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Deal Deconstructions, Case Studies, and Case Simulations: Toward Practice Readiness with New Pedagogies in Teaching Business and Transactional Law

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DEAL DECONSTRUCTIONS, CASE STUDIES, AND CASE SIMULATIONS: TOWARD PRACTICE READINESS WITH NEW PEDAGOGIES IN TEACHING BUSINESS AND TRANSACTIONAL LAW

MICHELLE M. HARNER* AND ROBERT J. RHEE**

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INTRODUCTION

Striking an appropriate pedagogical balance in business law is challenging. The discipline is rich in doctrine and theory, and at the same time has incredibly significant practical application. In a traditional business associations, mergers and acquisitions, or securities law course, the professor barely has sufficient time to cover the basics. With such limited time, how do we help students better connect theory and practice to facilitate their development into practice-aware new lawyers?

In this short commentary, we explore the use of two interrelated pedagogical methods for teaching transactional and business law. The first method is deal deconstruction, which analyzes the set of final deal documents and outcomes. This method is backward-looking, conducting a post-mortem on business transactions and analyzing the parties' choices

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memorialized in the agreement against the legal and financial alternatives. The second method involves case studies and simulations, which are commonly seen in business schools. This method is forward-looking, exposing students to the uncertainties and situational contexts of doing deals and deal-related litigation. Together, these complementary methods help students understand the tradeoffs and dynamics of transactions and deal negotiations. They provide pedagogical alternatives to the traditional Langdellian method, which relies heavily on the study of edited appellate opinions. By presenting problems in different packages and from different temporal perspectives, these methods hone analytical, deal structuring, problem-solving, and decision-making skills.

I. THE NEED FOR NEW PEDAGOGY

Law schools today face enormous challenges. These challenges are well-known: fewer jobs for new graduates due to overcapacity in the legal market, high student debt levels due to high tuition costs, client demands for rationalization of professional services, high cost structure of law schools, and increased demand by the profession for “practice ready” graduates. These factors have prompted criticism of law schools, including criticisms of their curriculum.¹

In response to these challenges, most law schools are considering, at least, programs and curricula that better bridge the training gap. We do not believe that better training in school is a silver bullet to the crisis as a whole, but we do believe that producing more “practice ready” graduates is helpful. Anecdotal evidence suggests that corporate clients are no longer willing to pay the fees for junior attorneys, which has historically been the way law firms trained their young lawyers.² Law firms would have to bear this cost unless training can be further pushed down to law schools. As a result there is a heightened sense of responsibility on the part of most law schools to answer the call for greater “practice ready” graduates.

In the history of modern law schools, the bedrock pedagogical method—indeed the predominant method—in law schools has been the Langdellian case method.³ For many generations, law students learned the law (and presumably how to practice law) by reading edited appellate cases and engaging in an intellectual discussion through the Socratic method. This

1. See generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012) (providing a general criticism of law schools).

2. See, e.g., Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 320–21 (2011).

3. See generally Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597 (2007) (arguing that the business school case method should be incorporated more into the law school curriculum and pedagogy).

process trains students to “think like a lawyer” within the scale of large classrooms typically comprising 1L courses. Students read appellate cases in the common law tradition and other sources of law, such as statutes and regulations, decipher and distill the rule of law, and conceive the legal framework to analyze a particular legal issue.

The Langdellian method is a limited means of teaching problem-solving and transactional skills.⁴ To be clear, we are not suggesting that it ought to be displaced. It has and will have a prominent role in the training of law students, particularly in the 1L curriculum. The first step in becoming a lawyer is thinking like a lawyer, and this means that students must be able to analyze case law and statutes.⁵ In most business law classes that cover doctrine, reading appellate cases and statutes must be standard fare. However, beyond the 1L curriculum, there are diminishing pedagogical returns in terms of skills training through the Langdellian method. What else is offered in the upper-level curriculum in terms of skills development?

A major weakness of the Langdellian method is that it does not provide the necessary context in which legal problems exist. Appellate judges distill facts and procedure to their relevant essence, and casebook authors further distill them for the purpose of casebook design. The end of this process is nothing remotely resembling actual litigation—something that might have taken years and many thousands of hours of professional work. Even when the litigation is a deal gone wrong, it is rarely the case that we see the full contract in the case opinion, which will usually only provide the most relevant facts surrounding how the contested provisions were written or interpreted at the time. Furthermore, by focusing on the analysis and disposition of appellate opinions, the Langdellian method has a litigation bent, which is certainly useful, but at the same time appellate cases are necessarily studies of what went wrong resulting in a trial court outcome and an appeal. Litigation frequently reduces to a zero sum dynamic⁶ with discrete determinatives (for example, is there a right or not, is there a breach or not, is there an injury or not, and, ultimately, is there liability or

4. See *id.* at 598–600 (describing the Langdellian method and arguing that it is limited to a pedagogy focusing on appellate litigation, fixed facts, and retroactive viewpoint).

