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Shirking, Opportunism, Self-Delusion and More: The Agency Problem Today

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SHIRKING, OPPORTUNISM, SELF-DELUSION AND MORE: THE AGENCY PROBLEM LIVES ON

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One would think, after nearly a century of effort to limit the self-serving and wealth-destroying practices of corporate executives and their board of directors, Americans could finally feel confident that the goals of corporate leaders were now fully aligned with those of their investors.[1] We should now be able to observe these men and women acting with integrity, diligence, and grace.

Investor anxiety about shirking, opportunism, self-promotion, and outsized greed should be, one would think, an artifact of the past.

Alas, we cannot say we have achieved that enlightened state of affairs. It is still all too possible to find evidence of executive sloth, corruption, mendacity, and hubris. All the gatekeepers, media scoldings, scholarly inquiries, and judicial sermons aimed at curbing the agency problem have failed to restrain the worst in human impulses. Should we be surprised?

In thinking about the failures of the law and the culture of business to counteract the predictable weaknesses (and sometimes worse) of human beings, several high-profile examples quickly come to mind: Richard Fuld of Lehman Brothers, Jon Corzine of MF Global Holdings, Ken Lewis of Bank of America, Angelo Mozilo of Countrywide Financial, Aubrey McClendon of Chesapeake Energy, and Rajat Gupta of McKinsey and Goldman Sachs.

There are other corporate leaders, however, whose stories are less well known, and these individuals are the focus of this Essay: Russell Wasendorf Sr., former CEO of Peregrine Financial Group; Lee B. Farkas, former CEO of the mortgage firm Taylor Bean & Whitaker; Albert "Jack" Stanley, former chairman and CEO of KBR,

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1. I trace the efforts to limit CEO self-interest to the seminal case of *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919), though surely CEO self-interest predates that decision.

Inc.; Gilbert Fiorentino, former group CEO of Systemax, Inc.; and Jeffery S. Fraser, former CEO of NIC, Inc.

Each of these men, in different ways, abused his position and profited from that abuse. Each of them was removed or pushed from office. Each of them has been publicly disgraced. Three of these men are now in prison; two have not been criminally charged.

In recounting these men's stories, I proceed with considerable regret. I have read (and written) some of the literature extolling the virtues of work: work can provide happiness, meaning, and dignity in life.[2] A productive work life can stimulate a creative mind, provide solace for a troubled soul, generate opportunities to care for and elevate others, and foster a sense of accomplishment, service, gratitude, and awe.[3]

One would think that those men and women privileged to work at the highest levels of the economic pyramid, as corporate chief executives, would treat their work as a profound gift. After all, the work of a senior executive, unlike the work of most people in the world, is not boring, humiliating, or physically punishing. It is stimulating, empowering, and financially rewarding. Some people spend their entire careers longing for—and jousting for—the position of CEO.[4] So why do some of the elite executives who have won their respective tournaments debase their work—and themselves—by squandering their gift?

This Essay offers four possible explanations: (1) the obstinacy of self-interest, (2) the influence of power on one's inclination to take risks, (3) the often toxic feedback loop of organizational and financial success, and (4) some form of mental derangement.

The Essay will unfold as follows: Part I will offer brief narratives of the downfalls of the five once-successful corporate chief executives I have identified. Parts II-V will consider the factors that may have influenced their behavioral excesses.

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2. *See, e.g.*, Jayne W. Barnard, *Rule 10b-5 and the "Unfitness" Question*, 47 ARIZ. L. REV. 9, 12–13 (2005) (noting the powerful, debilitating impact of blacklisting and other exclusions from meaningful work).

3. There are dozens of books now on the market developing these themes. One of the most influential books examining the transformative power of work is MIHALY CSIKSZENTMIHALYI, FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE (1990). Other books offering valuable insights include THE DALAI LAMA & HOWARD C. CUTLER, THE ART OF HAPPINESS AT WORK (2003); ROBERT GREENE, MASTERY (2012); DANIEL H. PINK, DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US (2009); and HUGH WHELCHEL, HOW THEN SHOULD WE WORK? REDISCOVERING THE BIBLICAL DOCTRINE OF WORK (2012).

4. *See* Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Tournament*, 61 WASH. & LEE L. REV. 1615, 1624–30 (2004) (describing the process by which corporate employees ascend the power ladder and in which certain characteristics—including self-confidence, competitiveness, and an "appetite for risk"—are rewarded).

Specifically, Part II will consider the pervasive influence of self-interest in the business environment. While recent scholarship on human evolution has focused on the tendency toward altruism and cooperation, the underlying drumbeat of evolutionary biology is self-interest, self-aggrandizement, and greed.

Part III will explore the relationship between the accumulation of power and increased risk-taking. Recent laboratory studies by behavioral psychologists show that giving some persons even a hint of power over others encourages them to take on more risk. The causal agent here is the pleasure-seeking architecture—the "approach system"—of the brain.

Part IV will examine some recent neuroscience literature exploring the so-called "winner effect." Scientists now recognize that an animal engaged in some form of combat, if victorious, will exit the competition with an elevated level of testosterone. The higher the hormone level, the more willing the winner is to engage in further combat. This cycle continues until the winner becomes overloaded with testosterone and, rather than going forward as a canny and effective combatant, becomes a foolish and risk-defying one. Annihilation often follows. The impact of testosterone, moreover, does not stop with animals in the wild. It has recently been measured, and the "winner effect" observed, among traders in the City of London. I will argue that the "winner effect" can also affect CEOs.

Part V will touch on the most reductive story one can tell about what can go wrong with transgressive CEOs. Sometimes, they are psychopaths.

Part VI will conclude.

I. FIVE DISHEARTENING STORIES

On nearly a daily basis, a reader of the business or popular press can find stories of high-status people running amok.[5] In this Essay, I will add five more. The following stories of business misconduct were not randomly chosen, nor were they painstakingly tracked down. Rather, I selected these stories to reflect different industries, different forms of wrongdoing, different lifestyles and personality types, and different official sanctions. These stories are all infuriating as well as heartbreaking. The voices of the victims of these men's misconduct—including their customers, employees, and families—are rarely heard.

A. *Russell R. Wasendorf, Sr.*

Russell R. Wasendorf, Sr. pleaded guilty in September 2012 to multiple counts of mail fraud, making false statements to

5. Silvio Berlusconi, Dominique Strauss-Kahn, David Petraeus, and Anthony Weiner immediately come to mind.

regulators, and embezzlement in connection with his looting of the Peregrine Financial Group ("PFG"), a leading commodities futures brokerage firm of which he was founder and CEO.[6] During most of the twenty years Wasendorf was running PFG, prosecutors said, he "was taking hundreds of millions of dollars of his customers' money to cover losses and live large."[7] U.S. District Judge Linda R. Reade sentenced Wasendorf to fifty years in prison.[8] She also ordered him to pay more than $200 million in restitution to his victims.[9]

Wasendorf began his life as a "small-town Iowa boy, raised in hard times by a widowed mother. [He started his] business in the back room of a barber shop before setting out to the big city."[10]

Throughout his time in the big city—Chicago—Wasendorf sought the approval of the local financial community. "He felt he wasn't always granted the respect he deserved."[11]

So, in a move eerily reminiscent of Bernie Madoff, Wasendorf joined an influential advisory group of the National Futures Association, the self-regulatory organization overseeing the futures industry.[12] In another move similar to Madoff, he "invested in technological capabilities to create one of the futures industry's first platforms for electronic trading."[13]

After achieving success in Chicago, Wasendorf relocated his firm back to Cedar Falls, Iowa.[14] He "bought a private jet and built a $24 million state-of-the-art office, touting the move as a template for revitalizing small-town America."[15] According to a family lawyer, "[Wasendorf] wanted to come back to Cedar Falls to be the big man."[16]

6. P.J. Huffstutter et al., *Special Report: Iowa Broker Built Empire on a Lie Concealed in a Postal Box*, REUTERS (Sept. 24, 2012, 7:52 AM), http://www.reuters.com/article/2012/09/24/us-wasendorf-life-one-idUSBRE88N0EJ20120924.

