



LegalWriting  
institute

## Monograph Series

### Volume 13—Examining Legal Writing Empirically

This article was originally published with the following citation:

Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59 (2007).

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TRANSACTIONAL LAW IN THE REQUIRED  
LEGAL WRITING CURRICULUM: AN EMPIRICAL STUDY OF  
THE FORGOTTEN FUTURE BUSINESS LAWYER

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#### I. INTRODUCTION

News Flash: All lawyers are litigators. Each and every lawyer in America spends his or her career conducting jury trials, authoring motions and memoranda of law, and prosecuting appeals. Without exception, the day-to-day life of every attorney includes depositions, choosing jurors, and arguing motions.

Perhaps you are thinking that this thesis will prove difficult to defend. You would be right; the truth is that not all lawyers are litigators. In fact, few practicing lawyers will ever try a case to a jury or argue an appeal. Yet, by examining a cross-section of American law schools' required Legal Research and Writing (LRW) courses, the average on-looker would think that every law student will some day become a litigator. This simply is not so.

In fact, research shows that the vast majority of first-year law students, despite the trend toward legal specialization,<sup>1</sup> have no idea what area of practice they will pursue. Furthermore, even among those who are targeting a specific subfield of the law, a surprisingly small number claim to be headed towards a life of litigation. Yet law schools accredited by the American Bar Association and the Association of American Law Schools overwhelmingly focus students' attention on litigation by means of their required LRW curriculum. These courses traditionally begin with an office memorandum assessing the likelihood of success of a forthcoming lawsuit, then move on to a persuasive brief (usually in a trial court), and conclude with an oral argument.<sup>2</sup> This approach both subliminally pushes law students towards litigation and, at the same time, omits transactional drafting skills that many will need.<sup>3</sup>

So, what then should we do? Is there any justification for the inclusion of transactional drafting instruction within the mandatory LRW curriculum? Are there really sufficient numbers of incoming law students devoted to transactional practice that law schools should tinker with a tried-and-true method that arguably provides continuity between the doctrinal and the practical? While litigation training in first-year LRW courses allegedly has formative benefits for all students,<sup>4</sup> would transactional drafting instruction be a waste of time for those uninterested in that subject? On the other hand, by ignoring transactional skills are we subliminally and artificially pushing students towards a career in litigation?<sup>5</sup> In so doing, is LRW pedagogy nothing more than a tool of the market-place, funneling future workers into practice areas to supply work-force demands?

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<sup>1</sup>Lynn A. Epstein, *The Technology Challenge: Lawyers Have Finally Entered the Race But Will Ethical Hurdles Slow the Pace?*, 28 NOVA L. REV. 721, 727 (1994) (identifying the recent trend towards specialization in the legal field).

<sup>2</sup>Kenneth D. Chestek, *Reality Programming Meets LRW: The Moot Case Approach to Teaching the First Year*, 38 GONZ. L. REV. 57, 62-63 (2003) (identifying "legal analysis, predictive memo writing, persuasive writing, and legal research" as the substance of most first-year LRW courses); Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis or More?*, 100 DICK. L. REV. 245, 281 (1996).

<sup>3</sup>See generally Chestek, *supra* note 2 (critiquing briefly the traditional LRW curriculum as often too litigation-centric). Although discussed frequently, no commentator has directly addressed the need for (and the feasibility of) required transactional instruction. See also Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten "Dirt Lawyer,"* 62 U. PITT. L. REV. 335, 335 (2000) (critiquing the law school curriculum's traditional focus on litigation at the expense of students with future transactional careers).

<sup>4</sup>Melissa H. Weresh, *Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 TOURO L. REV. 427, 435 (2005) (arguing that legal writing courses teach the fundamentals of legal analysis and "clearly integrate many of the skills and values in the traditional legal writing curriculum").

<sup>5</sup>See Christine Nero Coughlin, *Cogito, Ergo Sum or I Think, Therefore I Am [A Lawyer?], A Comment on "Is 'Thinking Like a Lawyer' Really What We Want to Teach?,"* 1 J. ASS'N LEGAL WRITING DIRECTORS 113, 115 (2002) ("If an institution adds more upper-level legal writing courses, it should adopt . . . a transactional tier, a litigation tier, and a judicial/academic tier.").

