RESPONSE

THE TOXIC SIDE EFFECTS OF SHAREHOLDER PRIMACY

LYNN A. STOUT†

In response to Barry E. Adler & Marcel Kahan, *The Technology of Creditor Protection*, 161 U. PA. L. REV. 1773 (2013), and Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907 (2013).

INTRODUCTION 2003
I. SHAREHOLDER PRIMACY AS ACADEMIC CENTRAL PLANNING 2005
II. SHAREHOLDER PRIMACY BECOMES DOGMA 2007
III. SHAREHOLDER NIRVANA THREATENS CREDITOR WELFARE 2010
IV. MORE TOXIC SIDE EFFECTS FROM SHAREHOLDER PRIMACY: DAMAGE TO STAKEHOLDERS OTHER THAN CREDITORS 2012
V. STILL MORE TOXIC SIDE EFFECTS: UNLEASHING SHAREHOLDER SHORT-TERMISM 2016
CONCLUSION: IS SHAREHOLDER PRIMACY TOO TOXIC? 2019

INTRODUCTION

The past two decades have seen a dramatic shift in the corporate landscape.[1] For most of the twentieth century, well into the early 1990s, directors

† Distinguished Professor of Corporate and Business Law, Clarke Business Law Institute, Cornell University Law School.

1 This shift has been analyzed in a number of recent publications. *See, e.g.*, GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA 59-101 (2009); Edward B.

and executives of large U.S. corporations saw themselves as stewards of great economic institutions that should serve not only equity investors but also customers, creditors, employees, suppliers, and the broader society.[2] Today this "managerialist" philosophy is viewed as obsolete and inefficient. Many, and possibly most, public companies now embrace a shareholder-centered vision of good corporate governance that emphasizes "maximizing shareholder value" (typically measured by share price) over all other corporate goals.[3]

What have been the practical results of the shift? The philosophy of "shareholder primacy" overtook managerialism in large part because it was thought to offer a cure for the "agency cost" problem of corporate managers neglecting shareholders' interests in order to serve their own. Today, many argue that the shareholder primacy cure has largely succeeded in eliminating any significant divide between managers' and shareholders' interests.[4] Institutional shareholders in particular enjoy more influence over corporate boards today than at any other time in American business history, and executives are far more focused on keeping share prices high.

Yet there are signs that the shareholder primacy cure has troubling side effects. This concern provides the basis for the two Articles reviewed in this Response: one by Edward Rock and the other by Barry Adler and Marcel Kahan.[5] These Articles point out that increasing shareholders' influence in public companies and driving managers to focus on share price to the exclusion of other considerations can help shareholders by harming corporate creditors. Each Article offers novel and plausible approaches for ameliorating this negative, creditor-damaging side effect of shareholder primacy.

This Response applauds both Articles, but it also suggests that we should further expand the inquiry into shareholder primacy's negative consequences. There is reason to fear that the side effects of the shareholder

---

Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907 (2013); Lynn A. Stout, *On The Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1177-78 (2013).

2 *See* Rock, *supra* note 1, at 1912-17; Stout, *supra* note 1, at 1170-72.

3 *See* Rock, *supra* note 1, at 1910 ("[S]ince the early 1980s, the U.S. system has shifted from a manager-centric system to a shareholder-centric system."); Stout, *supra* note 1, at 1177-78 (describing "how shareholder primacy managed so swiftly to mature from provocative academic theory to conventional wisdom").

4 *See* Rock, *supra* note 1, at 1910 ("With respect to the most important decisions . . . there is substantial reason to believe that managers and directors today largely 'think like shareholders.'").

5 Barry E. Adler & Marcel Kahan, *The Technology of Creditor Protection*, 161 U. PA. L. REV. 1773 (2013); Rock, *supra* note 1.

primacy cure are more toxic than these two Articles suggest. Indeed, they may be threatening the health of the corporate patient.

I. SHAREHOLDER PRIMACY AS ACADEMIC CENTRAL PLANNING

The public corporation as we know it—that is, the large, publicly listed company with professional management and dispersed shareholders—first emerged at the beginning of the twentieth century. For most of that century, shareholders remained dispersed and passive, exercising little or no influence over boards of directors. In 1932, Adolf Berle and Gardiner Means famously documented this pattern of the "separation of ownership from control."[6] Far from being held under shareholders' collective thumbs, boards of directors in public firms operated as self-selecting and autonomous decisionmaking bodies. They did not privilege shareholders' interests or the idea of "shareholder value" over the interests of other corporate stakeholders, such as customers, creditors, employees, and the local community. While shareholders were treated as an important corporate constituency, they were not the only constituency that mattered. Nor was share price viewed as a reliable proxy for corporate performance.

Managerialism appears to have first come under attack and the idea of shareholder primacy seems to have first gained traction in academia. This began during the 1970s with the rise of the Chicago school of free-market economics and its intellectual cousin, the "law and economics" movement.[7] In 1970, Milton Friedman published a famous essay in the *New York Times Magazine* arguing that the only proper goal of business (which he seemed to view as synonymous with large corporations) was the pursuit of profit for the company's owners (which he assumed to be its shareholders).[8] In 1976,

---

[6] *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 4 (1939) (noting that public corporations are characterized by "a large measure of separation of ownership and control"). As discussed in greater detail later, *see infra* text accompanying note 45, the statement that "ownership" and "control" are separated in public corporations reflects a mistaken notion that shareholders somehow "own" corporations. In fact, as the Supreme Court recently reaffirmed in *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010), corporations are independent legal entities that own themselves. This legal reality has important economic consequences that we gloss over at our peril.

[7] *See* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 15-23 (2012) (discussing the rise of shareholder primacy theory in academia); *see also* DAVIS, *supra* note 1, at 81 ("From an economic point of view, the idea of managerialism was intolerable . . . .").