5. See, e.g., Michelle M. Harner, *The Value of “Thinking Like a Lawyer,”* 70 MD. L. REV. 390, 417–18 (2011) (discussing the value of “thinking like a lawyer” in the context of transactional law).

6. See Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry Into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 663 (2006) (explaining that litigation can result in mutual surplus in the light of transaction costs).

not). This type of problem solving promotes adversarial positioning and typically closed-form solutions on ultimate questions.⁷

Professors Todd Rakoff and Martha Minow aptly critiqued the Langdellian method as follows:

Remarkable as such endurance may be, survival is not the only or even the best test of an educational curriculum, especially given the pull of the status quo on teachers and administrators. The fact is, Langdell's case method is good for some things, but not good for others. We are not talking about fancy goals here; we are talking about teaching students "how to think like a lawyer." Langdell's case method fails in this mission. It fails because lawyers increasingly need to think in and across more settings, with more degrees of freedom, than appear in the universe established by appellate decisions and the traditional questions arising from them. The Langdellian approach treats too many dimensions as already fixed. When what is at issue is whether an appellate bench correctly decided a case, or how its decision fits into the general fabric of appellate decisions, self-evidently we have already decided that the paradigmatic institutional setting for thinking about a legal problem is the appellate court.⁸

In the study of business law specifically, students should appreciate the context of business practice and transactions. A large part of transactions concerns contracting for terms. Transactional lawyers must advise clients on what the positive law is, while creating the private ordering of participants in a myriad of configurations as memorialized in the transaction documents.

Business lawyers do not operate within a litigation framework (of course, always keeping in mind that a large part of their work is to prevent litigation). Business transactions must be more contextualized than the Langdellian method can provide. Contextualized to what? Our answer is to the business situation, the choices of parties, the risk and reward calculations and allocations, the transactional documents, the varied possibilities of contractual solutions to difficult problems, and the possibilities of economic value creation.⁹ This is quite a lot of "context," and the Langdellian method falls short in creating it.

7. We speak here in broad generalities, and we do not mean to dismiss or diminish the enormous volume of meaningful scholarship on litigation dispute resolution. Our suggestion is only that the dynamics seen in litigation and in business transactions have important differences.

8. Rakoff & Minow, *supra* note 3, at 600.

9. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 246 (1984) (discussing the potential value an attorney

Students should, instead, learn transactions through deal deconstructions, case studies, and simulations. Each of these methods provides greater contextualization and teaches students more deal-related skills than the Langdellian method of reading appellate cases. The skills developed are: (1) understanding and appreciation of transactional documents, (2) contract drafting skills, (3) understanding and appreciation of deal economics and business issues, (4) decision-making under uncertainty, and (5) negotiation skills in a non-litigation context.

II. DEAL DECONSTRUCTIONS

“Deal deconstruction” is the post-mortem analysis of real transactions with a focus on analyzing transactional documents such as merger agreements, proxy statements, and summary judgment pleadings.¹⁰ We use the term “deconstruction” in its more generic sense to mean the “analytical examination of something.”¹¹ Although the approach may draw on and benefit from aspects of traditional deconstruction theory, that is not the focus of this article.¹² Rather, we want students to dissect, analyze, and question the components of a deal so that, when they are practicing attorneys, they will build the next one even better and more efficiently.

Deal deconstruction is not necessarily a novel concept. Professors are experimenting with simulations and deal analysis in a variety of business law courses.¹³ For example, Professors Victor Goldberg and Ronald Mann

adds to the context of a business transaction).

10. See *infra* note 12 (using a “deconstruction” concept in various settings and explaining how, practitioners, business executives, and institutions often use a “deconstruction” approach to perform a post-mortem analysis of a deal or project); see generally Mary Ann Jones, Derek Marshall & Sharon A. Purtee, “*Big Deal*” *Deconstruction*, 65 SERIALS LIBR. 137 (2013) (analyzing certain subscription packages in the University library setting). The authors create and use the term “deal deconstruction” here to represent a distinct pedagogical method for analyzing deals in the classroom setting.

11. MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/deconstruction> (last visited Sept. 2, 2013).

12. See, e.g., Jack M. Balkin, *Deconstruction’s Legal Career*, 27 CARDOZO L. REV. 719, 719, 723 (2005) (explaining the history of deconstruction theory and its application in the legal context).