This Article will examine whether the expansion of required LRW courses into the realm of transactional drafting is justifiable.<sup>6</sup> Part II will assess the need for required transactional drafting instruction by showing, empirically, that many students lack a disposition towards litigation or have an affirmative inclination towards non-litigation work. This Part includes both a quantitative and qualitative analysis of the issue: It includes a survey of nearly one-thousand first-year law students nationwide and a set of questions and responses from a number of law students who self-identified as future transactional lawyers but who were members of traditional litigation-centric LRW courses. Part III will establish that, despite a significant demand for transactional drafting instruction, law schools' curricula include inadequate numbers of such courses.<sup>7</sup> Drawing on this research, Part IV argues that law schools should expand their required LRW courses, not necessarily in the first-year, to include additional training for both the future transactional lawyer *and* the future litigator. This Part describes several models of required LRW courses that would facilitate a more holistic approach to legal writing by implementing transactional skills training.

The task of expanding law schools' writing curricula is not without its difficulties. This article concludes, however, that only through this expansion will legal education adequately prepare students and quell the continuing complaints from legal employers that new lawyers simply lack basic writing skills.<sup>8</sup>

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<sup>6</sup>A threshold issue is the question: What is transactional drafting? For purposes of this analysis, I will adopt Professor Michael R. Smith's definition, which states:

Legal drafting is generally broken down into three subcategories. The first is *transactional drafting*—the writing of documents that memorialize and effectuate a client's intentions in connection with business and financial events and transactions.

Examples include:

- general contracts to which a client is a party
- a client's estate planning documents, such as wills, trust agreements, and powers of attorney
- documents created in connection with a client's real estate transactions, such as purchase and sale agreements, deeds, leases, mortgages, promissory notes, construction contracts, easements, and restrictive covenants
- documents created in connection with a client's personal property transactions, such as contracts of sale, bailment contracts, bills of sale, security agreements, promissory notes, and leases
- documents created in connection with business entities of which a client is a part, such as partnership agreements, joint venture agreements, franchise agreements, articles of incorporation, and corporate bylaws.

Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. LEGAL EDUC. 119, 124 (2004).

<sup>7</sup>*Cf.* KRISTIN GERDY ET AL., ASSOCIATION OF LEGAL WRITING DIRECTORS/LEGAL WRITING INSTITUTE, 2003 SURVEY RESULTS 9 (2003), available at [http://www.alwd.org/alwdResources/surveys/2003survey/PDFfiles/2003surveyresults\\_alwd\\_.pdf](http://www.alwd.org/alwdResources/surveys/2003survey/PDFfiles/2003surveyresults_alwd_.pdf) (Question 20; showing that forty-four of the 170 reporting schools include "drafting documents"); *see also* Amy E. Sloan, *Erasing Lines: Integrating the Law School Curriculum*, 1 J. ASS'N LEGAL WRITING DIRECTORS 3, 7 n.16 (2002) (stating that the answers to Question 20 in the survey indicate that some first-year LRW courses introduce students to transactional drafting).

<sup>8</sup>*See* Matthew C. Cordon, *Beyond Mere Competency: Advanced Legal Research in a Practice-Oriented Curriculum*, 55 BAYLOR L. REV. 1, 2-4 (2003) (discussing the legal field's criticism of the theory-based curriculum and finding that a significant percentage of

## II. ASSESSING THE DEMAND FOR TRANSACTIONAL DRAFTING INSTRUCTION: QUANTITATIVE AND QUALITATIVE ANALYSES OF THE NECESSITY FOR EXPANSION

Preliminary data and anecdotes suggest that a need exists in the academy for more transactional writing training. It also suggests that LRW professors are generally not called upon to satisfy that need. The open question, however, is how students feel about all of this. How many students are out there who are interested in transactional careers? One would think that the influence of films, books, and television shows about litigation would produce more would-be litigators than would-be transactional lawyers.<sup>9</sup> Is this true? If not, then how does the LRW curriculum treat transactional law-inclined students? Is there really a need, from a demand-side analysis, for more transactional instruction?