[8] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32. Davis traces the intellectual roots of shareholder primacy theory back even further to Henry Manne, who was "one of the leading lights of the 'law and economics' movement" and his 1965 writings on "the market for corporate control." DAVIS, *supra* note 1, at 81

Michael Jensen and William Meckling published an influential article on the "theory of the firm," which is still the most frequently cited academic article in the managerial literature today.[9] Jensen and Meckling argued that the main problem in firms was coercing wayward professional managers (whom the authors called agents) to faithfully serve the interests of the firm's owners (so-called principals). Like Friedman, Jensen and Meckling treated the concepts of the "firm" and the "corporation" as synonyms, and they assumed that the shareholders were the corporation's owners and residual claimants.[10]

Jensen and Meckling's article was eagerly embraced by a rising generation of corporate legal scholars.[11] Yet there are at least two odd aspects to legal scholars' enthusiasm for the "agency cost" approach to understanding the nature of corporate law. First, the classic agency cost model relied on patently inaccurate assumptions about the legal structure of corporations. As a legal matter, directors are not agents subject to shareholders' control; nor do shareholders own corporations, which are legal entities that "own" themselves; nor are shareholders the sole residual claimants of functioning public companies, although they can come close to that status in insolvent firms.[12] Because Friedman, Meckling, and Jensen were economists, and not lawyers, they were perhaps understandably ignorant of the complex web of rights and responsibilities that comprise the modern public company. This ignorance allowed them to assume that large public corporations were simply larger versions of the familiar sole proprietorship or small, closely-held company.[13] But it is curious that scholars with formal legal training (including, for many years, the Author) so easily accepted their views.

(discussing Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965). Rock emphasizes the role of Michael Jensen and William Meckling's 1976 article. Rock, *supra* note 1, at 1913 (discussing Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976)).

9 ROGER L. MARTIN, FIXING THE GAME: BUBBLES, CRASHES, AND WHAT CAPITALISM CAN LEARN FROM THE NFL 10-13 (2011).

10 *See* Jensen & Meckling, *supra* note 8, at 309 ("[T]he relationship between the stockholders and manager of a corporation fit[s] the definition of a pure agency relationship . . . .").

11 *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 9 (1991); RICHARD A. POSNER & KENNETH E. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION 10-66 (1980).

12 *See infra* text accompanying notes 45-48.

13 A similar lack of legal sophistication explains why many who defend shareholder primacy in public corporations rely on dicta from the antiquated Michigan corporate law case of *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919), to argue that corporate law mandates shareholder primacy. *Dodge* was primarily a close corporation case, and it has been cited by modern Delaware courts only in that context. However, in modern public corporations, the business judgment rule leaves boards with ample room to pursue corporate objectives other than increasing shareholder

The second odd aspect of the law and economics approach to corporate governance is that it led many emerging corporate scholars to believe that managerialism was outmoded and inefficient and that corporate law and practice needed reform from the outside.[14] In other words, economic analysis led many legal experts to conclude that academics had better insight into how to run businesses than businesspeople themselves; that the voluntary contractual arrangements of atomized individuals were inferior to mandatory governance rules imposed by reformers and regulators; and that uniform, "one size fits all" practices produced better corporate governance than diverse, individualized arrangements. Such beliefs are anathema to free-market economists like Friedrich Hayek, who placed far more faith in voluntary arrangements that evolve naturally from the needs of atomistic individuals in the business world than attempts at the "intelligent design" of institutions by bureaucrats or academics.[15] Nevertheless, embracing economic analysis led many legal scholars to attempt the academic equivalent of bureaucratic central planning in corporate governance.

Despite the shaky intellectual foundations of shareholder primacy theory, the shareholder primacy theorists had impeccable timing. By the late 1970s and early 1980s, managerialism—which had dominated the business world for more than half a century—had become suddenly and uniquely vulnerable to critique. This vulnerability can be traced to two developments: the 1973–74 bear market, and corporate raiders discovery that the stock market often undervalued the conglomerate business structure that many managerialist boards and executives had favored.[16]

II. SHAREHOLDER PRIMACY BECOMES DOGMA

It is worth noting that managerialist practices did not cause the 1973–74 bear market, which saw the Dow Jones Industrial Average lose nearly forty percent of its value. Managerialism, after all, had been around for more than half a century. The Arab oil embargo, which quadrupled oil prices, and Richard Nixon's inflation-triggering decision to take the United States off

wealth. *See* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 168-72 (2008) ("[C]ourts regularly allow corporate directors to make business decisions that harm shareholders in order to benefit other corporate constituencies.").

14 *See, e.g.*, Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923 (1984) (discussing calls for reform).

15 *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 88-100 (1944) (arguing for the superiority of economic freedom over central planning).

16 *See* DAVIS, *supra* note 1, at 81-87 (discussing how the conglomerate trend opened managerialism to criticism and the chronic undervaluation of corporations); Stout, *supra* note 1, at 1172-73 (discussing the role of the 1973–74 bear market).

the gold standard were far more plausible causes of the market decline.[17] Still, the stock market's abysmal performance during the early 1970s opened the door to doubts about managerialism's efficacy.

Similarly, the discovery that the stock market tended to undervalue large conglomerates comprised of many different business divisions, relative to the price the market attached to those business divisions when trading as freestanding entities, provided highly questionable evidence that managerialism was inefficient in any sense other than the very narrow sense of maximizing current share price.[18] The 1980s, however, were the heyday of a particularly extreme version of the "efficient market hypothesis" that held that stock prices always reflected true economic value.[19] Thus, the phenomenon of conglomerate undervaluation was viewed at the time as prima facie evidence that large conglomerates were poorly run.[20] Today, it is widely understood that stock market prices can deviate significantly from underlying value[21] and that shares in diversified conglomerates often trade at a discount that does not necessarily reflect diminished operating performance.[22]

Whatever the limits of conglomerate discounts and the 1973–74 bear market as evidence of managerialism's supposed inefficiency, by the mid-1980s, many shareholders in public companies had become disillusioned. Some shareholders, such as corporate raiders Carl Icahn, T. Boone Pickens, and Ronald Perelman, saw opportunities to profit from buying stock in conglomerate firms and then pressuring their boards to break them up and sell off their pieces. This set the stage for the ascent of shareholder primacy, as academic shareholder-primacy advocates in the ivory towers gained a powerful ally in the form of shareholders (especially "activist" shareholders) themselves.