13. See, e.g., Eric J. Gouvin, *Teaching Business Lawyering in Law Schools: A Candid Assessment of the Challenges and Some Suggestions for Moving Ahead*, 78 UMKC L. REV. 429, 441–44 (2009) (discussing, among other things, use of case files, simulations, and deal courses); see also Daniel D. Bradlow & Jay Gary Finkelstein, *Training Law Students to be International Transactional Lawyers—Using an Extended Simulation to Educate Law Students About Business Transactions*, 1 BUS. ENTREPRENEURSHIP & L. 67, 71–72 (2007) (explaining negotiation simulation in the international transactional law context); W. David East, Douglas Wm. Godfrey & Carol D. Newman, *Teaching Transactional Skills and Tasks Other than Contract Drafting*, 12 TRANSACTIONS: TENN. J. BUS. L. 217, 231–32 (2011) (discussing the Deals Skills

offer a Deals course at Columbia Law School that allows students to analyze documents from completed transactions and then discuss those transactions with the lawyers who worked on them.¹⁴ This course offers students an opportunity to start honing their analytical and strategic skills through real-life deal situations. The deal lawyers' participation enhances the experience. We see potential in greater use of transactional documents and collaboration with the bar, both of which we want to push further through this Article.

Transactional documents are valuable teaching tools. We can use them to explain deal structures and to explore the dynamics of business relationships, agreements, and litigation. To that end, we suggest deconstructing the deal, agreement, or litigation through deep dives into the relevant transactional documents. We want students to understand not only the how and why of a particular transaction, but also the role of applicable law and theory in shaping transactions—both the deal that has been completed and future deals in that space.

Consider a lawyer whose client has been asked to serve as a director of a corporation. The lawyer can review the corporation's articles of incorporation and bylaws and then explain her client's indemnification rights as a director of that company. The lawyer who understands the applicable corporate indemnification statute, how courts interpret that statute, and how insolvency law impacts indemnification rights, however, can also suggest and draft an indemnification agreement that better protects and achieves her client's objectives.

We certainly can teach these concepts in the abstract. We can, for example, review Section 145 of Delaware General Corporation Law, discuss case law applying the section, and explain that bankruptcy law

course offered at Emory University); Victor Fleischer, *Deals: Bringing Corporate Transactions Into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 477–78 (2002) (discussing the value of incorporating transactional skills training into the law school curriculum). At University of Maryland Carey Law School, we strive to integrate these approaches not only in our traditional business law courses, but also in new offerings such as Business Law Boot Camp and Business 101. For a description of these courses, see *The Business Law Track*, U. MD. FRANCIS KING CAREY SCH. L., <http://www.law.umaryland.edu/programs/business/academics/track.html> (last visited Sept. 2, 2013). Moreover, several law schools, including Harvard, Michigan and University of Virginia, have started transactional law clinics. See, e.g., *Entrepreneurship Clinic*, U. MICH. L. SCH., <http://www.law.umich.edu/clinical/entrepreneurshipclinic/>; *The Transactional Law Clinics*, HARV. L. SCH., <http://www.law.harvard.edu/academics/clinical/tlc/> (last updated Dec. 17, 2013); *Transactional Law Clinic*, VA. L. SCH., <http://www.law.virginia.edu/html/academics/practical/transactional.htm> (last visited Jan. 30, 2014).

14. See Charles E. Gerber, *Deals Course at Columbia Law School*, COLUM. L. SCH., <http://www.law.columbia.edu/courses/L6107-deals> (last visited Mar. 24, 2013) (describing the basic structure and content of the course).

generally prevents debtors from honoring in full their pre-bankruptcy obligations.¹⁵ But will those concepts connect for the student when she is asked to review the relevant corporate governance documents? Will the new lawyer see the potential need to address vesting of the indemnification rights, clarify ambiguous coverage terms, and protect in the event of the corporation's insolvency?¹⁶ Although we cannot teach law students how to connect the dots in every situation, we can use deconstruction to help them develop this skill while gaining a more thorough understanding of the underlying theory and doctrine and how lawyers use that knowledge in practice.¹⁷

Another example of how deconstruction might work in the classroom is focusing on merger or acquisition agreements that end up in litigation. These transactions resemble the traditional business school case study method and have the benefit of providing a blueprint for the professor's and ultimately the students' benefit. The provisions below are taken from the Agreement and Plan of Merger among RAM Holdings, Inc., RAM Acquisition Corp. and United Rentals, Inc., dated July 22, 2007, and they represent just two of the useful and interesting discussion points in the agreement:

SECTION 8.2 Effect of Termination . . . (e) *Notwithstanding anything to the contrary in this Agreement, including with respect to Sections 7.4 and 9.10, (i) the Company's right to terminate this Agreement in compliance with the provisions of Sections 8.1(d)(i) and (ii) and its right to receive the Parent Termination Fee pursuant to Section 8.2(c) or the guarantee thereof pursuant to the Guarantee, and (ii) Parent's right to terminate this Agreement pursuant to Section 8.1(e)(i) and (ii) and its right to receive the Company Termination Fee pursuant to Section 8.2(b) shall, in each case, be the sole and exclusive remedy, including on account of punitive damages, of (in the case of clause (i)) the Company*

15. DEL. CODE ANN. tit. 8, § 145 (2011); *see also* Marla H. Kanemitsu, *Under Siege: The Effect of Bankruptcy on D&O Protections*, CORP. COUNS. BLOOMBERG L. REP. (Feb. 23, 2012), http://www.dicksteinshapiro.com/files/Publication/1c8b85d1-92c4-4f18-885e-29f276185a17/Presentation/PublicationAttachment/83a26c5e-4bd1-453d-a145-34056a3f889b/Bankruptcy_DO_Protections.pdf (explaining the potential impact of corporate bankruptcy on directors' indemnification rights).

