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WHAT'S RIGHT WITH AGENCY AND, INCIDENTALLY, PARTNERSHIP?

*Michael L. Richmond**

Some forty years ago, the course in Agency thrived in American law schools. In many instances Agency formed an integral part of the first-year curriculum, and, at the very least, upperclass law students could take it as a respected and highly significant part of their legal training. Recognized as a course which built on and synthesized issues developed at the rudimentary levels in Torts and Contracts, Agency served as the ideal bridge between the fundamental skills acquired in the first-year curriculum and the advanced concepts explored in the upper classes.¹

With the realization that for many law students Agency provided the first true exposure to the world of business and finance, law schools accepted the concept of a course which combined the developmental aspects of the traditional Agency course with an introduction to other aspects of basic business relationships. Thus evolved a course combining the advanced theory of the Agency course with the fundamental subject matter of a course introducing law students to business enterprises.² Minimally, this course covered the advanced elements of agency law and the application of that theory in the field of partnership law. Other aspects covered in one course or another included rudimentary discussions of workers' compensation, franchising and licensing arrangements, and the employer-employee relationship.³ Despite the shift to include these other doctrinal considerations, the course (variously denominated Agency & Partnership, Basic Business Organizations, or some similar permutation of the underlying theme) continued to occupy a prominent place in the curriculum. The same rationale justifying the course as appropriate for first-year students continued to be true,

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1. Conard, *What's Wrong with Agency?*, 1 J. LEGAL EDUC. 540 (1949). See also Steffen, *What Now, About Agency?*, 5 J. LEGAL EDUC. 26 (1952).

2. See Steffen, *supra* note 1.

3. Consider the contents of the agency casebooks, *infra* note 13, as well as W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY (1964) and W. SELL, AGENCY (1975).

now bolstered by the additional consideration that the information transmitted provided a building block for the remaining courses comprising the business curriculum of a law school.

Thirty years ago, a flurry of articles in the *Journal of Legal Education* discussed this transformation of the course, debating its validity and considering the proper mode for presentation of the subject matter.⁴ Yet despite the robust debate exemplified in these articles, Professor Steffen sounded a note of disquiet. "It cannot be too strongly emphasized, therefore, that although Agency has the imprimatur of the American Law Institute, that fact, favorable as it is, is no guarantee that Agency will always be taught in American law schools. Leastwise, that it will always be taught as a separate course."⁵ Something in the wind, perhaps, brought notice that the time when the only battles to be fought on behalf of the course were between the conflicting camps of the "purists" and the business advocates might soon reach a troubled and inglorious end. Unfortunately, Professor Steffen's prophecy has proved to be only too true.

Today, of one hundred and four law schools responding to a recent survey only forty-six reported offering a course in Agency and Partnership as a combined offering.⁶ Of these, only three required that students take the course in their first year. Two other schools still offered a separate course in Agency, while six others combined the subject matter either with Workers' Compensation or in a course entitled "Enterprise Organizations." This compared to approximately one hundred forty adoptions of case books in the field by AALS members alone in 1949.⁷

Three considerations led to this severe decrease in law schools which offered the course at all, let alone required it. Those schools responding to the survey which had either removed the course from the first year or dropped it entirely grouped their reasons into three major categories: (a) the material could be covered adequately in other subjects, (b) the developing law required addition of other subjects, or (c) the faculty or student body no longer demonstrated interest in the course. The dates on which the schools let the course fall by the wayside also reflect this thinking. The trend toward re-

4. Conard, *supra* note 1; Steffen, *supra* note 1; Mechem, *What's Wrong With Agency?—A Comment*, 2 J. LEGAL EDUC. 203 (1949).

5. Steffen, *supra* note 1, at 27.

6. The survey, conducted by the author, appears in full as the Appendix to this article.

7. Conard, *supra* note 1, at 546. This comparison is not of apples and oranges. Even if we assume that of the 140 adoptions, forty were by different professors at the same school, at least 100 schools offered the course at that time.

moving the course from the first-year curriculum did not truly begin until the 1960s, gaining its greatest strength between 1971 and 1975. Schools that dropped the course entirely began to do so about the same time, and in the last five years this trend has gained momentum. The growth in social awareness of Americans in the late 1960s produced a host of new course offerings to law students based on the entry-level course in Constitutional Law.⁸ Continued social change fostered by such movements as women's liberation and increased regulation of business by federal and state agencies further heightened the trend to incorporation of new elements into the curriculum.⁹ Law schools added new courses and had to reject old ones; the prime target for deletion was a course which integrated aspects of several different subjects, the elements of which could be redistributed to those other subjects. Agency, whether in its pure or its evolved form, was such a course. Similarly, with the rapid growth of new areas of legal regulation, a course in such a stable area (with a highly respected Restatement of the Law and a set of widely adopted Uniform Acts) would not appeal to younger faculty members trained during the last fifteen years and imbued with the idealism of social consciousness and societal change.

