EXCEEDING OUR BOUNDARIES: TRANSNATIONAL EMPLOYMENT LAW PRACTICE AND THE EXPORT OF AMERICAN LAWYERING STYLES TO THE GLOBAL WORKSITE

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> Although the word "globalization" may be controversial, few doubt that in the future there will be more cross-border flows of capital, goods, people, services and ideas. . . . Lawyers and others who deliver legal services must be prepared for such a world, whether or not they engage personally in legal work which we currently think of as "international."
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> Labor law is local law, plain and simple.
>
> Harry Arthurs

I. INTRODUCTION

Until very recently, one almost never heard mention of international issues among labor and employment law practitioners in

† Professor of Law, Thomas Jefferson School of Law. Versions of this article were presented in 2004 at a panel on transnational labor rights at the Law & Society Association's Annual Meeting in Chicago, Illinois; in 2003 at a Chicago-Kent College of Law Faculty Workshop; and in 2002 both as part of U.C. Berkeley's Center for Law and Society Luncheon Speakers Series, and at a panel on the globalization of labor and employment law at the Law & Society Association's Annual Meeting in Vancouver, Canada. I benefited greatly from the insightful comments of the participants at those events, from the feedback of my good friends, Marty Malin and Mike Zimmer, who reviewed the penultimate draft, and from my astute readers at the *Comparative Labor Law and Policy Journal*. This project would not have been possible without the gracious cooperation of Ken Rose and Scott Wenner, co-chairs of Littler Mendelson's International Practice Group, and the willingness of labor lawyers in thirteen countries to engage in transnational, electronic dialogue with me. My thanks also extend to Debora Gerads, who provided outstanding research assistance. Finally, I am exceptionally grateful for the love and support of my intrepid household, Charles, Skylar, Ezra, and Sarah, who with me ventured 2,000 miles from home so I could visit at Chicago-Kent College of Law during fall semester 2003.

the United States.[1] The practice of labor and employment law is considered quintessentially local; the country and state in which employees work governs the employment laws that structure the employees' jobs and it is these domestic laws that occupy the time of U.S. lawyers.[2] It is the rare employment attorney who encounters international or transnational legal issues.[3]

Yet in the last few years—a period of no more than a decade—the transnational aspects of labor and employment law practice have begun to be discussed and written about with increasing frequency by employment practitioners.[4] Illustrative of this trend was the recent

1. Writing in 1993, attorney Stephen Mazurak practically begged his practitioner colleagues to think in global terms. *See* Stephen A. Mazurak, *Comparative Labor and Employment Law and the American Labor Lawyer*, 70 U. DET. MERCY L. REV. 531, 558 (1993) ("As our community in the United States travels down the road of our labor and employment policy I encourage those of you involved with changing its direction to become informed about how other world communities treat similar issues. Only by consulting such policies and processes may we truly seek the appropriate course for our own travel."). Of course, the academic literature on international and/or comparative labor and employment law is voluminous.

2. *See* Matthew W. Finkin, *International Governance and Domestic Convergence in Labor Law as Seen from the American Midwest*, 76 IND. L. J. 143, 166 (2001) ("Despite the overlay of federal protection law . . . our law of employment [in the U.S.] remains overwhelmingly state law, both legislative and judge made."); Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 275 (2001) ("Labor law is local law, plain and simple."); James Atleson, *The Voyage of the Neptune Jade*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION 379, 381 (Joanne Conaghan et. al eds, 2002) ("[D]espite the history of attempts to set international standards for labour, labour law regimes are nevertheless intensely local in character."); *but cf.* Brian Bercusson, *Globalizing Labour Law: Transnational Private Regulation and Countervailing Actors in European Labour Law*, *in* GLOBAL LAW WITHOUT A STATE 133 (Gunther Teubner ed., 1997) (arguing that "European labour lawyers must come to terms" with the "tendencies toward convergence of national labour laws and the formation of transnational labour law in the European Union.").

3. *See* Donald C. Dowling, Jr., *The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium*, 17 LAB. LAW. 1 (2001) ("Traditionally, international employment practice barely even existed. . . ."). Lawyers use the terms "international," "transnational," and "global" interchangeably. *See* John Flood, *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice*, 3 INT'L J. LEGAL PROF. 169, 195 (1996). In truth, "international practice" and "transnational practice" refer to lawyering that occurs across national boundaries. *See id.* at 189, 195; Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 738 (1994). Global practice, on the other hand, "connotes complete coverage throughout the world." Flood, *supra*, at 195. Nonetheless, many so-called international labor and employment lawyers aspire to create networks that are global in scope. Thus, all three terms are used synonymously in this article.

4. *See*, *e.g.*, INTERNATIONAL LABOR AND EMPLOYMENT LAWS (William L. Keller & Timothy J. Darby eds., 2d ed. 2003) (an exhaustive two-volume treatise and supplement on the subject published by the American Bar Association Section of Labor and Employment Law); Roy Heenan, *Employment Law Issues in the International Arena, in* CROSS-BORDER HUMAN RESOURCES PROJECTS AND INTERNATIONAL EMPLOYMENT LAW AND PRACTICE (2001) (an ABA-CLE publication published in conjunction with a ninety-minute teleconference on the subject; Roy Heenan is a Canadian lawyer); Philip M. Berkowitz et al., *International Employment*, 34 INT'L LAW. 453 (2000). Another indication that transformative forces may be afoot within American labor and employment law circles is the creation of international labor and employment law seminars at a number of U.S. law schools. For example, such courses are

4th Annual International Program on Labor and Employment Law, a two-day practitioners' conference in Dallas, Texas, hosted by the Center for American and International Law and the American Bar Association's Sections of Labor and Employment Law and International Law and Practice.[5] The event featured sessions on, among other topics, what employers need to know about doing business in the European Union, international forums for the enforcement of labor rights, doing business in NAFTA countries, foreign law complications for U.S. executive compensation, extra-territorial application of U.S. employment laws, and international codes of conduct.[6] Moreover, not only are issues like those at the international program being discussed, some U.S. practitioners who confront them are identifying themselves as part of a discrete area of employment law practice, a phenomenon that on reflection is not surprising given the increasing globalization of labor markets.[7] One would expect the practice orientation of employment attorneys would mirror, to some extent, the increasingly global vision of their clients.

Writing in 2001, attorney Donald Dowling noted that although "[i]nternational labor and employment law, as a practice area, is still just a tiny corner of labor and employment law practice . . . its importance in the new millennium is exploding."[8] Whether Mr. Dowling is right or wrong about the mushrooming significance of this new area of practice, the fact that he writes about it in these terms merits consideration for his observations may portend a change in the way we conceptualize the field of employment and labor law and the professionals who engage with it.[9] The power of practitioners to

or have been taught recently at Chicago-Kent College of Law, John Marshal School of Law, Louisiana State University, Notre Dame University, Seton Hall University, Thomas Jefferson School of Law, University of Buffalo, University of California Davis, University of Cincinnati, and University of Virginia.

5. *See* 4TH ANNUAL PROGRAM ON INTERNATIONAL LABOR AND EMPLOYMENT LAW, Sept. 30–Oct. 1, 2003 (on file with author).

6. *Id.*

7. *See*, *e.g.*, Robyn Iredale, *The Internationalization of Professionals and the Assessment of Skills*, 16 GEO. IMMIGR. L.J. 797, 797–98 (2002) (discussing "global migration streams" and "the move towards international labor markets"). Some industries, like the airline industry, have for decades managed international employment issues. I am indebted to Professor Hank Perritt for pointing this out to me.

The term "globalization," as used in this Article, "refers to those processes which tend to create and consolidate a unified world economy . . . and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it." WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY (2000).

8. *See* Dowling, *supra* note 3 , at 1.

9. Among the U.S. law firms announcing on their Web sites expertise in international labor and employment law are: Akin, Gump, Strauss, Hauer & Feld LLP, http://www.akingump.com/labor/labor_employment.cfm; Baker & McKenzie, http://www.bakernet.com/BakerNet/Practice/Employment/Practice+Site/Description/default;

influence legal outcomes and affect legal systems can be significant.[10] If, as maintained herein, U.S. labor and employment law practice is evolving, policymakers, commentators, and researchers will want to track the developments.

The hallmarks of this emerging practice area, as described by Dowling, are quite interesting, and here the focus is on attorneys who represent employers.[11] A portion of such a practitioner's caseload certainly involves single country issues; for example, the U.S.-based multi-national wants to fire an employee working in its Rome office and wants to know how to do it under Italian law.[12] These kinds of issues are not terribly novel and have been around for years.[13] What international employment lawyers actually aspire to, however, is the coordination of multinational clients' employment law projects across national jurisdictions.[14] This kind of work is very new, at least in the United States. Dowling offers the following as examples of transnational projects:

Dechert LLP, http://www.dechert.com/practiceareas/practiceareas.jsp?pg=detail&pa_id=41; Dinsmore & Shohl LLP, http://www.dinslaw.com/practicearea/practice_area2.asp?PracticeArea=79; Epstein Becker & Green P.C., http://www.ebglaw.com/prac_44.htm; Faegre & Benson, http://www.faegre.com/firm_practice_detail.aspx?practiceID=24; Jackson Lewis, http://www.jacksonlewis.com/pa/pa.cfm?paid=18; Ogletree Deakins, http://www.ogletreedeakins.com/practice/laboremployment.cfm; Proskauer Rose LLP, http://www.proskauer.com/practice_areas/areas/126; and Seyfarth Shaw, http://www.seyfarth.com/practice/news.asp?groupid=5. One must, of course, be careful not to over-emphasize the internationalization of labor and employment law practice; most employment lawyers continue to work on garden variety state and federal law matters, as they always have.

10. *See*, *e.g.*, Maureen Cain, *The Symbol Traders*, *in* LAWYERS IN A POSTMODERN WORLD 15, 15–48 (Maureen Cain & Christine B. Harrington eds., 1994); Doreen McBarnet, *Legal Creativity: Law, Capital and Legal Avoidance*, *in* LAWYERS IN A POSTMODERN WORLD 73, 73–84 (Maureen Cain & Christine B. Harrington eds., 1994).

11. That this practice sub-specialty seems to be emerging among defense lawyers makes sense for this is the attorney group whose clients include multinational corporations, a client population with global employment concerns. It is possible that attorneys representing unions or plaintiffs may be interested in international practice, although this author has yet to see evidence that they consider themselves part of a specialized field. Nonetheless, it is notable that representatives of organized labor, including attorneys, are framing the recently launched campaign to reform the National Labor Relations Act in the vernacular of international human rights law. *See* Steven Greenhouse, *Unions Push to Make Organizing Easier*, N.Y. TIMES, Aug. 31, 2003, at 16. This strategic move is part of a larger movement to demonstrate that labor conditions in the United States have human rights implications. *See*, *e.g.*, WORKERS' RIGHTS AS HUMAN RIGHTS (James A. Gross ed., 2003); Lance Compa, *The ILO Core Standards Declaration: Changing the Climate for Changing the Law*, 7 PERSPECTIVES ON WORK 24, 24–26 (June 2003); Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22–47 (Lance A. Compa & Stephen F. Diamond eds., 1996). Perhaps this engagement with an international legal regime will cause some union attorneys to think of their practice as global in orientation.

12. *See* Dowling, *supra* note 3, at 4.

13. *See id.*

14. *See id.*

- The multinational client wants to know if all of its overseas operations comply with local employment laws and orders a worldwide employment law compliance audit.[15]
- The multinational client wants to globalize its human resources policies and needs to articulate the company's philosophies and goals and then implement them in compliance with the local laws of many national jurisdictions.[16]
- The multinational client wants a Code of Conduct drafted that guarantees minimum labor standards in its operations around the world.[17]
- The multinational client needs to implement company layoffs (known in Europe as collective redundancies) on a global scale and comply with legal variations across borders.[18]
- In the context of global mergers and acquisitions, the purchasing multinational client wants an employment expert to participate in due diligence to reveal the employment ramifications of the deal.[19]

Transnational projects cannot be executed alone by U.S.-based employment attorneys. Rather, they require coordination and collaboration with foreign lawyers. In fact, U.S. employment attorneys who are interested in international practice are advised to create an international network of employment law colleagues.[20] Writing about transnational corporate law practice, Professor Richard Able notes that "interaction among legal cultures . . . in a common

15. *See id.* at 6.
16. *See id.*
17. *See id.* at 8–9.
18. *See id.* at 13–14.
19. *See id.* at 12–13.
20. *See id.* at 4; *see also* comments of lawyers Malcolm Mason and Els de Wind, ABA-CLE Teleconfrence (Dec. 5, 2001), *in* CROSS-BORDER HUMAN RESOURCES PROGRAMS AND INTERNATIONAL EMPLOYMENT LAW PRACTICE (tape on file with author) (discussing the need for a network of lawyers in other national jurisdictions). These networks need not be huge to be effective. Discussing the proliferation of "intimate circles and small networks" that cross national boundaries, Ulf Hannerz notes that "the transnational is not always immense in scale." ULF HANNERZ, TRANSNATIONAL CONNECTIONS (1996). One potentially powerful network to watch is *ius laboris*, an alliance of twenty-two labor and employment law firms from twenty-one countries. *See ius laboris* Web site, http://www.iuslaboris.com/en/about/ (last visited Mar., 5, 2004). Created in January 2001, the network covers Argentina, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Holland, Ireland, Italy, Luxembourg, Mexico, Poland, Portugal, Spain, Sweden, the United Kingdom, and the United States. *Id.* Seyfarth Shaw, an American firm with one of the country's largest labor and employment law practices, became "the exclusive U.S. member of *ius laboris*" in May 2002. *See* Seyfarth Shaw Web site, *at* http://www.seyfarth.com/practice/news.asp?groupid=5 (last visited March 4, 2004).

forum encourages the emergence of a common style."[21] It is true that the world's legal regimes that regulate labor markets are remarkably culturally specific and diverse in character.[22] It is similarly accurate that the American system of employment regulation is known for its exceptionalism.[23] Even so, to the extent that transnational networks of employment lawyers are formed and begin to operate regularly, those networks may create the opportunity for the transfer across borders of ideas about how employment law is practiced.[24] Since America tends to be an exporter of culture,[25] might there be a possibility for transmission of U.S. lawyering styles to employment practitioners elsewhere?[26] And might U.S. attorneys learn something from exposure to their foreign colleagues?[27]

21. *See* Abel, *supra* note 3, at 755.

22. *See* Roger Blanpain, *Comparativism in Labour Law and Industrial Relations, in* COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRALIZED MARKET ECONOMIES 3, 3–22 (Roger Blanpain & Chris Engels eds., 1998); *see also* ABIGAIL C. SAGUY, WHAT IS SEXUAL HARASSMENT: FROM CAPITOL HILL TO THE SORBONNE (2003) (a study of the legal, social, and interpretative differences in France and the United States on the subject of sexual harassment).

23. *See generally Examination of the Relationship Between the United States and the International Labor Organization*: *Hearing Before the Senate Committee on Labor and Human Resources*, 99th Cong., 1st Sess., Vol. 1 (1985).

24. *See* Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039, 1039–40 (2002) [hereinafter Silver, *Foreign Lawyer*] ("The interactions resulting from . . . cross border meetings provide an opportunity for national models of lawyering to influence one another, through the competition and cooperation of lawyers and their firms in work performed on behalf of clients, both shared and competing."); Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 NW. J. INT'L L. & BUS. 487, 488 (2003) [hereinafter Silver, *Regulatory*] ("By working alongside and across the table from each other, U.S. and foreign lawyers have opportunities to influence one another and extend the reach of their conceptions about the way law and legal practice should work.").

25. *See* Arthurs, *supra* note 2, at 277 ("American lawyers may seem indifferent and insensitive to globalization . . . because they are generally the authors of globalization, not its subjects."). For general discussions decrying the effects of Americanization on other world cultures, *see* GEORGE RITZER, THE MCDONALDIZATION OF SOCIETY (1993); BENJAMIN BARBER, JIHAD VS. MCWORLD (1995); *but cf.* ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 17 (1996) ("[G]lobalization is itself a deeply historical, uneven, and even *localizing* process. Globalization does not necessarily or even frequently imply homogenization or Americanization. . . .") (emphasis in original).

26. Interestingly, in a recent ABA-CLE teleconference on international employment law practice, two speakers—one a lawyer based in London, the other a lawyer based in Amsterdam—stated that the legal practitioners in their international, multi-jurisdictional networks must understand and be comfortable with the culture of American law practice. *See* Mason & de Wind, *supra* note 20. Laura Beth Nielsen's work, however, strikes a cautionary note and indicates that client expectations may influence lawyering styles. Her comparative study of a U.S. multinational corporation's discharge practices in the United States and Canada revealed significant differences across national borders in the way attorneys' services are used by local managers, the U.S. managers being much more reliant on legal counsel than their Canadian counterparts. *See* Laura Beth Nielsen, *Paying Workers or Paying Lawyers: Employee Termination Practices in the United States and Canada*, 21 LAW & POLICY 247 (1999). She similarly noted differences in the way attorneys from the two countries evaluate the actions of the managers they work with; in Canada the company attorney praised the termination decisions

American notions of law firm organization, styles of lawyering, and formal law have had a tremendous impact in Europe and Canada generally, especially in the area of corporate and business transactions law.[28] Nonetheless, in keeping with his view that there is little incentive for states, multinational corporations, and management lawyers to pursue or promulgate transnational labor standards, Professor Harry Arthurs has recently written about the intractable provincialism of forty labor and employment lawyers whom he interviewed, lawyers who hail from seven different countries.[29] Confirming an intuition grounded in legal pluralism that "the search for a single unified legal culture can only be viewed as quixotic,"[30] Professor Arthurs found that "[i]n apparent contrast to the law of commercial contracts, intellectual property, banking and insolvency, the law of employment and industrial relations remains resolutely local in character."[31] His study unearthed little evidence of the lawyers' involvement in transnational employment strategies and in the few instances in which the lawyers had worked on such matters, the projects were initiated by transnational corporate clients, not the attorneys themselves.[32]

made by managers while in the United States, the corporate counsel was less sanguine, expressing her desire to exert greater control over the termination process. *Id.* at 272.

27. *See infra* notes 418–425 and accompanying text.

28. *See* David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 420 (1994); H.W. Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 CANADIAN J. OF L. & SOC'Y 219, 235–38 (1997); YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996); *see also* Ugo Mattei, *A Theory of Imperial Law: A Study of U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003); Lawrence M. Friedman, *Erewhon: The Coming Legal Order*, 37 STAN. J. INT'L L. 347 (2001); Wolfgang Wiegand, *Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991).

29. *See* Harry Arthurs, *The Role of Global Law Firms in Constructing or Obstructing a Transitional Regime of Labour Law*, *in* RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 273 (Appelbaum et al. eds., 2001). Professor Arthurs notes that states are loath to jeopardize their comparative advantage in lower labor costs, corporate interests are concerned with preserving their ability to "shop among local labour regimes," and lawyers wish to avoid conflicts with the state and "the displeasure of clients and the devaluation of their own professional capital." *Id.* at 277.

30. *Id.* at 274.

31. *Id.* at 275.

32. *Id.* at 285. Somewhat similar provincialism was identified by Professor Kal Raustiala in his study of transgovernmental networks. Raustiala notes that there is "little transgovernmental cooperation" between regulators from agencies with a social character, like the Equal Employment Opportunity Commission, and their counterparts in other countries. *See* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 15 (2002). In contrast, there appears to be robust transgovernmental cooperation in the securities and antitrust fields, fields whose regulatory focus is economic in character. *Id.* at 28–43.

This article plows much the same field, albeit from a slightly different angle, and offers decidedly different insights. Specifically, it takes a look at the efforts of one U.S. law firm to promote regular on-going contact between its own lawyers and those in other countries. Described within is an ethnographic study[33] of how one law firm, the mega-labor and employment firm Littler Mendelson, is building its international employment law practice and how the foreign lawyers it encounters react to the firm's distinctly American style of employment lawyering.

To lay the groundwork for thinking about Littler's international law efforts, Section II traces the evolution of U.S. management-side labor and employment law practice over the last fifty years, and considers how practitioners currently ply their trade. In short, today's management attorneys not only engage in activities aimed at addressing existing disputes, they also devote a healthy portion of their practice to dispute avoiding activities. More specifically, the defense bar is actively engaged in the development and dissemination of litigation prevention strategies and compliance practices that seek to insulate corporate clients from the incursion of formal law before any dispute occurs. Such practices clearly help employers maximize the strategic advantages they hold on the litigation playing field. That they always and necessarily advance the interests of employees or the goals of labor and employment law is less certain.

Section III refines the picture, taking up the topic of Littler Mendelson as an example of the way management-side labor and employment law has come to be practiced in the United States. Littler bears the hallmarks of American labor and employment law practice: highly aggressive and entrepreneurial, technologically innovative, and thoroughly immersed in dispute avoidance and compliance practices.

Section IV describes Littler's strategy and goals for building its International Practice Group (IPG), information obtained over a period of about eighteen months through general dialogue and e-mail discussion with the IPG co-chairs, this author's attendance at two Littler-sponsored conferences in 2002, and a review of literature written by the firm. It also, through a discussion of e-mail dialogue this author engaged in with twenty-one lawyers in thirteen countries,

33. Ethnography is grounded in a case study approach to research that "can be based on participant observation, on interviews and observation of a non-participant kind, or a mixture of both approaches." P.K. Edwards et al., *Introduction: The Workplace and Labor Regulation in Comparative Perspective*, *in* WORKPLACE INDUSTRIAL RELATIONS AND THE GLOBAL CHALLENGE 3, 5 (Jaques Bélanger et al. eds., 1994).

reveals the reactions of foreign labor practitioners to Littler's international efforts and summarizes their views about the possibility of the transference of employment lawyering styles across borders. Unlike the lawyers in Professor Arthurs' study, many of the employment practitioners in this study do engage in transnational legal strategies. Additionally, and perhaps more importantly, they report a willingness to learn from American-style employment lawyering and law, especially in the area of anti-discrimination law, though many were less certain about what Littler attorneys could learn from foreign firms. Finally, many of the study subjects believe exposure to the lawyering styles of practitioners in other national jurisdictions will, over time, diminish the differences between the ways management attorneys deliver legal services to multinational clients.

This article concludes with Section V, which discusses the implications of those findings. While this initial study can make no grand empirical claims, it does indicate that the conventional wisdom that workplace law and lawyering is firmly rooted to its domestic borders is a truism that is, in subtle but significant ways, changing. Indeed, this study suggests that an incipient form of global employment practice already exists. Future researchers must be attentive to the ways in which employment lawyers from different national jurisdictions interact, learn from one another, and perhaps in turn adopt similar ways of thinking about and working on employment problems on a global scale. Numerous factors mediate for and against the convergence of national systems of employment relations[34] and the same is certainly true of employment lawyering. If commonalities in lawyering style ultimately emerge among elite groups of global employment practitioners, the intriguing and obviously as yet unanswerable question is whether and how those stylistic changes may in turn affect the functioning and efficacy of employment law regimes outside our borders.