16. *See, e.g.*, Kevin LaCroix, *Taking a Look at the Limits of Indemnification*, THE D&O DIARY (Feb. 22, 2012, 3:46 AM), <http://www.dandodiary.com/2012/02/articles/shareholders-derivative-litiga/taking-a-look-at-the-limits-of-indemnification/> (explaining potential issues for directors under Delaware law, including tensions in objectives that lawyers need to consider in drafting indemnification agreements).

17. *See generally* Joan MacLeod Heminway, *Corporate Finance as Advanced Contract Drafting*, 12 TRANSACTIONS: TENN. J. BUS. L. 243 (2011) (stressing the importance of connecting theory and practice and explaining tools for doing so in the context of Corporate Finance course).

and its subsidiaries against Parent, Merger Sub, the Guarantor or any of their respective affiliates, stockholders, general partners, limited partners, members, managers, directors, officers, employees or agents (collectively “Parent Related Parties”) and (in the case of clause (ii)) Parent and Merger Sub against the Company or its subsidiaries, affiliates, stockholders, directors, officers, employees or agents (collectively “Company Related Parties”), for any and all loss or damage suffered as a result thereof, and upon any termination specified in clause (i) or (ii) of this Section 8.2(e) and payment of the Parent Termination Fee or Company Termination Fee, as the case may be, none of Parent, Merger Sub, Guarantor or any of their respective Parent Related Parties or the Company or any of the Company Related Parties shall have any further liability or obligation of any kind or nature relating to or arising out of this Agreement or the transactions contemplated by this Agreement as a result of such termination. The parties acknowledge and agree that the Parent Termination Fee and the Company Termination Fee constitute liquidated damages and are not a penalty and shall be the sole and exclusive remedy for recovery by the Company and its subsidiaries or Parent and Merger Sub, as the case may be, in the event of the termination of this Agreement by the Company in compliance with the provisions of Section 8.1(d)(i) or (ii) or Parent pursuant to Section 8.1(e)(i) and (ii), including on account of punitive damages. *In no event, whether or not this Agreement has been terminated pursuant to any provision hereof, shall Parent, Merger Sub, Guarantor or the Parent Related Parties, either individually or in the aggregate, be subject to any liability in excess of the Parent Termination Fee for any or all losses or damages relating to or arising out of this Agreement or the transactions contemplated by this Agreement, including breaches by Parent or Merger Sub of any representations, warranties, covenants or agreements contained in this Agreement, and in no event shall the Company seek equitable relief or seek to recover any money damages in excess of such amount from Parent, Merger Sub, Guarantor or any Parent Related Party or any of their respective Representatives.*

SECTION 9.10 Specific Performance. The parties agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. Accordingly, (a) Parent and Merger Sub shall be entitled to seek an injunction or injunctions to prevent breaches of this Agreement by the Company and to enforce specifically the terms and provisions of this Agreement, in addition to any other remedy to which such party is entitled at law or in equity and (b) the Company shall be entitled to seek an injunction or injunctions to prevent breaches of this Agreement by Parent or Merger Sub or to enforce specifically the terms and provisions of this Agreement and the Guarantee to prevent breaches of or enforce compliance with those covenants of Parent or Merger Sub

that require Parent or Merger Sub to (i) use its reasonable best efforts to obtain the Financing and satisfy the conditions to closing set forth in Section 7.1 and Section 7.3, including the covenants set forth in Section 6.8 and Section 6.10 and (ii) consummate the transactions contemplated by this Agreement, if in the case of this clause (ii), the Financing (or Alternative Financing obtained in accordance with Section 6.10(b)) is available to be drawn down by Parent pursuant to the terms of the applicable agreements but is not so drawn down solely as a result of Parent or Merger Sub refusing to do so in breach of this Agreement. *The provisions of this Section 9.10 shall be subject in all respects to Section 8.2(e) hereof, which Section shall govern the rights and obligations of the parties hereto (and of the Guarantor, the Parent Related Parties, and the Company Related Parties) under the circumstances provided therein.*¹⁸

The details of the failed United Rentals/Cerberus merger are well known among business law professors and practitioners.¹⁹ The Delaware Chancery court's decision and the related commentary on the drafting inconsistencies (some of which are provided in the quoted material above), contractual interpretation principles and case law, and substantive issues concerning veil piercing, reverse breakup fees, and material adverse change clauses, among others, offer at least a semester's worth of materials for an advanced business law course.²⁰ Moreover, most law students are not