Rock's Article provides an excellent account of how lobbying efforts by academics and shareholder activists changed corporate law and practice over

---

17 *See OPEC Oil Embargo, 1973–1974*, U.S. DEP'T ST.: OFF. HISTORIAN, http://history.state.gov/milestones/1969-1976/OPEC (last visited May 6, 2013).

18 *See* Peter G. Klein, *Were the Acquisitive Conglomerates Inefficient?*, 32 RAND J. ECON. 745, 745-47 (2001) (challenging the idea that conglomerates are "per se inefficient").

19 *See infra* text accompanying notes 64-66.

20 Rock, *supra* note 1, at 1925 (discussing how premiums paid in buyouts were assumed to be evidence of managerial costs and how "[i]t is now clear that there are a variety of explanations for premiums").

21 *See generally* Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. CORP. L. 635, 639-50 (2003) (explaining the "limits of orthodox efficient market theory"); *infra* text accompanying notes 64-66.

22 Perhaps the best explanation for this phenomenon was offered by Edward Miller in his famous paper *Risk, Uncertainty, and Divergence of Opinion*, 32 J. FIN. 1151, 1162-64 (1977).

time.[23] They shifted the U.S. corporate system away from what Rock calls a "manager-centric system" in the 1980s to the "shareholder-centric system" we see today.[24] Rather than repeat his analysis, this Response highlights three particularly significant changes in corporate law and practice that played large roles in creating what Rock calls the "new shareholder-centric reality."[25]

The first was a 1993 change in the tax code that encouraged public corporations to tie executive pay to "objective" performance metrics.[26] Shareholder primacy theory suggested the obvious metric should be share price. The 1993 tax code change thus dramatically shifted the manner in which most public corporations paid their top executives: it encouraged widespread use of stock options and stock grants, which eventually ensured that executives' interests in raising share price thoroughly overshadowed their salary interests. As Rock correctly observes, today there is no longer any "empirical basis for assuming any general divergence between the CEO's incentives and shareholder value."[27]

The second change was the increasing clout that mutual funds, pension funds, and hedge funds enjoyed over boards of directors, due in large part to Securities and Exchange Commission (SEC) rule changes in the 1990s and early 2000s designed to promote greater "shareholder democracy."[28] Examples include the 1992 changes to the proxy rules, which allowed activist hedge funds (the descendants of the 1980s corporate raiders) to coordinate and communicate with each other;[29] the 2003 adoption of NYSE and NASDAQ listing standards requiring public companies to have a majority of independent directors;[30] and a 2004 SEC rule requiring mutual funds to publicly disclose how they vote shares in their portfolios.[31]

---

23 Rock, *supra* note 1, at 1910.

24 *Id.*

25 *Id.*

26 26 U.S.C. § 162(m)(4)(c) (2006) (permitting deductions for certain performance-based compensation).

27 Rock, *supra* note 1, at 1919.

28 Because institutional investors have large and relatively concentrated shareholdings, they can better overcome the rational apathy that discourages small retail investors from becoming involved in corporate governance. *See* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1274-83 (2008); Rock, *supra* note 1, at 1922.

29 Anabtawi & Stout*, supra* note 28, at 1276-77.

30 Self-Regulatory Organizations, Exchange Act Release No. 34-48745, 68 Fed. Reg. 218 (Nov. 4, 2003).

31 *See generally* Tamara C. Belinfanti, *The Proxy Advisory and Corporate Governance Industry: The Case for Increased Oversight and Control*, 14 STAN. J.L. BUS. & FIN. 384 (2009). Prior to 2004, most mutual fund managers routinely voted as incumbent boards recommended. After 2004, the vast majority have "outsourced" their voting decisions to commercial proxy advisory services,

Finally, a third change that greatly advanced the shareholder primacy agenda was a fundamental shift in business leaders' subjective beliefs about the purpose of public corporations—to maximize shareholder wealth, of course. As shareholder primacy theory was embraced by professors in economics departments and in law and business schools in the 1970s and 1980s, those professors in turn taught its precepts to their students. Those students eventually became today's CEOs, directors, investment managers, policymakers, and regulators. Thus, shareholder primacy has become dogma: a belief system so widely accepted that most of those who embrace it cannot recall where they first learned of it or explain what evidence supports it over other theories.[32]

The result of these developments is that the idea of the managerial corporation is, as Rock cogently states, "dead and should be buried. Managers now largely think and act like shareholders."[33] What modern academics long viewed as the core problem of corporate law—the agency cost problem of self-interested managers exploiting powerless shareholders—"has largely been solved."[34] So where do we go from here?

III. SHAREHOLDER NIRVANA THREATENS CREDITOR WELFARE

People—including professors—are creatures of habit. Corporate scholars whose writing has focused for decades on the problem of managerial malfeasance may be easily tempted to simply keep doing what they have always done. That is, they may continue assuming that the primary problem we need to address in public corporations is still managers exploiting shareholders, and that public corporations need an even stronger dose of the shareholder primacy cure.[35] Rock and Adler and Kahan deserve great praise for being more observant. They recognize that the corporate landscape has changed. Rather than ruminating over old, well-chewed problems, they look ahead to identify the challenges that the new terrain presents.

And they see challenges. The Articles by Rock and by Adler and Kahan are pioneering contributions to what seems likely to prove an emerging new literature in corporate governance. In this new literature, the focus of

especially Institutional Shareholder Services (ISS), which often embrace shareholder primacy ideals. *See* Anabtawi & Stout, *supra* note 28, at 1277-78.

32 *See* STOUT, *supra* note 7, at 21.

33 Rock, *supra* note 1, at 1988.

34 *Id.* at 1909.