II. THE EVOLUTION OF MANAGEMENT-SIDE LABOR AND EMPLOYMENT LAW PRACTICE IN THE UNITED STATES: 1950 TO THE PRESENT

The term "labor law," in American legal parlance, refers generally to the laws structuring the relationship between unions and

34. *See* Stephen Frenkel & Sarosh Kuruvilla, *Logics of Action, Globalization, and Changing Employment Relations in China, India, Malaysia, and the Philippines*, 55 INDUS. & LAB. RELS. REV. 387, 388–95 (2002).

employers, and also that between unions and employees.[35] A traditional law school course in labor law covers subjects such as the organization and recognition of unions, the scope of the economic weapons available to unions and employers, and the structure and process of collective bargaining.[36] The law covered in this granddaddy of workplace law courses is not likely to be practiced by those who take the class,[37] however, because traditional labor law practice plays an increasingly marginal role within the legal profession.[38]

Professor Steven Willborn wryly observed some time ago that in the United States "labor law without labor, employment law, is the next wave of the future."[39] It is "employment law," consisting of the laws prohibiting discrimination, regulating wages and hours, safeguarding pensions, and governing, where they exist, the individual contractual terms of employment, that occupies the lion's share of the average labor and employment attorney's time.[40] Obviously, much of this work takes place in the context of existing disputes. However, over time management lawyers have developed what one might term a "dispute avoidance" part of their employment practices. They have expanded their roles as business counselors, engaging in activities such as teaching employment law training classes, writing and reviewing employment policies, and conducting compliance audits of their clients.[41] This latter set of activities, the promulgation and

35. *See* Steven L. Willborn, *Labor Law without Labor*, 1988 WIS. L. REV. 547 (reviewing MARK A. ROTHSTEIN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW (1987)).

36. *See generally* ARCHIBALD S. COX ET AL., LABOR LAW: CASES AND MATERIALS (13th ed. 2001).

37. *See* Jeffrey A. Van Detta, *Collaborative Problem-Solving Responsive to Diverse Learning Styles: Labor Law as an Active Learning Experience*, 24 N.C. CENT. L.J. 46 (2001). In fact, there is evidence that the standing of labor law in American law schools is on the decline. *See* Maria L. Ontiveros, *Work in the 21st Century—Creating the Social Architecture,* 37 U.S.F. L. REV. 511, 518–19 (2003); Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL'Y J. 789 (2002); Clyde W. Summers, *American Labor Law Scholarship—Some Comments*, 23 COMP. LAB. L. & POL'Y J. 801 (2002); Matthew W. Finkin, *The Marginalization of Academic Labor Law in the United States*, 23 COMP. LAB. L. & POL'Y J. 811 (2002).

38. *See* Arthurs, *supra* note 2 , at 291.

39. *See* Willborn, *supra* note 35, at 549.

40. *See* Arthurs, *supra* note 2, at 291; *see also* Harry W. Arthurs, *Where Have You Gone, John R. Commons, Now That We Need You So?*, 21 COMP. LAB. L. & POL'Y J. 373, 382 (2000); Christopher David Ruiz Cameron, *No Ordinary Joe: Joseph R. Grodin and His Influence on California's Law of the Workplace,* 52 HASTINGS L.J. 253, 255 (2001).

41. *See* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice,* 26 FLA. ST. U. L. REV. 959, 977–79 (1999) [hereinafter Bisom-Rapp, *Bulletproofing*]; Susan Bisom-Rapp, *Discerning Form From Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 1, 15–16 (1999) [hereinafter Bisom-Rapp, *Discerning Form*]; Suzanne Loomis-Studinsky, *An Ounce of Prevention . . . Five Local Attorneys Discuss How Employment and Labor Laws Affect Your Business*, BUS. PEOPLE MAGAZINE, Nov. 1, 2002, at 72, *available at* 2002 WL 12198262 (describing the roles management attorneys play for their clients); Margaret

dissemination of compliance and prevention strategies, is a notable aspect of labor and employment law as presently practiced in the United States.[42]

Numerous forces no doubt influenced the distinctive shape of management-side practice. It seems commonsensical that among the most important factors were: 1) the increasing demand of employer clients that labor unions and the threat of unionization be met with aggressive and preventive tactical responses; 2) the continuing, precipitous decline of union density in the United States; 3) the rise of individual rights theories to protect workers; and, 4) increased competition in the legal profession, which coincided with greater specialization among lawyers and prompted entrepreneurial behavior among them. Though these factors are likely interrelated, each will be discussed in turn below and after that, the characteristics that exemplify American management-side practice and the motivations of American employers in undertaking preventive strategies will be illuminated.

A. Union Prevention Tactics

In the 1950s the American workforce consisted of a large, largely unregulated, non-unionized sector without job security protections[43] and a smaller unionized sector governed by statutory law and privately negotiated collective bargaining agreements.[44] With unions enjoying unprecedented strength during that decade—union density was 35% in 1954[45]—it is not surprising that labor lawyers in the 1950s focused largely on legal problems originating in the latter category. A typical, management-side caseload of that period would include work designed to avoid unionization, like developing and executing management's legal strategy during union election campaigns, and, for

M. Clark, *Employer, Audit Thyself*, HRMAG., Feb. 1, 2003, at 64, *available at* 2003 WL 12152576; *see also* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUMB. L. REV. 458, 527-30 (2001).

42. *See generally* Bisom-Rapp, *Bulletproofing*, *supra* note 41, at 976–84.

43. *See* Stephen F. Befort, *Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 355 (2002). Of course, non-union workers in the 1950s had the minimal protections of the Fair Labor Standards Act, which sets the minimum wage and provides for overtime compensation, state workers' compensation statutes, which provide recompense for employees injured on the job, and social security, which provides payments to retired, older workers. *See* Gerald D. Reilly, *Book Review,* 67 HARV. L. REV. 532, 533 (1954) (reviewing two labor law casebooks of the period and noting that the books do not cover minimum wage and maximum hour regulation, workers compensation, and social security).

44. *See* Befort, *supra* note 43, at 355, 357.

45. *See id.* at 357 (citing *Bureau of Labor Statistics 1980b*, *in* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 10 tbl.1 (1987)).

unionized clients, engaging in the activities attendant to collective bargaining, like contract negotiations, grievance arbitration, and monitoring strikes and lockouts.[46]

The alliance between employers and attorneys in the labor relations arena is longstanding. Aided by a judiciary willing to fashion anti-worker common law theories to stymie concerted activity,[47] lawyers in the nineteenth century helped plan legal and extra-legal strategies to assist virulently anti-union employers seeking to avoid unionization or break existing labor organizations.[48] At the turn of the twentieth century, the American Anti-Boycott Association, a group of attorneys and businessmen, engaged in an aggressive, temporarily successful litigation campaign that applied statutory anti-trust law to unions' collective activities.[49] Tremendous employer defiance of the newly passed Wagner Act of 1935, which guarantees employees the right to organize, bargain, and engage in concerted activity, was facilitated by the lawyers committee of the American Liberty League, which produced an opinion pronouncing the new law glaringly unconstitutional.[50] To a great extent, one can say that management attorneys' notoriously adversarial lawyering style is at the same time a product of and at one with American employers' strong antipathy to labor organizations[51] and, at least historically, was facilitated by a judiciary often sympathetic to employers' concerns.

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46. *See* Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law*, 42 SW. L.J. 97, 97 (1988) (noting that in the twenty-five years following "the 1935 passage of the Wagner Act . . . the typical labor lawyer devoted most of his time to the collective bargaining process, contract negotiations, union election campaigns, unfair labor practices and the like"); Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and their Clients*, 67 S. CAL. L. REV. 507, 537 (1994) (noting that during the frequent strikes of the 1940s and 1950s, it was common for labor lawyers to spend the duration of the work stoppage on site).

47. *See generally* CHARLES O. GREGORY, LABOR AND THE LAW 22–30 (1946) (discussing application by courts of common law conspiracy theory to concerted activity by labor unions).

48. For example, Coke King Henry Frick's attorney, Philander Knox, helped orchestrate the "ill fated plan of sending 150 armed Pinkerton detectives up the Monongahela River . . . in an unsuccessful attempt" to end the Homestead Steel strike of 1892. *See* Painter, *supra* note 46, at 535. Attorneys of that time were also responsible for effectuating the wave of injunction suits filed by aggressively anti-union employers to stymie strikes, boycotts, and picketing. *See generally* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930); William Forbath, *Law and the Shaping of Labor Politics in the United States and England*, *in* LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS 201, 212–13 (Christopher L. Tomlins & Andrew J. King eds., 1992) ("[A]t least forty-three hundred injunctions were issued between 1880 and 1930.").

49. *See* DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM (1995).

50. *See* Benjamin Aaron, *A Half-Century of Labor Relations Law and Collective Bargaining,* 13 LAB. LAW. 551, 553 (1998). *See generally* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1779 (1983).

51. *See* Painter, *supra* note 46, at 536 ("L]abor-management relations are still often fraught with confrontation . . . [a]n 'adversarial psychology' still dominates collective bargaining. Each

Nonetheless, some commentators see the 1950s and 1960s as a period in which unions prospered and employer anti-union efforts were directed more toward union substitution, accomplished by providing comparable wages and benefits to those provided in unionized workplaces, than union suppression, which involves active and sometimes illegal campaigning against unions.[52] These scholars discern a shift in employer and attorney tactics vis-à-vis unions in the 1970s, with the rise of "preventative labor relations" or "union avoidance" techniques, methodologies that are still employed today.[53] In fact, there is evidence that the use of union avoidance tactics by employers faced with organizing campaigns increased in the 1990s.[54]

The union prevention practices revived from earlier decades, developed and then perfected in the 1970s and 1980s are diverse.[55] Some of the most effective are entirely legal, such as teaching seminars on employer election strategies,[56] interviewing management personnel during an organizing campaign to identify employee concerns and corrective solutions,[57] and writing "captive audience" speeches and campaign literature making clear the reasons why the employer opposes unionization.[58]

side uses lawyers to exert whatever contractual control it can over the other."); *see also* Leo Troy, *The Rise and Fall of American Trade Unions: The Labor Movement from FDR to RR.*, *in* UNIONS IN TRANSITION: ENTERING THE SECOND CENTURY 75, 100 (Seymour Martin Lipset ed., 1986) ("From the inception of unions in this country, employers, or most of them, have opposed unionization of their employees.").

52. *See* Paul Berks, *Social Change and Judicial Response: The Handbook Exception to Employment-at-Will*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 231, 261–62 (2000). Paul Weiler notes that in "1957 only 922 illegally dismissed employees had to be offered reinstated by the [National Labor Relations] Board." Weiler, *supra* note 50, at 1779. Weiler describes 1957 as "the calm before the storm." *Id.*

53. *See* Hoyt N. Wheeler & John A. McGlendon, *Employment Relations in the United States*, *in* INTERNATIONAL AND COMPARATIVE EMPLOYMENT RELATIONS 63, 72–73 (Greg J. Bamber & Russell D. Lansbury eds., 3d ed. 1998); Michael H. LeRoy, *Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLRA*, 29 U.C. DAVIS L. REV. 1019, 1072–73 (1996); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 259 (1990); Berks, *supra* note 52, at 262. *See generally* Jules Bernstein, *Union-Busting: From Benign Neglect to Malignant Growth,* 14 U.C. DAVIS L. REV. 1 (1980).

54. *See* Kate Bronfenbrenner & Tom Juravich, *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*, *in* ORGANIZING TO WIN 19, 28–33 (Kate Bronfenbrenner et al. eds., 1998).

55. *See* Bruce E. Kaufman & Paula E. Stephan, *The Role of Management Attorneys in Union Organizing Campaigns*, 16 J. OF LAB. RES. 439, 446–449 (1995) (discussing tactics used by management attorneys during union organizing campaigns).

56. *See* Andrew J. Kahn, *Problems of Professional Ethics in Labor Law,* 1987 DET. C.L. REV. 731, 733 (1987).

57. *See* Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL'Y REV. 729, 786 (1999).

58. *See* Berks, *supra* note 52, at 262 n.110. Lawful tactics may nevertheless be experienced by workers as coercive. For example, in union organizing campaigns it is not uncommon for

Other tactics are terribly troubling. Professor Stephen Pepper notes, that some management lawyers "suggest to employers . . . that they violate provisions of the National Labor Relations Act," by, for example, firing union supporters in order to defeat an organizing campaign or dislodge an existing union.[59] Because the administrative procedures for contesting employer unfair labor practices are so slow and the remedies under U.S. labor law so limited, the benefits of violating the law can seem to some employers to greatly outweigh the costs of compliance.[60]

While most management attorneys are probably not recommending their clients engage in unlawful tactics, in the last several decades, management attorneys responded to employers' adversarial stance toward unions by altering their own practices accordingly.[61] Managers today see unionization not just as a hindrance but as a failure with potentially severe career consequences.[62] With such sentiments in currency, it makes sense that preventing workers from organizing is an absolute management imperative. In turn, a shift toward aggressive union prevention not

employers to predict that unionization and anticipated increases in labor costs will force management to contract out work, layoff employees, or close a plant. Fear of job loss may then prompt many workers to vote against union representation in the election. *See* Phil Comstock & Maier B. Fox, *Employer Tactics and Labor Law Reform*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 90, 98 (Sheldon Friedman et al. eds., 1994). Workers may also be averse to workplace conflict. By portraying life in a unionized workplace as fraught with confrontation, employer communications can capitalize on those employee concerns. *See* Larry Cohen & Richard W. Hurd, *Fear, Conflict, and Union Organizing*, *in* ORGANIZING TO WIN 181, 193–96 (Kate Bronfenbrenner et al. eds., 1998). One might both avoid these effects and limit the opportunities for illegal employer behavior by greatly shortening the representation election period, as recommended by Paul Weiler. *See* Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century,* 3 U. PA. J. LAB. & EMP. L. 177, 189–90 (2001).

59. *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1592 (1995); *see also* Richard W. Hurd & Joseph B. Uehlein, *Patterned Responses to Organizing: Studies of the Union-Busting Convention*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 61, 62 (Sheldon Friedman et al. eds., 1994) (noting that union avoidance commonly involves use of a management lawyer and that while many campaigns are run lawfully, "many others openly violate NLRB policies.").

60. *See* Pepper, *supra* note 59, at 1592*; see also* Gordon, *supra* note 53, at 260; Weiler, *supra* note 50, at 1787–97. Though the extent of management attorneys' involvement in such illegal conduct is unclear, legal violations of the NLRA are apparently significant. A 2000 report by Human Rights Watch found that 20,000 illegal firings of or reprisals against union supporters occur every year in the United States and concluded that U.S. labor law does little to prevent gross violations of the international human rights of American workers to freely associate and bargain collectively. *See* LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (Human Rights Watch 2000); *see also* Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity under the NLRA and RLA*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 317 (1998). *But cf.*, Thomas B. Moorehead, *U.S. Labor Law Serves Us Well*, *in* WORKERS' RIGHTS AS HUMAN RIGHTS 135, 137–38 (James A. Gross ed., 2003) (criticizing the Human Rights Watch report cited above).

61. *See supra* note 53 and accompanying text.

62. *See* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 62 (1999).

only influenced the employment relations context in which attorneys offer advice, it placed them in roles that today appear commonplace; that is, it situated them in classrooms as trainers and as drafters of policies, like no solicitation policies, activities that one does not need a law degree to engage in. Ironically, and hardly surprisingly, as the decades have progressed there has been, as will be described below, less and less union avoidance work to do.

B. The Decline in Union Density

Coinciding roughly with the rise in union prevention practices was the continuing decline of union density in the United States. Organized labor's increasingly tenuous hold on the American workplace could not help but change the nature of the work done by management lawyers. As noted above, union density reached an unprecedented high of 35% in 1954.[63] By 1970, union density had dropped to 24.7%.[64] In 2000, 13.5% of the nonagricultural labor force was unionized.[65] This figure includes government sector workers, who, unlike private sector employees, are highly unionized. Union density in the private sector in 2000 stood at a mere 9%.[66]

The reasons for the decline are diverse. Among them are: globalization, including the increased mobility of capital and increasing competitive pressures on domestic employers; the changing composition of the American workforce; increases in the use of contingent workers; employer opposition to unionization; deficiencies in American labor law, which labor lawyers help employers capitalize on; the strategies of the union movement itself; and a culture of "rugged individualism" in the United States.[67] While millions of employees continue to be unionized—the figure in 2000 was 16.3 million[68]—it is commonly conceded that over the last three decades management attorneys have shifted their practices away from traditional labor law matters because that type of work is less plentiful than in the past.[69]

63. *See supra* note 45 and accompanying text.
64. *See* Befort, *supra* note 43, at 361.
65. *See id*.
66. *See id*.
67. *See id.* at 362–76.
68. *See id* at 361 n.66. John Dunlop in an interview published in 2002 stressed the importance of putting declines in union density in perspective by looking at actual numbers of union members. *See* Bruce E. Kaufman, *Reflections on Six Decades in Industrial Relations: An Interview with John Dunlop*, 55 INDUS. & LAB. REL. REV. 323, 336 (2002) (noting that thirty years ago, the number of union members was about twenty-one million).
69. *See, e.g.,* Painter, *supra* note 46, at 537–38.

C. The Rise of Individual Rights Theories

The decline of unionization dovetailed with the rise in the 1960s and 1970s of individual rights theories, which protect employees regardless of union status. These new theories, emanating from civil rights statutes and common law causes of action such as wrongful discharge in violation of public policy, filled the vacuum created by the contraction of the labor movement[70] and likely hastened labor's decline.[71] Additionally, and most significantly for the purposes of this article, the individual rights revolution opened up significant practice opportunities for management attorneys.

New workplace regulation, especially the civil rights protections embodied in Title VII of the Civil Rights Act of 1964,[72] greatly destabilized the legal environment confronting employers.[73] Naturally, as the first suits were brought under the new legal theories, management attorneys stepped up to the plate in their traditional defensive posture. More interesting, however, is the role these lawyers played in fashioning and disseminating strategies designed to forestall litigation, strategies that were not prescribed by the new legislation. Sensing that the moment was nigh, human resource professionals, followed a bit later by management attorneys,[74] began recommending that employers adopt a range of personnel practices aimed at achieving non-discriminatory workplaces[75] and demonstrating compliance with the new legal regime and principles of

70. *See* Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. REL. L.J. 1, 2 n.4 (1991); WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 55–58 (1993); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 15 (1988); Befort, *supra* note 43, at 391–94.

71. *See* Jane Byeff Korn, *Collective Rights and Individual Remedies: Rebalancing the Balance after* Lingle v. Norge Division of Magic Chef, Inc., 41 HASTINGS L.J. 1149 (1990); Aaron, *supra* note 50, at 555.

72. 42 U.S.C. §§ 2000e–2000e-17 (2000). Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin.

73. *See* Bisom-Rapp, *Discerning Form*, *supra* note 41, at 9 (*citing* Frank Dobbin et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 AM. J. SOC. 396, 402–03 (1993); Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1406 (1990)).

74. *See id.* (*citing* Dobbin et al., *supra* note 73, at 404–05; Edelman, *supra* note 73, at 1410–11; Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1546 (1992); Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 L. & SOC. INQUIRY 903, 924 (1997); John R. Sutton et al., *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955-1985*, 61 AM. SOC. REV. 794, 800 (1996)).

75. *See* Dobbin et al., *supra* note 73, at 402.

equality.[76] These compliance structures included non-union grievance procedures, equal employment opportunity and affirmative action offices, formal promotion mechanisms, and employment at-will clauses designed to forestall wrongful discharge suits.[77]

Members of these allied professions touted the use of formal evaluation and promotion procedures as mechanisms for defeating discrimination and maximizing the efficient use of human resources.[78] Grievance procedures were recommended as devices to enhance employee due process, avoid suit, and efficiently handle workplace conflict.[79] Training programs on a host of employment law topics, from how to bulletproof termination decisions to how to handle workplace sexual harassment complaints, over time became ubiquitous.[80] By describing the risk of liability as looming and proffering solutions developed to minimize the threat, lawyers and human resource professionals greatly enhanced their prestige and created a new market for their skills.[81]

Today, employers' reliance on the legal profession is extensive.[82] Employment regulation in the United States is complicated, fragmented, and indeed, has been charged with lacking doctrinal coherence.[83] Professor Stephen Befort describes the regime as "a maze of potential claims and forums" emanating from statute and common law at both the state and federal levels.[84] Management attorneys act as expert translators of this volatile legal environment for their clients not only by offering client-specific legal consultation on a tangible problem, but also by engaging in litigation prevention and compliance activities like teaching topical training classes to managers, publishing general advisory articles directed at human

76. *See* Lauren B. Edelman & Stephen M. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 RES. IN SOC. STRATIFICATION & MOBILITY 107, 108 (1999).

77. *See* Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law,* 22 BERKELEY J. EMP. & LAB. L. 1, 13 (2001).

78. *See* Dobbin et al., *supra* note 73, at 404.

79. *See* Edelman, *supra* note 73, at 1411–12.

80. *See id.* at 1434; Bisom-Rapp, *supra* note 77, at 15–17.

81. *See* Suchman & Edelman, *supra* note 74, at 935; *see also* Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 74–76 (1992); Sutton et al., *supra* note 74, at 795.

82. *See* Bisom-Rapp, *Bulletproofing*, *supra* note 41, at 976–1010 (*citing* Edelman et al., *supra* note 81, at 60–62.)).

83. Befort, *supra* note 43, at 395–96.

84. *Id.* at 397.

resource professionals and supervisors,[85] and conducting compliance audits of company policies.[86]

D. Increased Competition in the Legal Profession

The final trend that shaped current labor and employment practice is increased competition in the legal field generally. During the twentieth century entry into the legal profession shifted from an apprenticeship system to formal training in professional schools.[87] Power to control the numbers permitted to join the profession's ranks was thus wrested away from lawyers themselves and placed in the hands of professional educators whose incentives are to increase rather than curtail entry.[88] The increase in the number of lawyers in the United States has been phenomenal; membership in the profession has increased 142% since 1975.[89]

One consequence of the explosive growth in the field was specialization. Over time, many lawyers migrated away from general legal practice and began to specialize in discrete practice fields, labor and employment law being only one among many.[90] Increased competition in the legal profession has also inspired entrepreneurial behavior among practitioners, a phenomenon evidenced by the rise of law firm marketing[91] and the expansion of services offered to tasks not traditionally associated with legal practice.

Labor and employment attorneys are among the most entrepreneurial of America's legal specialists.[92] Most labor and

85. *See* Bisom-Rapp, *Bulletproofing*, *supra* note 41, at 977–78; *see generally* Loomis-Studinsky, *supra* note 41.

86. *See generally* Clark, *supra* note 41.

87. *See* Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Post-Professional World*, 33 LAW & SOC'Y REV. 713, 726 (1999).

88. *Id. See generally* M.A. Stapleton, *Lawyers Have Met the Enemy and It Is Them,* CHI. DAILY LAW BULL., Sept. 13, 1996, at 3 (noting that the increase in law schools and law students leads to increased competition and marketing).

89. *See* CLARA CARSON, THE 1995 LAWYER STATISTICAL REPORT 1 (American Bar Foundation, 1995).

90. *See* Kritzer, *supra* note 87, at 727.

91. *See generally* Renee Deger, *Firms Look to Escape Being Identified with a Single Hometown to Lure Clients and Keep Outposts Happy*, THE RECORDER, May 6, 2003, at 1 (discussing the efforts of firms to market themselves as national and/or international firms); Julie A. Eichorn, *Develop Leadership and Business Skills,* N.Y.L.J., Jan. 28, 2002, § 6 (arguing that intense competition requires that lawyers "maximize every marketing tool available"); Linda Daniels, *Marketing Directors' Roles Grow to Encompass MDPS, Mergers and Strategic Thinking*, FULTON COUNTY DAILY REP., Sept. 18, 2000, at B3 (discussing changes in law firm marketing and advertising).

