the legendary accounting

---

[2] McLean, Bethany and Peter Elkind," *Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enro*n," (Penguin Group) (2003).

[3] Levelle, Marianne, and Matthew Benjamin, "*The Biggest Bust*," U.S. News & World Rep., Dec. 10, 2001, at 34.

[4] Id.

[5] "*U.S. v. Fastow*," No. H-02-0665 (S.D. Tex. 2004), *available at* http://fl1.findlaw.com/ news.findlaw.com/hdocs/docs/enron/ usafastow11404plea.pdf.

[6] *U.S. v. Skilling*, No. H-04-25, 2006 WL 1444909 (S.D. Tex. May 26, 2006).

[7] "*U.S. v. Lay*," No. H-04-25, 2006 WL 1444908 (S.D. Tex. May 25, 2006).

[8] Emshwiller, John, *"Enron's Kenneth Lay is Dead at 64," The Wall Street Journal*, July 5, 2006.

[9] His appeal was argued in April 2008.

[10] Eichenwald, Kurt, "An Enron Chapter Closes: The Overview," Enron Founder, Awaiting Prison, Dies in Colorado, *New York Times*, July 6, 2006, at A1.

[11] Belson, Ken and Jennifer Bayot, "*Ebbers Sentencing to Proceed as Judge Denies Plea for Retrial," New York Times*, July 13, 2005, at C2.

[12] In September 2008, WorldCom's bankruptcy was dwarfed by investment bank Lehman Brothers' declaration. That institution, begun in 1844, bet heavily and recklessly in the subprime mortgage market. It also acquired excessively

firm of Arthur Andersen, collapsed shortly thereafter under the weight of a criminal indictment by the United State Department of Justice (DOJ) and the avalanche of client defections that followed. Its partner in charge of the Enron audit, David Duncan, had ordered and supervised the destruction of audit papers and sensitive documents in response to subtle hints by Nancy Temple, an in-house Andersen lawyer.[13] At trial, Duncan was described by fellow partner Ben Neuhausen as an auditor who stretched accounting rules "to excess."[14] Nevertheless, he had ascended to the position of Andersen's lead auditor for the firm's 5th largest client. In the years preceding its untimely demise, Andersen had been fined by the Securities and Exchange Commission (SEC) for accounting irregularities at clients Sunbeam and Waste Management, and was implicated in lawsuits involving yet other clients including Qwest Communications and Global Crossing.[15] Apparently, in its rush to replace consulting business lost in a messy divorce with Andersen Consulting (now Accenture), and to embrace a practice labeled "billing our brains out" by Andersen ethicist Barbara Ley Toffler,[16] the firm achieved "results" at the expense of its reputation, integrity and, ultimately, existence.

In December of that same year, ten of the world's leading investment banks including Goldman Sachs and Morgan Stanley – as of this writing, the only large, independent American banks left standing, though in the altered form of federally-regulated holding companies – were forced to settle with the then New York State Attorney General Elliot Spitzer, the SEC and a host of other regulators for producing dishonestly flattering research in exchange for lucrative underwriting business and fees from issuers.[17] $400 million of the unprecedented $1.4 billion settlement was borne by the firm of Salomon Smith Barney whose star Telecom analyst, Jack Grubman, was referred to as the Pied Piper of Wall Street. In his heyday, Grubman was cautioned about his friendly relationships with CEOs of the companies he researched, but responded that "what used to be a conflict is now a synergy."[18] He even boasted of his friendship with WorldCom Executive Chairman Bernie Ebbers and bragged about attending Ebbers' wedding in March 1999.[19] For his part in the scandal Grubman was barred from the securities industry for life. As a postscript to the affair, in November 2004 a federal court

---

leveraged properties for its own portfolio, which totaled $88 billion compared to shareholder equity of $22.5 billion. See, Jamieson, Bill, *"How the Masters of the Universe Ran Amok and Cost us the Earth,"* The Scotsman, September 16, 2008, at 1. At minimum, the leaders at Lehman can be faulted for losing their heads and making extremely imprudent bets that they couldn't afford to lose. The day following Lehman's bankruptcy, the government stepped in to prevent an even larger one, that of insurance giant and Dow Jones 30 Industrial component AIG, which compounded those same faults with others. Ken

On September 25th, the government siezed the nation's largest thrift institution, Washington Mutual. With its $307 billion in assets, WaMu's failure eclipsed Continental Illinois' 1984 collapse ($40 billion in assets) as the largest banking bust in history. See, Sidel, Robin, David Enrich, and Dan Fitzpatrick, *"WaMu is Seized, Sold Off to J.P. Morgan In Largest Failure in U.S. Banking History," The Wall Street Journal*, September 26, 2008.

13 "Arthur Andersen LLP v. U.S.," 544 U.S. 696 (2005).

14 Teather, David, *"Partner says Duncan stretched rules to excess,"* Guardian Unlimited, May 10, 2002.

15 Brewster, Mike, "Unaccountable: How the Accounting Profession Forfeited a Public Trust," (Wiley) (2003).

16 Toffler, Barbara Ley, "Final Accounting: Ambition, Greed and the Fall of Arthur Andersen," (Broadway Books) (2003).

17 Berenson, Alex and Andrew Ross Sorkin, *"How Wall Street was Tamed," New York Times*, Dec. 22, 2002 at 31.

18 Editor, "How Not to Conduct Business", Business Week, August 5, 2002.

19 Smith, Randall, and Deborah Solomon, *"Ebbers's Exit Hurts WorldCom's Biggest Fan," The Wall Street Journal*, May 3, 2002, at C1. Ebbers was convicted of conspiracy and securities fraud in March 2005 and sentenced to 25 years in prison. He was 63 years old. The conviction and sentence were upheld in July 2006. The Supreme Court turned down Ebber's appeal without comment in May 2007. CFO Scott Sullivan, the architect of the WorldCom fraud pled guilty in 2004 to manipulating earnings, and received a lenient five year sentence for cooperating with federal prosecutors in the Ebbers trial.

approved a $2.58 billion settlement between Citigroup (Salomon's parent company) and plaintiffs who alleged, *inter alia*, that Grubman inflated the value of WorldCom stock by knowingly producing inaccurate research.[20]

In retrospect, the Dotcom crash of 2000-2002[21] revealed the great bull market of the '90's' soft underbelly of misstated financials, compromised research, valueless IPO's and over-inflated stock prices. It also ushered in a period of financial turmoil, cathartic reform and harsh recriminations over an era of fraud, pump-and-dump schemes and discredited leaders. Society, the economy and business (writ large) have labored mightily these past few years to put the debacle behind us.[22] In the end, the scandal wiped out billions of dollars in market capitalization, shattered countless illusions, threw tens of thousands of employees out of work while endangering their financial prospects in retirement, and imposed punitive legislation on all commercial enterprise in the guise of Sarbanes-Oxley,[23] an Act widely credited with leading the United States' decline from preeminence in global capital markets.[24] Evidently, a repeat of recent events is something that business, the economy and society can ill afford to experience, and should desperately seek to avoid.

The purpose here is not to indict business – the engine of advancement in humanity's quest for material prosperity and self-determination – or to single out any companies or "players" for derision. Rather it is to learn from history lest we be condemned to repeat it, and to underscore a point. In the search for analyst-pleasing, short-term financial performance, riches, glory, fame and the kind of adulation that dominance in business confers, too many market actors cut too many corners in the pursuit of achievements that would ensure receipt of these prizes. In the process they endangered all of us by putting the cart before the horse through valuing the *goods* of financial success above and beyond their regard for *professional excellence*. The mass phenomenon of cheating and fraud among executives and market professionals in turn suggests that in the search for magazine covers, option compensation, levitating stock prices and market supremacy – in a word, "success" – "America, Inc." turned a blind eye to its protagonists' skewed values. In the process, it succumbed to a culture of fraud and financial restatements. The result is that its most worthwhile accomplishments – producing wealth, generating employment, expanding the circle of productivity and exchange, lifting standards of living – go overlooked, underappreciated and unremarked, to the point that its integrity (as opposed to its appeal) as a human activity is impugned.

