

**THE ROLE OF THE BASIC COURSE:
WHAT IS IT AND WHERE IS IT GOING?**

William J. Carney, Emory

I'm the senior member of this group, and my job is to reflect a bit on the changes I've seen in the basic course. What the course "is" has changed considerably over the years, and continues to change.

My experience at Yale would never have predicted that I would spend my life in corporate law. I was taught out of the 1959 edition of Baker and Cary, which was the first edition in which William Cary participated. The preface claimed an innovation: that a distinction had been drawn between closely held and public corporations. My reaction to the course was that it was quite dull. Mike Dooley's preface to his own book recalls a colleague's description of the course as "like coming in on the second act of a not very interesting play." I suspect that hundreds of my own students might have the same reaction, but I'll ignore that. My overall impression was that there was very little law in the course, that most of the cases involving duties depended entirely on how the Chancellor felt about the fairness of a particular course of action. Even then the book was massive - over 1500 pages, and covered corporate finance, a little securities regulation and mergers and acquisitions. It had evolved from the Dodd & Baker casebook, which began in 1940. A section on derivative suits and one on mergers had been added since the first edition, but much remained the same.

One thing was missing from the course, which I had no reason to appreciate at the time. There was no coverage of agency and partnership. I think it was the bias of the elite schools that all the action was in regulating public corporations, as evidenced by the number of their colleagues who had joined the New Deal early to write the new securities laws and regulate other areas of society. I recall one Yale professor remarking on how Yale had conned Chicago into raiding Yale for a noted scholar on agency and partnership, which Yale apparently regarded as passé. The book contained no questions after the cases, and no problems. The book had extensive notes on related cases, and the editing of cases was much lighter than in today's books. Langdell was

alive and well forty-nine years ago.

The dominant culture was corporate, with little interest in unincorporated enterprises. When I first taught Business Associations in 1973, from the fourth edition of what by then had become Cary's book, the basic outline of the book had changed remarkably little. It was still devoid of material on agency and partnerships. I supplemented the corporate materials with some handouts on agency and partnerships. Chapters on financing now covered the federal securities laws more extensively. By 1973 the book had expanded to over 1800 pages plus appendices. The book still had no questions or problems, just case notes, with an occasional question buried in a note. The chapter on control and management began with a series of hypotheticals about who was authorized to undertake certain actions, but that was about it.

One of the early authors of an agency and partnership book was Alexander Frey, of Penn, whose Business Associations book was first published in 1935. When a successor book was published by Frey, Morris and Choper in 1966, it was entirely devoid of any partnership materials, which was probably just acceptance of where the market's interest lay at the time.

There were casebooks on agency and partnership, in addition to the Frey book. The real shift was into books that truly covered "business associations" as we think of it today. Al Conard's first two editions of his "Business Organization" book, in 1950 and 1957, were still agency and partnership books. With the addition of Robert Knauss and Stanley Siegel in 1972, the book morphed into an "Enterprise Organization" book which was nearly half corporate law. Hamilton's first edition, which appeared in 1976, devoted about 60 pages near the beginning to partnership, and included cases many of you would recognize today. From my perspective the most dramatic and innovative shift occurred with Larry Ribstein's Business Associations book in 1983. The book is organized functionally rather than along the older doctrinal lines, in terms of what happens during the life of a business. That by itself would be enough to count as a major contribution, but Larry went one step further, by laying out partnership and

corporate law side-by-side in each chapter. He also devoted significant space to problems, divided between litigation problems and planning problems. It was truly a rich book, which I taught for a number of years. My only difficulty was that students never got to see an entire entity at once. I was never certain they fully understood exactly what a corporation was. Other books have attempted to give extensive coverage to agency and partnership alongside corporations, such as Klein, Ramseyer and Bainbridge.

Two other changes are noteworthy. The number of problems in casebooks has grown significantly over the years, moving students from mastering doctrine to attempting to apply it to problems that are the kind they may face in practice. At the same time, finance and economics have entered the market. Mike Dooley's 1995 casebook began with economics, to try to give students and understanding of the why behind structures, rules and duties. Like Ribstein's book, it follows a functional approach, although it focuses exclusively on corporations. I suspect it was too challenging for many students. A later and more restrained effort in this area is by Epstein, Freer, Roberts and Shepherd. Another notable effort in this area is Ribstein and Letsou, which is laced with economics and finance, although they are not used as the organizing principle. The most recent addition is by Allen, Kraakman and Subramanian, which shifts more heavily toward text, with a lot of discussion of the economics of organization.

I've left the future, where the difficulties lie, for last. Those of you with a future in this area, unlike me, have a large problem to confront. Will you confront it? Years ago a publisher's representative told me that I could write the most innovative casebook I might want, as long as it contained the same old chestnuts. We are a conservative bunch. We also have our limits. Pressures to publish keep us from adopting improved new books whenever the old one will do. Our experience is limited. Many of us lack extensive practice experience, and as a general rule what experience we have was in large firms representing large corporations. We are not as broad-gauged as a good

business lawyer, who probably also knows a certain amount of tax.

The problem is that the world of business organizations has changed far more rapidly than we have. The fourth edition of Conard, Knauss and Siegel's book, in 1977, shows how corporations dominated the census of business entities as late as 1972, and probably much later. In that year there were over 1.8 million corporations and only 992,000 partnerships. Those proportions remain pretty much constant, according to the 2009 Statistical Abstract of the United States, which shows 2.7 million partnerships and 5.6 corporations filing tax returns. Since LLCs will generally file as partnerships, I assume this includes all unincorporated entities. But that figure may be misleading. In 2007 Delaware had 35,700 incorporations and 111,820 filings for new limited liability companies. While it seems that Delaware is the state of choice for LLCs, its numbers are probably representative – the national trend is in the same direction. As of 2009 Georgia had 249,741 domestic corporations and 253,512 domestic LLCs filed with the Georgia Secretary of State. If this is the case, LLCs are of equal importance to our students, and we do relatively little about it.

Several of the business associations casebooks take a few pages to deal with LLCs, including the one I use. I always feel guilty when I finish that material, but I cover by telling my students that what they've learned about partnerships provides them with the principles to understand LLCs. Only one book takes this problem seriously: Larry Ribstein's *Unincorporated Business Enterprises*, which devotes over 300 pages to the subject. I don't teach it, because I only have four hours for the basic course, and I can't do justice to corporations and LLCs in the same course.

I suspect the cowardly solution is the one that many schools follow: to treat an unincorporated entities course as an elective. In that setting it is treated as a less important course, and students get the signal. Far too few students will take the course, although many of them will see more LLCs than corporations in practice. Many of us don't even offer such a course. Our tax colleagues may touch on the subject in their pass-through enterprise courses, but they will probably draw a limited audience.

The unincorporated enterprise material is the foundation of business associations, especially to the extent that it covers agency principles. And yet we haven't really figured out how to integrate it into our curricula in a satisfactory way. I believe that is the urgent question facing us in the next decade. I wish all of you well in figuring out the answer. I'm moving toward retirement, and this is not a wheel I care to reinvent.