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Charles O'Kelley

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SYMPOSIUM ESSAYS

FOREWORD: THE MANY PASSIONS OF TEACHING CORPORATIONS

*Charles R.T. O'Kelley**

Teachers of Corporations¹ share a passion for their subject and consider this first course in the business law curriculum to have fundamental importance for all law-trained professionals. Seemingly, however, we agree on little else, including the substantive focus of the course, the nature of the course materials, and the insights that teachers should convey. In fact, Corporations differs dramatically from school to school. Some teachers focus substantial attention on unincorporated business associations, while others cover only corporation law. Some who teach exclusively about the corporation emphasize closely held firms, while others highlight the law related to publicly traded entities. Likewise, teachers have

* Kilpatrick Professor of Law, University of Georgia. J.D., University of Texas, 1972; LL.M., Harvard University, 1977.

¹ The Corporations course often goes by other names, with Business Associations or Business Organizations being among the more prominent alternatives. Still, "Corporations" is the dominant name, perhaps because the central focus of the introductory course is the corporation and the state law statutory and judicial rules that comprise corporation law. I herein use the term "Corporations" to refer to all such introductory courses.

dramatically different views on the extent to which Corporations should introduce federal securities law; stress the Delaware corporation code or the Model Business Corporations Act; draw on the insights learned from economics, sociology, history, and cognitive psychology; scrutinize corporations' social responsibility; attempt to teach lawyering skills such as negotiation, drafting and counseling; or highlight the ethical dimensions of corporate law and practice.²

The diversity in the content and focus of the Corporations course is echoed by the striking contrast between the student audiences addressed by Corporations teachers at elite and non-elite schools. The professional aspirations and horizons of typical students in the Corporations course at elite law schools³ differ dramatically from the expectations and aspirations of the average student at schools lower on the reputational ladder. The average student at an elite law school, regardless of his or her class rank, has the likely post-graduation option of a position at an elite law firm at which a sophisticated understanding of corporate law presumptively will be value-adding. The average student at non-elite schools enters the Corporations course with a growing understanding that the elite law firm positions are almost certainly out of reach, and with the assumption that the Corporations course will have value to him or her only as a bar course, or perhaps as an associate at a non-elite law firm that primarily represents small, local businesses.

While teachers of Corporations may face very different types of student audiences, students' beliefs about their professors do not seem to differ depending on the reputational niche of their school. Thus, members of the bar—our former students—generally believe that teachers of the Corporations course are similar in one important way: We share identical viewpoints with respect to the relative importance of scholarship and teaching, and with respect to the

² For survey data concerning the content and structure of the introductory Corporations course, see Robert Thompson, *The Basic Business Associations Course: An Empirical Study of Methods and Content*, 48 J. LEGAL EDUC. 438 (1998).

³ I have no exact definition of the term "elite law schools." I mean it to refer to a very small proportion of the total law school population, including Harvard, Yale, Stanford, Columbia and any other schools that confer access to elite post-graduate employment opportunities for most of their students.

proper focus of scholarly endeavor. Scholarship, and the more theoretical the better, is the road to tenure, promotion and professional happiness and success; teaching is of relatively little importance in the reward system and should not be allowed to divert an ambitious professor from her scholarship.⁴

Given these differences in approaches, contents, and audiences, it is tempting to conclude that the term "Corporations course" is a mere euphemism conveying no meaningful understanding of what a particular course carrying that name is about, and that teachers at polar ends of the reputational spectrum of American law schools have little to talk about and nothing to learn from each other concerning the teaching of Corporations. Further, given law professors' presumed strong preference for scholarly investigation of profound topics, and the noted lesser importance of good teaching in the law school reward system, one might also conclude that the actual *teaching* of Corporations is not a topic of scholarly interest to teachers of the subject.

This Symposium belies such skeptical views of the Corporations course and those of us who teach it. The 1999 Teaching Corporate Law Conference was organized around teachers' self-identified passions in teaching Corporations—the themes, insights, skills or puzzles about which they are most intrigued or enthused. Thirty-seven professors made presentations at the Conference⁵; twenty-eight have converted their presentations into the essays in this Symposium edition, which have been grouped substantively rather than in the exact order presented at the Conference.

Conference participants ranged in experience from less than one year to more than thirty years of teaching. For those of us on the more senior end of this scale, the Conference was a time to reflect

⁴ AMERICAN BAR ASSOCIATION, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 5 (1992).

⁵ The Teaching Corporate Law Conference was held at the University of Georgia School of Law on October 15-16, 1999. All participants are indebted to the University of Georgia School of Law, Dean David Shipley, the Kilpatrick Chair endowment, Aspen Publishers, and Foundation Press for arranging or providing financial and in-kind contributions supporting the Conference.

on how far Corporations and Corporations teachers have come since 1970.

