

BORROWING FROM THE B SCHOOLS: THE LEGAL CASE STUDY AS COURSE MATERIALS FOR TRANSACTION ORIENTED ELECTIVE COURSES: A RESPONSE TO THE CHALLENGES OF THE MACCRATE REPORT AND THE CARNEGIE FOUNDATION FOR ADVANCEMENT OF TEACHING REPORT ON LEGAL EDUCATION

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INTRODUCTION

Teaching law students substantive business law, transactional skills and professionalism in the context of a real transaction, rather than in the context of resolving a dispute, as the traditional appellate case focus does using the Socratic Method, offers students advantages in preparing for their professional role as

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problem solvers.¹ This transactional perspective in legal education approaches the goals set forth in the American Bar Association's MacCrate Report, which urges legal educators to help "bridge" . . . the . . . "gap" between law school and practice.² The MacCrate Report's lessons on the role of the law school emphasize skills training and professionalism over mere knowledge of the applicable substantive law.³ More recently, the Carnegie Foundation for the Advancement of Teaching has argued for context-based education.⁴ The transactional perspective demands that lawyers, and students as they learn this approach to practice, be well versed in "not only the legal aspects of a contract concept, but also its business purpose."⁵ Additionally, skills training corresponding with the transactional practice area is critical to students learning to act like lawyers. Interviewing clients, negotiating deals, and reviewing and drafting documents are appropriate skills here. Finally, students need to develop legal judgment and the ability to help clients make decisions and craft solutions.

Course materials to achieve these new goals have been developed by a handful of law professors in the real estate area. The traditional casebook filled with appellate court opinions has been replaced by fact patterns that simulate real-life deals and documents used in practice. These new texts use the words "transactional" or "transaction-based" in their titles to distinguish them from traditional casebooks.

Since the Harvard Business School began to publish them in 1925, business case studies of actual cases have been widely used by business schools to provide students with a context in which to learn basic business principles.⁶ In some ways, the business case studies parallel the use of the ubiquitous "hypothetical" in law school classrooms. However, case studies may be more effective than hypotheticals, because they involve real-life, often well known, scenarios or stories where the players face issues that require resolution, thus providing students with a chance to test their book learning and to make decisions on how to provide advice to their

¹ See, e.g., Patricia Mell, *Taking Socrates' Pulse: Does the Socratic Method Have Continuing Vitality in 2002?*, MICH. B.J. 46, 46 (May 2002) (reporting that the Socratic Method approach is "dying" even in first-year courses).

² ROBERT MACCRATE ET AL., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 7 (1992) [hereinafter *The MacCrate Report*].

³ See *id.*

⁴ See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

⁵ Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 226 (2004) (identifying a principle skill of transactional lawyers as "translating the business deal into contract concepts").

⁶ See David A. Garvin, *Making the Case: Professional Education for the World of Practice*, HARVARD MAGAZINE, 56, 60 (Sept.-Oct. 2003).

clients. Producing and using *legal* case studies as materials for elective courses in real estate and other transactions-based courses seems like a possible next step for law school teaching.

The author of this article uses an existing *business* case study as the basis for developing a *legal* case study involving private real estate auctions to sell non-distressed real estate.⁷ This type of auction is in contrast with court conducted and supervised sales in conjunction with foreclosure, for example. The case study involves the decision of the debtor and its attorney, in collaboration with the creditors and their representatives, to seek and obtain the approval of a bankruptcy judge to dispose of the real estate assets of the bankrupt debtor, a national home builder, by means of an auction. “*Auctioning United Homes Portfolio: A LEGAL Case Study*” (the “United Homes Legal Case Study”) provides a fascinating look at one response that may be an alternative to traditional ways of selling real estate, especially during the current real estate crisis.⁸

Part I of this paper explains the widespread use of the case study as a teaching tool in business and other professional education settings. Part II reports criticism of legal education in preparing J.D. students for the practice of law and discusses recommendations for reform. Reformers suggest alternatives to the Langdellian Method and to the use of traditional appellate court cases as teaching materials. Part III notes the growing recognition of a distinct and valuable role for transactional attorneys. It also discusses experiential learning approaches used to prepare students for a business transactional practice.

Part IV argues for the creation and use of *legal* case studies to support the goals of teaching law students about transactional practice as an alternative to the traditional Langdellian appellate case approach. Limits to and frustrations associated with this new approach also are discussed. Part V presents the United Homes Legal Case Study as a *legal* case study indicating one way to sell real estate assets in troubled times.⁹ By approving a proposal earnestly and carefully negotiated by the players to use a private real estate auction to dispose of the debtor’s real estate assets, the

⁷ See Steven L. Good & Margot B. Weinstein, *Auctioning the United Homes Portfolio: A Case Study* (April 2006) (unpublished paper, presented at the 2006 American Real Estate Society (ARES) Conference in Florida) (on file with author); see also STEVEN L. GOOD, *CHURCHES, JAILS, AND GOLD MINES: MEGA-DEALS FROM A REAL ESTATE MAVERICK* (2003). The facts of the United Homes case were set out in a most engaging manner by Steven L. Good in Chapter 8 entitled “Un-United Homes.” *Id.* at 137-60. This book tells the stories of many successful auctions of real property and is directed at a non-legal audience.

⁸ See Celeste M. Hammond, Steven L. Good & Margot B. Weinstein, *Auctioning the United Homes Portfolio: A LEGAL Case Study* (Aug. 10, 2009) (unpublished work paper), available at <http://ssrn.com/abstract=1446951>.

⁹ See *id.*

bankruptcy court adopts a creative device to sell a portfolio of properties quickly, thus avoiding operating costs. The private real estate auction is likely to get a higher price than would be likely in either a traditional sale or a court ordered foreclosure sale. Part VI discusses the actual use of the United Homes Legal Case Study in two law school courses. The reaction of faculty and students is examined. Part VII is the conclusion.

The United Homes Legal Case Study demonstrates transactional lawyering.¹⁰ It uses the facts of the already published business case study of the same event as the backdrop for students to learn about the underlying credit problems of the real estate owner, the function of the bankruptcy process, and the advantages that a professional auction provides in monetizing the real estate assets. Through interviews of the players, this legal case study demonstrates the collaboration between the attorney for the debtor, the attorney for the Unsecured Creditors Committee, the auctioneer, and the bankruptcy judge. Moreover, students review documents that create debt, both secured and unsecured. Students learn the rules of priorities among secured creditors and other non-secured creditors and debtors in bankruptcy. Students view numerous court documents that support the final proposed agreement to conduct the auction. Perhaps most importantly, by considering challenging decision-making throughout the process, students gain insight into the interactions between the transactional lawyer and the client, preparing law students for the roles of lawyer as counselor, lawyer as problem solver, and lawyer for players in a transaction.

I. USE OF CASE STUDIES IN BUSINESS AND PROFESSIONAL EDUCATION

A. Definition of Case Study

Professor Charles I. Gragg provides a classic definition and description of the function of the case study in business education:

[A] case typically is a record of a business issue which *actually* has been faced by business executives, together with surrounding facts, opinions, and prejudices upon which executive decisions had to depend. These real and particularized cases are presented to students for considered analysis, open discussion, and final decision as to the type of action which should be taken.¹¹

The original approach at the Harvard Business School, which gets much credit for the placement of the case method in business education, was a problem method.

¹⁰ *See id.*

¹¹ Charles I. Gragg, *Because Wisdom Can't Be Told*, in *THE CASE METHOD AT THE HARVARD BUSINESS SCHOOL* 6, 6 (Malcolm P. McNair ed., McGraw-Hill 1954).

Dean Wallace Donham insisted in 1921 on a faculty vote to adopt the label “case method.”¹² He explained the differences between the two: “I use the word ‘case’ rather than ‘problem’ because the latter fails to connote the actuality and the realistic detail which must surround the specific situation if it is to start with the flavor of life.”¹³ In a more recent explanation of the value of case studies in business education, David A. Garvin recalls the most important aspect of the method, namely that the case is “the vehicle by which a chunk of reality is brought into the classroom to be worked over by the class and the instructor.”¹⁴

Since it was first introduced at the Harvard Business School, the discussion type of instruction using the case study has been an experiment to compare and to challenge the traditional lecture method then in fashion. This distinction, combined with the use of actual case studies as course materials, is the essence of the case study approach in business education. Indeed, as of 2001, the Harvard Business School faculty continued to “write over 700 cases per year and produce over eighty percent of the cases sold around the world.”¹⁵

B. Function of Case Study Approach in Business Education

Case studies have been used in business schools since they were introduced as a teaching mechanism by the Harvard Business School in the 1920s.¹⁶ The advantage of using case studies is that it redefines the traditional educational dynamic in which the professor dispenses knowledge and students passively receive. The case method creates a classroom in which students succeed not by simply absorbing facts and theories, but also by exercising the skills of leadership and team work in the face of real problems.¹⁷

¹² MELVIN T. COPELAND, AND MARK AN ERA: THE STORY OF THE HARVARD BUSINESS SCHOOL 259 (1958).

¹³ Dean Wallace Donham, *quoted in* COPELAND, *supra* note 12, at 259.

¹⁴ Garvin, *supra* note 6, at 60 (quoting Paul R. Lawrence, *The Preparation of Case Material, in* THE CASE METHOD OF TEACHING HUMAN RELATIONS AND ADMINISTRATION 213 (Kenneth R. Andrews ed., 1953)); *see id.* at 60-63 (providing an excellent history of case writing at the Harvard Business School).

¹⁵ George J. Siedel, *Legal Complexity in Cross-Border Subsidiary Management*, 36 TEX. INT’L L.J. 611, 614 (2001).

¹⁶ *See* COPELAND, *supra* note 12, at 257-59.

¹⁷ *But see* Ronald Alsop, *How Stanford is Grooming Next Business Leaders*, WALL ST. J., May 29, 2007, at B6 (discussing the use of a lab simulation approach at Stanford University Graduate School of Business that is characterized as “more realistic than a typical case study”).

1. Case Study Teaching¹⁸

Students are asked to read a case and to discuss the situation presented, the decisions made, and the actions taken. Questions are often provided to start the inquiry. The critical element is to engage students in a discussion of how the situation can best be addressed and the presented problems resolved by applying knowledge of the subject matter to the particular circumstances. There rarely is a “correct” answer. The case study approach is also referred to as “discussion teaching.” The basic premise is that it is important to not only acquire knowledge, but also to learn how to use and apply that information. It is a blend of cognitive and affective learning modes. As developed at the Harvard Business School, the approach is designed to create business leaders who can effectively analyze and solve real world problems.

The following are the most important principles underlying the method. First, the case method involves the primacy of the situational analysis approach. Decision-making in the professional world requires leadership when dealing with the uncertainties, nuances, and the multiple, and often conflicting, demands of each particular situation. The case discussion forces students and the instructor to focus on situation-specific rather than generalized problem solving. Generalizations could be developed out of a series of case discussions, but their utility is recognized as limited and always open to adjustment.

Second, there is recognition of the imperative of relating analysis and action. A practitioner’s challenge is to apply knowledge to the complexity of a given problem, often when no “complete” solution is possible. The case discussion reflects this by focusing on what can and should be done in a particular situation. Third, the case method emphasizes student involvement. Students cannot learn to make decisions by passively listening to a lecture. They must practice the skill, and case discussion requires that participation. Not only does the discussion engage students in an active process, it also insists that students take responsibility for their own and their fellow students’ learning, much like the demands of a practitioner who must constantly be learning and “teaching” to be an effective professional.

