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## LATTY AND "CORPORATIONS" IN THE ACADEMY\*

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Scholarly work is its own tribute to a scholar, as are the contributions in this symposium to Jack Latty, whose scholarly ideas, assessed appreciatively by Professor Lattin in an earlier issue,<sup>1</sup> have invigorated the field of corporation law for more than fifty years. So does the law school which he led as dean mark his wider impact on legal education. But the style and influence of the man would be missed in a review of the area where he concentrated his academic interests unless some observations were included about Latty as a "teaching entrepreneur" and about "corporations" as an academic enterprise.

Teaching entrepreneurship is hereby defined as a form of association comprising one person and an educational institution: purpose is understood but not stated; control as a unitary concept cannot be located; net gains cannot be measured or reported; services offered are indefinable; periodic losses, acutely felt, are guaranteed; and the risk of final judgment of failure is high, although bankruptcy per se is rarely a cause of dissolution.

Law professors have no difficulty entering into such an association because all law professors are gods, as most law students quickly perceive without undue wonderment. The great gods, like Latty, fired by infernal questions that must be handed on, actually appear in human form.

Thus came Professor Elvin R. Latty to Duke in 1937 in a gray, tweed sport coat. (Later, as dean, he sported a homburg with equal aplomb as he scoured the whole country for better students, better faculty, and more money for the law school.) He was known for having

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1. Lattin, *A Tribute to Dean Elvin R. Latty*, 1972 DUKE L.J. 857.

taught romance languages and having coached track, suggesting an enviable versatility, and it was said that he had forsaken, for academe, a lucrative Wall Street practice. ("Lucrative" was pinpointed by student gossip at an incredibly high \$10,000, then five times the highest salary for beginning lawyers.) Latty was asked, as a newcomer, to deliver a chapel talk in the gothic cathedral which towers over the Duke campus. I do not remember the religious message, but I do remember his sweeping up to the pulpit in flowing black robes set off, perfectly for his personality, by white saddle shoes.

The saddle shoes were his trademark. They cushioned his swift, last-minute entrance stride down the classroom aisle. He also wore them to frequent law school social affairs, where everybody, in those days, was dancing, and when law students whirled Mrs. Latty away, he whirled away their dates with dignified ebullience.

His ebullience was undiminished in class, where the academic message, unlike the chapel theme, was unforgettable. If it was not then always perfectly clear, as with a Zen lesson, time lent it cohesion. Its essence was the superior rating of the question over the answer, if the two must be so ranked—a rating running contrary to the suppositions of the uninitiated and the expectations of most students. Isn't the known answer, after all, the objective, especially in law? True, but the question is the indispensable means for getting at it. It can shape the objective. It can unveil the pretensions and reveal the complexities of the objective. It can bring an answer, but so can it bring a realization that the answer is only an apparent one and really a sinking mire.

Thus is Latty held in the mind's eye wielding his favorite short, chopping tools: "what if," "what about," "how come," and "suppose," pondering the ceiling with eyebrows raised, expecting or demanding attempts to answer, attempting himself, admitting bafflement, shrugging, laughing at the legal or human predicament revealed, reddening occasionally when two students in the back of the room exchanged confidential answers. (If the conversation was *intra vires* the subject, he wanted it disclosed; if not, he wanted it stopped.) And thus can he be assured, if his mortal guise troubled him with doubts about the immortality of his teaching, that he is still remembered by thousands of lawyers everywhere, somewhat as a god, but more as an engaging human. In their counseling, litigating, legislating, judging, reforming, teaching and using law, they cannot keep from reflecting the searching, probing, "seeking" side of law, divine and human, absorbed in large measure from Latty.

For all those questions, it is now clear, served a common thrust: to expose, as a first step, the uncompleted thinking shielded by doctrinal generalities, majestic legal phrases, and conclusory labels. That first step

then leads on to a realization of the work to be done in making and reasoning about hard choices, and in analyzing the crucial "facts" and considerations that constitute the conflict, the problem, and the solution. The interaction of those facts and considerations and of legal goals in decisions, statutes, and regulations can thus be isolated, and the further interaction of law and social policy understood and planned.

Latty did not invent that way of thinking about law, but he epitomized it. In the 1930s, Columbia—where he did his doctoral work—was a garden of legal realism. The main lines of that philosophy and the inquiries it advocated were congruent with his own. The tenets of legal realism and his teaching message emerge from his doctrinal thesis, later published in book form,<sup>2</sup> in which he concentrated on an issue at the heart of "corporations" as an academic subject: the relationship between the concept of incorporation and the insulation from liability afforded individual and corporate shareholders under that concept.