Yet the law school community must confront significant issues which this trend has engendered. If indeed the purpose of removal of the course was to make room for new subjects, was this achieved at the cost of depleting the fundamental theoretical background on which these new courses had to rely? If the course lapsed into disrepute only because faculties felt the fundamental subject matter could adequately be covered elsewhere, has this assumption proven true? Finally, despite the introduction of intriguing new issues and areas, should teachers in the business curriculum recognize an obli-

8. See, e.g., Ares, *Legal Education and the Problem of the Poor*, 17 J. LEGAL EDUC. 307 (1965); Mooney, *The Media is the Message*, 20 J. LEGAL EDUC. 388 (1968); Pincus, *Reforming Legal Education*, 53 A.B.A. J. 436 (1967); Taylor, *Wealth, Poverty and Social Change: A Suggestion for a Balanced Curriculum*, 22 J. LEGAL EDUC. 227 (1969).

9. See, e.g., Dunning, *Notes for an Environmental Law Course*, 55 CORNELL L. REV. 804 (1970); Irwin, *The Law School and the Environment*, 12 NAT. RESOURCES J. 278 (1972); Wallach, *Genesis of a "Women and the Law" Course: The Dawn of Consciousness at UCLA Law School*, 24 J. LEGAL EDUC. 309 (1972); Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U. L. REV. 211 (1973).

gation to teach the basic course? If these issues cannot be satisfactorily resolved, law schools will have done their students and faculties a grave disservice by removing or de-emphasizing the course in Agency.

The principal components of the course as it has evolved are threefold: vicarious liability, authority to bind a principal, and partnership and related forms of doing business. Of schools no longer offering the course, thirty-two claim to cover the first two areas in the first-year courses in Torts and Contracts and forty-three say they have included them in the Corporations course. Fifty-four schools offer the partnership material in the Corporations course, but thirteen defer any consideration until a course in Business Planning. Unless the courses into which these considerations have been placed in fact deal with them, the theoretical framework is lost, and one underlying assumption used by curricular revision committees has no validity.

One way of assessing the degree to which the material taken from the Agency course has been integrated in the remainder of the curriculum is to view the extent to which these matters are covered in the leading current casebooks in the field. The following table analyzes the principal casebooks in Torts, Contracts, Corporations, and Agency & Partnership by comparing the number of pages devoted to these topics to the total number of pages in each text.¹⁰ One significant text has been omitted from this table: Conrad, Knauss, and Siegel, *Enterprise Organization*.¹¹ This casebook attempts to integrate the discussion of agency, partnership, corporations, and related business organizations into a unified whole. It will be considered later in this article, but since only sixteen professors have adopted it as of this writing,¹² its effect on the problem cannot be considered to be of sufficient weight to offset the concerns raised in the succeeding discussion.

10. Representatives of several major publishing firms kindly gave the number of adoptions for their books. Unfortunately, not all firms were as willing to furnish this information. When adoptions appear, they are approximations. Further, some publishers list adoption by number of schools while others do so by number of professors. Thus, the figures may not correlate precisely.