7. *Id.*

8. Peter Lattman & David V. Henderson, *Ex-Peregrine Chief Sentenced to 50 Years in Prison*, DEALBOOK (Feb. 1, 2013, 8:33 PM), http://query.nytimes.com/gst/fullpage.html?res=9E02EEDD103AF932A35751C0A9659D8B63.

9. Karen Gullo & Edvard Petterson, *Peregrine's Wasendorf Gets 50 Years for Theft of Millions*, BLOOMBERG (Jan. 31, 2013), http://www.bloomberg.com/news/2013-01-31/u-s-wants-peregrine-s-wasendorf-imprisoned-for-50-years.html.

10. Huffstutter et al., *supra* note 6.

11. *Id.*

12. *Id.*

13. *Russell R. Wasendorf Sr.*, BLOOMBERG BUSINESSWEEK, http://investing.businessweek.com/research/stocks/private/person.asp?personId=39832716&privcapId=4473790 (last visited June 11, 2013).

14. Huffstutter et al., *supra* note 6.

15. *Id.*

16. *Id.*

1. *Wasendorf's Fraud*

In 1993, shortly after Wasendorf started the firm, PFG was investigated by the Commodity Futures Trading Commission ("CFTC"), apparently for a violation of the net capital rule.[17] According to Wasendorf's confession—actually a suicide note—written in July 2012, that investigation was the genesis of his fraud.[18] "I had no access to additional capital and I was forced into a difficult decision: Should I go out of business or cheat?" the letter states.[19] "I guess my ego was too big to admit failure. So I cheated. I falsified the very core of the financial documents of PFG, the Bank Statements."[20]

Wasendorf's scheme was "remarkably crude."[21] He diverted all the firm's bank statements to a private postal box–P.O. Box 706, Cedar Falls, Iowa.[22] Then, when regulators asked for confirmation of how much money was in the firm's accounts, Wasendorf simply generated false bank statements on his computer and forged replies purporting to come from the bank.[23] In this way, he was able to keep the CFTC off the trail of his defalcations.[24]

The government alleged that, over a twenty-year period, Wasendorf misappropriated more than $200 million in PFG customer funds,[25] representing 13,000 victims.[26] In his confession, Wasendorf said that he had spent most of the money to keep his business afloat.[27] He also spent some of the money to pay fines for PFG's involvement in a customer's Ponzi scheme.[28]

2. *Wasendorf's Self-Image*

On his personal website, Wasendorf described himself as "a noted writer and educator, having written or co-written six books about futures and trading."[29] He sat on the President's Committee

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Lattman & Henderson, *supra* note 8.
22. Huffstutter et al., *supra* note 6.
23. *Id.*
24. This description of Wasendorf's conduct seems to suggest a very odd fraud. Surely, the CFTC should have been communicating directly with the bank, not with Peregrine, to verify the firm's bank balances. So, the use of a phony post office box for delivery of the bank statements does not seem to answer completely the question how Wasendorf fooled the CFTC for so long.
25. Huffstutter et al., *supra* note 6.
26. Lattman & Henderson, *supra* note 8.
27. Ryan Schlader, *Peregrine CEO Wasendorf to Plead Guilty to Fraud*, REUTERS (Sept. 12, 2012, 1:57 AM), http://www.reuters.com/article/2012/09/12/us-peregrine-ceo-agreement-idUSBRE88A1I920120912.
28. *Id.*
29. *PFG Best's Leadership*, PFGBEST, http://www.pfgbest.com/about/russsr.asp (last visited June 11, 2013).

of both the University of Iowa and the University of Northern Iowa.[30] Through his family foundation, Peregrine Charities, Wasendorf funded research for rare childhood diseases.[31]

His biggest impact, though, was on the city of Cedar Falls, home to the University of Northern Iowa. Wasendorf built his firm's new headquarters there and relocated many PFG executives from Chicago to Cedar Falls.[32]

To entice them, he built the new headquarters next to the exclusive Beaver Hills Country Club.[33] The offices had a day-care center with an outdoor playground, a Montessori school for the employees' children, and free breakfast and lunch for the firm's nearly 150 workers.[34]

Wasendorf opened an upscale Italian restaurant nearby and "paid for the entire staff to travel to Italy . . . 'How can I expect them to prepare and cook north Italian food if they haven't experienced it?' Wasendorf [asked]."[35]

In the liquidation of PFG's assets, the receiver had to sell Wasendorf's Hawkes Beechcraft jet and a $100,000 wine collection.[36] Hundreds of thousands of dollars in charitable contributions were put in jeopardy of clawback.[37]

3. *Wasendorf's Remorse*

In his confession/suicide note, which was addressed to his son, Wasendorf wrote:

> By the time you read this I will have taken my life. I beg for your forgiveness. I have written my final confession that will be discovered with my body. I know you will be shocked to

30. *Id.*
31. *Id.*
32. Lattman & Henderson, *supra* note 8.
33. Huffstutter et al., *supra* note 6.
34. Azam Ahmed & Peter Lattman, *At Peregrine Financial, Signs of Trouble Seemingly Missed for Years*, DEALBOOK (July 12, 2012, 2:18 PM), http://dealbook.nytimes.com/2012/07/12/at-peregrine-financial-signs-of-trouble-seemingly-missed-for-years/.
35. Lattman & Henderson, *supra* note 8.
36. Ann Saphir & Tom Polansek, *Jet-Owning Peregrine CEO Russell Wasendorf, Sr.: "I Don't Live a Lavish Lifestyle,"* HUFFINGTON POST (July 18, 2012, 3:54 PM), http://www.huffingtonpost.com/2012/07/18/russell-wasendorf-sr-peregrine_n_1684131.html.
37. Emily Christensen, *Hospitals, Universities May be Forced to Return Donations from Peregrine*, GAZETTE (July 18, 2012, 11:45 AM), http://thegazette.com/2012/07/18/hospitals-universities-may-be-forced-to-return-donations-from-peregrine/.

> discover my crimes. It all started about 20 years ago. I never wanted you to know the kind of guy I really was.[38]

He also commented on the pressure he felt from regulators: "I don't feel bad having deceived the Regulators—the CFTC (the Commodity Futures Trading Commission) and the National Futures Association.[39] These Regulators are not the Police of the Industry they are the Gestapo!"[40]

Finally, for what it was worth, Wasendorf offered this statement of contrition: "I have committed fraud. For this I feel constant and intense guilt. I am very remorseful that my greatest transgressions have been to my fellow man."[41]

B. Lee B. Farkas

Lee B. Farkas was convicted in April 2011 for his role in masterminding one of the largest bank fraud schemes in history.[42] "As chairman of [the mortgage firm Taylor, Bean & Whitaker], Mr. Farkas orchestrated a plot that caused the demise of Colonial Bank [of Montgomery, Alabama] and cheated investors and the government out of billions of dollars," said federal prosecutors.[43] U.S. District Court Judge Leonie Brinkema sentenced Farkas to thirty years in prison. She also ordered him to pay $38.5 million in restitution.[44]

1. Farkas's Fraud

> Mr. Farkas's $2.9 billion scheme began in 2002, prosecutors [alleged], when Taylor Bean was facing mounting losses. To hide the losses, Taylor Bean executives secretly overdrew the firm's accounts with Colonial Bank. [Taylor Bean], aiming to cover up the overdrafts, sold Colonial about $1.5 billion in

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38. *Russell Wasendorf Sr.'s Suicide Note to His Son, Deal Journal*, WALL ST. J. (July 27, 2012, 4:41 PM), http://blogs.wsj.com/deals/2012/07/17/russell-wasendorf-sr-s-suicide-note-to-his-son/.

39. Saphir & Polansek, *supra* note 36.

40. *Id.*

41. *Wasendorf: "I Have Committed Fraud," Deal Journal*, WALL ST. J. (July 13, 2012, 3:01 PM), http://blogs.wsj.com/deals/2012/07/13/wasendorf-i-have-committed-fraud.

42. Tom Schoenberg, *Ex-Taylor Bean Chairman Farkas Found Guilty on All 14 Counts in Fraud Case*, BLOOMBERG (Apr. 20, 2011, 12:01 AM), http://www.bloomberg.com/news/2011-04-19/ex-taylor-bean-chairman-convicted-of-conspiracy-fraud-1-.html.