35 *See id.* at 1925 (referring to "[a]cademics' stubborn focus on the 'problem' of managerial resistance").

attention will shift away from conflicts between the interests of corporate managers and those of shareholders. Adler and Kahan believe that this shift will occur not only because "the agency costs between a firm's shareholders and its managers have recently declined."[36] It will also occur because the very developments that have reduced the shareholder–manager conflict have worsened a *different* conflict: the conflict between creditors and shareholders.[37]

Corporate nirvana for shareholders, as Rock and Adler and Kahan point out, can be hazardous to creditors' financial health. In making this observation, they remind readers of a basic reality of the institutional complexity we call a corporation. If the corporation (as economists like to say) is a "nexus of contracts," many of those contracts (as economists also like to say) are seriously "incomplete." Creditors—at least, voluntary creditors—can bargain with the firm and try to negotiate detailed debt covenants that protect them against foolish or opportunistic corporate behavior. But, given the substantial costs of contracting, the impossibility of predicting all possible future changes in circumstances, and the riskiness of relying on imperfectly informed outside observers like courts to enforce contractual provisions, it is inevitable that circumstances may arise where boards can make decisions that threaten corporate creditors' interests, and debt contracts will not clearly and completely control board behavior.[38]

This means that how a board of directors chooses to run a corporation has a substantial effect not only on shareholders' but also creditors' welfare. For example, a board of directors can choose to avoid risky business projects, refuse to "leverage" the firm by taking on additional debt, and hoard its cash rather than pay out dividends or repurchase shares. Each of these business strategies benefits creditors by reducing the chance of insolvency. Conversely, a board can embrace risky new ventures, borrow wildly, and pay lavish dividends. These strategies all increase shareholders' expected returns while reducing creditors' chances of repayment.

The result, as Adler and Kahan discuss, is that "the interests of shareholders and those of creditors sometimes conflict."[39] There is a tension between the way creditors would like boards to run firms and the way shareholders would like boards to run firms. A necessary corollary is that changes in corporate law and practice that make boards more attentive to shareholders' interests can prove harmful to creditors. As Rock notes,

---

36 Adler & Kahan, *supra* note 5, at 1775.

37 *Id.* at 1775-76; Rock, *supra* note 1, at 1926-29.

38 *See* LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 178-81 (2011) (discussing reasons why virtually all contracts are incomplete to some degree).

39 Adler & Kahan, *supra* note 5, at 1777.

"When shareholders are in control . . . there is less reason to worry about shareholder–manager agency costs. But the downside of shareholder control is that the incentive to externalize risk onto creditors comes to the fore."[40]

The problem is more than theoretical. Rock's Article cites several empirical studies that support the view that changes in corporate law and practice that have caused boards and executives to focus more on shareholder wealth have had negative effects on bondholders.[41] Rock also provides a detailed case study of Dynegy, Inc. to illustrate how Dynegy's shareholders sought to extract "shareholder value" at the expense of Dynegy's creditors.[42]

Having shown that moving toward a more shareholder-centric system of corporate governance has put creditors at risk, Rock and Adler and Kahan all offer concrete suggestions for addressing this emerging problem. Rock surveys some common contractual solutions to the creditor–shareholder conflict. He also insightfully analyzes the strengths and weaknesses of creditors' various existing legal protections, including fraudulent conveyance law, legal limits on dividends and corporate repurchases, and different understandings of directors' duty of loyalty and duty to obey the law.[43] Adler and Kahan offer a novel and creative proposal by arguing that we should expand creditors' remedies against third parties, including creating notice procedures analogous to those already employed by secured creditors.[44]

Both Rock's analysis and Adler and Kahan's proposal have several strengths. This Response suggests that they also share one significant weakness. In brief, *they do not go far enough*. Thus, the remainder of this Response argues that we should consider an alternative approach to the problem of dealing with shareholder primacy's toxic side effects and stop asking public corporations to take the shareholder primacy cure.

IV. MORE TOXIC SIDE EFFECTS FROM SHAREHOLDER PRIMACY: DAMAGE TO STAKEHOLDERS OTHER THAN CREDITORS

When asked to explain exactly why corporations should focus solely on maximizing shareholder value, nonexperts typically default to empirically false claims like "shareholders own corporations" or "the law says corporations

40 Rock, *supra* note 1, at 1928.
41 *Id.* at 1928-29.
42 *Id.* at 1966-77.
43 *See id.* at 1944.
44 Adler & Kahan, *supra* note 5, at 1797.

must maximize profits for shareholders."[45] More sophisticated shareholder primacy advocates typically rely on a different factual assertion: that shareholders are the sole "residual claimants" in corporations.[46] According to this view, because the claims that nonshareholders such as creditors, employees, or taxing authorities have against corporations are fixed by contract or by law, maximizing the value of the shareholders' residual interest in the corporation is equivalent to maximizing the value of the corporation itself, which in turn maximizes social value.[47]

The shareholders-are-the-residual-claimants argument has its roots in bankruptcy law. At least in theory, when an insolvent company is liquidated, shareholders receive any assets remaining in the firm after the legal and contractual claims of other stakeholder groups (employees, creditors, suppliers, and government tax collectors) have been paid in full.[48] As both Rock's and Adler and Kahan's discussions of the tension between shareholders' and creditors' interests implicitly admit, however, it is not accurate to treat shareholders as the sole residual claimants in a company that is not insolvent. In fact, outside the bankruptcy context, it is highly misleading to suggest that shareholders are legally entitled to receive each and every penny of corporate profit left over after the fixed claims of other stakeholders have been paid. To the contrary, the corporation as a legal entity is its own residual claimant, with legal title to its profits; shareholders are only legally entitled to whatever dividends the board of directors might, in its business judgment, declare. The interests of creditors, employees, suppliers, and taxing authorities are likewise neither fixed nor static. In solvent corporations, the business judgment rule gives boards legal discretion at any time to increase employee salaries and benefits, treat suppliers more generously, retain earnings to give creditors a larger "equity cushion," or decline to pursue aggressive tax-avoidance strategies.