This Part addresses that question in two ways, both empirically-based. First, it discusses the results of a large-scale survey of first-year law students asking them, as they entered law school, whether they were interested in a career in litigation, transactional law, or “other” areas of law. The results of this quantitative analysis are surprising and support my general thesis that law schools should expand their mandatory LRW curricula to include transactional writing skills. The second analysis, a separate qualitative study, probes more deeply. A number of students, all inclined heavily towards careers in transactional practice, were specifically asked (in a questionnaire format) to detail their experiences in the strictly litigation-oriented mandatory LRW course. The results of this analysis show that the traditional litigation-oriented LRW curriculum<sup>10</sup> under-serves transactional law-inclined students, possibly subliminally pushes them towards litigation, and leads to the conclusion that law schools should be doing more.

### A. *Quantitative Analysis: A Nationwide Survey of Student Interest in Transactional Drafting Skills*

In the late summer and early fall of 2005, I conducted an extensive survey of incoming first-year law students across the nation. The purpose of this survey was to determine the percentage of law students who enter law school interested in litigation practice, transactional practice, or “other” types of practice. Surveying incoming law students provided an opportunity to determine student interest prior to any significant influence by the academy. Nearly one-thousand students participated,<sup>11</sup> and their responses are surprising to say the least.

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respondents, 51.2%, thought that the ability to draft legal documents were of great importance for their daily work).

<sup>9</sup>To my knowledge, there has yet to be a “Law and Order: Transactional Drafting Unit.”

<sup>10</sup>Please note my use of the more inclusive word “curriculum” rather than just the word “course.” There is a reason for this semantic choice, which will be discussed in Part IV.

<sup>11</sup>This survey received the approval of the Suffolk University Institutional Review Board. Most universities, Suffolk included, require any research conducted on human participants to conform to standards established by the federal government. *See* 45 C.F.R. § 46.101-.409 (2005). To meet these standards, researchers generally must submit an application to their home universities describing the research and must complete an online training series. *See* National Cancer Institute, U.S. National Institutes of Health, Human Participant Protections Education for Research Teams, <http://cme.cancer.gov/clinicaltrials/learning/humanparticipant-protections.asp> (last visited Mar. 1, 2007). For an example of one university’s requirements,

### 1. Methodology

In September of 2005, I contacted the directors of the Legal Writing programs at about twenty schools nationwide asking whether their school would agree to facilitate the study. Ultimately, thirteen schools agreed, and the chosen schools equally represented several controlled categories: (1) geographic location; (2) law school size (based on number of students); (3) public or private; and (4) the U.S. News & World Report tier rankings.<sup>12</sup> In other words, there was a fairly equal distribution of schools from each sub-group of these categories. There were three schools from the Northeast,<sup>13</sup> three schools from the Midwest,<sup>14</sup> three schools from the Southwest,<sup>15</sup> two schools from the Northwest,<sup>16</sup> and two schools from the South.<sup>17</sup> There were four schools with incoming first-year classes numbering zero to 175,<sup>18</sup> four numbering 175-225,<sup>19</sup> and five numbering above 226.<sup>20</sup> There were seven private schools,<sup>21</sup> and the other six were public.<sup>22</sup> Finally, there were two Tier One

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see Institutional Review Board, Suffolk University College of Arts and Sciences, General Information, <http://www.suffolk.edu/college/17776.html> (last visited Mar. 1, 2007).

<sup>12</sup>See U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS 60-63 (2006 ed. 2005). The use of this control in the study does not reflect an acceptance of the methodology or propriety of these rankings. Rather, I have used this factor as a general tool to control for variables in the type of student at each school. In other words, including a proportionate number of schools from each tier controls for the assertion that higher tiered schools might conform to more of a business orientation.