92. *See* Larry Smith, *The Attack of the 50-Foot Boutique . . . Labor Firms Find New Leverage Sources to Pursue Divergent Growth Strategies*, OF COUNSEL, May 19, 1997, at 1. ("[T]he leading labor firms have launched some of the shrewdest and most energetic marketing in the profession.").

employment firms today publish newsletters, sponsor regular client seminars, engage in preventive counseling, set up compliance programs, and review employee manuals.[93] Practitioners also write articles for publications produced by the human resources profession,[94] speak at conferences hosted by the human resources profession,[95] spin off independent consulting companies,[96] and even tap the market for online education.[97] Such activities, which are interdisciplinary in the sense that they can be undertaken by individuals without formal legal training, not only publicize a firm's services; many generate much needed revenue, and are a way of changing or enhancing a firm's image.[98]

Competition within the profession, which no doubt inspired the development and marketing of preventive legal strategies, has made management attorneys subject to competition from without. Recently, employment firms have found themselves competing with lay consultants for preventive work.[99] Firms can respond to the competitive threat from lay consultants by stressing the special expertise of counsel, reducing their prices, or launching training companies supervised by lawyers but staffed by non-lawyers.[100] There is some evidence that labor and employment lawyers are engaging in all three of these strategies.[101]

E. The Distinctive Nature of American Employment Law Practice, Its Effect on Labor and Employment Law, and Its Relationship to the Ethos of American Employers

Aside from a notoriously adversarial style, among the most notable characteristics of American management-side lawyering is its emphasis on dispute avoidance and litigation prevention.[102] While management attorneys still engage in legal work that involves

93. *See generally id.* at 7 (noting that it is a rare employment firm today that doesn't publish newsletters, sponsor regular client seminars, engage in preventive counseling, set up compliance programs, and review employee manuals because these activities support the practice).

94. *See* Bisom-Rapp, *Bulletproofing*, *supra* note 41, at 977–78.

95. *See id.* at 985 n.153.

96. *See infra* note 98.

97. *See infra* notes 167–70 and accompanying text.

98. *See* Smith, *supra* note 92, at 7.

99. *See* Charles Toutant, *Laymen Compete for Workplace-bias Consulting Work*, N.J. L.J., Jan. 20, 2003, at 25.

100. *See* Clark, *supra* note 41, at 64; *see also* Julia D. Gray, *Troutman Launches Human Resources Subsidiary*, FULTON COUNTY DAILY REPORT, Nov. 7, 2002, at 1, *available at* WL; Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1368 (2000) (describing Littler Mendelson's formation of an independent consulting business).

101. *Id.*

102. *See supra* note 42 and accompanying text.

addressing problems or challenges that presently exist—such as employment litigation or the negotiation of collective bargaining agreements—a great part of their efforts are aimed at disseminating information about, and helping clients anticipate and effectively plan for, potential employment problems that might but have not yet materialized.[103] In the process, management lawyers enhance their employer clients' advantage as repeat players, and hold out to them the possibility of taming formal law through the adoption of strategies, like employee grievance procedures, mandatory pre-dispute arbitration agreements, or corporate codes of conduct, rooted in the notion of private ordering.[104]

For some commentators, the shift to corporate self-regulation, (and one could argue by extension those who enable it), is a troubling phenomenon. Professors Lauren Edelman and Mark Suchman posit, for example, that large organizations internalize legal rules, structures, personnel, and activities that transform them from being repeat players in the public legal system to being private legal systems able "to manage, transform, and even supplant societal rules."[105] Others, notably Professor Susan Sturm, see great promise in private ordering and attorneys' roles in creating such regimes, arguing that employers must develop corporate problem-solving capabilities that create fair and non-discriminatory workplaces.[106]

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103. *See* Bisom-Rapp, *Discerning Form*, *supra* note 41, at 14–17. New programs within the U.S. Labor Department and Equal Employment Opportunity Commission have shifted the roles of those agencies away from enforcement and prosecution in favor of consulting with employers on legal compliance. *See* Leigh Strope, *U.S. Seeks Cooperation with Employers*, FINDLAW LEGAL NEWS, July 25, 2002, *at* http://news.findlaw.co...52/7-25-2002/20020725134502_15.html (last visited July, 29, 2002) (on file with author).

104. *See generally* Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941 (1999).

105. *Id.* at 976. *See also* Harry W. Arthurs & Robert Kreklewich, *Law, Legal Institutions, and the Legal Profession in the New Economy*, 34 OSGOODE HALL L.J. 1, 27 (1996) ("Generally speaking, as privatized law-making is removed further and further from democratic institutions and the practice of democratic politics, we can expect that the content of legal rules will more and more closely correlate with the interests of the stronger party to any dispute or transaction."); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow-Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996) (criticizing the practice of requiring workers as a condition of employment to submit all employment disputes to binding arbitration); Bob Hepple, *A Race to the Top? International Guidelines and Corporate Codes of Conduct,* 20 COMP. LAB. L. & POL'Y J. 347, 353–57 (1999) (describing a historical shift from public to private, self regulatory measures); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401, 403–24 (2001) (critiquing self regulatory initiatives); Harry Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION 471, 471–87 (Joanne Conaghan et. al eds., Oxford University Press, 2002) (questioning the legitimacy of voluntary corporate codes).

106. Susan Sturm, *supra* note 41, at 527–30; Susan Sturm, *Lawyers and the Practice of Workplace Equity,* 2002 WIS. L. REV. 277, 278 (2002) ("Proactive lawyers . . . are spearheading

Ultimately, the most useful way to view compliance and prevention practices is in context. One must assess, on both a firm specific and then a more global basis, what particular strategies aim to achieve, the impact of those strategies on employer and employee interests, and the long-term implications of such approaches on the efficacy of labor and employment law.

1. Assessing the Effects of Litigation Prevention and Compliance Practices

Evaluating dispute avoidance practices is complex business; one must carefully tease out the possible effects. Take the common practice of bulletproofing the employment decision-making process, for example. Many employers acting on the recommendations of employment attorneys and human resource professionals have adopted procedures to simultaneously eliminate illegal bias and safeguard hiring, firing, and promotion decisions from challenge.[107] These policies, which aim to create evidentiary records that can be used defensively if necessary, seek to vanquish employment discrimination and eliminate supervisors' arbitrary discretion.[108]

Employees certainly derive benefits from these practices.[109] Yet that they do so in all cases is far from clear. As this author has explained at length elsewhere, the bulletproofing efforts of often well-meaning employers can, in cases of subtle or unconscious discrimination, mask rather than eliminate biased decision-making.[110] Moreover, this masking phenomenon has implications for the efficacy of civil rights law. To the extent that agency personnel, plaintiffs' attorneys, and judges uncritically accept employer-created documentation, they will both fail to detect tainted employment

the redesign of employment systems in companies concerned about the adequacy and legal vulnerability of their workplace practices."); *see also* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 113–19 (2003) (discussing the role that legal professionals play in their roles as counselors and everyday problem-solvers). The European intellectual movement known as reflexive labor law emphasizes the potential inherent in legal systems that "facilitate processes of self-regulation within other social systems" by moving away from an instrumental, substantive form of employment regulation in favor of one that stress the procedural aspects of legal compliance. Ralf Rogowski, *Autopoietic Industrial Relations and Reflexive Labour Law in the World Society*, *in* ADVANCING THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT 67, 76–77 (Ton Wilthagen ed., 1998).

107. *See* Bisom-Rapp, *Discerning Form*, *supra* note 41, at 3.

108. *See* Bisom-Rapp, *Bulletproofing*, *supra* note 41, at 963.

109. *Id.*

110. *See* Bisom-Rapp, *Discerning Form*, *supra* note 41, at 34–35.

decisions and encourage a symbolic rather than substantive approach to legal compliance.[111]

Indeed, recent research has chronicled a disturbing trend in U.S. civil rights law and practice toward acceptance of legal compliance in form rather than in substance.[112] A compelling example of this phenomenon is in the area of sexual harassment law. Professor Lauren Edelman and her colleagues convincingly demonstrate that corporate grievance procedures are the primary symbol of nondiscrimination in sexual harassment doctrine, a fact owed not to judicial innovations but instead to the interventions of human resource professionals and management attorneys.[113] In the early 1980s, when there was little legal support for their assertions, these professionals began recommending grievance procedures as mechanisms for avoiding liability claiming, among other things, that courts were favorably disposed toward employers who implement internal procedures.[114]

Courts, with the U.S. Supreme Court taking the lead, over time responded to those claims, ultimately incorporating the so-called grievance procedure defense into an affirmative defense to harassment claims where the victim's employment environment has been affected but he or she has suffered no tangible employment action.[115] Edelman and her colleagues see this judicial deference to organizational practice as troubling, arguing that courts are unlikely to be aware of the organizational dynamics that may undermine grievants' rights.[116] The primary danger is that the absence or presence of a harassment grievance procedure may be used as the yardstick for legal compliance rather than a court undertaking an inquiry into the effectiveness of the device in eliminating workplace harassment.

Important works by Professors Joanna Grossman,[117] Teresa Beiner,[118] and Martha West[119] confirm Edelman's fears. Reviewing

111. *Id.* at 36–46.

112. *See generally* Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth,* 105 AM. J. SOC. 406 (1999); Bisom-Rapp, *supra* note 77.

113. *See* Edelman et al., *supra* note 81, at 407.

114. *Id.* at 412–13, 432.

115. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Ind., Inc. v. Ellerth, 524 U.S. 742 (1998); Pennsylvania State Police v. Suders, 124 S. Ct. 2342 (2004).

116. *See* Edelman, *supra* note 73, at 449.

117. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003).

118. *See* Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases,* 24 U. ARK. LITTLE ROCK L. REV. 117 (2001).

119. *See* Martha S. West, *Preventing Sexual Harassment: The Federal Courts Wake-Up Call for Women*, 68 BROOK. L. REV. 457 (2002).

courts' approach to the defense, Grossman identified a judicial preoccupation with procedural matters such as assessing whether employer complaint mechanisms include a bypass procedure ensuring that victims need not lodge formal complaints with their harassers and making clear to complainants other personnel to whom they can complain.[120] Beiner has found courts tremendously unsympathetic to plaintiffs who fail to use existing grievance procedures, notwithstanding their very rational concerns about the repercussions of lodging a formal complaint.[121] And West reports that despite language in the Supreme Court decisions establishing the affirmative defense about the necessity of adopting effective preventive policies to create non-discriminatory environments, the focus in harassment litigation is on what transpires after harassment occurs.[122] Merely creating and disseminating an anti-harassment policy with a grievance procedure seems to satisfy the employer's duty to prevent harassment.[123] As Grossman notes, such an approach arguably enables employers to avoid liability "without making a dent in the underlying problem."[124]

Another example of the American symbolic approach to civil rights law is provided by this author's work, which challenges the unthinking acceptance by employment lawyers and judges of training as a vaccination against and antidote for discriminatory work environments. Judges have embraced the pedagogical approach by incorporating it into civil rights doctrine,[125] by citing training as favorable employer evidence in litigation, and by making it a regular component of consent decrees, without ever inquiring about whether training accomplishes what it purports to accomplish.[126] Yet social scientists confess that we know very little about how and when these educational programs actually work[127] and in some cases their use can give the impression that discrimination is being meaningfully addressed when in fact it is not.[128]

120. *See* Grossman, *supra* note 117, at 5.
121. *See* Beiner, *supra* note 118, at 122–25.
122. *See* West, *supra* note 119, at 477.
123. *See id.* at 478.
124. *See* Grossman, *supra* note 117, at 3; *see also* Margaret S. Stockdale et al., *Coming to Terms with Zero Tolerance Sexual Harassment Policies,* 4 J. FORENSIC PSYCH. PRAC. 65, 65–78 (2004) (warning that zero tolerance policies risk emphasizing form over substance); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003) (arguing that internal compliance structures across a range of substantive areas fail to deter prohibited conduct).
125. *See* Bisom-Rapp, *supra* note 77, at 7–13.
126. *Id.* at 25–29.
127. *Id.* at 44–45.
128. *Id.* at 30–31.

Interestingly, a hint of a doctrinal shift from a culture of symbolic compliance[129] to a jurisprudence of accountability has recently appeared in a few U.S. jurisdictions. The Supreme Court of New Jersey, for example, in *Lehmann v. Toys 'R' Us*[130] set forth a number of indicia to determine whether an employer acted negligently in failing to establish an effective anti-harassment program. Among the factors listed was the existence of effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures.[131] The court articulated its bottom line in a subsequent case: "The efficacy of an employer's remedial program is highly pertinent to an employer's defense."[132] Making accountability integral to preventing, discerning, and eliminating discrimination is an essential check on the natural tendency of organizations to adopt symbolic rather than substantive litigation prevention and compliance strategies.[133] These judicial decisions, however, are at present outliers, not at all reflective of mainstream civil rights jurisprudence. Whether courts in other jurisdictions will be influenced by these doctrinal developments remains to be seen.

The shape and form of American dispute avoidance practices, the reactions of the judiciary to them, and their ultimate effects on the efficacy of civil rights law is not only of import to U.S. policymakers and legal scholars. Given the phenomenon described in this article—the birth of international employment law as a specialty area of legal practice—it also has implications beyond our borders. As will be discussed below, U.S. anti-discrimination law and practice is generally seen by the lawyers in this study as more mature and better developed than that of many other countries.[134] Moreover, the one area of U.S. labor and employment law and practice described by the foreign study subjects as compatible with and instructive for their own legal systems was anti-discrimination law.[135] Whether and how U.S. notions about

129. *See generally* Grossman, *supra* note 117.

130. 132 N.J. 587 (1993).

131. *Id.* at 621.

132. Gaines v. Bollino, 801 A.2d 322, 330 (2002); *see also* Sturm, *supra* note 41, at 559–60 (discussing the role courts might play in providing incentives for employer accountability).

133. *See* Bisom-Rapp, *Bulletproofing*, *supra* note 41, at 971–74.

134. *See infra* notes 313–323 and accompanying text; *see also* Frank Dobbin, *Do the Social Sciences Shape Corporate Anti-Discrimination Practice?: The United States and France*, 23 COMP. LAB. L. & POL'Y J. 829 (2002) (comparing the robust development of anti-discrimination compliance practices in the United States to the paucity of such practices in France and arguing that the differences can be accounted for by the structure of the state and its legal system in each country).

135. *See infra* notes 313–323 and accompanying text. *See also* Sanford M. Jacoby, *Social Science in Europe, Japan, and the United States,* 23 COMP. LAB. L. & POL'Y J. 819, 821 (2002) (noting that American ideas about employment discrimination law and its remedies may well

prevention spread to other national jurisdictions is at this time impossible to predict. Nonetheless, transnational networks of management lawyers could certainly act as conduits for the transmission of these ideas and ultimately influence, not necessarily for the better, the development of legal regimes and practices abroad.

2. Considering the Relationship Between Dispute Avoidance Practices and the Ethos of American Employers

This article argues herein that if we are to witness a convergence in lawyering styles, a major catalyst for the phenomenon will likely be client needs. In fact, as will be discussed below, the foreign practitioners in this study expressed a willingness to learn from their American counterparts if only in the name of better serving their American clients. With this in mind, it makes sense to consider how prevention addresses those needs and the motives that drive American employers to adopt compliance practices.

Few would dispute that while some prevention and compliance practices improve the lives of workers, the overriding aim of such strategies is to keep employers out of trouble.[136] Indeed, some of the counsel given by U.S. practitioners is designed to ensure that employers do not unwittingly provide employees with enforceable rights that they are not otherwise entitled to under statutory law. Advising employer clients to include a prominent disclaimer in employee handbooks stating that employees of the company may be discharged at-will, and that the policies themselves can be changed, without notice, by the employer at any time certainly does little to advance worker rights.[137] Preventive strategies are in demand and deemed effective to the extent they meet client needs not employee

flow to and be used by European nations as the latter attempt to grapple with the discontent of their "growing minority populations.").

136. *See* Bisom-Rapp, *Bulletproofing*, *supra* note 41, at 988–91; *see also* Arthurs & Kreklewich, *supra* note 105, at 36 ("What [law experts] are trying to do is to show their clients how to do what they wish to do without getting into serious legal or practical difficulties with the state or with other private actors.").

137. *See*, *e.g.,* Littler Mendelson, *Effective Personnel Relations: Developing an Employee Handbook*, *in* THE NATIONAL EMPLOYER 713, 722–23 (2003) (noting that to be effective a prominent, unambiguous disclaimer must "inform employees that the handbook does not constitute a contract and that the employment relationship may be terminated at the will of either party"); Peter M. Panken & Stacey B. Babson, *Creating the Personnel Paper Trail: Personnel Manuals*, *in* EMPLOYMENT AND LABOR LAW 1, 37 (7th ed. A.L.I.-A.B.A. 1995) (recommending employers "spell out that at-will employment is all that is offered" and suggesting language "reserving an employer's right to amend its policies"); Gerald S. Hartman et al., *Avoiding Liability*, *in* CURRENT EMPLOYMENT LAW AND RELATED LITIGATION ISSUES 355, 356–57 (Wake Forest University CLE Program 1994) ("Review handbooks and personnel manuals and delete unintentional guarantees of job security.").

needs. It is thus instructive to examine the reasons why American employers embrace prevention.

One way of understanding prevention is as a form of risk management.[138] For example, Professor Frank Dobbin argues that the reason for U.S. employers' embrace of a broad range of compliance practices in the wake of Title VII's passage was to "inoculate" their organizations from the risk associated with discrimination suits, "which could prove costly and embarrassing."[139]

Using France as a counter-example, Dobbin notes that despite the passage of race discrimination legislation in 1972, incentives for French employers to develop corporate anti-discrimination measures were lacking and therefore such devices were never implemented.[140] Stringent evidentiary standards for proving discrimination and the meager fines available produced few successful discrimination claims in France.[141] Moreover, the centralized French state failed to amend or expand the meaning of the initial legislation so that it never "turned into a genuine threat."[142] In short, French employers were not subject to the risk experienced by American employers and thus had no reason to manage it.[143]

Related to risk management is a second motive; American employers undertake preventive strategies because they seek flexibility in charting a course for their organizations. Most American employers conduct business with a mindset that is exceedingly bottom line oriented. This does not imply that employers are brutish exploiters of their employees.[144] Yet when decisions affect employees, as they often do in an era of complex and frequent business transactions, the individuals impacted are, to a great extent, conceptualized in abstract terms, as factors of production "to be mixed, matched, [and] moved" and, if necessary, speedily discharged

138. I am grateful to Professor Marty Malin for urging me to articulate my thoughts on this point.

139. *See* Dobbin et al., *supra* note 73, at 833.

140. *See id.* at 839–40.

141. *See id.*

142. *Id.* at 840.

143. Recent changes in French anti-discrimination law may alter the incentive structure for French employers. *See generally* Katell Berthou, *New Hopes for French Anti-Discrimination Law*, 19 INT'L J. COMP. LAB. L. & INDUS. REL. 109–37 (2003).

144. U.S. Department of Labor Under Secretary Thomas Moorehead expresses management sentiment as endeavoring "to develop and maintain a cooperative, positive, flexible, innovative, productive, profitable, nondiscriminatory, non-exploitive, safe, healthy, and open working environment that recognizes and builds on diversity." Moorehead, *supra* note 60, at 141.

in accordance with the changing needs and priorities of the organization.[145]

Moreover, unlike their counterparts elsewhere in the industrialized world, U.S. employers operate within a legal regime that does not recognize the vulnerability of employees and their corresponding need for protection from arbitrary dismissal.[146] Despite the rise of the individual rights theories mentioned above, the default rule structuring employment relationships in almost all of the United States remains the at-will principle; barring action taken on a prohibited basis such as race, sex, religion, or age, employees may be discharged for good reason, bad reason, or no reason at all.[147] U.S. labor and employment law, the crazy patchwork of regulation that overlays employment at-will, is a considerable impediment to the flexibility and control employers require. By implementing preventive strategies, employers seek to preserve flexibility in the face of uncertainty associated with formal law.

There is more motivating American employers' adoption of compliance practices than risk management and flexibility preservation. Recent scholarship, both in the United States and abroad, has identified a range of reasons why regulatory subjects comply with social and environmental law, motives other than fear of detection and punishment of legal violations.[148] Organizations and individuals also comply with law due to more affirmative reasons, including a sense of social obligation "to do the right thing."[149] In the civil rights area, Lauren Edelman's work has demonstrated that

145. *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 491 (2000). As Professor Martha Albertson Fineman recently noted: "Corporations favor down-sizing in the interests of stockholders and view labor as just another expense of production to be manipulated and contained. Employers and capitalists articulate their social responsibility in terms that leave workers behind. Allegiance is to stockholders, not employees." MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 248 (2004).

146. *See* Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 408–09 (2001) ("Compared to industrial models in other nations, the United States' regulatory scheme governing nonunionized employees privileges economic or property interests over the social interests of continued employment.").

147. *See* Cynthia L. Estlund, *An American Perspective on Fundamental Labour Rights*, *in* SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 192, 205–06 (Bob Hepple ed., 2002) (noting that although the at-will rule has been "softened" by common law developments and statutory exceptions, "most private sector employees can lawfully be fired with no explanation and no demonstrable cause"); Richard Michael Fischl, *Workplace Justice and Employment at Will*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION 253, 259-61 (Joanne Conaghan et al. eds., 2002) (discussing the at-will rule and noting that the rule itself "undermines the 'exceptions' to it and with them efforts to bring justice to the American workplace").

148. *See* Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 LAW & SOC'Y REV. 41 (2004) (describing the literature).

149. *See id.* at 44.

despite negligible government enforcement efforts in the immediate aftermath of Title VII's passage, "cultural factors," such as "considerations of legitimacy and propriety," catalyzed the voluntary implementation by employers of compliance measures that were sincerely calculated to show organizational allegiance to the aspirations underlying the new legislation.[150] Organizations, in this view, are social creatures whose actions are mediated as much by their cultural environments as they are by rational calculations of risk.[151]

Given the motivational backdrop described above, what might American multinationals seek to accomplish through preventive practices when they take their operations abroad? One would assume that where the legal environment presents a threat, they will attempt to manage the risk that their employment practices will trigger legal liability.[152] They may also be motivated by cultural and reputational concerns. For example, they may be sensitive to and attempt to stave off the arguments of non-governmental organizations (NGOs) and others that MNCs' overseas operations or suppliers, particularly in developing countries, exploit or abuse native workers.[153]

Lastly, regarding flexibility, the goal of most American MNCs is likely fairly close to the stated objective of the Labor and Employment Committee of the United States Council for International Business (USCIB), "the officially designated U.S. business representative to the key international organizations that adopt labor and employment treaties, regulations and codes of business conduct."[154] As noted by the committee, USCIB seeks "to establish an international industrial relations environment characterized by flexible labor markets and minimal government intervention."[155]

150. *See* Suchman & Edelman, *supra* note 74, at 923–24.

151. *See id.* at 918. This certainly doesn't guarantee that the measures adopted will have direct substantive effects. Indeed, the tenacious pull of the status quo in the form of managerial prerogative can drive organizations to adopt forms of compliance that are "minimally disruptive of the status quo." *See* Bisom-Rapp, *Bulletproofing*, *supra* note 41, at 971.

152. A chapter in Littler Mendelson's 2003 publication, THE NATIONAL EMPLOYER, highlights for multinational clients the potential liability minefield they must navigate and offers practical suggestions for dealing with those risks. *See* Littler Mendelson, *Employment Issues Affecting Multinational Employers*, *in* THE NATIONAL EMPLOYER 1913–63 (2003).

153. *See* Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611, 616–25 (2001) (describing how the virtual form of many MNCs "increases the likelihood that the multinational will abuse its workers").

154. *See* USCIB Web site, http://www.uscib.org/index.asp?documentID=825 (last visited Oct. 17, 2003). USCIB is comprised of over 300 multinational companies, law firms, and business associations. *Id.* at http://www.uscib.org/index.asp?documentID=721.

155. *See* USCIB Web site, http://www.uscib.org/index.asp?documentID=825 (last visited Oct. 17, 2003).

The extent to which American management lawyers and their international colleagues can help American employers achieve their aims is an interesting question. Before considering it, however, narrowing the focus to consider the subject of this ethnographic study is in order.

