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Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy

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THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC. By Lynn Stout. San Francisco, California: Berrett-Koehler Publishers, 2012. 134 pages. $16.95.

Reviewed by Jonathan Macey[*]

Introduction

In *The Shareholder Value Myth*,[1] law professor Lynn Stout pitches her tent firmly in the camp of the nascent and prematurely moribund Occupy Wall Street movement. And if contradictions abounded among Occupy Wall Street folks, they similarly flourish in this slim text. This book simultaneously argues that the idea of shareholder primacy is—in addition to being a myth—(a) "the dumbest idea in the world";[2] (b) "an ideology, not a legal requirement or a practical necessity";[3] and (c) bad law.[4] My responses to these observations are: (a) shareholder primacy is not an idea at all; (b) shareholder primacy is an ideology, but like certain other ideologies, such as the ones about the Constitution being sacred or the one about God not being dead, it is quite useful in a wide variety of situations and contexts; and (c) shareholder primacy is not bad law because it is not law at all—at least not in the cartoonish version often presented—and nobody thinks that it is. There is of course a difference between ideology and law, and the fact that shareholder primacy is an ideology does not mean that it is irrelevant to law; and it does not even necessarily mean that there is anything wrong with it. Christianity, Judaism, capitalism, and vegetarianism are ideologies rather than laws. But a lot of people find them convincing and even inspirational all the same.

Sadly, in my view, many people, and academics disproportionately, hate ideology of any sort and consider the very idea of ideology to be abhorrently

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1. LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012).

2. *Id.* at 5–6 (quoting Francesco Guerrera, *Welch Condemns Share Price Focus*, FIN. TIMES, Mar. 12, 2009, http://www.ft.com/intl/cms/s/0/294ff1f2-0f27-11de-ba10-0000779fd2ac.html#axzz2JJPvr8f5).

3. *Id.* at 3.

4. *See id.* at 25 (contending that the idea of a legal duty to maximize shareholder profits is a myth).

anti-intellectual. As this book illustrates, among a certain sort of academic, to describe something as an ideology is to condemn it. Ideology is different from reason, but ideology has its place even in the life of educated, highly reflective people. Professor Stout, however, trivializes the notion of ideology and considers the very use of the appellation "ideological" to be derogatory.

In this Review I challenge the basic assumption that the idea of shareholder primacy is bad simply because it is, at least in part, ideological in nature. Shareholder primacy, for all of its ideological baggage, is also efficient and sensible.

I also defend the idea that shareholder primacy serves valuable salutary functions in corporate governance. I also make what, at least to me, is the rather obvious point that if the myth of shareholder primacy were to be eradicated completely from the intellectual landscape, some other ideology would of necessity emerge to fill the void. And on reading this book, I cannot avoid the conclusion that whatever new ideology might emerge will be far more pernicious and destructive than the extant, thoroughly benign myth of shareholder primacy.

This Book Review is divided into three parts, each of which contains what I consider to be a serious challenge to the ideas propounded in *The Shareholder Value Myth*. First, the book is an attempt to dislodge shareholders once and for all from their mythical, privileged role as the primary, and to some degree exclusive, beneficiaries of the efforts of corporate directors and senior managers. Unfortunately, Professor Stout does not provide any clues as to where, if at all, shareholders would be moved in her preferred ranking. Surely, shareholders should have some place in the corporation. After all, shareholders' money is required to capitalize the corporation. If Professor Stout and her fellow travelers succeed in dislodging shareholders from their current, albeit mythical, position of primacy, where would these scholars place them within the panoply of corporate constituencies such as managers, creditors, employees, suppliers, customers, and local communities? I consider this problem in Part I of this Review.

My second objection deals with Professor Stout's own ideology. She rejects the ideology of shareholder-wealth maximization. It is interesting to consider what, if any, ideology she herself proposes to embrace in its stead, which is the subject of Part II of this Review.

