

## Employment as Transaction

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### I. INTRODUCTION

Revolution is in the air. The corridors of American law schools are teeming with talk of curricular reform as faculties and administrators across the country contemplate the implications of the *Carnegie Report's* recent assessment of the quality of legal education.<sup>1</sup> Many of the criticisms are familiar: graduating law students lack practical experience and an appreciation for professional values.<sup>2</sup> But unlike past indictments, the *Carnegie Report* stands poised to be the first to inspire concrete changes in curriculum and pedagogy.<sup>3</sup> In the same

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<sup>1</sup> WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter THE CARNEGIE REPORT].

<sup>2</sup> *Id.* at 126–28. The *Carnegie Report's* most recent predecessor, the American Bar Association's "MacCrate Report," similarly concluded that students were wanting in these fundamental areas. See LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM, 1992 A.B.A. SEC. ON LEGAL EDUC. AND ADMISSIONS TO THE BAR [hereinafter THE MACCRATE REPORT].

<sup>3</sup> While the MacCrate Report also generated significant discussion within the legal academy, it has resulted in only minimal change in legal teaching and curriculum. See, e.g., Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WIS. INT'L L.J. 295, 307–10 (2006) (discussing that while clinical programs have expanded as a part of law school curriculum, at most schools they can accommodate only a minority of students); Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 478 (2002) (noting

year as its release, Harvard Law School, the pioneer of the predominant method of law school pedagogy, announced a major curricular overhaul,<sup>4</sup> and to date, at least three national law schools have followed suit.<sup>5</sup>

Yet the legal academy has much to consider on the subject of professional training before picking up the Carnegie gauntlet. Preparation for practice is not a unitary issue. For many of the same reasons that law schools have marginalized skills instruction, they have also long sacrificed transactional training in favor of litigation preparation.<sup>6</sup> This bias persists in the current “skills” curriculum, which mostly emphasizes brief writing, advocacy, and litigation-based clinic opportunities.<sup>7</sup> This bias also goes wholly unmentioned in the *Carne-*

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that most law students will graduate without ever being exposed to transactional skills); Alice M. Noble-Allgire, *Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal Course*, 3 NEV. L.J. 32, 32–33 (2003) (urging more professors to incorporate skills training into traditional legal courses). See generally THE CARNEGIE REPORT, *supra* note 1, at 190 (“[E]fforts to improve legal education have been more piecemeal than comprehensive. Few schools have made the overall practices and effects of their educational effort a subject for serious study. Too few have attempted to address [their] inadequacies on a systematic basis.”).

<sup>4</sup> The new curriculum features foundational courses in legislation and regulation and international and comparative law, five delineated upper level “courses of study,” the adoption of a required complex-problem solving course designed to simulate a real life practice situation, and expanded clinical opportunities. See Elaine McArdle, *A Curriculum of New Realities*, HARV. LAW BULL. (Harvard Law Sch., Cambridge, Mass.), Winter 2008, at [PIN CITE], available at [http://www.law.harvard.edu/news/bulletin/2008/winter/feature\\_1.php](http://www.law.harvard.edu/news/bulletin/2008/winter/feature_1.php).

<sup>5</sup> See Vesna Jaksic, *For One Law School, the Third Year is Getting Real*, NAT’L L.J., Mar. 21, 2008, at 1 (reporting that Washington and Lee University School of Law requires all third year law students to participate in legal work with real clients as a replacement for traditional courses); Katherine Mangan, *New Hampshire Allows Law Students to Demonstrate Court Skills in Lieu of Bar Exam*, CHRON. OF HIGHER EDUC., July 4, 2008, at 1 (describing a program at Franklin Pierce Law Center in which selected students take specialized courses during the last two years of law school in which they take depositions, argue in front of judges, and participate in a mock trial); Lauren Robel, Letter, IND. L. UPDATE (Univ. of Ind. Sch. of Law, Bloomington, Ind.), July/Aug. 2007, at [PIN CITE], available at <http://www.law.indiana.edu/publications/ilu/200708.html> (discussing changes to the curriculum at the Indiana University School of Law requiring first year students to take a course regarding the “economics and values of the profession”).

<sup>6</sup> See Fleischer, *supra* note 3, at 485; Larry T. Garvin, *The Strange Death of Academic Commercial Law*, 68 OHIO ST. L.J. 403, 405, 421 (2007); Eleanor W. Myers, *Teaching Good and Teaching Well: Integrating Values with Theory and Practice*, 47 J. LEGAL EDUC. 401, 405 (1997); Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59, 91–93 (2007).

<sup>7</sup> See Edward A. Dauer, *Reflections on Therapeutic Jurisprudence, Creative Problem Solving, and Clinical Education in the Transactional Curriculum*, 17 ST. THOMAS L. REV. 483, 485 (2005) (“Rights-based and public-interest litigation is still the dominant flavor of

*gie Report*. Adoption of the *Carnegie Report* prescription without careful self-reflection thus risks replicating this long-standing error.

This Article joins a growing body of literature that applies the traditions of the “Scholarship of Teaching and Learning” movement to the workings of the legal academy.<sup>8</sup> This Article argues that, as part of the effort to implement the *Carnegie Report*, law schools must specifically address their primordial weakness in preparing students for transactional practice and posits the basic employment law course as an appropriate platform for such an initiative. The state of transactional law education has been much lamented by commercial law and business-oriented faculty,<sup>9</sup> and efforts to enhance training in this area have generally focused on developing skills-focused “deals” courses or adding skills components to basic contracts and business law offerings.<sup>10</sup> While such approaches create welcome opportunities for transactionally-minded students, they do not address the marginalization of transactional thinking within the larger curriculum. Ultimately, transactional skills are not inherently connected to the business and commercial law fields, but rather are one application of a

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clinical offerings.”); Schulze, *supra* note 6 (concluding, based on survey of law schools’ curricular offerings and course content, that only slightly over thirty percent of mandatory legal research and writing courses include transactional drafting). A noteworthy exception to the predominance of litigation-based skills opportunities is the Integrated Transactional Practice course offered at Temple University. See Myers, *supra* note 6, at 406–07.

<sup>8</sup> See ERNEST L. BOYER, THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORiate [PIN CITE] (1990). The Scholarship of Teaching and Learning (SOTL) is described as an effort to apply the methods and rigor of scholarship to the workings of the classroom. See MARY TAYLOR HUBER & PAT HUTCHINGS, THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, THE ADVANCEMENT OF LEARNING: BUILDING THE TEACHING COMMONS 18 (2005). For some examples of law school-related work in this tradition, see Andrea A. Curcio et al., *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271 (2008); Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413 (2007); Alice M. Thomas, *Laying the Foundation for Better Student Learning in the Twenty-First Century: Incorporating an Integrated Theory of Legal Education into Doctrinal Pedagogy*, 6 WIDENER L. SYMP. J. 49 (2000).

<sup>9</sup> See, e.g., Garvin, *supra* note 6, at 405, 421; Schulze, *supra* note 6, at 100; Debra Progrund Stark, *See Jane Graduate: Why Can’t Jane Negotiate a Business Transaction?* 73 ST. JOHN’S L. REV. 477, 487–88 (1999).

<sup>10</sup> See, e.g., Fleischer, *supra* note 3, at 491–92 (describing Columbia University School of Law’s “deals program,” which includes courses based on simulated transactions and actual deal papers presented by area lawyers); Seth Freeman, *Bridging the Gaps: How Cross-Disciplinary Training with MBAs Can Improve Transactional Education, Prepare Students for Private Practice, and Enhance University Life*, 13 FORDHAM J. CORP. & FIN. L. 89, 95 (2008) (urging programs in which law students work with business students to enhance skills involving corporate negotiations).

broader theory of preventive law practice.<sup>11</sup> In this respect, they reflect a type of service that any well-trained lawyer ought to be able to provide—the ability to structure a relationship consistent with client intent while minimizing future risk—regardless of the legal discipline. To train students to perform this type of service, law school faculty in all substantive law areas need to seek out the transactional aspects of their fields of expertise and leverage those teachable moments across the curriculum. In a twist on the old adage, it is law professors who must be retrained to think like lawyers.

Employment law is an area well suited to advancing this goal. In recent decades, the employment law field has migrated away from its public law tradition toward a model in which private ordering holds significant sway. State courts appear to be rolling back the progress employees made in asserting breach of contract claims in the early 1980s by treating employer-drafted disclaimer language as dispositive of employees' at-will status.<sup>12</sup> Under employment discrimination laws, courts now examine employer efforts to prevent and respond to unlawful behavior in assessing vicarious liability<sup>13</sup> and consistently route statutory claims to private arbitration based on ordinary contract

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<sup>11</sup> Preventive law practice aims to “help their clients achieve their personal or organizational or familial or corporate goals, by optimizing the arrangements that are relevant to those goals and by minimizing the chance that the purpose is confounded with unnecessary legal risks.” Edward A. Dauer, *Preventive Law Before and After Therapeutic Jurisprudence*, 5 PSYCHOL. PUB. POL'Y & L. 800, 801 (1999); see also Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 16 (1997); see *infra* Part II.C. See generally Myers, *supra* note 6, at 406 (“[T]ransactional teaching’ is not a question of subject matter . . . . Rather we use the term to signal a perspective shift. . . . We encourage students, first, to assume the viewpoint of the actors and their lawyers rather than that of impartial decision-makers and, second, to look at the transaction as it unfolds, not after it has become a problem.”).

<sup>12</sup> See, e.g., *Dore v. Arnold Worldwide*, 139 P.3d 56, 59 (Cal. 2006) (affirming summary judgment for employer on plaintiff's breach of implied job security contract claim based on “terminable at-will” proviso in unilaterally drafted offer letter despite employer promises of long-term employment and practice of terminating workers only for cause); *Levitan v. Apple Computer, Inc.*, No. CV795189, 2003 LEXIS 3972, at \*2 (Cal. App. Dep't Super. Ct., April 18, 2003) (affirming summary judgment for employer based on terminable at-will language in unilaterally drafted offer letter despite express promise by human resources manager during hiring process that plaintiff could retain residence outside of state and commute to work); see also *infra* Part II.B.1.

<sup>13</sup> See *Burlington Indus., Inc. v. Ellerth* 524 U.S. 742, 765 (1998) (recognizing affirmative defense to liability where employer exercised reasonable care to prevent and correct harassing behavior and that unreasonably failed to take advantage of employer's preventative or corrective procedures); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (same); *infra* Part III.B.1.

principles.<sup>14</sup> Along with these doctrinal developments, employers are becoming more aware of personnel matters as an area of legal exposure that must be managed and controlled. Companies routinely require starting employees to sign form documents, such as arbitration agreements and covenants not to compete,<sup>15</sup> and it has become standard practice for companies to maintain formal policies on everything from sexual harassment to dispute resolution.<sup>16</sup> Employment law scholarship too has recognized the broadening trend, citing the internal compliance behavior of employers as an important site of scholarly inquiry.<sup>17</sup> Thus, an emerging body of literature has begun to theorize the role of corporate actors and their agents, particularly their lawyers, in achieving the normative goals of workplace regulation.<sup>18</sup>

As of yet, however, there has been little to no assessment of how these interrelated developments in employment law scholarship, jurisprudence, and practice affect the domain of the classroom. This

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<sup>14</sup> See *Circuit City v. Adams*, 532 U.S. 105, 119 (2001) (holding employment contracts to be “transactions involving commerce” subject to the Federal Arbitration Act unenforceable only on grounds recognized under general state contract law); see *infra* Part III.B.

<sup>15</sup> I have described this trend in several prior articles. See generally Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637 (2007) [hereinafter Arnow-Richman, *Rise of Delayed Term*]; Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963 (2006) [hereinafter Arnow-Richman, *Worker Mobility*].

<sup>16</sup> See, e.g., Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 976 (1999) (describing employers’ internal implementation of “private legal systems” to address workplace disputes); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2122 (2003) (describing employers’ wide-spread and aggressive use of sexual harassment policies).

<sup>17</sup> See Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 908 (1996) (describing emergence of new institutionalist perspective in organizational analysis and its relationship to law and society scholarship); Michelle Travis, *Lashing Back at the ADA*, 76 TENN. L. REV. (forthcoming 2009) (manuscript at 48–50, on file with author) (describing the “new institutionalist” agenda in employment law scholarship); see *infra* Part III.B.

<sup>18</sup> See, e.g., Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25 (2007); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myths*, 105 AMER. J. SOC. 406 (1999); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise Of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Schultz, *supra* note 16; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Travis, *supra* note 17.

Article fills that gap. It calls for the redeployment of the basic employment law course as a skills-doctrine hybrid that integrates the analytical and applied aspects of transactional lawyering through practice-focused exercises and discussion. In so doing, it offers a pedagogical prescription that embraces the crisis in transactional training, the legacy of recent developments in employment law and practice, and at least a subset of the challenges identified in the *Carnegie Report*.<sup>19</sup>

The Article proceeds as follows: Part II sets out the key challenges facing legal education, intersecting the recommendations of the *Carnegie Report* with the long-standing curricular divide between advocacy work and transactional law practice in the legal academy. Part III examines the state of employment law in the curriculum and on the books, demonstrating that the field is ripe for creative reform showcasing the growing transactional dimensions of the practice. Part IV implements the Article's theoretical contribution, offering a concrete illustration of the use of transactional law pedagogy in the employment law course. Finally, Part V offers preliminary thoughts on the future of the law school curriculum and the "Scholarship of Teaching and Learning" with an eye toward encouraging and supporting creative and integrative law school teaching.

## II. SKILLS VERSUS DOCTRINE, AND OTHER (TRUE AND FALSE) CURRICULAR DIVIDES

The 2007 *Carnegie Report* offers a serious critique of what goes on in our law schools.<sup>20</sup> Principal among the concerns raised by the *Carnegie Report* is the lack of instruction in the important area of practical

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<sup>19</sup> This Article focuses specifically on the *Carnegie Report's* recommendations on integrating practical training. It does not directly address the *Carnegie Report's* parallel critique and recommendations concerning law schools' treatment of professional values. However, invoking realistic practice situations in the classroom inevitably leads to questions about professionalism and ethics. See Myers, *supra* note 6, at 411–19 (describing how simulated transactions create a rich context for raising and exploring questions of professional responsibility). In that respect, such issues are addressed here as well, albeit less comprehensively.

<sup>20</sup> THE CARNEGIE REPORT, *supra* note 1. A similar and somewhat more proscriptive exploration of the subject can be found in the Clinical Legal Education Associations report published shortly after the release of the *Carnegie Report*. See ROY STACKEY ET AL., CLINICAL LEGAL EDUC. ASS'N, BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereinafter CLEA]. Because the *Carnegie Report* was first in time and seems to have more thoroughly infiltrated the legal academy's consciousness, I refer principally to its pronouncements while recognizing that others have identified and thoughtfully presented similar concerns about the state of legal education.

training.<sup>21</sup> Schools do well preparing students to think like lawyers, but they do little to assist them in being lawyers.

This assessment, while accurate and valuable, oversimplifies the challenges facing legal education in one significant respect. The *Carnegie Report's* characterization of the “apprenticeship of practice”<sup>22</sup> and its calls for reform within the legal academy accept the implicit but institutionally pervasive construct of the lawyer as a legal advocate principally concerned with the resolution of disputes. The *Carnegie Report* does not consider the degree to which essential components of cognitive learning as well as practical skills—those necessary to a transactionally-focused practice—are not merely segregated from mainstream doctrinal instruction but largely unrepresented in any aspect in the current curriculum.

This Part sets forth the principal findings of the *Carnegie Report* before turning to the special problem of transactional skills training. Transactional skills, and indeed transactional thinking, have been marginalized within the legal academy owing to the supremacy of the institution’s public law focus, a decline in business and commercial law teaching and scholarship, and, most fundamentally, a misunderstanding of the nature of transactional practice. Contrary to the prevailing view of transactional planning as a distinctly private law competency, transactional skills and thinking are inherent components of a general legal practice, broadly applicable to all substantive disciplines. This Part concludes by drawing on the scholarship of preventive law theory to build a foundation for a new “pedagogy of practice” that will further the *Carnegie Report's* goal of enhancing practical training and will address the legal academy’s particular weaknesses in preparing students for transactional practice.

#### A. *An Intellectual Success, a Practical Failure*

In 2007, the Carnegie Foundation for the Advancement of Teaching issued its much awaited report on the state of American legal education. The Foundation’s conclusions are at best mixed and at worst an indictment of serious and long-neglected shortcomings in the current system.

Law schools get high marks in the first of three identified “apprentices” to professional competence—the transmission of cognitive knowledge.<sup>23</sup> The *Carnegie Report* credits law schools’ signature peda-

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<sup>21</sup> THE CARNEGIE REPORT, *supra* note 1, at 77; CLEA, *supra* note 20, at 16–18.

<sup>22</sup> THE CARNEGIE REPORT, *supra* note 1, at 27.