---

45 The Author has explained at length elsewhere why each of these claims is false. *See* STOUT, *supra* note 7, at 24-46. In brief, corporations are legal entities that own themselves; shareholders merely own a contract with the corporation called a "share," just as bondholders own a contract with the firm called "debt." Similarly, the vast majority of corporate charters state that the company was formed to do "anything lawful." In addition, the business judgment rule grants boards the legal discretion to pursue a wide range of corporate goals beyond shareholder wealth.

46 *See* EASTERBROOK & FISCHEL, *supra* note 11, at 36 (in "ordinary" circumstances, "employees and debt investors hold[] rights to fixed payoffs and equity investors hold[] a residual claim to profits, which the other participants promise to maximize").

47 *Id.*

48 However, empirical corporate law scholar Lynn LoPucki has found that shareholders are not always treated as residual claimants even in bankruptcy. *See* Lynn M. LoPucki, *The Myth of the Residual Owner: An Empirical Study*, 82 WASH. U. L.Q. 1341, 1343 (2004) (concluding that "no identifiable, single residual owner class exists in most reorganizing large public companies").

In other words, as discussed earlier, the contracts that corporations as legal entities enter into with counterparties are always, to a lesser or greater extent, incomplete. Moreover, corporations have noncontractual legal obligations (for example, to tort victims and taxing authorities) that are fluid and uncertain. Finally, corporations can and often do provide non-contractual and nonlegal external benefits to third parties, from voluntary charitable contributions to local communities, to the development of innovative technologies that benefit future generations.

This means that, as an empirical matter, large public corporations have many different residual claimants, in the sense that many different individuals and groups suffer or benefit from the way the corporation's board of directors chooses to exercise its business judgment. Indeed, there is reason to suspect that nonshareholders' interests in how public companies operate significantly outweigh shareholders' interests.

This point becomes apparent when examining the earnings statement of almost any large public corporation. Over the course of a year, a functioning public company may make dividend payments to shareholders or retain profits that (indirectly and unpredictably) contribute to "shareholder wealth" by raising share price. But any dividends paid or earnings retained by the corporation are typically grossly outweighed by the payments the corporation makes to debtholders, employees, suppliers, and the taxing authorities. They are also grossly outweighed by the market value of the goods and services the corporation provides to another essential stakeholder group: customers.

As an example, consider the 2011 earnings statement of Abbott Laboratories, a publicly traded pharmaceutical company.[49] In 2011, Abbott reaped $4.7 billion in net earnings that could, if the Abbott board so decided, be paid out as dividends to shareholders.[50] (In fact, Abbott paid only $2.9 billion in dividends.[51]) Yet in the same year, Abbott paid $33 billion to its employees and suppliers, as reflected in its reported operating costs.[52] It also

49 ABBOTT LABS., 2011 ANNUAL REPORT: CONSOLIDATED STATEMENT OF EARNINGS, *available at* http://www.abbott.com/static/content/microsite/annual_report/2011/01_earnings_statement.php (last visited May 6, 2013). The Author selected Abbott Labs at random from an alphabetized list of publicly traded pharmaceutical companies and believes its payment pattern is typical of many large public corporations.

50 ABBOTT LABS., 2011 ANNUAL REPORT: CONSOLIDATED STATEMENT OF CASH FLOWS, *available at* http://www.abbott.com/static/content/microsite/annual_report/2011/03_cash_flows.php (last visited May 6, 2013).

51 *Id.*

52 ABBOTT LABS., *supra* note 49.

paid $530 million in interest to creditors and $470 million in taxes.[53] Finally, Abbott also sold $38.9 billion in medical devices, prescription drugs, and nutritional products to consumers who presumably benefited from these products.[54]

As both Rock's and Adler and Kahan's Articles illustrate, shareholder-centric management practices that benefit the Abbott shareholders, who received $2.9 billion in dividends in 2011, may harm the Abbott bondholders who received $530 million in interest. But because Abbott's contracts are incomplete and its legal obligations and the external benefits it provides are not fixed and immutable, shareholder-centric practices may also pose a potential threat to the much larger interests, measured by financial flows, of Abbott's employees, suppliers, customers, and taxing authorities.

By offering solutions to the shareholder–creditor conflict, which they argue is worsened when managers focus on "shareholder value," Rock's and Adler and Kahan's Articles thus offer solutions to only one, possibly minor, negative side effect of the shift to shareholder-centric corporate governance. While shareholder primacy may allow shareholders to do only a little better at the expense of creditors, it may allow shareholders to do a lot better at the expense of employees, suppliers, consumers, local communities, and the Internal Revenue Service.

This raises problems of efficiency as well as equity. In the context of the shareholder–creditor conflict, it is easy to see how changing corporate law and practice to make it easier for shareholders to benefit at creditors' expense permits a one-time increase in shareholder wealth, while simultaneously making it more difficult and expensive for corporations to borrow in the future. A similar problem arises when a shift to shareholder primacy allows shareholders to exploit other corporate stakeholders.

Writing alone and with Margaret Blair, the Author has explored elsewhere how board-centric governance can encourage nonshareholder stakeholders to make vital specific investments in corporate production that cannot be fully protected by contract or law.[55] For example, employees may work harder than their formal contracts require, suppliers may allow invoices to go unpaid during times of weak cash flow, customers may invest time and effort in learning how to use the company's products, and communities may build specialized infrastructure, such as roads or schools, to support the

53 *Id.*

54 *Id.*

55 *See, e.g.*, STOUT, *supra* note 7, at 74-85; Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999) (noting that "boards exist not to protect shareholders *per se*, but to protect the enterprise-specific investments of *all* the members of the corporate 'team'").

corporations' needs. Stakeholders make such specific investments not because they are fully protected by law or contract, but because they believe a board-governed, managerialist firm will, to some extent, respect their contributions and treat them fairly. By contrast, stakeholders rationally distrust dispersed shareholders who can personally profit from threatening to expropriate or destroy the value of stakeholders' specific investments. This makes it harder for shareholder-focused public corporations to attract dedicated employees, loyal customers, cooperative suppliers, and support from local communities. Shifting public corporations from the managerial model to the shareholder-centric model thus can produce a one-time increase in "shareholder wealth," while simultaneously eroding public corporations' long-term ability to generate profits, just as fishing with dynamite produces a one-time increase in catch size while eroding long-term fishing returns.[56]

V. STILL MORE TOXIC SIDE EFFECTS: UNLEASHING SHAREHOLDER SHORT-TERMISM

The previous Part argued that the shift toward shareholder primacy exacerbates tensions between shareholders and creditors and further worsens economically significant tensions between shareholders' interests and those of stakeholders like employees, customers, and suppliers. In other words, shareholder primacy's negative side effects may operate on a much larger scale than either Rock or Adler and Kahan suggest. Yet there is another toxic side effect to fear from shareholder primacy—unleashing shareholder short-termism.