In Part III, I complain that *The Shareholder Value Myth* is but a sheep in wolf's clothing. Shareholder primacy is not so much a myth as it is an aspiration. For this reason, the aspiration that corporations' officers and directors should maximize shareholder value simply cannot be the problem that Professor Stout asserts it to be. In other words, the wolf disguise is the idea that maximizing value for shareholders actually causes any meaningful problems; in reality, shareholder value is not a concern to anybody because managers don't have to maximize shareholder value. Managers are virtually free to ignore shareholder value in what they do (though not in what they say). Professor Stout at one point actually acknowledges this point.[5] In other words, if Professor Stout is right in claiming that shareholder primacy is a myth, then she must be wrong in her claim that it is a serious threat or problem. Myths do not pose real threats.

I. Ignore Them and They'll Go Away: If Shareholders Aren't Primary, Are They at Least Secondary? Tertiary? Mortuary?

While Professor Stout is quite clear about what she opposes, it is not at all clear what she supports. What Professor Stout opposes, vehemently, is shareholder primacy.[6] Shareholder primacy is the notion that executives and senior managers must and should run their companies with the narrow, single-minded purpose of maximizing shareholder value at the expense of all other values.[7] I do not think that anybody, and particularly scholars such as Jeffrey Gordon, Henry Hansmann, and Reinier Kraakman, all of whom Professor Stout accuses of embracing this caricature of the shareholder primacy paradigm,[8] would recognize their work in Professor Stout's critique. But while Professor Stout is crystal clear in her desire to remove shareholders as top dogs in the corporate governance pecking order, she is frustratingly silent on where she would put them.

Perhaps Professor Stout favors merely orchestrating a minor shuffle in the hierarchy of corporate relationships and would be content simply moving shareholders from first to second place. Alternatively, sometimes it seems that Professor Stout might favor a more radical realignment, with shareholder wealth maximization being jettisoned altogether as a justification (or, if you prefer, as a pretext) for corporate action.[9]

Perhaps Professor Stout does not think that the question of where to rank the interests of shareholders, in a post-shareholder-primacy age, is interesting or important. Perhaps she never bothered to consider the issue, but it is important to address this question if we are to persuade investors to part with their money. Before a rational investor can be persuaded to trade some of her wealth for the privilege of becoming an equity claimant in a public company, she will be interested in knowing where she will stand in the queue when it's time to do things like develop corporate strategy, accept a merger proposal from another company, or distribute free cash flows to the

5. *See id.* at 32 (noting that "maximizing shareholder value" is a "managerial choice" rather than an obligation).

6. *See id.* at 6–8, 10–11 (outlining Professor Stout's criticism of shareholder primacy).

7. *See* Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy* 3 (Univ. of Toronto Legal Studies Series Research Paper No. 15-05, 2005) (explaining the concept of shareholder primacy).

8. STOUT, *supra* note 1, at 21–22.

9. *See id.* at 31–32 (characterizing maximization of shareholder wealth as optional and as simply one "possible corporate objective").

various and sundry groups who are interested in having such cash flows diverted away from investors and towards themselves. Would Professor Stout settle for moving shareholders out of first place and putting them in second place? What about third? Perhaps Professor Stout is joining the throng of scholars who believe that investors are irrational, and based on this belief, she takes the view that they will continue to invest no matter what. It would be interesting to know where Professor Stout stands on all of this.

We don't know where maximizing shareholder value ranks on Professor Stout's list of groups (workers, suppliers, local communities) and interests (the environment, philanthropy) that corporations should try to benefit. Of equal concern, we also are never told what *methodology* decision makers should employ when formulating corporate strategy.[10] In the absence of rules or standards or methods, the questions of how managers and directors decide whose interests the corporation should serve and how to go about serving such interests are of paramount importance.