<sup>23</sup> *Id.* (using the concept of “apprenticeship” as a “metaphor [extending] to the whole range of imperatives confronting professional education . . . [which are to

gogy, the Socratic dialogue, with quickly inculcating students into the art of legal thinking.<sup>24</sup> In short order, entering law students learn to parse and evaluate cases, articulate and apply legal rules, identify and categorize legal issues, and formulate and counter legal arguments.<sup>25</sup> In this respect, the *Carnegie Report* deems the structure of legal education a relative success.<sup>26</sup>

From there, things deteriorate quickly. Law schools do not carry through on the two remaining apprenticeships; the pedagogies of practice and of professional identity.<sup>27</sup> With respect to the former, the standard curriculum provides limited skills instruction in a few discrete (and often optional) courses typically taught by faculty of lower academic status than the so-called substantive faculty.<sup>28</sup> Students are not exposed to the “shadow pedagogy” of learning in context; they are only infrequently taught through the perspective of clients in real or simulated cases.<sup>29</sup> In this way, law school differs markedly from other institutions of advanced professional learning, such as medical school where patient contact and clinical experience is a principal site of learning early on and throughout students’ matriculation.<sup>30</sup> As a result, law students graduate ill-equipped to handle the complexity of client-centered situations and are unsure how to respond to practical exigencies, as well as moral concerns, that do not

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prepare students] to think, to perform, and to conduct themselves like professionals”).

<sup>24</sup> See *id.* at 185–86.

<sup>25</sup> See *id.* at 186.

<sup>26</sup> See *id.* (concluding that law schools’ ability to take students from “a wide variety of social backgrounds and undergraduate experiences” and teach them to “think like a lawyer . . . is an accomplishment of the first order that deserves serious consideration from educators . . . [in] other professional fields”).

<sup>27</sup> See *id.* at 28–29.

<sup>28</sup> See THE CARNEGIE REPORT, *supra* note 1, at 87–88.

<sup>29</sup> See *id.* at 56–57.

<sup>30</sup> See *id.* at 57 (likening the omission to training doctors by focusing instruction on disease process rather than patient care); Fleischer, *supra* note 3, at 483 (“New lawyers do not know how to swim on their own; they have studied the backstroke, the breaststroke, the crawl, and the butterfly, but they haven’t spent any time in the water.”).



fit within the formal legal schema.<sup>31</sup> In short, graduates exit law school thinking like students rather than professionals.<sup>32</sup>

This is by no means a novel observation. The American Bar Association's 1992 MacCrate Report similarly faulted law schools in the key areas of lawyering skills and professionalism, as the *Carnegie Report* acknowledges.<sup>33</sup> But the *Carnegie Report* brings to light an important additional dimension to the problem: the lack of integration between law schools' existing instruction in skills and professionalism and the core cognitive apprenticeship that dominates students' legal education.<sup>34</sup> A hallmark of the successful professional is the ability to integrate and bring to bear multiple competencies—expert knowledge, practical experience, and moral judgment—in circumstances of uncertainty and complexity. In this way, efforts to invigorate training in skills and professionalism through a strategy of adding supplemental courses, the dominant institutional response to the MacCrate Report, have missed the mark.<sup>35</sup> According to the *Carnegie Report*, what is needed is an “integrative” rather than “additive” approach to curricular reform, one that appreciates and imparts the holistic nature of professional expertise.<sup>36</sup>

### B. *The Transactional Thinking Gap*

So far, so good. But what are the essential skills and practical knowledge that must be integrated into the doctrinal curriculum? The *Carnegie Report*, as a study in teaching and learning, is principally

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<sup>31</sup> As the *Carnegie Report* explains, the case dialogue method is a “deliberate simplification . . . [consisting] in the abstraction of the legally relevant aspects of situations and persons from their everyday contexts. . . . By contrast, the task of connecting . . . [legal] conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the method.” THE CARNEGIE REPORT, *supra* note 1, at 187.

<sup>32</sup> *Id.* at 188 (“The result [of the lack of direct training in professional practice] is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner . . .”).

<sup>33</sup> *Id.* at 189.

<sup>34</sup> *See id.* at 58–59 (noting that while “practical courses in lawyering and clinical-legal education make an essential contribution to responsible professional training . . . [b]ecause case-dialogue teaching is seldom explicitly connected with clinical teaching, few law schools achieve the full impact that an integrated ensemble [experience] could provide”).

<sup>35</sup> *See id.* at 189–90. The *Carnegie Report* favorably excepts particular initiatives at a few schools including New York University and City University of New York. *Id.* at 197. Another important counter-example is the Integrative Transactional Program at Temple University. *See Myers supra* note 6, at 406–07 (describing Temple's program).

<sup>36</sup> THE CARNEGIE REPORT, *supra* note 1, at 191.

concerned with assessing the existing pedagogy of legal education and recommending sites of reform. It tells us relatively little about what an integrative curriculum actually looks like, and even less about the content of any of its components.

Yet the *Carnegie Report* does not write on a clean slate. Its understanding of the apprenticeship of practice is informed by what is currently taught in the prototypical law school curriculum. That curriculum, as reflected both in its cognitive dimensions and its modest practical components, has long espoused a particular view of the lawyer—as an advocate whose principal function is to advance legal rights and defend legal positions in the context of an existing or imminent dispute.<sup>37</sup> The analytical processes associated with case explication and legal argument—the aspects of professional competence that the *Carnegie Report* credits schools with successfully imparting—are the building blocks for an advocacy practice. In the event of litigation (or adjudication in an alternative forum), the lawyer will apply these analytical processes to such things as drafting a brief, preparing a position statement, arguing a motion or appeal, or crafting a closing argument. In the event of negotiation and settlement, the same competencies are transferable to valuing the case (which is dependent on the likelihood of success on the merits if adjudicated) and persuading opposing counsel of one's position (which requires delivering many of the same arguments that would be made at such a proceeding).<sup>38</sup>

The problem with the advocacy perspective is not, as some have put it, that most cases are not litigated, but rather that most “cases” are not cases. The daily work of a transactional lawyer involves structuring deals and drafting documents. Rather than dealing with disputes, he or she architects relationships. While there is some consensus within the legal academy that law schools do a reasonable job of preparing students in the advocacy tradition, it is widely agreed that law schools do little to groom students for their roles as counselors in

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<sup>37</sup> See Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL. EDUC. 223, 223 (2004) (“Although the academy prides itself on teaching students to think like a lawyer, for the most part we teach students to think like litigators.”). I use the term “advocate” rather than litigator to embrace any and all aspects of a lawyer's practice that involve a dispute, even if the problem does not lead to litigation.

<sup>38</sup> *Id.* at 224 (“[In first-year courses] we teach students to take the law and apply it to the facts to create a persuasive argument. That argument is then memorialized in a brief or a memo or is otherwise used to sway another, be it the other party or the court.”).

a planning and compliance-oriented practice.<sup>39</sup> This long-standing neglect suffuses the curriculum as a whole and, by some accounts, is worsening. Since the mid-1960s, there has been a documented drop in law schools' doctrinal offerings in the field of commercial law, which, along with corporate law courses, is widely viewed as the core of a substantive transactional curriculum.<sup>40</sup> Commercial law scholarship also is decreasing in prevalence and, according to some, has suffered a decline in prestige.<sup>41</sup> The number of faculty with expertise in the area is dwindling; many are nearing retirement and few newcomers to the legal academy are taking up the field.<sup>42</sup> Faced with the inability to staff the three core courses of a vibrant commercial law curriculum—sales, secured transactions, and payment systems—law schools have struggled with the viability of a general commercial law course touching on all three.<sup>43</sup>

The situation is even bleaker on the “skills” side of the curriculum. Whereas doctrinal offerings are evaporating, practice-oriented courses and clinical offerings designed to train students as transactional lawyers by-and-large never existed. The development of clinical education came on the heels of the “access to justice” movement of the late 1960s, and most clinics continue to focus on representing the indigent in public proceedings.<sup>44</sup> Along the same lines, first-year writing courses typically create contextual opportunities for students to research cases and statutes, draft briefs and research memos, and prepare and participate in simulated oral arguments—all hallmark functions of a legal advocate.<sup>45</sup> Many schools offer advanced lawyering skills courses as part of the upper-level elective curriculum; yet

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<sup>39</sup> See e.g., Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 7 (1995); Fleischer, *supra* note 3, at 478 (noting that most law students will graduate without ever being exposed to transactional skills); Noble-Allgire, *supra* note 3, at 32–33 (urging more professors to incorporate skills training into traditional legal courses); Stark, *supra* note 9, at 232 (noting that students have “little opportunity to get a thorough grounding in business before they leave law school,” putting them “behind the curve” when they start deals practice).

<sup>40</sup> See Garvin, *supra* note 6, at 412–13 & n.17.

<sup>41</sup> *Id.* at 415–16.

<sup>42</sup> *Id.* at 406–08 (comparing number of faculty in commercial law field to those in criminal law and intellectual property over a forty-year period).

<sup>43</sup> Whether such compressed exposure offers a meaningful survey of the field is a question that has dogged commercial law faculty; and employment faculty considering the adoption of a comprehensive work law class might take heed.

<sup>44</sup> Dauer, *supra* note 7, at 485 (“In a substantial number of schools, the clinic was first a way of pursuing social justice . . . and[,] secondly, an opportunity for teaching.”); Fleischer, *supra* note 3, at 485.

<sup>45</sup> See Schulze, *supra* note 6.

these are commonly concentrated in areas such as trial advocacy, advanced legal writing, and mediation and negotiation. Certainly some of these courses benefit the student bound for transactional practice (negotiation, for instance, is an inter-disciplinary skill), but at many, if not most, law schools there are few to no courses geared toward developing transactional-specific competencies.<sup>46</sup>

Efforts to address the underselling of transactional law have generally reflected the additive model criticized in the *Carnegie Report*. Many propose or presume the existence of a skills-focused, non-doctrinal course, such as a transactions “lab” or capstone experience in which students study real deal documents or execute simulated transactions.<sup>47</sup> Such courses deserve praise for providing a contextual learning experience for students that approximates closely the actual practice of transactional law.<sup>48</sup> But they cannot fill the deficit on their own. As the *Carnegie Report* suggests, segregated instruction teaches students that practical skills are discrete from and secondary to the analytical apprenticeship and fails to construct the critical bridge between competencies essential to expert professional practice.

Even more problematic in the context of the legal academy’s particular failures in transactional training, an additive approach leaves intact the existent doctrinal paradigm, which itself creates an untenable dichotomy between substantive transactional law and the mainstream doctrinal curriculum. Just as law schools have compartmentalized skills and doctrine within their curriculum, they have also cultivated an informal divide between “public” and “private” law courses with business and commercial law frequently equated with the latter. Such distinctions are questionable in the modern regulatory state, in which government intervention into all areas of human life, including business and commerce, is pervasive,<sup>49</sup> and the public/private divide has been widely criticized from a legal theory per-

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<sup>46</sup> A notable exception is the Integrated Transactional Program at Temple University, which combines trusts and estates, professional responsibility, and transactional skills training in a ten-credit, year-long program consisting of two to three credits of substantive law instruction and two to three credits of skills and simulations each semester. See Myers, *supra* note 6, at 406–07. This program is unique not only for its transactional focus, but for its efforts to truly integrate cognitive and applied learning. See *infra* Part V.A.

<sup>47</sup> See, e.g., Fleischer, *supra* note 3, at 490–92.

<sup>48</sup> See *id.* at 492–93 (explaining that deals classes offer students a leg up by showing them what business lawyers actually do).

<sup>49</sup> It is worth noting that the trading of securities, which forms the backbone of our economy, is intensely regulated at the federal level and that, in response to the 2007 collapse in the sub-prime mortgage market, a significant and more expansive regulatory overhaul of financial markets appears to be in the offing.

spective.<sup>50</sup> It is more useful when planning curriculum, particularly skills instruction, to leave aside such theoretical concepts and focus on the kinds of skills and analysis on which different types of legal problems will draw—that is, whether a particular matter requires the lawyer to effectuate a client’s goal or intention *ex ante*, or whether it requires her to unravel the consequences of a particular interaction, which may or may not have been planned previously.<sup>51</sup>

Viewed from this functional perspective, almost all legal disciplines lend themselves to both transactional and advocacy practice. Business and commercial transactions obviously give rise to litigated disputes. Advocates as much as “deal” lawyers must know the substantive law of real estate, secured transactions, business associations, and a host of other “private law” courses in dealing with the downstream consequences of preexisting transactions. On the flip side, all areas of law, including those traditionally considered “public law” fields, provide a set of external rules and limitations that shape individual behavior and can be leveraged by lawyers in planning future transactions. Doctrinal faculty routinely ask students to craft arguments for the application of rules to existing disputes—an essential exercise in anticipation of preparing a brief or oral argument for a matter in litigation. Only rarely however, do they ask students to plot a course of action that will insulate a client from disputes *ex ante*.<sup>52</sup> An ethically troubling hypothetical from a quintessentially public field offers a powerful example. Imagine a high-level organized crime figure wishes to orchestrate a bank robbery. Knowledgeable about criminal law and concerned about himself and other principals, he consults a lawyer about how to best structure the heist so as to reduce the risk of criminal conspiracy liability. While the rules of the profession and common sense dictate that no lawyer should provide this type of ad-

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<sup>50</sup> Much of the criticism centers on the claim that “public” and “private” represent ideological labels rather than a substantive framework for analysis. See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351–52 (1982). For a critique of the distinction in the labor law context, see Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, [PIN CITE] (1982).

<sup>51</sup> See Myers, *supra* note 6, at 406 (describing the difference between a transactional perspective and a more traditional litigation focus as looking at a legal matter “as it unfolds, not after it has become a problem”).

<sup>52</sup> Cf. Stark, *supra* note 9, at 484 (noting that asking students questions such as “how the attorneys representing the parties in the case may have been able to avoid the dispute by better structuring and negotiating the terms of the transaction” and “how the parties could have drafted the legal documents for a more favorable ruling from the court being asked to give effect to their agreements” can achieve the goal of introducing basic transactional skills into a substantive property or real estate course).

vice, it may be fair to say that all lawyers should have the underlying skill set necessary to formulate it.

In sum, the transactional thinking gap is about more than just skills and transactional courses. What is missing from the curriculum is not merely the opportunity to draft documents or negotiate deals, but exposure to a transactional mindset—a framework for viewing the law as a factor in planning interactions and managing risk, rather than in resolving disputes and crafting arguments. In other words, when it comes to preparation for transactional practice, law schools not only fail to provide a meaningful apprenticeship of practice, but they also fall short in developing its core analytical underpinnings. In that recognition lie both a challenge and the hope of a cure. Transactional competency cannot evolve purely from skills instruction in a specialized course, but neither does it depend on the quality of a school's substantive infrastructure for teaching business and commercial law doctrine. Put another way, any class—skills or doctrinal, public law or private law—has the potential to be an integrative “deals” class.

C. *Enhancing the Pedagogies of Knowledge and Practice:  
A Transactional Perspective*

To implement the teachings of the *Carnegie Report* with an eye toward rectifying the particular problems of law schools' transactional curriculum requires some further explication of what transactional lawyers do and, more importantly, how they think.<sup>53</sup> At the most basic level, the critical skills for successful business lawyering are the ability to understand transactions and prepare the corresponding deal documents. Professor Tina Stark describes this competency as the ability to translate client needs into legal form, and her work sets out a viable pedagogy for teaching this skill.<sup>54</sup> She proposes that students learn to abstract deal-specific issues into five broader categories common to all business transactions—provisions related to money, risk, control, quality standards, and ending the deal<sup>55</sup>—and then use the “building blocks” of representations, warranties, covenants, and

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<sup>53</sup> Victor Fleischer has noted that students bound for business law practice “finish law school with only the vaguest notion of what they will be doing.” Fleischer, *supra* note 3, at 492. I fear that many law professors suffer from the same ignorance.

<sup>54</sup> Stark, *supra* note 37, at 224 (“The lawyer must . . . find the contract concepts that best reflect the business deal and use those concepts as the basis of drafting the contract provisions. I call this skill ‘translating the business deal into contract concepts.’”).

<sup>55</sup> *Id.* at 229–32 (describing five-prong framework for identifying business issues).

conditions to compose the requisite contract.<sup>56</sup> This framework captures the core skill of drafting deal documents to memorialize a negotiated understanding, and it has the advantage of generalizing to all business and commercial transactions regardless of the substance of the deal.

However, underlying those functions, there is also a critical analytical process that reaches beyond business and commercial practice altogether. Transactional lawyering can be broadly understood to encompass the optimal structuring of private relationships, regardless of who the actors are and whether or not a written document flows from their arrangement.<sup>57</sup> The scholarship of preventive law provides a theoretical groundwork for understanding the cognitive component of this universal competency. Perhaps best understood as a theory of practice,<sup>58</sup> preventive law emphasizes the lawyer's role as a planner and facilitator.<sup>59</sup> Her aim is to achieve the client's goals in a way that enhances opportunities for gain and minimizes legal risk and other potential liabilities.<sup>60</sup> From a preventive law perspective, the lawyer's role is to generate options and facilitate choice rather than to advance a particular position.<sup>61</sup> Preventive law is also distinctly proactive and client-centered.<sup>62</sup> The model envisions the lawyer and client jointly engaged in formulating a comprehensive legal strategy not limited to one earmarked issue, but contemplating long-term risks and goals that are not strictly legal in nature.<sup>63</sup>

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<sup>56</sup> *Id.* at 225.

<sup>57</sup> This description of transactional practice leaves aside for the moment the question of the value added by the lawyer in any particular structure, a subject that has received significant attention in transactional law scholarship. See, e.g., Ronald Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239 (1984). Here, this Article's aim is to link the work that transactional lawyers do to an underlying cognitive theory that can be taught in the classroom. This Article returns to the concept of value added *infra* Part IV.C.

<sup>58</sup> Cf. BOYER, *supra* note 8, at 21–23 (describing “the scholarship of application” as the process by which the scholar responsibly applies knowledge to consequential problems in furtherance of the goals of individuals and institutions, and allows social problems to define an agenda for scholarly investigation).