Fourth, there is a nontraditional role for the instructor. The teacher must guide a learning process rather than simply provide information. Teaching becomes a collaborative process where, as discussion leader, the instructor must also be a

¹⁸ See LOUIS B. BARNES, C. ROLAND CHRISTENSEN & ABBY J. HANSEN, *TEACHING AND THE CASE METHOD: TEXT, CASES, AND READINGS* (3d ed. 1994) (providing an overview of case method teaching and useful materials for potential case study method instructors); see also WILLIAM ELLET, *THE CASE STUDY HANDBOOK – HOW TO READ, DISCUSS, AND WRITE PERSUASIVELY ABOUT CASES*, Harvard Business School Press (2007) and WILLIAM NAUMES & MARGARET J. NAUMES, *THE ART AND CRAFT OF CASE WRITING* (2d ed. 2006).

learner in order to not only provide information, but also to monitor the quality and nature of the student analysis and presentation so that the discussion continues on a high-quality path of problem-solving. In doing this, the teacher becomes the role model, demonstrating the skills of observation, listening, communication, and decision-making that are ultimately expected of students when they become practitioners.

Finally, there is a balance of substance and process teaching objectives to facilitate the development of a practitioner's point of view. Successful case method teaching produces practitioners with strong theoretical and abstract knowledge as well as the ability to apply such information. The "point of view" varies from one profession to another but, by focusing learning on cases from the particular field and discussing and analyzing them from the perspective of that discipline, it can be acquired.¹⁹

2. Case Study Method Used in Other Professional Education Settings

The Harvard Business School has committed significant resources to reflecting on teaching with the case method and has been developing case studies for its own students.²⁰ It also recommends use of this teaching approach in higher education, generally.²¹ Accrediting agencies have recommended more active learning in both liberal arts colleges and professional schools, and the case study method has been recommended for all of higher education.²² In their 1987 book, *Teaching and the Case Method*, Louis B. Barnes, C. Roland Christensen, and Abby J. Hansen provide prototype modules of seminars for two academic audiences: teachers in liberal arts

¹⁹ See Interview by Kai Ryssdal with Joel Podolny, Dean, Yale School of Management (Aug. 28, 2009), http://marketplace.publicradio.org/display/web/2008/08/28/case_study_q/ (discussing how students are using tools of the Internet to study business cases).

²⁰ See, e.g., BARNES ET AL., *supra* note 18.

²¹ *Id.* at 2-3.

²² See, e.g., *id.* at 2 (citing the report of a special panel of the Association of American Medical Colleges (AAMC) urging more active learning experiences by "reducing lecture time, emphasizing independent learning skills, and requiring less factual memorization"); see also John T. Rose & Charles J. Delaney, *Case Studies in Real Estate Education: The New AACSB Accreditation Standards and a Proposed Case Study in Real Estate Management*, 10 J. REAL EST. PRAC. & EDUC. 175 (2007) (arguing that case studies meet the new Association to Advance Collegiate Schools of Business (AACSB) International's *Eligibility Procedures and Standards for Business Accreditation*, approved in 2003, by "actively involv[ing] students in the learning process" as required under Strategic Management Standard No. 13, by "encourag[ing] collaboration and cooperation among students" as also required under Strategic Management Standard No. 13, and by requiring students to "contribute to the learning of others" as required by Strategic Management Standard No. 14). The authors conclude that case studies should be developed and used in the teaching of real estate in business schools. *Id.* at 177.

departments and teachers in professional schools, including business schools.²³ The Harvard Business School reports that “faculty from the arts and sciences . . . as well as [most] colleagues in education, medicine, public health, dentistry, and government” have adapted the case method for teaching in their respective fields.²⁴ Interestingly, the list does not include the Harvard Law School!²⁵ Nevertheless, the educational principles and goals discussed with respect to using the case method in business education resonate strongly with the new perspectives and goals for legal education.²⁶

3. Case Studies Developed for Real Estate Education

Although the adoption of the case method by the Harvard Business School led to nearly unanimous use of that method at all business schools and to the publication of thousands of case studies, business case studies in real estate were not published in great numbers until the 1990s.²⁷ In his book, *Real Estate—A Case Study Approach*, William J. Poorvu explains that “[t]raditionally, the industry had been viewed in academic circles as being too undisciplined and fragmented to lend itself to rational analysis.”²⁸ Especially after the commercial real estate cycle ending in 1990, the number and variety of real estate case studies have increased. The American Real Estate Society (ARES), an organization of business professors teaching courses and producing scholarship on real estate and related fields, has been responsible for publishing numerous business case studies on the subject.²⁹

²³ See BARNES ET AL, *supra* note 18.

²⁴ *Id.*

²⁵ *But see* Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 603-05 (2007) (exploring the use of case studies, even in the first-year courses, as more successful teaching materials than appellate cases).

²⁶ See *infra* Section II.B.

²⁷ See, e.g., Society for Case Research, SCR Mission and Purpose, <http://www.sfcr.org> (last visited Sept. 21, 2009) (indicating the organization is dedicated to facilitating “the exchange of ideas leading to the improvement of case research, writing, and teaching; assist[ing] in the publication of written cases or case research and other scholarly work; and provid[ing] recognition for excellence in case research, writing and teaching”). The Society for Case Research is a resource for anyone wishing to engage in case research. My specific reason for considering legal case studies involves my experience teaching commercial real estate transactions courses. I am fascinated by the evolution of the use of this method in the variety of business specialties, as well as the recent use in legal education.

²⁸ WILLIAM J. POORVU, *REAL ESTATE: A CASE STUDY APPROACH*, at xiv (1993).

²⁹ See, e.g., RONALD K. WILLS & HELEN I. DANIEL, *CASE STUDIES IN REAL ESTATE* (1990) (sponsored by the American Real Estate Society (ARES)).

Many of these case studies appear in ARES' *Journal of Real Estate Practice and Education*.³⁰ Also, as business schools have developed reputations for specializing in real estate, the demand for opportunities for faculty to publish case studies of real estate developments, transactions, and economic analysis has increased.³¹ The development of case studies by business school faculty is encouraged and expected.³² Additionally, trade organizations like the Urban Land Institute provide case studies about individual real estate developments that record the economic aspects of a particular development and provide insights about "innovative features and strategies."³³

There are only four published case studies regarding the sale of real estate by privately held auctions:³⁴ Alcoa and Newell Rubbermaid,³⁵ United Homes,³⁶ Lazy H Ranch,³⁷ and a Portfolio of Manufactured Homes.³⁸ None of these involves the legal issues or legal analysis of using an auction as a method to dispose of real estate assets.³⁹ The author is aware of no other legal case study involving real estate.

³⁰ See e.g., James C. Brau & Barrett A. Slade, *Franklin Covey Company: Retain Ownership versus Sale/Leaseback Decision: A Corporate Real Estate Case Study*, 9 J. REAL EST. PRAC. & EDUC. 81 (2006), for one that presents the facts and issues of a complicated situation in commercial real estate.

³¹ See, e.g., NORM MILLER & MARGOT WEINSTEIN, COMMERCIAL REAL ESTATE CAREER EDUCATION AND RESOURCE GUIDE (2d ed. 2009) (attempting to list all universities with real estate programs); DePaul University, College of Commerce, Department of Real Estate, <http://realestate.depaul.edu/About/ResearchCases/index.asp> (promoting the case studies its faculty has published); see also Mark Sullivan & Susanne Cannon, *Flower Residential Properties: A Real Estate Investment Trust Case Study*, 10 J. OF REAL EST. PRAC. & EDUC. 187 (2007).

³² See discussion *infra* Part IV.B.

³³ See Urban Land Institute, ULI Development Case Studies, <http://casestudies.uli.org>; see also ADRIENNE SCHMITZ & DEBORAH L. BRETT, REAL ESTATE MARKET ANALYSIS: A CASE STUDY APPROACH (2001).

³⁴ See Steven L. Good & Celeste M. Hammond, *Real Estate Auctions—Legal Concerns for An Increasingly Preferred Method of Selling Real Property*, 40 REAL PROP. PROB. & TRUST J. 765, 767-68 (2006) (contrasting private auctions of non-distressed real estate with public sales ordered in foreclosure or property tax situations).

³⁵ Margot B. Weinstein & Steven L. Good, A Multi-Case Portfolio Analysis of Alcoa & Newell Rubbermaid: Exploring the Use of Auctions to Sell Two Significant Portfolios of Non-Distressed Properties (Apr. 2005) (unpublished paper, presented at the 2005 American Real Estate Society (ARES) Conference in Santa Fe, New Mexico) (on file with author).

³⁶ Good & Weinstein, *supra* note 7.

³⁷ Marcus T. Allen, *Auctioning the Lazy H Ranch: A Case Study*, 6 J. OF REAL EST. PRAC. & EDUC. 269 (2003).

³⁸ Margot B. Weinstein, Steven L. Good & Jeffrey D. Fisher, *Bidder's Choice Cap Rate Auctions: A New Strategy for Selling Real Estate Portfolios*, 12 J. OF REAL EST. PRAC. & EDUC. 57 (2009).

³⁹ *Id.*

Although other law school professors have considered and positively responded to the possibility of using legal case studies as course materials and to using the case study as an approach to teaching, this author and those professors worked independently until now. Yet all reached a conclusion that legal educators should experiment with this approach.⁴⁰ Therefore, the United Homes Legal Case Study serves as a prototype for such an experiment.⁴¹

II. DEMANDS ON LEGAL EDUCATION TO PREPARE STUDENTS FOR TRANSACTIONAL BUSINESS LAWYERING

A. Criticism of Traditional Legal Education

First, it is doubtful that the Socratic Method is really alive in its original form as developed under Christopher Columbus Langdell, who was elected dean of the Harvard Law School in 1870.⁴² At the time, the Harvard Law School was the heart of traditional legal education, using appellate cases as the exclusive course materials.⁴³ Without providing a “precise definition,” Robert J. Rhee “loosely define[s]” the Socratic Method as “a teaching method done primarily through a dialogue between teacher and student, as compared to lecturing or experiential learning.”⁴⁴ When compared to the Socratic Method as it was known throughout the 1960s, “the experiences of today’s students are very different from those of students a generation ago.”⁴⁵ Even without considering the recent introduction of skills courses and clinical legal education, “[i]n the place of the traditional approach is an eclectic mixture of newer approaches, including toned-down Socratic questioning, student panels, group discussions, and lectures.”⁴⁶

Nevertheless, the nearly exclusive use of appellate cases as the only or primary course materials continues nearly 150 years after Langdell’s reform of legal

⁴⁰ See discussion *infra* Part IV.

⁴¹ See Hammond, Good & Weinstein, *supra* note 8.

⁴² Harvard Law School, Our History, <http://www.law.harvard.edu/about/history.html> (last visited Oct. 21, 2009); see, e.g., Robert J. Rhee, *The Socratic Method and the Mathematical Heuristic of George Polya*, 81 ST. JOHN’S L. REV. 881, 881-82 (2007) (bemoaning the decline of the Socratic Method because the essence of teaching and learning is “a dialogue between teacher and student”); see also Donald G. Marshall, *Socratic Method and the Irreducible Core of Legal Education*, 90 MINN. L. REV. 1, 2 (2005) (“The fact is that teaching and learning by genuine dialog has all but disappeared from the second and third years of law school, and is fast disappearing from the first.”).

⁴³ See Harvard Law School, *supra* note 42.

⁴⁴ Rhee, *supra* note 42, at n.3.

⁴⁵ Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 114 (1999).