43. Ben Protess, *Mortgage Executive Receives 30-Year Sentence*, DEALBOOK (June 30, 2011, 8:40 PM), http://dealbook.nytimes.com/2011/06/30/mortgage-executive-receives-30-year-sentence).

44. *Id.*

"worthless" and "fake" mortgages.[45] The government, in turn, guaranteed the bogus loans.[46]

Colonial Bank ultimately filed for bankruptcy in August 2009.[47] It was the sixth-largest bank failure in U.S. history.[48] Taylor Bean also ended up in liquidation.[49]

Importantly, and as often happens with big-time defrauders,[50] Farkas began his career with a small-time scam, followed by larger and larger scams. In 2002, when Taylor Bean was a tiny firm, Farkas tried to sell eight fraudulent mortgages to Fannie Mae.[51] "To make things even worse, the mortgages—all of which defaulted without a single payment being made—listed Mr. Farkas as the borrower."[52] At his trial, Farkas testified that the attempted sale of mortgages to Fannie Mae had been a mistake by a Taylor Bean employee.[53] Those mortgages had been created, Farkas testified, to be used as collateral to get money from a bank.[54] Whatever may have been the case at the time, *somebody* was being defrauded.[55] Fannie Mae refused to do further business with Taylor Bean.[56]

Farkas then upped the stakes of his fraud when he began selling phony loans to Colonial Bank in order to raise capital.[57] Colonial, in turn, used the Taylor Bean mortgages as collateral for further borrowing.

> Two major European banks, Deutsche Bank and BNP Paribas, thought their $1.68 billion in loans was fully secured by collateral. But only a tenth of that collateral was real. Colonial had lent hundreds of millions on the security of

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45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. Patrick Fitzgerald, *Taylor Bean Liquidation Plan is Cleared*, WALL ST. J. (July 22, 2011, 6:38 PM), http://online.wsj.com/article/SB10001424053111903461104576462574010327268.html.
50. *See* Jayne W. Barnard, *Securities Fraud, Recidivism, and Deterrence*, 113 PENN ST. L. REV. 189, 201–06 (2008) (recounting the careers of several recidivist defrauders).
51. Floyd Norris, *After Years of Red Flags, a Conviction*, N.Y. TIMES, Apr. 22, 2011, at B1.
52. *Id.*
53. *Id.*
54. *Id.*
55. Farkas may not have appreciated the irony of his testimony. In suggesting that he, personally, had done nothing wrong in 2002 or ever thereafter, he revealed three characteristics of the classic con man: blaming others for his own wrongdoing, failing to recognize the harm he had done, and showing no remorse. These are the classic signs of someone with antisocial personality disorder, a lifelong mental condition. *See* Barnard, *supra* note 50, at 214–16 (describing APD and its role in confidence crimes).
56. Norris, *supra* note 51.
57. *Id.*

mortgage loans that were either nonexistent or had already been sold to someone else.[58]

And, when Farkas then tried to help Colonial recapitalize and qualify for $570 million in Troubled Asset Relief Program funds in 2008, he designed a complex scheme that required him to raise $150 million from outside investors.[59] "[Farkas] told Colonial and the Treasury Department that he had done so, but that turned out to be a lie. He attributed the misinformation to an innocent mistake . . . ."[60]

Further, when he set out to buy his private jet, Farkas did so by "taking out mortgages on non-existent condominiums."[61] At one point, he boasted to a colleague that he "could rob a bank with a pencil."[62]

2. *Farkas's Self-Image*

In seeking a lengthy sentence for Farkas, the government argued that Farkas had enjoyed a "'lifestyle of ostentatious wealth,' with 'little to no regard' for the thousands of employees who lost their jobs when the fraud imploded."[63] "Mr. Farkas . . . diverted more than $40 million from Taylor Bean and Colonial to 'finance his lifestyle,' prosecutors said. He used the money . . . to buy a private jet, vacation homes, and a collection of vintage cars."[64]

Throughout his leadership of Taylor Bean, Farkas indeed enjoyed a high public profile. He was a prominent player in South Florida's gay community.[65] He owned three popular bars in Atlanta[66] and another bar in Fort Lauderdale.[67] Farkas was said to own expensive real estate "up and down the east coast."[68] His fleet

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58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. Patrick G. Lee, *White Collar Criminal Hopes Good Deeds Will Lead to Lighter Sentence*, *Law Blog*, WALL ST. J. (June 29, 2011, 3:00 PM), http://blogs.wsj.com/law/2011/06/29/white-collar-criminal-hopes-good-deeds-will-lead-to-lighter-sentence/.
64. Protess, *supra* note 43.
65. *Gay Mortgage CEO Lee Farkas Indicted in Billion Dollar Fraud Scheme*, TOWLEROAD (June 17, 2010), http://www.towleroad.com/.m/2010/06/gay-mortgage-ceo-lee-farkas-indicted-in-major-fraud-scheme.html?p=1.
66. Matt Hennie, *Former Blake's Owner a Mean, Garish Queen*, PROJECT Q ATLANTA (July 27, 2012, 9:46 AM), http://www.projectqatlanta.com/news_articles/view/former_blakes_owner_a_mean_garish_queen.
67. Peter J. Henning, *Long Sentences Send a Message Few May Hear*, DEALBOOK (June 27, 2011, 11:56 AM), http://dealbook.nytimes.com/2011/06/27/long-white-collar-sentences-send-a-message-few-may-hear/.
68. Matthew Barakat, *Feds See Life Term for Mortgage Fraud Mastermind*, HIGHBEAM RES. (June 24, 2011, 1:55 PM), http://www.highbeam.com/doc/1A1-3605a6eacf96497887e0fd05fa81331b.html.

of vehicles included a 1963 Rolls Royce, a 1929 Model A, and a 1961 Porsche 356.[69] Farkas was besotted with cars.[70]

In Ocala, Florida, where Taylor Bean was based, Farkas sponsored holiday ice-skating parties and symphony events.[71] He bought up abandoned buildings and refurbished them for small local businesses.[72] The executive dining room at Taylor Bean served pheasant and caviar to employees.[73]

3. *Farkas's Remorse*

When asked at his trial in 2011 if he thought Taylor Bean's relationship with Colonial Bank allowed the mortgage firm to sell "fraudulent, counterfeit, fictitious loans" to the bank, Farkas replied, "[Y]eah, I believe it does. It's very common in our business to, to sell—because it's all data, there's really nothing but data—to sell loans that don't exist[.] . . . It happens all the time."[74]

Farkas's claim at sentencing was that he had to "'take risks' because he couldn't accept the failure of [his company]."[75]

When it came time to sentence Farkas, Judge Brinkema said, "I do not detect one bit of actual remorse . . . . You [only] regret getting caught."[76]

C. *Albert "Jack" Stanley*

Jack Stanley pleaded guilty in September 2008 to violating provisions of the Foreign Corrupt Practices Act by paying over $180 million in bribes to Nigerian officials on behalf of the construction company of which he had been chairman and CEO, KBR, Inc. (formerly Kellogg, Brown & Root).[77] After several years of cooperating with the U.S. Department of Justice, Stanley was

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69. *The Disgusting $1.5 Billion Mortgage Fraud Scheme Perpetuated by Lee Farkas*, QUEERTY (June 20, 2010), http://www.queerty.com/the-disgusting-1-5-billion-mortgage-fraud-scheme-perpetuated-by-lee-farkas-20100620/.

70. *See* Jacqueline Palank, *Farkas to Government: Don't Take My Car!*, *Bankruptcy Beat*, WALL ST. J. (Mar. 2, 2012, 3:16 PM), http://blogs.wsj.com/bankruptcy/2012/03/02/farkas-to-government-dont-take-my-car/ (recounting Farkas's plea from prison not to sell a 1954 Cadillac Eldorado, a car Farkas describes as an "irreplaceable, unique asset").

71. Jacqueline Palank, *Letters Show Different Side of Lee Farkas*, *Bankruptcy Beat*, WALL ST. J. (June 28, 2011, 4:46 PM), http://blogs.wsj.com/bankruptcy/2011/06/28/letters-show-different-side-of-lee-farkas/.