<sup>59</sup> See Stolle et al., *supra* note 11.

<sup>60</sup> Dauer, *supra* note 11, at 801 (“The objective of lawyers practicing [preventive law] has been to help their clients achieve their personal or organizational or familial or corporate goals, by optimizing the arrangements that are relevant to those goals and by minimizing the chance that the purpose is confounded with unnecessary legal risks.”).

<sup>61</sup> Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 *CATH. U. L. REV.* 685, 691–92 (1981) (“It is the counselor's function to help clients make informed rational choices among alternative courses of conduct.”).

<sup>62</sup> Stolle et al., *supra* note 11.

<sup>63</sup> *Id.*

Owing in part to the influence of therapeutic jurisprudence on preventive law theory, these aspects of the practice are often framed in psychological terms.<sup>64</sup> In particular, preventive law contemplates that legal disputes are animated by feelings of loss or injury occasioned by a breach of expectation.<sup>65</sup> Thus, to secure against risk, the preventive lawyer must predict human behavior as much as legal results.<sup>66</sup> Along the same lines, the theory recognizes that legal tools are not the only, nor always the best, mechanisms of dispute avoidance, and that personal intervention and creative problem solving are at times superior responses.<sup>67</sup> In this respect, preventative law shares much in common with relational contract theory, which posits that contracting parties' actions and expectations are strongly informed by relational norms, and that the precise terms of agreement serve primarily as a backstop in situations of relational breakdown.<sup>68</sup> For all of these reasons, preventive law suggests that it rarely is efficient (and at times it is counterproductive) to attempt the elimination of all legal risk.<sup>69</sup>

These insights offer a useful framework for teaching the cognitive dimensions of transactional lawyering. They also address a key

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<sup>64</sup> Therapeutic jurisprudence is a body of scholarship concerned with the psychological consequences of legal rules and practice, it also has significant applications in the medical field. *Id.* at 17 (describing therapeutic jurisprudence as “an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects.”). The synergies between preventive law and therapeutic jurisprudence are explored in a number of articles. *See, e.g.*, Dauer, *supra* note 11, at 801; Stolle et al., *supra* note 11, at 18–20; Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, [PIN CITE] (1997).

<sup>65</sup> *See* Edward A. Dauer, *Four Principles for a Theory of Preventive Law*, in A PROACTIVE APPROACH TO CONTRACTING AND LAW 17 (Helena Haapio ed., 2008).

<sup>66</sup> *Id.*

<sup>67</sup> *See, e.g., id.* at 28–30 (providing the example of a hospital that managed its risk of liability to transfusion patients who may have acquired Hepatitis from contaminated blood with a strategy based on “compassion, acceptance of responsibility . . . attention to immediate needs, full disclosure and never letting the patient feel abandoned” as less costly than pursuing vigorous negligence defenses in inevitable lawsuits).

<sup>68</sup> The term “relational contract” refers to the notion that the behavior and expectations of contracting parties are heavily influenced by a desire to preserve their relationship and foster cooperative behavior. *See generally* IAN MACNEIL, THE NEW SOCIAL CONTRACT (1980); Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737 (2000); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983). The connection to preventive law is addressed in DAUER, *supra* note 65, at 24.

<sup>69</sup> DAUER, *supra* note 65, at 27–28.



objection of the *Carnegie Report* to the current substantive pedagogy by acknowledging the role of non-legal needs and interests in client behavior and legitimizing them within the lawyer's practice.<sup>70</sup> Preventive theory humanizes transactional work.<sup>71</sup> Its principles are as applicable to preparing a will or prenuptial agreement with an individual client as to papering a commercial real estate transaction or a corporate merger or acquisition. At the same time, preventive law recognizes that moral, personal, relational, and other non-legal, non-financial concerns permeate all economic undertakings—including business transactions. Most importantly, preventive law stresses the importance of creative foresight and problem solving that at times reaches outside the legal framework and ultimately may fall short of otherwise optimal legal solutions. Thus, the foundational cognitive and applied skills of transactional practice, broadly construed, can be summarized as follows: the ability to uncover and understand multi-dimensional goals and incentives; the ability to intuit areas of risk and foresee potential negative consequences, legal and behavioral; and finally, taking these considerations into account, the ability to execute the appropriate legal strategy, whether by contract drafting or other mechanisms.

### III. CLAIMING EMPLOYMENT LAW FOR THE TRANSACTIONAL LAW CURRICULUM (AND VICE VERSA)

Part II argued that preparation for transactional practice must be a centerpiece of any curricular reform efforts in the wake of the *Carnegie Report*, and it outlined the type of skills and cognitive processes that must be transmitted to students. The next step is to identify a means of integrating these components of professional training into the curriculum. Ultimately, it is the contention of this Article that, consistent with its broad definition of transactional practice, such learning can and should take place in all manner of doctrinal courses. However, employment law is one substantive area of law that is particularly suited to the task. This Part explains why.

It begins with a survey of the state of worklaw in the legal academy. A significant decline in union density, coupled with the ascendance of federal discrimination law, has resulted in uncertainty about the role of the basic employment law course in the current curriculum, leaving the field fertile for a new organizing framework. The

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<sup>70</sup> See *supra* Part II.A.

<sup>71</sup> Dauer, *supra* note 7, at 484 (“[Students should] understand that even in commercial matters people have real feelings about what they are doing and that feelings are just as much facts as widgets and dollars and documents are facts.”).

Part then turns to emerging developments in employment law doctrine, practice, and scholarship—all of which suggest the increasing importance of private planning in assessing rights and liabilities in the workplace. Courts and scholars alike are examining employers' compliance and prevention efforts, both as a litmus test for legal obligation and as a means of understanding the normative reach of the law. It therefore makes sense for the employment law course similarly to showcase the transactional aspects of the field. This Part concludes with a series of examples illustrating the prevalent role transactional planning plays in employment practice and offers some cautionary words about integrating transactional skills while maintaining a diversely focused and ideologically balanced course.

A. *From Labor Law to Worklaw: Trends in Teaching and Curriculum*

Employment law is facing a modest identity crisis. Historically, the study of workplace relationships in the legal academy concentrated on the role of unions and collective action. During the *Lochner* era and its aftermath, labor relations was the critical context in which constitutional questions about the reach of private contract were contested.<sup>72</sup> For this reason, the field was a foundation of the public law curriculum.<sup>73</sup>

Since then, social and doctrinal developments have entirely altered the legal landscape. Unions represent a mere twelve percent of the workforce, and the majority of protections afforded by the National Labor Relations Act are irrelevant to most workers.<sup>74</sup> “Traditional” labor law, as it has come to be called, is an increasingly insular specialty, and employment lawyers can maintain a busy practice with-

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<sup>72</sup> See Cynthia L. Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL'Y J. 789, 790 (2002) (“[L]abor law was the primary battleground for this great constitutional conflict, for legislative efforts to regulate the terms of the labor contract posed the most direct challenge to the reigning constitutional construct of ‘liberty of contract.’”).

<sup>73</sup> See *id.* at 791 (“[T]he Wagner Act and its constitutional vindication seemed to promise, and to some extent delivered, a just and peaceable resolution to ‘the labor question,’ which had plagued American society for generations. There was no doubt that the scholars and the scholarship that played a part in bringing about that resolution were at the very center of the public agenda.”).

<sup>74</sup> The 2008 statistics indicate that union member comprise 7.6 percent of private sector workers, 36.8 percent of public sector workers, and 12.4 percent of combined public and private sector workers. Press Release, U.S. Dept. of Labor, Bureau of Labor Statistics, *Union Members in 2008*, at 1 (Jan. 28, 2009) available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

out ever handling a labor law case or even referencing that body of law.<sup>75</sup>

This invites questions about the best way to package employment law instruction for students aspiring to the field. Notably, labor law itself has not changed; indeed, the absence of any meaningful reform to the labor law architecture is perhaps the principal complaint of contemporary labor law scholars.<sup>76</sup> Thus, to the extent it continues to be offered,<sup>77</sup> the traditional labor law course does not necessarily require significant reform.<sup>78</sup> Rather, what is needed is an organizing principle for the ever-growing body of law that has developed outside of the labor law regime, as well as a means of relating it to its historical foundations.<sup>79</sup>

The legal academy's response to this challenge was, in most cases, the development of a stand-alone employment law course and, subsequently, the spinning off of antidiscrimination law into yet another specialized employment law class.<sup>80</sup> This has worked well enough for teaching antidiscrimination law, which comprises a discrete set of statutes all embracing common doctrinal proof structures and recurring themes. The problem, which is well known to those who teach in the area, is what to do with the remaining body of employment law, which is anything but discrete. In contrast to tradi-

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<sup>75</sup> See Steven L. Willborn, *Labor Law Without Labor*, 1988 WIS. L. REV. 547, 548 (1988) (reviewing MARK A. ROTHSTEIN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW (1987)) (“[T]he labor law that is important outside of the law schools is labor law without labor—laws regulating wages and hours, providing for workers’ and unemployment compensations, prohibiting employment discrimination, protecting pension benefits, and so forth. . . . [L]abor law without labor, employment law, is the next wave of the future.”).

<sup>76</sup> See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

<sup>77</sup> Many have lamented the decline of student enrollment as well as course offerings in traditional labor law. See, e.g., Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1550 (2005).

<sup>78</sup> This is not to suggest that innovation is absent or unwelcome. Several faculty, for instance, have experimented successfully with simulated workplace organizing and unfair labor practices litigation in the traditional course. See generally Roberto Corrada, *A Simulation of Union Organizing in a Labor Law Class*, 46 J. LEGAL EDUC. 445 (1996); C. John Cicero, *The Classroom as Shop Floor: Images of Work and the Study of Labor Law*, 20 VT. L. REV. 117 (1995).

<sup>79</sup> See Willborn, *supra* note 75, at 549.

<sup>80</sup> This move dates roughly to the appearance of the first employment law textbooks in the late 1980s and early 1990s. See, e.g., SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIAL ON THE LAW GOVERNING THE EMPLOYMENT RELATIONSHIP (1st ed. 1990); MATTHEW A. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE (1st ed. 1989); MARK A. ROTHSTEIN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW (1st ed. 1987); STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS (1st ed. 1993).

tional labor and even employment discrimination, general employment law comprises an amalgam of federal and state statutes and common-law principles that differ widely in scope, coverage, and purpose.<sup>81</sup> Thus, the professor teaching basic employment law faces difficult coverage choices (particularly for the course that aspires to include a survey of antidiscrimination law), as well as a significant pedagogical challenge: the patchwork of laws in play is not easily shepherded into an integrated thematic structure.<sup>82</sup>

Recently, faculty in the field have speculated on the value of a holistic approach to the study of “worklaw”—traditional labor law, antidiscrimination law, and employment law—that integrates some portion of the doctrine and of these areas with the policy considerations common to all three.<sup>83</sup> As a curricular choice, such an approach promises to solve the thematic weaknesses of the stand-alone employment law course model. Placing employment law and labor law side-by-side allows the course to be structured around the choice of individual versus collective action and the competing legal regimes

<sup>81</sup> See Estlund, *supra* note 72, at 798 (“[T]he bulk of employment law is a bit of a hodgepodge, as anyone who has taught employment law will concede.”); Willborn, *supra* note 75, at 549 (“[E]mployment law has no natural organizing principle. There is no central, federal source of employment law. Instead, employment law is found in hundreds, if not thousands, of separate statutes and cases.”).

<sup>82</sup> Dean Steven Willborn, lamenting this problem, offers a plentiful array of organizing themes in his review of the Rothstein and Liebman text. See Willborn, *supra* note 75, at 551–53. However, he also notes significant drawbacks for each proposal. *Id.*

<sup>83</sup> See, e.g., Richard M. Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 169–70 (2007); Lobel, *supra* note 77, at 1549–53. The coverage choices of some recent casebooks reflect this view. For example, one text notes:

This casebook’s point of departure comes from . . . the view that the study of federal labor legislation . . . must not be separated from the study of . . . state and federal law that regulates individual employment relations. Instead of studying labor and employment law as separate regimes . . . we will examine how the legal discourses of collective bargaining and employment law relate, or should relate, to give rise to what we shall call ‘Work Law.’

KENNETH M. CASEBEER & GARY MINDA, *WORK LAW IN AMERICAN SOCIETY* 3–4 (2005). Another casebook states:

Understanding the story behind the decline of labor unions and labor law provides critical assistance in evaluating new employee representation systems and conceptualizing rights. A comprehensive study of the law of work also provides an opportunity to critically [MISSING WORD] what form enforcement of rights should take . . . . Accordingly, we have denominated this text WorkLaw and endeavor here to present basic material on each system of labor market regulation.

MARION CRAIN, ET AL., *WORKLAW: CASES AND MATERIALS* xiii–xiv (2005).

that attach to that decision.<sup>84</sup> It also allows students to experience the process of thinking across doctrinal boundaries as they must inevitably do in practice.<sup>85</sup>

But what may be gained thematically is likely to be offset logistically. It is difficult if not impossible to see how an instructor can meaningfully cover labor, antidiscrimination, and general employment law in a single course.<sup>86</sup> If such courses do take root, it seems likely that they will serve merely as overviews—courses for students seeking a taste of the field—or as gateways to more advanced study.<sup>87</sup> If so, the question remains: what is the significance of the stand alone employment law course, and what value does it add to the law school curriculum?

*B. The Power of Private Ordering in the Modern Employment Relationship*

This Article offers the theme of relationship planning as a coordinating approach to the stand alone employment law course. At the end of this Part, I will detail the extensive ways in which both employee- and management-side employment law practice call for the application of transactional skills and thinking. Before turning to those examples, however, it is necessary to lay the basis for this development.

In recent decades, there has been increased attention to private ordering in the identification and realization of employee rights and employer obligations.<sup>88</sup> Judicial decisions at the state and federal lev-

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<sup>84</sup> See Lobel, *supra* note 77, at 1552–53.

<sup>85</sup> See Fischl, *supra* note 83, at 168.

<sup>86</sup> Willborn, *supra* note 75, at 549 (noting that “[s]tructuring employment law as the core labor law offering[,] [including elements of employment discrimination and collective labor law,] risks even more superficial coverage of the three major topics”). It should be noted that recent “worklaw” texts, while offering a more holistic view of the law, do not necessarily purport to provide complete coverage of all three major areas of concentration. See, e.g., CRAIN, *supra* note 83, at xiv–xv (“This book will be most useful in Employment Law courses that address [individual rights]. We advert to Labor Law principles . . . throughout the book, but at a policy level rather than a doctrinal level . . . and make no effort here to provide a satisfactory substitute for a Labor Law text.”).

<sup>87</sup> This is precisely what has happened with the commercial law curriculum at some schools that now offer a general Uniform Commercial Code course purporting to cover sales, payment systems, and secured transactions.

<sup>88</sup> See Roberto L. Corrada, *Claiming Private Law For The Left: Exploring Gilmer's Impact And Legacy*, 73 DENV. U. L. REV. 1051, 1055 (1996) (finding “evidence of a New Private Law shift in the employment and labor law arena” based on Supreme Court decisions on pre-employment arbitration agreements and union access to private property); Estlund, *supra* note 18, at 322 (describing the move toward “self-

el appear willing to credit employer policies and practices and defer to their contract documents in limiting liability and defining employee rights. At the same time, employment law scholarship is growing increasingly sensitive to the role employers' internal practices play in the realization of the goals of workplace law.<sup>89</sup> Both trends reflect the critical importance of private choices, made principally by employers, in planning and structuring work relationships and personnel practices.

This Part will consider these interrelated developments. It begins by examining the shift to private law in modern employment law jurisprudence. It then details the emergence of an increasingly "legalist" approach to human resources management<sup>90</sup> and the corresponding rise of a "new institutionalist" movement in employment law scholarship.<sup>91</sup>

### 1. Judicial Deference and the Emerging Private Law Jurisprudence

Work law in its primordial form of labor law was a shared space for public and private impulses—a system premised on minimal public intervention with the aim of facilitating private agreement on fair terms.<sup>92</sup> In the latter half of the twentieth century, the field took a turn toward the public law model with the development of a variety of common-law causes of action designed to preserve job security<sup>93</sup> as

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regulation" that brings "the locus of enforcement of both rights and regulations inside the firm or under the firm's control"); Lobel, *supra* note 18, at 344 (2004) (describing the "shift from a regulatory to a governance model" that "challeng[es] the traditional focus on formal regulation as the dominant locus of change").

<sup>89</sup> See generally Arnow-Richman, *Worker Mobility*, *supra* note 15; Arnow-Richman, *supra* note 18; Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOCIOLOGY. 1589 (2001); Edelman, *supra* note 18; Estlund, *supra* note 18; Schultz, *supra* note 16; Sturm, *supra* note 18; Travis, *supra* note 17; *infra* Part III.B.2.

<sup>90</sup> Fischl, *supra* note 83, at 204.

<sup>91</sup> See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 120 (2003) (describing "new institutionalism" as the argument that "the legal environment affects organizational policies and practices" and that the law's "practical meaning is, to a large degree, determined within organizational fields rather than by official law-makers.").

<sup>92</sup> See generally Klare, *supra* note 50.

<sup>93</sup> See, e.g., *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 925–26 (Ct. App. 1981) (recognizing viability of contractual claim to job security based on company practices, personal assurances, and industry practices); *Fortune v. Nat'l Cash Register*, 364 N.E.2d 1251, 1255–56 (Mass. 1977) (recognizing claim for breach of duty of good faith based on termination for purposes of avoiding payment of earned commissions); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1267 (N.J. 1985)

well as extensive legislative activity aimed at eliminating status discrimination.<sup>94</sup> In the last few decades, however, the pendulum has swung the other way. In assessing both common law and statutory rights, courts have demonstrated increased deference to private ordering—assigning legal significance to employer policies and practices, as well as their formal written agreements—often to the detriment of workers.