11. A. CONRAD, R. KNAUSS & S. SIEGEL, *ENTERPRISE ORGANIZATION* (2d ed. 1977).

12. See discussion accompanying note 37.

TABLE I
TREATMENT OF AGENCY AND PARTNERSHIP
CONCEPTS IN LEADING CASEBOOKS

AREA	PRINCIPAL AUTHOR ¹³	VICARIOUS LIABILITY	AUTHORITY TO CONTRACT	PARTNER-SHIP	TOTAL PAGES	ADOP-TIONS
AGENCY & PARTNER-SHIP	Fessler	-0-	-0-	230	256	16
	Henn	55	108	187	378	19
	Hynes	136	177	119	482	20
	Mechem	127	267	-0-	546	NA
	Seavey	55	305	188	586	18
	Steffen	211	173	230	852	20
TORTS	Franklin	26	-0-	-0-	1176	29
	Green	-0-	-0-	-0-	1348	NA
	Gregory	34	-0-	-0-	1190	57
	Henderson	17	-0-	-0-	996	33
	Keeton	20	-0-	-0-	1190	NA
	Noel	12	-0-	-0-	701	NA
	Prosser	24	-0-	-0-	1261	140
	Shapo	04	-0-	-0-	1226	NA
	Shulman	13	-0-	-0-	1061	10
CONTRACTS*	Freedman	-0-	16	-0-	647	NA
	Jackson	-0-	05	-0-	1320	NA
	Kessler	-0-	05	-0-	1376	31
	Knapp	-0-	14	-0-	1217	16
	McGovern	-0-	01	-0-	397	NA
	Reitz	-0-	05	-0-	740	NA
CORPORA-TIONS	Cary	06	-0-	09	1732	70
	Deutsch	-0-	-0-	02	984	3
	Frey	-0-	-0-	03	1327	32
	Hamilton	-0-	-0-	138	1100	84
	Henn	-0-	-0-	17	1240	34
	Jennings	-0-	-0-	56	1156	15
	Soderquist	-0-	-0-	35	870	NA
	Sowards	-0-	-0-	11	830	NA
	Vagts	-0-	-0-	17	836	40

The following Contracts casebooks contain no discussion of these areas: Calamari, Closen, Dawson, Farnsworth, Fuller, Murphy, and Vernon.

13. Agency and Partnership texts: D. FESSLER, ALTERNATIVES TO INCORPORATION FOR PERSONS IN QUEST OF PROFIT (1980); H. HENN, AGENCY, PARTNERSHIP AND OTHER UNINCORPORATED BUSINESS ENTERPRISES (1972); J. HYNES, AGENCY AND PARTNERSHIP: CASES, MATERIALS AND PROBLEMS (1974); P. MECHEM, SELECTED CASES ON THE LAW OF AGENCY (4th ed. 1954); W. SEAVEY, H. REUSCHLEIN & L. HALL, CASES ON AGENCY AND PARTNERSHIP (1962); R. STEFFEN & T. KERR, CASES AND MATERIALS ON AGENCY-PARTNERSHIP (4th ed. 1980).

Torts texts: M. FRANKLIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES (2d ed. 1979); L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS, A. SMITH & J. TREECE, CASES ON THE LAW OF TORTS (2d ed. 1977); C. GREGORY, H. KALVEN & R. EPSTEIN, CASES AND MATERIALS ON TORTS (3d ed. 1977); J. HENDERSON, JR. & R. PEARSON, THE TORTS PROCESS (2d ed. 1981); P. KEETON & R. KEETON, CASES AND

With one exception, each of the casebooks in Torts contains some discussion of vicarious liability. Thus, if the topic needs little elaboration and a student can readily grasp the concepts, it would seem the subject has successfully been integrated into the course in Torts. The basic rule seems to be simplicity itself: "A master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion."¹⁴ Unfortunately, the application of the rule leads to permutations of increasing complexity.

For example, if physical harm results from the act of the agent, the principal will incur liability only if the agent was a servant as well.¹⁵ Determining whether an agent is also a servant can cause a host of problems, because the definition of servant hinges on the right of one to control the physical acts of another.¹⁶ Frequently servants and other agents undertake the work of their principals, but put it aside to follow their own inclinations or to do work for yet another. Depending on the degree of abandonment of the princi-

MATERIALS ON THE LAW OF TORTS (2d ed. 1977); D. NOEL & J. PHILLIPS, CASES AND MATERIALS ON TORTS AND RELATED LAW (1980); W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS (6th ed. 1976); M. SHAPO, CASES AND MATERIALS ON TORT AND COMPENSATION LAW (1976); H. SHULMAN, F. JAMES & O. GRAY, CASES AND MATERIALS ON THE LAW OF TORTS (3d ed. 1976).

Contracts texts appearing in the table: M. FREEDMAN, CONTRACTS: CASES AND MATERIALS (1973); J. JACKSON, CONTRACT LAW IN MODERN SOCIETY: CASES AND MATERIALS ON LAW OF CONTRACTS, SALES AND LEGAL METHODOLOGY (1973); F. KESSLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS (2d ed. 1970); C. KNAPP, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (1976); W. MCGOVERN, CASES, STATUTES AND READINGS ON THE LAW OF CONTRACTS (1980); C. REITZ, CASES AND MATERIALS ON CONTRACTS AS BASIC COMMERCIAL LAW (1975).