72. *Id.*

73. *Jury Gets $3B Fraud Case Against Mortgage Company Exec.*, THE DAILY REC. (Apr. 18, 2011, 5:28 PM), http://thedailyrecord.com/2011/04/18/jury-gets-3b-fraud-case-against-mortgage-company-exec/.

74. Norris, *supra* note 50.

75. Schoenberg, *supra* note 42.

76. Protess, *supra* note 43.

77. David Ivanovich & Mary Flood, *Ex-KBR Exec Pleads Guilty in $182B Bribe Scheme*, HOUS. CHRON. (Sept. 3, 2008), http://www.chron.com/business/article/Former-KBR-exec-pleads-guilty-in-182M-bribe-1630188.php.

sentenced to thirty months in prison.[78] He also agreed to pay restitution of $10.8 million.[79]

Graduate student Nnaoka Ufere describes the background of Stanley's prosecution:

> "Jack" Stanley, the 65-year-old chairman and CEO of KBR, [and a former] senior executive at [KBR's parent] Halliburton, was legendary for winning billion-dollar contracts in emerging countries; he seemed to possess a magic wand for dealing with government officials and winning their trust in countries like Egypt, Malaysia, Nigeria and Yemen. Those who know Stanley well describe him as a smart and fearsome competitor, intent on winning big deals and getting rewarded for his contributions. His dedication to Halliburton was unquestionable and he was considered a global rainmaker. He had it all. But all that changed on one private trip to Abuja, Nigeria.
>
> Mr. Stanley, according to federal prosecutors, made the clandestine trip to meet with senior Nigerian officials to figure out who to bribe and how much to pay. The agreed $182 million bribery greased the palms of Nigerian procurement officials who reciprocated by awarding a lucrative contract worth more than $6 billion to Halliburton. Nigerian officials rewarded Stanley with a "kickback" in the amount of $10.8 million.[80]

When Stanley faced sentencing, his lawyer argued that, whatever his crime, Stanley had provided essential information to the government that led to the recovery of $1.7 billion in fines, penalties, and forfeited profits from KBR, Halliburton, and others.[81]

During allocution, Stanley informed U.S. District Judge Keith Ellison that he had been raised on "traditional American values of hard work, honesty and integrity . . . . But somewhere along the way my values were compromised, through ambition, ego or alcoholism . . . . Somewhere along the way, I lost touch with Jack Stanley."[82]

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78. Laurel Brubaker Calkins, *Ex-KBR CEO Stanley Gets 2 ½ years in Prison for Foreign Bribes*, BLOOMBERG (Feb. 24, 2012, 12:01 AM), http://www.bloomberg.com/news/2012-02-23/ex-kbr-ceo-albert-stanley-gets-30-month-prison-term-in-nigeria-bribe-case.html.

79. *Id.*

80. Nnaoka Ufere, *"Alcohol Made Me Do It": Rationalizations and CEO Corrupt Behavior*, PRAC. SCHOLAR (May 1, 2012), http://weatherhead.case.edu/degrees/doctor-management/blog/post.cfm/nnaoke-ufere-alcohol-made-me-do-it-rationalizations-and-ceo-corrupt-behavior.

81. James Pinkerson, *Former KBR Exec. Gets Prison Time in Nigerian Bribery Scheme*, HOUS. CHRON. (Feb. 23, 2012, 9:11 PM), http://www.chron.com/news/houston-texas/article/Former-KBR-executive-sentenced-to-prison-in-3357138.php.

82. Calkins, *supra* note 77.

D. Gilbert Fiorentino

Gilbert Fiorentino has not been criminally charged. According to the SEC, however, while Fiorentino was a corporate director and group CEO of a Fortune 1000 company, he "systematically abused his position, obtaining payments from vendors and misappropriating company property . . . ."[83]

The company was Systemax, Inc., which sold personal computers and consumer electronics through retail stores, direct mail catalogs, and online, under the trade name CompUSA.[84] Fiorentino and his two brothers founded CompUSA in 1987.[85] Systemax bought CompUSA in 2008.[86] After the purchase, Fiorentino served as CEO of Systemax's Technology Products Group, which accounted for over ninety percent of Systemax's total sales.[87]

From 2006 through 2010, the SEC alleged, Fiorentino used his position to obtain over $400,000 in kickbacks from vendors doing business with Systemax.[88] "From one manufacturer's representative that dealt with the company he took part of the commissions."[89] From another, he received monthly payments of $5,000 to $10,000.[90] "During this same period Mr. Fiorentino routinely misappropriated property [from Systemax] worth several hundred thousand dollars."[91] None of these activities were disclosed to Systemax or to its shareholders.

Ultimately, Fiorentino's scheme was halted by a whistleblower complaint, which precipitated an internal investigation and later

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83. Thomas O. Gorman, *Director Scofflaw Undone by Whistleblower*, SEC ACTIONS (Sept. 17, 2012, 8:27 AM), http://www.secactions.com/director-scofflaw-undone-by-whistleblower/.

84. *Id.*

85. *Former Head of Miami-based CompUSA Agrees to SEC Settlement*, S. FLA. BUS. J. (Sept. 18, 2012), http://www.bizjournals.com/southflorida/blog/morning-edition/2012/09/former-compusa-head-agrees-to-sec.html.

86. *Systemax Acquires CompUSA Brand and Stores*, EWEEK (Jan. 6, 2008), http://www.eweek.com/c/a/Desktops-and-Notebooks/Systemax-Acquires-CompUSA-Brand-and-Stores/.

87. Gorman, *supra* note 82.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* According to one report, Fiorentino and his brothers actually removed some *$17 million* worth of electronics from Systemax. *See* Paul Kunert, *Feds Investigate $17 million of Missing Kit at CompUSA*, CHANNEL REG. (July 22, 2011, 1:02 PM), http://www.channelregister.co.uk/2011/07/22/fbi_investigating_compusa_theft/. Systemax has brought suit against Carl and Patrick Fiorentino for unjust enrichment, civil conspiracy, and breach of fiduciary duty. Elaine Walker, *Lawsuit: Former CompUSA Executives Stole Millions*, MCCLATCHY WASH. BUREAU (Jan. 9, 2012), http://www.mcclatchydc.com/2012/01/09/135320/lawsuit-former-compusa-executives.html.

Fiorentino's resignation.[92] In conjunction with his resignation, Fiorentino relinquished stock options valued at $9.1 million and repaid his 2010 annual bonus of $480,000.[93]

The Commission's complaint against Fiorentino alleged violations of reporting requirements, certification requirements, proxy solicitation rules, and the antifraud rule, Rule 10b-5.[94] In September 2012, Fiorentino settled with the SEC for a $65,000 civil penalty and agreed to be barred from serving as an officer or director of a public company.[95] Nevertheless, Fiorentino still appears on a vanity web page, describing himself as a "serial entrepreneur [and] turnaround and acquisition artist."[96] "He specializes in using the transforming power of technology to convert faltering companies into sustainably profitable enterprises," says the web page.[97] In 2010, before the problems at CompUSA were revealed, Fiorentino was named one of South Florida's Business Leaders of the Year.[98]

E. *Jeffery S. Fraser*

Jeffery S. Fraser has not been criminally charged. From 1992-1999 and again from 2002–2008, Fraser was CEO of NIC, Inc., a Kansas-based company of which he was a cofounder.[99] NIC manages citizen and business interactions with government websites.[100]

According to the SEC, NIC's public filings from 2002 to 2007 contained several material omissions regarding Fraser's perquisites of office.[101] The SEC allege[d] that NIC Inc.'s public filings

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92. Gorman, *supra* note 82.

93. *Id.*

94. SEC Charges Former Systemax Director in Compensation Scheme, SEC Litigation Release No. 22,481, 104 SEC Docket 2596 (Sept. 17, 2012).

95. *Id.*

96. *Gilbert Fiorentino*, GILBERT FIORENTINO OFFICIAL BLOG PAGE, http://gilbertfiorentino.co/ (last visited July 12, 2013).

97. *Id.*

98. *Id.*

99. Fraser tells NIC's "origin story" this way:

> Eighteen years ago, Ross Hartley and I started the first company in what would later become NIC, in a small rented apartment in Topeka, Kan., with a maxed-out credit card, a bartered Internet access node, and a single state contract for a brand-new concept called a "self-funded" state information computer dial-up service.