III. LITTLER AS AN EXAMPLE OF U.S. LABOR AND EMPLOYMENT LAW PRACTICE

Littler Mendelson is a firm that exemplifies the way management-side labor and employment law is practiced in the United States. Formed in 1942 in the San Francisco Bay Area when employers' need for representation before the War Labor Board was pressing,[156] Littler presently has close to 400 attorneys working in 28 offices nationwide.[157]

A. Littler's History

The firm's personal history generally tracks the historical trends in labor and employment law discussed above. Much of Littler's practice in the 1950s and 1960s involved work connected to unionization, including negotiating collective bargaining agreements and representing employers during union organizing campaigns.[158] During this period, in part due to the lawyering style of named partner Wesley Fastiff who joined the firm in 1963, the firm developed a reputation for a "take no prisoners" approach to battling unions on behalf of its clients.[159] Littler's aggressive, confrontational methods in

156. *See generally* Exec. Order No. 9017, 3 C.F.R. 1975 (1938–1943), *reprinted in* 2 U.S. DEPARTMENT OF LABOR, TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD 49 (1949).

157. Littler's Web site states that Littler is America's largest firm devoted exclusively to the practice of labor and employment law. *See* Littler Mendelson Web site, http://www.littler.com/about/index.htm (last visited June 2, 2004); *see also* Jennifer Fried, *Hard Labor*, THE AM. LAW., Sept. 2003, at 17 ("Littler is the biggest labor and employment firm in the country."). Littler's empire is comprised of offices in: Atlanta, Georgia; Boston, Massachusetts; Chicago, Illinois; Charlotte, North Carolina; Columbus, Ohio; Dallas, Texas; Denver, Colorado; Fresno, California; Houston, Texas; Las Vegas, Nevada; Los Angeles, California; Miami, Florida; Minneapolis, Minnesota; Newark, New Jersey; New York, New York; Philadelphia, Pennsylvania; Phoenix, Arizona; Pittsburgh, Pennsylvania; Reno, Nevada; Sacramento, California; San Diego, California; San Francisco, California; San Jose, California; Santa Maria, California; Seattle, Washington; Stockton, California; Walnut Creek, California; Washington, D.C. *See* Littler Mendelson Web site, http://www.littler.com/offices/index.htm (last visited June 2, 2004).

158. *See* Littler Mendelson Web site, http://www.littler.com/about/firm_history.htm (last visited Sept. 26, 2003).

159. *See* Julie Triedman, *Labor Lawyers "R" Us*, THE AM. LAW., Jan.– Feb. 1996, at 71. *See also* Littler Mendelson Web site, http://www.littler.com/about/firm_history.htm (last visited Sept.

facing unions like the Teamsters won it both new clients and the ire of organized labor and its supporters; the latter dubbed Littler a union buster,[160] a term that continues to haunt the firm even though its overall image has changed dramatically over time.[161] By 1970, the boutique firm had grown to nine attorneys.[162]

As union density and hence traditional labor law work declined throughout the 1970s, Littler attorneys trained their focus on the developing body of law that would become known as "employment law."[163] Legal work involving discrimination law, state statutory law, and emerging common law theories catalyzed rapid firm growth. By 1980, the firm could claim sixty-five attorneys and new offices in Fresno, San Jose, and Los Angeles.[164]

In the 1980s, Fastiff and partner Garry Mathiason, who joined the firm in 1972, launched their plan to make Littler America's premier labor and employment law specialty firm.[165] While no firm actually lays claim to that title, Fastiff's and Mathiason's strategy did, over the course of a decade, transform the firm in terms of its practice, client base, and image.[166] As part of their blueprint, Littler held its first large

26, 2003) ("By 1970, the firm . . . had acquired a reputation for aggressive representation of employer interests."). Littler's stance in this respect indicates that it was at the forefront of the trend away from a "union substitution" approach to labor relations instead vigorously pursuing at an early date the "preventative" labor relations strategies that management firms have come to favor. *See supra* notes 52–53 and related text.

160. *See* Triedman, *supra* note 159, at 71. Indeed, a nickname for the firm, "Hitler, Meddlesome & Fascist," was coined by union lawyers and their clients. *Id.* Describing Littler's hard line approach, one management attorney noted: "They would appeal everything to the hilt. If [they] lost, [they] filed all sorts of objections and skirted regulations." *Id.* at 3 (quoting anonymous source).

161. *See, e.g.*, Dan Lawson, *Student Fees and Bargaining, UC Hires Union-Busting Law Firm*, UAW LOCAL 2865 ANNOUNCEMENTS, Jan. 31, 2003, *available at* http://www.uaw2865.org/announcements.html ("[W]e have recently learned that UC has hired a notorious anti-Union law firm, Littler Mendelson, to advise the Administration on ways to undermine all the Unions at UC."); Krysten Crawford, *Littler's Labors*, THE RECORDER, Nov. 19, 2001, at 1 ("Change is a constant at Littler, which got its start during the World War II era busting unions from a California base."); Ken Myers, *An Anti-Union "Hit List" Propels Student Boycotts of Law Firms*, NAT'L L.J., Aug. 6, 1990, at 4 ("The students' list [of "unionbusting" firms] includes . . . San Francisco's Littler Mendelson. . . ."); Angie Cannon, *Labor Leaders Oppose S.F. School Bond Issue*, S.F. CHRON., Nov. 26, 1987, at 3 ("[L]abor leaders say [Littler] has a 'union busting' reputation.'"); Rick DelVecchio, *Union Leaders' Labor Day Blues*, S.F. CHRON., Sept. 2, 1985, at 1 (referring to Littler as "the most notorious union-buster"); *see also* Smith, *supra* note 92, at 4 ("In a union town like San Francisco, Littler must still grapple with its own legacy.").

162. *See* Littler Mendelson Web site, http://www.littler.com/about/firm_history.htm, (last visited Sept. 26, 2003).

163. *See* Triedman, *supra* note 159, at 3; Littler Mendelson Web site, http://www.littler.com/about/firm_history.htm, (last visited Sept. 26, 2003).

164. *See* Triedman, *supra* note 159, at 3.

165. *See id*. Specialization, a byproduct of stiff competition in the legal profession generally, allows Littler to reduce the amount of time its attorneys spend on routine matters and, in turn, to charge lower rates than competitors for its services. *Id.* at 8.

166. *See* Triedman, *supra* note 159, at 2.

scale employment law seminar in 1984 and, for the first time, published "The Employer," its annual, multi-volume treatise on labor and employment law developments.[167] Along with what became Littler's two-day annual seminar, also known as "The Employer," the firm over time began to offer employer breakfast briefings and regional conferences.[168]

Littler undertook a substantial expansion campaign in 1992, and by 1996, with 250 attorneys practicing in several states, the firm was listed on *The American Lawyer*'s annual ranking of top grossing firms.[169] During the 1990s, the firm opened offices in, among other cities, New York, Atlanta, Las Vegas, Denver, Chicago, Houston, and Minneapolis.[170] The last two offices to join the empire were the Miami office, added in 2003,[171] and the Boston office, added in early 2004.[172]

Littler's image changed along with the growth of the firm. The practice now focuses predominantly on employment law rather than traditional labor law.[173] Its client base has shifted from small, family owned companies toward companies comprising the Fortune 100, and its culture is generally one in harmony with the people oriented human resources profession.[174]

An additional factor shaping Littler's image is the demographic makeup of the almost 400 attorneys who practice with the firm. The firm is an hospitable place for women lawyers. An *American Lawyer* survey recently placed Littler at the top of a list of big firms with the highest percentage of female partners. While the national average is 16%, Littler's partnership is 28.4% female.[175] Moreover, the firm's

167. *See id.* at 73. The firm now publishes *The National Employer*, which covers legal issues across the fifty states, as well as separate state editions. *Id.* Littler Mendelson Web site, http://www.littler.com/about/firm_history.htm (last visited Sept. 26, 2003).

168. Littler Mendelson Web site, http://www.littler.com/about/firm_history.htm (last visited Sept. 26, 2003).

169. *See* Krysten Crawford, *After Tough Times, Littler Mendelson's Unique Strategy is Working—For Now*, LEGAL TIMES, Dec. 3, 2001, at 36. In 2000, the firm dropped from the American Lawyer's top 100 firms to the second 100 grossing firms, causing dissatisfaction on the part of some partners, who are known as shareholders. *See* Jennifer Fried, *Littler Experiencing Some Labor Pains*, THE RECORDER, Sept. 10, 2003, at 1.

170. *See* Crawford, *supra* note 161, at 2; Littler Mendelson Web site, http://www.littler.com/offices/index.htm (last visited Sept. 26, 2003).

171. *See* Fried, *supra* note 157, at 1.

172. *See* Alexei Oreskovic, *Littler Mendelson Opens Seven-Lawyer Office in Boston,* THE RECORDER, Jan. 6, 2004, at 2.

173. In 1996 about 85% of the firm's work was comprised of employment law litigation and dispute avoidance activities. The remaining 15% was made up of traditional union-management matters. *See* Triedman, *supra* note 159, at 77.

174. *See* Triedman, *supra* note 159, at 77.

175. Emily Barker, *Engendering Change*, AM. LAW., June 2003, at 82. In 2002, Littler was one of fifty San Francisco Bay Area firms to pledge "that a quarter of their leadership positions

President and Managing Director, Wendy Tice-Wallner, is a woman.[176] While Littler is less notable for racial diversity, Vault, a company providing career information in a host of disciplines including law, ranked Littler in its 2003 survey as seventh of the "Best 20" law firms for diversity.[177]

B. Littler's Commitment to Dispute Avoidance and Its Entrepreneurial Bent

Prototypical features of American management-side employment practice—stressing preventative strategies and entrepreneurial ways of marketing them—are clearly in evidence at Littler Mendelson. A cursory look at Littler's Web site, for example, demonstrates how thoroughly dispute avoidance principles have permeated its marketing strategy. In its pitch to prospective clients, Littler lists three capacities in which it can service employers, always leading with a preventive slant, with an emphasis on providing training programs and policy promulgation.[178] As the emphasis added to the excerpt below reveals, litigating or neutralizing existing problems is almost stated as an afterthought:

> We can work with you . . . [a]s an extension of your in-house legal department, working as partners to prevent problems through expert training programs and/or *expedite cost effective solutions to existing issues*. . . . We can work with you . . . [a]s your full-service employment law counsel . . . assist[ing] your management team in designing training programs and employee manuals; help[ing] you to understand legal specifics, including: rights and obligations in wage payment practices, unemployment and disability benefits, equal employment opportunity, health and safety laws, and hiring and termination policies; *litigat[ing] existing cases*; and implement[ing] alternative dispute resolution programs. We can work with you . . . [a]s trainers, who will prepare your human resource supervisors and frontline managers to make informed and smart decisions that will help to protect your company's most valuable asset—your employees. Our experienced trainers will custom-tailor programs to your organization's culture and ensure

will be filled by women by 2004." *See* Amanda Christensen, *Firms Sign Promise for More Female Leaders*, THE RECORDER, May 15, 2002, at 3.

176. *See* Littler's Web site, http://www.littler.com/about/comm_to_div.htm.

177. *See* Vault Web site, http://www.vault.com (last visited Sept. 26, 2003); *see also* MCCA, *Littler Mendelson: Diversity at Work*, DIVERSITY & THE BAR, March 2000 ("At Littler, hiring and retaining minority and women lawyers is a fundamental part of doing business.") (on file with author).

178. *See* Littler's Web site, http://www.littler.com/about/index.htm (last visited Sept. 26, 2003).

> that workplace decisions conform . . . with current employment laws.[179]

Littler is an entrepreneurial firm, willing to embrace opportunities that seek to turn prevention into profit. In 1996, for instance, the firm and individual Littler shareholders founded Employment Law Learning Technologies, Inc. (ELT), a company that designs, markets, sells, and licenses computer-based training programs to employers.[180] The legal content of the software is developed by Littler attorneys. ELT's computer and Web-based products include training programs in sexual harassment, workplace diversity, lawful hiring, lawful terminations, cyber policy, workplace privacy, and workplace violence.[181] The courses are billed as "engaging and entertaining"[182] and the company promises that its training "can form a powerful defense in the event of litigation" and that it "actually chang[es] workplace behavior."[183]

Live training for Littler clients is provided through the Legal Learning Group (LLG), a division of Littler Mendelson, which is advertised as "providing training and other compliance products and services to help your organization reduce the risk of employment-related litigation while improving employee performance and potential."[184] LLG provides, in addition to live classroom instruction, instructor-led training via satellite and over the Internet on fifty-two labor and employment law course topics, organized thematically and numbered as if they were college course offerings.[185] Customers who prefer not to be trained by an off-the-shelf curriculum can work "with [LLG's] team of expert attorneys and educators to build a learning curriculum that is just right. . . ."[186]

The firm was also one of the first to join with an insurance company providing employment practices liability insurance

179. Littler's Web site, http://www.littler.com/about/index.htm (last visited Sept. 26, 2003) (emphases added).

180. *See* Alexi Oreskovic, *Firms Struggle to Make E-Training Profitable*, THE RECORDER, Jan. 28, 2002, at 1.

181. *See* Employment Law Learning Technologies Web site, http://www.elt-inc.com/index.html (last visited Sept. 28, 03).

182. *See* Littler Web site, http://www.littler.com/resources/allied_bus.htm (last visited Sept. 28, 2003).

183. *See* ELT Web site, http://www.elt-inc.com/company_summary.html.

184. *See* Legal Learning Group Resource Guide, available in PDF at http://www.littler.com/publications/index.htm.

185. *Id.*

186. *Id.*

(EPLI).[187] The EPLI policy, which protects employers from workplace related suits brought by employees, comes with a risk management audit performed by Littler.[188] Such an alliance both guarantees work for the firm when policy holders are sued, and, at the same time, provides an opportunity, through the initial audit, to establish a relationship with the policy holder before trouble ever arises.[189]

Some of Littler's innovations seem geared more toward attention-getting rather than revenue generation. For example, Littler was the firm that a few years ago created the "Love Contract," an agreement by which couples involved in office romances confirm that their relationship is consensual and that if they break up they will not harass one another.[190] The firm promotes these consensual relationship agreements as a tool for staving off sexual harassment suits.[191]

Another such example is the Littler Forum. Unveiled in 1997, the Forum is Littler's equivalent of a think tank devoted to tackling the toughest employer problems and offering opinions or even second opinions on how they should be met.[192] The Littler Forum brings together "some of the best legal minds" for this task, not only drawing from its senior partnership ranks but also from the legal academy. Littler's Web site announces the participation of the following prominent legal academics in the Littler Forum: Professors Arthur Miller (Harvard Law School, Academic Chair of the Forum); Robert Bennett (Northwestern); John Donoghue III (Standford Law School);

187. Kevin Livingston, *Boom in Litigation Spawns "EPLI Alliance,"* THE RECORDER, July 24, 1998, at 1 ("Seeking to avoid being left out of the market if EPLI takes off, Littler Mendelson last year formed its first agreement to handle EPLI related work.").

188. *See* Bisom-Rapp, *Bulletproofing*, *supra* note 41, at 982 n.134.

189. *Id.*

190. *See* Gary Kramer, *Limited License to Fish Off the Company Pier: Toward Express Employer Policies on Supervisor-Subordinate Fraternization*, 22 W. NEW ENG. L. REV. 77, 138 (2000) ("The first of these agreements was drafted several years ago when an executive requested advice from Littler Mendelson. . . ."); *see also* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

191. *See* Niloofar Nejat-Bina, *Employers as Vigilant Chaperones Armed with Dating Waivers: The Intersection of Unwelcomeness and Employer Liability in Hostile Work Environment Sexual Harassment Law*, 20 BERKELEY J. EMP. & LAB. L. 325, 343 (1999) ("Littler Mendelson attorneys have characterized the agreement as a 'prenuptial agreement,' 'an amorous release,' and 'a safety valve to protect companies and also the individuals involved in relationships.'"); *see also* Note, Alison J. Chen & Jonathan A. Sambur, *Are Consensual Relationship Agreements a Solution to Sexual Harassment in the Workplace?*, 17 HOFSTRA LAB. & EMP. L.J. 165, 166–67 (1999).

192. Michael Klausner, Geoffrey Miller & Richard Painter, *Second Opinions in Litigation*, 84 VA. L. REV. 1411, 1430–44 (1998) (describing the Forum's role in providing second opinions); Rinat Fried, *Littler Mendelson May Be Looking Over Your Shoulder*, AM. LAW., June 1997, at 16.

Michael Gold (Cornell School of Industrial Relations); Douglas Leslie (University of Virginia); Vicki Schultz (Yale Law School); and David Strauss (University of Chicago).[193]

Like many U.S. management firms, Littler uses current events as a springboard for outreach. The firm was quick after the attacks of September 11, 2001, to publish an informative article advising employers how they should address the "fallout" from the tragedy.[194] Advice included addressing the needs of traumatized employees for leave under the Family and Medical Leave Act, the advisability of taking a strong stand against possible discrimination against or harassment of Arab-Americans and Muslims, and the legal implications of the anthrax threat and other acts of bioterrorism.[195] In like fashion, the firm jumped into the fray advising employers how to cope with the Severe Acute Respiratory Syndrome (SARS) outbreak of 2003.[196] In the wake of the Enron debacle, Littler could be found advising about the employment implications of Sarbanes-Oxley, the new corporate responsibility legislation.[197]

The above-described efforts are designed to make Littler Mendelson a brand name, a goal it may well have achieved.[198] Brand name or not, however, the firm is a prototypical example of labor and employment practice in the United States: highly aggressive and entrepreneurial, technologically innovative, and thoroughly immersed in litigation prevention and dispute avoidance. Indeed, if one were looking for a metaphor for the firm, one would look no further than the product that best embodies the Littler Mendelson gestalt: the Littler-designed board game cum automated computer program called Winning through Prevention.[199] It is not only the supervisors who play the interactive training game who win through prevention;[200] one assumes Littler Mendelson wins as well.

193. *See* http://www.littler.com/resources/forum.htm ("The synergy between the legal practitioner and the legal scholar may permit the Forum to see and solve problems in ways that are not otherwise apparent.").

194. *See* Terri M. Solomon & Katherine E. Bierma, *Facing the Effects of Terrorism at Work: How Can Employers Address Absences, Other Fallout from Sept. 11 and Beyond?*, N.Y. L.J., Nov. 19, 2001, at S1; *see also* David Hechler, *Employment Counsel Tackle Post-Sept. 11 Anxieties and Problems*, N.J. L.J., Nov. 5, 2001, at 25 (describing advice given by attorneys at a number of firms including Littler.)

195. Solomon & Bierma, *supra* note 194.

196. *See* Alexei Oreskovic, *Working with Sars*, THE RECORDER, May 21, 2003, at 1.

197. *See* Eric A. Savage, *The New Corporate Responsibility Legislation: Understanding the Critical Employment Law Implications*, CORP. LEGAL TIMES, Feb. 2003, at 42.

198. *See* Jenna Greene, *Making the Firm a Brand Name*, N.J. L.J., Mar. 8, 1999, at 29.

199. *See* Ann Shoket, *Littler, Mendelson Toys with Employment Law*, AM. LAW., Nov. 1996, at 19.

200. *See* HR Tools, LLC Web site, http://4progress.com/products/hr/winning.shtm (last visited Oct. 4, 2003).

IV. ACTION AND REACTION: MAKING SENSE AND CONSIDERING THE IMPLICATIONS OF LITTLER'S GLOBAL STRATEGY AND ITS RECEPTION BY FOREIGN PRACTITIONERS

A study that hopes to shed light on the emerging practice of international labor and employment law, both in terms of its potential parameters and possible effects, must take into account what we know about transnational lawyering in other contexts. The rise of transnational corporate legal practice has attracted the attention of a small group of socio-legal scholars for about two decades.[201] Predominantly but not exclusively a phenomenon driven by the increasing integration of national economies, and the corporate and financial opportunities made available by those linkages, internationalization has profoundly affected elite law firms, especially those in the United States and the United Kingdom.[202] Indeed, U.S. corporate law firms are "international standard setters" in size, foreign expansion, and aggressive marketing.[203] Not only do American law firms offer expertise in complex corporate or financial transactional work, they also possess long-standing relationships with the financial services institutions—banks and the like—that run the global economy.[204] Anglo-American firms, while not entirely occupying the global legal field, certainly dominate it[205] a fact that has made them ripe for examination.

Professor Carole Silver, in her work on globalization and U.S. legal practice, describes four models of international expansion[206]—in reality stops along a continuum—that are useful in situating Littler Mendelson's efforts to dip its toes into international waters. One starts with the concept of the domestic law firm, which operates only within a single country, works only on domestic legal problems for domestic clients, and is staffed by U.S. educated partners and

201. *See* Abel, *supra* note 3, at 737 (noting, in 1994, that transnational law practice has grown considerably since the 1980s but that "scholarship has not kept pace.").

202. *See* Christoper J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law*, 34 VAND. J. TRANSNAT'L L. 931 (2001); Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093, 1094–95 (2000); Flood, *supra* note 3, at 172–73.

203. Silver, *supra* note 202, at 1094–95.

204. *Id.* at 1095–96.

205. Whelan, *supra* note 202, at 931 ("Anglo-American law firms enjoy a competitive advantage in global practice due to the dominance of Anglo-American capital markets and financial institutions and of New York and English law in regulating international financial transactions."); Flood, *supra* note 3, at 188 ("[T]he international market for legal services is very competitive and the territory is mainly being fought over by the English and American law firms without much intervention from other European law firms."); Able, *supra* note 3, at 741 ("One striking pattern [in transnational practice] is the dominance of common law lawyers.").

206. *See* Silver, *Regulatory*, *supra* note 24, at 495–503.

associates.[207] Domestic firms may begin a process of internationalization by representing foreign corporations in their U.S. activities, representing U.S. clients in their dealings abroad, and becoming members of international networks of law firms.[208]

The next step on the globalization continuum is represented by what Silver refers to as international firms.[209] International firms make the provision of U.S. legal expertise to foreign clients a central part of their practice, an avocation that can be accomplished either from a U.S. home office or by opening one or more foreign offices.[210] A third model, the multinational firm, typically has multiple foreign offices, many foreign clients, and advises not only on U.S. law but also on foreign legal systems, an effort that requires hiring lawyers trained in foreign law who are able to practice in jurisdictions outside U.S. borders.[211] Silver's transnational firm, the last stop on the continuum, is "comprised of multiple nationally-based groups of lawyers specializing in their own national systems."[212] Such firms also focus on international legal strategies, an advisory role facilitated by specialization in the laws of multiple national jurisdictions.[213]

Littler Mendelson is just beginning to enter the international market for legal services. The firm currently has two shareholders, Kenneth "Ken" Rose, based in San Diego, and Scott Wenner, based in New York, who co-chair the firm's International Practice Group (IPG). Established in 2000 as part of the firm's larger effort to assimilate its geographically diverse national offices through discrete practice area specialty groups, the IPG is an acknowledgement of the growing salience of employment issues that reach beyond U.S. borders.[214]

Unlike the firm's other practice groups, the IPG did not at its inception represent an existing area of firm expertise.[215] Littler saw itself as a domestic firm with a domestic practice, and, as Wenner puts it, did not envision its lawyers "rendering sophisticated advice about German employment contracts, engaging in Chinese employment

207. *See id.* at 495.

208. *See id.* at 496; *see also* Flood, *supra* note 3, at 197 (noting that "[n]ot all law firms wish to establish overseas branches" and that "referral networks" are considered a cheaper way to internationalize a practice).

209. *See* Silver, *Regulatory*, *supra* note 24, at 496.

210. *See id.* at 497–98.

211. *See id.* at 499–501.

212. *See id.* at 502.

213. *See id*.

214. E-mail from Scott Wenner, Partner, Littler Mendelson, to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (July 10, 2002) (on file with author).