That insulation from owners' responsibility for the obligations of an enterprise is a central attribute and advantage of the corporate form. And the "separateness" of a legal corporate entity also insulates other corporate entities, including those within the same business or economic enterprise, from liability for the obligations of any other. The insulation is said to be "normal," but it is not unfailing. The terminology of its denial—that the corporate "veil" will be "pierced," or the corporate "entity" "disregarded"—compels the question "when" and "why." The answers repeated in judicial opinions—whenever it would be "equitable," or fraud would otherwise result, or injustice would otherwise be done, or whenever the pierced or disregarded entity is a mere agent, instrumentality, dummy, or alter ego—illustrate the easy use of empty language. Behind such contentless phrases, as Latty showed, are facts in such categories as capital inadequacy, stopping short of steps to complete corporate financing and operation, commingling or confusion of assets, and the calculated policy of "milking" one entity for the benefit of another or for the entity's shareowners. Of further bearing are such factual considerations as the nature of the liability asserted (a tort arising from foreseeably dangerous activity?), the plaintiff's position (an eyes-open contract creditor who "consented" to being relegated to the assets of this entity?), and the defendant's interests (an individual shareholder or a parent corporation with insulated individual shareholders?).

Educationally, the implications from such factual considerations suggest, on one issue alone, that the real nature of a lawyer's work is awareness, inquiry, and assessment of facts. Academically, also, predict-

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2. E. LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* (1936).

able paths of decision are exposed by such an analysis. Putting "disregard," for example, in the factual light of not separating, deliberately or negligently, the "estate" of one corporation from the separate estate of the shareholder, or of a related corporation, as Latty put it,<sup>3</sup> illuminates one such path, if it is not mistaken as the only path, through a tangled underbrush of judicial terminology. It also invites new comparisons, such as juxtaposition of corporate asset segregation with older and more familiar problems of the segregation of partnership property from the partners' individual assets.

On the strictly practical side, no claim need be made that clarifying theories bring quick order to a jungle of notions deeply rooted in metaphor. "Disregard" cases are still ringing old changes fondly.<sup>4</sup> Some courts may see the proffered light but brush it off. The facts in *Bartle v. Homeowners Cooperative, Inc.*,<sup>5</sup> for example, afforded the New York Court of Appeals an opportunity—which it conspicuously let pass—to illuminate the controlling considerations in its decision. The subsidiary was milked. Eventually, and perhaps predictably, it became bankrupt. It was organized, in the dissenting opinion's words, to enable the parent cooperative corporation's shareholders to obtain at cost houses constructed by the subsidiary, and "business was done on such a basis that [the subsidiary] could not make a profit."<sup>6</sup> The dissent, citing Latty, viewed the factual situation as containing those factors noted in Latty's book<sup>7</sup> as present in cases in which the parent corporation was held liable. The majority, noting that incorporation is permitted "for the very purpose of escaping personal liability,"<sup>8</sup> chose not to withhold insulation and not to elucidate. It observed only that "the outward indicia of these two separate corporations was at all times maintained," that the creditors "were in no wise misled," and that "there has been neither fraud, misrepresentation, nor illegality."<sup>9</sup> Thus tucked in with the usual phraseology was the hint, though not an unmistakable one, that contract creditors dealing with subsidiaries must take them as they are, no matter how they are, as long as "form" is strictly observed. Left doubtful is whether such a conclusion would apply only to creditors, like these, who knew that the

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3. *Id.* at 183-84.

4. *E.g.*, *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 717 (7th Cir. 1965); *Tanner v. Presidents-First Lady Spa, Inc.*, 345 F. Supp. 950, 956 (E.D. Mo. 1972); *Fisher v. First Nat'l Bank*, 338 F. Supp. 525, 530 (S.D. Iowa 1972); *Service Afloat, Inc. v. United States*, 337 F. Supp. 458, 464 (Cust. Ct. 1972); *Penntube Plastic Co. v. Flurotex, Inc.*, 336 F. Supp. 698, 702 (D.S.C. 1971); *Hellenic Lines Ltd. v. Winkler*, 249 F. Supp. 771, 776 (S.D.N.Y. 1966).

5. 309 N.Y. 103, 127 N.E.2d 832 (1955).