Corporations texts: W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS (5th ed. 1980); J. DEUTSCH & J. BIANCO, THE LAW OF CORPORATIONS: WHAT CORPORATE LAWYERS DO (1976); A. FREY, J. CHOPER, N. LEECH & C. MORRIS, JR., CASES AND MATERIALS ON CORPORATIONS (2d ed. 1977); R. HAMILTON, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED PARTNERSHIPS (2d ed. 1981); H. HENN, CASES AND MATERIALS ON THE LAWS OF CORPORATIONS (1974); R. JENNINGS & R. BUXBAUM, CORPORATIONS CASES AND MATERIALS (5th ed. 1979); L. SODERQUIST, CORPORATIONS A PROBLEM APPROACH (1979); H. SOWARDS, CORPORATION LAW CASES AND MATERIALS (2d ed. 1978); D. VAGTS, BASIC CORPORATION LAW: MATERIALS—CASES—TEXT (2d ed. 1979).

14. RESTATEMENT (SECOND) OF AGENCY § 216 (1957).

15. *Id.* § 250. See also *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975); *Southern Nat'l Ins. Co. v. Williams*, 224 Ark. 938, 277 S.W.2d 487 (1955).

16. RESTATEMENT (SECOND) OF AGENCY § 220 (1958). "Right by the master to control the conduct of the driver (servant) is the favorite approach of the courts . . ." *Kowaleski v. Kowaleski*, 235 Or. 454, 458, 385 P.2d 611, 613 (1963). See also *Green v. Independent Oil Co.*, 414 Pa. 477, 201 A.2d 207 (1964); *Dowsett v. Dowsett*, 116 Utah 12, 207 P.2d 809 (1949).

pal's business, courts may not hold the principal liable for the tortious conduct of the servant.¹⁷ Each of these variations on the basic rule gives rise to other variations. Underlying them all is the fundamental problem that the entire concept of vicarious liability is in opposition to the system of tort law traditionally based on the fault of an individual.¹⁸ The first-year student can hardly be expected to grasp the import of the basic rule in one or two sessions of class, to say nothing of grasping the subtle distinctions which have arisen over the years to further complicate the field.

Exacerbating the problem, the past fifteen years have seen dramatic growth in at least two critical areas of tort law: products liability and defamation.

When published, the section [Restatement of Torts (Second) § 402A] reflected the law of only a few jurisdictions, but in the twelve years following its publication it has become the basis of strict tort recovery in the vast majority of the States.

So quickly has the law of strict tort liability developed, that Section 402A, which only a few years ago was criticized as being "an attack upon established legal fundamentals," is now criticized as restricting desired growth of the law in this field.¹⁹

In 1964, the Supreme Court of the United States decided *New York Times Co. v. Sullivan*,²⁰ the first of a series of cases²¹ which, continuing through the present day, has dramatically altered the law of defamation. The course in Torts, therefore, has developed an increasing number of new subject areas while continuing to build on existing material. The rapid growth has caused an increase in the quantity of material pertinent to the one course. Quite reasonably, the settled (although complicated) area of vicarious liability receives a decreasing amount of attention. The trend in recent years to compress the traditional six-hour course into a four or five-hour module²² also makes it substantially less likely that the principles

17. Teaching this point proves particularly rewarding, as the instructor and the class have the opportunity to trace a solid line of Cardozo opinions: *Marks' Dependents v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929); *Fiocco v. Carver*, 234 N.Y. 219, 137 N.E. 309 (1922); *Riley v. Standard Oil Co.*, 231 N.Y. 301, 132 N.E. 97 (1921); *Clawson v. Pierce-Arrow Motor Car Co.*, 231 N.Y. 273, 131 N.E. 914 (1921).

18. *Cf. J. O'CONNELL & R. HENDERSON, TORT LAW, NO FAULT AND BEYOND* 55 (1975).

19. 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* 3-6 (1980).

20. 376 U.S. 254 (1964).

21. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Herbert v. Lando*, 441 U.S. 153 (1979); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).

22. For example, the following law schools all announce in their catalogs courses in the

supposed to have carried over into Torts from the Agency course will be the subject of class discussion. In fact, although no formal survey exists to prove the point, the Torts teacher who spends more than one or two hours (if that) on the concept of vicarious liability is rare indeed.