215. *Id.*

litigation or handling strikes in Spain."[216] Nonetheless, the IPG attorneys sought to develop, and report that over time they have developed, the ability to "spot and resolve issues" for clients involving the laws of other national jurisdictions.[217] However, the firm's growing international reach, at least at this time, will not be fostered by opening offices outside U.S. borders. Instead, consistent with Silver's model of the domestic firm taking steps to internationalize, Littler is building a global network—a web of relationships—with foreign lawyers in other nations.

Establishing a foreign office does offer advantages. Situating a few of the firm's lawyers outside of the U.S. allows those individuals to immerse themselves and develop expertise in the legal, political, and business culture of another country, experience that can greatly enhance the lawyers' ability to dispense legal advice.[218] Moreover, U.S. firms use the existence of their foreign offices as symbols of their international activities and global orientation. Having a foreign office on the firm letterhead announces that the firm is an international player.[219] In contrast, obtaining transnational work through referral networks may signal a firm's marginal status in the international arena.[220]

Yet opening an office abroad is a very costly and risky undertaking[221] and carries with it the potential to disturb a firm's existing referral networks. A foreign jurisdiction's practitioners may view a non-indigenous firm's efforts to gain a local toehold as a competitive invasion and sever their ties with the intruder.[222] None of Littler's clients are clamoring for the firm to establish a foreign beachhead, thus leaving it without a guarantee of sufficient work to justify such an entity.[223] Additionally, in February 2003 Littler teamed up with an Arizona immigration boutique, creating the joint venture Littler Mendelson Bacon & Dear, a separate firm focusing on the

216. *See id.*
217. *See id.*
218. *See* Silver, *supra* note 202, at 1103.
219. *See id.* at 1101–02; Able, *supra* note 3, at 741.
220. *See* Abel, *supra* note 3, at 747.
221. *Id.* at 741; Flood, *supra* note 3, at 197. In fact once opened, firms are loath to close their foreign offices for fear that a shutdown will be perceived as a failure of the firm's strategy. *See* Silver, *supra* note 202, at 1126.
222. Able, *supra* note 3, at 741.
223. Able, *supra* note 3, at 742 (noting that "[f]or most firms, the decision to open a [foreign] branch is client driven" and that "[a] particular service rendered at home for a foreign client may generate enough additional business to justify opening in the client's country."); Flood, *supra* note 3, at 176 (noting that "big clients often want [their law firms to have] a local presence" in foreign countries).

employment aspects of immigration law.[224] Littler is thus acting cautiously, internationalizing its practice by taking small, incremental steps. This prudence is understandable given the relatively recent status of international labor and employment law as a practice sub-specialty, the uncertainty that surrounds the economic viability of this sub-genre, and, as noted above, the very rapid growth Littler has experienced domestically, making the stabilization of the new national offices the firm's most pressing priority.

A. Building the IPG

Understanding why Littler was impelled to begin internationalizing its practice may reveal some of the dynamics behind the birth of the new sub-specialty known as international labor and employment law. The impetus for developing Littler's global practice was twofold. First, at the time the IPG was established, the firm leadership wished to explore whether there were practice opportunities for Littler corresponding to the globalization of its clients' businesses.[225] It seemed to the leadership that global employment issues would become more important, and establishing a practice group to assess this developing trend seemed like a good idea.[226] The leadership, however, left the firm's charge to the IPG very general, giving Wenner and Rose the "freedom to be creative" with the direction in which they would take their new group.[227] The lack of a specific business strategy for establishing an international practice is not unique to Littler or to labor and employment law. Rather, perhaps due to the newness of the terrain or the differences between the logic of national and international practice, it is characteristic of the global expansion efforts of U.S. law firms in general.[228]

Second, over time, Littler's multinational clients began to seek assistance with international employment issues.[229] In order to meet their needs, Littler's IPG attorneys are "educating [themselves] about

224. *See* Alexei Oreskovic, *Littler, Phoenix Firm Form Venture*, THE RECORDER, Feb. 14, 2003, at 1; Julia D. Gray, *Littler Axes Local Immigration Group*, FULTON COUNTRY DAILY REPORT, Feb. 20, 2003, at 1.

225. *See* E-mail from Ken Rose, Partner, Littler Mendelson, to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (July 28, 2002) (on file with author).

226. *See id.*; E-mail from Scott Wenner (July 10, 2002), *supra* note 214.

227. *See* E-mail from Scott Wenner (July 10, 2002), *supra* note 214.

228. *See* Silver, *supra* note 202, at 1135.

229. *See* E-mail from Ken Rose (July 28, 2002), *supra* note 214.

employment issues abroad . . . [and building their] knowledge base" in order to better respond to individual issues that arise.[230]

These twin impulses, assessing the potential for new business development and meeting existing client needs, are apparent in the IPG's stated aims. Among the group's goals are to: 1) achieve name recognition for Littler among lawyers and employers from other nations;[231] 2) obtain referrals from lawyers in other countries whose clients do business in the United States;[232] 3) acquire business directly from foreign employers with U.S. operations;[233] 4) develop trustworthy international referral sources who can be called upon when Littler clients face complex employment problems abroad;[234] and, 5) gain sufficient knowledge of foreign employment law regimes so that Littler may provide initial assistance to its clients before calling in foreign counsel.[235]

The first three goals relate to the generation of new business for Littler as a purveyor of U.S. labor and employment law advice. Goals four and five, however, regard improving the service provided to Littler's existing clients. These latter objectives are interesting because they indicate Littler's realization of a developing consumer need, and its corresponding determination to meet the demand rather than to lose clients to U.S. competitor firms.[236] This fact provides support for the notion that domestic competition may be a driving force in the internationalization of employment law practice.[237]

There is no guidebook for management attorneys interested in internationalizing their practices; they must make it up as they go along. Littler and the IPG have taken a two-pronged approach to building the international practice. The first part of the strategy involves introducing foreign attorneys to Littler's clients through the firm's two-day annual conference, The Employer. In 1998, before the IPG was formally established, Littler began offering an international law session at the conference so that its clients could learn about

230. *See id.*
231. *See id.*
232. *See id.*
233. *See id.*
234. *See id.*
235. *See id.*
236. *See* E-mail from Scott Wenner (July 10, 2002), *supra* note 214 ("The more knowledgeable I became [about international employment issues], the more convinced I was that Littler Mendelson should be looking beyond the United States . . . to help our clients take care of their increasing employment needs abroad.").
237. *See generally* Able, *supra* note 3, at 740 ("Competition within the domestic market may explain why some law firms open abroad since it is a natural next step after the creation of a national law firm.").

foreign labor and employment law.[238] In 2001, for example, the international session featured an English lawyer, a Belgian lawyer, a Mexican lawyer, and a Canadian attorney.[239] At the East Coast version of Littler's 2002 conference, held in Washington D.C., the international session featured a lawyer from the Netherlands, a lawyer from Spain, and once again, a lawyer from England.[240] The international law lineup differed at the 2002 West Coast conference, held one month later in San Diego. Instead of one, there were two international panels. The first had a North American focus, and featured talks given by Mexican and Canadian lawyers. Presentations by English, Dutch, Belgian, and Australian lawyers were featured on the second panel.[241]

Attending the conferences provides foreign practitioners with the chance to get to know Littler attorneys. For example, in 2002, Rose and Wenner hosted a dinner in San Diego for the foreign participants. The chance to converse in a relaxed atmosphere can strengthen the fragile professional ties that make up referral networks.[242] Informal opportunities for interchange additionally present themselves between training sessions. Foreign participants chatted with Littler attorneys during coffee breaks at the two conferences I attended in 2002.

The conferences also allow foreign practitioners direct exposure to American-style employment law training. They may go to sessions led by Littler attorneys and, as described below, some of them evidence enthusiastic reactions to the panels and some less so. Those sessions also provide the foreign practitioners with a management attorney's outlook on U.S. labor and employment law, and likely influence their views of the similarities and differences between the U.S. system of employment regulation and that of their own country.

It is less clear that Littler's international panels are mechanisms for foreign practitioners to gain direct access to potential clients. Part of the problem may be a mismatch between the subject presented and

238. *See* E-mail from Ken Rose, Partner, Littler Mendelson, to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Jan. 23, 2002) (on file with author).

239. *See id.*.

240. *See* Littler Mendelson, THE 2002 EMPLOYER AGENDA, May 17, 2002 (on file with author) (listing The Global Employer Institute as an afternoon session). This author attended the conference and this session.

241. *See* Littler Mendelson, THE 2002 EMPLOYER AGENDA, June 13, 2002 (on file with author) (listing The Global Employer Institute—Focus on North America as a morning session and The Global Employer Institute—Focus on European Union and the Pacific Rim as an afternoon session.) This author attended the conference and both sessions.

242. *See generally* Able, *supra* note 3, at 747 (noting that referral networks "tend to be fragile, susceptible to disruption.").

the potential audience. The clients attending Littler's conferences tend to be members of the human resources profession and in-house counsel whose attention is focused on existing workplace legal threats, challenges, and problems. A general overview of how labor market regulation works in a foreign jurisdiction is likely less captivating of a topic than some of the more timely, topical panels Littler offers at its conferences, panels on subjects like coping with terrorism in the workplace and developments in sexual harassment law. Indeed, attendance at the 2002 East Coast international panel was sparse, though the West Coast presentations did garner a respectable audience. On the other hand, having foreign practitioners at the conference does suggest to Littler's clients that the firm has relationships that it can call upon when transnational or international employment issues arise and may indirectly result in business generation.

The second part of Littler's strategy for building its global practice involves sustained outreach to the international legal and business community, a strategy that is an important way for the firm to establish credibility and expertise in the new practice sub-specialty. For example, Rose and Wenner have been attending the American Bar Association Labor Law Committee's International Subcommittee meetings in Europe, which present significant opportunities for networking with foreign attorneys.[243] Moreover, when they travel abroad, Wenner and Rose set up meetings with foreign labor and employment lawyers, simply to meet them.[244] This kind of interchange also potentially helps Littler build its referral network, though assessing the quality of the legal services rendered by the foreign practitioners one meets only briefly is very difficult.[245] Ultimately, one must actually work with foreign colleagues in order to gauge whether a referral relationship will be a fruitful one.

The pair also author articles on international employment law topics for the United States and the international legal press.[246] Wenner and Rose have in addition begun speaking on international employment law topics at professional gatherings in the United States.[247] Finally, the two have just recently begun to speak overseas.

243. *See* E-mail from Ken Rose (Jan. 23, 2002), *supra* note 238.

244. *See id.*

245. *See* Able, *supra* note 3, at 746–47.

246. *See, e.g.*, Scott J. Wenner & Kenneth J. Rose, *The Challenge of Improper Labor Practices Abroad*, N.Y. L.J., Aug. 6, 2001, at 7, col. 2; Kenneth J. Rose, *Employment Discrimination Prohibited Under Title VII of the United States Civil Rights Act of 1964*, XI-3 INT'L LEGAL STRATEGY 4–17 (2002) (in Japanese and English).

247. *See* Ken Rose list of International-Related Projects, Feb. 26, 2002 (on file with author).

At the invitation of foreign attorneys, the firm has given several presentations on U.S. employment law to foreign multinational corporations.[248] To the extent these foreign clients are doing or considering doing business in the United States, are apprehensive about U.S. labor and employment law, and looking for American legal expertise, such presentations may help the IPG realize its goal of new business generation. However, as noted above in the discussion of the international panels at Littler's own conferences, the utility of this strategy for obtaining clients is, at the present time, unclear.

B. Assessing as a Theoretical Matter the Potential for U.S. Employment Law and Lawyering Style to Take Root Elsewhere

Predicting the course and effects of a new practice sub-specialty is far from an exact science and involves no small amount of speculation. In order to guide an ethnographic inquiry into Littler's attempts to internationalize its labor and employment practice, it helps to consider what is known about transnational interactions between legal actors in other arenas.

It is axiomatic that the legal field,[249] as Professor John Flood notes, is "peculiarly bound to specific jurisdictions."[250] National differences are apparent in the way the legal profession is structured,[251] the unconscious ideology that animates legal professionals,[252] and the legal culture in which those professionals operate.[253] Even so, transnational encounters between legal professionals, both as competitors and cooperators, over time

248. E-mail from Ken Rose, Partner, Littler Mendelson, to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Nov. 19, 2001) (on file with author).

249. *See* Trubek et al., *supra* note 28, at 416 ("The legal field is the ensemble of all actors who make, interpret and apply the law; transmit legal knowledge; and socialize players in the game of the field.").

250. *See* Flood, *supra* note 3, at 174. *See also* Trubek et al., *supra* note 28, at 411 ("[T]he logic of [legal] practice still plays itself out primarily on a national plane."); Bryant G. Garth & Carole Silver, *The MDP Challenge in the Context of Globalization*, 52 CASE W. RES. L. REV. 903, 904 (2002) ("Law is domestic by definition, which has meant that truly global law firms have been very difficult to assemble.").

251. *See* Mary C. Daly, *Monopolist, Aristocrat or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom after the Disintegration of Andersen Legal*, 80 WASH. U. L.Q. 589, 627–28 (2002).

252. *See* Flood, *supra* note 3, at 175.

253. *See* Daly, *supra* note 251, at 646–47; *see also* Vittorio Olgiati, *Process and Policy of Legal Professionalization in Europe: The Construction of a Normative Order*, *in* PROFESSIONAL COMPETITION AND PROFESSIONAL POWER: LAWYERS, ACCOUNTANTS AND THE SOCIAL CONSTRUCTION OF MARKETS 170, 195 (Yves Dezalay & David Sugarman eds., 1995) (noting with respect to European legal professionals "that the *national* legal culture and *national* legal system . . . are—and will be in the future—at the core of professional creditionals." (emphasis in original)).

transform the practices of those actors and those less directly involved in such work.[254] This process, complex and partial, has yet to produce a homogeneous, legal professional prototype. Instead, players from different national jurisdictions adopt and adapt useful elements from other legal cultures or practices and disregard those that are not.[255] Moreover, that which is imported is very much shaped by the history and present strategic position of the importing nation and its legal professionals.[256]

Professor Pierre Bourdieu argues that a global legal field is being produced by "competition among national approaches."[257] While it is possible for international practitioners to adopt the local law of another jurisdiction or to try to create a new normative legal order unconnected to any particular nation,[258] lawyers working on transnational matters, because of their national orientation, often attempt to export their own forms of practice and legal culture.[259] This is certainly evident regarding the internationalization of corporate legal practice. Corporate attorneys from the United States play a central role in this contest, promoting an American conception of law "as the lingua franca for business"[260] and proudly offering to their international clients U.S. style legal services[261] characterized by aggressive, creative, and strategic business planning.[262]

254. *See* Trubek et al., *supra* note 28, at 411 ("Yet it is these embedded [national] practices of lawyers, judges and academics which constitute the legal field as we know it, whose logics are being transformed directly, and indirectly, by transnational interactions.").

255. John Flood notes that exported "American [legal] techniques . . . are adapted to local cultures and so become local knowledge." John Flood, *The Cultures of Globalization: Professional Restructuring for the International Market*, *in* PROFESSIONAL COMPETITION AND PROFESSIONAL POWER 139, 160 (Yzes Dezalay & David Sugarman eds., 1995).

256. *See* YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 33 (2002) ("[T]he import and export of dominant U.S. expertises is shaped by national agendas and national histories."); *see also* Saguy, *supra* note 22, at 138 ("The globalization of culture means that ideas circulate broadly, but it does not mean that they take hold everywhere they circulate. Ideas are selected and changed in interaction with political regimes . . . institutional factors . . . and cultural repertoire. . . .").

257. Pierre Bourdieu, *Forward*, *in* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER vii (1996).

258. *See* Flood, *supra* note 3, at 176.

259. *See* Bourdieu, *supra* note 257, at vii–viii.

260. Yves Dezalay & Bryant G. Garth, *Legitimating the New Legal Orthodoxy*, *in* GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTANTION OF A NEW LEGAL ORTHODOXY 306, 307 (Yves Dezalay & Bryant G. Garth eds., 2002). Likewise, many English corporate practitioners view their jobs as "sell[ing] English law." Whelan, *supra* note 202, at 947.

261. *See* Garth & Silver, *supra* note 250, at 930–31.

262. *See* Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization*, 46 EMORY L.J. 1057, 1071 (1997); Trubek et al., *supra* note 28, at 425 (noting "[t]he entrepreneurial nature of the American legal profession, its early adoption of business methods and practices, [and] its tradition of zealous advocacy on behalf of clients").

Yet as Bourdieu makes plain, legal invaders, like the U.S. corporate firms that open offices abroad, will meet resistance from the national legal fields of the countries where they wish to compete.[263] Within those fields, traditionalists will cling to protectionism and endeavor to maintain the status quo, while the more socially privileged modernizers will embrace change in order to advance their own interests in the face of a foreign competitive threat.[264] The latter may adopt those of the invaders' attributes that best suit the competitive endeavor but will retain characteristics that give the modernizers a local or regional competitive advantage.

An example is provided by considering changes in corporate legal practice in the United Kingdom once a market for transnational business law was created by the process of European unification. In order to compete with large American corporate law firms and major accounting firms offering legal services, elite lawyers from the United Kingdom transformed their law practices into multinational, U.S.-style mega-law firms with a twist.[265] While using the American technique of law firm merger to promote rapid firm growth,[266] the English firms retained elements of the old European form such as close ties with high status legal academics and socially privileged European "legal notables."[267] Indeed, their ties to English and European culture are articulated by British lawyers as key to beating the Americans at their own game.[268]

Nonetheless, features of American-style mega-lawyering, such as celebrating a macho legal work ethic that requires thirteen-hour workdays, are now a common cultural feature on both sides of the Atlantic.[269] And differences between lawyers in the two countries—the image of English lawyers being mere technicians while U.S. lawyers are entrepreneurial, business advisors—are even bemoaned

263. *See* Bourdieu, *supra* note 257, at viii.

264. *See id.* at viii; *see generally* DEZALAY & GARTH, *supra* note 256.

265. *See* Trubek et al., *supra* note 28, at 427; *see also* John Flood, *The Governance of Law: The Structure and Work of Corporate Lawyers*, *in* PROFESSIONS AT BAY: CONTROL AND ENCOURAGEMENT OF INGENUITY IN BRITISH MANAGEMENT 45, 52 (Ian Glover & Michael Hughes eds., 2000) ("The desire [of London's City law firms] has been to grow rapidly to compete in the international legal market place, especially with the American firms.").

266. *See* Flood, *supra* note 3, at 179.

267. Trubek et al., *supra* note 28, at 427.

268. *See* Flood, *supra* note 3, at 151 ("English lawyers are convinced that American lawyers do not have the nous to operate in the EC."); *see also* Flood, *supra* note 3, at 189.

269. *See* Flood, *supra* note 3, at 152–53; *see also* Flood, *supra* note 265, at 47 (arguing that "[w]hile there is some validity" to the claim that we are witnessing the Americanization of English legal practice, "the isomorphism is not complete.").

by some lawyers in the United Kingdom.[270] This is because being seen as "European" may be an advantage to an English lawyer engaged in lobbying the European Commission in Brussels,[271] but may be a decided disadvantage when attempting to counsel a U.S. multinational client accustomed to American-style legal representation.[272] In fact, there is evidence that some British large firm lawyers are advised to view themselves as "chameleons," adopting the American posture of extreme identification with one's clients rather than the more traditional British posture of detached independence.[273]

What lessons might be drawn from the above and applied to the emerging American practice of international labor and employment law? As an initial proposition, one might suspect that transnational exchanges between employment practitioners, especially those who work on cross-border projects, may affect the practices of those individuals. The networks that are being created by firms like Littler Mendelson are conduits for the transmission of lawyering style and legal culture more generally. Moreover, even when working cooperatively, international employment lawyers may try to export their own national conceptions about how law and legal practice should operate.[274] U.S. employment attorneys, in particular, may be likely to think in these terms for they, like their corporate counterparts, are noted for an aggressive, entrepreneurial, highly client-identified approach to lawyering.

Nonetheless, one would expect, especially since workplace law is so tied to the local,[275] that the efforts of U.S. practitioners to export an American approach would meet with some resistance. Assuming that transnational practitioners can be characterized as modernizers who willingly embrace the opportunities afforded by globalization, one might predict that they will selectively adopt those attributes that suit their own interests and resist others in order to maintain a local competitive advantage. The key, of course, is discerning the arenas,

270. *See* Flood, *supra* note 3, at 192–93; *see also* Daly, *supra* note 251, at 646 ("The ideology of entrepreneurialism is almost entirely missing from the legal culture in France and Germany and is incipient in the U.K.'s.").

271. *See* Flood, *supra* note 3, at 150–51; *id.* at 194.

272. Describing the plight of the U.S. general counsel of a global enterprise, Professor Mary Daly notes that those who locate foreign practitioners "willing to step outside the usual role of scribe and legal servant" are fortunate; "such foreign counsel can be a pleasure to work with, always remaining a step ahead of the customary, and providing the 'can do' approach that clients demand of their U.S. lawyers but too often fail to find in counsel outside the United States." Daly, *supra* note 262, at 1078.

273. *See* Whelan, *supra* note 202, at 944.

274. *See* Silver, *Foreign Lawyer*, *supra* note 24, at 24; Silver, *supra* note 202, at 1039–40.

275. *See supra* note 2 and accompanying text.

both in terms of substantive law and national jurisdiction, in which transplantation may take place and those where it will not. For transplantation is a very partial and incomplete process. Indeed, one might even see international employment lawyers from different national jurisdictions acting like chameleons, changing their practice styles like stripes, depending on the nationality of the client they are presently serving.

C. Encountering One Another: Discerning the Admittedly Vague Outlines of International Labor and Employment Law Practice

The activities that bring Littler attorneys into contact with foreign employment and labor lawyers, and the impressions these practitioners form of one another, are among the most interesting aspects of this study. Through their seminars, informal conversations, e-mail correspondence, publications, and even through the firm Web site, Rose and Wenner are formally and informally disseminating Littler's American-style approach to workplace law and legal culture to lawyers practicing in other national jurisdictions.[276] In turn, foreign practitioners provide Littler attorneys with glimpses of the legal worlds within which they operate. What do those involved make of those encounters? How do they view the project of constructing an international practice? What do they think they will learn from one another? Could this new practice area catalyze the development of commonalities in lawyering style and even substantive law?

To consider such questions, this author undertook a qualitative study that attempts to discern the parameters and possible consequences of international employment law practice. To that end, IPG co-chairs Ken Rose and Scott Wenner spoke and met with me informally, answered numerous e-mail queries during the study's eighteen month duration, permitted me to attend two Litter conferences in 2002, and provided me with literature generated by the firm. Rose also provided contact information for thirty-three foreign practitioners[277] who, in varying degrees, came into contact with Littler as part of the IPG's effort to build its international network.[278] Of

276. *See* Silver, *supra* note 202, at 1039–40.

277. *See* E-mail from Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law, to Ken Rose and Scott Wenner, Partners, Littler Mendelson (July 9, 2002) (on file with author) (noting that there are thirty-three names on my foreign attorney contact list).