6. *Id.* at 107; 127 N.E.2d at 834.

7. E. LATTY, *supra* note 2, at 138-39.

8. 309 N.Y. at 106, 127 N.E.2d at 833.

9. *Id.* at 106-07, 127 N.E.2d at 833.

subsidiary was in a "difficult financial situation" and made an extension agreement with it under which they even took over construction responsibilities. Or, narrowing it still further, whether the scale was tipped by the circumstance that the ultimate loss from a successful claim would have fallen in some measure on returning veterans who were helping themselves get low-cost housing by private arrangements they thought would work.

The way of the world may not let us hope that all fog will be dispelled by an assignment of precise weights to such *Bartle* factors in every case. But a little gloom over the general trend is due when the fog is thickened with recent, un-Latty-like remarks about the anatomical characteristics of parent-subsidiary domination. In *Berger v. Columbia Broadcasting System, Inc.*,<sup>10</sup> the plain, nonbiological facts were that the wholly-owned subsidiary (CBS Films, Inc.) was organized to obtain general film distribution rights to shows and films also televised on the network of the parent (CBS Inc.). The directors and officers of the subsidiary were employees of the parent, as is not uncommon, and the subsidiary was regarded by at least some, on the testimony of a comptroller, as a "division" of the parent. The plaintiff had devised a "fashion show" which was "scouted" personally by the subsidiary's vice-president and the parent's director of special events, after which the subsidiary obtained from the plaintiff the exclusive nine-year film distribution rights, and first refusal for television broadcast, on the plaintiff's show, or any "similar type" show, as produced in a pilot film made with advances from the subsidiary. Then the same parent officer who had "scouted" the plaintiff's show worked with others to develop a second show "similar in all material respects to the plaintiff's."<sup>11</sup> The parent obtained from others nine-year exclusive broadcasting rights on the second show "and similar shows" and televised the second show, but not the plaintiff's. The plaintiff alleged a breach *by the parent* of the plaintiff's contract *with the subsidiary* on the grounds that the subsidiary was the "alter ego" and mere "instrumentality" of the parent. The district court treated both corporations as one for purposes of the action.<sup>12</sup> The Fifth Circuit thought "it had no alternative but to reverse" because the plaintiff "failed to prove" that the subsidiary was the "alter ego of the [parent] defendant."<sup>13</sup> Noting evidence, excluded by the district court as irrelevant, that the parent was not required to "buy," nor the subsidiary to sell to the parent, a film acquired by the subsidiary, and finding an absence of evi-

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10. 453 F.2d 991 (5th Cir. 1972).

11. *Id.* at 993.

12. *Id.* at 994.

13. *Id.* at 997-98.

dence of "actual" domination, the court said that the *potential* for domination is not enough.<sup>14</sup> "Just as siamesing is a biological fact," said the court, "so must corporate umbilication be anatomically demonstrated under New York law,"<sup>15</sup> noting in conclusion that:

New York law respects corporate identity, and its destruction by piercing or surrogation requires substantiation of facts, not just organizational charts and labels. The instrumentality referred to in New York cases requires a specific kinetic result, and inuscularity to effect such result must be demonstrated. Plaintiff's omission to prove such muscularity constitutes his failing.<sup>16</sup>

The parent control necessary for liability, then, is energetic domination manifested with muscle. Here no muscle was displayed. Without deploring at length the court's display of metaphor, Latty might have inquired, to show how facts reduce the meaning of metaphor, whether the "muscle failure" owed anything to the fact, alluded to early in the opinion, that the "commentator" for the plaintiff's show was the wife of the subsidiary's vice-president. Did such a liaison between the subsidiary and the plaintiff put the subsidiary and parent asunder for this particular liability?

The value of such questions does not lie in one case,<sup>17</sup> one issue, or one academic field. Latty pressed them in an early course he called "Chattel Transactions," with mimeographed materials of his own, about contentlessness in such words as "sale," "gift," "possession," and "property." More of the same inquiry came in his "Business Associations," just as similar questions and similar methods characterize teaching of lasting effect in any subject.

However gratifying to a teacher that his ideas apply beyond a particular subject through a whole web of law, the web appears, in school, in strands and sections. Some teachers barely get beyond a necessary preoccupation with fascinating strands. A salute is due the teacher who achieves identification with a whole section of the web, and such a salute brings the state of that section under review.

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14. *Id.* at 998.

