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TRIBUTES

A TRIBUTE TO MICHAEL P. DOOLEY

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MIKE Dooley was one of the country's most prominent corporate law professors during his forty-four years in law teaching, of which forty-one were at the University of Virginia.

Mike received both his undergraduate and law degrees from the University of Iowa. He practiced for five years with Dewey Ballantine in New York and then began his academic career in 1968 at the University of Illinois.

In the fall of 1971, Mike came to Virginia for a visit. Years later, displaying his trademark wit and lack of self-importance, Mike said "my chief qualification was the fact that I was available."[1] Even had that been true at the time he was asked, it would not remain true. During that visit Mike published in the *Virginia Law Review* a magnificent article titled *The Effects of Civil Liability on Investment Banking and the New Issues Market*.[2] The piece can fairly be called one of the pioneering efforts in the economic analysis of corporate and securities law. More importantly, its analysis was so penetrating and prescient that the passage of forty years has not dimmed its insightfulness and influence.

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[1] Michael P. Dooley, John A.C. Hetherington, 80 Va. L. Rev. 1197, 1197 (1994).

[2] 58 Va. L. Rev. 776 (1972).

Much of the article contrasts the civil liability scheme of Section 11 of the Securities Act of 1933[3] with the implied cause of action under Rule 10b-5[4] adopted under Section 10(b) of the Securities Exchange Act of 1934.[5] The former was the result of an explicit legislative balancing of the interests of buyers and sellers of new securities issues. As such it represented, however imperfectly, an attempt to weigh both the social costs and benefits of liability. The same was not true of the judge-made cause of action created to allow investors to enforce an SEC rule not written with civil liability in mind.

What put the article so far ahead of its time is that Mike did not merely undertake the standard lawyerly exegesis of the similarity of Section 10(b) to common law fraud and the concomitant limitations that one would expect to see applied to the cause of action—thus anticipating a line of Supreme Court cases that would come later in the 1970s.[6] It also analyzed the likely impact on those substantive legal standards of the expansion of the class action device pursuant to Rule 23 of the Federal Rules of Civil Procedure as amended in 1966.[7] Mike observed that the efficient maintenance of a class action was inconsistent with the serious application of traditional fraud concepts such as reliance and transaction causation and predicted that courts would erode these concepts for purposes of 10b-5 class action litigation. Thus, the cause of action would over time come to resemble negligent misrepresentation rather than fraud. The combination of a low standard of proof with an almost unlimited plaintiff class and no privity limitation would mean that Rule 10b-5 would not serve as a means to force sellers to internalize the cost of their misstatements, but instead would effectively become a tax on securities transactions.

Seldom has a law professor made predictions so novel and nonobvious only to see them vindicated so thoroughly by subsequent events. Mike's article rightfully remains part of the canon of the law and economics of business law.

[3] 15 U.S.C. § 77k (1970).

[4] 17 C.F.R. § 240.10b-5 (1970).

[5] 15 U.S.C. § 78j(b) (1970).

[6] See Santa Fe Indus. v. Green, 430 U.S. 462 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

[7] Fed. R. Civ. P. 23.

Mike joined the faculty permanently in 1972 and began a long friendship and occasional collaboration with our late colleague John Hetherington. That collaboration bore fruit in another influential article, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, published in the *Virginia Law Review* in 1977.[8]

Prior to that article there was a move to supplement corporate statutes by adding provisions designed specifically for closely held corporations.[9] These proposals were motivated by the idea that the detailed organizational rules set out in a typical corporate statute were too unwieldy for close corporations, which needed simpler and more flexible rules. Dooley and Hetherington showed that this was *not* an important problem facing close corporations, which explained why so few of them bothered to make use of these new statutes. The problem close corporations faced was lock-in: once minority shareholders invested, they could not easily exit and majority shareholders could exploit that fact.

John and Mike argued that the solution to the close corporation problem was to provide greater liquidity to minority shareholders and proposed a statutory buy-out right. Later, as a member of the Corporate Laws Committee of the American Bar Association's Section of Business Law, Mike was able to champion the addition to the Model Business Corporation Act of a limited buy-out provision in lieu of dissolution in cases of oppression.[10]

As this example shows, Mike maintained strong connections to the world of practice during his time in the academy. He has played a leading role on the Corporate Laws Committee—one of the few ABA Committees for which membership is by invitation only—for almost 30 years.