<sup>13</sup>These schools were Boston College Law School, University of Maine School of Law, and Suffolk University Law School. See Louis N. Schulze, Jr., Quantitative Analysis Survey Notes 7-8 (September 12, 2005) (unpublished project notes) (on file with author) [hereinafter Survey Notes].

<sup>14</sup>These schools were the University of Minnesota Law School, Wayne State University Law School, and Hamline University School of Law. *Id.*

<sup>15</sup>These schools were Arizona State University College of Law, the William S. Boyd School of Law at the University of Nevada, Las Vegas, and Golden Gate University School of Law. *Id.*

<sup>16</sup>These schools were the University of Oregon School of Law and Willamette University College of Law. *Id.*

<sup>17</sup>These schools were the Cumberland School of Law at Samford University and Nova Southeastern University Shepard Broad Law Center. *Id.*

<sup>18</sup>These schools included Samford, Maine, Wayne State, and UNLV. *Id.*

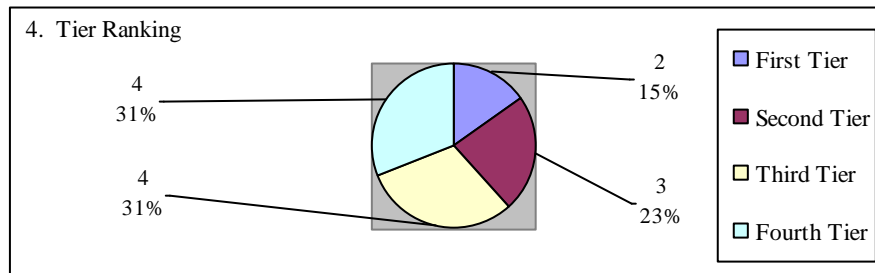
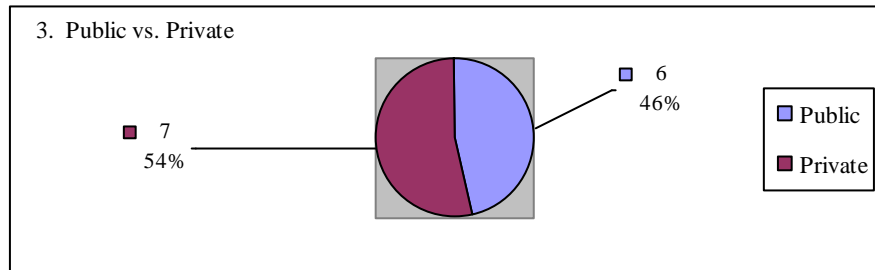
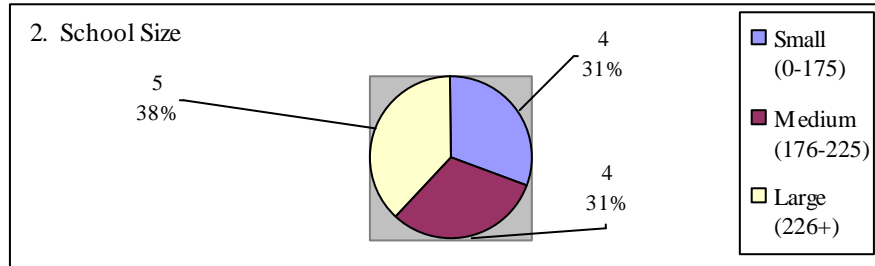
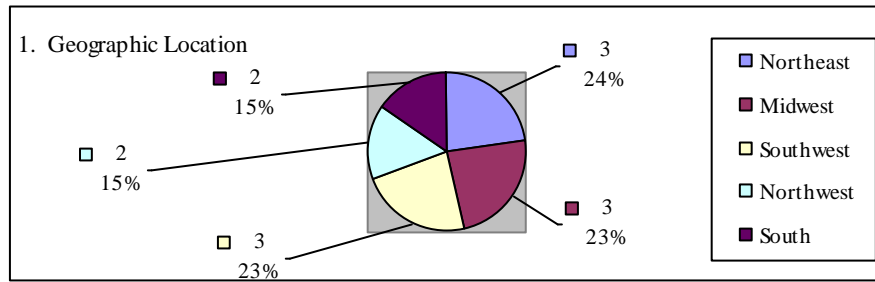
<sup>19</sup>These schools included Oregon, Minnesota, Willamette, and Golden Gate. *Id.*