---

[20] Pacelle, Mitchell , *"Citigroup's WorldCom Payment Is Finalized at $2.58 Billion," The Wall Street Journal*, Nov. 8, 2004, at C5.

[21] Between March 11, 2000 and October 9, 2002 the Nasdaq Composite Index dropped from 5046.86 to 1114.11, a collapse of 78%.

[22] To little or no avail, as the events between March and September 2008 – the period between Bear Stearns and Washington Mutual's meltdowns – indicate.

[23] Sarbanes-Oxley of 2002, Pub.L. 107-204, 116 Stat. 745 (2002).

[24] In November 2006, the independent Committee on Capital Markets Regulation, a "bipartisan and diverse group of 22 experts from the investor community, business, finance, law, accounting and academia" found significant erosion in the US's traditionally dominant position in global capital markets, and that regulation and litigation are keeping foreign issuers and investors out of the public market. The Committee recommended a number of correctives, specifically an adjustment in the implementation of Section 404 of the Sarbanes Oxley Act. In a follow-up report dated December 4, 2007 entitled "The Competitive Position of the United State Public Equity Market," it concluded that "[b]y almost any meaningful measure, the competitiveness of the United States public equity market has significantly deteriorated in recent years. From 2006 to 2007, most measures either continued to decline or failed to substantially improve." The Committee renewed its call for action on the regulatory reduction front. See, Comm. on Capital Markets Regulation, The Competitive Position of the U.S. Public Equity Market (2007), available at http://www.capmktsreg. org/pdfs/The_Competitive_Position_of_the_US_Public_Equity_Market.pdf.

Parallel History

Something similar happened in the world of American sport that sheds light on this phenomenon in business, namely the crisis besetting Major League Baseball regarding steroid use among players.[25] The recently released Mitchell report – issued pursuant to baseball commissioner Bud Selig's request for an investigation in 2006, and authored by former United States Senator George Mitchell of Maine – named 89 professional baseball players, including some of the sport's greatest, for their use of performance enhancing drugs.[26] Most notorious among those implicated was baseball's newly crowned *home run* king, Barry Bonds. He pursued the career record under a cloud of suspicion after experiencing an eyebrow-raising growth spurt and age-defying power surge relatively late in an already-glorious career.[27] In 2007, Bonds claimed baseball's preeminent statistic by breaking the *career record* of 755 home runs

---

[25] See, Wilson, Duff and Michael S. Schmidt, *"Steroid Report Cites 'Collective Failure," New York Times*, December 14, 2007; Levin, Josh, *"Sports Nut: The Stadium Scene, The Rocket Under Fire; Congress investigates Jose Canseco's barbecue, a nanny in a peach bikini, and Roger Clemens' bloody butt,"* Slate, Feb. 13, 2008.

The problem, to be certain, is not one exclusive to baseball players. For instance, Olympic track and field champion Marion Jones was stripped of five medals won at the 2000 Summer Olympics in Sydney, and sentenced to six months in prison, inter alia, for lying to federal prosecutors about her use of performance-enhancing drugs. See, Associated Press, "*Jones (six months), former coach (63 months) sentenced to prison,"* ESPN.com, January 14, 2008. http://sports. espn.go.com/oly/trackandfield/news/story?id=3191954.

Floyd Landis, winner of the 2006 Tour de France was stripped of his championship, the first winner in the roughly 100-year history of the Tour to suffer that ignominy. He was dismissed from his riding team and suspended from competition for two years because of drug tests showing that he used performance-enhancing drugs during a critical stage of the 2006 event. See, Macur, Juliet , *"Landis's Positive Doping Test Upheld," New York Times*, September 21, 2007.

Nor is the problem one exclusive to United States athletes. Johann "Juanito" Muhlegg, the German-born speed skater turned Spanish Olympian was disqualified from a race in which he'd won a gold medal, and expelled from the 2002 Olympics in Salt Lake City for blood doping. See, Ziegler, Martyn , *"Drugs in Sport: Caborn calls for tougher doping code," The Independent*, January 25, 2003. He was banned from competition for two years, and later stripped of two other gold medals won at the same Olympics. Ironically, Muhlegg was unavailable to receive a call of congratulations from King Juan Carlos of Spain for winning his second gold medal because he was being tested at that moment for drug use. The King sent a telegram that read: "This is a very important victory for Spanish sports." See, *"Staff, Olympics: Notebook; Record Run by Italian Threatens German Dominance in the Luge," New York Times*, February 11, 2002. Rather, it proved to be Spain's greatest sporting humiliation.

Canadian sprinter Ben Johnson forfeited a gold medal won at the 1988 Olympics in Seoul after testing positive for steroids. He'd won a greatly anticipated showdown with Carl Lewis of the United States, a burst for the ages in which Johnson actually had time to turn around and look at Lewis before stretching for the tape. Following a two year ban for that infraction, Johnson returned to international competition only to test positive again and be banned for life. See, Kram, Mark, *"Ben Still Needs to Run," Outside Magazine,* December, 1998.

Argentine soccer legend Diego Maradona was removed from the 1994 World Cup after testing positive for five variants of ephedrine, a substance banned by the sport. See, Verhovek, Sam Hovve, *"World Cup '94; After Second Test, Maradona Is Out of World Cup," New York Times*, July 1, 1994.

[26] Staff, *"Players listed in the Mitchell Commission report,"* ESPN.com, December 13, 2007, http://sports.espn.go.com/mlb/news/story?id=3153646.

[27] Bonds was named *The Sporting News*' Baseball Player of the Decade in 1999 for winning three National League (NL) Most Valuable Player (MVP) awards, eight Gold Gloves and ranking in the top three players in home runs, runs batted in (RBI's), slugging percentage and walks in the '90's. In 1998, the season of America's infatuation with the "long ball" (see the discussion of McWire and Sosa, *infra*) he became the first player in the entire history of major league baseball to hit 400 home runs and steal 400 bases in a career. Few people outside of San Francisco, where he played, seemed to notice.

Though not apposite to the issue of his stature before allegedly beginning steroids use, Bonds became MLB's only 500-500 career player in 2003, and won four more NL MVP awards between 2001 and 2004. Altogether in his career, he won the award an unprecedented seven times, finished second in balloting twice and in the top five players 12 times. He won the NL Hank Aaron Award in 2001, 2002 and 2004 and was named Major League Player of the Year in 1990, 2001 and 2004. He finished his career with scores of other awards, titles and honors.

held by Hall of Fame outfielder, Hank Aaron.[28] In 2001, Bonds broke Mark McGwire's *single-season record* of 70 home runs, which stood for only three years.[29] McGwire's 1998 chase of Roger Maris's record 61 home runs (set in 1961) with Sammy Sosa in hot pursuit captivated the nation's attention[30] and resuscitated fan interest in baseball, which had drowned in a sea of resentment after a player's strike cancelled the 1994 season.[31] The adulation that both men received, culminating in their joint naming as Sports Illustrated magazine's "Sportsman of the Year" in the "easiest selection in our history,"[32] is credited with provoking the luminescent yet overshadowed Bonds to *begin* using steroids.[33]