⁴⁶ *Id.*

education. This longevity is probably due to the elite reputation of Harvard University and its Law School. Legal education is remarkably homogeneous. Law schools are rewarded to the extent that they mimic the top ten ranked schools. Prior to Langdell's reform in 1870, legal education for many years had consisted of using textbooks prepared by law teachers and containing their "jealously guarded secrets," supplemented by apprenticeships.⁴⁷ Langdell's notion was of law as a "science."⁴⁸ The objective of legal education was:

[N]ot precisely and only to educate young men to be practicing lawyers, though it [was] largely used for that purpose. It [was] to furnish all students who desire it the same facilities to investigate the science of human law, theoretically, historically, and thoroughly as they have to investigate mathematics, natural sciences, or any other branch of thought.⁴⁹

The limitations of Langdell's model for educating law students have received a lot of attention, and the underlying goals of this approach may be the basis for some of the problems.⁵⁰ Langdell sought to make law more academic to support legal education within the private university setting.⁵¹ The measure of its success is

⁴⁷ See David D. Garner, Comment, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 BYU EDUC. & L.J. 307, n.14 (2000) (citing ALFRED ZANTZINGER REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA 207 (1927)) (detailing the history of legal education from Colonial times); see also Amy Deen Westbrook, *Learning from Wall Street: A Venture in Transactional Legal Education*, 27 QUINNIPIAC L. REV. 227, 244-52 (2009). By 1860, an apprenticeship was required in only nine of the 39 states. Garner, *supra*, at n.14.

⁴⁸ Garner, *supra* note 47, at 319.

⁴⁹ *Id.* (quoting Langdell).

⁵⁰ See, e.g., Michael A. Mogill, *Dialing for Discourse: The Search for the 'Ever After'*, 36 WILLAMETTE L. REV. 1, 1-3 (2000) (arguing that the case method used in legal education focuses on the "identification in appellate cases of the discrete elements of facts, issues, holdings and rationales without an appreciation for any story or narrative"). Mogill suggests using the case study method so ubiquitous in business schools to teach about litigation of torts in a way that tells the entire story of the litigants, meaning the remedy as well as the law. *Id.* at 2-4. See generally Benjamin V. Madison III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, 85 U. DET. MERCY L. REV. 293, 293 (2008) ("[I]f law schools paid attention to the discoveries in the field of education, law school teaching would improve dramatically.").

⁵¹ See, e.g., Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 599-600 (1994) (commenting on Langdell's moving of most, if not all, of legal education to the university, rather than to the law office).

to teach law students to “practically solve problems” as lawyers would, “rather than only [to] solve problems the way academics would.”⁵²

Even Todd Rakoff and Martha Minow, both currently professors at the Harvard Law School who are of the opinion that “American legal education is pretty good,” criticize Langdell’s case method as not responding to changes in approach necessitated by tremendous changes in society.⁵³ While the Langdellian model has survived, survival is not the best test of a curriculum.⁵⁴ Criticism of Langdell’s approach stems from the limits of treating too many dimensions as fixed, as well as from the decision “that the paradigmatic institutional setting for thinking about a legal problem is the appellate court,” which the case method reflects.⁵⁵ Yet, Rakoff and Minow do not consider transactions-based legal education and limit their comments to dispute solutions other than litigation, even though the role of the transactional lawyer requires a different perspective and skills set from the litigator.⁵⁶ “As far back as 1891, the American Bar Association issued a report that concluded that the case method produces ‘a class of graduates admirably calculated to argue any side of any controversy . . . but quite unable to advise a client when he is safe from litigation The student should not be so trained to think he is to be a mere hired gladiator.’”⁵⁷

As one coming out of law practice, government, and corporate life into an academic and administrative career, new Dean of Pace University School of Law Stephen J. Friedman comments that current legal education is remarkably similar to the education he received in the late 1960s.⁵⁸ He concludes that even with the

⁵² Sacha Pfeiffer, *T’was a Time for Change*, THE BOSTON GLOBE, May 7, 2006, available at http://www.boston.com/business/articles/2006/05/07/twas_a_time_for_change (quoting Harvard Law School professor Martha L. Minow, chair of the curriculum review committee).

⁵³ Rakoff & Minow, *supra* note 25, at 597-98. Martha Minow became the Dean of Harvard Law School in 2009.

⁵⁴ *Id.* at 599 (remarking that one might continue using the method because “one still cares about working from the particular to the general and back again . . . [or] because one thinks this mirrors what lawyers do in practice,” even though “one ceases to believe that the law consists of principles or doctrines” and begins to believe that legal education should reflect the modern situation, rather than one that is more than a century old); see also Erwin Chemerinsky, *Radical Proposals to Reform Legal Pedagogy: Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595 (2008) (urging that a clinical experience for each student is the most important reform needed).

⁵⁵ Rakoff & Minow, *supra* note 25, at 600.

⁵⁶ See *infra* Part IV for a discussion of using legal case studies even in first-year courses.

⁵⁷ Siedel, *supra* note 15, at 613, (quoting Garner, *supra* note 47, at 319 (quoting Gerard W. Gawalt, *The Impact of Industrialization on the Legal Profession in Massachusetts, 1860-1900*, in *NEW HIGH PRIESTS* 108 (Gerard W. Gawalt ed., 1984)).

⁵⁸ Stephen J. Friedman, Essay, *Why Can’t Law Students Be More Like Lawyers?*, 37 U. TOL. L. REV. 81 (2005).

MacCrate Report's findings and suggestions and the growth of some skills training, "legal education has not accommodated the enormous changes that the legal profession has undergone."⁵⁹ The increasing cost of legal services and complexity of the law has demanded real expertise earlier in a lawyer's career.⁶⁰ The "traditional paradigm of legal education and training" through an apprenticeship is becoming "increasingly unrealistic."⁶¹ Young associates are pressured to be productive sooner and to develop specializations.

B. Recommendations for Reform

In 1992, the Section of Legal Education and Admissions to the Bar of the American Bar Association published The MacCrate Report.⁶² The report examined the extent to which legal education was preparing students for the practice of law and called upon law schools to provide students with the skills training and notions of professionalism that would enable them to assist clients upon graduation.⁶³ The MacCrate Report influenced many changes in J.D. programs and resulted in a dramatic increase in LL.M. programs, most of which are practice-based and prepare students for practice in specialties from bankruptcy to tax.⁶⁴ Other recent LL.M. specialties include banking law, employee benefits law, environmental law, intellectual property, information technology, international law, and real estate law.⁶⁵ In reviewing changes since 1992, it is to be noted that, while law schools have added courses and training in their J.D. programs to prepare students for litigation practice, there has been little attention paid to transactional practice, where most students

⁵⁹ *Id.*

⁶⁰ *Id.* at 85.

⁶¹ *Id.*; see also James A. Fanto, *When Those Who Do Teach: The Consequences of Law Firm Education for Business Law Education*, 34 GA. L. REV. 839, 842 (2000) (arguing that neither the old apprenticeship model nor the more recent personal mentoring of associates is viable and that formal training by the firm is a challenge and opportunity for legal education reform).

⁶² See The MacCrate Report, *supra* note 2.

⁶³ See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION—A VISION AND A ROAD MAP (2007) [hereinafter Best Practices Report] (evaluating these recommended changes).

⁶⁴ St. John's University School of Law, LL.M. in Bankruptcy, <http://new.stjohns.edu/academics/graduate/law/academics/llm/bankruptcy> (last visited Aug. 3, 2009). The only LL.M. degree program in Bankruptcy is at St. John's Law School. See American Bar Association, Post J.D. Programs, <http://www.abanet.org/legaled/postjdprograms/postjd.html> (last visited Aug. 17, 2009). According to the American Bar Association, 31 law schools have LL.M. Tax degree programs. *Id.*

⁶⁵ See The John Marshall Law School, <http://jmls.edu/academics/index.shtml> (last visited Aug. 2, 2009). The John Marshall Law School has programs in many of these areas of practice: employee benefits, information technology, intellectual property, international business and trade, and real estate law. See *id.*

eventually make their professional careers.⁶⁶ Indeed, this litigation model persists even in light of an empirical study by Louis N. Schultze, Jr. indicating that a majority of incoming law students are more interested in transactional practice than in litigation.⁶⁷

Recently, the Carnegie Foundation for the Advancement of Teaching published a valuable edition on legal education that advances the goals of the MacCrate Report and addresses the teaching approach that would be necessary to achieve those goals (the “Carnegie Report”).⁶⁸ Chapter 3 of the Carnegie Report, entitled “Bridges to Practice-From ‘Thinking Like a Lawyer’ to ‘Lawyering’” makes a good argument for “context-based” education.⁶⁹

While there are many suggestions from both reports that deserve the attention of those involved in the evolution of legal education,⁷⁰ this article primarily considers the benefits of developing new course materials, specifically legal case studies to enhance a new teaching approach, especially for business and transactional courses.⁷¹

III. TRANSACTIONAL LEGAL EDUCATION: PREPARING STUDENTS FOR THE WORK OF THE BUSINESS LAWYER

A. Growing Recognition of the Distinct and Valuable Business/Transactional Attorney Role

There may be disagreement about precisely what the role of the business transactional lawyer involves, but no longer is there doubt that these attorneys add value, that they are “expanding their realm,” and that legal educators should prepare

⁶⁶ Westbrook, *supra* note 47, at 261 (discussing efforts to revise the Langdellian Model).

⁶⁷ 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, 69 (2007).

⁶⁸ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter Carnegie Report]; see generally Stephen Nathanson, *Conceiving the Lawyer as Creative Problem Solver: Legal Education: Designing Problems to Teach Legal Problem Solving*, 34 CAL. W. L. REV. 325 (1998) (commenting on the advantages of simulated problems as a teaching approach in non-US legal education).

⁶⁹ See Carnegie Report, *supra* note 68, at 115-25.

⁷⁰ See, e.g., Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947) (arguing for clinical education as a necessary part of a lawyer’s education); see also Fanto, *supra* note 61, at 842 (suggesting that the apprenticeship system and the personal mentoring of new associates by the law firm are no longer viable and are being replaced by formal training after law school).

⁷¹ See, e.g. Myron Moskovitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 260 (1992) (noting the disjoint between traditional law school exams and the teaching of law school courses); Rakoff & Minow, *supra* note 25, at 603 (remarking on how clinical experiences can meet the new goals of legal education).

law students for this area of practice.⁷² In his seminal work, Ronald J. Gilson concludes that the business lawyer as a “transaction cost engineer” adds value to the transaction, and when the role is performed well, “the courts, and formal law generally, shrink dramatically in importance.”⁷³

An empirical study by Steven L. Schwarcz calls into question Gilson’s conclusion that the transactional lawyer is valuable primarily by reducing transaction costs and Gilson’s view that law schools should not teach skills but should focus on finance and economics.⁷⁴ Instead, Schwarcz’s study indicates that the primary value of the transactional lawyer is “reducing transactional costs.”⁷⁵ Schwarcz argues that the only way that attorneys can add value is if they perform *as attorneys*, not merely as well as a *sophisticated negotiator who is not an attorney* might perform.⁷⁶ Schwarcz’s warning to transactional attorneys to “preserve their franchise” must also be considered by legal educators to train law students to perform non-legal transactional work most efficiently.⁷⁷ He suggests that “law schools should consider emphasizing writing, contract-drafting, and negotiating skills, which business schools (at least regarding writing and drafting) do not presently emphasize,” lest transactional lawyers lose in the competition with non-lawyers.⁷⁸ Schwarcz’s most recent empirical study assumes that transactional “lawyers do indeed add value” because all available research supports that conclusion.⁷⁹

George W. Dent, Jr. sees a broader role for the business lawyer than the mergers and acquisitions “transaction cost engineers” considered by Gilson 25 years

⁷² George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, BUS. LAW. 279, 317 (Feb. 2009).