On the state level, this trend can be seen in the emerging common-law jurisprudence of job security claims. A key judicial innovation of the 1980s was the recognition of a cause of action for an employer's breach of an implied-in-fact "just cause" contract based on a combination of employer policies, practices and assurances.<sup>95</sup> In recent years, however, courts are visibly reining in these claims, most notably by awarding summary judgment to employers based on employer-drafted language disclaiming any promise to job security. The legal significance of disclaimers was acknowledged in tandem with the recognition of job security claims based on employee handbooks.<sup>96</sup> But while many early decisions closely scrutinized such language for consistency with other terms and practices,<sup>97</sup> increasingly courts seem willing to rubberstamp disclaimer language without regard to contrary evidence, such as oral representations and other management actions that might reasonably instill expectations of continued employment on the part of workers.<sup>98</sup> Such disclaimers

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(recognizing viability of contractual claim to job security based on personnel manuals); *Nees v. Hocks*, 536 P.2d 512, 515 (Or. 1975) (recognizing tort claim based on termination for a "socially undesirable motive" in case of worker terminated for jury service). See also Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351 (2002) (describing the common-law trend recognizing wrongful discharge claims); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1995) (same).

<sup>94</sup> See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2 (2006)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-13 (2006)); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (2006)). See generally Estlund, *supra* note 18, at 331-32 (describing this trend).

<sup>95</sup> See, e.g., *Pugh*, 171 Cal. Rptr. at 925-27; *Woolley*, 491 A.2d at 1267.

<sup>96</sup> See *Woolley*, 491 A.2d at 1271.

<sup>97</sup> See generally Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 351-67 (1992) (describing judicial approaches to effectiveness of disclaimers).

<sup>98</sup> See, e.g., *Grossman v. Computer Curriculum Corp.*, 131 F. Supp. 2d 299, 305-06 (D. Conn. 2000); *Guz v. Bechtel National, Inc.*, 8 P.3d 1089, 1094-95 (Cal. 2000); *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 271 (Mich. 1991); *Finch v. Farmers Co-op Oil Co. of Sheridan*, 109 P.3d 537, 541-42 (Wyo. 2005). See generally Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract* [PIN CITE]

appear with increasing frequency not only in employee handbooks, but in offer letters, job applications, expense reimbursement forms, and a host of other employer-drafted personnel documents.<sup>99</sup>

This type of deference to private action is not limited to common-law claims grounded in contract. A related trend can be discerned in the area of employment law most explicitly associated with the public law/civil rights model: antidiscrimination law. In the last two decades, the Supreme Court of the United States, through its decisions on both arbitration agreements and sexual harassment claims, has signaled a turn in favor of private dispute resolution and private ordering generally. In *Gilmer v. Interstate* and *Circuit City v. Adams*, the Court held that employment contracts are subject to the Federal Arbitration Act and that an employee's agreement to arbitrate does not constitute a waiver of federal statutory rights.<sup>100</sup> These decisions allow employers to insist on *ex ante* agreements to submit any employment claims, including those arising under federal discrimination statutes, to private resolution.<sup>101</sup> During the same period, the Court decided *Ellerth v. Burlington* and *Faragher v. City of Boca Raton*, which established an affirmative defense to vicarious liability in sexual harass-

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(Univ. of Colo. Law Sch. Legal Studies Research, Paper No. 07-25, 2007), available at <http://ssrn.com/abstract=1015136> (describing this judicial trend in favor of employers as the inevitable result of reliance on contract law, which allows the party with stronger bargaining power to draft away the possibility of implied protections). Empirical research demonstrates that most workers incorrectly believe they are protected against arbitrary dismissal even when presented with an employer's reservation of rights to terminate without cause in a personnel manual. See, e.g., Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 447 (1999); see also Cynthia Estlund, *How Wrong are Employees About Their Rights, and Why Does it Matter?*, 77 N.Y. U. L. REV. 6, 9-11 (2002) (summarizing and discussing Professor Kim's data).

<sup>99</sup> See, e.g., *Ohanian v. Avis Rent A Car Sys., Inc.*, 779 F.2d 101, 104 (2d Cir. 1985) (disclaimer appearing in a reimbursement form); *Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56, 58 (Cal. 2006) (disclaimer appearing in an offer letter); *Nieves v. Bell Indus.*, 204 Mich. App. 459, 461-62 (Ct. App. 1994) (job application and compensation agreement containing a disclaimer); *Barnell v. Taubman Co.*, 203 Mich. App. 110, 113 (Ct. App. 1993) ("memorandum" distributed to workforce as a disclaimer).

<sup>100</sup> *Circuit City v. Adams*, 532 U.S. 105, 119 (2001) (holding employment contracts to be subject to the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2006), and not excluded under exception for railroad workers, seamen, and other workers engaged in commerce); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2006), compelled enforcement of pre-dispute arbitration agreement between stock broker and New York Stock Exchange).

<sup>101</sup> See *Gilmer*, 500 U.S. at 35 (distinguishing prior decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and holding that a collective bargaining agreement could not preclude plaintiff from bringing statutory discrimination claims in federal court).



ment claims based largely on employer policies and practices.<sup>102</sup> Under these cases, the employer can successfully avoid liability if it shows that it implemented measures to prevent and respond to harassment, which the plaintiff unreasonably failed to utilize.<sup>103</sup> District and appellate courts applying the *Ellerth/Faragher* doctrine have since treated employers' sexual harassment policies as a (if not *the*) critical factual element in determining whether a worker's claim will survive summary judgment.<sup>104</sup> Considering the arbitration and harassment decisions together, employers are in a position to reduce the likelihood that claims will arise through preventive measures, to limit the likelihood of liability by responding appropriately, and to ensure that in the event a claim arises it be resolved in a pre-designated forum of their own choosing.

## 2. Employers as Legal Actors and the Rise of New Institutionalism

Employers are savvy to the power of planning. No stranger to the risks and obligations associated with employment, they have long relied on individually negotiated written instruments when hiring upper echelon employees to limit the likelihood of loss or liability.<sup>105</sup> Executive contracts generally structure the flow of compensation and establish termination protocols that both incentivize desirable worker behavior and protect the company in the event the relationship sours.<sup>106</sup>

What is changing is employers' expanded focus on rank-and-file personnel issues as a critical front in the battle to minimize legal

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<sup>102</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>103</sup> Specifically, the employer will avoid liability where it can prove: (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and (2) that the "employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer," or otherwise avoid harm. *Ellerth*, 524 U.S. at 765; *see also Faragher*, 524 U.S. at 807.

<sup>104</sup> *See* David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1283 (2001) (finding existence of a sexual harassment policy containing the requisite judicially articulated provisions to be the only factor statistically predicting an award of summary judgment in employer's favor).

<sup>105</sup> *See* Stewart Schwab & Randall Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?* 63 *WASH. & LEE L. REV.* 231, 246-57 (2006) (describing content of such agreements).

<sup>106</sup> *See id.* at 246-54.

risk.<sup>107</sup> Human resources departments and in-house counsel offices have proliferated and, with them, businesses' reliance on contractual documents and formal policies imposed across the workforce.<sup>108</sup> Companies now frequently require workers at all levels to sign a host of standard forms, including such things as agreements to arbitrate, waivers of employment status, acknowledgements of at-will status, noncompetition agreements and other restrictive covenants.<sup>109</sup> Similarly, it has become standard practice for large companies to maintain anti-harassment and discrimination policies, internal dispute resolution mechanisms, and other best practices and procedures for handling worker complaints and requests.<sup>110</sup>

Scholars of employment law are taking note as well. Borrowing from the teachings of social science and organizational theory, a body of "new institutionalist" scholarship has claimed the practices and policies of employers as key components in the social understanding, effectiveness, and, ultimately, the content of workplace regulation.<sup>111</sup> Professor Laura Edelman's managerialization-of-law theory teaches that the way in which employers respond to and implement legal mandates often reflects managerial values distinct from (and at times counter to) the goals of the laws themselves.<sup>112</sup> Thus, employers have implemented internal dispute resolution programs that tend to

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<sup>107</sup> See Adele Nicholas, *GCs Reveal Their Litigation Fears and Headaches*, CORP. LEGAL TIMES, Oct. 2004, at 72 (indicating that 62 percent of surveyed general counsel ranked labor and employment litigation as their number one potential exposure). Further evidence of the increased concern about personnel matters as a serious business issue is a recent trend toward seeking business executives to serve in key human resources positions. See Erin White, *HR Departments Get New Star Power at Some Firms: Business Executives Now Tapped to Lead as Job is Rethought*, WALL ST. J., June 23, 2008, at B6.

<sup>108</sup> See Edelman & Suchman, *supra* note 17, at 953–57; Estlund, *supra* note 18, at 335–38; Sturm, *supra* note 18, at 527–30.

<sup>109</sup> See, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1010 (9th Cir. 1997) (en banc) (workers required to sign document providing that worker was "an Independent Contractor" and nothing in the agreement should be construed as creating an "employer-employee relationship"). On the prevalence of noncompete and arbitration agreements, see generally Arnov-Richman, *Rise of Delayed Term*, *supra* note 15; Arnov-Richman, *Worker Mobility*, *supra* note 15; and Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. Pa. L. Rev. 379 (2006).

<sup>110</sup> See generally Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331 (2006) (describing arbitration agreements); Shultz, *supra* note 16, 2103–19 (describing sexual harassment policies).

<sup>111</sup> See, e.g., Williams & Segal, *supra* note 91, at 120 (describing "new institutionalism" as the argument that "the legal environment affects organizational policies and practices" and that the law's 'practical meaning is, to a large degree, determined within organizational fields rather than by official law-makers').

<sup>112</sup> See generally Edelman et al., *supra* note 89.

focus on conflict management more than the legal rights of aggrieved workers.<sup>113</sup> Similarly, their antidiscrimination and harassment policies have frequently targeted consensual workplace relationships and non-harassing sexual behavior consistent with management's interest in maintaining a strict and productive work environment as well as its desire to avoid liability associated with unwelcome sexual harassment.<sup>114</sup>

This process has both risks and advantages to would-be plaintiffs. In the area of harassment, where employer policies have become an explicit component of the vicarious liability rule, scholars have expressed concern that a system of "paper compliance" will overtake genuine efforts to eradicate workplace harassment.<sup>115</sup> A stream of federal court decisions finding in favor of employers on the basis of paper policies gives credence to these fears.<sup>116</sup> Yet employer efforts at liability avoidance in other contexts, most notably under the Americans with Disabilities Act (ADA), appear to point in the other direction. Business compliance literature and existing empirical research suggest that employers may be over-complying with the law—accommodating workers that, until recently,<sup>117</sup> would not have met

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<sup>113</sup> Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW SOC'Y REV 497, 511–12 (1993) (suggesting that employers may use internal discrimination complaint resolution mechanisms more for purposes of advancing a managerial goal of ensuring smooth employee relations than for vindicating legal rights); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM J. SOCIOLOGY 1531, 1545–47 (1992).

<sup>114</sup> See, e.g., Schultz, *supra* note 16, at 2090–94 (explaining how the proscription against workplace sexual harassment has been interpreted by employers as consistent with an ideal of a sanitized workplace focused on productivity and divorced from passion and emotion).

<sup>115</sup> See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 24–25 (2006); Margaret S. Stockdale et al., *Coming to Terms with Zero Tolerance Sexual Harassment Policies*, 4 J. FORENSIC PSYCHOL. PRAC. 65, 97 (2004) (warning of the likelihood of mere symbolic compliance by employers).

<sup>116</sup> See Bagenstos, *supra* note 115, at 25–26 ("Under the prevailing approach, employers can avoid liability for harassment simply by adopting and distributing policies. . . . This is true even absent any indication that the process set up by the employer has been effective at that or any other workplace."); Sherwyn et al., *supra* note 104, at 1283–85 (finding the existence of a sexual harassment policy containing the requisite judicially articulated provisions to be the only factor to statistically predict an award of summary judgment in an employer's favor).

<sup>117</sup> Under the ADA Amendments Act of 2008, which became effective January 1, 2009, Congress expanded the definition of "disability" to include a variety of impairments that might not previously have been protected under the Act, such as episodic impairments, impairments alleviated by mitigating measures, impairments affecting only the ability to perform one's job, and impairments to bodily systems that do not necessarily manifest in one's performance of life activities. See 42 U.S.C. § 12102; Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act:*

the legal definition of disability and providing accommodations beyond what the law considers reasonable and necessary—in an effort to avoid liability.<sup>118</sup>

This Article is not the place to debate the role that employer compliance efforts should play in judicial assessment of liability or the merits of the private turn in employment law generally. I have discussed these questions in other contexts, as have many others.<sup>119</sup> Rather, the point is that the choices employers (and to a lesser extent employees<sup>120</sup>) make at the outset of and during the course of their relationship have significant legal ramifications. The reach and scope of workplace policies and the nature of employer responses to employee requests and workplace disputes often determine whether a claim will arise, where it will be resolved, and, ultimately, whether liability will result.

C. *The Employment Lawyer as Transaction Planner and Business Decision Maker*

The previously described common-law and statutory developments both reflect and require a change in the nature of employment practice. Given the prominent role of federal discrimination claims in employment law, practitioners in the field have often been thought of principally as litigators. From this perspective, employee-side lawyers serve as public advocates, vindicating workers' rights through the administrative and court systems, while management lawyers act principally in a responsive role, defending managerial inter-

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*Assessing The ADA Amendments Act of 2008*, 103 NW. U. L. REV. (forthcoming 2009) (manuscript at 2–8, on file with author) (summarizing the 2008 changes to the ADA's definition of "disability").

<sup>118</sup> See Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 333, 335, 338 (2008); Helen A. Scharz et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 MISS. L.J. 917, 939, 941–42 (2006); Travis, *supra* note 17, at 44–55.

<sup>119</sup> For a critical perspective on the role of employer policies and practices on worker rights, see generally Bagenstos, *supra* note 115; Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMP. RTS. & EMP. POL'Y J. 1 (1999); and Schultz, *supra* note 16. For expressions of cautious optimism about the value of internal employer compliance efforts, see generally Arnov-Richman, *supra* note 18 (benefits to working caregivers); Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615 (2004) (benefits to disabled workers); and Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005) (workplace safety compliance). For a roadmap to enhancing the oversight and effectiveness of self-regulatory efforts by employers, see Estlund, *supra* note 18, at 377–83.

<sup>120</sup> I take up the role of transactional planning in representing workers *infra* Part III.C.2.

ests and seeking to limit employment rights through favorable judicial ruling.

The pedagogy of employment law courses generally caters to this civil rights model of employment practice, and not without some legitimacy. Employment discrimination litigation cases have continued their upward spiral since the passage of the 1991 Civil Rights Act and comprise approximately ten percent of the federal bench's case docket.<sup>121</sup> Law firms also embed this model in their firm structure. Employment practice groups often developed and continue to be situated under the umbrella of their firm's litigation department.

Yet the developments previously described require employment lawyers to assume a stronger preventive role, particularly (though not exclusively) those who advise management on employment issues. The frontline in employment practice is no longer the dispositive motion stage, nor even the pre-litigation phase, of a dispute. It is a point in time well in advance of any dispute, often in advance of hire, when the lawyer structures the intended work relationship, or influences that structure, in a way that best meets the client's needs. For this reason, it would be a mistake to continue viewing the practice of employment law as a litigator's domain. Transactional training—the analytical approach and practical skills employed in planning and counseling clients—must be a significant component of any employment law course. To that end, this Part describes how and where transactional teaching moments arise in employment law and practice, as well as what their inclusion means in terms of the ideology of the classroom.

### 1. Identifying Drafting and Planning Opportunities

From the employer's perspective, there are two main areas of employment practice that offer synergies with the goals of the transactional curriculum: drafting contracts between the company and its workers and developing policies on behalf of management. Management lawyers routinely draft a host of contract documents, including pre-dispute arbitration agreements, severance and release agreements, independent contractor agreements, and noncompetes and other restrictive covenants. They are frequently involved in the development or revision of written policies on such matters as parental leave, disability, nondiscrimination and harassment, internal and external dispute resolution, and discipline and termination procedures.

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<sup>121</sup> See Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts Of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 548 (2003).

The following scenarios illustrate how such matters arise in practice:

1. A software company is considering developing a database product in the competitive market of medical office technology. Its workers are highly skilled and highly mobile. The client would like to know what measures it can put into place to safeguard product secrecy and reduce the risk that its key employees will defect to competitors prior to the completion of the project. At the same time, it wants to ensure that it remains competitive in hiring.<sup>122</sup>
2. A foreign-based company is in the process of opening a U.S. office. It has a written parental leave policy used in its foreign offices that provides twelve weeks of paid leave to mothers of newborn children and six weeks paid leave plus six weeks unpaid leave to fathers of newborn children. The client would like to know whether it must alter any aspect of this policy to comply with U.S. law.<sup>123</sup>
3. A company has just emerged from a protracted employment discrimination lawsuit. While it ultimately won at trial, its litigation costs were significant. The company's human resources director has heard about the cost-saving benefits of arbitration and is considering adopting a company-wide policy requiring employees to agree to submit all disputes to arbitration. The client would like to know whether such a policy would be in its best interest and, if so, what the terms of its arbitration policy ought to be.<sup>124</sup>

As these examples suggest, transactional questions are not specific to any one area of employment law doctrine. They will surely arise with respect to matters that are fundamentally contractual. In the first scenario, for instance, the resources on which the lawyer will most likely draw will be restrictive covenants, fixed term contracts, or some combination of these legal tools. But transactional problems can also arise with respect to public law mandates, such as federal antidiscrimination law and minimum labor standards. As the second and third scenarios illustrate, these are areas in which corporate clients are likely to have questions regarding compliance and planning,

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<sup>122</sup> See *Comprehensive Techs. Int'l, Inc. v. Software Artisans, Inc.*, 3 F.3d 730, 733-34 (4th Cir. 1993).

