RUBY R. VALE AND A DEFINITION OF LEGAL SCHOLARSHIP

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ABSTRACT

The following lecture was presented on March 21, 2005 on the occasion of Professor Lawrence A. Hamermesh's installation as the first Ruby R. Vale Professor of Corporate and Business Law. This is the first endowed professorship created at the Widener University School of Law, and is therefore a significant milestone in the growth of the Law School. The generosity of the Ruby R. Vale Foundation in funding this professorship is expected to support future research, lectures and symposia on the subject of Delaware business entity laws. Professor Hamermesh's lecture followed introductory remarks by The Honorable Jack B. Jacobs, Justice of the Delaware Supreme Court. In this speech, Professor Hamermesh discusses some of Ruby R. Vale's contributions to legal scholarship as well as the impact those contributions had on the legal community. Additionally, Professor Hamermesh explains how he can continue Mr. Vale's scholarly purpose as the Ruby R. Vale Professor of Corporate and Business Law.

I thank Justice Jacobs for his characteristically kind and generous remarks. It is a somewhat tired joke to respond that my mother would believe everything he said about me; in fact, my mother, who was not in a position to travel from Minnesota for this event, actually did want me to convey her thanks to the administration and the faculty of the Widener University Law School for honoring her son with this distinguished professorship. I join her in that expression of gratitude to my colleagues here at Widener, and add to it in three respects.

First, I need to acknowledge my debt to my wife Marion, who is here today, and whose counsel, support, and love have made it possible for me to do what we have done, including raising two wonderful children.

Second, I need to acknowledge a great personal debt to Justice Jacobs: he has been a generous, thoughtful intellectual partner over the years—he commented critically and very helpfully on my first major law

*Ruby R. Vale Professor of Corporate and Business Law, Widener University School of Law. Footnotes were, of course, not included in the original lecture presentation. The author acknowledges with love and gratitude the contributions to the lecture through the counsel of his wife Marion Yager Hamermesh, and the teaching of The Florence Melton Adult Mini-School, on the subject of Jewish law.
review article, on disclosure duties of corporate directors.¹ Our discussions of corporate life and law since then have greatly enhanced my ability to understand important corporate law issues of the day. He is a good friend, to me and to the Law School.

Third, I need to express my own thanks to the trustees of the Ruby R. Vale Foundation. Their foundation's contributions to Widener Law School have been awe-inspiring in sheer size and consistency, and reflect a gratifying and encouraging confidence in both the past and the future of the school, its students, and its faculty. Like Widener's annual interscholastic corporate moot court competition, just held this past weekend, and the magnificent courtroom in which we sit today—both of which were also funded by the Vale Foundation—I sincerely hope that this new professorship will reflect brightly and well on the memory of the gentleman after whom it is named.

Despite what the name of the professorship suggests—an emphasis on corporate and business law—my remarks this afternoon do not really focus much on that subject. I thought, instead, that this occasion should be a time out from my usual attention to corporate law—a time out to give some thought to how to bring about the kind of positive reflection on Ruby R. Vale that this newly created professorship should create and, more specifically, what kind of legal scholarship it should call forth. My answer is simple, and I believe quite fitting for the occasion. My claim is that the Ruby R. Vale Professor of Corporate and Business Law should attempt to provide the kind of intellectual contribution that Ruby R. Vale himself provided: namely, scholarship that attempts to identify and explain the underlying rationale of the law, for the benefit of the judges, legislators, and lawyers who must daily try to define and improve the operation of the legal system, so that the legal system can best serve the cause of justice.

Before attempting to explain why I consider this definition of legal scholarship to be the most suitable, it will be helpful to say a few words about Ruby R. Vale himself. The more I have read about him, the more interesting a character he has become for me.

Ruby Vale's first job after graduating from college in 1896 was in the academy—more specifically, as principal of the Milford Classical Academy in Milford, Delaware. After a few years, however, and like others in his family before him, Mr. Vale was called to the law. He graduated from Dickinson Law School—Widener Law School was not yet established—in 1899 (the same year—I can't resist observing—that Delaware's modern General Corporation Law was enacted). From that

point on, Mr. Vale enjoyed a distinguished legal career. An obituary described him as "one of the nation's leading corporation lawyers," and his role as an advocate is reflected in dozens of reported judicial opinions in Pennsylvania, Delaware, and New Jersey.