A reporter covering 1998's chase of history noticed a bottle of Androstenedione ("Andro"), a performance enhancing drug, in McGwire's locker.[34] This unsettling revelation focused attention on modern ballplayers' unusual size and power, and raised the uncomfortable suspicion that their accomplishments in this most statistics-conscious of sports might lack integrity. The worst fears were "confirmed" by the salacious memoirs of one-time superstar and self-confessed "juicer," Jose Canseco, the first player in history to hit 40 home runs and steal 40 bases in a single season.[35] Steroids, he said, were "as prevalent in... the late 1980s and 1990s as a cup of coffee".[36] The controversy surrounding his unrepentant confession and tawdry allegations, coupled with the surfeit of home runs orbiting Major League stadiums, spurred Congress to convoke hearings on steroid use in baseball. It subpoenaed McGwire and Sosa, both implicated in Canseco's tell-all, to testify in 2005 before the House Government Reform Committee.[37] The hearing, entitled "Restoring Faith in America's Pastime: Evaluating Major

---

[28] The career record had stood since 1974 when Aaron broke the legendary Babe Ruth's record of 714 career homers. See, Donovan, John, *"History maker: Bonds slugs No. 756 to pass Aaron as home run king,"* SI.com, August 8, 2007; *"Sham? Maybe. Shame? Definitely: Bonds holds the home run record, but he's no hero,"* SI.com, August 8, 2007.

[29] Bonds finished the season with 73. His career total stands at 762. Barry Bond's Career Stats, http://mlb.mlb.com/stats/historical/individual_stats_player.jsp?c_id= mlb&playerID=111188 (last visited Nov. 18, 2008).

[30] Maris and teammate Mickey Mantle's pursuit of Babe Ruth's record 60 home runs (set in 1927) nearly 40 years earlier was celebrated in the movie "61*." Maris's feat was accomplished in a 162-game season, while Ruth's was achieved in a 154-game season (though Ruth had more at-bats, and hence opportunities than Maris in their respective record setting seasons). Baseball's commissioner Ford Frick determined that Maris's record should be marked in the books with an asterisk to denote his supposed advantage. It effectively deprecated and marginalized Maris's feat as being unfairly accomplished, and tainted the record with a patina of stigma. The asterisk was eventually removed from the record books, but not until after Maris's death. History has been kinder to Maris than were his contemporaries in the New York media. And Frick's act rather than Maris's record has come to bear the mark of injustice.

[31] Kaplan, David A., and Brad Stone, *"In baseball's season of redemption, two men go after the most fabled record in American sports—61 home runs," Newsweek*, September 14, 1998.

[32] Smith, Gary, "*Sportsman of the Year 1998: Mark McGwire and Sammy Sosa*," *Sports Illustrated*, December 21, 1998.

[33] Kroichick, Ron, *"Book traces Bonds' steroids use to McGwire-Sosa HR race," San Francisco Chronicle*, March 7, 2006.

[34] "Andro" was a substance banned by professional football, college basketball, the Olympics and professional tennis at the time, but not by professional baseball. See, Bianchi, Mike, *"Amid steroid scandal, it's time to apologize to AP's Steve Wilstein," The Orlando Sentinel,* December 27, 2004. It has subsequently been banned in baseball as well.

[35] Jose Canseco, Juiced: Wild Times, Rampant 'Roids, Smash Hits, and How Baseball Got Big, (Harper Entertainment) (2006).

[36] Sheinin, Dave, *"Baseball Has a Day of Reckoning In Congress: McGwire Remains Evasive During Steroid Testimony," Washington Post,* March 18, 2005, at A1.

[37] Staff, *"Baseball under the microscope,"* CBC Sports Online, March 17, 2005. Canseco later apologized for naming players, an act he came to regret. "I never realized this was going to blow up and hurt so many people." He apparently named names in order to bolster his claims with the ring of truth, and wrote the tell-all because he

League Baseball's Efforts to Eradicate Steroid Use," was marked by culpable evasions (McGwire: "I'm not here to discuss the past… I'm here to be positive about this subject") and crafty denials (Sosa: [I have not] "broken the laws of the United States or the laws of the Dominican Republic").[38] In consequence, McGwire, a player with Hall of Fame credentials, has already been denied entry into that august body in his first two years of eligibility.[39] In 2003, Barry Bonds was called to appear before a federal grand jury impaneled to investigate activities at the Bay Area Laboratory Co-operative (BALCO), a veritable steroids dispensary, where he testified under oath to never *knowingly* having taken performance-enhancing drugs.[40]

A subsequent exposé of BALCO and its clientele focused on Bonds' alleged use of human growth hormone (a substance not banned by baseball at the time) and cast serious doubts on the veracity of his testimony.[41] Victor Conte, the laboratory's founder and president who ultimately served four months in prison and four under house arrest for his role in the scandal, was fond of articulating what might be considered the catchphrase of the steroids era: "Cheat or lose."[42] Bonds, arguably the greatest ballplayer of all time, currently faces perjury charges

---

wanted revenge on the sport for allegedly having black-balled him. "If I could meet with Mark McGwire and these players, I definitely would apologize to them… They were my friends. I admired them. I respected them." See, Staff, *"Canseco regrets naming names in his book about steroids,"* ESPN.com News Service, October 21, 2008, http://sports.espn.go.com/mlb/news/story?id=3655031& campaign=rss&source=MLBHeadlines.

[38] Sheinin, *supra* note 37.

[39] Associated Press, McGwire denied Hall; Gwynn, Ripken get in: Slugger with 583 HRs only gets 23 percent of votes; Gossage 21 short, NBC Sports, January 10, 2007.

[40] Bloom, Barry M., *"Transcript reveals Bonds' testimony,"* MLB.com, March 1, 2008.

[41] Fainaru-Wada, Mark, and Lance Williams, *"Game of Shadows: Barry Bonds, BALCO, and the Steroids Scandal that Rocked Professional Sports,"* (Gotham) (2007); Kakutani, Michiko, *"Barry Bonds and Baseball's Steroids Scandal," New York Times*, March 23, 2006.

[42] Naturally, the problem of cheating in sport is hardly confined to the use of performance-enhancing drugs, which is merely the variant-cum-flavor of the day. For instance, in the 2002 Olympics French figure skating judge, Marie Reine Le Gougne, confessed to scoring the Russian team preferentially due to pressure from Didier Gailhaguet, the French ice sports federation president. See, staff, *"Three-year ban for skating judge," BBC Sports,* April 20, 2002, http://news.bbc.co.uk/sport2/hi/other_ sports /1959181.stm. In return, the French entrant in the upcoming ice dancing competition was expected to secure the Russian judge's preferential treatment. Unfortunately for the conspirators, the Russian pair of Yelena Berezhnaya and Anton Sikharulidze committed an obvious technical error during its performance. Le Gougne's high scores denied the gold medal to the crowd-darling Canadian pair, Jamie Salé and David Pelletier, which had skated flawlessly. The resultant uproar was quelled when a second gold medal was awarded to the defrauded Canadian team. Though Le Gougne later recanted her confession and shifted the finger of blame to pressure by the Canadian committee rather than to machinations by the Russian and French ones, she and Gailhaguet were found guilty of misconduct and banned from the sport for three years including the 2006 Olympics. See, Clarey, Christopher, *"Figure Skating; Judge and Ice Official Face Accusers," New York Times*, April 30, 2002.