Press Release, NIC, NIC Announces Resignation of Director Jeff Fraser (Sept. 4, 2009), *available at* http://www.egov.com/Media/PR/Pages/ViewRelease.aspx?PRID=20090904005385; *see also Jeffery Fraser – Former CEO of NIC*, Jeffrey Fraser, PEOPLEPOND, http://peoplepond.com/jefferyfraser (last visited June 12, 2013).

100. NIC, *supra* note 98.

101. Press Release, SEC, SEC Charges Government Website Provider and Four Executives with Failure to Disclose CEO Perks (Jan. 12, 2011), *available at* http://www.sec.gov/news/press/2011/2011-8.htm.

> failed to disclose that the company footed the bill for wide-ranging perks enjoyed by [ ] Fraser, his girlfriend, and his family—including vacations, computers, and day-to-day personal living expenses.[102] NIC failed to disclose that it paid thousands of dollars per month for Fraser to live in a Wyoming ski lodge and commute by private aircraft to his office at NIC's Kansas headquarters.[103]

Specifically, the SEC alleged that Fraser, who did not have a personal credit card, routinely charged living expenses on NIC credit cards and submitted expense vouchers falsely claiming personal items were business-related in order to have NIC pay for these personal expenses.[104] Fraser also sought reimbursement for certain expenses that he had not incurred.[105]

As a result of the SEC's action, Fraser agreed to pay $1,184,000 in disgorgement, $358,800 in prejudgment interest, and a $500,000 civil penalty.[106] He also consented to the entry of an obey-the-law injunction against him and an order barring him from serving as an officer or director of a public company.[107]

Today, Fraser describes himself as a Ph.D. student and entrepreneur.[108]

F. *What Are We to Make of These Narratives?*

Certainly most corporate leaders do not behave like the five CEOs whose stories I have summarized here. Most CEOs—even if they are voracious self-servers—try to minimize the impact of their self-interest on shareholders, at least where it can be seen. Still, these five men's stories are emblematic of what can go wrong when a CEO becomes unhinged by envy, insecurity, ambition, poor judgment, greed, unchecked narcissism, or a larcenous heart.

The question before us, then, is: What are the mechanics of professional derailments like these? What factors play a role when powerful business leaders self-destruct? Parts II-V will explore four possible answers.

II. EVOLUTIONARY BIOLOGY, SELF-INTEREST, AND GREED: THE TRIUMPH OF THE "SELFISH GENE"

Let us begin with this simple premise: man is hard-wired to look out for himself. As Richard Dawkins frames the issue, "we are

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. JEFFERY FRASER, http://jefferyfraser.net/ (last visited June 12, 2013).

born selfish" and then we must learn to modify our fundamentally self-serving instincts in order to become social creatures.[109]

Certainly, scholarship in recent years has focused more on altruism and pro-social behavior than on the pursuit of self-interest.[110] Still, most human beings take care of themselves before looking out for others. And most human beings—not only those in the Western world—cherish their status-conferring possessions.[111]

This desire for possessions—and the acquisitiveness it breeds—is a product of evolutionary biology: "For our ancestors in a harsh world, greed paid off in the only currencies that matter to genes—survival and the ability to have offspring. From them, we have inherited a greediness that manifests itself today as a desire to accumulate money and possessions."[112]

The question thus inevitably arises: does simple greed explain the behavior of CEOs who steal from their companies? Perhaps. I would argue, however, that more than greed is at work when people in power decide to run off with money and goods to which they are not entitled. Something more than greed is required when men of accomplishment, privilege, and power somehow cannot satiate their desire for more.

III. POWER, RISK, AND THE ARCHITECTURE OF THE BRAIN

Acquiring power in any organization can bring out the best or the worst in people. As President Abraham Lincoln admonished, "if you want to test a man's character, give him power."[113]

There has been a great deal of scholarship in recent years about power in both the public and private sectors: how people acquire it,[114] how they exercise it,[115] and how it affects their social interactions.[116]

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109. RICHARD DAWKINS, THE SELFISH GENE 3 (1989).

110. *See, e.g.*, STEPHANIE BROWN ET AL., MOVING BEYOND SELF-INTEREST: PERSPECTIVES FROM EVOLUTIONARY BIOLOGY, NEUROSCIENCE AND THE SOCIAL SCIENCES (2012).

111. TERRY BURNHAM & JAY PHELAN, MEAN GENES: FROM SEX TO MONEY TO FOOD: TAMING OUR PRIMAL INSTINCTS 109 (2000) ("The drive to acquire material possessions is a human universal.").

112. *Id.* at 120.

113. *Leading Thoughts: Quotes on Character*, *Leading Thoughts*, LEADERSHIPNOW, http://www.leadershipnow.com/characterquotes.html (last visited June 6, 2013).

114. *See, e.g.*, ROBERT GREENE, THE 48 LAWS OF POWER (1998); JEFFREY PFEFFER, POWER: WHY SOME PEOPLE HAVE IT AND OTHERS DON'T (2010)

115. *See, e.g.*, ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE (2002); DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN (2005); JOHN MEACHAM, THOMAS JEFFERSON: THE ART OF POWER (2012).

116. *See, e.g.*, Jacob Hirsh et al., *Drunk, Powerful & in the Dark: How General Processes of Disinhibition Produce Both Prosocial and Antisocial Behavior*, 6 PERSP. ON PSYCHOL. SCI. 415 (2011).

Recent research by psychologists has begun to unpack the relationship between a person's sense of power and his willingness to take risks.[117] Management studies have extended this research. In a 2012 study comparing firms that engaged in subprime lending with similar firms that did not, the authors found that companies whose CEOs exhibited a "power" profile were more likely to engage in subprime lending than those companies whose CEOs did not have a "power" profile.[118]

The authors of the study hypothesized that "those with power [are likely] to focus on the potential reward aspects of risky behavior while ignoring potential threats."[119] In the case of CEOs, they reasoned, "the cognitive bias activated by this psychological process leads the CEO to ignore the downside consequences of risky choices and to consider only the upside potential."[120]

Using proxies for power—whether the CEO was also the board chair; whether the CEO owned a significant percentage of the company's stock; whether the CEO was an "expert" as a result of long tenure with the company; and the CEO's prestige–the authors found that

> CEO ownership and expert power and, to a lesser extent, structural and prestige power, exert significant main effects on the likelihood that CEOs engaged in high levels of risk taking represented by their firms specializing in subprime mortgages . . . . [As] CEO tenure lengthened, providing opportunities to enhance the CEO's expert power by garnering greater firm-specific knowledge, social capital and confidence, there was a greater likelihood for a firm to be a subprime specialist.[121]

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117. *See* Cameron Anderson & Adam D. Galinsky, *Power, Optimism, and Risk-taking*, 36 EUR. J. SOC. PSYCHOL. 511, 529 (2006) (concluding based on laboratory studies that a person's sense that he possesses power alters his risk perceptions and increases risk-taking behavior). The authors state that "[a]cross five studies, [they] found converging evidence that a heightened sense of power increases individuals' optimism in viewing risks and their propensity to engage in risky behavior." *Id.*

118. *See* Krista B. Llewellyn & Maureen I. Muller-Kahle, *CEO Power and Risk Taking: Evidence from the Subprime Lending Industry*, 20 CORP. GOVERNANCE: AN INT'L REV. 289, 300, 303 (2012).

119. *Id.* at 291.

120. *Id.*

121. *Id.* at 300. The authors cautioned that "firms with long-tenured CEOs without an outside owner with substantial equity holdings and board members who have low tenure may be more prone to have CEOs pursuing excessively risky strategies, because of their high level of power." *Id.* at 303. *But see* Shams Pathan, *Strong Boards, CEO Power and Bank Risk-Taking*, 33 J. BANKING & FIN. 1340 (2009) (finding that strong bank boards positively affect (that is, encourage) bank risk taking). In contrast, CEO power negatively affects bank risk taking. The explanation for this outcome is that

The authors then identified the mechanism by which accretion of power leads to increased risk taking as being located in the "approach system" of the brain.[122] According to the authors, activation of the brain's "approach system" provides the link through which the CEOs of subprime lenders were led "to assume [an] overly optimistic assessment of the possible consequences of their actions, and subsequently take risks other executives would avoid."[123]

There are limitations, however, to the notion that, simply because they have acquired power, CEOs necessarily are more likely to take financial risks than others with less power. Some people in power become more cautious and conservative, rather than more acquisitive, in order to retain their power.[124] They avoid taking risks.[125] Importantly, moreover, men's response to power and risk-taking may differ according to their individual levels of testosterone,[126] a subject to which we now turn our attention.