Clearly, Mr. Vale was an accomplished practitioner. But what I find remarkable about him is that he was a practitioner who sought to advance the law through scholarship, and whose work reflects that he never lost his original calling as a teacher. Mr. Vale's scholarship took many forms, of which I will mention three:

- His most famous contribution is surely what we now know as Vale's Pennsylvania Digest, which has grown into a forty-five volume compilation of Pennsylvania case law. It is perhaps easy to take this kind of endeavor for granted in a time of searchable data bases and online delivery of court opinions. Even today, though, we can step back and appreciate what an achievement it must have been to create an organizing framework in which to report the vast and diverse body of judicial decisions. We can certainly appreciate, too, how useful such a framework and compilation must have been at a time when computer research was still unknown. It makes me feel increasingly old, in fact, to think that I am part of a generation of lawyers who still remember using resources like Vale's Pennsylvania Digest as a way to first approach a legal problem and appreciate its various facets.

- The second area of Mr. Vale's scholarship was his law review articles. Those articles included a lovely recounting of the judicial legacy of a former Chief Justice of the Pennsylvania Supreme Court, who had been a longtime friend of Mr. Vale. Mr. Vale also published a piece sharply critical of President Roosevelt's efforts to modify the composition of the United States Supreme Court following its rejections of some of his legislative initiatives.

- The third of Mr. Vale's scholarly efforts that I mention today is the one of which, it is said, he was most proud: his four-volume treatise entitled Some Legal Foundations of Society. This is an extraordinarily broad work, with underpinnings in law, psychology,

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economics, history, sociology, and religion. The fourth volume of the treatise—Justice as Foundation of Society and Challenge of Civilization—was published in 1948, and reaches topics as diverse as *ex post facto* laws, tax laws, and the newly created United Nations. Some of Mr. Vale's ideas in this book sound positively radical and dangerous in our era of shareholder primacy and corporate wealth maximization. "There will be no peace in industry and there can be no justice in life," he argued, "until the profits of economy are shared equitably among the parties whose work contributed to the success of the joint venture." 4 His argument in this vein begins by acknowledging that "the initial return to labor is the total annual wages paid, together with amounts necessary to pay life, health and accident insurance premiums and medical and hospitalization expenses for the worker's protection." 5 Perhaps even this assertion is controversial today. Mr. Vale goes on from there to urge that owners should receive "a fair per centum of the average yearly capital assets . . . as compensation for the use of their capital contribution." 6 Whatever earnings remain, according to Mr. Vale—and this is the truly remarkable part of his argument—should be divided into three parts: one to be paid to owners as "a real dividend"; one to surplus "as a reserve"; and one "to the workers as extra or deferred compensation." 7 It is perhaps sad that Mr. Vale's sense of fairness and collective responsibility seems outdated today.

Whatever one thinks of Mr. Vale's ideas, however, there really can be no debate about the common thread in his scholarship: it was the utility of his writings to those actively involved in the establishment and operation of the legal system. Everything he wrote seems to have been aimed at distilling, categorizing and rationalizing an astonishingly broad range of legal subjects, so that practicing lawyers and judges who themselves sought to understand and apply the law could do so more knowledgeably and responsibly.

And that brings me to the question I posed earlier, about how to honor Mr. Vale's memory through the work of the professorship named after him. In this regard, I think it is helpful to think about *hukkim* and

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5 *Id.* at 1073.

6 *Id.*

7 *Id.* at 1073-74.
mishpatim. Why it is helpful is surely not obvious, even to those who understand that terminology of Jewish law. Let me try to explain.

Hukkim are laws that defy rationalization and justification. Being at least divinely inspired, or perhaps divinely ordained, those laws without rationale must be accepted on faith. Like the Biblical injunction against wearing fabrics that mix wool and linen, these laws without rationale are beyond all but the most fanciful attempts to supply a humanly comprehensible justification. Extending, applying and interpreting laws like these in new and borderline situations is extraordinarily difficult, if not impossible, because we cannot truly conceive of their logic and purpose.

Mishpatim, on the other hand, are laws whose justifications are capable of human comprehension. We can all understand, for example, why we have a law against murder, even as we debate the precise contours of the definition of murder. In fact, it is our shared understanding of the function and purposes of the law against murder that enable us to define the crime.