Shareholder primacy theory implicitly treats shareholders as a homogeneous group with identical interests. In reality, of course, "shareholders" are human beings who happen to own shares in public companies. Their individual interests can diverge substantially.[57] One source of conflict of interest among shareholders is differences in the period of time shareholders expect to hold their shares. Some shareholders, especially "mom and pop" individual investors, buy stocks to invest in long-term goals like retirement or paying a child's college tuition. Others are short-term investors (speculators might be a more accurate description) who hope to reap trading profits from stock price movements over periods of weeks, days, or even (in the

56 *See* STOUT, *supra* note 7, at 51-52.

57 *See id.*, at 8-9; *see also* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 577-93 (2006).

case of "flash trading" hedge funds) mere seconds.[58] There is reason to suspect short-term investors want boards to manage corporations in ways that are quite different from what longer-term investors prefer.

In particular, many people in business believe certain strategies can raise a company's share price without necessarily improving, and indeed possibly harming, its long-term performance. A large share repurchase program is one classic example; cutting or minimizing reported expenses for employee salaries, customer support, or research and development is another.[59] Empirical studies of "activist" hedge funds that typically hold shares only for a year or so confirm that these are exactly the sorts of corporate strategies they pressure boards to adopt.[60] Yet large share repurchase programs raise the risk of insolvency. Cutting the budgets for employees, customer support, and research and development also threatens a company's long-term growth. In either case, managers focusing on next year's share price have less time and energy to spend planning for the next decade. These possible negative effects of focusing on share price—which damage not only the company's creditors, employees, customers, and other stakeholders, but also its long-term shareholders—do not concern the short-term speculator who plans to sell and get out before any damage becomes apparent.

Accordingly, shifting to a shareholder-centric corporate system increases the risk that boards and executives will make more myopic business decisions. The risk is great for at least two reasons. First, institutional investors enjoy far more clout in the boardroom than individual investors do, and two important categories of institutional investors—actively managed mutual funds and hedge funds—are notorious for typically holding shares for only one or two years. (The growing dominance of mutual funds and hedge funds in the market partly explains why the average holding period for stocks listed on U.S. exchanges has declined from eight years in 1960 to around four months today.[61]) Second, the emphasis on "pay for performance" also gives executives, whose pay is largely determined by how the stock

---

58 *See* Nick Baumann, *Too Fast To Fail*, MOTHER JONES, Jan.–Feb. 2013, at 36-38 (describing flash trading).

59 *See, e.g.*, Slav Fedorov, *Does A Stock Buyback Affect the Price?*, MOTLEY FOOL, http://wiki.fool.com/Does_a_Stock_Buyback_Affect_the_Price%3F (last visited May 6, 2013) ("A stock buyback usually pushes up the price . . . ."). The belief that repurchases raise share price has both empirical and theoretical support. *See* Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235, 1252-56 (1990). This effect of repurchases helps explain the massive amounts of equity public companies have retired in recent years. *See* Rock, *supra* note 1, at 1919.

60 *See* William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1401 (2007) ("Activist hedge funds look for . . . free cash, and cuttable costs.").

61 STOUT, *supra* note 7, at 66.

performs for the next year or two, personal incentive to focus on short-term share prices instead of focusing on the company's longer-term future.

While business leaders often complain about short-term pressures,[62] some academics argue that their complaints must be either insincere or naïve, because it is impossible to raise a company's short-term share price while harming its long-term prospects.[63] According to this argument, the stock market will recognize if damage is being done. Adopting destructive short-term strategies will cause stock price to decline, punishing any management team foolish enough to follow such a course.

This critique fails for two reasons. First, it relies on an extreme version of the once-popular efficient market hypothesis, which, at one time, was thought to predict that the market price of a corporation's shares accurately reflected the best possible estimate of the company's fundamental economic value.[64] Today this version of the efficient market hypothesis has been largely discredited both empirically and theoretically.[65] Even shareholder primacy advocates now concede that the stock market can over- or under-value a company's shares for some period.[66] From the perspective of a hedge fund manager hoping to profit from flipping shares held for a few months or an executive planning to sell vested shares, only a few months of over- or underpricing is needed.

---

62 *See, e.g.*, ASPEN INST. BUS. & SOC'Y PROGRAM, OVERCOMING SHORT-TERMISM: A CALL FOR A MORE RESPONSIBLE APPROACH TO INVESTMENT AND BUSINESS MANAGEMENT 3 (Sept. 9, 2009), *available at* http://www.aspeninstitute.org/sites/default/files/content/images/Overcoming%20Short-termism%20AspenCVSG%2015dec09.pdf (outlining "recommendations to focus attention . . . on the intricate problems of short-termism").

63 *See* Jeremy C. Stein, *Efficient Capital Markets, Inefficient Firms: A Model of Myopic Corporate Behavior*, 104 Q.J. ECON. 655, 668 (1989) (noting how many academic economists dismiss fears of managerial myopia as inconsistent with efficient market theory).

64 *See* Stout, *supra* note 21, at 640-41 (discussing the idea of fundamental value efficiency, which requires markets to respond "quickly" and "accurately" to "available information"). Today, even those who favor the efficient market hypothesis typically adhere to a much weaker "informational efficiency" version that simply predicts it is difficult to make short-term profits trading on publicly available information. *See id.* at 640-42.