15. *Id.* at 996.

16. *Id.* at 998.

17. Similar relationships have been mentioned without indication of the weight, if any, accorded them in decision. Thus, a principal was held not vicariously liable when an employee injured a plaintiff who was the employee's friend. *Dumas v. Lloyd*, 6 Ill. App. 2d 1026, 286 N.E.2d 566 (1972). The insurance company of a master held vicariously liable when its servant ran down his own father was held entitled to indemnity from the servant. *Romford Ice & Coal Storage Co. v. Lister*, [1956] 2 Q.B. 180. A plaintiff-principal in a negligence action was relieved of any imputation of contributory negligence from the negligence in that transaction of the principal's office manager, who was his son-in-law. *Brown v. Poritzky*, 30 N.Y.2d 289, 283 N.E.2d 751 (1972).

In the forty years of Latty's interest, "Corporations" has been cemented in central place in the curricula of most schools, held there more by a tradition of supposed necessity than by popular interest. Whether as a single course—required, recommended, or freely elected—or as a basic segment of a major interest area of several courses, or of a combined degree, the popular view has had it concerned mostly with necessary formalities, internal organizational technicalities, and the mechanics of commercially organized wealth. Older casebooks steeped these ingredients in metaphysics. Mistrust of corporations prevailed in the forefront of the century, and much of the legal conflict raged on the battle-line of limitations on corporate powers. Corporations were to be created for limited times and limited purposes, to be specified, and one function of the law was to hold them to those legal limitations. Vital questions were viewed, therefore, in terms of birth, being, and power. A leading casebook published in 1913<sup>18</sup> devoted five of its ten chapters to "the legal conception of a corporation," "corporations de jure," "corporations de facto," "the powers of a corporation," and "ultra vires"—all matters treated now almost in passing, if at all.

Each new edition of later casebooks took on more than it unloaded or compressed about such items as proper and defective organization procedures, record inspection, shareholder lists, meeting protocol, voting mechanics, article and bylaw provisions, organic change requirements, and formalities of merger and dissolution. With new federal securities materials added, the whole dry weight topped out at 5-1/2 pounds and 1816 pages for the latest edition of a well-known casebook on corporations.<sup>19</sup>

What an academic subject with such an identity needs is an identity crisis. "Corporations," fortunately or not, has never been without one. It has never been definable as the academic reflection of a specialized field of practice, with boundaries marked accordingly. "Corporation lawyers"—firms with substantial practice for corporate clients—are more likely to be worrying over an antitrust, tax, labor, real estate, negotiable instruments, government regulatory, or other problem encompassed by other curricular subjects than a traditional corporations one; and if it is a corporations one, it is rarely isolated from one of the others. The other commercial subjects are sure enough of their own academic boundaries to leave traditional "Corporations" looking comparatively

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18. G. CANFIELD & I. WORMSER, *CASES ON PRIVATE CORPORATIONS* (1913).

19. W. CARY, *CASES AND MATERIALS ON CORPORATIONS* (4th ed. 1969). A 1639-page Cary and Eisenberg Fifth Edition successor in 1980 is no lighter. A 1400-page competitor, R. STEVENS & H. HENN, *STATUTES, CASES AND MATERIALS ON THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* (1965), weighs close to six pounds.

dispensable to many students free to by-pass a reputedly dry, bulky, and esoteric elective.

Nonetheless, many old and new organizational issues and developments still do come together in a *schema* so coherent in underlying theme, so intriguing when examined in relationship to each other, and so close to great questions of law, organized social effort, and individual life, that they cannot be displaced from unitary consideration, under whatever name, in a basic law curriculum. A banner they would all go under is regulation of the resources and control of organizational effort. The main theme is the interaction, and hence the fair balance to be struck, between the advantages and benefits to insiders, outsiders and society in the financing and control of an organized effort, as against the risks, costs, and constraints which society should impose on account of such benefits.

Under such a banner, with all that should be brought under it, one can formulate criteria for jettisoning, or communicating in new ways, much that is high-clerical only; putting trade-creditor protection against financial skulduggery in reduced, modern perspective; and getting together some strayed or straying areas needed for the vitality of the whole.