18. United Rentals, Inc., Form 8K, dated July 22, 2007, Exhibit 2.1 (emphasis added).

19. See generally United Rentals, Inc., Form 8K, dated Nov. 16, 2007, Exhibit 99.3 (complaint filed by United Rentals, Inc. in the Court of Chancery of the State of Delaware, County of New Castle); STEVEN M. DAVIDOFF, *GODS AT WAR: SHOTGUN TAKEOVERS, GOVERNMENT BY DEAL, AND THE PRIVATE EQUITY IMPLOSION* (2009) (examining the United Rentals/Cerberus merger and related litigation); Dealbook, *Diagramming the United Rentals Lawsuit*, N.Y. TIMES (Nov. 30, 2007, 3:09 PM), <http://dealbook.nytimes.com/2007/11/30/diagramming-the-united-rentals-lawsuit/>.

20. See *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007); see also, e.g., Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies*, 71 PITT. L. REV. 71 (2009); Ken Adams, *Costly Drafting Errors, Part 3—United Rentals Versus Cerberus*, ADAMS ON CONT. DRAFTING (Dec. 23, 2007), <http://www.adamsdrafting.com/uri-versus-cerberus/>; Jeffrey Lipshaw, *The Cerberus Case and Lessons in Law, Society, and Language*, CONCURRING OPINIONS (Dec. 22, 2007, 9:57 AM), http://www.concurringopinions.com/archives/2007/12/the_cerberus_ca.html; Edward B. Micheletti, *Chancery Declines to Require Specific Performance in a Case of Buyer's Remorse*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 4, 2008, 8:52 PM), <http://blogs.law.harvard.edu/corpgov/tag/united-rentals-v-ram/>. The Merger Agreement also offers a variety of one-off drafting and critical analysis teaching opportunities. For example, the Solvency provision of the acquirer's Representations provides, "the Surviving Corporation and each of its subsidiaries will not: (i) be insolvent (either because its financial condition is such that the sum of its debts, including contingent and other liabilities, is greater than the fair market value of its

sufficiently familiar with the facts or transactional documents to recognize the deal if the parties' names are removed. A professor thus can start with the relevant transactional documents—that is, the merger agreement, equity commitment letter, and the limited guarantee—and guide the students' critical analysis of the various components.²¹

By starting with the final set of deal documents, students are forced to consider why the parties agreed to the stated terms. What aspects of the law or possible client objectives might have been in play? Through this process, students also should consider what potential issues might lie ahead for the parties based on their assessment of the documents.²² The professor can then supplement the discussion with, for example, the parent's decision to terminate the merger prior to closing and what that might mean for the parties. The initial exercise of working backwards through the documents with little information concerning the parties or their real-life objectives and then confronting potential factual twists will help students better appreciate how the law shapes and reshapes deal negotiations and structures.

As part of deconstructing the deal, students should draft at least one memorandum critiquing the transactional documents.²³ This part of the

assets or because the fair saleable value of its assets is less than the amount required to pay its probable liability on its existing debts, including contingent and other liabilities, as they mature); (ii) have unreasonably small capital for the operation of the businesses in which it is engaged or proposed to be engaged; or (iii) have incurred debts, or be expected to incur debts, including contingent and other liabilities, beyond its ability to pay them as they become due." United Rentals, Inc., Form 8K, dated July 22, 2007, Exhibit 2.1 § 4.13, p. 30 (merger agreement). A professor can use this provision to explore potential fraudulent conveyance and related legal issues, including in the context of leveraged buyouts, as well as the underlying drafting and negotiation techniques.

21. See Steven M. Davidoff, *URI's Argument*, M&A L. PROF BLOG (Nov. 29, 2007), <http://lawprofessors.typepad.com/mergers/2007/11/uris-argument.html> (providing a thoughtful analysis of the United Rentals/Cerberus dispute and links to copies of the relevant documents); see also United Rentals, Inc., Form 8K, dated Nov. 19, 2007, Exhibit 99.3 (equity commitment agreement); United Rentals, Inc., Schedule 13D/A, dated Nov. 14, 2007, Exhibit 2 (limited guarantee); United Rentals, Inc., Form 8K, dated July 22, 2007, Exhibit 2.1 (merger agreement).

22. This exercise can include sensitizing future deal lawyers to the importance of appreciating what the deal and related documents will look like in any subsequent litigation. See, e.g., Erik J. Olson et al., *The Wheels Are Falling Off the Privilege Bus: What Deal Lawyers Need to Know to Avoid the Crash*, 66 BUS. LAW. 901, 915–17 (2011).