> if a bank board better represents the bank shareholder's interests, then there will be greater bank risk-taking because shareholders have reasons to prefer more risk. Similarly, the CEO power results show that if bank CEOs have more power or ability to compel board decisions, then their banks would exhibit less risk since bank managers (including CEOs) have reason to be risk-averse.

Id. at 1341 (citation omitted).

122. Llewellyn & Muller-Kahle, *supra* note 117, at 291; *see also Biological Processes in Personality*, WILDERDOM, http://www.wilderdom.com/personality/L7-4BiologicalProcessesPersonality.html (last updated Sept. 1, 2003) ("The approach system causes one to be both sensitive to potential rewards and motivated to seek those rewards. Attraction to a person or a chocolate cake and a desire to approach the person or cake comes from this system (Behavioral Approach System or BAS)."). The Behavioral Inhibition System, or BIS, "causes one to be sensitive to potential punishment and motivated to avoid those punishments. Fear of rejection by someone you fancy or fear of a snake and the motivation to avoid these things comes from this system." *Id.*

123. Llewellyn & Muller-Kahle, *supra* note 117, at 300; *see also* PO BRONSON & ASHLEY MERRYMAN, TOP DOG: THE SCIENCE OF WINNING AND LOSING 172–73 (2013) ("The brain does indeed have separate systems, electrically and chemically distinct. One neural system [the behavioral approach system] is waiting for something to get excited about, at which point it cranks up and drives you to action. The other system [the behavioral inhibition system] is monitoring everything you do like a hovering parent. It's ready to jump in and stop you from taking a risk or making a careless mistake.").

124. *See* John K. Maner et al., *Power, Risk, and the Status Quo: Does Power Promote Riskier or More Conservative Decision Making?*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 451, 452 (2007) (finding that, though most studies show that "power may evoke action, disinhibition, and a tendency to make risky choices," circumstances may lead people in power to make more conservative decisions).

125. *See id.*

126. *See generally* Richard Ronay & William Von Hippel, *Power, Testosterone, and Risk-taking*, 23 J. BEHAV. DECISION MAKING 473 (2010).

IV. SUCCESS, REINFORCEMENT, AND SELF-DELUSION: TESTOSTERONE AND THE "WINNER EFFECT"

Human beings are subject to many cognitive biases.[127] We all experience (and generally benefit from) over-optimism, grandiosity, and resistance to bad news.[128] People who experience financial success are especially susceptible to these tendencies. A recent book by neuroscientist John Coates reveals the biological origin of this phenomenon: the steroid hormone testosterone.[129]

Testosterone affects the brain in both animals and humans, especially those engaged in dominance-seeking behavior.[130] Imagine, for example, two lions in the wild.

> Two males enter a fight for turf or a contest for a mate and, in anticipation of the competition, experience a surge in testosterone, a chemical bracer that that increases their blood's capacity to carry oxygen and, in time, their lean-muscle mass. Testosterone also affects the brain, where it increases the animal's confidence and appetite for risk. After the battle has been decided the winner emerges with even higher levels of testosterone, the loser with lower levels. The winner, if he proceeds to a next round of competition, does so with already elevated testosterone, and this androgenic priming gives him an edge, helping him yet again. . . . However, at some point in this winning streak the elevated steroids begin to have the opposite effect on success and survival. Animals experiencing this upward spiral of testosterone and victory have been found after a while to start more fights and to spend more time out in the open, and as a result they suffer an increased mortality. As testosterone levels rise, confidence and risk taking segue into overconfidence and reckless behavior.[131]

Testosterone works in humans in much the same way as it does in wild animals. For example, humans experience a rise in testosterone in anticipation of physical combat, such as athletic contests.[132] (Interestingly, they may also experience a rise in testosterone in anticipation of nonphysical contests, such as chess matches.)[133] Coates characterizes testosterone as the "fuel of exuberance."[134]

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127. *See generally* DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011).

128. *See* Tali Sharot, *The Optimism Bias*, TIME (May 28, 2011), http://www.time.com/time/health/article/0,8599,2074067,00.html.

129. JOHN COATES, THE HOUR BETWEEN DOG AND WOLF: RISK TAKING, GUT FEELINGS AND THE BIOLOGY OF BOOM AND BUST 192 (2012).

130. *Id.* at 27.

131. *Id.* at 27–28.

132. BRONSON & MERRYMAN, *supra* note 122.

133. *Id.* Sports fans, too, may experience a rise in testosterone before a big game. "[O]ne group of scientists took testosterone samples from fans before and after the 1994 football World Cup final between Brazil and Italy. Both teams' supporters went into the game with elevated testosterone, but when Brazil won

The similarities between humans and other mammals go beyond the rise in testosterone in anticipation of combat. There is also an "upward spiral" of testosterone in those humans who experience serial combat successes.[135] And, there may even come a time when elevated testosterone resulting from serial combat successes leads to foolish risk-taking behavior. This is what Coates calls the "winner effect."

Coates illustrates these phenomena in humans with an ingenious experiment conducted using traders in the City of London as his subjects.[136] Using simple cheek swabs, Coates sampled the testosterone of the traders at the beginning and the end of their trading days over a two-week period.[137]

> What we found was that their testosterone levels were significantly higher [at the end of the] days when they made an above-average profit. More intriguing, though, was what we found when we looked at testosterone levels in the morning, because these predicted how much money the traders would make in the afternoon. When the traders' morning testosterone levels were high, they went on to make a lot more money in the afternoon than they did on days when their morning testosterone levels were low. Moreover, the difference in P&L between high and low-testosterone days was large, amounting in statistical terms to one full standard deviation . . . .[138]

In a related experiment, Coates found specifically that the presence of elevated testosterone in the body increased the risks the traders took.[139]

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their fans' testosterone levels rose, while the Italians' crashed." COATES, *supra* note 128, at 185.

134. *See* COATES, *supra* note 128, at 161.

135. *Id.* at 182 ("[A]thletes on a winning streak may . . . have a very different body chemistry than those on a losing streak.").

136. *Id.* at 186.

137. *Id.*

138. *Id.* at 186–87. Traders have since cashed in on Coates' insights, becoming—alongside professional athletes—eager clients of testosterone clinics. *See* Cindy Perman, *Wall Street's Secret Weapon for Getting an Edge*, CNBC (July 11, 2012, 2:48 PM), http://www.cnbc.com/id/48149955 ("The patient list at Cenegenics [an anti-aging clinic] . . . reads like a Who's Who of Wall Street: Goldman Sachs, JPMorgan, Deutsche Bank, Bank of America, traders from the New York Stock Exchange and Nasdaq and a lot of hedge funds.").

139. COATES, *supra* note 128, at 189. Others have made similar findings. *See, e.g.*, Press Release, Univ. Chi. Booth Bus. Sch., New Study Explores the Role of Gender, Testosterone in Financial Risk Aversion (Aug. 24, 2009), *available at* http://www.chicagobooth.edu/about/newsroom/news/2009/2009-08-24 (citing Paola Sapienza et al., *Gender Differences in Financial Risk Aversion and Career Choices are Affected by Testosterone*, 106 PROCEEDINGS NAT'L ACAD. SCI. 15,268 (2009)). This study attributes the fact that men are more risk tolerant than women in making financial decisions to men's much higher levels

Coates was unable to show experimentally that the "winner effect"—the progression from simple combat-readiness to self-destructive, irrational behavior, where "risk taking becomes increasingly foolish"[140]—actually happened in the trading room. He was, however, able to claim to have found "preliminary evidence" of the winner effect.[141] He was also able to imagine, based on his own trading experience, how the "winner effect" might work.