⁷³ Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 294, 306 (1984) (proposing using two areas of economics to link legal theory to practice to facilitate a partnership between academics and practitioners to improve legal education for the transactional practice).

⁷⁴ Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 487, 505 (2007) (“Almost two-thirds of client-respondents indicated that the non-legal work performed by transactional lawyers could be performed more efficiently by non-lawyers.”).

⁷⁵ *Id.* at 486.

⁷⁶ *Id.* at 487 (“For example, as key players in most business transactions, investment bankers appear equally capable of identifying differences in valuation between parties, reducing transaction costs, acting as reputational intermediaries, anticipating (at least non-legal) risks and outcomes, and developing economies of scope. Unless transactional lawyers add significant value in their capacity as lawyers, their utility would be questionable if not fungible.”).

⁷⁷ *Id.* at 505.

⁷⁸ *Id.*

⁷⁹ Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, 23 IOWA J. CORP. L. 497, 500 (2008).

ago.⁸⁰ Rather than focusing on the role of lawyers in large acquisitions, which he sees as “not at all typical of most business lawyers’ practice,” Dent argues for a broader perspective on the transactional role, calling such attorneys “enterprise architects.”⁸¹ Moreover, Dent suggests transactions other than acquisitions, relational contracts, strategic alliances, and “internal” transactions, which have been ignored by Gilson and his successors.⁸² Dent and others disagree with Gilson’s argument against a focus “on practical skills like drafting and negotiation and familiarity with standard types of agreements.”⁸³

B. Recognition of the Attorney as Non-Litigator Requires a Response from Legal Educators

The formation of the Section on Real Estate Transactions within the Association of American Law Schools (AALS) to supplement the academy’s focus on teaching and scholarship beyond property and contracts reflects the commitment to legal education by encouraging and preparing students for a practice specializing in real estate transactions. The argument for greater coverage and integration of international law into the curriculum emphasizes the increasing role of attorneys in transnational transactions.

Stephen J. Freidman, who transitioned from partner in the Corporate Department at Debevoise & Plimpton in New York to Dean and Professor of Law at Pace University School of Law, argues that “[c]orporate law and financial transactions are two areas where there is a large gap between law school and practice.”⁸⁴ This is because corporate and financial lawyers involved with transactions need to know “neither law nor skills.”⁸⁵ Rather, corporate and financial lawyers must understand the documentation of transactions. For example, “virtually every financing document from a home mortgage to a corporate bond indenture has common elements in both structure and content . . . financial tests, events of default, remedies and the like.”⁸⁶ These provisions are the ground rules for borrowing money and must be known by practicing attorneys. However, merely knowing the underlying rules of negotiable instruments helps a student to understand why they

⁸⁰ Dent, *supra* note 72, at 281.

⁸¹ *Id.* at 281-82.

⁸² *Id.* at 295-309.

⁸³ *Id.* at 284.

⁸⁴ Friedman, *supra* note 58, at 88.

⁸⁵ *Id.*

⁸⁶ *Id.* at 88-89. *See also* Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69 (2009) (reflecting new legal scholarship on transactional law, and consideration by serious academics of how to teach it).

are drafted as they are, but it does not put a new associate in a position to take the first step in working on a financing deal. “Yet a high percentage of American law students graduate without the slightest understanding of the purposes of those provisions and the thinking that underlies them.”⁸⁷ If the goal of legal education is to prepare students to practice law, the fact that students do not appreciate the different goals of buyers and sellers or lenders and borrowers means they will not be able to negotiate contractual rights on legal issues.⁸⁸ Thus, legal education has fallen short of meeting this goal.⁸⁹ Friedman calls attention to the disparity between courses about litigation and courses related to transactional law practice even in practice-oriented education, with litigation receiving greater practical attention.⁹⁰

Recent scholarship concludes that “the Langdellian model is particularly out of touch for the simple reason that transactional lawyers rarely have much to do with appellate cases.”⁹¹ Edward McAnnis and Afra Afsharipour reported to their colleagues at the 2009 AALS Workshop on Transactional Law: “litigation is pathology.”⁹² Amy Deen Westbrook argues that the litigation approach of current legal education “may contribute to aggression and litigiousness of American lawyers.”⁹³ As an example of the difference between the goals and achievements of the case method and the needs of the profession, she recommends that a more relevant legal education would provide an appreciation of the difficulty of changing a provision of a letter of intent once it has been circulated, rather than an “encyclopedic knowledge of traditional contract law cases.”⁹⁴

Seth Freeman, a clinical professor at NYU’s Stern School of Business and an adjunct assistant professor at Columbia Business School, teaches negotiations to

⁸⁷ Friedman, *supra* note 58, at 89.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* (“Think about the way law schools offer courses about litigation. This is an area in which, for many law schools, practice-oriented education has advanced far beyond the courses related to transactional law practice. There are many courses and relevant experiences offered by most law schools that deal with litigation.”). Yet, Friedman then criticizes the current litigation-oriented curriculum. *See id.*

⁹¹ Westbrook, *supra* note 47, at 261.

⁹² Afra Afsharipour & Edward McAnnis, Remarks at American Association of Law Schools Workshop on Transactional Law (June 2009).

⁹³ Westbrook, *supra* note 47, at 262.

⁹⁴ *Id.*; see also Carol R. Goforth, Essay, *Use of Simulations and Client-Based Exercises in the Basic Course*, 34 GA. L. REV. 851, 853 (2000) (commenting that as a new professor coming out of practice, transactional no less, she saw little change from the inadequate preparation she herself experienced as a law student – an “under-emphasiz[ing] [of] transactional practice and skills.”).

classes made up of both business school and law school students.⁹⁵ He reports that “[law] [s]tudents crave deal experience” and that his negotiation class was offered at the urging of his business students.⁹⁶

Moreover, the bar has expressed its dissatisfaction with the preparation of law students for business practice.⁹⁷ Students continue to lack the basic skills and approach to transactional practice.⁹⁸ In 1998, the American Bar Association’s Section on Business Law created a Task Force on Business Lawyers as Problem Solvers.⁹⁹ Their concern is presented by James Freund:

But when young lawyers emerge from the law school cocoon - flashing their freshly minted analytical bent of mind - and take their places on the firing line practicing business law in firms or corporate legal departments, most of what they know anything about is “the law,” as taught primarily through the study of appellate court opinions. Some law schools, to be sure, have made recent strides in exploring the problem-solving area; but in the main, the new graduates are unlikely to have much more than a passing acquaintance with what is about to become the grist of their mill.¹⁰⁰

Instead of teaching students how to think like a lawyer, let alone to practice law, legal education teaches students how “to think like a law professor[:] . . . identify[ing] issues [in cases], absorb[ing] doctrine, pars[ing] the holdings of cases, argu[ing] intelligently about policy, and . . . close[ly] reading statutory language.”¹⁰¹ Victor Fleischer complains that this prepares students to “writ[e] a bench memo, craft[] an

⁹⁵ See 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, n.1a (2008).

⁹⁶ *Id.*

⁹⁷ See, e.g., *id.* at n.6 (reporting telephone interview with partners at large business firms in NYC and Chicago).

⁹⁸ See *id.*; see also Dent, *supra* note 72, at 309 (calling for a range of practical skills from spotting and solving problems and counseling to knowing the business aspects of the client goals to ethics); Kenneth N. Klee, *Teaching Transactional Law* (UCLA School of Law Research Paper Series, Research Paper No. 03-17, 2003), available at <http://ssrn.com/abstract=445823>.

⁹⁹ See *Teaching Problem Solving: New Business Lawyers Need to Know How to Find the Deal: A New Task Force: Two Views*, BUS. L. TODAY 32-33 (July/Aug. 1999).

¹⁰⁰ James C. Freund, *Teaching Problem Solving: New Business Lawyers Need to Know How to Find the Deal: A Lawyer’s Perspective*, BUS. L. TODAY, July/Aug. 1999, at 32-33.

¹⁰¹ Victor Fleischer, Essay, *Deals: Bringing Corporate Transactions into the Law School Classroom*, COLUM. BUS. L. REV. 475, 477 (2002).

appellate brief, or research[] a complicated statute.”¹⁰² However, it prepares students poorly for transactional practice.¹⁰³

The practicing bar’s concern is shared by students. A second-year student eloquently inquired, “If you can ‘think’ like a lawyer, does that mean you can ‘act’ like a lawyer?”¹⁰⁴ This reflects the concern of many law students. Students generally share the opinion that law school should train them for the practice of law according to anecdotal reports.¹⁰⁵

Professors dedicated to preparing law students for transactional practice write forward-looking articles that are less critical of the Langdellian approach and more encouraging to others who share their view.¹⁰⁶ Increasingly, casebooks for transactional courses are written from a transactional perspective.¹⁰⁷ In the dedication of the Stanford Journal of Law, Business & Finance, Joseph A. Grundfest explains:

[B]usiness is becoming much more “law-intensive.” As commerce grows increasingly international, as regulators impose complex new constraints on all forms of business activity, and as the stakes involved in litigation grow to “bet-your-company” extremes, the role of the lawyer as problem-solver, planner, and business counselor becomes all the more essential.¹⁰⁸

¹⁰² *Id.* at 478.

¹⁰³ *Id.*

¹⁰⁴ Elizabeth Wilson, *Learning to Be a Lawyer*, KNOWLEDGE DIRECTIONS 78 (Fall/Winter 2001), reported in Garvin, *supra* note 6, at 60.

¹⁰⁵ See, e.g., Friedman, *supra* note 58, at 83.

¹⁰⁶ See, e.g., Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten “DIRT Lawyer,”* 62 U. PITT. L. REV. 335 (2000).

¹⁰⁷ See, e.g. DEBRA STARK, ET AL., COMMERCIAL REAL ESTATE TRANSACTIONS: A PROJECT AND SKILLS ORIENTED APPROACH (Lexis Nexis 2001); STEVEN BENDER, ET AL., MODERN REAL ESTATE FINANCE AND LAND TRANSFER, A TRANSACTIONAL APPROACH, (4th ed. 2008); DANIEL BOGART & CELESTE HAMMOND, COMMERCIAL LEASING (Carolina 2007); DEBRA STARK, RESIDENTIAL REAL ESTATE LAW- A TRANSACTIONAL SKILLS ANALYSIS (2004); GEORGE LEFCOE, REAL ESTATE TRANSACTIONS (5th ed. 2005); and RICHARD GRUNER, S. GHOSH & J. KESAN, INTELLECTUAL PROPERTY IN BUSINESS ORGANIZATIONS: CASES & MATERIALS (Lexis Nexis 2006).

¹⁰⁸ Joseph A. Grundfest, *An Introduction*, 1 STAN. J.L. BUS & FIN. 1 (1994); see also Jonathan Lipson, *Doing Deals in School*, BUS. L. TODAY, Sept./Oct. 2005, at 51, 53 (listing the “four things . . . most good business lawyers routinely do: help plan the deal, investigate the facts and the law as the deal develops, help negotiate it, and draft the paperwork, once there is agreement in principle.”).

C. Summary of Experiential Transactional Learning Approaches

The Carnegie Report argues that experiential courses are essential for the development of law students in their development toward professional competence.¹⁰⁹ Even with teachers lacking transactional experience in the academy, there are innovative approaches in legal education that provide experiential learning geared toward training students for transactional practice.¹¹⁰ There is a range of settings for this learning, including transactional clinics, which are limited to issues brought by small business owners and entrepreneurs.¹¹¹ Additionally, multi-disciplinary programs offer law students an education in both the law affecting business transactions and the skill of understanding the economic and financial goals of the client.¹¹² Thus, the University of Virginia Law School has instituted a range of

¹⁰⁹ Carnegie Report, *supra* note 68, at 95-125, 194-203.