278. Rose provided some of the contact information directly. *See, e.g.*, E-mail from Ken Rose, Partner, Littler Mendelson, to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Nov. 20, 2001) (on file with author); E-mail from Ken Rose, Partner, Littler Mendelson, to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Dec. 11, 2002) (on file with author); E-mail from Ken Rose, Partner, Littler Mendelson, to Susan

those, twenty-one agreed to enter into e-mail dialogue with me and, as will be discussed below, provided fascinating anecdotal data.[279] The twenty-one attorneys practice in thirteen countries outside of the United States: Argentina (1); Australia (3); Belgium (2); Canada (3); England (2); France (2); Hong Kong (1); India (1); Italy (1); Mexico (1); the Netherlands (1); Singapore (1); and, Spain (2).[280]

There are obviously limitations to this study. The sample size is small and nonrandom, making it difficult to generalize from the stated opinions of the study subjects to the broader population of practitioners involved in international employment work. Moreover, introductions were made by Ken Rose, who encouraged his colleagues' participation. Rose's intervention may have led the study subjects to shade their answers somewhat to comport with what they felt he wanted to hear. After all, these individuals are engaged in establishing a business relationship with Littler, and they may have assumed that once the study was complete it was likely that he would read it. Finally, all the participants, including Ken Rose and Scott Wenner, are interested in making their international practices appear viable if not robust. Thus, one must review their responses as potentially influenced by the altogether understandable desire to market their services.

Nonetheless, the study subjects practice in well-established firms actively engaged in promoting international employment work.

Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Jan. 4, 2002, 12:22 p.m.) (on file with author); E-mail from Ken Rose, Partner, Littler Mendelson, to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Jan. 4, 2002, 12:45 p.m.) (on file with author); E-mail from Ken Rose, Partner, Littler Mendelson, to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Jan. 4, 2002, 7:43 p.m.) (on file with author); E-mail from Ken Rose, Partner, Littler Mendelson, to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Jan. 6, 2002) (on file with author). Rose provided some of the contact information indirectly by inviting me to attend the East and West Coast versions of *The Employer* in 2002. There were foreign attorneys in attendance at both conferences in addition to those foreign practitioners who served as panelists at the events. Littler gave me free access to all these individuals, some of whom provided me with their business cards and indicated that they would be willing to hear from me and participate in the study. In one case, an Australian lawyer whom Rose suggested I contact asked a colleague in his firm to correspond with me. That colleague, however, had also had contact with Littler Mendelson in the past. *See* E-mail from Bisom-Rapp (July 9, 2002), *supra* note 277.

279. Interestingly, Ken Rose noted that e-mail is the predominant way he communicates with his foreign colleagues whether working on group projects or answering and posing quick questions. *See* Notes from Ken Rose guest lecture (Mar. 17, 2003) (on file with author).

280. These lawyers first encountered Littler Mendelson in a variety of ways. Six mentioned having met Rose and/or Wenner through European meetings of American Bar Association Labor Law Committee's International Subcommittee. Five had been referred to Littler by lawyers with whom they practice. Three were referred to Littler by sources outside of their firms. Two found Littler after engaging in self-initiated research. One was directly contacted by Ken Rose. One confessed being unable to remember how contact was first made, and three others provided no answer to the question.

Several belong to firms that are part of the *ius laboris* network, an exclusive labor and employment law specialty alliance of twenty-two firms from twenty-one countries.[281] Large international firms with significant labor departments, based in England, Australia, Canada, and Italy are represented as well. Additionally, lawyers who work for the correspondent legal practice of a major international accounting firm are among the study subjects.

Some of the respondents are personally quite well-known on the international scene. For example, a couple of the lawyers are senior editors of the ABA's highly regarded, exhaustive treatise *International Labor and Employment Laws*.[282] A few, though they are foreign practitioners, have been invited to speak at ABA programs on international labor and employment law. In light of these facts, the respondents' opinions and observations on this developing legal sub-specialty should be viewed, with the caveats above, as credible and potentially revealing. Moreover, the commentary described below is not meant to represent the "truth" about international labor and employment practice, as if such a thing exists. Rather, it is used as a mechanism for discerning the inchoate contours of this new enterprise and how it may affect those who participate in it.

1. The American Propensity for Export

The United States is an exporter of culture, a fact that causes consternation on the part of its friends and foes around the globe but is a point of celebration for others. America has made the export of law its business as well, with widely varying results. Whether Rose and Wenner, two U.S. employment lawyers, describe their international efforts or the ramifications thereof in such terms thus seems a natural starting place for evaluating the empirical data from the Littler study.

Rose and Wenner express respect for their foreign colleagues, and find learning about the regulatory regimes of other countries exciting and intellectually stimulating. Unlike the Anglo-American international corporate law firms described above, neither explicitly portrays the efforts of the IPG as that of selling or exporting U.S. law. Both recognize that aspects of U.S. labor and employment doctrine are at odds or incompatible with the labor and employment law regimes of other countries, mentioning, for example, that employment

281. *See supra* note 20.
282. *See supra* note 4.

at-will is a legal concept that renders the American system exceptional.[283] Both also mention remedies and the forums in which employment disputes are adjudicated as significant differences between the United States and other countries.[284]

However, Rose and Wenner both mention employment discrimination law as an area where U.S. legal doctrine may influence other countries. Rose noted the similarity between American law and the European Union civil rights directives.[285] Wenner described the Americans with Disabilities Act[286] as "serving as a model for the disability laws of other jurisdictions" and mentioned that the U.S. Age Discrimination in Employment Act[287] may influence the shape of "legislation that must be enacted by EU member states by 2006."[288] Beyond the discrimination area, however, Wenner said it was unlikely that American law would affect employment and labor laws elsewhere due to the different and contractually protective way in which other nations conceptualize the employment relationship.[289]

The IPG co-chairs are not alone in their observations about the effect of U.S. employment discrimination law on other civil rights regimes. As will be described more fully below, many of Littler's foreign colleagues make similar statements.[290] Comments from the legal academy are also in accord. For example, Professor Sanford Jacoby, an American, has recently noted that "when it comes to employment discrimination and its remedies, we may likely see a future flow" of ideas from the United States to Europe as the latter begins to respond to the challenges of an increasingly diverse population.[291] Professor Gregor Thüsing, a German, used the U.S. experience as the intellectual touchstone for his comprehensive analysis of the consequences of two recent anti-discrimination

283. E-mail from Ken Rose (July 28, 2002), *supra* note 225 ("With regard to terminations, most foreign countries have laws that require employers to provide a specified period of notice and termination pay."); E-mail from Scott Wenner (July 10, 2002), *supra* note 214 (noting that the aspect of American law most obviously at odds with foreign law "is the employment at will concept").

284. E-mail from Scott Wenner (July 10, 2002), *supra* note 214; E-mail from Ken Rose (July 28, 2002), *supra* note 225. More specifically, they note the availability in America of compensatory and punitive damages, which can represent "multiples of the contract-based backpay damages generally at issue in other jurisdictions," and jury trials, than an administrative tribunal or civil bench trial as "prevails elsewhere," set our labor and employment regime apart from others. *Id.*

285. E-mail from Ken Rose (July 28, 2002), *supra* note 225.

286. 42 U.S.C.S. § 12101 et seq. (2003).

287. 29 U.S.C.S. § 621 et seq. (2003).

288. E-mail from Scott Wenner (July 10, 2002), *supra* note 214.

289. *See id.*

290. *See infra* notes 313–323 and accompanying text.

291. *See* Jacoby, *supra* note 135, at 821.

directives enacted by the European legislature.[292] Lisa Waddington, a senior lecturer in law at Maastricht University, the Netherlands, and Aart Hendriks, a member of the Dutch Equal Treatment Commission, likewise use American law as a reference point for considering the duty to reasonably accommodate disabled workers in Europe.[293]

This is not to say that anti-discrimination law elsewhere will come to resemble in every facet the American approach. Nor is any claim being made that interaction among international employment lawyers is the only or even the most important transmission mechanism for these ideas. There are certainly other ways for foreign practitioners to learn about American law. Many foreign practitioners receive LL.M. degrees from American law schools where they may learn in the classroom about U.S. labor and employment law.[294] One must also remember the vital norm-generating role played by the human resources profession, which, as noted above, was instrumental in launching the preventive approach to anti-discrimination law compliance in the United States and clearly has an impact on the global scene as well.[295] Nonetheless, one looking for a substantive arena for the transplantation of American ideas about workplace law might reasonably identify employment discrimination law as a fertile subject.

What about the possible transplantation of lawyering style? American international corporate law firms export more than U.S. business law; they sell abroad a distinctly American form of legal practice that is aggressive, proactive, creative, and highly client-identified.[296] This homegrown lawyering style is analogous to the practice of U.S. management-side employment attorneys, which this author has described as adversarial, entrepreneurial, and wedded to

292. *See* Gregor Thüsing, *Following the U.S. Example: European Employment Discrimination Law and the Impact of Council Directives 2000/43/EC and 2000/78/EC*, 19 INT'L J. COMP. LAB. L. & INDUS. REL. 187 (2003). Thüsing compares with enthusiasm America's highly developed employment discrimination jurisprudence to the fact that "protection against discrimination has not taken concrete form in the employment law of many European states." *Id.* at 188–89.

293. *See* Lisa Waddington & Aart Hendriks, *The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination*, 18 INT'L J. COMP. LAB. L. AND INDUS. REL. 403 (2002).

294. *See* Silver, *supra* note 202, at 1040 ("Law schools are an additional site of interaction for lawyers trained in different national systems, and U.S. law schools are attracting increasing numbers of foreign lawyers in their one-year LL.M. degree programs.").

295. *See* Arthurs, *supra* note 2, at 289 ("The new normative reality of employment in the global economy may originate in explicit human resource policies promulgated by TNCs and their subsidiaries.").

296. *See supra* notes 261–262 and accompanying text.

the notion of litigation prevention and dispute avoidance. In fact, when Rose and Wenner discuss what their foreign colleagues might learn from Littler and whether they envision the development of commonalities across national jurisdictions, they primarily refer to stylistic matters. In this respect, their observations make reference to what their foreign colleagues might gain by taking a preventive approach to employment practice and to the belief that over time the lawyering style of international employment practitioners will come to resemble the "can do" ethos of the American management bar. Each of these points will be discussed in turn.

While litigation prevention and strategic planning is practiced by some of Littler's foreign colleagues, especially in Europe,[297] foreign practitioners in general appear to the IPG co-chairs to be less advanced in their use of American-style preventive tools such as alternative dispute resolution (ADR) and "promoting training as a litigation avoidance strategy."[298] There might be less incentive for foreign practitioners to promote ADR, noted Wenner, because employment tribunals elsewhere produce largely predictable results and very moderate awards.[299]

Yet training is an altogether different matter. Wenner described foreign lawyers as "uniformly taken with Littler's training programs as an idea that would have an impact in their jurisdictions."[300] Similarly, Ken Rose noted that foreign labor and employment lawyers could learn from Littler's lawyering style "[t]he value we give our clients through training and other hands-on preventive practices."[301] These observations might be coupled with the co-chairs' statements about the influence of substantive American employment discrimination law. Prevention, in the form of policy promulgation and training, is an essential aspect of U.S. anti-discrimination law compliance. Moreover, as described above, some have noted a disturbing trend in American civil rights doctrine and practice toward accepting forms of legal compliance that are symbolic rather than substantive. If employment lawyers elsewhere were to begin promoting anti-

297. E-mail from Ken Rose (July 28, 2002), *supra* note 225 ("I believe [litigation and strategic planning] is being used by the more progressive employment lawyers in the EU. I expect that it soon will become the norm."); E-mail from Scott Wenner (July 10, 2002), *supra* note 214 ("Quite clearly our goal of litigation prevention is one we share with our colleagues in Europe and elsewhere.").

298. E-mail from Scott Wenner (July 10, 2002), *supra* note 214.

299. *Id*.

300. *Id*.

301. E-mail from Scott Wenner (July 28, 2002), *supra* note 225.

discrimination prevention in earnest, the developing anti-discrimination law regimes of other nations could well be affected.

The IPG co-chairs also believe that commonalities in practice style may develop over time, at least with respect to the representation of U.S. multinational clients. Asked whether he thinks the way in which lawyers from different countries dispense legal advice will begin to converge, Ken Rose answered affirmatively, and added that he believed a more uniform, global style of employment lawyering "will be most influenced by how U.S. employment lawyers assist clients."[302] Scott Wenner too predicted that "at least some convergence is bound to happen if for no reasons other than human nature and business sense once lawyers, executives and other opinion leaders are exposed to more and better ways of delivering services."[303]

Notably, Rose and Wenner identified as a catalyst for such convergence the needs and desires of U.S. multinational clients. Rose noted, "I expect multinational clients will want that uniformity to the extent possible in light of the different political and legal systems around the world. . . ."[304]

Wenner posited that a failure by foreign lawyers to adopt an American style of representation can lead to the dissatisfaction of U.S. clients. American employers, used to a "somewhat more aggressive style" of representation, and a close, long-standing alliance with management attorneys, are disappointed by the "reluctance [of some foreign counsel] to take on the establishment."[305] Exposure of his foreign colleagues to Littler and its clients would help them understand "what U.S. corporations expect from their lawyers, whether they are in Toledo, Ohio or in Madagascar or Tibet."[306] American employers expect "aggressive but ethical representation of their interests," whether working on strategic plans to forestall problems or addressing presently existing concerns.[307] He predicted that if foreign law "firms understand they will have to conform to certain conventions to be in play for legal work from multinationals, they will likely conform."[308] In this sense, at least with respect to

302. *Id*. The term "convergence" as used in this Article refers to the process by which legal systems or phenomena associated with those systems "evolve in parallel directions." Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 72 (1996).

303. E-mail from Scott Wenner (July 10, 2002), *supra* note 214.

304. E-mail from Ken Rose (July 28, 2002), *supra* note 225.

305. E-mail from Scott Wenner (July 10, 2002), *supra* note 214.

306. *Id*.

307. *Id*.

308. *Id*.

representing American clients, the Littler co-chairs do envision the export of U.S. lawyering style to practitioners in other countries. Of course, what those foreign colleagues choose to accept and resist is an important matter that will be taken up next.

2. Acceptance and Resistance: Gauging the Receptivity of Foreign Practitioners to American Labor and Employment Law and Practice

This author has posited that when confronted with the potential transplantation of U.S. law or legal culture, foreign employment practitioners working on transnational matters might select and adapt those characteristics that suit their competitive and cultural needs and resist the rest. Yet how does this notion square with the traditional view that workplace law and lawyering is overwhelming local in character? If the latter is true, one might expect that foreign lawyers challenged with the export of U.S. law or legal culture would zealously defend their own national regulatory regimes and practices.[309]

Data from my interactions with Rose and Wenner tends to support the initial assertion. The IPG co-chairs believe American employment discrimination law is influential in some other countries, think their foreign colleagues can and want to learn from Littler's preventive method of legal practice, and posit that a more uniform, international employment lawyering style will develop over time modeled on the U.S. approach. Whether Littler's foreign colleagues have similar impressions will be considered in the subsections below in order to gain a sense of whether and how the practice of international labor and employment law might evolve.

a. Might U.S. Employment Discrimination Law Be a Model for Other Nations?

In 2001, Professor Harry Arthurs published a study that validated the conventional wisdom concerning labor and employment law, to wit "labor law is local law, plain and simple." Arthurs sought to determine, through interviews with forty practitioners from seven different nations, the role that lawyers play in elaborating the employment relations regimes in multinational corporations. More specifically, he wondered whether "American legal concepts and arrangements" were the kind of influence in the global workplace that they are on the "legal culture of global business transactions."[310] Not a

309. *See* Arthurs, *supra* note 29, at 284.
310. *See id.* at 279.

single interviewee detected an emerging transnational system of labor and employment law.[311] Each declared that domestic law was the driving force behind employment relations in his or her home jurisdiction. Few worked on transnational projects or had regular contact with foreign colleagues.[312]

In contrast, fifteen of the twenty-one foreign practitioners in this study affirmed that they were indeed engaged in promulgating and implementing transnational strategies in their practices. Another four reported occasionally being involved in such projects. One admitted to counseling foreign clients, but only on domestic matters. Only one lawyer answered the question in the negative. While this data must be tempered by the fact that these practitioners are attempting to engage in a new practice sub-specialty and thus might be inclined to exaggerate the character of their work, the parochial attitude of Arthurs' interviewees was not apparent in their responses.

Moreover, despite noting a host of differences between their labor law regimes and that of the United States, many of the study subjects described American employment discrimination law as compatible with their own legal regimes. Indeed, many said that the U.S. position was both better developed than their home jurisdiction and instructive.

Unlike the comments about the transnational character of their employment practices, there is no reason to question the credibility of these claims. These lawyers gain little by embracing the principles of U.S. employment discrimination law, and they certainly noted without inhibition that many other areas of American legal doctrine were incompatible with their own domestic law. Thus, this set of comments is best taken at face value and is useful to the extent that it identifies an area of substantive workplace law where transplantation could take place.

For example, a Spanish lawyer noted, "U.S. employment and labour law has already sorted . . . out all the most important present problems that now Europe is facing (discrimination, harassment . . .). In this sense we have a lot to learn about U.S. practice."[313] Similarly, an English practitioner observed:

> Where there are similar types of employment protection in the U.S. and U.K., it is good to consider the approach that the U.S. has taken to those issues: as the U.S. tends to be more litigious, the

311. *See id.* at 280.

312. *See id.* at 281.

313. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Dec. 18, 2001) (on file with author).

> U.S. [c]ourts have often already considered in detail some of the issues we are considering for the first time. . . . [D]isability discrimination is one example.[314]

Another U.K. lawyer noted that British disability legislation "originated from the U.S. model" and that proposals for age discrimination legislation are likely to mirror the American approach.[315]

A lawyer from the Netherlands, said that she found the U.S. conception of "[n]on-discrimination rules" most compatible with Dutch law because "it seems that the [Dutch] approach to non-discrimination issues stems from the U.S."[316] A French practitioner noted that, while in contrast to the United States, discrimination has not traditionally been a significant workplace issue in France, "things are changing and some new notions in French employment law like moral harassment/bullying are clearly base [*sic*] on the concept of discrimination."[317]

Combining references to both substantive law and legal practice, a lawyer in Hong Kong noted that his jurisdiction's developing discrimination law might catalyze U.S.-style compliance practices such as "formulating and implementing policies . . . as well as instituting regular training programs."[318] "Sexual harassment issues appear to be developing in the same way they did in the U.S.," said an Argentine lawyer.[319] One Australian practitioner noted that he saw "great adaptability of the U.S. experience" in equal opportunity law "to the Australian scene."[320] Another Australian noted that U.S. and Australian discrimination law "are closely aligned" and that he has "alerted [his] clients to U.S. trends."[321] A Canadian lawyer took aim at the U.S. approach to disability discrimination, arguing that

314. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (July 8, 2002) (on file with author).

315. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (July 9, 2002) (on file with author).

316. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (July 10, 2002) (on file with author).

317. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (July 25, 2001) (on file with author).

318. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Aug. 13, 2002) (on file with author).

319. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Aug. 5, 2002) (on file with author).

320. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (June 24, 2002) (on file with author).

321. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (July 15, 2002) (on file with author).

Canadian disability law "is decades ahead."[322] Still, he conceded that "American law in gender and race discrimination is more mature."[323]

Overall, the willingness of some of the study subjects to consider American employment discrimination law as an influence in their countries was striking though in truth not surprising. The aspirational, anti-discrimination principle, extensively developed in U.S. civil rights doctrine, is found not only in domestic statutory law but also in many national constitutions,[324] in European Union directives,[325] in bi- and multi-lateral trade agreements,[326] in numerous human rights documents including important International Labour Organization conventions,[327] and is a little like mom and apple pie: hard to resist and nearly impossible to argue against. A country's adoption of U.S. style laws on the books, however, tells us little about how anti-discrimination law will work in practice and, in particular, if and how employment practitioners will help implement and give it meaning. The next subsection attempts to address that latter question by considering whether Littler's foreign colleagues are amenable or resistant to the notion of American-style litigation prevention and dispute avoidance.

322. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Aug. 22, 2002) (on file with author).

323. *Id.*

324. *See, e.g.*, Riccardo Del Punto, *What has Equality Got to do with Labour Law? An Italian Perspective*, 18 INT'L J. COMP. LAB. L. & INDUS. REL. 197 (2002) (discussing the Italian Constitution); Miguel Rodriguez-Piñero Bavo-Ferrer & Miguel Rodriguez-Piñero Roya, *The Principle of Equality in the Labour Market—Reflections on the Spanish Model*, 18 INT'L J. COMP. LAB. L. & INDUS. RELS. 169 (2002) (discussing the Spanish Constitution); Berthou, *supra* note 143, at 109 (discussing the French Constitution).

325. Council Directive 2000/43/EC of 29 June 2000, O.J. 2000 (L 180/22) (implementing principle of equal treatment between persons regardless of racial or ethnic origin); Council Directive 2000/78/EC of 27 Nov. 2000, O.J. 2000 (L 303/16) (establishing an equal treatment framework for employment and occupation).

326. *See, e.g.*, North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499, 1515–16 (listing eleven labor principles that bind the signatories including the elimination of employment discrimination). *See generally* Marley S. Weiss, *Two Steps Forward, One Step Back—or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689 (2003).

327. Equal Remuneration Convention, June 29, 1951, 165 U.N.T.S. 303, 306; ILOLEX Database of International Labour Standards, C100 Equal Remuneration Convention, 1951, *at* http://www.ilo.org/ilolex/english/convdisp1.htm (last visited July 12, 2004); Discrimination (Employment and Occupation) Convention, 362 U.N.T.S. 31, 32; ILOLEX Database of International Labour Standards, C111 Discrimination (Employment and Occupation Convention, 1958, *at* http://www.ilo.org/ilolex/english/convdisp1.htm (last visited July 12, 2004).

b. The Potential for Importing Preventive Employment Lawyering

One key aspect of U.S. management lawyering style is the commitment to preventive practices—policy promulgation, training, employment audits, and the like—that enable employers to avoid or minimize the problems associated with workplace disputes. The IPG co-chairs report that litigation prevention and strategic planning is practiced by some of their foreign colleagues. However, Rose and Wenner intuit that lawyers in other national jurisdictions are not as advanced as Littler in their use of preventive tools, especially training, and could take a page from Littler's methods.

What do the foreign lawyers say about prevention? Do they see themselves as practicing it? Do they believe other firms in their home jurisdictions engage in preventive lawyering? Is there evidence that interaction with Littler influences the way they think about prevention? Confirming Rose and Wenner's impressions, some of the non-U.S. lawyers noted that they too advocated a preventive approach to their clients. Without exception, however, those who proclaimed their commitment to this style qualified their statements in ways that both underscore the uniqueness of American preventive practice and may reveal something about its potential for importation.

The foreign lawyers' caveats fell into three categories: 1) acknowledgement that Littler's distinctive style is one that they might emulate; 2) expression of the idea that Littler's approach could be a potential revenue generator for their own firms; and, 3) articulation of the fact that most of the lawyers in their home country did not take a preventive approach to lawyering. The first caveat, implying that Littler's style might be importable, is notable because it was primarily expressed by lawyers from common law countries. It thus gives some indication of the national arenas in which employment lawyering style transplantation might be most likely to take place.

Caveat number two, the notion of preventive lawyering as a revenue generator, is interesting because it identifies, in addition to client need, another possible catalyst for the spread of commonalities in practice style. The third qualification, the representation by foreign lawyers that their own firms' preventive style is unique, merits attention because it shows a potential split in some foreign jurisdictions between globalizing modernizers and those practitioners who may be committed to more traditional forms of legal work. The latter, of course, may well defend against the incursion of U.S. law and practice and in the process perhaps affect the way in which the modernizers adapt the American practices they choose to embrace.

Each of the three caveats will be explored below. Before doing so, however, one should note that many of Littler's foreign colleagues say very complimentary things about the firm. The lawyers may sincerely believe every word they communicated. Even so, this is one area where one must acknowledge the incentives in play. These individuals are forming business relationships with Littler, and hope to represent the firm's clients in transnational employment matters. There thus is reason for them to slant their commentary in ways that may exaggerate the potential for importing Littler's American-style of employment lawyering. Nonetheless, the comments are a fascinating look at an area that until now has remained unexamined by scholars.

i. Littler's Training Style as Ripe for Emulation

Notably, the lawyers who most clearly articulated a desire to adopt elements of Littler's preventive style came from English-speaking, common law countries, specifically Australia, Canada, and the United Kingdom. While far from a certainty, perhaps those are the national arenas most amenable to U.S. lawyering style importation. Indeed, their comments evidence a belief that a preventive culture is developing in those jurisdictions or at the very least in the lawyers' own firms.