Read in a vacuum—in a colorless catalog—all of our human laws are hukkim, laws without rationale. But being human laws, they do not merit acceptance on faith. It is only when someone with legal insight—often a judge, a lawyer, or a law professor—is able to articulate a rationale, an organizing principle to explain them, that laws transform from hukkim into mishpatim—justified laws. Let me give one example from a subject that I have been working on recently.

Many of you are probably familiar with a case that was recently tried in the Delaware Court of Chancery, involving severance compensation paid to Michael Ovitz by the Walt Disney Company. One of the key defendants is Mr. Ovitz's friend—or maybe more accurately, former friend—Michael Eisner, Disney's CEO. One of the key questions is whether Mr. Eisner reasonably agreed to let Mr. Ovitz leave Disney with a no-fault termination of his employment agreement—which called for Disney to pay as much as $140 million for about one year's work—or whether Eisner should have insisted on firing Ovitz for good cause, which presumably would have cost Disney a lot less.

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9 Leviticus 19:19; Deuteronomy 22:11.
10 MAIMONIDES, supra note 8.
A key legal issue in the case is how to determine when corporate officers, like Eisner, are to be held liable for harm due to their own lack of care. I make no judgment on whether Mr. Eisner was guilty of such lack of care; but if he was, by what standard should he be judged? When should he be financially accountable to Disney for any harm that his misjudgment or lack of care, if there was such a failure, may have caused?

There are two competing rote statements of law—hukkim—on this question. One of them, called the business judgment rule, clearly applies to corporate directors, and relieves them of liability unless their conduct involves what is called "gross negligence"—more than ordinary lack of care, perhaps something more like reckless indifference. The other rote statement is the one from traditional agency law, holding that a paid agent (like an employee) "is subject to a duty to the principal[—the corporation—] to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has." This second statement, because it requires actions to be taken with "standard" care and skill, is obviously much more demanding than the business judgment rule, and would be much more likely to result in Michael Eisner being liable to Disney.

Which of these legal statements is right? The relatively few courts that have spoken on the issue have said that the business judgment rule—the deferential standard favorable to Eisner—applies; but they haven't really explained why. So Professor Lyman Johnson of Washington and Lee Law School recently took on this unexplained judicial pronouncement, writing an article explaining why the justifications for the business judgment rule and its protection of corporate directors—about which much has been written—do not and should not apply to corporate officers, and why the more demanding agency rule should apply. I think this is good scholarship on Professor Johnson's part: it attempts to force courts to think more carefully about why they adopt a particular standard of liability.

As much as I admire his willingness to question the rationale of the law, however, I happen to disagree with Professor Johnson about what the right rule should be. So I recently co-authored, and will soon publish, a short reply to his article. In that reply, I explain why I think that the

rationales underlying business judgment rule protection for corporate directors apply with essentially equal force to senior corporate officers. Regardless of who is "right," both Professor Johnson and I are engaged in attempting to convince courts how otherwise unexplained rules—*hukkim*—have real rationales and serve real purposes, and should therefore be understood as *mishpatim*, as legal rules with real life and rationality.

This vital exercise of turning laws without rationale into justified laws is the kind of legal scholarship that I hope to continue to pursue. But this is by no means the only accepted definition of legal scholarship. One recent distinguished visitor to our school, in a presentation to faculty, described legal scholarship broadly as "exploring ideas and sharing them with others." This definition is certainly capacious enough to cover what I have in mind, but it quite appropriately covers lots of other kinds of legal scholarship as well. Another brand of scholarship—one that is increasingly the coin of the realm in legal academia, particularly in corporate law—is an interdisciplinary form of inquiry that has been described as "legal empiricism." In that brand of scholarship, law professors draw upon empirical techniques used in social sciences—economics, notably—to test hypotheses about the functioning of the legal system. As Professor Randall Thomas puts it, "their articles look more like those published in economics and finance journals, and that is often where they are found."

This kind of legal empiricism is a hot topic among law professors these days. In the most recent newsletter of the American Association of Law Schools, the president's lead article is entitled "Empirical Scholarship: What Should We Study and How Should We Study It?" Professor Thomas properly cautions corporate law professors to use empirical techniques modestly, and not in excess of their own mastery of those techniques. I take that warning to heart personally. I am not trained as an economist. I am trained as a lawyer, battle tested by eighteen years of private practice. I do not really do interdisciplinary scholarship.