<sup>20</sup>These schools included Hamline, Suffolk, Boston College, Arizona State, and Nova Southeastern. *Id.*

<sup>21</sup>These schools are Boston College, Suffolk, Hamline, Golden Gate, Willamette, Samford, and Nova Southeastern. *Id.* at 8.

<sup>22</sup>These schools are Maine, Minnesota, Wayne State, Arizona State, UNLV, and Oregon. *Id.*

schools,<sup>23</sup> three Tier Two schools,<sup>24</sup> four Third Tier schools,<sup>25</sup> and four Fourth Tier schools.<sup>26</sup> This data is graphically represented as follows:



<sup>23</sup>These two schools were Minnesota and Boston College. *Id.*

<sup>24</sup>These three were Arizona State, Oregon, and UNLV. *Id.*

<sup>25</sup>These four schools were Samford, Maine, Willamette, and Wayne State. *Id.*

<sup>26</sup>These four schools were Suffolk, Nova Southeastern, Hamline, and Golden Gate. *Id.*



Upon agreeing to facilitate the survey, LRW directors received an email to forward to all students in their incoming first-year class. When forwarded to those students, the email included brief instructions<sup>27</sup> and a hyperlink to the online survey.<sup>28</sup> Upon reaching that website, students encountered a brief statement regarding the purpose of the survey.<sup>29</sup> After clicking on a link to start the survey, participants encountered four questions.<sup>30</sup> The first asked if the participant was a first-year student at an ABA-accredited law school.<sup>31</sup> The second question asked if

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<sup>27</sup>The professors were asked to send the e-mail with a message similar to the following: Professor Louis Schulze, Suffolk Univ. Law School, is conducting a survey of first-year law students to determine their career interests. The survey is short and simple; it will take no more than three minutes to complete. In addition, your identity (i.e., your email address) will not be disclosed to anyone. Would you take a couple minutes to help Professor Schulze in his research project? You need only click on this link[.] <http://www.zoomerang.com/survey.zgi?p=WEB224NS48GRCF>. Thank you. Professor \_\_\_\_\_.

*See, e.g.*, e-mail from Louis N. Schulze, Jr., Assistant Professor of Legal Writing, Suffolk University Law School, to Alice Silkey, Director, Legal Research and Writing, Hamline University School of Law, et al. (Sept. 28, 2005, 3:52:00 EDT) (on file with author).

<sup>28</sup>I used the online survey product “Zoomerang,” which I highly recommend. I chose to use an online survey methodology for many reasons. First, the fact that this survey was nation-wide would have created logistical problems for a traditional paper survey. The online survey provided easy access for participants (i.e., they merely had to click on a hyperlink to participate), and it also automatically compiled statistics. Second, given that the participants were all incoming first-year law students, I expected the vast majority of them to be below the age of twenty-five, and thus, generally comfortable with computers and online activities. Finally, recent scholarship has asserted that online survey methodology is as good as (or better than) traditional paper surveys. EARL R. BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 271 (10th ed. 2004) (stating that Internet based social science research techniques are actually more efficient than conventional techniques and do not comprise the quality of data). In fact, one commentator notes that Internet surveys may soon replace traditional methods. *Id.* (quoting Mick P. Couper, *Web Surveys: A Review of Issues and Approaches*, 64 PUB. OPINION Q. 464, 464 (2000)). One theory for this is particularly intriguing: Participants generally give more accurate answers due to the anonymity of an internet setting. When physically presented with a paper survey, in person, by those conducting the survey, participants have less of a feeling of anonymity. Accordingly, an online methodology was the optimum choice for this endeavor. For additional information on conducting empirical research, see ALAN ARGESTI & BARBARA FINLAY, *STATISTICAL METHODS FOR THE SOCIAL SCIENCES* (3d ed. Prentice Hall 1997); JOHN FOX, *APPLIED REGRESSION ANALYSIS, LINEAR MODELS, AND RELATED METHODS* (1997). For an excellent example of empirical research in the LRW field, see Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81 (1996).