And here we come to the fun part of the book. Professor Stout is no parvenu in the field of corporate law: she knows who runs corporations, and, stunningly, she has no interest in changing this facet of corporate governance. In more or less plain view on page 32, Professor Stout acknowledges that management runs the corporation:

> As far as the law is concerned, maximizing shareholder value is not a requirement; it is just one possible corporate objective out of many. Directors and executives can run corporations to maximize shareholder value, but unless the corporate charter provides otherwise, they are free to pursue any other lawful purpose as well. Maximizing shareholder value is not a managerial obligation, it is a managerial choice.[11]

This is the key passage in the book, and page 32 is the key page in the book. Professor Stout's message, slightly obscured, but discernible nonetheless, is that managers do and should run the corporation with plenary authority and with no reference to the shareholders' interests. The two key words in this book are "managerial choice."[12] The title of the book should have been not just *The Shareholder Value Myth*—it should have been *The Shareholder Value Myth and the Managerial Value Reality*.

Most people think that the role of corporate governance is to protect shareholders from managers (i.e., to control agency costs).[13] Professor Stout, on the other hand, appears to embrace the view that the role of corporate

10. *Id.* at 10.

11. *Id.* at 32.

12. *Id.* at 4, 32.

13. *See, e.g.*, Larry E. Ribstein, *The Mandatory Nature of the ALI Code*, 61 GEO. WASH. L. REV. 984, 988 (1993) (detailing the view of many academics that corporate governance should be proscribed by law because of the need to protect shareholders from managers).

governance is to protect management from shareholders.[14] And bear in mind, as Professor Stout also makes clear on the crucial page 32, her theory is simultaneously positive (a description of the way things are) and normative (a description of the way things ought to be).[15]

I certainly understand that corporate activists and gadflies sometimes argue that corporations should not serve "only" the interests of shareholders, but should also serve broader societal interests. On the other hand, it is difficult to comprehend the notion that all power should be vested in the hands of corporate managers without articulating precisely what constraints should be placed on managers. After reading page 32, one wonders what sorts of constraints the author believes should be imposed on managers. Astonishingly, the author offers not even a hint. Managerial choice is, as far as this book is concerned, not only unconstrained as a matter of fact—it is unconstrained as a matter of policy. For example, suppose a manager decides simply to steal a few million dollars from a company. In the real world, where shareholder primacy is still the articulated and occasionally even the operational public policy objective of corporate law, such stealing of course is illegal because these assets are held for the benefit of the shareholders. In Professor Stout's strange alternative universe, it would appear that such stealing would be OK as long as the nonshareholder constituencies of the corporation (workers, the government, the environment, the local community) were not harmed. Perhaps Professor Stout would even applaud having managers abscond with a few (hundred) million in corporate assets if those assets were distributed as gifts to worthy local charities.

One can only wonder and imagine what legitimate policy interests might be served by acknowledging that we live in a legal environment of unconstrained managerial choice. Professor Stout's book posits that we really do live in a world of unconstrained managerial choice now.[16] While as I explain in the following section, I think that Professor Stout is clearly mistaken in this assertion, hers is not a crazy position to take. The really crazy part is the part in which Professor Stout argues that we should even stop *pretending* that top corporate managers operate in a world that is even loosely or fictionally constrained by the "myth" that managers are supposed to maximize value for shareholders.

Wow. Even those who feel uncomfortable with the shareholder value-maximization model would worry about shifting to an unconstrained-managerial-power model. But Professor Stout is apparently so untroubled by the implications of this that she does not even pause to consider how

14. *See* STOUT, *supra* note 1, at 46 (arguing that the traditional theory of corporate governance that focuses on making "boards more accountable to shareholders and more focused on increasing shareholder wealth . . . is inconsistent with both corporate law and with the real economic structure of public corporations").

15. *Id.* at 32.

16. *See id.* ("Maximizing shareholder value is not a managerial obligation, it is a managerial choice.").

different the world would look under her proposed regime. The silent assumption is that society somehow will be better off if we free not only the professoriate, but also the corporate managerial class and even judges and legislators, from the myth of shareholder primacy.[17]

The first problem with this point of view is that we live in the age of the imperial CEO.[18] Within many parts of this particular substratum of society, the myth of shareholder primacy appears to have been eradicated root and branch eons ago. Precious few (if any?) managers have succumbed to the myth of shareholder primacy.[19] Rather, the shareholder-primacy illusion is a disease that appears disproportionately to afflict academics, theoreticians, and thankfully, the corporate bar and the Delaware judiciary.