The National Football League's (NFL's) New England Patriots – winners of Super Bowls XXXVI in 2002, XXXVIII in 2004 and XXXIX in 2005, and the team universally recognized as the game's regnant dynasty – were fined $250,000 in 2007 and stripped of their coveted #1 pick in the 2008 college player draft. New England violated league rules by videotaping opposing New York Jets' coaches as they flashed defensive signals during a game, thereby enabling the Patriots to break the Jets' code, giving them an unfair and dishonest advantage. See, Mortensen, Chris, *"Sources: Goodell determines Pats broke rule by taping Jets' signals,"* ESPN.com, September 13, 2007, http://sports.espn.go.com/nfl/news/story?id=3014677. The League's statement indicated that the Patriots had long been suspected of the anti-competitive practice, and that all teams had been strongly warned not to indulge in it. Patriots' coach Bill Belichick, who is known for his exceptionally thorough and successful game plans, was fined $500,000 by the League, the largest fine ever paid by an NFL coach. Similar to the way that Bonds, McGwire, Sosa and Clemens' feats of athletic prowess are questioned due to the taint of cheating allegations, New England was accused on the eve of Super Bowl XLII in 2008 (won by the New York Giants in an improbable upset of the undefeated and heavily favored Patriots) of having videotaped its Super Bowl XXXVI opponent (2002), then defending champions and heavily favored Saint Louis Rams, during their final "walk-through" of plays in the relating to his grand jury testimony.[43] His contract with his long-time team, the San Francisco Giants, expired after the 2007 season and was not renewed. No other team picked him up for the 2008 season though he expressed a strong desire to continue playing and appeared capable of doing so at a very high level.[44] Adding insult to injury, Marc Ecko, the owner of the record-breaking home run ball (#756) had it branded with a laser-cut asterisk before donating it to the Baseball Hall of Fame in Cooperstown, New York for display.[45] Congress punctuated the "steroids era" of the game with an exclamation point by referring the 2008 testimony of superstar Roger Clemens before the House Committee on Oversight and Government Reform to the FBI for investigation.[46] It is exploring whether sufficient evidence exists that the most dominant pitcher of his era – and a player with Hall-of-Fame credentials to rival Bonds'– committed perjury by denying (emphatically) and disputing (vigorously) charges leveled against him in the Mitchell Report.

Again, the purpose here is not to indict baseball or single out specific athletes, teams or sports,[47] but to learn from history lest we be condemned to repeat it, and by analogy to underscore a point so as to shed light on problems in business. In the search for records, riches and glory, something went wrong. Too many players and teams cut too many corners in the pursuit of accomplishments that would ensure receipt of these prizes. Those that engaged in cheating put the cart before the horse by *valuing*, in actions, the *goods* of victory over those of spirited athletic competition and the personal excellence necessary to ensure competitiveness in the longer term. The alleged mass phenomenon of steroid use among ballplayers suggests in turn that Major League Baseball (incidentally, a very large business) was itself complicit in the deceit. In the quest to achieve fan interest, gate receipts, advertising revenue, consumer loyalty and network deals, "America's Pastime, Inc." turned a blind eye to the embrace of skewed values by its players. In the process, it succumbed to a culture of steroids, cheating, and fraud. The result is that its most hallowed records stand tarnished, indeed branded, its greatest players stand accused and face a potential loss of liberty, and the very integrity (as opposed to appeal) of the game is questioned.

Superdome the night before the game. See, Fish, Mike, *"Ex-Ram Warner wants NFL to expand probe of Patriots,"* ESPN.com, February 3, 2008, http://sports.espn.go.com/nfl/news/story?id=3227592. While acknowledging the Patriots' superiority that day, opposing Rams' quarterback in 2002, Kurt Warner, nevertheless commented that "anytime you have something like this go on, and you get caught doing that, it raises questions. And I think rightfully so." Regarding the violation, Patriot's backup quarterback in 2002, Drew Bledsoe, commented that "[l]ike in other realms in the world, in the business world, when you get into a highly competitive environment, people are going to try and do what they can get away with. [sic] That is not unique to football" (emphasis added).

43 Staff, "*Baseball star Barry Bonds charged*," BBC SPORTS, November 16, 2007, http://news.bbc.co.uk/2/hi/americas/7097583.stm.

44 Bonds' career total of 1,996 RBI's remains only four short of the magical 2,000 mark, a milestone reached by only two players in the history of the game: Hank Aaron and Babe Ruth. Bonds ranks third on the all-time list.

45 Ecko, a fashion designer, purchased the ball for $752,467 in an online auction. He put the question of whether the ball should be defaced in protest to a vote on the internet. The options were to brand it with an asterisk, do nothing to it, or shoot it to the moon. Almost half of the 10 million votes cast favored branding it. See Curry, Jack, *"Barry Bonds ball goes to the Hall, asterisk and all," International Herald Tribune,* July 2, 2008.

46 Hosenball, Mark, "*Roger Dodger v. The Feds*," *Newsweek,* March 10, 2008, at 10.

47 For the record, this author is a lifelong fan of the San Francisco Giants, and has marveled at Bonds' nearly routine heroics on behalf of the team since his arrival in 1993.

The Problem: Aiming at the "Fences" Rather Than at "Making Contact"

Every child who has played baseball knows that swinging at the ball with an aim to reaching the home run barrier (i.e., the fence) is a certain recipe for "striking out," that is for achieving the ultimate failure in an at-bat rather than its most perfect outcome. Hitting a moving baseball with a bat is harder than it looks, and to hit it far, one must first hit it. Consequently, children are coached to aim at solidly meeting the ball with the bat, at *making contact*, the regular achievement of which is the sign of an accomplished hitter. A person with moderate power will reach the fences on occasion by habitually making solid contact with the ball. Ironically, then, the means to accomplishing the ultimate success in an at-bat (i.e., a home run) is to *not* aim for that ultimate success, but rather to aim at that which brings it about.[48] Something similar happens in all endeavors including the practice of business.

Professional baseball is "big business," and thus corrupt competition in the sport is a species of business ethics gone awry. But the importance of the analogy lies elsewhere. Summarizing what has preceded thus far, in the case of both business and baseball, too many "players" were inclined to grasp at prizes (by hook or crook) that are intended to honor and reward honest achievement. That is, they valued honor, glory, riches, fame and the like, which they could only attain through professional excellence or by cheating, and proved willing to cheat rather than restrain their desires or reorient their values. The result has been scandal, taint, downfall and social disturbance. It would be irrational for companies or teams to encourage the development of such unhealthy and self-defeating tendencies. Yet that is precisely what they incentivize via extravagant compensation for executives and players alike. The 1980s came to be known as the "Decade of Greed" for illicit trafficking in, and profiting from, privileged information by investment bankers, arbitrageurs and sundry financial professionals personified by Dennis Levine, Ivan Boesky and Michael Milkin.[49] This past decade has compounded treachery with deceit and constitutes (in its worst light) an "Era of Fraud" for the pump-and-dump schemes of corporate chieftains, hoodwinked auditors and starry-eyed analysts personified by Ken Lay, David Duncan and Jack Grubman.[50]

Former Chairman of the SEC, Arthur Levitt, warned in 1998 of the dangerous "game of nods and winks" in which erstwhile market fiduciaries conspired to satisfy consensus earnings estimates by 'fraud-light', thereby placing "integrity in financial reporting...under stress."[51] In baseball, the universally decried use of performance-enhancing drugs is merely the *external*, empirical manifestation of an *interior* predilection rooted in deformed *character*. Embedded within the unchecked wills and passions of both business practitioners and athletes alike, the

---

[48] It should be noted that the game's greatest home run hitters also rank among its greatest strikeout victims. For instance, Bonds hit more home runs than any player in history, and struck out more than all but 34 of them. His dual ranking is thus (#1-#35). Other players with notable home run-strike out career rankings are McGwire (#8-#29), Sosa (#6-#2), Ruth (#3-#88), Aaron (#2-#72), and Mantle (#15-#16). Additionally, all of these players enjoyed long and prosperous professional careers. The conclusion is that hard swingers will strike out more often. But, at the unusually high end of those who also connect often, longevity will ensure enough at-bats to achieve notable success along with, and in spite of, notable failure.