<sup>29</sup>The statement read as follows: “First Year Law Student Survey. Thank you for participating in this survey. The results will be published in a forthcoming law review article and, hopefully, will have an impact on law school curriculum quality.” First-Year Law Student Survey, <http://www.zoomerang.com/survey.zgi?p=WEB224NS48GRCF> [hereinafter Survey Website] (last visited Mar. 1, 2007).

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

the participant was a full-time student.<sup>32</sup> The fourth question sought the participant's email address and assured them that that address would not be disclosed.<sup>33</sup>

The third question was the substantive one.<sup>34</sup> Its instruction read as follows: "As you now enter law school, what general areas of legal practice do you see yourself pursuing as a career? For each practice area listed below, please indicate the likelihood that you will practice in that area after graduating."<sup>35</sup> Three choices immediately followed, which defined<sup>36</sup> each practice area and gave the participant the choice of answering either "Very Likely," "Somewhat Likely," "Possible," "Somewhat Unlikely," or "Very Unlikely" for each practice area.<sup>37</sup> The question, thus, looked like this:

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<sup>32</sup>The survey sought participation only by full-time first-year students in ABA-accredited law schools. It sought only full-time students because other students would likely already have a career, and, thus, be predisposed to a certain answer for reasons outside the purview of this research. I surveyed only first-year students because I sought answers free from the influences of the law school environment. One sub-thesis of this article is that the traditional litigation-centric LRW program subliminally pushes students toward a career in litigation. Therefore, had this research included participation from upper-class students, those participants already would have been subjected to the subliminal influences of law school and the LRW courses.

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

<sup>34</sup>Obviously, this survey was very simple, and I intentionally designed it that way. The most effective empirical research is that which is most simple and most clear. See BABBIE, *supra* note 28, at 245 ("Closed-ended questions are very popular in survey research because they provide a greater uniformity of responses and are more easily processed than open-ended ones.").

<sup>35</sup>Survey Website, *supra* note 29; *see infra* p. 68.

<sup>36</sup>These definitions proved to be the most difficult part of the survey design. I consulted a number of sources for input on how to name and define the broad, general areas I sought to analyze. Ultimately, I chose three such general areas: (1) litigation; (2) transactional; and (3) quasi-legal. I defined the first area, litigation, by giving examples of "business lawsuits, prosecutor, personal injury lawsuits, criminal defense attorney, etc." I defined transactional with the examples of "mergers & acquisitions, corporate practice, real estate transactions, securities transactions, etc." Finally, I defined quasi-legal as including "academic, political, non-law careers, etc." These names and definitions represented the consensus of all the sources, professors both in the legal writing field and elsewhere, that I consulted.

<sup>37</sup>Survey Website, *supra* note 29; *see infra* p. 68. The survey adopted this structure based upon Babbie's guidelines. See BABBIE, *supra* note 28, at 245 (Structuring of closed-ended questions should be guided by two requirements: (a) response categories should be exhaustive; and (b) the categories must be mutually exclusive (i.e. the responder should not be compelled to answer more than one).).

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As you now enter law school, what general areas of legal practice do you see yourself pursuing as a career? For each practice area listed below, please indicate the likelihood that you will practice in that area after graduating.

1	2	3	4	5
Very Likely	Somewhat Likely	Possible	Somewhat Unlikely	Very Unlikely

Litigation (i.e. business lawsuits, prosecutor, personal injury lawsuits, criminal defense attorney, etc.)

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
----------------------------	----------------------------	----------------------------	----------------------------	----------------------------

Transactional (i.e. mergers & acquisitions, corporate practice, real estate transactions, securities transactions, etc.)

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
----------------------------	----------------------------	----------------------------	----------------------------	----------------------------

Quasi-Legal (academic, political, non-law careers, etc.)