A second, more fundamental problem with Professor Stout's point of view is that it rather alarmingly presumes that the corporate managerial class simply is not only different, but actually qualitatively better and certainly more moral than the rest of us. In general, top corporate managers of large public companies are different from you and me in the Fitzgeraldian sense: they are rich and the rich are different. Certain corporate managers, particularly in the megabanks that dominate the U.S. economy,[20] seem to me to be rather careless, like Tom and Daisy in *The Great Gatsby*: "They were careless people, Tom and Daisy—they smashed up things and creatures and then retreated back into their money or their vast carelessness or whatever it was that kept them together, and let other people clean up the mess they had made . . . ."[21]

Professor Stout's bottom line is right there on the cover. Her book's title purportedly explains "how putting shareholders first harms investors, corporations, and the public." On reading the book, however, one also discovers that Professor Stout is of the view that putting managers first—or at least freeing managers of the constraints of the shareholder value-maximization myth—somehow would help investors, corporations, and the

17. *See id.* at 46 (proclaiming that the "shareholder primacy ideology is inconsistent with both corporate law and with the real economic structure of public corporations" and with "empirical evidence").

18. Scott Green, *Unfinished Business: Abolish the Imperial CEO!*, J. CORP. ACCT. & FIN., Sept./Oct. 2004, at 19, 19–22.

19. Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., July–Aug. 2012, at 48, 50.

20. *See generally* Jonathan R. Macey & James P. Holdcroft, *An Ersatz-Antitrust Approach to Financial Reputation*, 120 YALE L.J. 1368 (2011) (describing the dominance of the very largest U.S. financial institutions).

21. F. SCOTT FITZGERALD, THE GREAT GATSBY 179 (Scribner trade paperback ed. 2004). This appears to be a pretty good description of what happened in the U.S. in various financial crises. The people who do the cleaning up are, of course, the politicians, and U.S. taxpayers are the ones footing the bills. Examples include the Enron, WorldCom, and Tyco era, which was followed by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), and the financial crisis that began in 2007, which was followed by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

public. This seems to me to be one of those flagrantly erroneous assertions that is refuted merely in the telling.

It is interesting to ponder how far Professor Stout would go in her allegiance to unconstrained managerial primacy. Clearly the oft-articulated notion that managers' fiduciary duties of care and loyalty are owed exclusively to shareholders must be abandoned. Presumably another vestigial remnant of the shareholder-primacy myth that should be jettisoned is what Professor Stout apparently regards as the silly tradition that shareholders, and only shareholders, are eligible to vote to elect corporate directors. For example, only shareholders get to cast advisory votes on executive compensation arrangements, and of course only shareholders get to elect corporate directors.[22]

II. OK, So Shareholder Primacy Is Dead, and We Need a New Myth to Replace It?

My second complaint about the analysis in this book also falls into the category of worrying about what might emerge to replace the shareholder primacy paradigm that Professor Stout seeks to eradicate. Shareholder primacy is, as Professor Stout rightly points out, a "dogma,"[23] "a belief system that was rarely questioned,"[24] and a mere "ideology."[25] But the book does not seem to take itself seriously enough to address the question of the role served by mere dogma and ideology. The assertion that shareholder primacy certainly has an ideological component, just as other notions, such as "democracy" and "freedom of religion" and even "capitalism" do. But like some of these other ideologies, it is an ideology with a basis in reason and in fact. As such, before we jettison our possibly dogmatic belief in shareholder primacy, we first should consider whether or not we should replace it with another, perhaps sounder, ideology. Alternatively, of course, it is conceivable (though barely) that Professor Stout is simply an anarchist and that she favors the complete eradication of every sort of structured belief system. But this does not seem to me an attainable goal. As long as there are business organizations of any kind, the people who run them likely will have some notion or theory about what they are supposed to be doing (like maximizing profits or saving the whales) and why they are doing it (because that is the basis on which they were hired). If we get rid of shareholder primacy as the response to the question "what should the people who run businesses do?," it would appear that we have to replace it with something else. Professor Stout's only answer is that businesses should do whatever their managers want them to do. This hardly seems like a slogan likely to