[49] See, Bruck, Connie , *"The Predators' Ball: The Junk Bond Raiders and the Man Who Staked Them,"* (The American Lawyer/Simon & Schuster) (1988); Stewart, James B., *"Den of Thieves,"* (Simon & Schuster) (1991).

[50] See, Torres, Maximilian, et al., *"A Virtue-based Business Ethics,"* pp. 131-148 (Samuel Gregg and Gerald Zandstra (eds.), 2005, Acton Center for Entrepreneurial Stewardship) (2005).

[51] Levitt, Arthur, "Sec. and Exch. Comm'n Speeches & Public Statements," *The Numbers Game* (Sept. 28, 1998) available at http://www.sec.gov/news/speech/ speecharchive/1998/spch220.txt.

problem is "cheating," which in the first instance is a personal inclination or disposition to win by any means necessary, and at any eventual cost including that of excellence, honesty, sociability[52] (i.e., fitness for social relations) and the like. Cheating and fraud signify competition gone awry by way of personal defects in competitors. Only after the problem manifests itself in restated financials and deflated stock prices, or inflated home run totals and tarnished records, does the resulting outcry provoke structural change and the imposition of external controls such as law, regulation or compliance regimes, e.g., mandatory drug testing. Fear of getting caught is a powerful motivator, but not a lasting one. To be truly effective in getting business off steroids (or baseball off fraud), correctives must address the interior, hidden problem in addition to the secondary and contingent, observable ones. A lens through which to view the problem from the perspective of interior personal development is needed.

In "*Whose Justice? Which Rationality?,"*[53] Aristotelian virtue ethicist Alasdair MacIntyre proposes an interpretive device that can be of great service to this project. In it he suggests that *citizens* of a *polis* – think "employees of a company," "players on a team," "market participants within a capitalist political economy," "professional athletes" or even "members of a global village" – might alternatively be directed (and historically have been) toward one of two ends that ultimately explain human activity: *victory* on one hand, or *excellence* on the other.[54] In the final analysis, either victory or excellence might serve to answer questions regarding the *rationality* of human action such as why a person acts as he does, or regarding the *morality* of human action such as why she ought to act in this way or that.[55] The rationality and morality of human acts are necessarily anchored in one end or the other. The steroids controversy in Major League Baseball merely dramatizes in a popular and accessible forum the consequences of prioritizing victory (swinging for the fences) over excellence (making contact with the ball). It renders the problem transparent to all, and less threatening to consider than does the collapse of a world-class business such as Enron or Andersen. At bottom, contemporary crises in business and baseball are cut from the same cloth: cheating, an interior disorder, which begins in the personal misidentification of ends. To solve the problem, practitioners must be encouraged – perhaps coached, as are children learning to hit a baseball – to focus on the end of excellence.

To posit the ends of victory and excellence as alternatives to one another is not to suggest that they are mutually exclusive. As we know, victory is often the just reward for excellence, and excellence often brings victory. Mediocrity is rarely rewarded with victory in a competitive setting, and the excellent are rarely drubbed in competition. But to win does not always mean to be excellent, and vice-versa. The ends conflict when the excellent professional nevertheless

[52] Sociability refers to the social nature of the person: his inclination towards, and need for, others. Aristotle gives the notion definitive expression in the *"Politics:"* "[H]e who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god... A social instinct is implanted in all men by nature..." See, Aristotle, "Basic Works of Aristotle," pp. 27-30, 1130, 1253 (Richard McKeon (ed.), Benjamin Jowett trans., 1941, Random House, New York) (1941).

[53] MacIntyre, Alasdair, "*Whose Justice? Which Rationality?,"* (University of Notre Dame Press) (1988).

[54] Note that MacIntyre's focus on ends, or telos, identifies him as a philosopher in the Aristotelian, virtue tradition. Indeed, his book entitled *"After Virtue,"* which immediately preceded *"Whose Justice? Which Rationality?"* in his oeuvre greatly contributed to the reestablishment of virtue ethics in the lexicon of academically respectable ethics. See, MacIntyre, Alasdair, "*After Virtue"* (2nd ed., University of Notre Dame Press) (1984).

[55] Note that either explanation or final cause of personal action might also serve to explain the aggregate of such action within a company or economic system. Hence, alternative answers to the question of what purpose a corporation ultimately serves might be victory (i.e., shareholder wealth maximization) or excellence (i.e., social welfare, or stakeholder wellbeing through the satisfaction of needs).

loses due to bad luck, an official's error, political chicanery, deceit, treachery or a host of reasons including the greater excellence of another. When Enron's Andy Fastow created and managed SPEs effectively to keep the company's debt off its balance sheet and deceive capital markets, regulators, investors, lenders, analysts, and reporters as to its true financial condition, the ends of victory and excellence collided. He appeared to achieve victory as a CFO, but in retrospect only 'jimmy-rigged' a short cut to its trappings, e.g., wealth, fame, glory, prestige – prizes reserved for those who achieve excellence. In reality, he excelled at cooking the books and duping gullible investment bankers into funding his "Raptors." Thus, Enron, his *polis*, is to be faulted for incentivizing him toward the end of victory to the neglect of excellence.

Orientation toward either end (or purpose) directs professionals to the appreciation and choice of *values*, or *goods* proper to it. As stated, a company effects this attraction by offering incentives to which the hearts and minds of employees adhere. These are what employees and officers, players and coaches learn to desire, strive for and love. They motivate the choice of an action, which serves as a *means* to the end. A person aiming at victory will choose action geared towards what MacIntyre calls "*goods of cooperative effectiveness*" such as wealth and riches, power, status and honor, prestige and glory. And a *polis* ordered toward victory and conquest will motivate citizens toward these values. A person aiming at excellence will rather choose action geared toward "*goods of excellence*" such as knowledge for its own sake, life and health, aesthetic appreciation, friendship and sociability. And a company or team driven toward excellence will motivate its employees' or players' actions toward such values. In the case of either victory or excellence, the intelligibility of an action chosen is conferred by the end aimed at and the goods valued. Note that a polis will not achieve excellence by motivating citizens toward goods of cooperative effectiveness such as stock options, lavish bonuses or incentive clauses written into contracts, because by highlighting and incentivizing these goods of cooperative effectiveness, the polis will orient citizens towards the end of victory rather than that of excellence.

Repeated motivation toward values and action aimed at victory or excellence builds habits, or *virtues* in the person so choosing. These personal qualities (habitual dispositions or cultivated inclinations) dispose a person's choices to the attainment of goods through action. The end selected, goods chosen and actions taken as means toward the end consequentially develop corresponding virtues in a person, analogous to the way in which water pulled downstream by gravity carves a canal, or the sun and its rays orient a sunflower.[56] In some cases the virtue required and developed to guide action toward victory or excellence will coincide, as in the case of resoluteness, or resolve, i.e., determination, purposefulness. That virtue is necessary to achieve either end by guiding action toward the attainment of either's proper goods when those goods are elusive or difficult to attain. Separately, the end of excellence can only be sustained in a *polis*, which cannot subsist without wealth, power and other goods of cooperative effectiveness. That is to say, "the goods of excellence can only be sustained by being provided with institutionalized settings [whose maintenance] always requires the acquisition and

[56] The latter analogy is admittedly unflattering to persons, insofar as people enjoy a freedom that sunflowers don't. It is precisely daily exercises of freedom that virtue guides. Freedom implies and requires a personal contribution in the setting of human orientations whereas the direction faced by a sunflower is determined by stimuli external to it. Freedom notwithstanding, human development partially depends upon something outside of oneself (some perceived good), which beckons and obliges a personal response. Naturally, people differ from sunflowers in too many other regards to name. Most importantly for the present purpose, each person selects her own end and by analogy chooses which sun to face.

retention of some degree of power and some degree of wealth."[57] Consequently, a polis or person aiming for excellence cannot achieve it without cultivating some modicum of virtue in "citizens" disposed toward victory and the goods of cooperative effectiveness. The challenging implication of this need for a company, which cannot survive without some level of profitability, is that its pursuit of excellence will oblige some orientation of human action toward victory. Its people must value wealth, status, power and prestige to some extent,[58] but not too much lest they, and it, fall prey to the ravages of cheating. Regardless, the qualities or virtues necessary to achieve excellence will not always coincide with those necessary to achieve victory. And a quality constituting a virtue in the light of one end may not be a virtue in light of the other.