The same paucity of coverage of agency concepts found in Torts holds true for Contracts as well. Sixty percent of the major casebooks in the field omit any concentrated discussion of the material, and of the remainder only two devote more than five pages to it. At the same time, the contractual aspects of the agency relationship pose even more difficult problems than do the tort aspects. Students cannot easily learn the complex interrelationships posed by contracts entered by an agent for an undisclosed principal,²³ particularly when these concepts are studied without the guidance of a professor. The many rules governing when notice to an agent will serve as notice to a principal, and when a principal must notify third parties of the termination of an agent, are best understood when they are developed through case study and an historical analysis.²⁴ The prohibition against self-dealing, so critical to later discussions of the duties of corporate directors and officers, seems unduly harsh to students unless it is presented in a deliberate manner as the natural evolution of a unified practice of business dealing.²⁵ Not only do contracts courses fail to take these issues into account, but faculties

basic law of torts taking either four or five credit hours: Columbia University, Fordham University, Georgetown University, Northwestern University, Stanford University, U.C.L.A., the University of Connecticut, the University of Michigan, the University of Pennsylvania, and the University of Wisconsin.

23. For example, while the undisclosed principal may claim the benefits of a contract at any time, the third party still has a right to any defenses which might exist against the agent. *Robert Lawrence Assocs., Inc. v. Del Vecchio*, 178 Conn. 1, 420 A.2d 1142 (1979). At the same time, the agent will remain personally liable on the contract. *Hodges-Ward Assocs., Inc. v. Ecclestone*, 156 Ga. App. 59, 273 S.E.2d 872 (1980). The havoc these concepts wreak on the basic underpinning of the law of contracts—the arm's length transaction—multiplies a hundredfold in the mind of the uninitiated law student. Cf. Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 YALE L. J. 443 (1909).

24. Consider the careful analysis employed in the following: Seavey, *Notice Through an Agent*, 65 U. PA. L. REV. 1 (1916); Merrill, *The Anatomy of Notice*, 3 U. CHI. L. REV. 417 (1936); Seavey, *Agency Powers*, 1 OKLA. L. REV. 3 (1948); Twerski, *The Independent Doctrine of Ratification v. The Restatement and Mr. Seavey*, 42 TEMP. L.Q. 1 (1968). Indeed, the inherent conflict between the approach of the law to the torts of an agent and the contracts of an agent leads to even more confusion and befuddlement. "[T]he matter of an employer's liability for his agent's promises is really quite complicated." Mearns, *Vicarious Liability for Agency Contracts*, 48 VA. L. REV. 50 (1962).

25. Cf. Shreiber & Yoran, *Allocation of Corporate Opportunities by Management*, 23 WAYNE L. REV. 1355 (1977), in which the authors rate three distinct lines of cases on the very narrow issue of usurpation of corporate opportunities by management and attempt a solution to the quagmire through a test seeking "maximalization of profits."

have reduced the hours allocated to Contracts in the first year, much as has happened with Torts. Thus, the prospects for successfully integrating these concepts into the Contracts course of the future seem non-existent.

Given that the courses in Torts and Contracts fail to discuss agency concepts adequately, and given that the tendency is toward decreasing present coverage rather than increasing it, the issue then is whether law schools should include formal discussion of agency concepts in their curricula. Pragmatically, if one function of law schools is that of training practitioners, then law schools have a duty to include discussion of agency concepts in their curricula. As Table II indicates, bar examiners think practitioners must exhibit a sound knowledge of the law of agency.

TABLE II
BAR EXAMINATIONS REQUIRING KNOWLEDGE
OF AGENCY, PARTNERSHIP, OR
BUSINESS ORGANIZATIONS—1980

SUBJECT	NUMBER OF JURISDICTIONS REQUIRING
Agency and Partnership	21
Agency and Business Organizations	6
Partnership	2
Business Organizations generally	14
Neither Agency, Partnership, nor Business Organizations	8

While the inclusion of subject matter on a bar examination should not dictate coverage of that subject matter in a law school curriculum, this factor should receive very serious consideration.²⁶ When

26. In this Alice-in-Wonderland of legal pedagogy, the Bar examination courses are "bread and butter," "meat and potatoes" or "realistic" courses for students to take despite the well-known fact that but for a few spectacular individual specialists no lawyer today can make office rent from the first-year courses.

Mooney, *The Media is the Message*, 20 J. LEGAL EDUC. 388, 392-93 (1968). See also Boden, *Is Legal Education Deserting the Bar?* 37 INS. COUNSEL J. 97 (1970). But see Beytagh, *Prescribed Courses as Prerequisites for taking Bar Examinations: Indiana's Experiment in Controlling Legal Education*, 26 J. LEGAL EDUC. 449 (1974).

over half of the jurisdictions require Agency specifically and all except eight require knowledge of agency concepts, law schools that neglect to teach these principles should consider whether they are adequately preparing their students for their future careers.