Thirty years ago, the typical Corporations course looked little different than the usual first-year course in Contracts or Torts. Case analysis was the dominant methodology, with a traditional focus on comparing and contrasting the majority and minority judicial or statutory approaches to a particular issue. Fiduciary duty was normally taught as a tool by which courts arbitrated intra-corporate disputes, protecting shareholders whenever insiders' conduct was "unfair." Case law was parsed with a view to determining whether the majority or minority approaches to a particular issue offended our abstract sense of "fairness." Teachers and casebooks provided students with no insight into the relationship between fiduciary duty and the economic underpinnings of the incorporated firm, or other analytical tools to determine what constitutes "unfairness." Very little cohesive treatment of state corporation law was provided, both because the large, coherent body of Delaware case law did not then exist and because the corporate governance role of federal securities law loomed much larger than it does today.

The essays in this Symposium paint a picture of the modern Corporations course that is remarkably unlike the Corporations course of 1970. Today, Corporations is a rich mosaic of central themes and methodologies, representing both the diverse viewpoints of those who teach it and a substantive complexity and richness that is unmatched in other business law offerings.

The Symposium begins with essays examining how to teach fiduciary duty and the role of Delaware corporate law. As Delaware continues the process of broadening, deepening, adjusting, and clarifying the judicial doctrines and procedures related to the resolution of intra-corporate disputes, teachers are faced with difficult pedagogical choices. These first essays reveal the ongoing puzzle that law professors attempt to solve in order to best educate their students. What is the real-world importance of *Smith v. Van Gorkom*⁶? Is it the dominant fiduciary duty case of the last century, or a historical relic? If it is to be extensively covered, as it is in most

⁶ 488 A.2d 858 (Del. 1985).

courses, how do we enable students to understand the highly complex merger setting in which the case arose? What are the implications of recent trends in Delaware law? What is the underlying nature of Delaware law? What motivates its lawmakers and explains the nature of their decisions? What should lawyers understand a Delaware Supreme Court decision to mean? Given the dominance of Delaware as the state of incorporation for a majority of publicly traded corporations, should all Corporations courses contain a significant emphasis on the Delaware corporation code?

This part concludes with an examination of a corporation's relationship with its creditors. Separate from the fiduciary concerns of corporate management, the limitations to the limited liability status of corporate owners and directors provide another set of issues for the Corporations teacher.

The next essays puzzle over related questions: Should we, and if so, how can we give students in the introductory course some meaningful understanding of corporate finance in a world dominated by frighteningly complex financing devices, arguably the most complex of which are the so-called derivative securities? Few of us yet dare to attempt more than the most fundamental introduction to the complexity of corporate finance. These essays explain how introducing a basic understanding of financial theory into the Corporations course facilitates a gradual introduction to more complex topics in corporate finance, while giving students a more sophisticated understanding of the basic role played by corporate securities.

The Symposium next turns to a consideration of the thematic and organizational benefits derived from structuring the Corporations course around a fundamental theme or method of analysis. The topics here include, *inter alia*, a detailed evaluation of how to use Berle and Means's early twentieth-century identification of the core problem facing publicly traded firms—the separation of ownership and control—as an organizing theme, a step-by-step guide to the use of contractarian analysis to critique particular judicial decisions, an evaluation of the role of securities law and comparative law in the introductory course, and a consideration of the advantages and disadvantages of using the Corporations course to introduce

students to both incorporated and unincorporated business associations.

Central to the MacCrate Report's searching critique of legal education was the assertion that law schools should do a better job of instilling an understanding of the ethical dimensions of law practice, and of providing students with negotiating, counseling, and other "non-scholarly" skills essential to professional success. The Symposium delves deeply into how the Corporations course can play a meaningful role in transforming law students into effective and ethical corporate lawyers. Given the coverage demands associated with the introductory course and the dissociation of most professors from the actual practice of law, this is a daunting challenge. Essays in this part explore the use of negotiation, transactional and traditional materials to teach problem-solving and "deal-making" skills and to ensure that students understand the fundamental nature of ethical rules governing the corporate law practitioner.

The Symposium concludes with a provocative examination of corporate social responsibility and the basic course. Should we be content to teach students the ins and outs of the corporation, understood as a legal device designed to provide a structure governing the relationship between its shareholders and the directors who manage it? Or should we also introduce students to the social role played by incorporated firms in damaging our environment, in exploiting workers in underdeveloped countries, and in continuing employment systems that discriminate against women and minorities? The implications of the distinction between the corporation understood as a state-provided, standard-form structure governing relations between shareholders and managers, and the corporation understood as the underlying economic organization whose equity investors chose to utilize the state-provided corporate form, are often overlooked. Thus, when we introduce corporate responsibility issues into the Corporations course, are we adding to students' understanding of corporate law in the former sense or, instead, providing our students with a blueprint for how the corporation could be transformed to give greater rights to other corporate constituencies? The essays in this part provide emphatic and detailed arguments that we are doing some of both, and that corporate social responsibility is a core topic

that permeates state corporation law and federal disclosure regimes, and should therefore be emphasized in the basic course.

In sum, this Symposium illustrates that the Corporations course is a vibrant, organic phenomena, ever-changing and present in as many forms as there are teachers. The future is certain to present even more diversity in approach and content. Still, as the Symposium demonstrates, the apparent diversity masks the surprising similarity among teachers of Corporations in their passion for the subject, for helping their students who so desire to become value-adding corporate lawyers, and for engaging in an ongoing scholarly dialog about the most important thing we do—teaching corporate law.