65 *Id.* at 667 ("[T]he evidence . . . does not support the close correlation between price and value predicted by orthodox efficient markets theory."). Economist John Quiggin calls the efficient market hypothesis a "zombie idea" that is intellectually dead but still exercises influence. *See generally* JOHN QUIGGIN, ZOMBIE ECONOMICS: HOW DEAD IDEAS STILL WALK AMONG US 35-77 (2010).

66 *See, e.g.*, Lucian A. Bebchuk & Jesse M. Fried, *How To Tie Equity Compensation to Long-Term Results*, 22 J. APPLIED CORP. FIN. 99, 104 (2010) (arguing that pay arrangements that tie compensation to share price can lead to loss in long-term value); Michael C. Jensen, *The Agency Costs of Overvalued Equity and the Current State of Corporate Finance*, 10 EUR. FIN. MGMT. 549, 553-554 (2004).

Second, it does not really matter whether executives and directors are correct in believing they can raise tomorrow's share price by adopting strategies that harm the company later on. Because executives and directors (not academics) run corporations, it is what they believe that counts. Disturbingly, they seem to believe that keeping the stock price high in the short run sometimes requires them to take steps that harm the company in the long run. A survey of 401 corporate finance officers found that eighty percent said they would cut expenses like marketing or product development if necessary to make their reported quarterly earnings targets, even if they personally believed this would hurt the company's long-term performance.[67]

Of course, the hedge fund manager who plans to sell his or her shares in a few months would applaud a CFO's decision to reject a project that would produce profits a few years down the line if necessary to "make the numbers" next quarter. But the long-term investor who plans to hold shares for years or decades feels differently about the matter. Solving the manager–shareholder agency cost problem by encouraging managers to "think like shareholders" does more than worsen the shareholder–creditor agency problem that Rock emphasizes.[68] It also creates a new shareholder–shareholder agency problem when the new shareholder-centric reality causes managers to think, in particular, like *short-term* shareholders.[69]

CONCLUSION: IS SHAREHOLDER PRIMACY TOO TOXIC?

The classic agency cost model of the corporation presumes that the central problem to be resolved by corporate law is wayward managers exploiting helpless shareholders. To a large extent, shifts in corporate law and practice over the past two decades have solved that problem. Yet in the process, these shifts may have created new problems, such as the heightened conflict between shareholders and creditors that Rock and Adler and Kahan emphasize in their Articles.

This Response suggests that heightened shareholder–creditor tensions may be just the tip of a large and ugly iceberg. At least in theory, moving

67 John R. Graham et al., *Value Destruction and Financial Reporting Decisions*, 62 FIN. ANALYSTS J. 27, 31 fig.4 (2006).

68 Rock, *supra* note 1, at 1910 (arguing that if "managers and directors today largely 'think like shareholders,'" then "the shareholder–creditor agency cost problem should return as a central concern of corporate law").

69 Shareholder primacy worsens other shareholder conflicts as well, including the conflicts between diversified and undiversified shareholders and between asocial and prosocial shareholders. *See* STOUT, *supra* note 7, at 86-102.

toward shareholder-centric governance can cause boards and executives to try to maximize shareholder wealth by exploiting the specific investments not only of creditors, but also of other stakeholders like employees, customers, and suppliers. It can also drive managers to pursue programs designed merely to raise share price, like share repurchases or cutting expenses. Such strategies have the potential to increase shareholder wealth in the short term. But in theory, they can also harm public corporations' abilities to generate future products and profits, to the collective detriment of creditors, employees, consumers, suppliers, and long-term shareholders alike.

Is there any reason beyond theory to take the possibility of such negative side effects seriously? Anyone who follows the financial press should conclude the answer is "yes." For over two decades, our public corporations have been taking the shareholder primacy cure, but the patient has only gotten sicker. In particular, U.S. public corporations are showing three alarming negative symptoms.

The first symptom is that public companies are no longer performing well for the shareholders whom the new shareholder-centric system was supposed to benefit.[70] After an initial spike in investor returns during the 1990s bull market, returns from holding public equity in the new "shareholder-centric reality" have been nearly flat—the "lost decade" of 2000–2009 is becoming the lost decade-and-a-half.[71] This outcome, of course, is exactly the opposite of what shareholder primacy theorists predicted should have resulted from the "improvements" to corporate governance made during the late twentieth and early twenty-first centuries. It is consistent, however, with this Response's hypothesis that moving from a managerial model to a shareholder-centric model produces initial increases in shareholder wealth followed by poor subsequent returns.

The second symptom is the recent rapid decline in the number of publicly listed companies. Between 1997 and 2008, the number of corporations (both private and public) filing U.S. tax returns increased by more than twenty percent.[72] During the same period, the number of public companies listed on U.S. exchanges declined by nearly forty percent, from 8823 to

---

[70] Roger Martin has calculated that between 1933 and 1976, when Jensen and Meckling published their agency cost article, *see supra* note 8, investors who bought the S&P 500 enjoyed real compound annual returns of 7.5% despite the 1973–74 bear market. MARTIN, *supra* note 9, at 63. After 1976, this average dropped to 6.5%. *Id.*

[71] *See* MARTIN J. PRING ET AL., INVESTING IN THE SECOND LOST DECADE: A SURVIVAL GUIDE FOR KEEPING YOUR PROFITS UP WHEN THE MARKET IS DOWN 1-18 (2012).

[72] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 491 tbl.744, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0744.pdf.

5401.[73] Why are public companies disappearing as quickly as endangered species?[74] In brief, some public companies (e.g., Enron, Merrill Lynch, Countrywide) are collapsing or being acquired after scandals and disasters, others (e.g., Dunkin' Donuts, Toys"R"Us) are voluntarily "going private," and emerging firms are choosing to stay private and not sell shares to public investors at all.[75] Again, this trend is inconsistent with shareholder primacy theory, which predicts that as public corporations become more shareholder-centric, they should prove more attractive to investors and entrepreneurs who are seeking to raise capital. It is consistent, however, with this Response's hypothesis that entrepreneurs recognize that it is becoming too difficult to attract stakeholders' specific contributions and too difficult to make long-range plans and investments using the public corporation form.