In our contemporary economy virtually no transaction occurs without an agency relationship appearing at one stage or another.²⁷ Axiomatically, a corporation, as a fictional entity, must use an agent when it transacts business.²⁸ Even when a business is conducted as a sole proprietorship, agents far more often than not represent the business in negotiations or direct sales. Despite the advent of no-fault concepts in legal treatment of vehicular accidents,²⁹ the question will remain whether, under agency principles, an injured person may reach the pockets of a financially responsible individual. The concepts developed in the Agency course thus reach the practice of all but the most specialized practitioner, and success or failure with a case can depend upon an issue involving the law of agency. Similarly, any discussion of advanced topics in the law school curriculum requires knowledge of the fundamental law developed in a course in Agency.

For example, a student cannot fully grasp the rationale and the implications of the business judgment rule³⁰ without understanding, first, why a corporate officer stands as an agent of the corporation and, second, the nature of the fiduciary obligations imposed by the agency relationship. Similarly, only the student versed in agency concepts can appreciate the paradoxes which arise when corporations attempt to take advantage of contracts entered by their pro-

27. J. HYNES, *supra* note 13, at viii. See also H. REUSCHLEIN & W. GREGORY, *HANDBOOK ON THE LAW OF AGENCY & PARTNERSHIP* 2 (1979). "Agency is an indispensable tool for the completion of the vast majority of business transactions." Twerski, *supra* note 24, at 14.

28. "It is elementary knowledge that a corporation in its relations to the public is represented and can act only by and through its duly authorized officers and agents." Raper v. McCrory-McLellan Corp., 259 N.C. 199, 130 S.E.2d 281, 285 (1963).

29. Cf. J. O'CONNELL, *supra* note 18.

30. "Under the common law, courts are disposed to give directors a wide latitude in the management of a corporation's affairs, so long as they reasonably exercise an honest, unbiased judgment." W. KNEPPER, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* 20 (3d ed. 1978). Thus, courts will place the burden of proof on the plaintiff to prove fraud or bad faith rather than requiring the defendant director to prove reasonability or intrinsic fairness. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971); *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (1968). But see *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), in which the Delaware Supreme Court broke with years of precedent in holding that, in certain instances where a committee of a corporation's board of directors moves to dismiss a shareholder's derivative actions, "[t]he Court should determine, *applying its own independent business judgment*, whether the motion should be granted." *Id.* at 789 (emphasis added).

motors.³¹ The student of negotiable instruments who has no background in agency will have difficulty with the nuances of section 3-403 of the Uniform Commercial Code,³² while the student of banking law must understand those agency principles which add to the contractual relationship of banker and client. The relationship between an attorney and a client is delineated in great part by the fundamental concepts discussed and developed in the Agency course.

In summary, once basic agency concepts are dropped from the curriculum as an independent course, they are generally not included as parts of other curricular offerings. These concepts, rather than posing simple issues, instead can demand serious and protracted thought if the student hopes to comprehend them. Finally, agency concepts are important to the student for three reasons: they form the doctrinal foundation for many courses to be studied later in law school, they appear on more than eighty percent of all bar examinations, and they appear regularly in the practice of most attorneys. At all stages of a lawyer's professional growth, he or she must deal competently with the law of agency. Therefore, law schools that no longer offer this subject matter should reconsider their decisions because they may have eliminated a critical part of their students' education.

In much the same manner, without a good understanding of partnership law a student will have a difficult time mastering virtually any advanced course in the business or commercial curriculum. For any planning course, the need to incorporate consideration of partnerships can hardly be gainsaid. The establishment of businesses or real estate ventures requires careful consideration of the advantages of conducting business in the partnership format.³³

31. See generally H. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* §§ 107-115 (1970); I W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 214 (1974).

32. The authority of an agent or other representative to act, pursuant to U.C.C. § 3-403, has been analyzed by courts according to traditional agency lines. *Cf.* *Gate City Furniture Co. v. Ramsey*, 115 Ga. App. 753, 156 S.E.2d 221 (1967); *First Nat'l Bank v. Achilli*, 14 Ill. App. 3d 1, 301 N.E.2d 739 (1973).