Interestingly, the common law country practitioners were most likely to focus on Littler's extensive training repertoire and the manner in which instruction is given as the dispute avoidance practice they found most influential. One lawyer from a large Australian firm, for example, remarked that the similarities between Littler's and his firm's emphasis on training were striking.[328] Nonetheless, he acknowledged that his firm had something to learn from Littler's training style. Commenting that Littler's method of presenting legal subjects is very practical he noted "we have tended to be a bit too legalistic in our approach . . . and [Littler's] emphasis of the practical dimensions I think is very powerful and what the client wants."[329]

The theme of practical, accessible presentation of material was echoed by another Australian lawyer: "The main learning experience I have gained from LM has been to experience the techniques they use to train; ie., the use of non-legalistic terms and 'interesting' and attention grabbing scenarios and role plays."[330]

328. *See* E-mail to Susan Bisom-Rapp (June 24, 2002), *supra* note 320.
329. *See id.*
330. *See* E-mail to Susan Bisom-Rapp (July 15, 2002), *supra* note 321.

A Canadian lawyer described her firm's approach as "pro-active" and noted that her firm holds "general annual conferences" and "specialized seminars" for clients.[331] Like the Australians she found Littler's training entertaining, and remarked especially about the use of actors in some of the sessions: "[T]he little scenarios that were developped [*sic*] were very useful in showing the pitfalls awaiting an employer if the supervisor or manager has not been trained or briefed on how to handle an issue."[332]

The no-nonsense, comprehensible style of Littler's educational program was evident to a lawyer from the United Kingdom as well. She began by asserting that a preventive culture is developing in the United Kingdom. Clients are being advised on "litigation prevention and strategic planning," and training programs are being developed.[333] She noted, however, "we can always learn from the U.S. experience of training client managers—and I know that Littler's training programme is regarded as extremely practical and accessible."[334] Another English lawyer from a competitor firm described her impressions of Littler: "I have been impressed by their approach to training."[335]

Perhaps the affinity for Littler's training style is rooted in the common cultural and legal heritage of the English-speaking countries. An attorney from Brussels, for example, reacted less than positively to the approach, implying that he found it professionally undignified:

> Only the reaction of the U.S. audience counts. Nevertheless, my impression was that the "show case" approach overshadowed somewhat the key issues for which "pre-emptive" advice or teaching from Littler Mendelson is useful to prevent negative exposure for the employer.[336]

Clearly, the American penchant for making employment law training entertaining is not for everyone.

It may well be that the aggressive showmanship that is part-and-parcel of Littler's training program is antithetical to the professional images maintained by lawyers in some other countries. Here, there may be a parallel in the differences between legal education in the United States and other national jurisdictions. The culture of

331. Interestingly, this lawyer practices in French-speaking Montreal, though her firm also has offices in English-speaking Toronto and Vancouver.

332. *See* E-mail to Susan Bisom-Rapp (July 8, 2002), *supra* note 314.

333. E-mail to Susan Bisom-Rapp (July 9, 2002), *supra* note 315.

334. *Id.*

335. E-mail to Susan Bisom-Rapp (July 8, 2002), *supra* note 314.

336. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (June 19, 2002) (on file with author). He added that he did hear positive comments from the audience about "the show." *Id.*

American law schools—embodied in the Socratic dialogue, clinical courses, and seminars—puts a premium on dynamic, interactive exchange and "provide[s] a rough-and-tumble atmosphere completely unfamiliar to legal education in civil law countries," which tends to rely on a passive lecture format.[337] Thus, where other national jurisdictions adopt preventive programs like managerial employment law training, they may model their programs on their own educational experiences. Additionally, as a broader principle, one must be mindful that imported preventive techniques may be adapted in ways that make them look and function rather differently from the way they operate in the United States.

ii. Littler's Approach as a Potential Revenue Generator

A number of the foreign lawyers indicated that exposure to Littler made them appreciate the revenue generating potential of preventive practice. Rose and Wenner identified the needs of U.S. multinational clients as a catalyst for foreign practitioners to adopt an American style of employment practice. The statements below highlight revenue generation as another. These sentiments were best expressed by a Canadian lawyer:

> I do think, . . . after having seen Littler, that we do not do enough training. The [Employer] conference has shown me that we now have to emphasize this part of our relationship with our clients more than we have in the past . . . . We can learn from [Littler's] marketing skills in emphasizing prevention and litigation avoidance. This style of approach probably generates business that the client will find more worthwhile and positive as opposed to having to expend money for legal fees as a "defendant" to a claim.[338]

Similarly focusing on business development, a Mexican practitioner suggested that his firm could learn from Littler "[t]he way they have developed legal training which has become an important part of their practice . . . [and] the manner in which they advertise their services."[339] An Argentine practitioner noted his firm could improve "productivity, quality, and competitive[ness]" by learning from Littler "about communication techniques with our clients, managerial education and use of technology."[340]

337. Daly, *supra* note 262, at 1073–74.

338. *See* E-mail to Susan Bisom-Rapp (July 8, 2002), *supra* note 314.

339. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (June 11, 2002) (on file with author).

340. *See* E-mail to Susan Bisom-Rapp (Aug. 5, 2002), *supra* note 319.

A Spanish lawyer saw in Littler's approach a way to diversify his practice:

> I see Littler[ ] as a modern firm close to the client by combining a wide range of services connected to labour and employment issues. This diversification of services, no[t] only strictly legal, is well perceived by clients nowadays. Human [r]esources managers need a complete approach to their problems and Littler's strategy is clear in that direction. I like this firm.[341]

Whether the revenue generating potential of preventive practice is as great in these diverse jurisdictions as in the United States is entirely unclear. Indeed, as will be explained below, there are a number of factors indicating that the incentives for prevention are not as great in other countries as they are in the United States. Nonetheless, exposure to Littler did get some practitioners to at least consider the market potential of this aspect of American employment lawyering.

iii. Acknowledging That Prevention is Not Widely Practiced Elsewhere

A number of the foreign practitioners specifically contrasted what they characterized as their firm's commitment to preventive practice with the approach of other firms in their home jurisdiction, the point being that these domestic competitors did not engage in preventive lawyering. These observations highlight the uniqueness of U.S. employment practice, which is preventive across-the-board. More importantly, to the extent the study subjects are accurately reporting about their home jurisdictions rather than puffing in order to make their firms sound more advanced than their competitors, they reveal a potential split in other domestic legal fields between those willing to embrace and capitalize on globalization and those traditionalists more heavily tied to the status quo. Modernizers, in their competition with traditionalists, may seek to use imported strategies "to build their own positions at home," ultimately affecting the governing rules associated with, for example, aspects of workplace law and practice.[342]

An example of how an imported strategy might set the stage for changes in national legal practice is provided by a French lawyer, who said his firm strongly recommends to its U.S. clients doing business in

341. *See* E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (June 21, 2002) (on file with author).

342. *See* Dezalay & Garth, *supra* note 260, at 313.

France a compliance audit of the clients' employment policies and compensation plans.[343] He also noted that his firm conducts training for clients during monthly breakfast conferences on topics like workplace harassment, the regulation of mass dismissals, and employee privacy.[344] Yet he confessed that while his firm takes a proactive approach, "[s]urprisingly enough, French employment lawyers [in general] are not particularly focused on litigation prevention."[345] His aspiration to change the rules of the game was clear. "Training in employment law is something new in France . . . and will be a major concern to French companies within a couple of years," he predicted.[346]

Other foreign practitioners also contrasted their embrace of prevention with what they portrayed as the less enlightened approach of the traditional bar. "[W]e make a lot of effort in training," reported a Spanish practitioner,[347] who mentioned meeting with representatives from Littler's ELT in order learn more about how to train clients effectively. Regarding the general mindset of European lawyers he stated that a "'preventing culture' is not already very implemented in the European mentality."[348] "In Europe," he noted, "first, the problem; after, the remedy."[349]

A lawyer who had practiced in Italy agreed generally, commenting "[o]nly the big labour and employment firms in Europe (for sure in Italy and in Belgium) encourage they [*sic*] clients to adopt preventive measures in order to avoid litigation."[350] Asked whether Dutch lawyers advocate that their employer clients engage in litigation prevention and/or strategic planning a lawyer from the Netherlands answered, "Not particularly and I think they should do more."[351] Such comments not only reveal a potential rift between modernizers and traditionalists, they attempt to set the stage for change by implying the inferiority of the traditional approach.

Echoes of such comments came from lawyers in the Western hemisphere as well. An Argentine practitioner responded that all the lawyers at his firm are "engaged in preventing or diminishing the risk

343. *See* E-mail to Susan Bisom-Rapp (July 25, 2002), *supra* note 317.
344. *See id.*
345. *See id.*
346. *See id.*
347. E-mail to Susan Bisom-Rapp (Dec. 18, 2002), *supra* note 313.
348. *Id.*
349. *Id.*
350. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Jan. 12, 2002) (on file with author).
351. E-mail to Susan Bisom-Rapp (July 10, 2002), *supra* note 316.

of conflicts and litigation."[352] Thus, he noted, "from the beginning of our relation with [Littler] we could easily understand each other."[353] Nonetheless, when asked whether Argentine attorneys in general take this approach he answered, "Not most of them."[354] A Mexican lawyer also described his firm as exceptional: "We provide legal training to our clients . . . however, this is not something generally offered by [Mexican] labor attorneys."[355]

From Asia came the admission that the size of the company represented affects whether labor lawyers recommend litigation prevention and strategic planning. "The much larger companies tend to adopt the American approach [in Singapore]," commented a Singaporean practitioner.[356] A Hong Kong lawyer stated that because the labor law of his jurisdiction is "generally very simple in structure" he had had little need to counsel employers on preventive practices.[357] Nevertheless, he noted that recent legal developments, including the passage of legislation prohibiting discrimination on the basis of sex, disability, and family status, "are in the process of changing that."[358] "Accordingly," he commented, "I consider that there is an increasing role for active prevention of employment litigation and strategic planning."[359] He suggested that "many of the techniques and approaches adopted by Littler will be applicable in Hong Kong."[360]

All the comments evidence efforts by the foreign lawyers to portray their preventive practices as the cutting edge of lawyering in their home jurisdictions. Some suggest that the lawyers believe that such practices will eventually become more widespread. Others indicate that the study subjects see their own firms as occupying an elite position in comparison to other firms. Ultimately, however, the adoption of preventive lawyering will have to make sense in local terms if it is to affect legal regimes outside U.S. borders. This point will be discussed more fully below in the subsection detailing the factors that cut against the adoption of American-style preventive practices.

352. *See* E-mail to Susan Bisom-Rapp (Aug. 5, 2002), *supra* note 319.
353. *See id.*
354. *See id.*
355. *See* E-mail to Susan Bisom-Rapp (June 11, 2002), *supra* note 339.
356. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Aug. 6, 2002) (on file with author).
357. E-mail to Susan Bisom-Rapp (Aug. 13, 2002), *supra* note 318.
358. *Id.*
359. *Id.*
360. *Id.*

c. Will Commonalities Develop in International Employment Lawyering Style?

Interaction between lawyers of different national jurisdictions arguably facilitates the development of commonalities in lawyering style.[361] Such cross-border encounters are especially likely among those lawyers who engage in transnational projects. Professor Arthurs' recent study uncovered little evidence of such work among the forty labor lawyers he interviewed.[362]

Although Arthurs' interviewees failed to discern "a new lex laboris in the making," the non-Americans did give voice to the tensions they often encounter when representing U.S.-based transnational clients.[363] These clients endeavored to replicate abroad the legal environment they enjoy at home, one that is predominantly non-union and at-will.[364] Indeed, according to the interviewees, American clients were surprised and more than a little peeved to learn that their host countries are by law much more supportive of unions and notions of job security.[365] In other words, given a choice these clients would like to impose American employment law concepts and arrangements on their global operations, at least with respect to their business in other developed countries.

Faced with a conflict between domestic employment standards and the non-conforming demands of a U.S. client, many of Arthurs' study subjects reported making efforts to safeguard their domestic legal culture and tried to tame the client.[366] Although the initiators are clients rather than American lawyers, the reactions of Arthurs' interviewees are examples of local resistance to the attempted transplantation of U.S. law.

A few Canadian lawyers in Arthurs' study, however, admitted to developing innovative strategies that "allowed their clients to adhere to their own internal policies and to operate, in effect, without regard to Canadian law."[367] Several Canadian lawyers owned up to complying just within the letter of domestic labor law and achieving "union-free" environments for multinational clients.[368] Similarly, some Mexican practitioners were able to demonstrate to their clients

361. *See* Abel, *supra* note 3, at 755; Silver, *supra* note 202, at 1039–40.
362. *See* Arthurs, *supra* note 29, at 281.
363. *See id.* at 280, 284.
364. *See id.* at 284.
365. *See id.*
366. *See id*.
367. *See id.*
368. *See id.* at 291.

that Mexican legal requirements were, though in appearance onerous, in effect quite trivial and that it was possible to operate "pretty much unencumbered."[369]

These latter anecdotes are examples of foreign lawyers delivering for American clients what U.S. multinationals seek when they do business abroad: "an international industrial relations environment characterized by flexible labor markets and minimal government intervention."[370] In short, what these employers want, and to a greater or lesser extent what was provided by foreign counsel, is a legal environment that to them looks like home.

IPG co-chairs Rose and Wenner posit that commonalities in lawyering style are likely to develop along a U.S. model, at least with respect to representing American multinationals. Moreover, they believe that client needs and demands will be a primary catalyst for this convergence. Many of the foreign lawyers seconded these predictions, though few described the style that would emerge as an American one. They did, however, clearly identify as a catalyst the desires of the client population. These needs were articulated both in terms of multinationals wanting to develop more centralized human resource policies, and expecting a uniform level of service from their lawyers, wherever those practitioners might be located.

A Mexican lawyer, who said his practice involves advising "many foreign clients in the implementation of their labor strategies in Mexico," touched on both these client requirements:

> I have tried to internationalize my practice because I strongly consider that employment and labor law issues are becoming more global following the same trend as the economy. Certainly, the experience that I have obtained in my dealings with lawyers from other countries enriches my practice by making me understand the needs of my international clients and what they may expect of me as a Mexican labor attorney.[371]

These sentiments not only echo the views of the IPG co-chairs, who opined that the expectations of U.S. multinational clients would catalyze changes in lawyering style, they also identify transnational cooperation between employment lawyers as the transmission mechanism.

The Mexican lawyer too envisioned a more uniform approach to labor and employment law issues developing over time "as a consequence of the globalization of the markets" and because "the

369. *See id.* at 285.
370. *See supra* note 155 and accompanying text.
371. E-mail to Susan Bisom-Rapp (June 11, 2002), *supra* note 339.

results the client is expecting to receive are the same anywhere they might be doing business."[372] These stylistic changes, however, would not influence the average Mexican lawyer. Instead it would appear among "labor lawyers advising employers in corporate firms, who are the only ones exposed to international matters."[373] Thus, embracing the "global" or "international" is seen as a way to reinforce one's elite status in the national legal field.

An English lawyer's views tracked closely with those of the IPG co-chairs. She reported that her firm was engaged in promulgating transnational strategies for clients and offered "we are often asked by clients to lead international projects with employment lawyers in other jurisdictions to advise on local operations."[374] Examples of these projects included "implementing international handbooks or standard contracts," and the effectuation of "transnational appointments and terminations."[375]

In response to a question about the possible convergence of lawyering styles, she noted:

> [T]he globalization of our key clients will lead to a more uniformed approach in delivery of employment law services in key jurisdictions. For example, the list of overseas lawyers with whom we work on international employment matters has been carefully chosen based on their having a similar level of delivery to ourselves in relation to technical advice, commercial approach, client handling, fee levels and general accessibility. I know that we are not alone in choosing only to work with lawyers who operate to a similar standard as ourselves.[376]

In other words, commonalities in the delivery of legal services are consciously cultivated because they meet the needs of clients doing business in multiple jurisdictions.

"[Increasingly] there is a major influence of U.S. employment and labour law practice in Europe," reported a Spanish attorney, who works on transnational legal strategies "related to international employment contracts, restructuring of companies, expatriation, human resources audits, compensation and benefits, [and] codes of conducts [*sic*]. . . ."[377] He continued:

> The key factor is globalizations [*sic*] in general. Companies now are more global in all aspects, including human resources policies. .

372. *Id.*
373. *Id.*
374. E-mail to Susan Bisom-Rapp (July 9, 2002), *supra* note 315.
375. *Id.*
376. *Id.*
377. E-mail to Susan Bisom-Rapp (June 21, 2002), *supra* note 341.

> . . These policies, with the necessary amendments, are now more and more decided by the mother company for all employees despite their location.[378]

Once again, this is a view of convergence driven by the needs of multinational clients who wish to implement worldwide policies.

An Australian attorney reported being "regularly involved in transactions with clients which have international dimensions."[379] He noted the challenge of trying to bring together simultaneously "differing cultures, differing workplaces and differing practices."[380] The firm thus found itself consulting "with our clients about global strategies" in order to promote consistent approaches to issues like equal employment opportunity and privacy.[381] He noted:

> I think we will necessarily have to be dispensing legal advice in similar ways—for example, I think a highly legalistic approach to a legal issue is unlikely to go down well with Littler clients. To the extent we deal with those clients I am sure they will be looking for practical guidance on the outcomes. . . .

He noted that, in addition to client need, legislation in certain substantive areas is catalyzing convergence. "There are great similarities between the equal opportunity and privacy laws in our respective countries,"[382] he argued. "Thus, in dealing with clients pursuing global strategies, it is not too difficult to create general policy positions on topics such as that."[383]

Not all the attorneys agreed. Asked whether he engaged in transnational legal strategies an Australian lawyer from a different firm responded:

> This is the fundamental aspect of my practice. I assist clients in addressing cross-border employment issues throughout the Asia Pacific region. The portability of executives and the increasing internationalization of employment underpins what I do.[384]

Yet despite this international focus, this practitioner "disagree[d] that internationalization will create uniformity" in practice styles.[385] Indeed, he was "inclined to think it will breed diversity."[386] He anticipated that interaction across legal cultures would create "hybrid

378. *Id.*
379. E-mail to Susan Bisom-Rapp (June 24, 2002), *supra* note 320.
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.*
384. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (July 30, 2002) (on file with author).
385. *Id.*
386. *Id.*

styles" of lawyering.[387] Ultimately, however, his vision may not be incompatible with those of the foreign practitioners above. Lawyers who are chameleons, who switch their lawyering style depending on the client they presently serve, might be characterized as adopting hybrid forms of lawyering. One of my study subjects, a lawyer from Belgium, provided an illustration of this potential phenomenon noting, "[Y]es, it is true: an American client will probably get another style of advice than a [F]rench client."[388]

The comments excerpted in the sections above indicate that a formative, insipient sort of internationalization is underway, if only for a small group of globally-oriented labor and employment lawyers. Whether the efforts of these practitioners to take their practices beyond national borders will ultimately succeed is impossible to say. And whether, should they succeed, a global employment lawyering style will emerge is equally beyond determination. Yet the observations of the twenty-three practitioners—Rose and Wenner and their twenty-one foreign colleagues—are intriguing and hint at a possible trend that greatly alters the traditional view of labor and employment law practice as rooted almost exclusively in the local. Before summing up, however, it is necessary to assess the factors that might inhibit the development of preventive practice and common lawyering styles among non-U.S. employment practitioners, and to consider what Littler might learn from its foreign colleagues.

3. Points of Resistance: Factors Inhibiting the Import of American-style Law and Lawyering

The United States is without a doubt a leading exporter of law and legal culture.[389] Yet when we think about transnational employment work, it is clear that the U.S. approach is in competition with other nationally-produced models of labor market regulation.[390] Indeed, where the U.S. approach conflicts with those paradigms, one would anticipate that American efforts at transplantation will be resisted.

Littler's foreign colleagues provided observations that shed light on where the possible points of resistance might be.[391] Many of the

387. *Id.*

388. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (July 12, 2002) (on file with author).

389. *See* Dezalay & Garth, *supra* note 260, at 307–08.

390. *See generally id* at 308–09.

391. The comments in this subsection are raised merely to reveal the study subjects' perceptions of the differences between their home jurisdictions and the United States. A

study subjects mentioned two substantive sites that distinguish the U.S. system from other national labor and employment law regimes: American labor law; and the American concept of employment at-will. These areas, one implicating an expectation of collective voice and the other the prospect of a measure of job security, are deeply embedded in the cultures of many industrialized nations.[392] Efforts to undermine them in favor of U.S. notions of law and legal practice are therefore likely to provoke significant reactions.[393]

Regarding the former, most of those offering commentary implied that their labor law systems were so different than the American legal regime that there was little about the latter that could inform their practice. An Argentine lawyer noted that "[U.S.] employers' practices toward unions are incompatible with Argentine legislation."[394] A Spanish lawyer described the aspect of U.S. employment and labor law most at odds with Spanish law to be

detailed discussion of the conditions under which employment disputes arise in other countries and the mechanisms by which they are resolved is beyond the scope of this article. Nonetheless, those interested in such comparisons and information about the employment relations systems in Britain, Canada, Australia, Italy, and France should consult INTERNATIONAL AND COMPARATIVE EMPLOYMENT RELATIONS (Greg J. Bamber et al. eds., 4th ed. 2004). Similar information on those countries and also on Belgium, Hong Kong, Mexico, the Netherlands, Singapore, and Spain is available in INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 4. For information on India *see* P.L. MALIK, HANDBOOK OF LABOUR AND INDUSTRIAL LAW (8th ed. 2003).

392. *See, e.g.*, Roy J. Adams, *Why the Right to Refrain from Collective Bargaining Is No Right at All*, *in* WORKERS' RIGHTS AS HUMAN RIGHTS 142, 147 (James A. Gross ed., 2003) ("[In contrast to the U.S. a]t the national level most continental European countries, while fostering the freedom of workers to join or not to join trade unions, have put in place mechanisms ranging from conventional collective bargaining through statutory works councils to worker representatives on corporate boards of directors, that provide nearly all working people with a voice at work."); Young, *supra* note 146, at 406 ("The persistence of the at-will doctrine in defining the nature of the employment relationship for most private sector employees in the United States remains an important factor distinguishing U.S. employment relations law from that of other industrialized nations.").

393. The 2002 murder of Italian labor law reformer Marco Biagi by members of Italy's Red Brigade comes to mind as a particularly extreme reaction to proposed changes in a country's labor law regime. *See Biagi Homicide: Six Requests for Judgement,* June 29, 2004, AGI online, *available at* http://www.agi.it/english/news.pl?doc=200406291915-1165-RT1-CRO-0-NF11&page=0&id=agionline-eng.oggitalia; *Suspected Member of Radical Italian Leftist Group Sentenced to Life,* June 9, 2004, CJAD 800: News, *available at* http://www3.cjad.com/content/cp_article.asp?id=/global_feeds/canadianpress/worldnews/w060969A.htm; Biagi, a socialist, advised the Italian labor ministry on proposed reform legislation that sought to relax firing restrictions for some small companies and employers of temporary workers. He was murdered four months after the proposal become public. *See* Alan B. Krueger, *Reforming the Extreme Labor Restrictions in Italy Is No Slice of Tiramisu*, N.Y. TIMES, June 27, 2002, *available at* http://www.irs.princeton.edu/krueger/italy.htm; *see generally* Tony Royle, *Worker Representation under Threat? The McDonald's Corporation and the Effectiveness of Statutory Works Councils in Seven European Union Countries*, 22 COMP. LAB. L. & POL'Y J. 395 (2001) (describing the clash of McDonald's non-union culture with the legally mandated worker representation systems of several E.U. countries).