For example, action directed toward either victory or excellence will engender some inclination towards justice. But justice for the person aiming at excellence is a habitual disposition to act in a way that gives each person his or her due. External rules are fair to the extent that they make it possible to reward those who merit it. The actual virtue of justice, however, has value independent of the rules and is their measure. Alternatively, justice for the person aiming at victory will consist of no more than a fixed disposition to abide by agreed-upon rules which reflect only the outcome of negotiation, and not any intrinsic value. In this view, rules are arbitrary and simply convenient to the party with superior bargaining power. That negotiated rules will vary according to the relative strength of the ones bargaining and hence reflect the will of the powerful is of no significant concern to such a person. The implicit conclusion for one aiming at victory, therefore, is "might makes right," as was explicitly (and unsuccessfully) argued by Thrasymachus against Socrates in Plato's *"Republic*:" "I proclaim that justice is nothing else than the interest of the stronger."[59] For the one aiming at excellence, just rules always bind because to violate them is to commit injustice, which first and foremost harms the violator. Hence Socrates' argument against Polus in Plato's "*Gorgias*:" "[T]he greatest of all misfortunes is to do wrong... [I]f I had to choose one or the other I would rather suffer wrong than do wrong."[60] We need not fear such a person's falsifying a financial statement or research report, or enhancing performance with steroids because she will police herself. She would personally lose her orientation towards excellence by cheating, develop bad habits[61] inclining her away from that end and forfeit the goods of knowledge, friendship, sociability and the like that she prizes. Being showered with goods of cooperative effectiveness such as bonus compensation or fame for tainted achievements would afford scant recompense.

---

[57] MacIntyre, *supra* note 55, at 35.

[58] Juan Antonio Pérez-López terms this necessary and indispensable quantum of goods of cooperative effectiveness (e.g., profitability) to which organizations must orient decision-makers "minimum effectiveness," not because decision-making in organizations should aim at underperformance or mediocrity, but because the organization must achieve some necessary minimum of operating results in order to cover costs, engage in research and development, build reserves, provide a return on capital, etc.; in a word, flourish. Beyond minimum effectiveness, Pérez-López contends that decision-making best aims at the achievement of other values, specifically "attractiveness" and "unity." See, discussion infra, and Juan Antonio Pérez-López, *"Teoría de la acción humana en las organizaciones: La acción personal" ("The Theory of Human Action in Organizations: Personal Action"),* (Ediciones Rialp, Madrid) (1991); Juan Antonio Pérez-López, *"Fundamentos de la dirección de empresas" ("The Foundations of Business Management"),* (Rialp, Madrid) (1993).

[59] Plato, *"The Republic and Other Works,"* (Benjamin Jowett trans., 1960, Dolphin Books, Doubleday and Company) (1960).

[60] Plato, *"Gorgias,"* (Walter Hamilton trans., 1960, Penguin Books) (1960).

[61] Note that "bad" necessarily refers to the self-selected end, which anchors the evaluation. It is a bad habit with respect to one that seeks excellence rather than victory.

Not so for one aiming at victory, who is bound by rules only to the extent that he fears getting caught breaching them. Such a person will engage in *strategic compliance* and conduct a probability-weighted cost-benefit analysis to determine whether or not to abide by the rules[62] and, moreover, consider himself rational (in an economic sense) in the bargain. As long as one is not caught breaching the rules, to be unjust harms only cheated competitors. One does not lose one's way and set oneself against desired goods by cheating; to the contrary, doing so brings one closer to their possession. For such a person, to have these goods is the proof of deserving them. Unfortunately, we all need to fear such a person because she will not police herself and is likely to behave opportunistically if not controlled externally by law, rules, testing regimes, etc. As economists explain, opportunism drives up agency costs.[63] Yet agency costs are not inevitable; nor need they continually escalate in response to ever more sophisticated forms of opportunism. MacIntyre's theory – and Aristotelian virtue ethics generally – fleshes out the interior dynamic of opportunism: action pursuant to the guidance of justice in one whose end is victory, who pursues goods of cooperative effectiveness without concern for merit or just deserts. Virtue in one pursuing excellence is a truly rational control system: personal, interior control, which reduces agency costs to society. Conversely, virtue in one aimed solely at victory increases such costs. Consider the case of much-heralded Bernie Ebbers, who led WorldCom to a position of preeminence in the Telecom industry through a series of mergers and acquisitions. No less than 85% of his net worth consisted of company stock – ironically, much of it granted as compensation intended to align his values with shareholders' – which he used to collateralize $400 million in loans. Had he aimed primarily at excellence, he might have thought twice before leveraging himself into such a position, or liquidated stock and other assets to reduce personal debt when a sharp downturn hit the industry (and stock price in consequence). In brief, he would have suffered the downturn and acted to ameliorate its effects on the company, cautioning and protecting shareholders as fiduciary duties required of him. Rather, he acted to retain the goods of wealth, power and fame by insisting that CFO Scott Sullivan "hit our numbers" in impossible conditions, a command the CFO interpreted as a mandate to cook the books. Sullivan's alleged pleas to quit lying to Wall Street were rebuffed with comments such as "We can't lower our guidance. We just announced new guidance… Now you get to work on it"[64]. Such is the posture of one aiming at mere victory, not genuine excellence. Constituents expecting justice from company executives in the form of honest reporting in accordance with GAAP hoped in vain.

Other virtues such as self-control (temperance) and courage (fortitude) are also necessary to guide action toward the goods germane to either end. For instance, to one aiming at excellence self-control requires the transformation of desires, aversions and dispositions so that one may better judge and move toward the goods of excellence. "Thus temperateness is a virtue which

---

[62] Elias, Jaan, and J. Gregory Dees, *"The Normative Foundations of Business,"* (Harvard Business School Press) (1997).

[63] Such costs consist of: 1) monitoring expenditures by the principal; 2) bonding expenditures by the agent, and 3) the residual loss. Monitoring expenditures include "efforts on the part of the principal to 'control' the behavior of the agent through budget restrictions, compensation policies, operating rules, and so forth." See, Jensen, Michael C., and William H. Meckling, *"Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure,"* 3, *Journal of Financial Economics,* 305 (1976). Bonding expenditures would include audited financial statements, explicit bonding against agent malfeasance and a limitation of the agent's decision-making powers. See, generally Romano, Roberta, "*Foundations of Corporate Law,"* (Foundation Press, New York) (1993).