23. To be effective transactional lawyers, law students need strong basic writing skills and exposure to drafting transactional documents. See, e.g., Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASSOC. LEGAL WRITING DIRS. 118, 123–26 (2008) (explaining transactional competencies necessary to be an effective transactional lawyer); Wayne Schiess et al., *Teaching Transactional Skills in First-Year Writing*

exercise forces students to be active participants in the critical analysis process. In the memorandum, students should, at a minimum, identify provisions in the transactional documents that work well and those that might pose issues; explain why they have reached those conclusions based on applicable law and other considerations; and, if relevant, redraft or draft provisions to address the issues. Using this annotated drafting approach allows students to work on two types of related but different writing skills, both of which are important to business (and most all) lawyers.

As we continue to talk with our colleagues who practice in the business law community, we are identifying different ways in which law schools might better prepare soon-to-be business lawyers. Notably, many of these colleagues emphasize the need for law students to grasp the import of case and statutory law on business clients, that deals and business are not done in a vacuum, and that little substitutes for a strong work ethic. Although some are skeptical about what law schools can or should teach law students about practical business law skills, most appear to believe that law schools are really well suited to hone critical thinking, writing and drafting skills, and substantive knowledge.

Our concept of deal deconstruction capitalizes on what law schools already do well. The approach is based in critical analysis and doctrine. It subtly introduces writing and drafting exercises in a way that allows law students to practice those skills and start to develop confidence and style. Yet, it is not focused on specific forms or drafting techniques that law firms would need to “unteach” after graduation. Moreover, it provides a safe environment in which students can start exercising judgment about clients’ needs, objectives, and strategies—a skill that many argue you cannot teach but that typically improves with practice.

Overall, deal deconstruction offers a meaningful way to structure advanced business law courses and better prepares law students for practice. It is not a complete solution, and it is not the only way to integrate theory and practice concepts in the classroom. It also may pose resource challenges to law schools that generally do not generate transactional documents. Nevertheless, we believe that such potential challenges can be overcome, and we encourage professors to consider its value in the business law curriculum.

III. CASE STUDIES AND CASE SIMULATIONS

Deal deconstruction sharpens analytical skills through forensic study of deals. Complementing this method are case studies and case simulations.

Courses, 9 *TRANSACTIONS: TENN. J. BUS. L.* 53, 54–57 (2009) (examining the value of teaching transactional drafting skills in law school).

Through these methods, students learn how to analyze business problems and legal issues, and then how to form judgments and to make decisions. Unlike deal deconstruction, which is backward-looking in time, case studies and case simulations are forward-looking—that is, students are placed in situations where the problem is situated at a point in time at which the deal or transaction is anticipated and participants are expected to move forward toward resolution.

Case studies are standard fare in business school pedagogy. The differences between the Langdellian case method and the business school case method are stark. In the business school case method, there is no starting point analysis done by an expert, such as a lawyer or a judge, to criticize, deconstruct, or evaluate. There are only facts and data, and often the problem or issue is not even explicitly stated. Business school professors write case studies on actual situations or transactions with the cooperation of the participants involved. They place the students in the position of the manager or executive, and the teaching method asks students to identify the problem, propose a solution from many potential options, and defend the decision based on facts and data. In any problem, in business or in law, a set of facts constitutes the context and the specific nature of the problem.

Professors Todd Rakoff and Martha Minow aptly describe the business school case as follows:

The archetypical “case” at a business school consists of much more information, and a much more open-ended situation, than the appellate cases used in law schools. They are taught by teachers asking different questions, often in classes as large as law school classes. A careful study by a Harvard Business School professor comparing the methods used in several of Harvard’s professional schools found that alternative “case methods” do indeed develop different skills. Business school students, for example, generate alternative solutions and choose among them more ably than the typical law student; medical school students more successfully learn to identify what they do not know and how to find it out.²⁴

In the analysis of appellate opinions, the emphasis is situating the decision in a framework of policy and theory, a type of thinking that lawyers must learn (of course). However, much of law practice is more complex than just desktop legal analysis. Lawyers develop facts and construct the case theories, deal with uncertainties, calculate risk and reward, make decisions, and solve problems. Business school case studies

24. Rakoff & Minow, *supra* note 3, at 603–04.

present contextualization that is frequently lost during the appellate litigation and casebook production processes. Problems are presented and analyzed from an *ex ante* framework; students are expected to look forward toward an answer. Frequently, business students are not told ahead of time the outcome of the case, and they are sensitized to the fact that uncertainty pervades the real world and that business problems require decisions at the end of the day and not just intellectualized analysis.

A variant of the business school case study is a case simulation. In our vision of this method, “case simulation” has two attributes that distinguish it from a case study: (1) the problem is fictional as opposed to a case study, which is based on a real situation, and (2) the problem is conducive to role-playing, negotiations, or some other form of simulated situation involving active participation of students.