One such area includes securities regulation issues involving transfers of shares. Share transferability is a corporate advantage of equal importance to shareholder non-liability. Legal issues involving transfer, especially those touching financing, control, and the fiduciary implications of the combination, were never isolated from corporations when "investor protection" law was thin and overshadowed by the "creditor protection" function of stated capital. Place was always made for the *Old Dominion Copper* cases,<sup>20</sup> in which the Massachusetts Supreme Judicial Court determined, in disagreement with Mr. Justice Holmes and a majority of the United States Supreme Court, that some redress would be provided in equity, through the device of a corporate recovery, against promoters' dubious property transactions not disclosed to public investors in a later original issuance from the corporation.

When federal statutes, mainly the Securities Act of 1933 (Securities Act)<sup>21</sup> and the Securities Exchange Act of 1934 (Exchange Act)<sup>22</sup> were enacted to afford more effective investor protection in connection with securities transfers, the misimpression arose that a body of law independent from corporations had been created. This attitude persisted as legislative concern, administrative actions, and judicial decisions expanded

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20. *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U.S. 206 (1907); *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 89 N.E. 193 (1909).

21. 15 U.S.C. §§ 77a-77aa (1982).

22. *Id.* §§ 78a-78hh.



the impact of those statutes. By 1946, the Exchange Act, which dealt mainly with post-distribution securities trading, although in language derived from the Securities Act control of initial public distributions, had already been extended to the affairs of a two-family corporation in *Kardon v. National Gypsum Co.*<sup>23</sup> Latty foresaw in 1953<sup>24</sup> that this development in the *Kardon* case was a portent of a wider impact for both statutes on a "private fight" over a Main Street store<sup>25</sup> and "private" deals in close corporations.<sup>26</sup>

From then on, securities transfer control as a hook has held a mounting weight of federal surveillance of corporate operations and management, so that now the state legislative "enabling" approach emerges as passive and ministerial by comparison, the state administrative "blue sky" approach as subordinate to the federal in most states, and the procedural criteria for shareholder court action as often fruitless alongside federal statute-based actions brought through civil, administrative, class, derivative, and criminal proceedings in federal courts.

The need for the advanced "securities regulations" courses and seminars which appeared in the 1960s to deal in detail and depth with aspects of these and related statutes is not questioned and is in fact confirmed by these developments. But the developments represent too significant a shift from state to federal pre-occupation with the legal affairs of all-sized enterprises, including small and non-corporate, to await "advanced" consideration only. An offering of costs and risks of control and financing without substantial and cohesive treatment of these issues would be a crust without a large part of the center.

In the last year, three more strong threads have woven securities control closer into a pattern of general organizational control. First, through the administrative actions of rules 144-147 (later supplemented by Regulation D),<sup>27</sup> the Securities and Exchange Commission tightened regulation of the sale and resale of securities not involving any public offering ("restricted securities"), with an effect on the financial planning of small and medium-sized corporations as great as many conventional state rules on organization and capital maintenance. Second, through

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23. 73 F. Supp. 798 (E.D. Pa. 1947). For a more recent case involving application of the disclosure requirements of the Exchange Act to a "closely controlled three-person" corporation previously conducted as three partnerships, see *Levin v. Marder*, 343 F. Supp. 1050 (W.D. Pa. 1972).

24. Latty, *The Aggrieved Buyer or Seller or Holder of Shares in a Close Corporation Under the S.E.C. Statutes*, 18 LAW & CONTEMP. PROBS. 505, 506 (1953).

25. *Id.* at 505.

26. *Id.* at 509.

27. SEC Securities Act Release No. 5223, 37 Fed. Reg. 596 (Jan. 11, 1972) (codified at 17 C.F.R. § 230.144 (1972)); SEC Securities Act Release No. 5336, Fed. Sec. L. Rep. (CCH) ¶ 79,108 (Nov. 28, 1972) (codified at 17 C.F.R. § 230.251 (1972)).

private action, a proposed Federal Securities Code,<sup>28</sup> which was submitted for discussion to the American Law Institute, represented a major effort, albeit never enacted *in toto*, to integrate the present bifurcated approach, multiple registrations, and overlapping provisions affecting disclosure and transfers, into a consistent federal company registration and continual disclosure plan. An incidental result has been to make less tenable the present division of the Securities Act problems largely in advanced courses and the Exchange Act problems in a basic course. Third, the United States Supreme Court indicated, without dissent, in *Superintendent of Insurance v. Bankers Life & Casualty Co.*,<sup>29</sup> that "whatever might be available as a remedy under state law," section 10(b) of the Exchange Act should be given a broad construction, not limited to "preserving the integrity of the securities markets . . . , though that purpose is included."<sup>30</sup> The Court has confirmed this broad construction in *Carpenter v. United States*.<sup>31</sup>