> In the financial world, testosterone feedback loops, once they start, can cause traders to pass through the early stages of thrill and excitement, and end up convinced of their own infallibility. As these cycles rise to their euphoric high point, one finds traders, most of whom are young males, with impaired judgment, doing dangerously silly things. Following the pattern of the winner effect, traders experience a rise in testosterone when their trades make money, which increases their confidence and appetite for risk, so that in the next round of trading they put on even larger trades. If they win again, as they are likely to during a rising market, their profits will increase their testosterone once more, until at some point confidence becomes overconfidence, trading positions grow to a dangerous size and the risk-reward profiles of the trades start to stack the odds against them.[142]

How might Coates's findings and speculation about the winner effect ultimately translate into the behavior of wayward CEOs? I would argue that, as with the London traders, "as profits rise, so does testosterone."[143] And, as testosterone rises, so does one's willingness to take on added risk.[144] Finally, "at some point, as testosterone builds up, confident risk-taking morphs into overconfidence and rash behavior."[145]

The result is what Bronson and Merryman call "maladaptive competitiveness."[146] Psychiatrist Jonathan Davidson uses a

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of testosterone. *Id.* The study also found that women with higher testosterone levels were willing to take more risks than women with lower testosterone levels. *Id.*

140. COATES, *supra* note 128.

141. *Id.* at 190.

142. *Id.* at 193.

143. *Id.* at 163.

144. *Id.* at 192.

145. *Id.* This build-up of testosterone may specifically make humans more greedy. *See* Paul J. Zak et al., *Testosterone Administration Decreases Generosity in Ultimatum Game*, PLoS ONE, at 1, (Dec. 16, 2009), *avaliable at* http://www.plosone.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371 %2Fjournal.pone.0008330&representation=PDF.

146. BRONSON & MERRYMAN, *supra* note 122, at 12 ("Maladaptive competitiveness is characterized by psychological insecurity and displaced urges. It's the individual who can't accept that losing is part of competing; it's the person who competes when others around him are not competing. He has to be the best at everything, and he can't stop comparing himself to others even

different term: "hubris syndrome."[147] All three of these formulations—the "winner effect," "maladaptive competitiveness," and "hubris syndrome"—would seem to apply to at least some of the CEOs whose stories I have told in Part I.

But, is there any evidence to support the application of the testosterone-based "winner effect" to CEOs? We don't have cheek swabs or actual records of CEOs' testosterone levels.[148] We may, however, have some indirect evidence.

> Consider older men . . . . Testosterone levels in men rise until their mid-twenties, then go into a slow decline that accelerates after the age of fifty. At the same time, cortisol levels [a hormone that moderates risk-taking] drift upward. As they age, men may therefore become less and less susceptible to the testosterone feedback loops that . . . can morph risk taking into risky behavior.[149]

So, is there a difference between the combat behaviors of older CEOs vis-à-vis younger CEOs? Perhaps. A recent study found that CEOs younger than forty-five are more likely than older CEOs to initiate M&A deals.[150] (Making an unsolicited offer to acquire a company is seen as "dominance seeking" behavior.)[151]

More interesting in this study was the fact that when younger CEOs made a takeover bid (a "bear hug") for a company headed by another young CEO, there was a significant likelihood that the approach would fail completely or be replaced by a hostile tender

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when the competition is over. He doesn't stop when the whistle blows. He drags others into competitions they don't want to be in, by provoking them. And he will resort to cheating when he can't win.").

147. David Owen & Jonathan Davidson, *Hubris Syndrome: An Acquired Personality Disorder? A Study of US Presidents and UK Prime Ministers Over the Last 100 Years*, 132 BRAIN 1396, 1397 (2009) ("The key concept is that hubris syndrome is a disorder [associated with] the possession of power, particularly power which has been associated with overwhelming success, held for a period of years and with minimal constraint on the leader.").

148. Some scholars have attempted to use proxies for testosterone levels, such as the facial width-to-height ratio. *E.g.*, Elaine M. Wong et al., *A Face Only an Investor Could Love: CEOs' Facial Structure Predicts Their Firms' Financial Performance*, 22 PSYCHOL. SCI. 1478 (2011).

149. COATES, *supra* note 128, at 269–70.

150. Maurice Levi et al., *Deal or No Deal: Hormones and the Mergers and Acquisitions Game*, 56 MGMT. SCI. 1462, 1463 (2010) (finding a "positive and significant association between the male CEO being young and the likelihood of making an acquisition bid"). *But see* Felix D. Schönbrodt, *Why Using Age as a Proxy for Testosterone Is a Bad Deal* (Mar. 26, 2012) (Ludwig Maximilians Univ. Munich Working Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028882 (challenging the methodology and conclusions of the Levi study).

151. Levi et al., *supra* note 149, at 1465 ("[D]ominance can take various forms, from aggression where the intent is to inflict harm on another person, to non-aggressive dominance involving enhancing one's status over another.").

offer.[152] Since "tender offers are likely to follow unsuccessful negotiations—going to the target shareholders after other negotiations have failed—we would expect such a target CEO effect; cooperation is less likely from the young, and by implication high-testosterone, target male CEOs whose dominance is challenged."[153]

In thinking about the combative behavior of younger CEOs, one might consider Facebook's CEO, Mark Zuckerberg, who is now twenty-nine years old. Facebook has made nearly forty acquisitions since 2005.[154] One of the riskiest of these deals was the $1 billion acquisition of Instagram, negotiated by Zuckerberg himself over a junk-food fueled weekend in 2012.[155] Critics argued that the purchase reflected poor strategy on Facebook's part,[156] but also that Instagram's twenty-eight-year old CEO, Kevin Systrom, negotiated rashly.[157] Were either of these CEOs victims of elevated testosterone or, perhaps, of the "winner effect?" Of course, we cannot know.

For now, however, let us step back and try to put the "winner effect" into a modern business context: (1) Ninety-six percent of public company CEOs are men.[158] (2) These men presumably have testosterone levels at least as high as (and probably higher than) other men their age. (3) These men presumably have been successful in serial rounds of dominance-seeking (or "combat") behavior.[159] (4) Successful CEOs with a

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152. *Id.* at 1469.

153. *Id.* at 1475.

154. *See List of Mergers and Acquisitions by Facebook*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Facebook (last visited June 11, 2013).

155. *See* Shayndi Raice et al., *In Facebook Deal, Board Was All but Out of Picture*, WALL ST. J. (Apr. 18, 2012), http://online.wsj.com/article/SB10001424052702304818404577350191931921290.html; *see generally* Steven M. Davidoff, *In Silicon Valley, Chieftains Hold Sway with Few Checks and Balances*, N.Y. TIMES, Jul. 5, 2012, at B4 (explaining how Silicon Valley CEOs have the tendency to make decisions without the input of directors or shareholders and citing as an example the fact that in the Facebook IPO "[Zuckerberg] reportedly told his board only about 24 hours before the deal was approved, appearing to present it as a fait accompli").

156. *See* Molly Wood, *Facebook Buys Instagram . . . But for What?*, CBSNEWS (Apr. 10, 2012, 9:38 AM), http://www.cbsnews.com/8301-205_162-57411761/facebook-buys-instagram-. . .but-for-what/.

157. Steven M. Davidoff, *How Instagram Could Have Cut a Better Deal*, DEALBOOK (Aug. 20, 2012, 9:55 AM), http://dealbook.nytimes.com/2012/08/20/how-instagram-could-have-cut-a-better-deal/.

158. *Catalyst 2012 Census of Fortune 500: No Change for Women in Top Leadership*, CATALYST (Dec. 11, 2012), http://www.catalyst.org/media/catalyst-2012-census-fortune-500-no-change-women-top-leadership (finding that only 3.8% of Fortune 500 companies are headed by women).

159. Levi et al., *supra* note 149 ("CEOs are clearly in dominant positions by virtue of their leading corporate roles: [they] must have sought dominance to be at the pinnacle of their corporations.").

history of winning may experience—and ultimately become victims of—the "winner effect."