<sup>123</sup> See TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 686 (Vicki Been et al. eds., 2007) (problem 10.3).

<sup>124</sup> *Id.* at 928 (problem 13.7).

and, in the last example, may use contract (in the form of an arbitration agreement) to implement their choices.

When examining these examples, it also becomes apparent why transactional questions require more than just the ability to understand legal rules and draft legal instruments. Consistent with the teachings of preventive law theory, these scenarios require the lawyer to consider the client's business interests in determining its best legal course of action. In the first and third scenarios, the client is explicit about those interests. Even if noncompetition law would enable the employer in the first scenario to require a broad restraint against post-employment competition, the employer will want to temper its contract somewhat to ensure that it does not lose strong job candidates with multiple employment opportunities who are put off by such terms.<sup>125</sup> In the third scenario, the client wants the attorney not simply to produce a viable arbitration agreement, but to opine on whether it would be worthwhile to implement an arbitration policy at all.

In some situations, however, the client's goals are less clear and may implicate ethical questions about the lawyer's role. The employer in the second scenario merely asks whether its paid leave policy must be altered to comply with U.S. law. In fact, the United States does not require the employer to provide any paid leave at all, although it does require that any voluntarily provided benefit program treat men and women equally absent a medical reason for the deviation.<sup>126</sup> The attorney in this situation will have to explain this to the client and determine whether the employer wants to provide paid

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<sup>125</sup> On the influence of relational incentives on employers' choice to require a noncompete agreement, see Arnov-Richman, *Rise of Delayed Term*, *supra* note 15, at 662 n.115.

<sup>126</sup> The federal Family Medical Leave Act (FMLA) requires employers of fifty employees or more to provide qualifying employees of either gender with a maximum of twelve weeks of unpaid, job-protected leave for a discrete set of qualifying caregiving-related events. 29 U.S.C. § 2612(a)(1) (2000); 29 C.F.R. § 825.112(a). This leaves the employer free to provide additional benefits on a voluntary basis, such as paid leave, provided it does not run afoul of basic gender-discrimination prohibitions, which would make unlawful any policy that benefits women more than men. The exception is a situation in which the employer provides additional benefits to women on the basis of pregnancy or related medical conditions. This is because the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k) (2006), requires gender-neutral treatment only insofar as a pregnant woman is similarly situated to male comparators in her ability to perform the requirements of the job. *See generally* Johnson v. Univ. of Iowa, 431 F.3d 325, 328–29 (8th Cir. 2005) (explaining the distinction between parental leave benefits that must be gender neutral and lawful disability leave favoring biological mothers under PDA).

leave absent a legal obligation to do so before adjusting the policy to comply with antidiscrimination law.

These types of transactional planning questions need not arise exclusively in management-oriented practices. High level workers, and workers at any level who have sought-after skill sets, may be in a position to request particular terms of employment or to negotiate out of an employer's standard requirements. Workers in weaker bargaining positions, who have little to no ability to demand unique terms of employment, can expect to be confronted with their employer's form agreements and other unilaterally drafted documents on which they may need the advice of counsel. Finally, incumbent employees at all levels may encounter personal circumstances—the need for leave, a medical accommodation, or similar event—that will lead them to a lawyer to learn more about their legal rights.

The following scenarios are typical of transactional problems that an employee-side lawyer might encounter:

4. A recent veterinary school graduate has been offered a position with an established veterinarian in a small town. The established doctor has asked her to sign a contract that prohibits her from practicing animal medicine within the county limits for two years after terminating her relationship with the practice. She would like to know whether such an agreement is enforceable, and if so, whether she can refuse to sign it.<sup>127</sup>
5. A truck driver was recently injured in an automobile accident in which he sustained serious back injuries that will permanently limit his ability to lift and carry. He has been on medical leave for some time and is now free to return to work as a driver, but he will not be able to do the loading and unloading work that his employer typically requires. He wants to know what his rights are.<sup>128</sup>

As with the management-side examples, these scenarios demand more than just an assessment of the law. Irrespective of the enforceability of the noncompete presented in the fourth scenario, the client is best off avoiding the hassle of having to litigate that question when and if she leaves the established veterinarian's practice. It is therefore in her interest to avoid signing the noncompete now.<sup>129</sup> Weighing against her refusal are the relational risks of raising objections to

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<sup>127</sup> See *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 536–37 (Wyo. 1993).

<sup>128</sup> Cf. GLYNN, ARNOW-RICHMAN & SULLIVAN, *supra* note 123, at 646 (problem 10.1).

<sup>129</sup> See generally Arnow-Richman, *Worker Mobility*, *supra* note 15, at 980–84 (describing the in terrorem effects and practical difficulties that noncompetes create for departing employees irrespective of whether the restraint proves enforceable in court).



the employer's form. In the fifth scenario, the employee's legal rights are questionable. Prior to the ADA Amendments Act of 2008, his back injury most likely would not have qualified as a disability;<sup>130</sup> and even subsequent to that Act, accommodating his condition may be unreasonable or pose an undue hardship to the employer.<sup>131</sup> However, those legal issues may not matter. He is free to request an accommodation, and if it is framed effectively—with reference to the law, but with sensitivity to the employer's needs—it may well be granted.<sup>132</sup>

In sum, transactional questions are pervasive in all types of employment practice. The management attorney can expect to review policies, draft contracts, and consult about particular personnel decisions and general human resources strategies, while the employee-side attorney should anticipate being called upon to evaluate the risks and benefits associated with employer-drafted documents and help workers assert rights and preferences in the face of employer policies and practices. In all cases, this will require skills well beyond cognitive knowledge of legal rules and the ability to apply them to the facts of a particular dispute. It will require the lawyer to appreciate a range of human and business interests, to identify relational and legal risks, and to forge and execute an appropriate course of action—in short, the full complement of preventive law skills.<sup>133</sup> It is time to make that skill set a priority in preparing students to practice employment law.

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<sup>130</sup> See, e.g., *Hancock v. Potter*, 531 F.3d 474, 479 (7th Cir. 2008) (holding that a work-related back injury that hindered the employee's ability to perform her job was not a disability under the 1990 Act because there was no evidence that the injury affected the employee's major life activities); *Sarmiento v. Henry Schein, Inc.*, 262 Fed. App'x. 26, 27 (9th Cir. 2007) (lifting restrictions resulting from a back injury did not constitute a disability under the 1990 Act because an inability to perform a particular job is not a substantial limitation). For an explanation of the changes wrought by the 2008 Act, see *supra* note 117 and accompanying text.

<sup>131</sup> See, e.g., *Peters v. City of Mauston*, 311 F.3d 835, 845 (7th Cir. 2002) (employee's request to have someone else perform the heaviest lifting was unreasonable because some heavy lifting was an essential function of the city job of operator of construction equipment); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1260 (11th Cir. 2001) (employer was not required to alter the position of material handler for an employee with a back injury because lifting items weighing up to fifty pounds was an essential function of the job).

<sup>132</sup> For a discussion of the reasons why employers may be inclined to grant accommodations not mandated by law, see Hoffman, *supra* note 118, at 335–37; Scharz et al., *supra* note 118, at 941–43; Travis, *supra* note 17, at 44–55; *supra* Part III.B.2.

<sup>133</sup> See *supra* Part II.C.

## 2. Resisting Claims of Right and Left

The next Part of this Article tackles the specifics of how to incorporate transactional training into the basic employment law course. Before turning to implementation, however, it is important to address the ideological significance of adding a transactional component to the course. Many of the jurisprudential developments described in the previous Part are decidedly anti-plaintiff in effect, if not in intent. Even so, teaching transactionally should not be equated with presenting a management-sided course or even a purely transactional one.

To begin, the pedagogical approach espoused here is intended to supplement rather than displace other teaching methods and course themes. Advocacy skills remain important for all members of the employment bar, including those representing corporate clients. While corporate and commercial law practices tend to sharply divide the “litigators” from the “deal makers,” management-side employment lawyers both make their beds and lie in them. That is, these lawyers both draft contracts and policies and litigate their effect and enforceability down the road. Pedagogical reform that comes at the expense of traditional training would be a disservice to aspiring management lawyers, as well as to the future members of the plaintiff’s bar.

Neither must transactional training necessarily focus on management-side work. As the previous Part indicates, opportunities to apply transactional skills and thinking will present in employee-side practice as well, albeit with less frequency.<sup>134</sup> Such skills are also applicable in other dynamics that attorneys for employees will regularly encounter. Negotiation and settlement of disputes, while heavily dependent on advocacy skills, also require the creative problem solving ability that transactional training cultivates.<sup>135</sup> The lawyer who understands how to avoid problems *ex ante* will likely do better at resolving them *post hoc*.<sup>136</sup> Finally would-be plaintiff’s attorneys will benefit from better understanding the perspective of the opposing party. The goal of transactional teaching is to present lawyering in an active posture that more closely approximates real-life practice. Employee-side lawyers will fare better if they understand the business and rela-

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<sup>134</sup> See *supra* Part III.C.1.

<sup>135</sup> See *Re*, *supra* note 61, at 694–97 (describing relationship between preventive law practice and the skills required for conciliation and settlement).

<sup>136</sup> See *id.*

tional motivations that underlie employers' policies, practices, and legal strategies.

More importantly, management-side transactional practice need not be taught from the perspective of liability avoidance. Reducing the costs associated with employment is certainly a motive and effect of proactive defense practice; but compliance is an equally important goal. To the extent management lawyers emphasize compliance in their practice, their transactional planning activities need not be at odds with plaintiffs' interests. If an employer, through advice of counsel, familiarizes itself with the law and acts in accordance with its legal obligations, the employee is better off than if the employer shirks responsibility, forcing that individual to pursue her rights through judicial or other legal channels.<sup>137</sup> Of course, the approach is also less costly to the employer. In short, where compliance (rather than avoidance) is the primary defense strategy, everyone is advantaged.

There is even reason to believe that in some cases transactional defense practice will result in outcomes better than what workers would obtain through the adversarial process. As previously noted, research on ADA accommodation requests suggests that employers not infrequently grant accommodations to workers who do not qualify for statutory protection.<sup>138</sup> Data suggest that they both accommodate workers who do not meet what, until recently, was a strict statutory definition of disability, and they provide accommodations that at times exceed what the law requires of them.<sup>139</sup> Preventive law theory offers insight on this phenomenon. Given the complexity of clients' interests and human motivation, it is seldom advisable or possible to eliminate risk completely or pursue a strategy that reaches to the limits of the law.<sup>140</sup> Thus, in the fifth scenario, involving the injured

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<sup>137</sup> There is extensive literature on the superiority of non-litigation channels for achieving better outcomes for disputants, which is beyond the scope of this Article. It should be noted, however, that scholars of alternative dispute resolution (ADR) have long emphasized the potential for "win-win" outcomes through cooperative, problem solving approaches to party disputes that aim to identify shared interests. See, e.g., Carrie Menkel-Meadow, *Access to Justice: The Social Responsibility of Lawyers*, 10 WASH. U. J.L. & POL'Y 37, 42-43 (2002) (noting that ADR outcomes are "qualitatively better" when parties take a cooperative approach rather than an adversarial approach to resolving legal disputes); see also Ronald J. Gilson & Robert H. Mnookin, *Business Lawyering and Value Creation for Clients*, 74 OR. L. REV. 1, 9-10 (1995) (describing ways in which lawyers, through negotiation, structure solutions that maximize value and benefit all parties).

<sup>138</sup> See *supra* Part III.B.2.

<sup>139</sup> See Hoffman, *supra* note 118, at 333, 338; *supra* Part III.B.2.

<sup>140</sup> See DAUER, *supra* note 65, at 19.

truck driver, a compliance-oriented management lawyer might agree to an accommodation irrespective of whether the driver has a statutory disability, either through an abundance of caution or to advance other managerial interests (such as the desire to maintain a good worker or avoid a gap in coverage).<sup>141</sup> In short, transactional training is not about teaching students how to skirt legal obligations or avoid liability. Rather it is an opportunity to inculcate those who will be representing management with a compliance ethic. By incorporating a transactional perspective in the classroom we can prepare students not simply to do right by their client but to run a management-side practice responsibly.

#### IV. IMPLEMENTING THE TRANSACTIONAL APPROACH: THE LAW OF EMPLOYEE HANDBOOKS AS AN EXERCISE IN TRANSACTIONAL PRACTICE

The previous Part explained why the employment law course is a valuable platform for training transactionally minded lawyers as well as why the contemporary employment practitioner must acquire transactional skills. This Part turns to the mechanics of leveraging those synergies in the classroom.

Transactional teaching can be achieved through a variety of techniques and using any number of materials. In its simplest form, it consists of supplementing doctrinal discussion rooted in case law and rule application with forward-thinking questions that push students to implement law proactively. The book that I use in the basic three-credit employment law course, *Employment Law: Private Ordering and Its Limitations*, by Timothy Glynn, Charles Sullivan, and myself, provides the advantage of incorporating these types of questions and problems in the text itself among the primary materials and authors' notes.<sup>142</sup> Of course, once an instructor becomes accustomed to identifying transactional teaching moments, it is easy to supplement any set of materials with these types of questions and problems.

Ideally, however, transactional teaching should go beyond classroom discussion. Providing a rich forum for developing skills in this area often requires an extended experience in which students can put their ideas and advice to the test in a realistic context. This Part describes an exercise I have developed and incorporated into the basic three-credit employment law course that requires students to revise an employer's personnel manual in light of case law suggesting

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<sup>141</sup> See Travis, *supra* note 17, at 44–55 (describing advantages to employer of strong accommodation ethic).

<sup>142</sup> GLYNN, ARNOW-RICHMAN & SULLIVAN, *supra* note 123.

that such documents can have contractual significance. The assignment is administered upon completion of the case materials on employee handbooks, thus providing a simulated practice experience in which students engage in problem-solving, drafting, and anticipating client needs in response to existing law.

This Part begins with a brief primer on the state of the law on employee handbooks, drawing on the three principal cases that students in my course read prior to participating in the employee handbook revision exercise. It then describes the goals and parameters of the exercise and provides instruction on how to administer it. Finally, this Part deconstructs the exercise, offering insights on its pedagogical value.

#### A. *Handbook Basics*

Employee handbook law offers an accessible and highly realistic context for constructing an exercise in transactional practice. It is well-settled in almost all jurisdictions that promises contained in an employer-drafted personnel manual can be contractually binding.<sup>143</sup> The key case, presented in most employment law casebooks as well as many contracts casebooks, is the New Jersey Supreme Court's decision in *Woolley v. Hoffmann La Roche*.<sup>144</sup> This case serves as the principal source for teaching the basic doctrine in my textbook, as well as the factual scenario on which the handbook revision exercise is based.

In *Woolley*, an engineer with nearly nine years on the job was fired after writing a report on a piping problem in his employer's building.<sup>145</sup> Upon hire, the plaintiff had received a company personnel manual that stated: "It is the policy of Hoffmann-La Roche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively."<sup>146</sup> The manual also listed and defined six types of termination: "layoff," "discharge due to performance," "discharge, disciplinary," "retirement" and "resignation."<sup>147</sup> It made no mention of the possibility of termination without cause.<sup>148</sup>

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<sup>143</sup> An important exception occurs under Montana law, where such claims are preempted by the Montana Wrongful Discharge from Employment Act. Wrongful Discharge from Employment Act of 1987, MONT. CODE ANN. § 39-2-913 (2007).

<sup>144</sup> *Woolley v. Hoffmann La Roche*, 491 A.2d 1257 (N.J. 1985).

<sup>145</sup> *Id.* at 1258.

<sup>146</sup> *Id.* at 1259 n.2.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

Woolley sued for breach of contract, alleging the company had violated the termination policy in the manual by firing him without cause.<sup>149</sup> The court agreed that the contents of the manual, including the categories and procedures for termination, could contractually bind the employer.<sup>150</sup> Emphasizing the language of the manual and the context in which it was disseminated, the court stated that the document comprised the most definitive statement of the company's policies and that an employee would likely view it as binding.<sup>151</sup> The court held that under these circumstances the manual should be "construe[d] . . . in accordance with the reasonable expectations of the employees."<sup>152</sup>

In so holding, however, the court created a significant loophole. Addressing anticipated objections by employers, including the fear that the decision would open the floodgates to employee handbook claims, the court offered employers a blueprint for avoiding liability. It stated that employers wishing to preserve the nonbinding status of its policies are free to do so by inserting disclaiming language in their personnel materials. The court explained:

All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.<sup>153</sup>

This language exposes students to the key contractual tool they will employ in revising the manual on behalf of Hoffmann-La Roche. If an employer does not want to be bound by its handbook, the *Woolley* court explains, it must say so explicitly. Since that decision, a large body of case law has developed on the viability of disclaimer language in employee handbooks, much of which gives significant deference to employers that include such language. However, at least some courts have shown a willingness to permit employee contract claims where the employer's disclaimer is confusing or perceived as contradictory to other parts of the handbook. In *Conner v. City of Forest Acres*, the South Carolina Supreme Court denied summary judgment to an em-

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<sup>149</sup> *Id.* at 1258.