Professor Rhee has taught case studies in his law school and business school courses on corporate ethics. These case studies include, among others, the collapse of Enron, Hewlett-Packard’s board spying scandal, Walmart’s efforts and challenges in environmental sustainability, Credit Suisse’s changes in executive compensation after the financial crisis of 2008-2009, and IKEA’s efforts to combat child labor.²⁵ These case studies are factually very dense, most comprising more than 25 pages of factual information. The density and complexity of the facts and problem do not perfectly mimic real practice, but this form of presentation gets students closer to practice and situational awareness than the study of edited appellate cases.

Consider, for example, the Hewlett-Packard (“HP”) board spying scandal, which illustrates the point. If we teach this case in the classroom, then, in addition to the fine contributions of academic analysis,²⁶ the HP case can be taught through a case study of the facts and circumstances of

25. See Christopher A. Bartlett, Vincent Dessain & Anders Sjöman, *IKEA’s Global Sourcing Challenge: Indian Rugs and Child Labor (A) & (B)*, Harvard Business School Case # 906414-PDF-ENG and # 906415-PDF-ENG (May 3, 2006) (30 pages); Krishna G. Palepu et al., *Hewlett-Packard Co.: The War Within*, Harvard Business School Case # 107030-HCB-ENG (Nov. 1, 2006) (35 pages); Erica Plambeck & Lyn Denend, *Walmart’s Sustainability Strategy*, Stanford Business School Case # OIT71-PDF-ENG (Apr. 17, 2007) (36 pages); Clayton Rose & Aldo Sesia, *Post-Crisis Compensation at Credit Suisse (A)*, Harvard Business School Case # 311005-PDF-ENG (July 7, 2010) (28 pages); Malcolm S. Salter, *Innovation Corrupted: The Rise and Fall of Enron (A) & (B)*, Harvard Business School Case # 905048-PDF-ENG & # 905049-PDF-ENG (Oct. 11 and 17, 2005) (73 pages). These case studies are available from the Harvard Business Publishing at <http://hbsp.harvard.edu/>.

26. See, e.g., Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard’s Pretexting Scandal?*, 77 U. CIN. L. REV. 523, 524 (2008) (analyzing the conflict between the board’s competing obligations of overseeing internal corporate monitors and implementing norms and structures of good corporate governance).

the company at that point in time.²⁷ Students learn to assimilate a complex set of facts and data that are relevant to the growing dysfunction of the board, among other things: the introduction of a new CEO, the bursting of the technology bubble in 2000, the role of corporate culture, the effect of a languishing stock price on strategy, the internal conflict over the proposed merger with Compaq, the post-merger execution, the role of unique personalities within a social structure, the rapidly changing board compositions post-merger, the failure of leadership, the breakdown of trust, and the erosion of a sense of obligation toward the corporate enterprise. These are not conclusions of a preexisting analysis, but rather students must tease out this analysis from facts and data, which mimics imperfectly what occurs in “the thick of things.” This kind of holistic analysis associated with business school case studies promotes judgment, analysis, and problem-solving skills that are inadequately developed through the Langdellian method.

Case studies are not entirely new to the legal academy. Jonathan Zittrain and Jennifer Harrison have written a case study published as a book entitled, *The Torts Game: Defending Mean Joe Greene*.²⁸ This book excerpts material from a real case involving a lawsuit against “Mean” Joe Greene (the Hall of Fame defensive lineman for the 1970s Pittsburgh Steelers) and the Arizona Cardinals arising from an incident in which Greene struck the plaintiff. Among other things, the book contains portions of the complaint; answer; deposition testimonies of key witnesses; several insurance policies; attorney letters, including settlement offers; and edited appellate opinions.²⁹ The book is really a condensed litigation file, and students can develop many skills by analyzing the case studies. These skills include gathering facts, assessing testimony, learning directly from reading insurance policies the implications of insurance on a tort action, and reading appellate cases in this context.³⁰

Another benefit of case studies and case simulations is that students can work in groups or simulated transaction teams. Case studies are conducive to formal and informal presentations performed by groups of students. Team production and business communication skills are learned. Furthermore, simulation is one form of experiential learning as it requires a

27. Krishna G. Palepu et al., *supra* note 25.

28. JONATHAN ZITTRAIN & JENNIFER K. HARRISON, *THE TORTS GAME: DEFENDING MEAN JOE GREENE* (2004).

29. *Id.* at 1–65 (providing in chapters 1 and 2 various sources of facts such as a newspaper article, deposition testimonies, the law of torts, an attorney demand letter, and a legal memo).

30. *Id.* at 88, 97, 112, 118–31 (providing opportunities for written exercises and analysis of insurance policies in the context of a tort).

student to experience a hypothetical situation in the context of an assigned role.