As "Corporations" (or "organizations") embraces much new federal corporation law, it cannot neglect a second area commonly eclipsed, if not excluded: small business proprietorship and partnership. Agency is well gone as a separate study of common law principles and equitable considerations, as was partnership before it, and as "Corporations" would be if confined to corporations. New flexibility of form in organizational planning is now available, however, under a relaxing judicial attitude toward deviation from a single norm, under close corporation statutes enacted in the wake of Latty's pioneering drafting and "promotional" efforts in North Carolina,<sup>32</sup> and under tax provisions for tailoring features of different associational forms into a single association.<sup>33</sup> A more unitary grasp of the principal tort, contracts, equity, and tax consequences of unincorporated and incorporated enterprises together thus becomes more imperative than ever. Furthermore, neat division of subject

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28. FED. SEC. CODE (Tent. Draft No. 1, 1972).

29. 404 U.S. 6 (1971); see Note, *Bankers Life: Paying for a Corporation by Selling Its Securities Violates 10b-5*, 1972 DUKE L.J. 465. *Bankers Life* was followed in *Jannes v. Microwave Communications, Inc.*, 461 F.2d 525 (7th Cir. 1972) (reversing the district court's ruling that no federal claim was stated in a derivative action for waste and diversion of assets).

30. 404 U.S. at 12.

31. 108 S. Ct. 316 (1987).

32. See Latty, *The Close Corporation and the New North Carolina Business Corporation Act*, 34 N.C.L. REV. 432 (1956); Latty, Powers & Breckenridge, *The Proposed North Carolina Business Corporation Act*, 33 N.C.L. REV. 26 (1954).

33. Internal Revenue Code of 1954 § 7701 defines organizations for tax purposes independently of local law, so that a corporation for tax purposes may be an unincorporated association. Internal Revenue Code of 1954, §§ 1371-1379 (Subchapter S), provides some noncorporate tax advantages to certain corporations. The Treasury Department has acquiesced in the treatment of certain professional associations as valid corporations for federal income tax purposes. T.I.R. No. 1019, Rev. Rul. 70-101, 1970-1 C.B. 278; Rev. Rul. 70-455, 1970-2 C.B. 297.

matter and courses between small business ("Main Street") and public corporations ("Wall Street"), while attractive superficially, cannot be made without severance of many basic principles common to both and many basic problems involving both.

A "corporate" student, or lawyer, who does not know anything about the idea of "authority," or what an unincorporated principal or a partner is, or does, and why, will not know how to assess the control and financing problems of a joint corporate business venture, or a limited partnership with corporate partners, or a franchising relationship or arrangement among corporations. Nor will he know quite what to make of a corporate statutory provision that invites "parties to the agreement or . . . stockholders of the corporation to treat the corporation as if it were a partnership or to arrange [corporate] relations . . . in a manner that would be appropriate only among partners."<sup>34</sup> Nor will he sense the difficulty in a partnership statute that defines the partners' power to bind the partnership as including acts which "apparently [carry] on in the usual way the business of the partnership . . . unless . . . the person with whom he is dealing . . . [knows] he has no such authority."<sup>35</sup> Nor will he react critically to an alleged partnership case that tells him that "the true test of a partnership, at last, is left to be that of the relation of the parties as principal and agent."<sup>36</sup> Nor will he approach with confidence securities fraud litigation under section 10(b) of the Exchange Act, such as a recent case against a brokerage firm whose president allegedly persuaded the plaintiff customer to remove his funds from the firm's care and repose them with the president in a personal "Ponzi" scheme.<sup>37</sup> Nor will he appreciate the implications of the recent case of a personal, individual guaranty of business purchases given to the plaintiff by three partners engaged in partnership purchasing, but on which their liability was not asserted until eleven months after they had incorporated that business and had been purchasing from the plaintiff and paying as a corporation rather than a partnership.<sup>38</sup> In that case, the court suggested that the individual defendants should have given "formal" notice to the plaintiff of their switch from a partnership to a corporation.<sup>39</sup> The dissent believed that the plaintiff's loss should be chargeable to "poor communication" between the plaintiff's credit and sales departments, thereby causing the failure of the credit department to know that the plaintiff was

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34. 8 DEL. CODE ANN. tit. 8, § 354 (Supp. 1968).