<sup>150</sup> *Woolley*, 491 A.2d at 1264.

<sup>151</sup> *Id.* at 1265.

<sup>152</sup> *Id.* at 1264.

<sup>153</sup> *Id.* at 1271.

ployer on an employee's breach of contract claim despite the fact that the handbook on which it was based contained numerous disclaimers and reiterations of employees' at-will status.<sup>154</sup> Conner was a police dispatcher for the city of Forest Acres from 1984 until her termination in 1993.<sup>155</sup> The city's personnel manual, on which Conner based her breach of contract claim, contained extensive provisions regarding the bases and mechanism for discharge and discipline.<sup>156</sup> Among other things, the manual contained a nonexclusive list of acts considered to be violations of the city's code of conduct, all of which were for-cause bases for discipline or termination.<sup>157</sup> It also laid out a three-step progressive discipline policy.<sup>158</sup> However, the manual disclaimed any obligation to follow this progression and stated in several places that its policies were noncontractual and subject to change.<sup>159</sup>

The court found a jury question on whether the handbook created a contractual right to termination only for cause pursuant to the procedures outlined therein.<sup>160</sup> The court explained that the handbook contained numerous statements that were entirely at odds with its various disclaimers.<sup>161</sup> For instance, the manual used mandatory language when describing the disciplinary process, asserting that "discipline shall be of an increasingly progressive nature."<sup>162</sup> Such language was enough to create a factual question as to whether a reasonable employee would understand the manual to be contractual.<sup>163</sup> Thus, *Conner* presents a second point of law that students must assimilate in conducting the revision exercise: not only must the handbook include an appropriate disclaimer, it must avoid conflicting promissory language.

The final frontier in the law of employee handbook, and the area in which significant legal uncertainty persists, concerns handbook modification. Assuming the handbook has the force of contract, how do employers go about changing its terms? Jurisdictions

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<sup>154</sup> *Conner v. City of Forest Acres*, 560 S.E.2d 606, 612 (S.C. 2002).

<sup>155</sup> *Id.* at 607.

<sup>156</sup> *Id.* at 608–09.

<sup>157</sup> *Id.* at 608.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Conner*, 560 S.E.2d at 611.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 611 n.4.

<sup>163</sup> *Cf. Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1264 (N.J. 1985) (When an employer distributes a manual providing certain employee benefits, a court "should construe them in accordance with the reasonable expectations of the employees.").

that have wrestled with the question are divided. Some hold that the employer may modify its handbook unilaterally and others require something akin to a formal contract modification.<sup>164</sup> *DeMasse v. ITT Corp.*, a case on certified question to the Arizona Supreme Court, offers students a glimpse of both camps.<sup>165</sup> In 1989, well after the plaintiff-employees had been hired, the defendant-employer modified its personnel manual to include an “at-will” provision and a clause permitting unilateral modification.<sup>166</sup> Subsequently, in 1993, the employer announced that future layoffs, previously based on seniority, would now be dependent on performance.<sup>167</sup> The plaintiffs were laid off under the new policy and brought breach of contract claims against the company based on the original handbook.<sup>168</sup> The precise question certified to the court was whether the employer could unilaterally alter the layoff procedure, assuming the manual was contractual to begin with.<sup>169</sup>

The majority held that it could not.<sup>170</sup> Adopting what is arguably emerging as the minority rule, the court held that once an employer contracts to provide a form of job security, an implied-in-fact agreement exists which can be modified only with consideration from the employer and explicit assent by the employee.<sup>171</sup> The majority rejected the idea that the employee’s decision to remain employed or the employer’s decision to retain the employee could supply the requisite contract formalities, insisting on “[s]eparate consideration, beyond continued employment.”<sup>172</sup> It further held that in order for the employer to secure employee acceptance, the “employee must be informed of any new term, aware of its impact on the pre-existing con-

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<sup>164</sup> Compare *Asmus v. Pac. Bell*, 999 P.2d 71, 78 (Cal. 2000) (holding that contract rights which were unilaterally granted may also be unilaterally reduced or terminated), and *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 401 (Utah 1998) (holding that continuing employment by an employee after a unilateral contract offer constitutes the necessary consideration for an acceptance when the employee had been notified of the change), with *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 662 A.2d 89, 99 (Conn. 1995) (holding that continued work by an employee does not comprise an acceptance of a modified handbook manual that “substantially interferes with an employee’s legitimate expectations about the terms of employment”).

<sup>165</sup> *DeMasse v. ITT Corp.*, 984 P.2d 1138, 1140 (Ariz. 1999).

<sup>166</sup> *Id.* at 1141.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1142.

<sup>170</sup> *Id.* at 1144.

<sup>171</sup> *DeMasse*, 984 P.2d at 1144.

<sup>172</sup> *Id.* at 1145.



tract, and affirmatively consent to it to accept the offered modification.”<sup>173</sup>

A strong dissent took issue with the notion that the employment relationship had ever lost its at-will character as a result of the company’s layoff policy and argued that continued retention of the workers alone provided sufficient consideration for any new terms.<sup>174</sup> Insisting that employers must retain discretion to alter terms of employment when economic necessity dictates, it concluded: “A single contract term in a policy manual may, while it exists, become an enforceable condition of employment . . . [and] the party unilaterally responsible for inserting it into the manual may, on reasonable notice, exercise an equal right to remove it.”<sup>175</sup>

### B. Goals and Logistics

The basic instructions for the exercise are presented as a problem in the casebook:

Imagine that, following *Woolley*, the Human Resources director at Hoffmann-LaRoche contacts you about revising the company’s personnel manual. The HR director feels that the manual is good for employee morale and would like to continue using it, but hopes to alter the language so as to protect the company from future contractual liability. Look at footnote 2 of *Woolley*, which contains the key language that gave rise to Woolley’s claim. How would you re-draft this? What might you add? Will the revision you create satisfy the company’s goals?<sup>176</sup>

I supplement this with an assignment memo that describes the exercise requirements, as well as a digital copy of the handbook text taken directly from the case. Because the court quotes only a small amount of the most relevant language, tying the exercise to the case provides a natural and necessary limit on the scope of assignment.<sup>177</sup>

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<sup>173</sup> *Id.* at 1146.

<sup>174</sup> *Id.* at 1153–55 (Jones, J., dissenting in part).

<sup>175</sup> *Id.* at 1153.

<sup>176</sup> GLYNN, ARNOW-RICHMAN & SULLIVAN, *supra* note 123, at 115.

<sup>177</sup> I am forever dismayed by the fact that the critical language from which the court derives a contractual promise to job security is contained in lowly footnote to the opinion. *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1259 n.2 (N.J. 1985). However, it offers the opportunity to point out how important it is to read cases at this level of detail, as well as to demonstrate how little legal rules mean in the absence of specific facts. See generally David Simon Sokolow, *From Kurosawa to (Duncan) Kennedy: The Lessons of Rashomon for Current Legal Education*, 1991 WIS. L. REV. 969, 969–70 (1991) (critiquing the legal academy’s emphasis on legal rules and its failure to teach students how to find and analyze facts).

I impose strict limits on the resources students can consult. Students may use only the three principle cases in the textbook—*Woolley*, *Connor*, and *DeMasse*—and the accompanying note material.<sup>178</sup> Outside research (legal or otherwise) is prohibited. This is in part to ensure that students do not turn in a ready-made, internet-accessible form of questionable quality in fulfillment of the assignment.<sup>179</sup> It is also to preempt the inevitable wrongheaded plunge into additional case law. Having completed one or more years of law school courses taught predominantly in the advocacy tradition, students are primed to turn to Westlaw or LexisNexis to suss out the “key case” that will magically answer whatever legal question they face. That is generally not the way to approach a transactional problem. Indeed the notion of a case “on point” is inapposite here; students have yet to draft the language that would form the factual basis for an analogy to decisional law.<sup>180</sup> Contrary to prior skills experiences, the “answer” here will not come from more cases but from thinking creatively and strategically about what they already know.

The goal of the revision is explicit. Both the casebook instructions and the supplemental assignment memo emphasize that students are to revise the manual in light of the client’s competing interests.<sup>181</sup> These include avoiding future liability and maintaining the utility of the manual as a management tool. The former interest flows directly from the case law: the employer wants to prevent a repeat of the result in *Woolley*. It would like the freedom to alter or deviate from the provisions in its handbook without placing itself at risk of a breach of contract suit. The latter interest has nothing to do with the case law and is in fact at odds with the employer’s desire to reduce legal risk. The content of the handbook, particularly those

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<sup>178</sup> See GLYNN, ARNOW-RICHMAN & SULLIVAN, *supra* note 123 at 102–22.

<sup>179</sup> There is a wide literature on the value and efficiency of form contracts, which is beyond the scope of this Article. See generally Symposium, “Boilerplate”: Foundations of Market Contracts, 104 MICH. L. REV. 821 (2006). It is worth noting, however, that recent scholarship has called into question the effectiveness of standard contracts used even in heavily negotiated and highly lawyered contexts. See, e.g., Steven M. Davidoff, *The Structure of Private Equity*, 82 S. CAL. L. REV. (forthcoming 2009) (manuscript at 42–43), available at <http://ssrn.com/abstract=1148178> (describing how relational and institutional impediments to modifying the structure of private equity acquisitions resulted in the collapse of multiple transactions amid the economic downturn of 2007).

<sup>180</sup> It is for this reason that this Article refers to the skill of transactional lawyering as “creating facts from law.” See *infra* Part IV.C.1; cf. Brest, *supra* note 39, at 7 (“[L]awyers in everyday practice are called upon to help clients arrange their future affairs in dynamically changing situations where the facts, as well as the law, are anything but determinate.”)

<sup>181</sup> GLYNN, ARNOW-RICHMAN & SULLIVAN, *supra* note 123, at 115.

provisions that relate to job security, help create a positive work environment. The court in *Woolley* describes the company's handbook as an "attractive inducement" to employees that has helped it to achieve a reputation as an employer of choice.<sup>182</sup> The literature of business management has linked workplace morale to business outcomes, and thus the positive impressions the manual creates may translate into a productivity advantages for the employer.<sup>183</sup> A widely disseminated manual can also ensure some amount of consistency in the administration of personnel matters.<sup>184</sup> In this way it serves top management's interests in maintaining a degree of centralized control across a large organization.

Students are less accustomed to identifying client business interests, as distinct from their legal problems, and I therefore allocate class time to teasing them out in advance of the exercise. *Woolley* alludes to a subset of these concepts in what might be thought of as the

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<sup>182</sup> See *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1266 (N.J. 1985). Putting it in less benign terms, the employer may have intentionally hoped that adoption of an employee-friendly manual would help forestall unionization of its workers. See *id.* at 1264.

<sup>183</sup> See FREDERICK F. REICHEL, *THE LOYALTY EFFECT: THE HIDDEN FORCE BEHIND GROWTH, PROFITS, AND LASTING VALUE* 19–21 (1996) (advocating a loyalty-based management approach focusing on retention of customers, employees and investors as key to long-term value creation); Stacey Wagner, *Retention: Finders, Keepers*, TRAINING & DEV., Aug. 2000, at 64 (noting that positive working relationships and personal investments between employers and employees are known to improve productivity and profit margins). On the subject of handbooks in particular, see, for example, Rachel Leiser Levy, Comment, *Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule*, 72 U. CHI. L. REV. 695, 721 (2005) (noting the "[c]onventional corporate wisdom" that employee handbooks produce a "sense of shared knowledge [that] boosts workplace morale and workplace productivity by giving employees confidence that employers uniformly apply company policies"); Anne Ciesla Bancroft, *Give that Handbook a Hand: Employee Handbooks Deserve both Applause and Attention—Keep Them Up to Date*, BUS. L. TODAY, Mar.–Apr. 2005, at 27 (2005) (suggesting that employee handbooks can raise employee morale and help prevent unionization by highlighting favorable employee benefits and presenting a positive company image); Mike Johnson, *Good Policies Lead to a Bias-Free Workplace*, TRIBUNE BUS. WKLY., Jan. 20, 2003, at 1 (discussing the causal link between standard policies appearing in an employee handbook and lower discrimination in the workplace and, therefore, higher employee productivity and morale).

<sup>184</sup> See Joseph W. R. Lawson II, *Give Your Employees a Hand (Book)*, 6 LEGAL MGMT. 24, 28–29 (1999) (employee handbooks promote consistency in handling human resource issues, communicate vital information to employees, save time for management, and help the firm comply with federal and state law); Maureen E. McClain, *Handling Wrongful Termination Claims 2001; What Plaintiffs and Defendants Have to Know*, 650 PRAC. L. INST./LIT. 111, 114 (2001) (employee handbooks promote consistent administration of policy which increases employee morale and manager confidence in applying company policy).

“policy” portions of the decision.<sup>185</sup> To carry discussion beyond the text, I simply ask students, “Why do you think the employer adopted this manual in the first place?” The answer is as critical as the legal rule in going forward into the exercise, but one entirely foreign to students who are accustomed to looking at the consequences of parties’ actions rather than the rationale for taking them. Were it not for the benefits the employer receives from the manual, it would make no sense to have one at all in light of the risk of contractual liability. Balancing that risk against the client’s goals is ultimately the exercise’s core.

The final product for the assignment consists of two documents: a revised draft of the handbook and a cover memo to the client detailing the proposed changes and the rationale behind them. Students complete the drafting work outside of class. Thus, only the presentation of the exercise and the post-completion debriefing compete with doctrinal material for instructional time.<sup>186</sup> In terms of assessment, I have administered the exercise both on a graded and pass/fail basis.<sup>187</sup> When administering the exercise for a grade, I use a rubric that evaluates the scope and effectiveness of the revisions themselves as well as the quality and sophistication of the client memo.<sup>188</sup> All students in the group get the same grade, which I count

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<sup>185</sup> This offers yet another illustration of the differences between advocacy and transactional thinking. Students have come to think of policy considerations as the gravy on a meaty argument, but “policy” discussion in cases ultimately reflects concerns about how particular rules will affect different constituencies. Such judicial discussions therefore offer a valuable data source for mining and understanding client interests and concerns. Cf. Dauer, *supra* note 7, at 493 (stating that the difference between “policy” issues and client issues is that “policy” is not about clients one-at-a-time; it is about social groups a million or two at a time”).

<sup>186</sup> This Article addresses the issue of time management and the competing demands on the basic course in greater detail *infra* Part V.A.

<sup>187</sup> Both methods have advantages, but ultimately, grading is the better course, albeit more time consuming for the professor. See *infra* Part V.A.

<sup>188</sup> The issue of assessment in legal education is a broad topic beyond the scope of this Article. See generally THE CARNEGIE REPORT, *supra* note 1, at 162–84. Briefly, my process for assessing the handbook revisions consists of examining whether students have addressed the four key areas where editing or additional language is required: I look to see if they have modified (1) the title and purpose of the handbook, (2) the bases for termination, and (3) the disciplinary procedures policy, and I look for (4) the addition of a disclaimer that meets the criteria as set out in *Woolley*. I assign between zero and five points on each of these components of the revisions, bearing in mind such things as the clarity of the language used and the degree to which the language actually accomplishes one or more of the client goals. In assessing the client memo, I similarly assign points, albeit based on a more intangible set of criteria. These include the writing mechanics and style, the thoroughness of the content, the accuracy and appropriateness of any references to law, and the degree to which the memo demonstrates an awareness of its audience and the competing concerns of the

as approximately fifteen percent of the final grade for the course. I require students to complete an exercise assessment form for my own edification as well as a teammate assessment form, which I hope serves as a modest deterrent to would-be shirkers.

### C. *Lessons Learned*

What does this exercise accomplish? Exposure to drafting—the “skills” lesson—is only one piece of the students’ pedagogical experience. In addition to this simulated “practice” component, the assignment re-teaches the analytical lessons learned in the first year of law school and reinforced through much of the curriculum, albeit with a transactional perspective.

#### 1. Creating Facts from Law

A key aspect of the assignment is learning how to apply the law in practice in a way that differs from the type of rule application in which students engage when responding to exam questions and classroom hypotheticals. By the second year, students are adept at analyzing how the law will apply to a set of facts and formulating arguments for and against a particular outcome.<sup>189</sup> However, as legal education critics have pointed out, facts do not arrive in ready-made packages; they must be ferreted out by the lawyer.<sup>190</sup>

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client. For other examples of other faculty’s methods for evaluating written and skills oriented exercises, see, for example, Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651, 659–74 (2007) (proposing techniques for effective feedback on student drafted assignments that emphasize tailored and appropriately detailed commentary drawing on class discussion and prioritizing defects in legal analysis); Michael J. Madison, *Writing to Learn Law and Writing in Law: An Intellectual Property Illustration*, 52 ST. LOUIS U. L.J. 823, 834–35 (2008) (explaining use of a ten-point scale to assess composition and substantive elements of student memos in an intellectual property course); Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1, 32–37 (2004) (explaining a method of developing grading rubrics with specific criteria and point values and advantages of using same for assessing exam performance).

<sup>189</sup> See Brest, *supra* note 39, at 7 (1995) (“The case method teaches problem solving by asking . . . [g]iven this set of facts and these precedents, what are the rights and liabilities of the parties?”); Stark, *supra* note 37, at 224 (“[W]e teach students to take the law and apply it to the facts to create a persuasive argument. . . . The paradigm is one in which the litigators seek a certain legal result by working backwards from the law to a static set of facts.”).