¹¹⁰ See Fleischer, *supra* note 101, at 479, 496-97 (suggesting that even those limited number of faculty with transactional experience may prefer to focus on specialized doctrinal courses, and that a partial solution of the Deals Workshop at Columbia is the addition of a fellowship in Transactional Studies to organize course materials, teach the Deals Workshop, and write case studies); *see also* The John Marshall Law School, Center for Real Estate Law, http://www.jmls.edu/academics/re_law/about/index.shtml (last visited Aug. 2, 2009). At The John Marshall Law School, the Center for Real Estate Law has developed a Real Estate Legal Practicum for its real estate students. Students spend 120 hours over six weeks in a private practice setting to experience the transactional practice in real life. Placements have included large firm, medium-sized firm, affordable housing developer, title insurance company, and corporation operating commercial real estate. The Practicum distinguishes itself from other externships by not offering more typical placements in government agencies or non-profits because commercial real estate transactions are rarely seen in the latter.

¹¹¹ See Loyola University School of Law Chicago, Business and Corporate Governance Law Clinic, <http://www.luc.edu/law/academics/special/center/buisness/clinical.html> (last visited Sept. 18, 2009); *see also* Northwestern University School of Law, Small Business Opportunity Center Clinic, <http://www.law.northwestern.edu/sboc/about/clinic.html> (last visited Sept. 18, 2009). *But see* Fleischer, *supra* note 101, at 485 (discussing the problem with extending the clinical model to complex business transactions: “corporate documents are burdened with financial jargon and a lack of transparency that make them especially confusing to the uninitiated”). An additional problem is finding a business client with sophisticated legal issues that it would entrust to law students. That concern is one of the reasons that the Center for Real Estate Law at The John Marshall Law School developed the Real Estate Legal Practicum instead of a clinic. *See* The John Marshall Law School, Center for Real Estate Law, at http://www.jmls.edu/academics/re_law/degreeprograms/courses.shtml (last visited Sept. 18, 2009). Most of the transactional clinics, including those at Loyola and at Northwestern in Chicago, limit their real-life experiences to the problems brought to them by entrepreneurs and small business owners.

¹¹² *See, e.g.*, Westbrook, *supra* note 47, at 235-42 (describing the University of Buffalo New York City Program in International Finance and Law, which includes second- and third-year law students with joint J.D./MBA students and some MBAs spending the spring semester in New York City with a curriculum organized in modular form with a different faculty member teaching a topic per week). The program is a joint program developed by the University of Buffalo Law School, University at Buffalo School of Management, and the Neil D. Gevin Graduate Institute of International Relations and Commerce. *Id.* at 235. At The John Marshall Law School, law students interested in commercial

learning experiences, including a joint J.D./MBA program for a limited number of students and the Law & Business Program to educate law students in a three-year curriculum.¹¹³ Columbia Law School offers a course in transactions formally named “Deals: The Economic Structure of Transactions and Contracting.”¹¹⁴ Additionally, at The John Marshall Law School, business professionals enrolled in a variety of MS degree programs for non-attorneys are in classes with J.D. and LL.M. students in specialties, including Real Estate and Employee Benefits; thus business professionals and law students interact in the same classroom.¹¹⁵

Course materials suitable for teaching the transactional approach include simulations and client based exercises,¹¹⁶ as well as the problem method.¹¹⁷ This article only considers legal case studies.

IV. THE LEGAL CASE STUDY: AN INNOVATIVE APPROACH TO TRANSACTIONAL/BUSINESS LEGAL EDUCATION

A. The Advantages of the Legal Case Study Approach

Wallace Donham, who was Dean of the Harvard Business School in 1919 when the case method became the central feature of education, “liked to compare the [b]usiness [s]chool case method with that used in” law schools.¹¹⁸ While case method teaching is similar to the classical Socratic Method used in law schools in that both invite students to analyze situations and challenge each other’s analyses, there are significant differences between the two approaches. In law school, students analyze opinions of appellate judges about a specific dispute that has been litigated up to an appellate court. The appellate decision usually considers both

real estate practice interact in classes with non-attorney, industry professionals who are enrolled in the MS in Real Estate Law program. See The John Marshall Law School, Center for Real Estate Law, *supra* note 111. MS students have included those engaged in finance in banking, a property management professional for the Archdiocese of Chicago, and an affordable housing developer.

¹¹³ Cullen Couch, *A Lawyer at Day One*, UVA LAW, Spring 2008, at 12-13.

¹¹⁴ See Fleischer, *supra* note 101 at 490-97 (describing the class, which includes case studies as course materials at the website, http://www.law.columbia.edu/center_program/deals/deals_class); see also Freeman, *supra* note 95, at 95, n.10.

¹¹⁵ See The John Marshall Law School, *supra* note 110.

¹¹⁶ See, e.g., Goforth, *supra* note 94 (describing the use of simulations and client-based exercises in a basic corporations course).

¹¹⁷ See William J. Carney, Essay, *Preparing the Corporate Lawyer: Teaching Problems in Corporate Law: Making It Real*, 34 GA. L. REV. 823, 834 (2000) (discussing the problem approach used in the late LARRY D. SODERQUIST, ET AL., *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS* (6th ed. 2005)).

¹¹⁸ Siedel, *supra* note 15, at 614.

substantive and procedural legal issues. From that analysis students are expected to discern legal principles. Indeed, this approach to teasing out the legal principles is so new and awkward to the neophyte that the first year of law school, at least, is devoted to the proper reading and analysis of the appellate cases with a hope that students will be able to extrapolate to actual or, more likely, hypothetical disputes. In contrast, business cases focus on concerns raised by the faculty authors about a particular actual business dilemma.¹¹⁹ The business case asks the student to take on the role of a business person, a decision-maker who suggests action.¹²⁰

Thus, case study discussions are usually more proscriptive, requiring students to look at a situation, identify problems, and propose solutions and approaches. Second, and perhaps most importantly, the analysis and problem-solving is viewed as a collaborative process rather than a competitive one. As noted above, one of the principles of case study teaching is development of a practitioner's point of view. The contrast between the combative Socratic Method and the collaborative case study approach is perhaps reflective to some extent of perceptions about the varying roles of attorneys.¹²¹ Rakoff and Minow looked at the "archetypal 'case'" at a business school in considering curriculum reform at Harvard Law School.¹²² They recommend it even for the first-year courses because case studies allow business students to "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."¹²³ For the transactional lawyer in particular, the adversarial emphasis is at best overemphasized.¹²⁴

This approach to the first-year curriculum also is consistent with the view that doctrine and skills training should be integrated, even in the first year of a legal

¹¹⁹ See *id.* at 611-12 (observing that legal issues are also considered in business cases and that learning about law ranks highly in executive business programs).

¹²⁰ *Id.* at 614-15.

¹²¹ *But see* Garner, *supra* note 47, at 330-37 (suggesting challenges, if not weaknesses, of the case method, while failing to mention that it does not prepare students for their likely professional roles outside of litigation as advisor to businesses, a transactional role).

¹²² Rakoff & Minow, *supra* note 25, at 603.

¹²³ *Id.* at 604. *But see infra* Part IV.B. for a discussion of difficulties of this approach.

¹²⁴ The proposal here to use legal case studies to teach law students about the substantive law surrounding business transactions and to train them in appropriate skills for transactions does not go so far as to get rid of appellate cases entirely. That approach has been successful for a very long time in getting new students to develop skills to "think like lawyers" and to become the self-educators attorneys must be in practice. See Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 531 (1994) (quoting Anthony T. Kronman about "what is valuable about the appellate case method" but disagreeing that "it is the only way—or even the best way—to help students develop legal judgment").

education. In contracts and property courses, appropriate transactional skills include: interviewing and fact-finding to understand the client's goals both from the business and the legal perspectives, negotiating "deals," reviewing documents, and drafting documents such as contracts, homeowner association declarations, and leases to assure they reflect the understandings reached during negotiations.¹²⁵

Legal case studies provide "experiential learning" by placing students in a role in which they see the practice of law.¹²⁶ Although this article emphasizes the importance of preparing law students for business transactional practice and suggests the use of legal case studies as an effective approach, Robert Rhee and others are using legal case studies to teach courses that are considered to prepare law students for litigation.¹²⁷ Rhee suggests using a case study method to supplement the Socratic approach.¹²⁸ In his Civil Procedure course, he includes "numerous client interview notes, pleadings, motions, orders, letters, and other documents constituting a litigation file" that are based on a real case he handled as a lawyer in private practice.¹²⁹

Among the first scholars to report on using the case study method to emphasize the legal complexities in a business situation was George J. Siedel, Williamson Family Professor of Business Administration and Thurnau Professor of Business Law in the Stephen M. Ross School of Business at the University of Michigan.¹³⁰ He reports the criticism of legal education for "its heavy reliance on litigated cases," which does not prepare students to "handle practical problems that are not related to litigation."¹³¹ Moreover, Siedel notes the criticism of "supplement[ing] [appellate] cases with hypotheticals, which are considered too short, too narrow in focus, and too shallow to simulate the multi-issue problems that law students will face in practice."¹³²

¹²⁵ See Celeste M. Hammond, Integrating Doctrine and Skills in First Year and Elective Courses: A Transactional Lawyer's Perspective (July 29, 2009) (unpublished paper, presented at Yes We CanNegie: Change in Legal Education After the Carnegie Report, conference at The John Marshall Law School) (on file with author).

¹²⁶ See Best Practices Report, *supra* note 63, at 165-67.

¹²⁷ Rhee, *supra* note 42, at 886.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See Siedel, *supra* note 15, at 614 (providing an enlightening history of the development of the case method at Harvard Business School, where two of the four founders were graduates of the Law School).

¹³¹ *Id.* at 613.

¹³² *Id.* (citing Moskowitz, *supra* note 71, at 246).

In his article discussing a study of executive business education evaluations, Seidel reports that “learning about law ranks third in value, behind organizational behavior/human resource management and finance, among the required subjects in MBA programs.”¹³³ Convinced that business students need to learn legal aspects of business decision-making, Siedel presents and discusses the use of an example of a “business school-style case that interlaces management concerns with legal issues in an international setting.”¹³⁴ Still, Professor Siedel is teaching in a business school, and not the law school at the University of Michigan. His education in law provides him with an insight from which law professors could learn: business and law are inextricably bound in such ways that teaching either separately without the other is inadequate.

Michael A. Mogill focuses on the value of storytelling as a way to fill the gaps created by using the traditional appellate case method.¹³⁵ He notes the tendency of legal education to omit the “human element” as would be found in the case study method used in business and other professional educations.¹³⁶ Mogill explains how he shares the lives of the casebook litigants with his students in his Remedies course at the Penn State Dickinson School of Law.¹³⁷ In this manner, “the ‘voices’ presented . . . are primarily those of the litigants and advocates who shared their stories and helped add some flesh to the mere bones of the typical casebook.”¹³⁸

The author, as a new professor in the late 1970s after eight years of practice, recalls the “Talk to Entering Students” by James B. White at the University of Chicago Law School on August 15, 1977.¹³⁹ The lecture, directed at 1Ls, explained how to use the appellate cases found in the course materials.¹⁴⁰ Nevertheless, White’s thinking was instructive to a law professor on how to creatively use those

¹³³ See Siedel, *supra* note 15, at 611-12 (citing George J. Siedel, *Six Forces and the Legal Environment of Business: the Relative Value of Business Law Among Business School Core Courses*, 37 AM. BUS. L.J. 717, 727 (2000)).