In 1996, Mike became the Reporter for the Committee. He continues to serve in that capacity today and has now done so for longer than any of his predecessors. As Reporter he has overseen publication of all changes to the Model Act, including periodic up-

[8] J.A.C. Hetherington & Michael P. Dooley, Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem, 63 Va. L. Rev. 1 (1977).

[9] See, for example, Subchapter XIV of the Delaware General Corporation Law. 8 Del. Code §§ 341–356 (1953).

[10] See Model Bus. Corp. Act § 14.34 (1990).

dates of the multi-volume, annotated version, which is one of the ABA's best-selling publications.

Norm Veasey, past Chairman of the Committee and former Chief Justice of the Delaware Supreme Court, expressed the extraordinarily high regard the other members of the Committee have for Mike. He emphasized that the members deeply appreciate "Mike's exceptional intellect, quick wit, and unwavering commitment."[11]

Mike's greatest legacy, however, is the extraordinary group of corporate lawyers he has trained. It includes influential professors such as Stephen Bainbridge and Adam Pritchard, and Justices Myron Steele and Randy Holland of the Delaware Supreme Court. Through them and others too numerous to count, Mike's influence will continue for many years to come.

Stephen M. Bainbridge[*]

I was fresh off defending my master's degree in chemistry when I entered the University of Virginia School of Law in the fall of 1982. My plan, as I explained to my somewhat dubious parents, was to pursue a career in patent law where I could put my science training to good use. But then I met Mike Dooley.

In the summer after my first year, I had no job offers from patent law firms. Instead, Glen Robinson hired me to be his research assistant. Glen was away for much of the summer, and, in the interim, I was assigned to Mike. I spent most of that summer researching shareholder derivative litigation for what ultimately became Mike's casebook, *Fundamentals of Corporation Law*.[1] Admittedly, it was an odd trigger for a transformative experience, but that's exactly what I had that summer. By the time the fall semester rolled around, I wanted to be a corporate lawyer. More precisely, I wanted to be a corporate law academic.

I thought Mike had the coolest job in the world. People actually paid him to sit around thinking great thoughts about those fascinating things called corporations. But it wasn't just the subject matter that had captured my imagination; it was also Mike. His passion for

[11] Private correspondence with author.

[*] William D. Warren Distinguished Professor of Law, UCLA School of Law.

[1] Michael P. Dooley, Fundamentals of Corporation Law (1995).

the subject, skill at teaching, and intellectual prowess inspired me. I loved his classes, taking all three that he then taught. I loved being his research assistant, as I was throughout my second and third years of law school. As the old ad said, I wanted to "be like Mike."

Mike became not just a boss and teacher, but also a mentor. Through his support and advice, he gave me the confidence to believe I could make it as a legal academic. His influence paid particular dividends when I applied for a position at the Illinois College of Law. Mike had started his teaching career at Illinois, and many of his friends from those days were now senior faculty there. Needless to say, my new colleagues later told me that Mike's endorsement had been the decisive factor in their decision to hire me.

As an academic, I have been tremendously influenced by Mike's scholarship. Whenever Mike put pen to paper, the results mattered. His article with John Hetherington on close corporations[2] is "famous and influential."[3] His article on the effect of underwriters' civil liability on the new issues market[4] is "seminal."[5] His "significant"[6] article on insider trading enforcement[7] was cited by the U.S. Supreme Court.[8] Even his smaller projects made valuable contributions. His short book chapter on harmonization of European Union company law,[9] for example, remains the best concise critique of codetermination I've ever read. In addition to traditional scholarship, moreover, Mike made huge law reform contributions through

[2] J.A.C. Hetherington & Michael P. Dooley, Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem, 63 Va. L. Rev. 1 (1977).

[3] Edward B. Rock & Michael L. Wachter, Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression in Close Corporations, 24 J. Corp. L. 913, 916 (1999).