33. It is assumed that by the time a student is enrolled in a planning course the student has received some exposure to many of the areas of the law considered in the course All too frequently when a planning question is asked in a course in a substantive area the answer is arrived at in terms of the course content, the best tax, property, corporate, partnership, securities, etc. result.

N. STEUBEN, *Preface to REAL ESTATE PLANNING* xix-xx (1980). Indeed, the first chapter of Professor Steuben's text deals extensively with the choice of the appropriate business entity in the context of a real estate transaction. Similarly, courses in business planning rely on a knowledge of the law of Agency and Partnership. "Because of the particular tax advantages

Lack of training in partnership law will lead the advanced tax student to make such gross oversimplifications as the misstatement that Subchapter S corporations receive the same tax treatment as partnerships.³⁴

The student attempting the basic course in Corporations will find it more difficult as a consequence of not having taken a course in Partnership. One of the most effective ways to discuss the value of conducting business as a corporation is to compare it with conducting business as a partnership. Without a solid grounding in partnership law, the student of corporations will not comprehend the liability of promoters and shareholders who, for one reason or another, find themselves liable as partners.³⁵ The complex ordering of priorities of payment on the termination of such a business venture which would normally be studied in partnership law must be applied in the corporate context.³⁶ Students would not have discussed these complex sections of the Uniform Partnership Act before having to work with them as basic assumptions of a more advanced course. Even more basic to the Corporations curriculum, the student entering such a course after having taken Partnership will have studied the Uniform Partnership Act. Aside from the additional practice gained in dealing with statutes, the student will have dealt with a statute which conceptually parallels the Model Business Corporations Act in one critical way: the legislation attempts to govern the external relationships of the business in all events, but it touches the internal relationships only when the parties to the business do not themselves establish rules and regulations.³⁷ Students accustomed to this bifurcated treatment find it

that flow from the partnership and trust forms of doing business, many of the tax shelter programs have been organized as limited partnerships or, to a lesser extent, as business trusts." Mofsky, *The Corporate Law Curriculum*, 27 J. LEGAL EDUC. 552, 553 (1975).

34. F. O'NEAL, *CLOSE CORPORATIONS: LAW & PRACTICE* § 204a, at 22 (2d ed. 1971).

35. *See* *Hobbs v. Triangle Supply Co.*, 378 S.W.2d 726 (Tex. Civ. App. 1964); HENN, *supra* note 31, at n.2, § 145.

36. *Compare* UNIFORM PARTNERSHIP ACT § 40 (1914); UNIFORM LIMITED PARTNERSHIP ACT § 23 (1916); REVISED UNIFORM LIMITED PARTNERSHIP ACT § 804 (1976); *with* MODEL BUSINESS CORP. ACT §§ 82-84, 98 (1969).

37. In the corporate setting, consider the treatment by the Model Act of the requirements for a quorum of directors. "The act of the majority of directors . . . shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the by-laws." MODEL BUSINESS CORP. ACT § 40 (1969). This same *laissez-faire* attitude toward structuring of internal relationships is seen in UNIFORM PARTNERSHIP ACT § 18 (1914): "The rights and duties of the partners in relation to the partnership shall be determined, *subject to any agreement between them*, by the following rules . . ." (emphasis added). In contrast, however, neither shareholders nor partners can by their own acts alter

easier to understand the statutes they confront in Corporations than students who encounter the concept for the first time in that course.

Fortunately, depending on the text used in the Corporations course, the professor has the option of including at least a brief discussion of partnership issues. Three texts³⁸ contain treatments of varying lengths of partnership matters. The professor choosing any other text, however, must supplement it with additional materials if the basic Agency and Partnership course has not been offered to the students at an earlier time.

As earlier noted, one text does attempt to incorporate all elements of business organizations in one compact volume.³⁹ If this text has been adopted, arguably many of the points raised thus far have been met. Problems do exist with this approach, however. The text contains roughly the same number of pages of text as many others used in the Corporations course, yet of these some forty percent are devoted to discussion of agency, partnership, and related concepts. Thus, the discussion of corporate matters seems to be curtailed. This conclusion seems to be supported by the small number of adoptions the text has received. As of this writing, the basic text has been adopted by only sixteen professors. An adaptation of the text, containing the first 603 pages (which deal primarily with agency and partnership matters) has, however, been adopted by twenty-six professors. This would indicate that although the quality of the presentation in both texts has been well-received, professors think a more complete treatment of corporate law is required. Further, attempting to treat both agency and partnership as component parts of the Corporations course cannot be adequately managed in the time span allocated to that course. Considering that inclusion of elements of securities regulation, itself a rapidly growing area, has become the usual practice in the Corporations course,⁴⁰ and considering the rapid growth of the law governing such traditional corporate areas as shareholders' derivative actions,⁴¹ the time required for a discussion of the more basic agency and partnership concepts

those relationships with outsiders which have been fixed by the statute. See, e.g., MODEL BUSINESS CORP. ACT § 113 (1969); UNIFORM PARTNERSHIP ACT § 11 (1914).