So is there no place in legal scholarship for people like me? Well, I certainly hope there is, and many respectable legal scholars, even

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15Id. at 876.
16Professor Barbara Glesner Fines of the University of Missouri-Kansas City School of Law, in a presentation to the faculty of the Widener University School of Law in Wilmington, Delaware on February 17, 2005.
19Thomas, supra note 17, at 983.
interdisciplinary scholars, agree. The issue is not nearly as stark as was suggested by federal court of appeals Judge Harry T. Edwards in a controversial 1992 article.\textsuperscript{20} In that piece, he argued that

\quote{\textit{[m]any "elite" law faculties in the United States now have significant contingents of "impractical" scholars, who are "disdainful of the practice of law." The "impractical" scholar \ldots produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner. As a consequence, it is my impression that judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.}}\textsuperscript{21}

To the contrary, one of the finest artisans in the interdisciplinary field of "law and economics," Professor Ron Gilson of Stanford, makes it a point to include in his scholarly endeavors doctrinal articles that speak to judges, particularly members of the Delaware bench. Justice Jacobs tells me, in fact, that an article by Professor Gilson in \textit{The Business Lawyer}, a publication of the American Bar Association Business Law Section, helped him decide cases involving antitakeover steps taken by corporate directors.\textsuperscript{22} Professor Jonathan Macey, another well respected "law and economics" scholar, states in a recent article that "the [doctrinalists'] task of treating like cases alike, closely reading statutes, pursuing legislative history, abjuring personal values, and rigorously surveying the legal landscape in search for a coherent canon in a particular case is a difficult and worthwhile endeavor."\textsuperscript{23}

In yet another recent article,\textsuperscript{24} Professor Mae Kuykendall extolled the virtue of this kind of legal scholarship, as reflected in the career of someone quite well known to old-time fans of Delaware corporate law—the late Professor Ernest Folk of the University of Virginia. As many of you know, Professor Folk was the reporter for the landmark 1967 modernization of the Delaware General Corporation Law—an enormously time-consuming and

\textsuperscript{21}Id. at 35.
ultimately brilliantly successful endeavor that he undertook while a law professor. He subsequently wrote a book on the Delaware corporation law that has become one of the well-used treatises on the subject. Professor Folk's dedication to the practice of law even extended to teaching the corporations portion of the Delaware bar review course that used to be conducted in the basement of what is now the DoubleTree Hotel next door. Was Professor Folk a legal scholar? Of course he was—and he was a legal scholar because of these activities, not in spite of them.

In short, I have no doubt that the doctrinal scholarship I do, and the work I do on legislative drafting committees, is well within the definition of valuable legal scholarship. And I draw comfort in this view from Ruby R. Vale's own career: in many ways, he was the kind of legal scholar that the Ruby R. Vale Professor ought to be.

I would like to close by addressing a point that is superficially quite distinct from, but actually quite relevant to, the matter of legal scholarship I have been discussing. It revolves around one more note about Ruby R. Vale. He and I might well have differences of political opinion if he were alive today. In a 1937 law review article, however, he wrote something that struck me as stating a lasting truth about our American political and legal system. He wrote:

The reason our government is so delicately balanced and the administration of justice so sensitive to change is because its structure is defined, its mechanism is determined, the rights of the people are protected and the limitations on the functions of its organs are imposed by a written constitution whose words of general import must be given ultimate meaning by a human tribunal. The mechanism of our government and its principles of constitutional law are in a constant state of flux and of becoming and both reflect in their evolution not only the variant political and economic conditions but also the minds, characters and environments of the judges that give meaning to the Constitution and apply it to changing conditions. They then are the real arbiters of government and of law under our Constitution who on final appeal speak last in the judicial understanding of its vital written words and in its application to new conditions.

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26 Vale, supra note 3, at 195-96 (emphasis added).
As I see it, lurking in these inspiring words from Mr. Vale is the real purpose of legal scholarship: to enable the participants in our legal system—particularly our judges and legislators—to see more clearly the "ultimate meaning" of our laws; to turn the laws from *hukkim* into *mishpatim*, and to do so continuously as times and conditions change, so that laws with comprehensible justification do not become ossified and turn back into laws without rationale. It is to that scholarly purpose that I will dedicate my work as the Ruby R. Vale Professor of Corporate and Business Law.