22. *Shareholder Approval of Executive Compensation and Golden Parachute Compensation*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/rules/final/2011/33-9178-secg.htm.

23. STOUT, *supra* note 1, at 21.

24. *Id.*

25. *Id.* at 3.

attract many principled supporters, much less to inspire people to pitch their tents in public parks in wintertime.

It would be interesting to know what "myth" or creed or legal objective Professor Stout thinks might replace the shareholder primacy myth. Like the Occupy Wall Street Movement itself, this book is loud and clear on what it is against, but is deadly silent on what it is for. There are a lot of myths that millions of people, often the most innocent and vulnerable in society, persist in embracing. Santa Claus and the Tooth Fairy are two examples that seem to cling on generation after generation in the West. Perhaps Professor Stout does not understand that there are myths that are malignant, but that there are also myths that are entirely benign. Some myths, like the one about cognitive differences among racial groups, are virulently malignant. Others, like the myth of shareholder primacy, seem quite benign. In fact, Professor Stout has no analysis or description of the harm, if any, that is done by the shareholder value myth.

In her book, Professor Stout successfully makes the point that top corporate managers do not really have to maximize shareholder value.[26] I agree. In fact, I make this very point every year to my students when I teach the introductory survey course on corporate law. My students have no difficulty grasping this point, particularly because it is a core implication of the business judgment rule,[27] not to mention a central component of the cases permitting corporations to donate money to charities that have little or no connection to the interests of the corporation.[28] But if I am right that some myths are more harmful than others (and surely I am), then it is not sufficient for Professor Stout merely to assert that the notion of shareholder value maximization is a myth. She also must establish somehow that it is a harmful myth. This she utterly fails to do. A lot of important legal doctrines, like the corporate opportunity doctrine,[29] the duty of loyalty,[30] and the duty

26. STOUT, *supra* note 1, at 32.

27. The business judgment rule is "a legal principle that makes officers, directors, managers, and other agents of a corporation immune from liability to the corporation for loss incurred in corporate transactions that are within their authority and power to make when sufficient evidence demonstrates that the transactions were made in good faith." *Business Judgment Rule*, *in* WEST'S ENCYCLOPEDIA OF AMERICAN LAW at 190–92 (2d ed. 2005).

28. *See, e.g.*, Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (affirming dismissal because the business judgment rule allows the director of a professional baseball team to make decisions based on "the effect on the surrounding neighborhood").

29. The corporate opportunity doctrine states that

> if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.

Guth v. Loft, Inc., 5 A.2d 503, 511 (Del. 1939).

30. "As a matter of agency law, an employee owes a duty of loyalty to her employer. A breach of this duty occurs when an employee (a) competes directly with her employer, (b) misappropriates

of care[31] are anchored in the shareholder value-maximization model/myth. It would be bad simply to jettison these doctrines because, notwithstanding that they may be grounded in the myth of shareholder primacy, these doctrines reduce managerial pilfering and negligence and make corporations more valuable than they would be if they did not exist. Moreover, Professor Stout offers no replacements for the shareholder value-maximization paradigm that she seeks to depose. Some pretty bad behaviors, including gross negligence, fraud, and theft, are considered illegal because they conflict with the shareholder value-maximization model/myth. Would such behavior still be outlawed in Ms. Stout's Brave New World?

If we bury once and for all the shareholder value myth, both in theory as well as in practice, and replace it with nothing other than the recognition that corporations are controlled in plenary fashion by their top corporate managers, then such managers really will be free to have their wanton way with the corporate assets under their control. This does not sound like a particularly attractive alternative to our current status as dwellers in a legal landscape clouded by a heavy fog of shareholder wealth-maximization ideology.