[4] Michael P. Dooley, The Effects of Civil Liability on Investment Banking and the New Issues Market, 58 Va. L. Rev. 776 (1972).

[5] Jonathan R. Macey, The Politicization of American Corporate Governance, 1 Va. L. & Bus. Rev. 10, 43 n.88 (2006).

[6] Robert J. Haft, The Effect of Insider Trading Rules on the Internal Efficiency of the Large Corporation, 80 Mich. L. Rev. 1051, 1053 n.8 (1982).

[7] Michael P. Dooley, Enforcement of Insider Trading Restrictions, 66 Va. L. Rev. 1 (1980).

[8] Dirks v. SEC, 463 U.S. 646, 661 n.21 (1983).

[9] Michael P. Dooley, European Proposals for Worker Information and Codetermination: An American Comment, *in* Harmonization of Laws in the European Communities: Products Liability, Conflict of Laws, and Corporation Law 126 (Peter E. Herzog ed., 1983).

his work with the American Bar Association Committee on Corporate Laws as Reporter for the Model Business Corporation Act and with CORPRO in correcting the worst aspects of the American Law Institute's Principles of Corporate Governance project.

To my mind, however, Mike's most important contribution was made in his article *Two Models of Corporate Governance*[10] and its progeny. One of the chief insights of the Law and Economics movement was the identification of agency costs as a critical corporate governance problem. Unfortunately, as a result, several generations of scholars came to "believe that *the* fundamental concern of corporate law is 'agency costs.'"[11]

In *Two Models*, Mike restored needed balance. He acknowledged that deterrence and punishment of misconduct by the board and senior management are necessary functions of corporate governance. But accountability standing alone is an inadequate normative account of corporate law. Instead, as he persuasively explained, a fully specified account of corporate law must incorporate a value he called "Authority":

> If the board is never made accountable for its decisions, it is liable to exercise its power irresponsibly vis-a-vis the shareholders. On the other hand, the power to hold a party accountable is the power to interfere and, ultimately, the power to decide. Thus, affording shareholders the right to demand frequent judicial review of board decisions has the effect of transferring decision-making authority from the board to the shareholders.[12]

Mike went on to explain why such a transfer would significantly reduce the efficiency of corporate decision making, ultimately harming shareholder interests. Accordingly, he explained, the core problem was figuring out whether Authority or Responsibility values predominated in any given setting.

This was a powerful insight. In the first place, it had tremendous explanatory power. As Mike put it in an article co-authored with Norman Veasey, for example, "[b]y limiting judicial review of

[10] Michael P. Dooley, Two Models of Corporate Governance, 47 Bus. Law. 461 (1992).

[11] Kent Greenfield, The Place of Workers in Corporate Law, 39 B.C. L. Rev. 283, 295 (1998) (emphasis added).

[12] Dooley, supra note 10, at 470.

board decisions, the business judgment rule preserves the statutory scheme of centralizing authority in the board of directors."[13]

In the second, it marked a critical course correction in the law and economics of corporate governance. No longer could agency costs be the sole consideration in assessing corporate law. Instead, one now also had to take into account the board-centric nature of corporate governance and consider whether there were costs to intruding on the board of directors' primacy.[14] All of us who work in corporate governance owe him thanks for this vital course correction.

On a closing personal note, I owe Mike Dooley a debt of gratitude that I hope this tribute in some small sense begins to repay. I wish him and Jean a long, fruitful, and enjoyable retirement.

[13] Michael P. Dooley & E. Norman Veasey, The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared, 44 Bus. Law. 503, 522 (1989).

[14] I like to think that I also had something to do with that course correction, but I have always acknowledged that my role in many respects was that of a popularizer of Mike's work. "Professor Michael Dooley was the first to make the connection between the work of Kenneth Arrow and the structure of Delaware corporate law. Professor Bainbridge has adopted Professor Dooley's application of Arrow's theory and readily acknowledges the contribution Professor Dooley has made in the development of his director primacy model." Bernard S. Sharfman, Why Proxy Access is Harmful to Corporate Governance, 37 J. Corp. L. 387, 399 n.83 (2012) (citations omitted).

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