Case studies and case simulations can enhance the teaching of business law and transactional skills in important ways. They more effectively capture the complexity of real transactions and professional settings. They present fewer sharper divisions between “business problems” and “legal issues,” in contrast to appellate cases where discrete legal issues are the foci. They provide opportunities to work with whole transactional and governance documents rather than snippets of the relevant provisions at issue. They promote a greater degree of personification of the problem—that is, the sense that you are a part of the transaction or litigation involved rather than a legal analyst examining the events from a detached point of view. Lastly, they promote what Professors Rakoff and Minow have called “‘legal imagination[.]’ . . . the ability to generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions, to which they could apply their very well honed analytic skills.”³¹

IV. BARRIERS AND OPPORTUNITIES

Although we believe that deal deconstruction, case studies, and case simulations are effective methods to teach business law and transactional skills, there are three significant barriers to using them.³²

First, the most significant barrier is that course materials must be developed, oftentimes from scratch, as there is a dearth of prepackaged, published teaching materials. Casebooks are popular not only because professors are familiar with the Langdellian method, but also, and equally importantly, because the casebook authors have nicely packaged the teaching materials. Deal deconstruction, case studies, and case simulations require a significant upfront investment of time to prepare the course materials if there are no other available sources.

Second, even if a professor were inclined to create the teaching materials, she would need the raw materials: the suitable deal to analyze, the case study to write up, and the hypothetical scenario for the simulation. Research must be done. Cases must be found. The imagination must be unleashed. In addition to time, the source materials are another resource constraint.

Third, while teaching from appellate cases is the standard pedagogy in law schools, many law professors, who were themselves educated in the

31. Rakoff & Minow, *supra* note 3, at 602.

32. *See id.* at 604–06 (discussing the barriers to introducing case studies in legal curricula).

Langdellian method, may be unfamiliar with these relatively new pedagogical methods. In addition to an apprehension of the unfamiliar, class preparation may consume more time. Managing classroom participation for the experienced teacher is comfortably done. But managing group work, class presentation, and simulations may be more difficult. Participation in the context of case studies and case simulations is not always the transitory conversations between the teacher and a single student that is typical of the Socratic method.

We do not believe that these impediments are insurmountable. Law schools would benefit from the publication, either through traditional print media or open source networks, of more deal files, case studies, and case simulations. Certainly, the Harvard Business School has gained fame and fortune from publishing a huge repository of business school case studies. Recently, the Stanford Law School published case studies on environmental law for open use.³³ The effort to manufacture deal files, case studies and simulations requires a dedicated group of law professors who believe in the methods and are willing to write teaching materials. We believe that there are teachers who would be willing to write case studies for fun, service, personal profit, or a combination of these legitimate reasons.

Although law professors are certainly capable of putting together deal files and case studies from publicly available sources, a better and more efficient way to manufacture deal files and case studies is through a partnership with lawyers who actually participated in the deals and cases. Writing materials present excellent opportunities for law professors to collaborate with the professional bar. We are mindful of confidentiality and client issues, but they are not insurmountable barriers. On big public deals, most of the documentation is publicly filed, and these transactions are of such significance and open with respect to information that clients may be willing to talk about them on some detailed, helpful level that does not disclose vital secrets (these kinds of conversations are essential fodder for business school case studies). On many smaller deals, the client's need for strict confidentiality of business information may be lessened, and thus clients and attorneys may be able to talk about the deal or action in significant detail. These types of conversations could advance the educational mission, and the profession could provide a vital service. As well, there could be significant benefit for the clients and attorneys in the form of marketing benefits associated with law schools and law students studying *their* deals or actions. We see potential value in drawing on the

33. *Stanford Law School Case Study Collection*, STAN. L. SCH., <http://www.law.stanford.edu/node/175680/> (last visited Sept. 2, 2013) (providing an array of factually dense and legally complex case studies available for teaching use).

vast expertise and diverse experiences of the transactional bar to help better prepare our transactional law students.

CONCLUSION

The traditional Langdellian method does not fully develop transactional and deal skills. Analysis of appellate cases provides one facet of transactions—that is, deals gone so wrong that they resulted in lawsuits that were then presented in an edited appellate case opinion. By examining deals gone bad, we gain insight into how to do them properly, as well as the doctrinal developments gotten from appellate cases. However, as discussed, the Langdellian method falls short in important ways. We suggest that case studies, simulations, and deal deconstructions simulate experience, provide contextualization, promote problem-solving skills, and hone decision-making skills and judgment. Although actual experience can never be perfectly replicated, these methods bridge the gap between the classroom and actual transactional practice.

We do not discount the hurdles required to employ these pedagogical methods on a sustained basis. The Langdellian method has been supported over many decades by law professors writing casebooks in the service of the educational mission. Like the production of casebooks, the development of a case study, a case simulation, or a deal file requires a significant investment of time. We believe that if a broad enough segment of the professoriate sees the benefits of alternative pedagogical methods in teaching business and transactional law, many law professors, like authors of casebooks, will make similar investments in the service of the educational mission.