¹³⁴ *Id.* at 615; see also Constance E. Bagley, *Legal Problems Showing a Way to Do Business*, FIN. TIMES, Nov. 27, 2000, at 2-4 (arguing that “[m]anagers need to understand how the law can minimise risk and create value”).

¹³⁵ See Mogill, *supra* note 50, at 3.

¹³⁶ *Id.* at 3, n.7 (“In a ‘case study’-based curriculum, students explore extended problems simulated from real-life cases, designing and implementing solutions. This contrasts sharply from most legal curricula, which compel students to distill abstract legal rules from decided cases.”).

¹³⁷ *Id.* at 4-6.

¹³⁸ *Id.* at 4.

¹³⁹ James B. White, *Talk to Entering Students at the University of Chicago Law School* (Aug. 15, 1977) in *Occasional Papers Series*, No. 13 (a .pdf version of the Talk is on file with the author).

¹⁴⁰ See *id.*

appellate cases, virtually the only course materials acceptable in that time. This is especially relevant for a course in property, which seemed to be crying for a transactional bent in which the attorney would be considering the needs of the players, as well as demonstrating a competent understanding of the rules of law in order to assist the client in achieving future transaction-related goals.¹⁴¹

In legal education, there are few examples of *legal* case studies published as course materials. D. Gordon Smith and Cynthia A. Williams published *Business Organizations: Cases, Problems, and Case Studies*, which incorporates “actual problems faced by identified companies, as reported in decided cases or in the business press.”¹⁴² The authors included case studies because they “share a conviction that students learn this subject best by wrestling with real-world situations and materials.”¹⁴³ In the first edition of the book, an excellent example in the section on wrongful dissolution of a general partnership considers “Mall of America Associates: A Case Study,” and the authors acknowledge the contribution of materials from three attorneys at Dorsey & Whitney LLP.¹⁴⁴ The facts of this case study are the basis for a series of questions that require students to integrate the principles they have been studying with the facts presented.¹⁴⁵ There are numerous creative examples throughout this casebook, which uses case studies to illustrate real-life legal issues and possible ways to resolve them.¹⁴⁶ Professors interested in adopting the legal case method approach to teaching should review this excellent text.

Besides introducing law students to complicated, real-life fact patterns that require the best transactional lawyering, legal case studies enhance student knowledge and awareness of the business aspects of the deals. Students learn to integrate

¹⁴¹ Like many new professors who considered experience in the practice of law a necessary background for teaching law, I found it difficult, if not impossible, to achieve my teaching goals using only the Langdellian approach. Interestingly, when I consulted with my own Property professor at the University of Chicago, Alison Dunham told me that in 1976 he was using Illinois Continuing Legal Education (IICLE) materials for his course! He explained how he responded to what his students wanted to learn—at that time—real estate finance and development were keenly wanted by his first-year students.

¹⁴² D. GORDON SMITH & CYNTHIA A. WILLIAMS, *BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES* preface xx (2nd ed. 2008).

¹⁴³ *Id.*

¹⁴⁴ D. GORDON SMITH & CYNTHIA A. WILLIAMS, *BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES* 119-25 (2004).

¹⁴⁵ *See id.* Many professors use the facts of an appellate case for the same purpose. It is often impossible to find the appropriate appellate case for instructional purposes. In such cases, developing hypotheticals can meet the goal of demonstrating legal principles in a factual situation. A real-life case study such as is presented here in the Mall of America theoretically will be more intriguing to students than either an inapplicable appellate case or a sparsely defined hypothetical.

¹⁴⁶ *See generally* SMITH & WILLIAMS, *supra* note 142.

financial and economic information about a client with their learning about the applicable law because the attorneys and key individuals, such as lenders, architects, engineers, and leasing agents, involved in a transaction share their knowledge. Instructors can follow the approach of Smith and Williams in posing questions for students about the legal case study, which will include transactional documents, communications between parties and their lawyers, compliance manuals of regulators, and other various materials.¹⁴⁷ Additionally, instructors can use the legal case study as the basis for negotiations and reviewing and drafting documents assignments, thereby developing several of the most important skills required of the transactional attorney.¹⁴⁸ Hence, in comparison with traditional casebooks that involve analysis of appellate court cases, the legal case study is more suited to teaching the transactional nature of practice.¹⁴⁹ For example, in advanced real estate courses, students want to take the leap from law school to practice.¹⁵⁰ Using legal case studies as teaching materials allows the instructor to emphasize the special analytical skills so important in transactional practice.¹⁵¹ These involve more problem-solving and advising than the strategizing and attention to formal rules of engagement found in a litigation-oriented practice. A focus on the documents that were actually drafted, reviewed, and approved by the parties is part of the legal case study approach.¹⁵²

Moreover, a legal case study could be structured to provide students with an opportunity to consider the special ethical and professional role of the transactional attorney. Unfortunately, neither the ABA Model Rules nor the amendments of Ethics 2000 adequately consider the ethical or professional dilemmas of lawyers in transactional practice.¹⁵³ A case studies and problems approach was used by

¹⁴⁷ See generally, Westbrook, *supra* note 47.

¹⁴⁸ See Bogart, *supra* note 106, at 337-38.

¹⁴⁹ Increasingly, “casebooks” are being published with this area of practice in mind. See, e.g., *supra* note 107.

¹⁵⁰ This is known as “bridging the gap between law school and practice.” The MacCrate Report, *supra* note 2, at 7.

¹⁵¹ See Bogart, *supra* note 106, at 344-55 (discussing the need for a different pedagogical approach to prepare law students for a practice in real estate transactions).

¹⁵² See Fleischer, *supra* note 101, at 495 (discussing use of “Streetwatch,” a new business case study in the Deals Workshop at Columbia).

¹⁵³ Interestingly, the authors of the transaction oriented casebooks do consider the special problems of transactional lawyers. See, e.g., BENDER et al., *supra* note 107 (including “The Ethical Lawyer” sections in most chapters); BOGART & HAMMOND, *supra* note 107, at 393-408 (devoting an entire chapter to “Negotiations, Professionalism, and Ethics”).

Dzienkowski and Burton to teach ethics in their recently published text.¹⁵⁴ Although the legal case studies are not limited to transactional situations, the authors include numerous legal case studies on ethical issues that arose in business transactions.¹⁵⁵ In explaining the decision to use case studies based upon actual situations that “became the source of malpractice cases, grievances, motions to disqualify counsel, or other claims against lawyers,” the authors pointed to the limitation of the Langdellian approach in legal education.

Third, since law schools spend most of their time reading appellate opinions, they tend not to appreciate that a lawyer’s relationship with a client is a fluid and ever changing process in which the lawyer responds to new factual circumstances, evolving client expectations and objectives, and demands from opposing lawyers and judges.¹⁵⁶

Finally, several other examples of courses using the legal case studies deserve mention. Stanford Law School uses case studies and simulations in teaching environmental law.¹⁵⁷ In addition, the Harvard Negotiations Law Review published a negotiations case study attracting deserved attention by focusing on the *Oracle v. PeopleSoft* deal.¹⁵⁸

B. Limits and Frustrations

Rakoff and Minow identify four practical difficulties in using the legal case study approach in the first-year curriculum.¹⁵⁹ In addition to convincing the faculty that “distinctly legal capacities are engaged in the analysis of complex, rich factual descriptions of problems and in the generation of alternative avenues for problem-

¹⁵⁴ See generally JOHN S. DZIENKOWSKI & AMON BURTON, *ETHICAL DILEMMAS IN THE PRACTICE OF LAW: CASE STUDIES AND PROBLEMS* (2006).

¹⁵⁵ See *id.*

¹⁵⁶ *Id.* at v.

¹⁵⁷ See Michael Robinson-Dorn, *Teaching Environmental Law in the Era of Climate Change: A Few Whats, Whys and Hows*, 82 WASH. L. REV. 619, 638-39 (2007) (discussing the Stanford Case Studies Collection, available at <http://www.law.stanford.edu/publications/casestudies>, with particular emphasis on environmental law).

¹⁵⁸ See David Millstone & Guhan Subramanian, *Oracle v. PeopleSoft: A Case Study*, 12 HARV. NEGOT. L. REV. 1 (2007).

¹⁵⁹ Rakoff & Minow, *supra* note 25, at 604-05. I am grateful to Robert A. Fishman, Nutter McClennen & Fish LLP, who told me about a course he as an adjunct co-teaches with Professor Lisle Baker at Suffolk Law School. They are teaching a first-year Property course using “business, factual and physical aspects of a large project west of Boston called NewBridge on the Charles, a continuing care retirement community” to present typical Property topics like easement, covenants and restrictions. E-mail from Robert Fishman, Partner, Nutter McClennen & Fish, to Celeste Hammond, Professor, John Marshall Law School (Jan. 29, 2009, 10:45 CST) (on file with author).

solving,” producing the teaching materials will require investments in resources.¹⁶⁰ For the business school professor, production of case studies is an important part of preparing for a teaching position and continues to be treated as part of the required scholarship for tenure and promotion. Doing so requires the law school professor to generate all the materials for each legal case study, which may be more time-consuming than assembling a traditional case book or writing a traditional law review article. Funding of this project should at least be similar to what faculty members get for research grants.¹⁶¹ The discussion of law faculty curriculum committees about using legal case studies in elective transactions courses would need to consider these concerns.

Agreeing that teaching transactional skills by use of case studies is very labor intensive, especially at the beginning because a professor must develop them “essentially from scratch,” Matthew T. Bodie discloses that the Social Science Research Network (SSRN) has become the place to publish legal case studies and make them available to professors and students.¹⁶² Professors already share problems, skills assignments, and practice exams. Hopefully, sharing legal case studies will lead to experimentation with and greater use of them as course materials.

Producing legal case studies will also require authors to get materials from practitioners who have been involved in the real-life deals.¹⁶³ For example, I co-authored the legal case study attached to this article with an attorney who is CEO of an international real estate auction firm. He is intimately involved in using auctions to market and sell real property. The third member of our team is an educator who has co-authored numerous business case studies about real estate auctions. Especially with the learning curve, it was a time consuming task for me.

Finally, one needs to develop skills in producing this type of course material. Business schools benefit from frequently available seminars on writing a case study, and several organizations have missions of teaching and supporting those writing case studies.¹⁶⁴

¹⁶⁰ Rakoff & Minow, *supra* note 25, at 605; *see also* Garvin, *supra* note 6, at 60 (reporting the financial investment for the first case studies produced at the Harvard Business School).

¹⁶¹ Outside funding by law firms and others who need law students to be more prepared for practice could support the development of legal case studies as a commitment to legal education.

¹⁶² Matthew T. Bodie, *Open Access in Law Teaching: A New Approach to Legal Education*, 10 LEWIS & CLARK L. REV. 885, 892-93 (2006).

¹⁶³ *See, e.g.*, Rakoff & Minow, *supra* note 25, at 606 (discussing the benefits of these relationships with practitioners).

¹⁶⁴ *See supra* Section I.B. for discussion of the intense work on the skill of writing case studies, the literature, training materials, etc.