[64] Young, Shawn, Almar Latour, and Susan Pulliam, "*Burden of Proof: Linking Ebbers to the Fraud At WorldCom Proves Difficult; Ex-Finance Chief Sullivan Tells Of Meetings With the CEO, But Ambiguity Remains; 'We Have to Hit Our Numbers,'" The Wall Street Journal*, Feb 18, 2005, at A1.

transforms both what I judge to be a good and what I am moved by as a good." [65] For instance, a Jack Grubman in possession of temperateness respecting goods of excellence would come to view the production of honest research at the expense of Bernie Ebbers' ire as preferable to an invitation to Ebber's wedding at the expense of research integrity. By contrast, to one aiming solely at victory self-control "is a virtue only because and insofar as it enables me to achieve more efficiently goods antecedently recognized as such and desired." Self-control in this light would lead a David Duncan to avidly play golf and tennis at the tony Houston Racquet Club, not to stay fit for performing better risk assessments and audits, but to better "make rain" by consorting there with Ken Lay and other Houston luminaries.[66] Courage for the person aiming at either excellence or victory will include *endurance* and the ability to *confront harms and dangers*. But, the person exclusively seeking victory will risk danger only for the sake of power, honor or glory. Conversely, the seeker of excellence will risk danger for the sake of another person, group, institution or practice aside from personal benefit simply because that entity is the bearer of some great good. The case of Cynthia Cooper, VP of internal auditing at WorldCom, is instructive in this regard. Though primarily an operational auditor who monitored performance of WorldCom units and ensured proper spending controls, she turned her attention to financial auditing when a subordinate stumbled onto $500 million of undocumented expenses.[67] Within a month, her team's surreptitious investigation had discovered $3.8 billion in misallocated operating expenses and fraudulent entries. She'd earlier raised the issue of improper reserve transfers with external auditors from Arthur Andersen who'd brushed her off. She was warned off her sleuthing activities by none other than Scott Sullivan, her boss, who she nevertheless defied at great peril to herself. Eventually, she successfully confronted Sullivan before the board's audit committee, which asked him for an explanation and then his resignation. The highly-praised Sullivan risked danger for the sake of maintaining power, wealth and glory whereas Cooper risked it for the integrity of the company's financial reporting. Sullivan controlled his employees, ordering them to make questionable transfers of reserves and false entries in the books in order to carry out the fraud,[68] whereas Cooper controlled her fears and overcame her aversion to bringing the fraud to light, which would expose her company and its thousands of innocent employees to danger.[69] She doggedly adhered to a greater good than expedience. Were it not for her courage, perseverance and self-control, the accounting misdeeds at WorldCom might have remained

---

[65] MacIntyre, *supra* note 55, at 40.

[66] Enron was recognized as a "maximum-risk" engagement by senior Andersen partners, who met in February 2001 to discuss the pros and cons of retaining its business. They decided in favor because; *inter alia*, of their faith in Duncan's ability to manage it. See, AccountancyAge.com, "*Andersen memo: Houston office to David Duncan*," *Accountancy Age,* January 18, 2002, http://www. accountancyage.com/accountancyage/news/2028778/andersen-memo-houston-office-david-duncan.

[67] Cynthia Cooper has received well-deserved plaudits for blowing the whistle at WorldCom, including being named Time magazine's 2002 Co-Person of the Year along with Sherron Watkins of Enron and Coleen Rowley of the Federal Bureau of Investigation (FBI). Lacayo, Richard, and Amanda Ripley, "*Persons of the Year 2002*," *Time,* December 22, 2002, Cover. Less heralded have been the two selfless and faithful staffers who also risked their careers to ferret out the fraud: Gene Morse, a technology wonk, and Glyn Smith, a senior manager whose mother had been his and Ms. Cooper's high school accounting teacher.

[68] Pulliam, Susan, "*Over the Line: A Staffer Ordered to Commit Fraud Balked, Then Caved – Pushed by WorldCom Bosses, Accountant Betty Vinson Helped Cook the Books – A Confession at the Marriot," The Wall Street Journal,* Jun 23, 2003.

[69] Pulliam, Susan, and Deborah Solomon, *"Uncooking the Books: How Three Unlikely Sleuths Discovered Fraud at WorldCom – Company's Own Employees Sniffed Out Cryptic Clues And Followed Hunches – Ms. Cooper Says No to Her Boss," The Wall Street Journal*, Oct. 30, 2002.

hidden, buried in goodwill at the next consolidated merger. One might even say with justice that the "human face" of the "new capitalism" is hers.

Getting Business Off "Steroids"

This analysis suggests that no amount of law, regulation, or controls – even those signed off by executives and attested to by outside auditors, as required by the much-dreaded and bewailed Section 404 of Sarbanes Oxley – will rid the marketplace of cheating unless and until business practitioners develop interior control, or good character. To acknowledge this truth is not to advocate abandoning external and internal controls. It is rather to point the direction towards a freer marketplace in which fewer constraints would be needed and fewer agency costs would be expended. The ultimate solution for problems in business, or sport, is for people to control themselves. This is the domain of *ethics*. WorldCom will inexorably be followed into the abyss by a Lehman Brothers and whoever is next for want of prudent judgment, justice, courage and self control.[70] As argued, the problem lies fundamentally in the widespread orientation of business practitioners (and ballplayers) towards the end of victory irrespective of excellence, despite much palaver to the contrary. In the Aristotelian tradition, every decision-maker chooses goods (values in today's parlance) which become motives for action towards an end. Agents need to, and do, develop corresponding virtues through the interior "act" of freely choosing goods in order to attain ends. These virtues become dispositions, inclinations to action – a sort of canal for the flowing water of human behavior – directed toward the end. Through virtuous action, each and every person inclines toward sustainable prosperity (Socratic excellence) on the one hand, or social turmoil (Thrasymachan conquest) on the other. Thus, the place to address the problems discussed in this chapter is at the level of virtue formation in the person, by influencing her to elect excellence as the end of personal action. In accord with Herbert Simon's theory of administrative behavior,[71] it is a matter of addressing the choice that precedes human action and informing it as to the preeminent value of goods of excellence: for example, knowledge for its own sake, life and health, aesthetic appreciation, friendship and sociability. People who value these goods first and foremost are less likely to cheat and precipitate social calamity. And, because a company (and every *polis*) needs profit to survive, the cultivation of a moderate appreciation for goods of cooperative effectiveness is also required: for example, wealth, power, status, honor, prestige and glory. Nevertheless, notice is served by recent events in the worlds of business and sport that an excessive preoccupation with these latter goods underlies the problem of cheating and its social manifestations.

Following Pérez-López[72] I propose three questions for routine consideration by decision-makers (i.e., by everyone) in order that each might inform his own freedom with respect to the broad spectrum of goods available in each and every choice. The questions are ordered in a manner conducive to sustainable prosperity by first addressing the necessary modicum for survival of goods of cooperative effectiveness, and then addressing goods of excellence.[73]

---

[70] The defect was manifest at WorldCom as cheating and fraud, whereas at Lehman it took the form of something akin to gluttony. In both instances, action was marked by recklessness.

[71] Simon, Herbert A., "*Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization,*" (4th ed., 1976, The Free Press, Simon & Schuster Inc., New York: NY) (1976).

[72] Pérez-López, *supra* note 60.

[73] In Pérez-López's theory, the three questions correspond to diagnostic criteria, which address: 1) the accomplishment of direct "results" (the "effectiveness" criterion); 2) the accomplishment of learning and distinctive

1. If I act in the following way,[74] will this "action plan" accomplish my immediate objective?

Note that this question directs the decision-maker to consider some "bottom line" respecting the decision being made, which is commonly referred to as "getting results," though it is actually only one of three separate and distinct results – each addressed by a separate question – attained through action. Accomplishing immediate objectives is a necessary but insufficient condition for achieving excellence, though it might lead to (Pyrrhic) victory. Through the artful solution of immediate problems one is directed to solvency if not wealth, and advancement if not glory. Through the accomplishment of successive objectives one moves toward the goods of cooperative effectiveness. Note that at this stage of analysis, taking steroids would be an acceptable action plan for a ballplayer desirous of hitting home runs, just as cooking the books would be one for a CFO desirous of meeting Wall Street's expectations. Andy Fastow, Scott Sullivan and their respective bosses tended to this question with great solicitude. Their failures were in not following it up, and checking the answer, by asking the following two questions:

2. Will accomplishing my immediate objective this way make me (and by extension, make my organization) more knowledgeable and adept at accomplishing objectives of this type in the future (in a word, more competent)?