38. R. HAMILTON; R. JENNINGS; AND L. SODERQUIST, *supra* note 13.

39. A. CONRAD, *supra* note 11.

40. Folk, *Recent Developments in Corporation Statutes*, 20 J. LEGAL EDUC. 511, 521 (1968); Mofsky, *supra* note 33, at 559; Thomforde, *The State, Corporate Power and the Public Interest: An Alternative to the Standard Course in Corporation Law*, 25 J. LEGAL EDUC. 459 (1973).

41. Cf. *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), and cases cited at 781 & n.4 therein.

within the format of a three or four-hour course simply does not exist.

A PROPOSAL

Given these considerations, law schools must re-examine their present positions. Ideally, students should have the opportunity to take a course in basic business associations before they attempt advanced topics in corporations. This should be part of the first-year curriculum. Perhaps too much faith is placed in the business acumen gained by students prior to their admission to law school. A course designed to give them a basic grounding in the ways people conduct business, placed in the first year of law school when most, if not all, courses are mandatory, would go far toward demonstrating that the practice of law is in no way confined to personal injury, civil rights, and criminal litigation.

This proposal, however, probably will not succeed with curriculum planners, who have by now abandoned it as atavistic. More acceptable, perhaps, would be the return of the basic course to the first semester of the second year of law school, where it could serve as a precursor to more advanced studies. The need exists for a renewed emphasis on both agency and partnership. The subject matter of these courses, which proves so necessary to advanced studies, has now been relegated to oblivion or, at best, to minor status. Similarly, the trend toward incorporating both agency and partnership into a single course has become a reality. To propose severing them would be counterproductive and unfeasible given the large number of electives to which law students should have exposure.

Thus, law schools should offer their students either a combined six-hour course in business associations which extends through an entire year, or a separate two-hour course in Agency and Partnership in the first semester of the second year, to be followed by a four-hour course in Corporations in the second semester. Curriculum planners who would avoid this structure and thus eliminate any consideration of agency or partnership from the law school experience do so misguidedly. Discussion and study of these areas is required if students are to understand the nuances (and in many instances the fundamentals) of their other courses. A great deal *is* right with both Agency and Partnership, and they should be restored to the list of curricular offerings available to students.

APPENDIX

AGENCY & PARTNERSHIP IN THE CONTEMPORARY LAW
SCHOOL CURRICULUM: A SURVEY

Total number of law schools responding: 104 (not all schools responded to each question).

I. Do you presently offer a course in Agency & Partnership as a combined offering?

YES — 46

NO — 58

A. If so, is the course:

required, first year 3

optional, first year 2

required, upper class 5

optional, upper class 38

B. If not, where do you cover the subject matter?

1. AGENCY

torts & contracts courses 32

combined with corporations 43

with worker's compensation 4

enterprise organizations 2

agency 2

commercial paper 1

reading course 1

2. PARTNERSHIP

combined with corporations 55

business planning 13

other 8

(taxation, small business associations, business associations, enterprise organizations)

II. Was either Agency or Partnership ever included in the first year curriculum, if no longer taught there?

YES — 40

NO — 48

A. What year did you remove it from the first year schedule?

1940-45:	2
1961-65:	9
1966-70:	6
1971-75:	13
1976-80:	9

B. Note why the change was made.

Make room for other subject(s)	7
Could be covered in other courses	4
Lack of time in 1st year curriculum	4
Faculty decision	3
To combine with corporations	3
Teacher left	1
Students didn't have enough background	1
General curriculum revision	1

III. Was there ever a combined course in Agency and Partnership or separate courses in these subjects, if no longer taught?

YES, COMBINED — 39

YES, SEPARATE — 5

NO — 11

A. What year did you remove it/them from the curriculum?

1956-60:	2
1961-65:	4
1966-70:	4
1971-75:	4
1976-80:	10

B. Note why the change was made.

Material covered in other courses	9
Material combined with corporations	5
Faculty not interested	5
Other	7