V. AUCTIONING THE UNITED HOMES PORTFOLIO: A LEGAL CASE STUDY:
COURSE MATERIAL FOR TEACHING TRANSACTIONS - ONE APPROACH
TO REAL ESTATE TRANSACTIONS IN TROUBLED TIMES

A. Framework

As is suggested for real estate case studies generally, this real estate legal case study uses a pedagogical framework of (1) “the *project*,” (2) “the *players*,” (3) “the *panorama*” – “the regulatory, financial, market, socio-economic [plus legal] environments;” and (4) “the *process*.”¹⁶⁵ As the faculty researcher and author of this case study, I benefited from having co-authored a journal article about legal aspects of real estate auctions. By partnering with a nationally known real estate auctioneer who had extensive professional relationships with brokers, auctioneers, and licensing agencies, I benefited from his knowledge and focus.¹⁶⁶ This relationship made me familiar with the auction process, the legal relationships created in this type of sale of real estate, and the legal issues that may arise.¹⁶⁷

Additionally, an existing *business* case study of the auction of the United Homes portfolio provides a starting point on parts of the framework.¹⁶⁸ Margot B. Weinstein and Steven L. Good had already published “*Auctioning the United Homes Portfolio: A Case Study*” and presented it at the annual conference of the American Real Estate Society (ARES) in the spring of 2006.¹⁶⁹ From that paper, I developed the project or setting of my legal case study, identified the players, and adopted some analysis of the panorama while adding my own regarding the debtor’s and creditors’ legal relationship and the role of the bankruptcy court. I relied on the description of the auction process as set forth by Weinstein and Good.¹⁷⁰

One goal of this legal case study is to introduce students to what is becoming an increasingly important trend: selling non-distressed real estate by means of a private auction rather than through a traditional sale. This legal case study provides an experience where law students can learn about the business aspects of the decision to sell by auction and examine legal alternatives of the developer in trouble, including using the real estate auction to sell the portfolio when the construction line of credit is no longer available to guarantee completion of the projects. Because the

¹⁶⁵ Poorvu, *supra* note 28, at xviii.

¹⁶⁶ See generally Good & Hammond, *supra* note 34.

¹⁶⁷ These continuing legal issues have led to an interest by the Joint Editorial Board of Uniform Real Estate Acts to consider a proposed Uniform Real Estate Auction Act.

¹⁶⁸ See Weinstein & Good, *supra* note 35.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

business aspects of using an auction device are considered in a legal context, law students learn about the real estate auction process differently than they would by reading an article describing it,¹⁷¹ looking at the legal issues of using an auction in the context of “traps for the unwary” bidder or seller or analyzing the process from the perspective of law reform.¹⁷²

Moreover, this legal case study integrates legal doctrine and skills training by presenting the legal background; here, mortgage law including foreclosure and Chapter 11 Bankruptcy, especially Section 363, in the context of the negotiations and drafting as they occurred in the course of the auction.¹⁷³ Instructors using this legal case study may choose to structure negotiation exercises and drafting assignments based on the legal and business issues that arise. A Teacher’s Guide provides not only answers to the Discussion Questions, but also includes suggested exercises.¹⁷⁴ Finally, because attorneys are learning about using real estate auctions only recently and often for the first time, in CLE programs and conferences presented by the American College of Real Estate Lawyers (ACREL)¹⁷⁵ and the ABA Section on Real Property Probate & Trust Law Section,¹⁷⁶ law students using this legal case study learn about what is at the cutting edge of the real estate business, namely using an auction as an alternative transactional approach to selling real property.¹⁷⁷

Finally, I am indebted to the instruction and practical advice of David W. Rosenthal and David Wylie, who conducted a seminar for DePaul University Business School faculty that plan to produce case studies. For a mere law professor who had only heard of the Harvard Business School model in the past several years, the Rosenthal and Wylie seminar was essential to my developing and using a legal case study. The entire legal case study is available at <http://ssrn.com/abstract=1446951>.

¹⁷¹ See, e.g., Steven L. Good & Margot B. Weinstein, *The Auction Advantage: Innovative Corporate Real Estate Portfolio Sales*, CORP. REAL EST. LEADER, Mar. 2005, at 54-58.

¹⁷² See, e.g., Good & Hammond, *supra* note 34.

¹⁷³ See 11 U.S.C. § 363 (2009).

¹⁷⁴ Hammond, Good & Weinstein, *supra* note 8, at 16.

¹⁷⁵ See Celeste M. Hammond & Steven L. Good, *Let the Bidding Begin: America for Sale—Real Estate Auctions*, ACREL Papers (Oct. 2008), available at http://files.ali-aba.org/thumbs/datastorage/skoob/articles/BKAC0810_TAB17-Hammond_thumb.pdf (on file with author).

¹⁷⁶ See, e.g., “Auctions as Marketing Devices for All Categories of Non-Distressed Real Estate—A Future Trend,” American Bar Association, Real Property Probate & Trust Law Section Spring Symposium in Washington, D.C. (Apr. 27, 2007); see also “Auctions as Marketing Devices,” ABA Teleconference (Nov. 7, 2007).

¹⁷⁷ See Good & Hammond, *supra* note 34; see also Celeste M. Hammond & Craig M. Post, *The Use of Real Estate Auctions in Commercial Short Sales*, PROB. & PROP., Mar./Apr. 2009, at 47. Both articles reflect the keen interest transactional attorneys have in learning about the auction device.

B. The Project

United Homes, Inc. (“United Homes”) was actually three different companies created to conduct a residential home building business in three different states.¹⁷⁸ United Homes owned a large portfolio of 320 properties, evenly divided around suburban Chicago, suburban Grand Rapids, Michigan, and Scottsdale, Arizona.¹⁷⁹ United Homes was a residential developer and was involved in constructing and marketing a variety of residential properties at the time the case study story begins.¹⁸⁰ The characteristics of the 320 properties varied: some were finished houses or townhouses, some were partially completed residences, and others were vacant land.¹⁸¹

United Homes’ construction lender was acquired by a competitor, and United Homes’ difficulties stemmed from more burdensome requirements imposed by the new lender on its construction line of credit. Instead of the 15% loan-to-equity ratio of the earlier lender, the new lender required a 25% ratio. Because United Homes was not able to raise the cash to enhance its equity, the lender considered United Homes in default.¹⁸² Bank of America and Residential Funding Corporation were secured lenders with mortgages on the real property.¹⁸³ Numerous lienors and unsecured creditors also had claims against United Homes.¹⁸⁴

C. The Players and Panorama

Attorney Richard Lauter was initially retained by the general counsel for United Homes to represent the Arizona company when it got into financial trouble.¹⁸⁵ At this point, United Homes had several options to deal with the situation, including defaulting on several of its secured loans.¹⁸⁶ Those options which the students consider when using the United Homes Legal Case Study are: (1) United Homes attempts to sell the properties by traditional marketing to raise capital to permit continuing construction with or without using the construction line of credit; (2) United Homes defaults on a variety of mortgages resulting in lenders’ foreclosure

¹⁷⁸ Hammond, Good, & Weinstein, *supra* note 8, at 2.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 5.

¹⁸² *Id.* at 2.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* Lauter is currently a partner at Freeborn & Peters LLP in Chicago. *Id.*

¹⁸⁶ *Id.*

and foreclosure sales, judicial or non-judicial; or (3) United Homes files for bankruptcy protection. This is the situation of the business client as the legal case study begins.

Lauter reports, “[o]riginally, I filed about seven bankruptcy cases involving United Homes to protect them as debtors. [The company’s] residential development projects were in trouble and their secured lenders were applying pressure by requiring United Homes to continue making debt service payments” beyond its ability because of the slow rate for sales.¹⁸⁷ The demands of the secured lenders under these circumstances decreased the cash flow needed to complete building that had already begun.¹⁸⁸

By filing these bankruptcies, United Homes put itself in a situation where the bankruptcy court would ultimately decide in what manner the assets of the debtor would be distributed. Secured lenders had the priority position to get paid in full before any payment was made to unsecured creditors. If any value was left, it would be distributed to the shareholders of the debtor corporation.¹⁸⁹

Lauter hoped to come up with a creative solution to prevent the secured lenders from taking over the properties, and thereby keep the secured lenders from freezing out both the unsecured creditors and the debtor from any recovery.¹⁹⁰ Lauter brought attorney Barry Chatz into the bankruptcy cases as the attorney for the Unsecured Creditors Committee of United Homes, Inc., an Illinois corporation.¹⁹¹ The attorneys’ goal was to obtain the greatest possible return for the secured and unsecured creditors.¹⁹² They decided to use a privately conducted series of real estate auctions to accomplish this goal.¹⁹³

From a business perspective, the auction process had several advantages over regular sales of the properties. First, the auction works well for real estate that is not easily valued and establishes a market value by itself.¹⁹⁴ United Homes’ properties were in such a variety of places and in such a variety of stages of completion that the

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ The case study provides students with real-life details about how the bankruptcy court functions. The judge structures the events, rather than deciding how the creditors will be satisfied. Court documents are included to provide students with indications on progress of negotiations.

¹⁹⁰ *Id.* at 2-3.

¹⁹¹ *Id.* at 3-4. Barry Chatz is an attorney with Arnstein & Lehr LLP. *Id.* at 4.

¹⁹² *Id.* at 3-4.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 4-5.

real estate portfolio was difficult to appraise.¹⁹⁵ Second, the auction sets a deadline.¹⁹⁶ This is a reversal of a traditional sale, where the seller waits for buyers to decide to make an offer. By using an auction, the seller sets the bidding date.

Third, the seller can schedule an auction to meet its needs, such as income tax goals.¹⁹⁷ In the United Homes situation, a sale date to satisfy the court was critical.¹⁹⁸ Fourth, for owners with multiple properties, the bidding can be structured to give the seller an opportunity to evaluate the range of offers for each property as well as for the entire portfolio. For United Homes, the latter advantage was not relevant because each unit was only offered separately. Fifth, the aggressive and intensive marketing techniques employed by the auctioneer allow the seller to know the likely bidders, if any, and to withdraw the property before the auction date or to negotiate a sale with one bidder outside of the auction if the bidder group is not promising.¹⁹⁹ In United Homes, the creditors retained a right to veto any sale.²⁰⁰ However, the right was only exercised to terminate one sale!²⁰¹ All of this means that, with an experienced national auctioneer in charge, the time delays of a regular sale and the attendant operations costs may be avoided.

Lauter and Chatz engaged Sheldon Good & Company, Inc., an experienced international real estate auction firm, to take a very active role, almost as an “[a]uctioneer in possession.”²⁰² Lauter and Chatz obtained the bankruptcy court’s approval of the plan for selling the assets.²⁰³ Ronald Barliant, who served as the judge in the United Homes Chapter 11 bankruptcies in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, explained how he “supervised” the players, rather than “deciding” the outcome.²⁰⁴ In the end, the auctions resulted in greater returns for both the secured and unsecured creditors than anticipated, and the outcome was definitely better than a sale by the bankruptcy

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 5.

¹⁹⁷ *See id.* at 4-5.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 6-7.

²⁰⁰ *Id.* at 6.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 7-14.

²⁰⁴ *Id.* at 9. Ronald Barliant is currently a partner at Goldberg Kohn, where he specializes in bankruptcy matters for the firm’s clients. *See* Goldberg Kohn, Ronald Barliant, <http://www.goldbergkohn.com/professionals-7.html> (last visited Oct. 27, 2009).

trustee or a sale conducted in a foreclosure lawsuit would likely have been.²⁰⁵ Other benefits of using an auction, including speedy sales that reduce ongoing maintenance costs in the interim, are explained in the legal case study.²⁰⁶

The authors of the legal case study relied heavily on personal interviews and written responses to questionnaires submitted to the attorneys representing the players, the auctioneer, and the judge of the bankruptcy court where the developer finally chose to seek protection.²⁰⁷ These interviews provide a context to discuss the role of attorneys in a transaction selling real estate assets by auction. This legal case study provides the basic documents used in auctions; for example, the agreement between the seller and the auctioneer and the bidder package including the non-negotiable real estate sales contract, which sets up the closing.²⁰⁸ Students can appreciate how truly transactional the work of a lawyer representing the seller, bidder, buyer, or auctioneer actually is.