35. UNIFORM PARTNERSHIP ACT § 9(1); *see, e.g.*, *National Biscuit Co. v. Stroud*, 249 N.C. 467, 106 S.E.2d 692 (1959).

36. *Harvey v. Childs*, 28 Ohio St. 319 (1876).

37. *SEC v. First Sec. Co.*, 463 F.2d 981 (7th Cir. 1972).

38. *Kingsberry Homes v. Corey*, 457 F.2d 181 (7th Cir. 1972).

39. *Id.* at 182.

dealing with a corporation,<sup>40</sup> perhaps implying that the old partner-like personal guaranty by the business "owners" of the now-incorporated business was made legally ineffective by the change in form, or that it was no longer an agreement of the parties.

Attempts to incorporate the unincorporated into published teaching material in "corporations" courses are not new. Professor Frey started in 1935 with *Corporations and Partnerships*, which omitted a discussion of agency.<sup>41</sup> Latty put agency, partnership, and "related topics in corporations" together in *Introduction to Business Associations* in 1949 (*Basic Business Associations*, with Frampton, since 1963).<sup>42</sup> Professor Conard's earlier editions on business organization in 1950,<sup>43</sup> emphasizing the relationship of agency and employment, effect a further integration, in 1972, in *Enterprise Organization: Cases, Statutes and Analysis on Licensing, Employment, Agency, Partnerships, Associations, and Corporations*.<sup>44</sup> A final bridge in mind but not yet built will have to unite the territory of these materials with larger areas of the land lying in the leading casebooks on corporations.<sup>45</sup>

Meanwhile, parallel work to distill and clarify the law will proceed apace, and will, if dreams come true, help trim it for the academic squeeze. Professor Loss, a Reporter for the proposed ALI Federal Securities Code, undertook to reduce the federal statutory material to a single, compact, smooth-flowing, understandable instrument that could be hailed with swift passage by a grateful Congress. Congress balked, but the proposed Code is still a nutshell of statutory securities law as it should be, just as the proposed American Law Institute Tentative Drafts of Principles of Corporate Governance are attempted clarifications of what the state law of intra-corporate powers, duties, and liabilities are or should be.

In the same spirit are hands being laid on the Uniform Partnership and Limited Partnership Acts, comprehensible only in conjunction with

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40. *Id.* at 184.

41. A. FREY, *CASES AND STATUTES ON BUSINESS ASSOCIATIONS* (1935); *see also* A. FREY, *CASES AND MATERIALS ON CORPORATIONS AND PARTNERSHIPS* (1951).

42. E. LATTY, *INTRODUCTION TO BUSINESS ASSOCIATIONS: CASES AND MATERIALS* (1949); E. LATTY & G. FRAMPTON, *BASIC BUSINESS ASSOCIATIONS: CASES, TEXT AND PROBLEMS* (1963).

43. A. CONARD, *CASES ON THE LAW OF BUSINESS ORGANIZATION: AGENCY AND EMPLOYMENT RELATIONS* (1950); *see* A. CONARD, *CASES ON THE LAW OF BUSINESS ORGANIZATION: AGENCY—EMPLOYMENT—PARTNERSHIP—JOINT ENTERPRISES AND VENTURES* (2d ed. 1957).

44. A. CONARD, R. KNAUSS & S. SIEGEL, *ENTERPRISE ORGANIZATION: CASES, STATUTES AND ANALYSIS ON LICENSING, EMPLOYMENT, AGENCY, PARTNERSHIP, ASSOCIATIONS AND CORPORATIONS* (1972). A third edition of this book was published in 1982.

45. W. CARY, *supra* note 19; A. FREY, C. MORRIS & J. CHOPER, *CASES AND MATERIALS ON CORPORATIONS* (1966); N. LATTIN, R. JENNINGS & R. BUXBAUM, *CORPORATIONS: CASES AND MATERIALS* (4th ed. 1968); R. STEVENS & H. HENN, *supra* note 19.

comprehensible common-law and equity doctrines which the Acts aimed ambivalently to eliminate or codify. A new Uniform Small Enterprises Act could bring to partnership, at last, the simpler touch of the drafters of close corporation acts. The attempt to subsume these organizational forms under a single statute would isolate material for discard and illuminate material for academic regard. Such reform would benefit the law and lawyers while demonstrating concurrently the feasibility of putting these problems academically and practicably together.