<sup>190</sup> See Brest, *supra* note 39, at 7 (“[T]he case method of instruction is limited by the inexorable fact that appellate cases embody static situations with determinate facts.”); Dauer, *supra* note 7, at 486 (describing preventive law practice as “[c]reating institutions and arrangements on a clean napkin” as opposed to litigation “in which the boundaries of a problem are to a considerable degree preset”).

The lawyer in such critiques is implicitly a litigator.<sup>191</sup> True, the facts do not lay themselves out on a conference table, neatly arranged to trigger particular legal questions, but for the litigator they exist to be “discovered.” This is not to diminish the indeterminate nature of what the litigator will find. He or she will have to parse through different versions of events, contend with foggy or selective recollections, weigh the possibility of bias, and perhaps form a moral judgment in shaping the facts into a particular narrative.<sup>192</sup> But the relevant events have happened.

In contrast, the transactional lawyer deals in a world in which there are no facts—yet.<sup>193</sup> Whereas the litigator is part sleuth, part sculptor, the transactional lawyer is the inventor of the raw material. It is her job to create the facts using the rule of law as a baseline and a boundary. In its baseline function, the law provides the basic tools that the lawyer will use to achieve desired results. In the ordinary business contract scenario, such “tools” include representations and warranties, covenants, and conditions.<sup>194</sup> By analogy, the relevant legal tool in the handbook exercise is the disclaimer. It is this drafting technique that allows the employer to create its desired protection against an adverse legal result. But the role of law is not only functional, it is also a constraint on interests. The transactional lawyer structures the relationship and papers the deal to stay within the law, but with an eye toward maximizing client gain. In the case of an employee handbook, that means offering the client the basic language it needs for protection, while at the same time sanctioning some degree of promissory language in order to achieve the client’s business goal of fostering a positive work environment. Absent this, the “deal” is not valuable for the client.<sup>195</sup>

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<sup>191</sup> See e.g., Sokolow, *supra* note 177, at 970 (“During the negotiating process, during settlement talks, or at trial, lawyers must first discover the facts before they can map out strategies or formulate defenses for their clients.”).

<sup>192</sup> See *id.* at 975.

<sup>193</sup> See Brest, *supra* note 39, at 7 (“By contrast [to what is taught through the case method], lawyers in everyday practice are called upon to help clients arrange their future affairs in dynamically changing situations where the facts, as well as the law, are anything but determinate.”).

<sup>194</sup> Professor Tina Stark refers to these as “the contract’s building blocks.” See Stark, *supra* note 37, at 225.

<sup>195</sup> The seminal work on value creation through transactional lawyering is Ronald Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984), which deals with the different but analogous context of a capital asset pricing in the context of a business to business transaction. This Article explores the analogy further *infra* Part IV.C.4.

To students, the notion of creating facts from law is perspective shifting and empowering. The construct offers a counter framework for evaluating the facts they read in reported cases. Facts are not simply crafted into a legal theory of a case at the point of dispute. Where sophisticated parties are concerned, the facts as often as not were designed by lawyers with the law in mind. It is the creative task of forming relationships and attempting to engineer desired results that makes transactional law attractive to those who practice it. The exercise allows students to experience some of the satisfaction of being in the role of an enabler rather than in the stop-loss posture of an advocate.<sup>196</sup>

More importantly, engineering facts in the face of legal boundaries reveals a more nuanced picture of the client's interest. Within the context of an adversarial proceeding, the client's goal is to win (whether that means receiving a favorable judgment or reaching a satisfactory settlement), and the lawyer obliges by making the best legal arguments that the existing facts enable. This often means lawyering from the extremes. Thus, in the case of a breach of contract action based on an employee handbook, the lawyer for the employer will argue that the manual provided no basis for employee expectations, that the employer never made or intended any promise, and that even if it had, the employer has the unilateral right to alter its procedures and policies.

The difference is that in the planning posture, the lawyer is not just thinking about a legal outcome, but must also think about business issues, which are often in tension with legal interests. That is very much the case in the handbook situation where, as described previously, the interest in using the manual as a managerial tool is at odds with the employer's desire to avoid liability.<sup>197</sup> I reiterate to students during the course of the exercise that their task is not to eliminate the risk of contractual liability, which is impossible in any event, but to best serve the client's interest.<sup>198</sup> Achieving the most for the

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<sup>196</sup> The frequent colloquial characterization of transactional lawyers as "deal makers" and litigators as those who "clean up" after them, is a propos here. Cf. Brest, *supra* note 39, at 7 ("[I]f one looks back to the origin of many cases, the parties were not contestants at all. Rather, they were individuals or entities seeking counsel in arranging their personal or business affairs or resolving a nascent dispute. In some instances, the very fact that litigation ensued signals a failure of their lawyers' judgment or skill.").

<sup>197</sup> See *supra* Part IV.B.

<sup>198</sup> Cf. Dauer, *supra* note 65, at 19 (A core principle of preventive law is that "the optimal management of legal risk is seldom achieved by driving one of its components to zero.").

client on both fronts means the lawyer will not be drafting a document that falls well outside the bounds of contract, the kind of document that would make litigators' work easy. Rather the transactional lawyer wants to play right along the boundary where it can remain safe from contractual liability but preserve the meaning of the document.<sup>199</sup> The worst possible result is a handbook so full of disclaimers and ambivalent statements as to be utterly functionless.<sup>200</sup> The challenge is finding a comfortable place in the middle.

## 2. It's Different (Drafting) in Real Life

Of course, saying and doing are a universe apart. The drafting component of the assignment demonstrates to students how difficult it is to effectuate in writing what they envision in their heads. This reality gap is one they have encountered in the context of framing legal arguments: they have already experienced the difference between articulating an idea in class and actually developing it in a brief or on an exam, but most have not had a comparable experience in a transactional context. When they learn that the assignment does not require (and indeed prohibits) research, they expect it to be relatively simple. They invariably report in debriefing the exercise that it

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<sup>199</sup> Framing the task in this way not only focuses and hones student drafting, it is likely to spur discussion about the lawyer's role. Students may be concerned that effectuating the client's dual goals will result in a document that is misleading to workers, or that this is perhaps the client's intent. Such a realization offers one of many opportunities to engage issues of professionalism and the rules of ethics in the context of the exercise. Students should realize that the rules of ethics do not prohibit this type of drafting. The lawyer owes no duty to the client's workforce, the handbook is not a court document, and there is no misrepresentation. That conclusion, however, does not address the degree to which students may find the endeavor unsettling, nor does it dictate that they go about their business disregarding the possible consequences of their work. See MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 2 (2004) ("It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice . . . [such] considerations impinge upon most legal questions and may decisively influence how the law will be applied."). A full treatment of the ethical and professional issues that arise in the face of legally sanctioned but morally troubling conduct is beyond the scope of this Article. However, on the particular question of misleading language in an employee handbook, it can be helpful to remind students that the legal standard for determining the employer's contractual liability is the "reasonable expectations" of the employees. The document that truly misleads the worker will also fail the employer. For a useful discussion of the gap between law and justice, as well as guidance for discussing such issues with clients, see generally Stephen L. Pepper, *Lawyer's Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181 (1999).

<sup>200</sup> Indeed, such a result is worse than no handbook at all in that it is likely to be confusing to the employee and, by virtue of its existence, still leave the employer at risk of suit.



proved significantly more difficult and time consuming than they initially expected.<sup>201</sup>

Like any exercise in legal writing, part of the challenge, and hence the value, derives from legal complexity. The process of rule application forces a much closer examination of the rules themselves than can be achieved in reading cases and articulating holdings. This is why the hypothetical question is considered the signature pedagogy of law school.<sup>202</sup> The process, depending on how the instructor formulates the questions, can illuminate either the forest or the trees. Thus, a particular fact pattern may highlight the individual elements of a multi-part test or it may introduce issues governed by rules other than those in the case immediately at hand, forcing students to integrate other sources of authority.

The same set of benefits accrues in the transactional exercise. It is easy enough to understand that a handbook must contain a disclaimer in order to avoid contractual obligation. But what exactly should the disclaimer say? Examining the language in *Woolley* with an eye toward drafting reveals that, to be effective, a disclaimer must have several components: a declaration of at-will status, a disclaimer of the manual's contractual significance, and a reservation of the employer's right to modify its terms.<sup>203</sup> Subsequent case law to which students are exposed further interprets *Woolley* to require that the disclaimer be prominently placed and comprehensible to the employee.<sup>204</sup> That is a lot for the drafter to carry off, particularly in light of the client's directive that the manual be employee-friendly and morale-enhancing.<sup>205</sup>

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<sup>201</sup> See Consolidated Student Comments Fall 2007–Spring 2008 (on file with author).

<sup>202</sup> THE CARNEGIE REPORT, *supra* note 1, at 47–51.

<sup>203</sup> *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1271 (N.J. 1985).

<sup>204</sup> See *Evenson v. Colorado Farm Bureau Mut. Ins. Co.*, 879 P.2d 402, 409 (Colo. Ct. App. 1993); *Nicosia v. Wakefern Food Corp.*, 643 A.2d 554, 560 (N.J. 1994); *Sanchez v. Life Care Ctrs.*, 855 P.2d 1256, 1259 (Wyo. 1993).

<sup>205</sup> It is for this reason that I have come to view the disclaimer proviso in the *Woolley* opinion as somewhat tongue-and-cheek. It seems highly unlikely that an employer would be willing to include the literal language the court proposes. See *Woolley* 491 A.2d at 1271 (“[R]egardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement.”). Certainly this is no “simple” addition to the handbook as the court suggests. See *id.* Furthermore, it is difficult to imagine that the New Jersey Supreme Court, well known for its progressive and pro-worker impulses, would set forth this important cause of action in an explicitly policy-based decision only to undercut everything it had penned in the final paragraph of the opinion. The better understanding of the proviso is that the court was offering one final chastisement to the defendant for wanting things both

Identifying and complying with these individual elements, however, is only one aspect of the assignment. Students must also fold in the holding of *Conner*, which denied summary judgment to the employer in a case involving a manual that appeared to have the requisite disclaimers in abundance.<sup>206</sup> *Conner* forces a reevaluation of the hierarchy of legal rules. Students tend to walk away from doctrinal instruction on handbooks with the impression that the disclaimer is the key proxy for determining contractual liability. But a disclaimer is simply that—a clause that disclaims contractual commitment. It is important to keep in mind what makes a handbook a binding contract in the first place, which is the affirmative language regarding discipline and termination. After all, there is no contract without a promise. The take-away in terms of rule application is that an employer who wishes to avoid liability must not only disclaim contractual commitment but also eliminate from the handbook any promissory language that might conflict with the disclaimer.

Ultimately, the students must successfully edit, as well as supplement, handbook language, consistent with both the law and the client's competing interest in maintaining a useful document. Further, they must accomplish these tasks as a group. Students at times have reported frustration, beyond the usual dissatisfaction with group assignments, at the diversity of opinion generated within the group on the wording of the revision.<sup>207</sup> This is part of the exercise design. The confluence of ideas within the group simulates the experience of working with other attorneys (and the client) on a shared case or project.<sup>208</sup> It also illustrates concretely the elusive nature of the legal standard, which determines contractual status based on the reasonable expectations of the employee.<sup>209</sup> The range of opinions within student groups likely accords with the range of perspectives reasonable employees will have when reading the manual and to which the employer must be sensitive. Finally, the variety of student opinions should offer the group a set of options as to where to strike the balance between managerial interests and risk avoidance. Even if all

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ways—to realize the morale benefits its employee-friendly handbook would provide while remaining free to abide by it or not as it saw fit.

<sup>206</sup> See *Conner v. City of Forest Acres*, 560 S.E.2d 606, 611 (S.C. 2002).

<sup>207</sup> See Consolidated Comments, *supra* note 201.

<sup>208</sup> See Brest, *supra* note 39, at 15 (“From the moment they enter practice, lawyers spend much of their time working collaboratively with others, including clients, other lawyers, legal assistants, and professionals in other fields. . . . Yet law schools have not traditionally offered students many opportunities to work collaboratively, let alone to reflect systematically on their successes and failures in team efforts.”).

<sup>209</sup> See *Woolley*, 491 A.2d at 1264.

students agree that certain language risks creating employee expectations, for instance about the security of their jobs, they may disagree as to whether they ought to eliminate that language given the employer's other interests.<sup>210</sup>

### 3. Lawyering as a Balancing Act

At the end of the day (and to the great relief of the students), it is the client who decides what is in its best interest. This aspect of the exercise provides a context for understanding an important value of the profession—that the lawyer is merely the enabler of the client's wishes rather than the actual decision maker.<sup>211</sup> The exercise clarifies the boundaries of the lawyer's role while illustrating the way in which the lawyer facilitates client choice.<sup>212</sup> Students should use the memo as an opportunity to provide the client with options where they are uncertain about the client's priorities, as well as to acknowledge the risks and limitations of the option they recommend. In this way, the process of generating content for the memo forces students to assume the role of counselor and advisor.<sup>213</sup> In addition, through drafting the final product, students gain an exposure to a writing style that differs significantly from what they have experienced in the typical legal writing class focusing on research memos and briefs.<sup>214</sup>

Ideally, the process of proposing and weighing alternatives also provides an experience analogous to contract negotiation. In the handbook exercise, and in much of the transactional work subsumed within employment law, there is only one represented party engaged

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<sup>210</sup> See Brest, *supra* note 39, at 15 (“[D]rafting provides students with a sense of the inherent ambiguity and vagueness of language and, indeed, of what [has been] called the ‘indeterminacy of aim’ that characterizes our vision of the future.”) (citing H.L.A. HART, *THE CONCEPT OF LAW*, 125–26 (1961)). This Article further explores the topic of drafting in a state of uncertainty *infra* Part IV.C.3.

<sup>211</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) (“A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.”).

<sup>212</sup> See *id.* R. 1.2(a) cmt. (“The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means . . . used in pursuing those objectives.”).

<sup>213</sup> See Brest, *supra* note 39, at 15 (“The form of writing distinctive to counseling is the memorandum to a client analyzing his or her problem and setting out and evaluating alternative courses of action. . . . Drafting such documents calls for imagination in predicting different ways in which the future may unfold and for creativity and strategic choices about the precision or open-endedness of language.”).

<sup>214</sup> *Id.* (asserting that the type of writing distinctive to client counseling “requir[es] students to analyze a set of facts (not already homogenized, as they typically are in appellate writing assignments) in terms of both legal and nonlegal considerations, and to present options and recommendations in nontechnical language”).

in planning—the employer. Yet students are essentially serving two masters inasmuch as their charge is to balance the employer’s competing legal and business interests. As noted previously, the options they generate as a group will likely form a continuum between two contrasting positions—the handbook language that most instills positive workplace morale and the handbook language that most reduces the risk of legal liability.

This in turn provides students with insight into the way compromise is generated in any business transaction on risk allocation issues. For instance, a buyer and seller negotiating a sale of goods may have competing views about how their agreement should account for the risk of a delay in the delivery of the merchandise. The seller might desire a strong force majeure clause that includes a detailed but non-exhaustive list of circumstances that will excuse delay in performance. By contrast, the buyer will want a clause making time “of the essence” and recognizing no excuse for deviation.<sup>215</sup> The result in most transactions involving players of equal bargaining power will be something between the two extremes, perhaps sanctioning “reasonable” delays or parroting the basic legal standard for excuse by supervening events.<sup>216</sup> An analogous compromise will likely result during the students’ process of creating the handbook. Perhaps the best employee handbook is one that includes the requisite disclaimers, but does so using friendly, non-legal language that avoids any promise of job security, but expresses the “hope” that workers will have a long future with the company. My own hope is that in the process of reaching this version, students will come to understand the range of options they can offer the client, as well as why the end result is often a somewhat dissatisfying middle ground.

Ultimately, the exercise is about using professional judgment to plot a course of action in the face of uncertainty. Professors constantly remind students that there are no “right answers” in law school. Generally, what they mean is that given the mutability of rules in a precedential system, and the reality that no two sets of facts are completely alike, one can never definitively predict how a court will apply the law in a particular case. But the world of the transactional lawyer is significantly more uncertain than this. In addition to

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<sup>215</sup> Cf. Stark, *supra* note 37, at 226–27 (using continuum of possible “no litigation” clauses in context of sale of company to exemplify the skill of translating client risk allocation preferences into legal language).

<sup>216</sup> See U.C.C. § 2-615(a) (2005) (allowing excuse of performance “if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made”).

the slippery task of predicting legal results, he or she must account for the client's fluctuating and indeterminate business needs.<sup>217</sup> Thus, in the handbook context, the ultimate legal question is how much promissory language will trigger a question of fact on the document's contractual enforceability. Determining how far to push the envelope on this open question requires a prediction as to where a court will draw the line between aspirational and binding language. But it also requires the lawyer to assess the degree of risk that is appropriate for a client to take on this matter given its liability concerns and its interest in having a useful manual. In other words, contending with uncertainty for the deal lawyer means facilitating a critical business choice. The transactional lawyer must intersect legal predictions with an understanding of the client's own competing goals to help the client decide what is in its overall best interest.<sup>218</sup>

#### 4. Adding Value (A.K.A. Earning Your Keep)

Of course, there are also limits on the degree to which the lawyer can rely on the client to identify its own interests. The lawyer brings professional expertise to the table and presumably has the ability to identify pitfalls that the client might otherwise overlook. In the transactional literature this component of the lawyer's role, the value added to the transaction, has garnered significant scholarly attention and has obvious practical significance.<sup>219</sup> A lawyer who does nothing more than facilitate a transaction is a mere intermediary whose services increase the total cost of the deal.<sup>220</sup> Thus, identifying and augmenting value is of supreme importance to clients as well as a matter of self-preservation for the profession. While scholars have

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<sup>217</sup> Myers, *supra* note 6, at 419 ("Students [think] that clients present matters to lawyers in relatively neat packages, that situations are static. . . . In practice, however, situations are much more fluid."); *see also* Brest, *supra* note 39, at 8 ("[A] good lawyer must be able to counsel clients and serve their interests beyond the confines of his technical expertise—to integrate legal considerations with the business, personal, political, and other nonlegal aspects of the matter.")