Also, the United Homes Legal Case Study authors' student research assistant skillfully sorted through court documents to help select those that would enhance the learning experience. Those documents were included as documents referred to in and attached to the legal case study.²⁰⁹ As background for appreciating the United Homes Legal Case Study, students need to understand the business needs of the debtor client, here to sell the units quickly to avoid overhead such as taxes, insurance, maintenance, and security, as well as the worry of the secured lenders that they might end up owning and subsequently managing this "hot potato real property."²¹⁰

D. The Process – Document Review and Negotiations

The relatively speedy sale of the assets of United Homes was due to the lawyering of those representing the players and Steven Good, CEO of Sheldon Good, Inc. and an attorney himself. Knowledge of the relevant substantive law applicable to real estate sales and financing, including remedies for defaults under foreclosure and bankruptcy laws, contributed to the successful outcome. For example, the availability of sales "free and clear" of liens under Section 363(f) of the Bankruptcy Code is essential to attracting bidders who will bid an amount

²⁰⁵ See Hammond, Good & Weinstein, *supra* note 8, at 14-15.

²⁰⁶ See *id.* at 3-5.

²⁰⁷ See, e.g., *id.* at 2-5 (recounting personal interviews with Richard Lauter, Barry Chatz, and Steven Good).

²⁰⁸ See *id.* at Document #1-12.

²⁰⁹ See *id.*

²¹⁰ Professor Steven Good, Class Lecture (Fall 2008).

approaching fair market value for the assets.²¹¹ Moreover, the experienced negotiation ability of the attorneys was critical. Because the underlying transaction, using the private real estate auction to sell United Homes' properties, had to be approved by the bankruptcy court within the procedures it used, the parties' attorneys had to be aware of the timing as much as the content of the agreement that set up the auctions. Also, the case study shows that it is as important for the attorneys to carefully review both the transactions' documents and the various court documents for accuracy, clarity, and the implications for the clients and players.

VI. USING THE UNITED HOMES PORTFOLIO LEGAL CASE STUDY IN A LAW SCHOOL CLASSROOM: A TALE FOR TWO COURSES

A. Introduction

The Center for Real Estate Law at The John Marshall Law School has instituted a Legal Case Study Project to create additional course materials suitable to meet the goals of educating the next generation of commercial real estate lawyers and non-attorney industry professionals.²¹² The legal case studies are based upon actual commercial real estate transactions. By analyzing the fact patterns, the dilemmas of the parties, and the responses of the professionals, the legal case studies provide a useful learning experience.²¹³ Attorneys at host firms share information about a real-life transaction or project that serves as the background facts.²¹⁴ Interviews with key individuals involved in the transaction, including lenders, architects, engineers, leasing agents, and of course, attorneys, ensure that the legal case study is grounded in reality. Like the transactions-oriented casebooks, legal case studies better engage students when compared with traditional casebooks, which are based upon reports of appellate opinions and questions.²¹⁵

²¹¹ 11 U.S.C. § 363(f) (2009).

²¹² See The John Marshall Law School, *supra* note 110. Celeste Hammond, the author herein, is the director of the Center. See also the report of this project in *John Marshall Law School Center for Real Estate Law Newsletter*, Summer 2007, http://www.jmls.edu/academics/re_law/pdf/summer%202007%20Newsletter.pdf. One of the goals of the project is to raise funds to meet the expenses of producing legal case studies.

²¹³ See Stark, *supra* note 5, at 224 ("Deal lawyers start from the business deal. The terms of the business deal are the deal lawyer's facts. . . . I call this skill 'translating the business deal into contract concepts.'").

²¹⁴ For example, in the United Homes Portfolio legal case study, several attorneys, including Steven Good, an attorney and auctioneer, share their creative solution to the troubled real estate. See *supra* Part V.

²¹⁵ Yet, case studies do not provide exactly the experiential learning of clinical courses, externships, and practicums. See Best Practices Report, *supra* note 63, at 188-205.

Possible topics for future legal case studies dealing with commercial real estate transactions include: acquisition of a small investment property, protecting a condominium developer by carefully drafting warranties made to purchasers, closing on an option to buy raw land with a simultaneous sale to a third party or joint venture for development, land assemblage process and decision-making for development or hold, environmental impairments and the impact of governmental agencies and consultants on a piece of real estate, and a REIT deal structure for a portfolio or corporate acquisition. In this way, legal case studies will be concerned with how real estate transactions respond to the philosophy of the Carnegie Report.²¹⁶

The focus here is on how the United Homes Legal Case Study was used in two fall 2008 courses at The John Marshall Law School.²¹⁷

B. Classes Using the United Homes Legal Case Study as Course Materials

Thanks to the cooperation of the adjunct faculty teaching two courses in fall 2008 and their students, the United Homes Legal Case Study served as course materials for Real Estate Finance, a required course, and Bankruptcy Aspects of Real Estate, an elective course selected by students concerned about the declining real estate cycle. Both are courses within the LL.M. in Real Estate Law curriculum at The John Marshall Law School. The classes include a mixture of J.D. students taking the courses as an advanced elective, joint J.D./LL.M. students who will earn both degrees in a special program that permits them to double count some LL.M. courses, LL.M. students who are J.D. graduates returning to specialize in commercial real estate transactions, and MS students who are neither attorneys nor J.D. students and instead have substantial experience in the commercial real estate industry and hope to understand the legal risk involved in deals. Jordan Peters taught the finance course, and the bankruptcy course was co-taught by Ronald Barliant, coincidentally the bankruptcy judge in the case study, and Daniel Zazove.²¹⁸

In both courses, the United Homes Legal Case Study was distributed to the faculty and students about 10 days before the final class of the semester. The legal case study was used to address the topic of bankruptcy treatment of real estate in financial distress in the Real Estate Finance course and the topic of sales free and clear of liens under Bankruptcy Code Section 363(f) in the Bankruptcy Aspects of

²¹⁶ See Carnegie Report, *supra* note 68.

²¹⁷ See Hammond, Good & Weinstein, *supra* note 8, for the entire legal case study, including legal documents.

²¹⁸ Jordan H. Peters is a partner in the Chicago office of Freeborn & Peters, LLP, and Daniel Zazove is a partner in the Chicago office of Perkins Coie.

Real Estate course.²¹⁹ The authors of the legal case study were invited to both classes to assist with the instruction. Students had been prepared for the relatively technical and sophisticated topics raised by the basic coverage of commercial real estate business and legal issues in these and other courses in the real estate curriculum.

A PowerPoint presentation by Steven Good set the stage for discussion of the questions raised by the case study itself and by students in the class.²²⁰ The presentation included additional details about the business side of the deal. The class considered how complex the stages of preparation can be for a developer. The presentation indicated that, for the bidders, the usual due diligence issues involved in any purchase of land remained operative. With an auction, the seller is prompted by the auctioneer to provide disclosures, such as title insurance reports and environmental reports, before the auction so that the real estate sales contract has few contingencies. As an experienced auctioneer, Good used a graphic to explain the different marketing approaches that would be used because of the different types of property and their varied locations. Also, students learned the legal differences between the various types of auctions, from the absolute auction sale to the auction with reserve version. Students unfamiliar with auction law were surprised to learn about hidden reserves and the ability of the seller to cancel the sale up to the final minute when the auction begins.

Both classes were conducted in three-hour sessions with one break. Informal discussions before class began and during breaks supplemented the in-class interaction. Each class consisted of approximately 20 students who appeared to be engaged in the work. Students seemed to recognize that the problems raised are not covered by one particular doctrinal course in law school, and this made some feel frustrated at first. However, as Amy Westbrook suggests, “students soon discover that, as in practice, a complete overview is unobtainable in the time available.”²²¹ As noted in the Carnegie Report, students must develop “the ability to both act and think well in uncertain situations.”²²²

C. Evaluation by Students and Faculty

A survey was e-mailed to students at the beginning of the following semester to request feedback for instructors and authors to improve both the legal case study

²¹⁹ The instructors assigned STEVEN BENDER, CELESTE HAMMOND, MICHAEL MADISON & ROBERT ZINMAN, *MODERN REAL ESTATE FINANCE AND LAND TRANSFER—A TRANSACTIONAL APPROACH* (4th ed. 2008) as course materials on this topic.

²²⁰ Part of the case study format is to include questions (and answers in the Instructors Manual) to guide discussion in class.

²²¹ Westbrook, *supra* note 47, at 263.

²²² Carnegie Report, *supra* note 68, at 9.

and the use of it in class. Those students who returned the survey provided suggestions for improvement of the use of the legal case study in class. They preferred earlier notice that a legal case study would be used, more information about what a case study is and how it is used in professional education, and earlier distribution of the legal case study giving them more time to prepare for the class, as this set of materials is relatively lengthy and involves sophisticated business and legal concepts. Merely giving out the legal case study without more advance instruction yielded fewer perceived benefits by students than the instructors and authors expected and hoped for. Students suggested that they be given lighter or no additional assignments for the classes when the legal case study was used. Neither the authors nor the instructors had appreciated the steep learning curve presented by a legal case study for both students and teachers.

Students reported feeling overwhelmed by the complexity of using the private auction to sell real estate owned by a bankrupt residential real estate developer. Actually, this reaction may be advantageous for a student trying to appreciate what a transactional practice involves. Afra Afsharipour, reflecting on her years as an associate in the corporate department of a large New York law firm before becoming an academic, concluded that an important transactional skill is recognizing the intricacies of substantive areas of law that may be involved in a single deal.²²³ She identified transactional skills beyond those which are typically mentioned, such as negotiating and drafting, as well as the additional skills of the “strong deal lawyer.”²²⁴ Therefore, our students’ feeling of confusion about where to begin to look for the relevant law simulates the experience of new transactional attorneys in practice. Students need to get used to that feeling and to know several relevant areas of law, such as both tax and the law of real estate finance and acquisitions in any sale of real estate, and to know when to bring in specialists.

Several aspects of the experience suggest why legal case studies are valuable in achieving the “Oh, I see” moment, even though the nature of the experience means that it is partially uncontrollable. The legal case study is definitely more interactive learning than a typical lecture or discussion, and it invites students who may be working in groups on some aspects of the legal case study to collaborate rather than compete. Even the instructors reported learning. One of them commented that, after teaching the United Homes Legal Case Study, he understood how the monetizing of the auction process works and how it may meet the needs of a client.

²²³ Afra Afsharipour, *Incorporating “Business” in Business Law Classes*, 8 U.C. DAVIS L.J. 1, 3-4 (2007).

²²⁴ *Id.* at 3-7; see also Stark, *supra* note 5, at 232 (discussing a two-credit course at Fordham Law School, Business Essentials, whose purpose is to “teach students essential business concepts and how those concepts relate to the work they will do as commercial lawyers. It is intended as an analog to the course that M.B.A. students take to learn how the law affects business”).

VII. CONCLUSION

In response to formal critiques of legal education by the practicing bar, learned societies, and law students themselves, legal education is responding to the notion that law students should be prepared to act like lawyers, as well as to have the analytical skills to think like lawyers. The recognition that there is a special role for transactional attorneys, distinct from the role of the litigator that has received most of the attention in legal education since the Harvard appellate case method was adopted, requires a response that only now is gaining attention in the academic sphere.

One of the difficulties in teaching law students to embrace the transactional perspective, which involves the business aspects of the client's deals, the overlay of various doctrinal sets of rules, and the development of transactional skills, is finding appropriate teaching materials. One approach is to consider the solutions advanced by the business schools and other professional schools that use actual case studies as teaching materials. Despite the potential difficulties, this article presents a legal case study that was actually successfully used as teaching materials in two transactional law school courses. The positive reactions to this approach suggest that law professors should consider incorporating the use of legal case studies into their transactional courses.