The notion of shareholder wealth maximization is not explained very well in *The Shareholder Value Myth*. It is overly simplistic simply to assume that maximizing value for shareholders means maximizing returns.[32] Rather, maximizing the value of a corporation's shares means maximizing the *expected value* of such shares. Expected value in this context refers to future value of shares adjusted for risk. Absent any consideration of risk, a corporate manager might pursue an investment that has a 10% chance of returning $500 million and a 90% chance of bankrupting the company and wiping out all shareholder value. The expected value of this investment, however, is only $50 million, and investors would prefer an investment with a 10% chance of gaining $65 million and a 90% chance of merely breaking even because the latter investment has an expected value of $51.6 million.[33] Because shareholder wealth maximization involves taking the risks as well as the rewards from corporate activity into account, the notion is not quite as wacky as sometimes is suggested.

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her employer's profits, property, or business opportunities, or (c) breaches her employer's confidences." Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 515–17 (4th Cir. 1999).

31. As *Caremark* states:

> Director liability for a breach of the duty to exercise appropriate attention may, in theory, arise in two distinct contexts. First, such liability may be said to follow *from a board decision* that results in a loss because that decision was ill advised or 'negligent'. Second, liability to the corporation for a loss may be said to arise from an *unconsidered failure of the board to act* in circumstances in which due attention would, arguably, have prevented the loss.

In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

32. STOUT, *supra* note 1, at 2–3.

33. (.10 × $500 million + .90 × $0) = $50 million; (.1 × $65 million + .9 × $50 million) = $51.5 million.

It is true, of course, that sometimes the best alternative for a company is to take big risks. With big risks come big losses, but big gains usually cannot be achieved without taking big risks. As long as the risks are fully disclosed to the other participants in the corporate enterprise, and as long as such risks are managed (and, where possible, hedged) competently, risk taking is not a problem. In fact it generally is believed that risk taking should actively be encouraged because such risk taking leads to innovation, economic growth, and important improvements in society. Risk taking clearly has a place in a world in which we cling, even if only in our hopes and aspirations, to the myth of shareholder value.

In contrast, risk taking appears to play no role whatsoever in Professor Stout's world without myth. If we diminish, much less eliminate, shareholders from our list of constituencies that corporate managers are supposed to serve, we are left only with the interests of fixed claimants, i.e., those claimants like workers, creditors, and local communities who enter into specific contractual relationships with corporations. For solvent companies, meeting the obligations owed to these constituencies does not require marginal risk taking. Marginal risk taking benefits only shareholders. Thus, Professor Stout's eliminating the myth of shareholder value also would eliminate the reality of risk taking, which is the critical component of entrepreneurship. This does not appear to be a recipe for anything other than economic catastrophe in light of the fact that economies that innovate survive and flourish, while those that do not innovate wither and die.

III. It Is Impossible to Kill a Theory That Is Already Dead

My final objection to *The Shareholder Value Myth* is that the entire exercise is but a failed attempt to present a sheep in wolf's clothing. The wolf disguise is a metaphor for the allegedly frightening idea that maximizing value for shareholders actually causes any meaningful problems for anybody. Shareholder value is not a concern to anybody because managers don't have to take extreme or socially destructive actions in the name of maximizing shareholder value. And nobody—literally nobody—thinks that managers can or should break the law for the sake of maximizing shareholder value. Managers are virtually free to ignore shareholder value in what they do (though perhaps not in what they say). But they are not free to steal from the company with impunity under a shareholder wealth-maximization model. But who would be damaged by a little stealing (particularly if it were done in "Robin Hood" fashion under Professor Stout's approach to corporate governance)? Nobody would be harmed if the corporation could pay all of its creditors and other fixed claimants in full, because the only people left are shareholders, and the whole point of Professor Stout's book is that we do not and ought not pay a shred of attention to that grasping cohort of greedy speculators.