394. E-mail to Susan Bisom-Rapp (Aug. 5, 2002), *supra* note 319.

"collective bargaining and [the] relationship with unions."[395] "We do really have a 'union mentality' in our labour market," he noted.[396] One Belgian attorney with an LL.M. from an American law school opined that U.S. labor law is in substance "alien to the central and southern European culture."[397]

The cultural context of labor relations practice, specifically the fact that unions are a force to be reckoned with, was mentioned by practitioners from the English-speaking world. An Australian noted:

> There is a far greater emphasis on collective bargaining issues and the need to deal with industrial relations matters with unions. . . . We have active unions who still hold significant power in many workplaces and who resort to strike action as one of their first remedies.[398]

A Canadian lawyer, similarly referring to the more significant role that organized labor plays in the Canadian workplace mentioned, "[o]ur unionized rate is much higher than in the U.S."[399]

As noted above, the foreign lawyers also mentioned America's exceptional at-will concept as antithetical to their conception of the nature of employment relationships. Some of those mentioning it not only stressed its uniqueness. They also highlighted the frustration and concern experienced by their American clients upon learning that their foreign operations would be governed by legally mandated job security protections. An Australian lawyer commented that "there is no similar concept [to at-will employment] in Australia and in my experience it often causes great distress to U.S. companies doing business in Australia."[400]

A Hong Kong practitioner confessed that it was only through his dealings with U.S. clients and lawyers that he had "come to have some basic understanding of what [the at-will] concept means."[401] He noted with evident amusement that his U.S. clients often assume that the common law position in Hong Kong is employment at-will only to discover that "the terms under which their U.S. employees are working in Hong Kong are rather different from what they thought."[402]

395. E-mail to Susan Bisom-Rapp (Dec. 18, 2002), *supra* note 313.
396. *Id.*
397. E-mail to Susan Bisom-Rapp (June 19, 2002), *supra* note 336.
398. E-mail to Susan Bisom-Rapp (June 24, 2002), *supra* note 320.
399. E-mail to Susan Bisom-Rapp (July 8, 2002), *supra* note 314.
400. E-mail to Susan Bisom-Rapp (July 30, 2002), *supra* note 384.
401. E-mail to Susan Bisom-Rapp (Aug. 13, 2002), *supra* note 318.
402. *Id.*

Nevertheless, while most accepted as a given the greater employee protections in their own jurisdictions, two lawyers working in regimes far more restrictive of employer prerogative enthused about the freedom for management action embodied in the American system. A practitioner who had worked in Italy commented: "[f]lexibility, this is the magic word I like in the American scenario."[403] A Spanish lawyer said that the aspect of U.S. employment law he found most interesting and adaptable to the Spanish workplace was "flexibility in the working conditions."[404] Perhaps the global movement toward "flexibilization" will reduce the resistance of some international employment lawyers toward the inclinations of their U.S. multinational clients, who are used to working in a legal environment that is highly accommodating of business needs. Even so, the ability to discharge at whim and without severance or separation pay is not an aspect of U.S. employment law one would identify as ripe for importation.

In addition to the above, the foreign practitioners mentioned two other items, one characteristic of American legal culture and the other based in structural and remedial differences, to explain why a more preventive approach to lawyering had failed to develop in their own jurisdictions. These two factors, which could affect the spread and shape of lawyering practices in other countries, are: 1) a perception of the American legal system as distinctly adversarial in nature; and, 2) differences in available dispute resolution forums, procedural devices, and remedies.

Professor Robert Kagan has written extensively and critically about the uniquely adversarial character of the American legal system and the culture it is embedded within.[405] The foreign lawyers in this study similarly believe the litigious or adversarial stance of Americans to be of note. "My impression is that the U.S. system is far more litigation-oriented than the U.K.," noted an English lawyer.[406] Another English practitioner from a competitor firm agreed, opining that litigation prevention "might be more low key [in the United

403. E-mail to Susan Bisom-Rapp (Jan. 12, 2002), *supra* note 350.

404. E-mail to Susan Bisom-Rapp (July 8, 2002), *supra* note 314.

405. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); Robert. A. Kagan, *Should Europe Worry About Adversarial Legalism?*, 17 OXFORD J. LEGAL STUD. 165 (1997); Robert A. Kagan & Lee Axelrad, *Adversarial Legalism: An International Perspective*, *in* COMPARATIVE DISADVANTAGES? SOCIAL REGULATIONS AND THE GLOBAL ECONOMY (P.S. Nivola ed., 1997).

406. E-mail to Susan Bisom-Rapp (July 12, 2002), *supra* note 388.

Kingdom] than in the States because we do not have such a highly developed litigation culture."[407]

Asked whether Belgian lawyers engage in preventive practices, a Belgian lawyer cautioned that in her country "litigation is less an issue than it is in the U.S."[408] Discussing the need to guard against litigation with sound human resources management policies, a Canadian practitioner observed that unlike their Canadian counterparts, "more often than not, the American management-side lawyers to whom I speak are engaged in a litigious approach to HR management issues."[409]

Differences in dispute resolution forums, procedural devices, and remedies were also mentioned by foreign practitioners. In their descriptions, the American legal environment was frequently portrayed as unpredictable, lengthy in its processes, and frightening in its potential consequences.[410] A Canadian lawyer exclaimed, "We certainly do not want jury trials (we do not have them in Canada)!" Another Canadian practitioner touted "the swiftness with which [labor] matters can be decided in Canada" and the use of administrative tribunals to decide them.[411] An Australian noted, "We have no civil jury system, unlike the U.S. Also, the class action approach of the U.S. is much more scary than what we confront. We find the problems you confront . . . amusing (and scary)."[412]

407. E-mail to Susan Bisom-Rapp (July 8, 2002), *supra* note 314.

408. E-mail to Susan Bisom-Rapp (July 12, 2002), *supra* note 388.

409. E-mail to Susan Bisom-Rapp (Aug. 22, 2002), *supra* note 322.

410. Although some of the concerns expressed are grounded in reality, inaccurate stereotyping of the American scene was evident. For example, foreign attorneys I conversed with at the two Littler conferences I attended frequently used the metaphor of the Wild West to refer to the U.S. civil justice system. *See generally* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998) (describing and debunking American urban legal legends). While popular belief may perpetuate the myth that employees get rich by bringing suit, empirical evidence indicates that plaintiffs lose disproportionately often in court. *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003).

411. E-mail to Susan Bisom-Rapp (Aug. 22, 2002), *supra* note 322.

412. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Jan. 10, 2002) (on file with author). Contrary to conventional wisdom, Professor Michael Selmi's work demonstrates that employment discrimination class action lawsuit settlements produce merely modest monetary benefits for plaintiffs, generally result in cosmetic rather than substantive employer reforms, and fail to deter corporate wrongdoing. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination and its Effects*, 81 TEX. L. REV. 1249, 1250–51 (2003). Moreover, Selmi argues that reported settlement amounts are misleading because they indicate the "defendants' maximum possible exposure, typically spread across a multi-year timeframe, and often exceed what the defendant will actually pay out." *Id.* at 1301.

A preoccupation with the availability in the United States of compensatory and punitive was also evident. One English lawyer commented that America provides a narrower range of claims with "a deeper measure of remedy" as compared with the United Kingdom and the other European Union members.[413] A Belgian practitioner noted that "[t]he fact that punitive damages may be imposed (in a jury trial) creates an economic basis for certain forms of law practice that are still largely absent in Europe."[414] "Financial consequences of litigations are a lot less in France than in the U.S.," remarked a French lawyer, "[t]herefore the need for litigation prevention is not the same."[415]

One Australian lawyer explained that while lawyers in his home jurisdiction actively engage in litigation prevention and strategic planning, the American approach is perhaps more extensive in part because in Australia "there is no jury factor or punitive damages exposure."[416] In his opinion, American employers undertake training "to avoid large adverse financial outcomes" in litigation while in Australia employers are motivated by "public perception and opinion."[417]

Earlier in this article, I argued that American employers embrace prevention for three reasons: risk management; obtaining managerial flexibility; and a sense of social obligation. To the extent that U.S. multinationals perceive less risk from foreign employment law regimes due to the factors detailed by the study subjects, they may be less inclined to seek, and their legal representatives may be less likely to advocate, preventive policies. On the other hand, wherever they do business, U.S. employers are likely to continue to seek flexibility, and to be motivated by reputational concerns. And, as noted in the conclusion below, U.S. international employment lawyers will likely try to help them achieve their goals through practices perfected on home turf.

413. E-mail to Susan Bisom-Rapp (July 9, 2002), *supra* note 315.

414. E-mail to Susan Bisom-Rapp (June 19, 2002), *supra* note 336. A major study comparing judge and jury performance in awarding punitive damages concluded that there is no significant difference between the rate at which judges and juries award punitive damages. Moreover, the relation, in terms of size, between judge- and jury-awarded compensatory and punitive damages is substantially the same. *See* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002).

415. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Sept. 17, 2002) (on file with author).

416. E-mail to Susan Bisom-Rapp (July 30, 2002), *supra* note 384.

417. *Id.*

4. What Littler Can Learn From Its Foreign Colleagues

Turn about is fair play and cultural exchange cannot help but influence the parties who engage in it. What might Littler learn from interaction with employment practitioners from other national jurisdictions? IPG co-chair Ken Rose highlighted the greater experience that European Union lawyers possess "in dealing with cross-border employment law matters" and suggested that their methods, in the procedural sense, "can be a model for us. . . ."[418] He and Scott Wenner also mentioned being able to absorb from interactions with foreign colleagues information regarding the workplace culture of other countries.[419] Wenner mentioned that there is a tendency on the part of American attorneys to overlook the fact that the parties sometimes must continue "to live with one another long after the dispute . . . is resolved."[420] By studying European works councils, American employment practitioners could learn how to "represent the client's interests" and, simultaneously, maintain continuing employment relationships.[421]

The foreign attorneys queried were on the whole less sure about what Littler could learn from the lawyering style of their firms, and given the posture of the study, which focused on the possible Americanization of international labor and employment law practice, this is perhaps to be expected. Many of the study subjects said they were unable to answer the question. Others simply declined to answer. Several mentioned that developing close client relationships was central to their practices, implying that Littler might pick up something from that approach.[422] A couple mentioned taking a more holistic, human resources-based (less legalistic) approach to legal practice.[423] Three indicated that through interaction with their firms Littler could develop sensitivity to foreign client expectations and different legal environments.[424]

418. E-mail from Scott Wenner (July 28, 2002), *supra* note 225.

419. *Id.*

420. E-mail from Scott Wenner (July 10, 2002), *supra* note 214.

421. *Id.*

422. E-mail to Susan Bisom-Rapp (July 15, 2002), *supra* note 321; E-mail to Susan Bisom-Rapp (Aug. 22, 2002), *supra* note 322.; E-mail to Susan Bisom-Rapp (July 8, 2002), *supra* note 314.

423. E-mail to Susan Bisom-Rapp (July 10, 2002), *supra* note 316.; E-mail to Susan Bisom-Rapp (Sept. 17, 2002), *supra* note 415.

424. E-mail to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (July 18, 2002) (on file with author); E-mail to Susan Bisom-Rapp (Aug. 13, 2002), *supra* note 318; E-mail to Susan Bisom-Rapp (July 11, 2002), *supra* note 339.

Besides the study focus, perhaps American cultural hegemony made it difficult for the subjects to speculate about how foreign influences might affect those from the United States. It seems obvious that transnational encounters will affect the way U.S. management attorneys engage in practice.[425] Much more study is needed on this subject in order to determine exactly how.

V. CONCLUSION: INTUITING THE FUTURE OF TRANSNATIONAL EMPLOYMENT LAWYERING

This article documents the rise of a new sub-specialty in labor and employment law practice: international labor and employment law. Contrary to conventional wisdom, I believe conditions exist for the possible emergence of commonalities in employment lawyering style, and even substantive employment discrimination law, across national jurisdictions. Significant changes, if they are to occur, would most likely appear among an elite group of international practitioners representing American multinationals in multiple jurisdictions.

Several factors make me think that this as yet purely hypothetical phenomenon would be both client-driven and based upon the preventive, entrepreneurial methods of American practitioners, though certainly adapted for local conditions and perhaps, as noted above, only operative in the representation of U.S. clientele. First, there was a clear refrain among some of my study subjects that stylistic similarities, if they were to appear, would be connected to multinationals' needs. These foreign practitioners expressed a willingness to add an American style approach to their repertoire if it would help them better serve their clients.

A second force that might drive shifts in practice style is the unhappiness and frustration of, for some foreign practitioners, a present and, for others, a potential client population: U.S. multinationals. The IPG co-chairs, several of their foreign colleagues, and a number of Professor Arthurs' interviewees described the dissatisfaction that American multinational executives experience when encountering foreign legal environments and, not infrequently, foreign employment counsel who refuse to represent them in the way in which they are accustomed.[426] While Arthurs' subjects, who generally had little regular contact with counsel from other jurisdictions, for the most part reported defending their domestic legal

425. *See, e.g.*, Abel, *supra* note 3, at 755 (noting that "American lawyers learn to restrain their aggressive lobbying tactics and their avalanche of paperwork before the EC").

426. *See supra* notes 363–365 and accompanying text.

regimes and domesticating their U.S. clients,[427] one wonders if their approach to legal problem solving might differ when working as part of an international team headed by a U.S. firm.

Arthurs conceptualized employment attorneys as relatively reactive creatures, rarely initiating international legal strategies but rather acting like "bees and wasps,"[428] cross-pollinating clients through their exposure to the human resource innovations and practices of foreign and domestic corporations.[429] These advocates "mediate amongst global and local economic interests, between their clients' economic interests and state law, between state law and non-state normative systems."[430]

There is, however, one aspect of employment lawyers' mediative role that should be added to Arthurs' account. When international employment lawyers work in teams on transnational projects, they must make peace among themselves, working together with lead counsel to achieve the singular objective of a multinational client. In fact, failing to work diligently to achieve the U.S. client's desired objective would be decidedly against the foreign practitioner's own economic interests.[431] One suspects that such a transnational team headed by Rose and Wenner would be diligently nudged toward American-style delivery of services.

Indeed, in the spring of 2003 Ken Rose gave a guest lecture on international employment law practice to my employment law class during which he described a successful transnational project that he supervised.[432] The American client, a manufacturer of medical devices, planned to issue stock options to executives. In return for the options, the client wanted the executives, located in twenty-two national jurisdictions, to sign, among other things, covenants not to compete that would prevent them from working for the client's competitors for a certain period of time after their departure from the company. Non-compete agreements are devices increasingly being used domestically by U.S. employers to prevent, to the extent possible, former employees from using the human capital they

427. Arthurs, *supra* note 29, at 284.
428. Arthurs, *supra* note 2, at 289.
429. Arthurs, *supra* note 29, at 290.
430. *Id.* at 290.
431. *See* Whelan, *supra* note 202, at 945 ("It would be professional suicide for a global firm lawyer to exercise professional judgment at the expense of the client's perceived best interests.").
432. *See* notes, Ken Rose guest lecture, Mar. 17, 2003 (on file with author).

developed on the job on behalf of a competitor.[433] Moreover, in the United States, employers are not shy about enforcing these agreements by filing suit seeking to enjoin the post-employment activities of former employees.[434]

Rose described to my students the difficulty inherent in the project. Not all jurisdictions permit covenants not to compete. Not all jurisdictions permit injunctions to issue from such agreements. Yet Rose's international legal team managed to come up with agreements for each jurisdiction that approximate, to the extent legally possible, the effect of American covenants not to compete. These agreements have not yet been tested by foreign courts, though they were designed to be enforceable in each country. What is important about the example, however, is that despite differences in the substantive law in each jurisdiction, attorneys connected to vastly different legal regimes were able to take their best shot at providing a U.S. client with what it would be able to obtain under the American system of employment law.

Obviously, there are significant limits to what American international employment lawyers can accomplish for their U.S. multinational clients. Although a small body of research indicates that American multinationals exhibit centralized human resource functions with headquarters that set or influence policy on a range of employment matters,[435] many elements of U.S. workplace practice are not exportable due to the regulatory constraints of host countries and native cultural assumptions.[436] Nevertheless, it is entirely possible that where host country law is similar or at least not antithetical to U.S. law, American multinationals and their U.S. employment counsel will endeavor to establish abroad preventive and compliance practices that approximate those they have at home, if only where it serves the corporations' economic interests to do so.[437] Multinational employers may be motivated to take a preventive approach, for example, in

433. *See* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 576–92 (2001).

434. *Id.* at 577–78.

435. *See* Anthony Ferner, *Country of Origin Effects and HRM in Multinational Companies*, 7 HUM. RES. MGMT. J. 19, 20 (1997) (reviewing the studies).

436. *Id.* at 33.

437. Multinational corporations are beginning to evidence an interest in exporting some dispute avoidance programs to the global worksite. A recent article in HR Magazine, for example, described the challenge of adapting diversity training programs, a mainstay of preventive practice, for the Latin American workplace. *See* Dee Dee Doke, *Shipping Diversity Abroad*, HR MAG., Nov. 2003, at 58–64. *See generally* Gary W. Florkowski & Raghu Nath, *MNC Responses to the Legal Environment of International Human Resource Management*, 4 INT'L J. HUM. RES. MGMT. 305, 315 (1993) (discussing the way multinationals can enact their own legal environments).

countries with new anti-discrimination legislation,[438] at overseas worksites where American citizens both work and are protected by U.S. civil rights law,[439] or to forestall or respond to the criticisms of foreign workers, unions, non-governmental organizations, and consumers.[440] The ability to realize multinational's preventive objectives, and thus increase client satisfaction, could be greatly enhanced by a well-functioning network of international legal colleagues.[441] Whether this would represent a positive development in employment law and practice is impossible to predict. One must acknowledge, however, that prevention and compliance strategies can influence, for better or for worse, the development of legal regimes and practices abroad. Moreover, the recent criticism of the American approach as promoting symbolic forms of compliance at the expense of those that are substantive cannot help but give pause to employee advocates here and abroad.

Finally, there is one additional reason why I believe an international employment lawyering style, were it to emerge, might be based on a U.S. model. The U.S. style of representation, with an emphasis on prevention and innovation, best plays to a trend identified by Professor Arthurs' study. Arthurs reviewed changes taking place in the industrial relations systems of the United States, the United Kingdom, the Netherlands, Mexico, France, and Canada. All, he noted, to a lesser or greater extent, were moving toward "deregulated labour markets, disempowered unions, insecure job tenure and flexible, non-standard terms of employment."[442] These

438. *See* Doke, *supra* note 437, at 60 (discussing fairly recent anti-discrimination legislation in Brazil and the adoption by several multinationals of diversity programs in response to it); *see also* Saguy, *supra* note 22, at 64 (finding "some evidence that French employers may be more likely to address the issue of sexual harassment when they are part of an American multinational firm").

439. *See* INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 4, at 50–93 (discussing the extraterritorial application of the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Title VII).

440. *See* Arthurs, *supra* note 105, at 479 ("[I]t is in the interests of transnational corporations to cosmeticize conflict . . . to pacify workers, neutralize unions, and reassure NGOs, governments, and consumers—all objectives that can be facilitated by adopting voluntary codes [of conduct].").

441. One should not expect that such networks would create convergent employment relations systems. To the contrary, the interaction between the differing legal cultures of the practitioners might well produce hybrid solutions, different in complexion from those found in the United States and the host country. Indeed, there is evidence that the employment relations systems of the industrialized economies display increasing diversity. *See* Harry C. Katz & Owen Darbishire, *Convergences and Divergences in Employment Systems*, *in* GLOBAL COMPETITION AND THE AMERICAN EMPLOYMENT LANDSCAPE: AS WE ENTER THE 21ST CENTURY 665–89 (Samuel Estreicher ed., 2000).

442. Arthurs, *supra* note 2, at 289; *see* Kerry Rittich, *Feminization and Contingency, in* LABOUR LAW IN AN ERA OF GLOBALIZATION 117, 120–21 (Joanne Conaghan et al. eds., 2002)

changes in state law allow corporations to exert greater influence over workplace structures, power that is exercised in the realm of private ordering.[443] To the extent that he is correct in his assessment, it would seem that American employment lawyering style, committed to instituting private regulatory systems that insulate employers from the incursion of state law, would be well-suited to the task of assisting employers with what Professor Arthurs calls "the new laws of work."[444]

Of course, the above thought experiment depends on the continuation of what anecdotally appears to be the rather recent interest of multinationals in implementing global policies. Further research is necessary to establish that global corporations are indeed on that track. Moreover, the emergence of commonalities in lawyering styles would also depend upon the continuing interest of firms like Littler Mendelson to develop their global practices. Along these lines, I was somewhat surprised to learn recently that Littler had no international panels at its 2003 annual conference. Scott Wenner attributed this to a complete restructuring of The Employer conference format.[445] The new style event is one whole day shorter and focused on fewer but high caliber attendees: "in house lawyers and HR Vice President and Director-level representatives."[446]

The Employer 2004 conference did feature a global panel entitled "Employment Law Challenges in a Time of Global Migration," which considered U.S. employers' "reliance on a global workforce," including trends and legal issues associated with global hiring, retention, and transfers.[447] The session featured a roundtable discussion with Leslie Lanna, a manager from Intel Corporation, Andrea Elliot, who at the time of the conference had recently become Global Resources Director of Littler Mendelson Bacon & Dear, and Laura Becking, an attorney with Donahue & Partners, a firm affiliated with Ernst & Young.[448] Littler apparently decided to forgo in 2003 and 2004 its strategy of introducing its clients to foreign practitioners through the firm's annual conference. Instead, it chose

(discussing the "market reform agendas" of many countries and how they require workers to embrace risk, eschew job security, and forego collective action).

443. Arthurs, *supra* note 2, at 289.

444. *Id*.

445. E-mail from Scott Wenner, Partner, Littler Mendelson, to Susan Bisom-Rapp, Associate Professor, Thomas Jefferson School of Law (Oct. 24, 2003) (on file with author).

446. *Id.*

447. Littler Web site, http://www.reg4.com/littler/04rtdetails.asp (last visited July 7, 2004).

448. *See* Littler Web site, http://www.reg4.com/littler/04speakers.asp (last visited July 7, 2004).

to highlight global migration, a subject it is positioned to assist its clients with given the launch in June 2004 of Littler Mendelson Bacon & Dear's "Littler Global division," which handles complex immigration issues confronting multi-national employers that are increasingly moving employees around the world.[449]

In the meantime, Donald Dowling, who judged the importance of international labor and employment law practice as "exploding," in October 2003 became international labor and employment law counsel for Proskauer Rose LLP, and reports that all of his practice, based in New York, will be dedicated to cross-border human resource law matters.[450] It will undoubtedly be years before we can assess the results of these formative efforts at globalization. Nonetheless, they hold the potential to shake our conventional understanding of the nature of labor and employment law practice to its core.

449. *See Littler Mendelson Bacon & Dear Launches Legal Industry's First Global Migration Group*, FINDLAW LEGAL NEWS AND COMMENTARY, June 30, 2004, *available at* http://news.findlaw.com/prnewswire/20040630/30jun2004124251.html (last visited Sept. 2, 2004). The global strategies of any firm may evolve at a rapid pace and my study is simply a snapshot of a particular period in time. Littler, at the present time, is evaluating its international efforts and may well settle on a strategy different from that presented in this article.

450. Don Dowling, fact sheet on Proskauer Rose's International Labor and Employment Law Practice (2003) (on file with the author).