The third troubling symptom is an alarming decrease in the duration of public corporations. It is estimated that the typical Fortune 500 company had a life expectancy of seventy-five years early in the twentieth century but now has one of only fifteen years (and that number is declining).[76] It is too easy to dismiss this troubling symptom merely as evidence of "creative destruction."[77] Although some businesses (Twitter comes to mind) can develop quite rapidly, it takes more than fifteen years to build a great consumer brand name, an aerospace industry, or a cutting-edge pharmaceutical firm. And for creative destruction to be creative it must lead to greater economic growth, not the economic stagnation we are currently experiencing.

Correlation is not causation, of course. Defenders of shareholder primacy can reasonably argue that reduced investor returns, declining numbers of public companies, and the shortening of large corporations' life expectancies can all be explained by other factors, such as global competition, too much or too little financial regulation, or creative destruction. In some cases they are likely right. Unfortunately, it is impossible to statistically prove what causes these kinds of macroeconomic trends. The sample size is too small, and the number of variables involved too large. And if we try to judge the shareholder-centric model by looking instead to what happens to individual companies after they adopt shareholder-friendly "reforms," we risk making

---

73 DAVID WEILD & EDWARD KIM, GRANT THORNTON: CAPITAL MARKET SERIES: A WAKE-UP CALL FOR AMERICA, 14 exhibit 14 (2009), *available at* http://www.gt.com/staticfiles/GTCom/Public%20companies%20and%20capital%20markets/gt_wakeup_call_.pdf.

74 *See Rival Versions of Capitalism: The Endangered Public Company*, ECONOMIST, May 19, 2012, at 13 (noting that public companies are disappearing).

75 WEILD & KIM, *supra* note 73, at 1.

76 *See* Steven Denning, *Why Did IBM Survive?*, FORBES (July 10, 2011), http://www.forbes.com/sites/stevedenning/2011/07/10/why-did-ibm-survive.

77 *See generally* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1942).

the same error as an empirical scholar who sees that fishermen who use dynamite get more fish in the short run than fishermen who use lines and bait, and concludes that everyone should fish with dynamite. From a policy perspective, we should care about macroeconomic growth, and not the possibility of temporary individual advantage. As every economics student familiar with the "Tragedy of the Commons" knows, it is not safe to assume the latter always leads to the former.[78]

But the absence of solid statistical proof on the causes of macroeconomic phenomena does not allow us to escape their effects. Nor does it excuse us from choosing how to respond. Whether we wish to or not, we must judge as best we can whether shareholder primacy's benefits from tempering the shareholder–manager conflict outweigh its costs in terms of heightening the conflict between shareholders and other stakeholders (including but not limited to creditors) and the conflict between short- and long-term shareholders. If we judge the benefits of the shareholder-centric model to be large and the costs small, it makes sense to respond as both Rock's and Adler and Kahan's Articles implicitly assume we ought to respond: not by abandoning shareholder primacy but by instead trying to smooth its rough edges through ad hoc changes in creditors' rights and shareholders' obligations. This is a conservative approach unlikely to do much harm.

Yet it may not do much good either. This Response argues that both logic and the evidence available suggest that the shareholder primacy cure is proving more debilitating to public corporations than the managerial disease it was supposed to remedy. Interestingly, many in the business world seem to have already reached this conclusion. As already noted, fewer private companies are "going public." But those that do are increasingly opting for multi-class share structures that permit managers to retain voting control while leaving outside investors essentially powerless.[79] One of the first and most prominent examples was Google, which went public in 2004 with a governance structure designed to keep voting power in the hands of the firm's founders and executives.[80] By 2009, more than eight percent of

---

78 *See* STOUT, *supra* note 7, at 50-52 (discussing the "investor Tragedy of the Commons").

79 *See* Adam Brown, *Calpers Strategy Could Avoid IPOs with Dual Class Structures*, INSIDE INVESTOR RELATIONS (Aug. 21, 2012), http://www.insideinvestorrelations.com/articles/ipos-private-share-markets/18938/calpers-could-avoid-dual-class-ipos (describing the current "trend toward dual class voting structures").

80 *See 2004 Founder's IPO: "An Owner's Manual" for Google's Shareholders*, GOOGLE, http://investor.google.com/corporate/2004/ipo-founders-letter.html (last visited May 6, 2013) (explaining Google founders Larry Page and Sergey Brin's justification for Google's corporate structure and executive roles).

firms going public had multiple share classes, and, by 2012, this figure had risen to more than eleven percent.[81] Thus, emerging companies are responding to what Rock calls the "new shareholder-centric reality" by adopting what the Author has elsewhere labeled "managerialism in the closet."[82]

Friedrich Hayek would hardly be surprised. After all, the shareholder-centric model sprang from the minds of academics in the 1970s and 1980s, and it became business reality in no small part due to the interventions of regulators like the IRS and the SEC during the 1990s and beyond. Like many market interventions driven by bureaucratic central planning, it has proven less than successful at achieving its intended objectives of improving corporate behavior and increasing shareholder returns. The market, ever resilient, is adjusting and responding.

Still, it would be helpful if corporate law experts at least would stop lobbying to give our ailing public corporations even larger doses of the toxic shareholder primacy cure. By announcing that the new shareholder-centric reality has arrived, and by pointing out that it creates problems for creditors, Rock and Adler and Kahan may have done the business world and business academia a great service. Hayek would be pleased. But one suspects that Hayek might have also wished that they had been bolder and questioned the wisdom of the shareholder primacy cure.

[81] Allen Latta, *Thoughts on IPOs With Multi-Class Share Structures*, ALLEN LATTA'S THOUGHTS ON PRIVATE EQUITY, ETC. (Aug. 20, 2012), http://www.allenlatta.com/1/post/2012/08/thoughts-on-ipos-with-multi-class-share-structures.html (explaining that, in 2009, one in twelve IPOs had multiple share classes and, in 2012, that figure rose to one in eight).

[82] *See* Stout, *supra* note 1.