V. THE PSYCHOPATHIC CEO

When political or business leaders run off the rails, it is easy enough to say, "oh well, he was crazy." It turns out, however, that sometimes that claim may be true. Apparently, "the incidence of psychopathy among CEOs is about 4 percent, four times what it is in the population at large."[160]

This assertion should not be surprising. Some of the common characteristics of psychopaths include glibness, charm, a need for stimulation, proneness to boredom, and a capacity to manipulate others.[161] Psychopaths also lack empathy and rarely feel remorse.[162] These characteristics, of course, can help advance the careers of mid-level managers. In other words, psychopathy may be a plus in the business world, at least up to a point.

In a recent book by British psychologist Kevin Dutton,[163] we learn that, in a 2005 study of three groups of subjects—business managers, psychiatric patients, and hospitalized criminals—researchers found that "a number of psychopathic attributes were actually more common in business leaders than in so-called disturbed criminals—attributes such as superficial charm, egocentricity, persuasiveness, lack of empathy, independence, and focus."[164]

In a 2010 study, Canadian researcher Robert Hare "handed out the Psychopathy Checklist-Revised ("PCL-R") to more than two hundred top U.S. business executives, and compared the prevalence of psychopathic traits in the corporate world to that found in the population at large."[165] "Not only did the business executives come out ahead, but psychopathy was positively associated with in-house ratings of charisma and presentation style: creativity, good strategic thinking, and excellent communications skills."[166]

University of Wisconsin psychologist Joe Newman has concluded that "the combination of low risk aversion and lack of guilt or remorse, the two central pillars of psychopathy . . . may

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160. Jeff Bercovici, *Why (Some) Psychopaths Make Great CEOs*, FORBES (June 14, 2011, 8:46 AM), http://www.forbes.com/sites/jeffbercovici/2011/06/14/why-some-psychopaths-make-great-ceos/.

161. *See generally* M.E. Thomas, *Confessions of a Sociopath: How to Spot a Sociopath*, 46 PSYCHOL. TODAY 53, 56 (2013).

162. *Id*

163. KEVIN DUTTON, THE WISDOM OF PSYCHOPATHS: WHAT SAINTS, SPIES, AND SERIAL KILLERS CAN TELL US ABOUT SUCCESS (2012).

164. *Id.* at 21.

165. *Id.* at 105.

166. *Id.*

lead, depending on circumstances, to a successful career in either crime or business. Sometimes both."[167]

Inevitably, these claims have led to neurological research and the application of functional MRIs ("fMRIs") to psychopaths and others. There is evidence that the brains of psychopaths process risk and reward opportunities differently than non-psychopaths. And those psychopaths who resort to crime "have such a strong draw to reward—to the carrot—that it overwhelms the sense of risk or concern about the stick .... It's not just that they don't appreciate the potential threat but that the anticipation or motivation for reward overwhelms those concerns."[168]

Dutton concludes that, for some CEOs, that unquenchable drive for reward is what ultimately leads them astray. "The psychopath seeks reward at any cost, flouting consequence and elbowing risk aside .... Money, power, status, and control . . . together constitute an irresistible draw for the business-oriented psychopath as he or she ventures ever further up the rungs of the corporate ladder."[169]

VI. DISCUSSION

So, how can we account for the troubling-to-shocking behaviors of Messrs. Wasendorf, Farkas, Stanley, Fiorentino, and Fraser? It is impossible to know what mix of greed, power, the "winner effect," or even the presence of a serious brain disorder, contributed to their downfalls. Nor is it likely that they themselves could disentangle these threads.

The two themes that run throughout these men's stories, however, are (1) they felt powerful and yet invisible, seeming to believe their misconduct would never be uncovered; and (2) their feeling of invulnerability led them to take extraordinary—and often escalating—risks.

What made these men think that they could get away with their misdeeds and escape undetected?

Most white-collar criminals—indeed, most criminals of any type —enjoy a sense of superiority and dominance over others.[170] (This is particularly true of Ponzi schemers who exploit social ties and persuade their victims that they can offer a unique, unbeatable

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167. *Id.* at 63.

168. *Id.* at 116 (quoting David Zald, who conducted some of the fMRI studies).

169. *Id.* at 117.

170. TERRY L. LEAP, DISHONEST DOLLARS: THE DYNAMICS OF WHITE COLLAR CRIME 4 (2007) ("[They] regard the world as a chessboard over which they have total control, and they perceive people as pawns to be pushed around at will. Trust, love, loyalty, and teamwork are incompatible with their way of life. They scorn and exploit most people who are kind, trusting, hardworking, and honest.").

investment opportunity.)[171] White-collar criminals rarely consider themselves in the same category with "real" criminals, whom they disdain.[172]

White-collar criminals may also be motivated by the acquisition of power or the trappings of power. Leap describes this pathology as the "'impatient wealth' phenomenon that emphasizes the rapid and sometimes dishonest accumulation of tangible assets as a mark of status and as a source of personal power."[173]

Finally, white-collar criminals often like to demonstrate their power and influence in public, self-affirming ways. "[They are] often pillars of the community. They may participate in fund-raising efforts for social causes, serve as benefactors for educational institutions or foundations, and give their time generously to church groups and volunteer organizations."[174]

This latter behavior—conspicuous philanthropy—characterizes Wasendorf and Farkas and perhaps some of the other men featured in this Essay. But conspicuous philanthropy is not a reliable predictor of criminal behavior. (If it were, the members of the board of the Metropolitan Opera would all be in jail.)

Similarly, conspicuous consumption (Wasendorf, Farkas, and Fraser); the ownership of bars and restaurants (Wasendorf and Farkas); and even the use of private jets (Wasendorf, Farkas, and Fraser) are not predictors of harm. Indeed, these are common practices among many CEOs.[175]

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171. *See* Jayne W. Barnard, *Deception, Decisions, and Investor Education*, 17 ELDER L. J. 201, 205–11 (2010) (describing the techniques Ponzi schemers employ to lure their victims); Barnard, *supra* note 49, at 206–12 (describing the con man's "tool kit").

172. LEAP, *supra* note 169, at 8.

> Board members, executives, managers, politicians, and others who violate white-collar criminal statutes rarely regard themselves as criminals. Instead, they are more likely to view themselves as misunderstood but law-abiding citizens. White-collar criminals use a variety of ego defense mechanisms to reduce the anxiety associated with their crimes. [Their] first line of defense for almost all criminals [is] to deny their misdeeds. When evidence of their guilt is strong, other rationalizations will likely be used. The term "misunderstanding" is a staple of the criminal's lexicon. Specifically, they adopt an innocent posture to reduce the severity of legal repercussions and to maintain their self-esteem and social status."

Id. at 108–09.

173. *Id.* at 43.

174. *Id.* at 117.

175. *See* Jayne W. Barnard, *Narcissism, Over-Optimism, Fear, Anger and Depression: The Interior Lives of Corporate Leaders*, 77 U. CIN. L. REV. 405, 408 (noting examples of such activities). Adultery, too, is common among CEOs. *See* Joann S. Lublin & Lauren Weber, *2012, A Year of Corner-Office Twists*, WALL ST. J. (Dec. 31, 2012), http://online.wsj.com/article/SB10001424127887323300404578203542770911514.html (noting that adulterous relationships involving CEOs are a "well-worn genre").

Being a founder (Wasendorf, Farkas, Fiorentino, and Fraser); having an alcohol addiction (Stanley and perhaps others); and exhibiting grandiosity in self-presentation (Wasendorf, Farkas, and Fiorentino); raise interesting issues but certainly cannot be said to be reliable indicators of a propensity to crime.

So what is the punch line of this Essay? In my view, there are three: (1) it is devilishly difficult to know what evil lies in the hearts of men; (2) the factors driving criminal behavior may be deeply buried, perhaps even at the molecular level; and (3) power is not only an aphrodisiac, it may also be a poison.

It is easy enough for someone like me to urge that the government learn more about the factors that foster fraud.[176] The real question, however, is: Where do we begin? And, while we are figuring out the answer to that question, we should not delude ourselves that the agency problem has been solved. The agency problem may be even worse than we think.

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176. *See* Jayne W. Barnard, *Evolutionary Enforcement at the Securities and Exchange Commission*, 71 U. PITT. L. REV. 403, 419–26 (2010) (recommending that the SEC create a behavioral unit that would develop expertise about the biographical, behavioral, and psychological characteristics of securities law violators).