So, yes, there are lots and lots of problems in corporate America, but, as Professor Stout herself clearly acknowledges at various points in her book, these problems are not driven by the fact that shareholder value is being pursued too rigorously.[34] Maximizing shareholder value is largely an aspirational concept, and corporate managers, corporate lawyers, corporate governance activists, and their interlocutors are acutely aware of this fact. On this point Professor Stout is correct. Where she is clearly in error is in her notion that this is a point that every other lawyer in America somehow has failed to notice.

For example, Professor Stout is right to say that, as a practical matter, the business judgment rule eviscerates large swathes of the notion of shareholder value maximization.[35] The business judgment rule, which protects most business decisions from judicial second-guessing, means that top executives and directors are free to do virtually anything they want with and to shareholders' money and never have to say they are sorry to shareholders, courts, workers, or anybody else.[36]

Professor Stout begins her attack on the shareholder value-maximization theory by recounting the tragedy of the April 20, 2010 catastrophe in the Gulf of Mexico that began with the massive explosion on BP's *Deepwater Horizon* oil rig and subsequent oil spill. Professor Stout observes that:

> The *Deepwater Horizon* disaster was tragedy on an epic scale, not only for the rig and the eleven people who died on it, but also for the corporation BP. By June of 2010, BP had suspended paying its regular dividends, and BP common stock (trading around $60 before the spill) had plunged to less than $30 per share. The result was a decline in BP's total stock market value amounting to nearly $100 billion. BP's shareholders were not the only ones to suffer. The value of BP bonds tanked as BP's credit rating was cut from a prestigious AA to the near-junk status BBB.[37]

Having just explained how damaging the *Deepwater Horizon* disaster was for shareholders, Professor Stout then unhesitatingly asserts that "the *Deepwater Horizon* disaster is only one example of a larger problem that afflicts many public corporations today. That problem might be called shareholder value thinking."[38] I am at a complete loss to understand how an event that cost shareholders over half of the value of their investment in a company can be blamed on a doctrine that says that managers are supposed to maximize value for shareholders. Blaming a catastrophe that destroyed massive amounts of shareholders' wealth on a theory that posits that

34. STOUT, *supra* note 1, at 3, 4, 8, 32.
35. *Id.* at 43.
36. *Business Judgment Rule*, *supra* note 27.
37. STOUT, *supra* note 1, at 1.
38. *Id.* at 2.

companies should maximize shareholders' wealth is not the sort of association or causal link that is consistent with logic or reason.

Professor Stout goes on to refer to a report by the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling, which, according to Stout, concluded that the catastrophe "could be traced to multiple decisions by BP employees and contractors to ignore standard safety procedures in the attempt to cut costs."[39] In fact, the National Commission itself had a different account of where the blame for the catastrophe should go. The Commission blamed "years of industry and government complacency and lack of attention to safety," not the single-minded pursuit by management of environmentally tainted lucre for shareholders:

> Our investigation shows that a series of specific and preventable human and engineering failures were the immediate causes of the disaster. . . . [T]his disaster was almost the inevitable result of years of industry and government complacency and lack of attention to safety. This was indisputably the case with BP, Transocean, and Halliburton, as well as the government agency charged with regulating offshore drilling—the former Minerals Management Service. As drilling pushes into ever deeper and riskier waters where more of America's oil lies, only systemic reforms of both government and industry will prevent a similar, future disaster.[40]

But even if one were to fantasize that some misguided notion of shareholder value maximization on the part of BP management somehow was to blame for the *Deepwater Horizon* disaster in the Gulf of Mexico, it does not stand to reason that shareholder value maximization in general is at fault. In fact, the opposite is true. If BP was trying to maximize value for shareholders, it failed miserably. It failed to such an extent that shareholders in BP and in the other public companies involved in the disaster can sue BP for its failure to adequately protect shareholders' wealth and to fully disclose the risks associated with its drilling practices. And they have done so in droves.[41]

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39. *Id.*

40. Press Release, Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, Oil Spill Commission Landmark Report on Gulf Disaster Proposes Urgent Reform of Industry and Government Practices to Overhaul U.S. Offshore Drilling Safety (Jan. 11, 2011), http://www.oilspillcommission.gov/sites/default/files/documents/OilSpillCommissionLandmarkReportonGulfDisasteProposesUrgentReformofIndustryandGovernmentPracticestoOverhaulU.S.OffshoreDrillingSafety.pdf.