---

competencies with which to produce future effectiveness (the "*efficiency*" criterion), and 3) the accomplishment of trust necessary to sustain effectiveness and retain efficiency (the "*consistency*" criterion). The discussion in this chapter will necessarily be limited to using the questions, and demonstrating their plausibility and *operationality* (i.e., usefulness, utility, usability).

The intricacies of how and why these questions and criteria address the character problems signaled by MacIntyre and throughout this chapter can be found in Pérez-López's work itself and elsewhere. See, Pérez-López, Juan Antonio, and María Nuria Chinchilla, *"Business or Enterprise? Different Approaches to the Management of People in Organizations,"* (IESE Business School Publishing, Barcelona, Spain) (1990); Pérez-López, Juan Antonio, and María Nuria Chinchilla, *"Social Effectiveness and Self-Control,"* (IESE Business School Publishing, Barcelona, Spain) (1990); Torres, Maximilian B., *"Character and Decision-making"* (IESE Business School Publishing, Barcelona, Spain) (2001), http://www.iese.edu/research/pdfs/T_103.pdf; Torres, Maximilian B., *"Motivational Conflicts,"* (IESE Business School Publishing, Barcelona, Spain) (2001); Ariño, Miguel A., *"Toma de Decisiones y Gobierno de Organizaciones" ("ecision-making and the Governance of Organizations")*, (Deusto) (2005); Argandoña, Antonio, et al., *"Rethinking Business Management–Examining the Foundations of Business Education,"* pp. 38-49 (Samuel Gregg and James R. Stoner, Jr. (eds.), 2008, The Witherspoon Institute) (2008); Argandoña, Antonio, Presentation delivered at the seminar entitled "Humanizing the Firm and the Management Profession" at IESE Business School: *"Consistency in Decision-making in Companies"* (June 30-July 2, 2008); Rosanas, Josep M., *"Beyond Economic Criteria: A Humanistic Approach to Organizational Survival," Journal of Business Ethics* (2007) at 78, pp. 447-462; Josep M. Rosanas, (2008) Presentation delivered at the seminar entitled "Humanizing the Firm and the Management Profession" at IESE Business School: "Towards a Humanistic Model of Decision-making in an Organizational Context" (June 30-July 2, 2008); Rosanas, Josep M. and Manuel Velilla (2005) *"The Ethics of Management Control Systems: Developing Technical and Moral Values," Journal of Business Ethics* (2005) at 57, pp. 83-96.

[74] Pérez-López's theory of management in human organizations considers the human person a "problem solver" whose action is ordered to achieving satisfactions of various kinds, specifically, sense-related, cognitive and affective. *A priori* evaluations of expected satisfactions from the results of alternative action plans provide motives for action. Satisfaction depends upon both the actual, *a posteriori* results of action, and a person's capacities for experiencing the full range of satisfactions. These capacities change according to evaluations made and satisfactions experienced in prior decisions. Every "problem" or event necessitating a decision is thus an opportunity to experience satisfaction or dissatisfaction, and for augmenting or eroding the capacities to experience them in the future. Each event presents the decision-maker with an immediate objective, the accomplishment of which occasions the development of greater or lesser capacities (for experiencing across-the-board satisfactions in the future). As the person is a dynamic, changeable being at the level of "capacity," decision-making has profound consequences for her and, derivatively, her organization, or *polis*.

Professionalism and competence are their own rewards, though possessing these traits also goes a long way toward ensuring the achievement of goods of cooperative effectiveness. Nevertheless, the development of expertise moves a problem solver toward goods of excellence such as knowledge for its own sake and the appreciation of work well done. Note that with each fraudulent entry, Sullivan gained no additional expertise in his function with which to honestly solve WorldCom's future problems. He'd solved the immediate ones (hitting the numbers), but in a way that did not prepare him or the company to address its true needs, *viz.*, making the changes and adjustments necessary to hit the numbers indefinitely into the future. Such a solution would have included giving Wall Street realistic guidance, rather than simply telling it what it, and the CEO, wanted to hear. The result of his decision-making was illicitly transferred reserves and five consecutive quarters of fraudulent entries in the capital accounts. Sullivan was enough of a craftsman to defend the booking of leased telephone line costs as "prepaid capacity" in a "White Paper" for the board's audit committee. But, smoke and mirrors are neither necessary nor sufficient tools for the long term; thus, it is better to avoid recourse to them in the short term, all things considered. By neglecting to ask whether the path he'd embarked on would habituate him to cheating rather than to capably solving tomorrow's problems, he continued on a path that led to his and others' destruction,[75] as well as his company's.

3. Will accomplishing my immediate objective this way increase cooperation around me (and by extension, in my organization) and likely lead to increased trust?

The example of Scott Sullivan indicates how dangerous a modicum of competence can be in a person lacking a corresponding solicitude for trust, the glue that binds all social actors. Bear Stearns discovered this the hard way when its store of trust within the banking community evaporated in March 2008, precipitating its overnight collapse and government-aided absorption into JPMorgan Chase. Barry Bonds learned the same lesson when baseball passed him over in 2008 despite his oft-verbalized wish, and evident ability, to continue playing. Tending to one's own trustworthiness habituates a person to a consideration of others, such as the fans who cheer athletic feats, or the investors who rely on honest research and financial statements. A person so habituated develops virtues that guide action toward excellence and its goods, e.g., friendship and sociability. A person who acts so as to be trustworthy (or professionally competent) is not apt to behave opportunistically. Decisions (choices) based routinely on the concerns expressed in all three questions – 1) achieving the immediate objective while building; 2) competence, and 3) trustworthiness – cultivate a person's *motivational structure*, i.e., her capacity to be motivated at multiple levels of value, or good, and act accordingly. She builds virtues to guide her action toward the ends of excellence primarily, and victory to the extent necessary for vitality. A person so structured is certain to relish her fair share of victory – no more, or less. The implication is that, given the possibility of a decision-maker's self-induced interior change, truly rational choice is a three-dimensional act, which shapes virtues in three ways: 1) those necessary for achievement now; 2) those necessary for achievement tomorrow through craftsmanship in one's field (roughly, *arte*, or *techne* in Aristotelian terms), and 3) those necessary for sustainable, meaningful relationships with others (roughly, *moral virtue* in Aristotelian terms).

---

[75] In addition to Ebbers and Sullivan, other accounting managers sentenced for misdeeds in the fraud were Buford "Buddy" Yates (one year and a day in jail), David Myers (one year and a day in jail), Betty Vinson (five months in jail and five months of house arrest) and Troy Normand (three years probation with no jail time, ostensibly because he'd attempted to resign his position at WorldCom).

This chapter has reviewed a number of recent scandals in business, analogized them to the steroids controversy in Major League Baseball, and assigned the blame for both to an exclusive, mistaken and ultimately self-defeating orientation of key decision-makers toward the end of victory. In consequence, protagonists were habituated to values that lured them to defeat despite their seeming achievement of victory. Ironically, the actors highlighted were all once praised for their professional virtuosity and lionized as exemplars worthy of emulation. Today their stories serve as cautionary, rather than exemplary, tales. The three questions proposed herein constitute a self-administered device with which to address and rectify the problems identified, and orient decision-makers toward flourishing lives of excellence, and perhaps even victory. This way is ultimately society's only sure path to sustainable prosperity. In conclusion, these questions are proposed as decision rules for businessmen and -women, as well as practitioners of the "national pastime" in the belief that their use will help clear the field of "steroids," reduce the intrusion of umpires into the game, and let the players play ball.