As "corporations" makes room for non-corporations, let it also admit non-business corporations, a third area currently divorced from corporations, if curricularly recognized at all. In the last hundred years the production of goods and services, the accumulation of wealth, and the application of legal talent and ingenuity have been associated with business corporations. Organization for profit has furnished the conflicts, the precedents, and the procedures.

The future, however, seems more bound than before to organizations that may generate motivations beyond profit for taxable distribution to "owners": nonprofit corporations, cooperatives, professional corporations, community development corporations, foundations, institutes, and certain unincorporated associations. Basic organizational inquiry, therefore, should not be cut off from the features and problems of nonprofit organizations. It is true that the purposes of these organization drastically alter the context. But even without the interesting legal question of profit-nonprofit borderlines, organizational issues involving non-business resources, costs, and controls may be usefully analogized to business precedents, with mutual advantage to the understanding and legal development of both types.

If the goal of embracing all that is essential seems possible, though hard, there is still the unsolved, perhaps unsolvable, accommodation of a fourth area vital to "Corporations": an understanding of accounting, the symbolic language in which capital, costs, risks, profits, and prospects are assessed and measured. Accounting illiteracy among law students continues to be widespread, for law schools still eschew subject entrance requirements and still purport not to teach basic communication in such symbolic languages.

Organizations, those in control of organizations, accountants, and even some investors are under legal strictures to communicate in accounting language about matters subject to legal controls, and a total ignorance of the language can be totally incapacitating for analysis of many legal issues. Professor Homer Kripke made plain, for example, the sterility of approaching the key phrase of "material fact" in the law of disclosure without reference to financial statements and accounting prin-

principles and practices.<sup>46</sup>

Of "legal accounting" books, only one, Professor Katz' little volume<sup>47</sup> (230 pages) "for students and . . . lawyers . . . [having] no acquaintance with the subject,"<sup>48</sup> was directed primarily to basic remedial help. It was designed in 1954 to be taken "before the courses in corporation law and taxation,"<sup>49</sup> which is rightly said but not readily done in a compressed curriculum where basic courses presuppose this basic skill.

Latty tried a different alternative, more than forty years ago, when he interrupted his corporations class for a few days or weeks to inject his own simplified, but relatively complete, basic course in bookkeeping and accounting. The solution was admirably direct, but in view of the cost in course time, necessarily short-term.

No long-term solution completely inside or completely outside the afflicted courses may be possible without new innovative arrangements involving the institution itself and the courses suffering most from the condition. The law school could subsidize special inducements or requirements, possibly impinging on first-year free time, that would combine the use of self-help guides, such as the basic accounting books for lawyers published by continuing legal education institutes,<sup>50</sup> short-course orientations, demonstrations, videotapes, and computerized forms of programmed learning that have proved successful in language and learning fields in reducing time and increasing efficiency in the acquisition of basic skills.

Attempts to bring all these areas into the focus of one academic subject, especially into one course, will be resisted as embracing too much too superficially. The painful choices, though, seem inevitable. The day is coming none too soon—and rightly, in my view—when the second year of law will be the final one for those who choose to make it so. The second year will call for work in depth and detail on matter already related in a general complete overview. It will be differentiable from the first year by teaching methods and institutional provisions designed for such advanced work and understanding. (The third year, if taken at all, would put the individual more completely on his own.)

A "subject" that cannot be made available in one course in such a regimen, and cannot be grasped profitably in broad, cohesive outlines by even a first-year student, will survive only as a specialty of limited inter-

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46. See Kripke, *Rule 10b-5 Liability and "Material" "Facts,"* 46 N.Y.U. L. REV. 1061 (1971).

47. W. KATZ, INTRODUCTION TO ACCOUNTING (1954).

48. *Id.* at iii.

49. *Id.*

50. B. FERST & S. FERST, BASIC ACCOUNTING FOR LAWYERS (ALI) (2d ed. 1965); C. OEHLER, ACCOUNTING FOR LAWYERS (PLI) (2d ed. 1953).

est. Legal problems in the context of basic organizational planning should escape that fate. Against other contexts of issues contesting for the finite hours of the main curriculum, these are by no measure too settled, too esoteric, too peripheral, or too mundane. Not just to satisfy the search for the identity of "organizations," nor just to preserve the teaching spirit of Latty as he concentrated it on this section of law, these issues and problems should survive as a curricular core together, as does his teaching message, by reason of their natural alliance with the central concerns of education, law, social policy, and life.