41. *Deepwater Horizon Oilspill Shareholder Lawsuits*, PARKER WAICHMAN LLP, http://www.yourlawyer.com/topics/overview/BP-Deepwater-Horizon-Oil-Spill-Shareholder-Lawsuits (describing shareholder derivative lawsuits against BP and other companies); Kevin LaCroix, *BP Deepwater Horizon Securities Suit, Though Narrowed, Survives Dismissal Motion*, THE D&O DIARY (Feb. 14, 2012), http://www.dandodiary.com/tags/deepwater-horizon (describing securities fraud suit against BP based on BP shareholders' "allegations that they had been misled regarding BP safety efforts and processes").

In other words, it appears that old-fashioned bureaucratic ineptitude at both the government and the corporate levels are to blame for the *Deepwater Horizon* disaster. Shareholder wealth maximization is no more to blame for this catastrophe than the Framers of the Constitution are culpable for the Monica Lewinsky scandal, or Watergate, or the various invasions of Iraq. Failure to perform in a manner that is consistent with a perfectly valid norm (e.g., the separation of powers, the right to privacy, shareholder wealth maximization) is not the fault of the norm; it is the fault of the person who fails to perform.

This point seems even more powerful where the norm that has been violated is, as Professor Stout asserts, merely a myth. After all, if Professor Stout is correct that the notion of shareholder value maximization is nothing more than an urban myth, then Professor Stout must be wrong to assert that shareholder value maximization is causing a problem for anybody. Myths don't cause problems because they are imaginary. Yet Professor Stout argues simultaneously that shareholder value maximization is a myth and a major problem in corporate governance and law. In other words, by claiming that shareholder value is a myth and then decrying the harm that it does, Professor Stout is quite literally tilting at windmills.

Conclusion

Yes, I concede that for the reasons articulated by Professor Stout, the notion of shareholder value maximization is in many contexts more aspirational or real. In this sense it has characteristics in common with myths. Of course, the *raison d'être* for Professor Stout's spirited attack on shareholder value maximization is the stubborn persistence of the shareholder value myth in the imaginations of scholars and practitioners of corporate law. Unfortunately, the reason why Professor Stout wants to destroy the myth of shareholder value maximization is not revealed in this book, at least not in any persuasive way. As noted above, her attempt to link the myth to corporate catastrophes, like the environmental disaster caused by BP's Gulf Coast oil rig in 2010, are not convincing or even credible. Professor Stout herself does not even attempt to draw a link between the catastrophe and the theory of shareholder value maximization that she is attacking. Perhaps, like many academics, Professor Stout simply finds myths to be annoying and anti-intellectual. Perhaps it makes no sense to someone fervently trying to lead a "life of the mind" to indulge in myth, superstition, fantasy or any other way of viewing the world that is not firmly grounded in observable, demonstrable fact. I respectfully disagree. Many brilliant minds have spent long and productive careers exploring the nature, purposes, and effects of myths and legends. While it is true that ancient myths appear to be held in much higher regard than myths of more modern vintage, there is no a priori rule why this should be so.

As far as myths go, the myth of shareholder value maximization is perhaps my favorite among many appealing rivals. The Tooth Fairy is right up there in the running, though I think that there is significantly more support for and merit in the shareholder value myth than the Tooth Fairy myth. For a year or two though, my eight-year-old's embrace of the "Jewish Santa" myth probably will continue to dominate my own private hierarchy of myths.