<sup>218</sup> Brest, *supra* note 39, at 8 ("[G]ood lawyers bring more to bear on a problem than legal knowledge and lawyering skills. They bring creativity, common sense, practical wisdom, and that most precious of attributes, good judgment.")

<sup>219</sup> *See, e.g.*, Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 244 (1984); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 487–88 (2007); Mark C. Schuman, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679, 681 (1996).

<sup>220</sup> *See* Gilson, *supra* note 219, at 241 ("Business lawyers are seen at best as a transaction cost . . .").

theorized the transactional lawyer's role in a variety of ways,<sup>221</sup> most descriptions fit comfortably within the idea that the transactional lawyer's value-added is his or her ability to anticipate and reduce legal or business risks of which the client was unaware or was unable to eliminate.<sup>222</sup>

The revision exercise gives students a taste of that role by leaving a key issue unstated. The client's request is that the attorney revise the manual; the client does not explicitly ask how the new manual should be implemented in the workplace. Yet the way in which the employer distributes the manual has important legal implications. As students know from *DeMasse v. ITT Corp.*, at least some jurisdictions will decline to recognize the validity of the employer's unilateral modification absent "new" consideration and assent beyond continued employment.<sup>223</sup> Thus, whether a court accepts the students' revisions as effectively eliminating any prior legal commitment will ultimately hinge on this issue. Selecting a method of disseminating the revised manual implicates business concerns as well. If the client must supply new consideration, it will have to decide how much it can afford to spend in providing additional benefits to its workers. The client must also account for logistical considerations, such as any administrative difficulty that might inhere in providing new consideration or securing employee signatures or other manifestations of assent. Finally, there is always the risk that efforts to secure knowing consent will emphasize the adverse change in the manual, thus sending a negative message to workers and defeating the client's goal of maintaining strong workplace morale.

Students are explicitly told that *DeMasse* is one of only three cases they can consider in completing the revision exercise, and almost all students include a reservation of the employer's right to modify terms of the manual in their recommended disclaimer language. Yet only a few students recognize that the addition of that language itself falls within the *DeMasse* paradigm—they are turning a manual that

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<sup>221</sup> See *id.* at 255 (positing that transactional lawyers add value by reducing transaction costs by structuring deals to create appropriate incentives and reduce moral hazard); Schwarcz, *supra* note 219, at 500 (arguing that transactional lawyers add value principally by reducing regulatory costs); Schuman, *supra* note 219, at 709 (contending that lawyers reduce transaction costs and thus add value by minimizing uncertainty).

<sup>222</sup> See Stark, *supra* note 37, at 228 ("'Adding value to the deal' is a euphemism for 'finding and resolving business issues.'").

<sup>223</sup> See *DeMasse v. ITT Corp.*, 984 P.2d 1138, 1145 (Ariz. 1999) ("[C]ontinued employment alone is not sufficient consideration to support a modification to an implied-in-fact contract."); see also *supra* Part IV.A.

provides job security (a benefit to the employee) into one that restores the at-will regime (a benefit to the employer). When debriefing the exercise, students invariably protest that they were never asked to advise on implementation, and to some extent I bear that in mind when assessing this aspect of the exercise. But the fact that students were not asked specifically to do this is precisely the point, and the widespread oversight of this issue offers the ultimate teachable moment as to what it means for transactional lawyers to practice law proactively.

#### V. VALUING AND ENABLING INTEGRATIVE TEACHING

The previous Part explained how one can implement the employment as transaction theory in the basic employment law course, as well as the pedagogical value in doing so. Its goal was to provide faculty with the information necessary to carry out a transactional exercise should they be persuaded to adopt this form of teaching. Adapting a course to incorporate such techniques requires nothing other than a willingness to sacrifice some amount of substantive coverage and devote the additional out-of-class time needed to grade a midterm assignment. Importantly, it does not require any structural change in the law school curriculum. A great deal can be accomplished toward better preparing students for legal practice through the concentrated efforts of professors in their own classrooms.

That said, there are ways in which the curriculum can change to better support integrative teaching, as well as ways in which faculty can do more to assist one another. This Article closes with preliminary thoughts about two developments that would strengthen efforts in this direction: the allocation of additional credits to upper-level substantive courses to enable the integration of practical training, and a commitment by faculty to teaching self-consciously and sharing their reflections with the academic community.

##### A. *The Case for a Four- (or Five-) Credit Hybrid*

The experience with the handbook revision exercise illustrates that doctrinal faculty can successfully incorporate a transactional skills component into a basic three-credit course. Yet there are many limitations to that structure. To fully realize the pedagogical value of the revision experience would require devoting significant class time beyond what I currently allot in my course. In an ideal situation, prior to the out-of-class component of the exercise, the professor should engage students in a preliminary in-class discussion about how to approach the exercise, fielding ideas about what areas of the

handbook need to be revised and how. He or she would then allow students in-class time to discuss the issues raised during the class discussion in their assigned groups, before sending them off to actually produce the revised draft and memo out of class. The professor should also allot more time to debriefing the exercise after completion in order to allow for in-class review and critique of the students' proposed revisions. Finally, he or she should send students back to the drafting table to revise their revisions following the in-class review.

To minimize the loss in substantive coverage, I take various short cuts in administering the exercise. In contrast to the description above, I limit preliminary class discussion to my expectations and requirements of the exercise, the group activity occurs almost exclusively outside of class, debriefing focuses broadly on the outcomes of the exercise and students' experiences rather than providing a careful critique of individual revision efforts, and there is no re-write. While I believe, and student feedback confirms, that the exercise is still extremely valuable, students are somewhat short-changed.<sup>224</sup> For many, this is the one and only transactional skills experience of their law school careers and their sole exposure to drafting a document other than a memo or brief.<sup>225</sup>

A more supportive structure for integrative teaching would allot an additional credit (or more) to each upper-level course for the purpose of incorporating a thorough skills experience. In terms of the employment law course, students would have one additional class meeting per week devoted to application of substantive material in a practical context.<sup>226</sup> This would include not only an extended version of the handbook revision exercise, but also other problem-solving exercises. For instance, with more credit hours the professor might ask students to draft or revise an employee noncompete or arbitration agreement, prepare an opinion letter assessing whether a particular set of workers are exempt from mandatory overtime pay, or negotiate

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<sup>224</sup> See Consolidated Comments, *supra* note 201.

<sup>225</sup> Indeed there is a chicken and egg problem at work here. Presumably, faculty would be more willing to engage students in transactional exercises if doing so were not so time-consuming. If more faculty members conducted exercises like this, students would have the cognitive framework and practical experience to complete any one assignment more independently and efficiently.

<sup>226</sup> This model tracks the structure of the Integrated Transactional Program, described previously, in which students participate in a traditional class meeting (in either trusts and estates or professional responsibility) and as well as participate in a weekly skills session. See Myers, *supra* note 6, at 406–07.



the termination and severance provisions of an executive employment contract.<sup>227</sup>

A comprehensive proposal for curricular reform is beyond the scope of this project. However, there are many benefits to incorporating the multi-credit hybrid structure as a central component of any new curriculum. The most important of these is the unique ability of a hybrid course to connect practical training to substantive law. The hybrid approach directly addresses the *Carnegie Report's* principal point—that law school untenably divides the cognitive and practical apprenticeships of professional education.<sup>228</sup> In this way, it is more responsive to the insights of the report than many of the more wide-scale proposals that have been publicized in its aftermath.<sup>229</sup> The point of the *Carnegie Report* is not merely that students need more skills training, but that skills instruction must be mainstreamed into the core of law school pedagogy.<sup>230</sup> Only by demonstrating how these bodies of learning bear on one another can we expect students to develop professional competence.<sup>231</sup>

In fact, it is possible to envision a reformed curriculum in which the multi-credit hybrid would be the default course structure among

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<sup>227</sup> For examples of such problems, see GLYNN, ARNOW-RICHMAN & SULLIVAN, *supra* note 123, at 3, 62, 166, 722. Of course, such exercise need not only be transactional in nature. For an illustration of how one might incorporate a litigation experience into a basic employment course, see Richard A. Bales, Conference Materials, Pedagogical Methods for Teaching Labor and Employment Law in the 21st Century, Se. Ass'n of Law Schools Ann. Meeting, Palm Beach, FL (August 1, 2008) (on file with author).

<sup>228</sup> See THE CARNEGIE REPORT, *supra* note 1, at 189; *supra* Part II.A.

<sup>229</sup> See, e.g., Scott Jaschik, *Overhauling Law School's Third Year*, INSIDE HIGHER ED (March 12, 2008), available at <http://www.insidehighered.com/news/2008/03/12/thirdyear> (describing Washington & Lee's new curriculum which "replac[es] all academic courses in the third year of its program with 'experiential' courses in which students will perform work equivalent to that done by lawyers"); Katherine Mangan, *New Hampshire Allows Law Students to Demonstrate Court Skills in Lieu of Bar Exam*, THE CHRONICLE OF HIGHER EDUC., July 4, 2008, at 2 (describing program of the New Hampshire bar and Franklin Pierce Law School that allows students to bypass the bar examination by taking a "series of specialized courses and activities on top of the core classes required of all students" that focus on litigation and trial preparation skills); see also Robel, *supra* note 5 (discussing Indiana University School of Law's new "economics and values of the profession" course that will be required in the first year). This is not to say that such reforms are not valuable in their own right; certainly they do much to address law schools' weaknesses in practical training generally. But, as described, they do not appear to respond to the particular need for an integrative law school experience.

<sup>230</sup> See THE CARNEGIE REPORT, *supra* note 1, at 12 (describing the report's pedagogical concern as "how to bring the teaching and learning of legal doctrine into more fruitful dialogue with the pedagogies of practice"); *supra* Part II.A.

<sup>231</sup> See THE CARNEGIE REPORT, *supra* note 1, at 12.

law schools' upper-level offerings. The typical law school course of study for the second and third year posits the purely doctrinal course as the standard platform for instruction with skills courses as optional, add-on components. Instead, the assumption might be that all upper-level courses have both doctrinal and pragmatic components. That is not to say that stand-alone skills experiences should be eliminated. Clinics, externships, practicum courses, and other intensive exposures form a critical, indeed irreplaceable, part of the curriculum. The point rather is that we cannot wholly outsource practical instruction to those programs. Legal knowledge and legal skill are intimately related and equally important for professional success.

Finally, the multi-credit hybrid approach is sensitive to the economics of curricular choice. An educational model that relies on this course structure does not entail expenditures for new programs nor does it necessarily require additional faculty.<sup>232</sup> Existing faculty would teach more work-intensive courses, but assuming the appropriate credit allocation, they would teach fewer of them.<sup>233</sup>

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<sup>232</sup> It is possible that schools could make fruitful use of adjunct practitioners to assist in assessing written work or contributing to other aspects of the skills component of such courses. See, e.g., Fleischer, *supra* note 3, at 491 (describing how the Columbia deals course, in which students review real transaction documents, incorporates presentations by the local attorneys that brokered those transactions). A thorough assessment of the most effective and economical means of staffing such courses is beyond the scope of this project. It is important to note, however, that integrative teaching requires an integrated faculty. The *Carnegie Report* recognizes that law schools' common reliance on non-tenure track teachers to staff the curriculum's skills offerings is a reflection of how the legal academy devalues this aspect of education. See THE CARNEGIE REPORT, *supra* note 1, at 189. To put the point more affirmatively, student learning is enriched where faculty demonstrate expertise in both theory and practice. For these reasons, as well as others documented by legal scholars, this Article does not support the proliferation of full-time, semi-permanent non-tenure track teaching positions to address deficits in faculty resources. See, e.g., Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1 (2000).

<sup>233</sup> To be clear, this Article does not mean to suggest that the resource allocation issues can be uniformly addressed by allocating a set amount number of credits to each (formerly) "doctrinal" class. Law schools will need to assess and determine what constitutes a skills experience, what amount of skills instruction justifies credit augmentation, whether student performance in experiential components of basic courses should be separately assessed, and a host of other related academic matters. Separate discussions may also be required to determine how such teaching is valued in fulfillment of faculty members' required teaching load. For instance, the number of students enrolled in these courses will likely be a consideration in assigning teaching loads, given the close student contact and additional assessment required of faculty teaching skills in their substantive courses. All of these matters require significant study, and perhaps trial and error, and are therefore beyond the scope of this Article.

*B. On Becoming a Teacher-Scholar*

Another implication of this Article is that the worlds of doctrine, theory, and practice are not so far apart. From a functional perspective, the transactional exercise provides an example of the integration of substantive teaching and practical training. But it also relies on an underlying jurisprudential theory and emerging scholarly trend. The private turn in employment law jurisprudence coupled with the insights of new institutionalist scholars justify the focus on transactional law practice as a central site for experiential learning.<sup>234</sup> Just as practice and substance are intricately related to one another, so is scholarship and pedagogy.

In the same vein, it behooves us as faculty to consider teaching—both the substance and methodology of what goes on in the classroom—with the intellectual rigor generally reserved for scholarship.<sup>235</sup> What has been called the “Scholarship of Teaching and Learning” has a long tradition among academics and has been recognized in recent decades as a critical component of the work that faculty do.<sup>236</sup> Such scholarship seeks to create a “teaching commons” by bringing to the public discourse the “intellectual work that is regularly being done” in the classroom.<sup>237</sup> As yet however, the tradition has made only modest inroads into the legal academy.<sup>238</sup>

This Article is not the place to speculate as to why law professors are latecomers to the movement nor to wade into the debate over

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<sup>234</sup> See *supra* Part III.B.

<sup>235</sup> See MARY TAYLOR HUBER & PAT HUTCHINGS, THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, THE ADVANCEMENT OF LEARNING: BUILDING THE TEACHING COMMONS 18 (2005) (suggesting that “all faculty” should “bring their habits, methods, and commitments as scholars to their work as teachers—and to their students’ learning.”).

<sup>236</sup> See ERNEST L. BOYER, *supra* note 8, at [PIN CITE]; see also HUBER & HUTCHINGS, *supra* note 235, at 17 (describing past research and teaching traditions that have contributed to the emergence of the field).

<sup>237</sup> See HUBER & HUTCHINGS, *supra* note 235, at 18 (quoting Dan Bernstein, *Representing the Intellectual Work in Teaching Through Peer-Reviewed Course Portfolios*, in THE TEACHING OF PSYCHOLOGY: ESSAYS IN HONOR OF WILBERT J. MCKEACHIE AND CHARLES L. BREWER [PIN CITE] (Davis & Buskist eds., 2001)).

<sup>238</sup> For some examples of law school-related work in this tradition, see Andrea A. Curcio et al., *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271 (2008); Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413 (2007); and Alice M. Thomas, *Laying the Foundation for Better Student Learning in the Twenty-First Century: Incorporating an Integrated Theory of Legal Education into Doctrinal Pedagogy*, 6 WIDENER L. SYMP. J. 49 (2000).

what constitutes academic scholarship.<sup>239</sup> The point rather is that serious, reflective assessment of our work in the classroom enriches our experience as both educators and scholars and, further, that public exposition of such endeavors is an obligation we owe our colleagues and institutions. I will teach my class better having written this Article, and I hope others will teach better having read it.

## VI. CONCLUSION

This Article has presented a new pedagogical perspective on teaching employment law, one based on the theme of employment as transaction. While employment litigation is an ever growing part of the judicial docket, a significant portion of the practice of employment law focuses on the ex ante creation of employment relationships and compliance with legal mandates. Developments in employment law jurisprudence reveal increased judicial deference to private ordering in assessing rights and liabilities in the workplace, and a growing area of employment law scholarship has exposed the critical role that institutional actors play—employers, their lawyers, and other agents—in the realization of workplace rights. It is time to give these concepts a more prominent place in the classroom.

Doing so necessarily requires more than teaching legal doctrine. As the *Carnegie Report* confirms, the standard pedagogy of discerning rules from cases and applying them to hypothetical fact patterns, while valuable and necessary to cultivating legal analysis skills, cannot alone prepare students for professional practice. This Article has demonstrated that the integration of a realistic exercise into a basic employment law class is a feasible undertaking that exposes students to the much neglected area of transactional practice and makes a significant stride toward bridging the persistent gap between legal analysis and lawyering. Finally, this Article has proffered the multi-credit hybrid course as the building block for an integrative upper-level curriculum. By mainstreaming skills and teaching them in tandem with substantive material, we demonstrate how these segregated components of the curriculum share space in the real world of legal practice and hopefully offer students a better foundation for achieving professional competence when they leave our classrooms.

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<sup>239</sup> See HUBER & HUTCHINGS, *supra* note 235, at 30 (recognizing that the place of teaching and learning scholarship in the academic reward system may well depend on the extent to which such research “closely parallels the features of traditional scholarship and leads to traditional forms of publication”).