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
----------------------------	----------------------------	----------------------------	----------------------------	----------------------------

Students then ranked their choices, indicating a five if they were “very unlikely” to choose to practice in that particular field and a one if they were “very likely” to choose that field. The survey ran from October 3, 2005 through October 17, 2005. Ultimately, the survey was distributed to 2472 law students.<sup>38</sup>

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<sup>38</sup>Survey Notes, *supra* note 13, at 7. This number was determined by the responses of the LRW Directors who received recruiting emails. *Id.* After sending the survey email to all students in their first-year full-time program, LRW Directors emailed me confirming that they had sent the email and reporting the number of students to whom they sent it. *Id.* The figure cited above is the total of all such reports. *Id.*

## 2. Survey Results

By the end of the survey, 969 students responded.<sup>39</sup> This represents a response rate of 39.19%, which is considered an acceptable and statistically significant response rate for a survey of law-related subjects.<sup>40</sup> I attribute the high number of responses to the fact that students in their first year of law school (in October) are eager to please their professors.<sup>41</sup> Accordingly, when they received an email from a professor asking them to participate in a study, I am not surprised that students jumped at the chance to comply.<sup>42</sup>

Ultimately, 167 students (17%) answered that they were “very likely” to pursue a career in litigation. Two-hundred students (21%) reported that they would be “very likely” to pursue a career in transactional law, while 148 (15%) stated that they were “very likely” to pursue a quasi-legal career. For the “somewhat likely” category, 234 (24%) chose litigation, 243 (25%) chose transactional, and 254 (26%) chose quasi-legal. In the “possible” category, 283 (29%) chose litigation, 202 (21%) chose transactional, and 269 (28%) chose quasi-legal.

The remaining results detail the percentage of students unlikely to choose the given areas. One hundred fifty-seven students (16%) reported that they were “somewhat unlikely” to choose litigation. One hundred sixty-five students (17%) chose this category for transactional work, while 184 (19%) stated the same response for quasi-legal fields. In the “very unlikely” category, 121 students (13%) chose litigation, 144 students (15%) chose transactional, and 104 (11%) chose quasi-legal.

The results, in tabular format, appear as follows:

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<sup>39</sup>Quantitative Analysis Data (November 21, 2005) (unpublished project data compiled by Zoomerang) (on file with author).

<sup>40</sup>See Kim Sheehan, *E-mail Survey Response Rates: A Review*, J. COMPUTER-MEDIATED COMM., Jan. 2001, <http://jcmc.indiana.edu/vol6/issue2/sheehan.html#discussion> (reporting a mean response rate of 36.83% of thirty-one studied email/web-based surveys); R.N. Singh et al., *Reforming the Jury System: What Do Judges Think?*, 63 TEX. B.J. 948, 952 (2000) (“[A] 25 percent response rate is considered ‘acceptable’ by many in sociological surveys[.]”); Judith D. Fischer, *The Use and Effects of Student Ratings in Legal Writing Courses: A Plea for Holistic Evaluation of Teaching*, 10 J. LEGAL WRITING INSTRUCTION 111, 139 n.195 (stating that there is no standard for what is an acceptable survey response rate and that surveys of busy attorneys often report acceptable response rates of 24%). *But see* BABBIE, *supra* note 28, at 261 (stating that for a traditional, non-web-based survey, a response rate of 50% is adequate; 60% is good; 70% is very good).

<sup>41</sup>See, e.g., James B. Levy, *As a Last Resort, Ask the Students: What They Say Makes Some an Effective Law Teacher*, 58 MAINE L. REV. 49, 67-68 (2006) (reporting a significantly higher response rate among first-year students (54%) than for second-years (35%) and third-years (45%)).

<sup>42</sup>Note, however, that students were informed that their identity would be anonymous, and, thus, their grades would not be affected by whether or how they responded. This, according to the literature, is critical to ensuring that subject participation is by means of informed consent. Jack P. Lipton, *Trademark Litigation: A New Look at the Use of Social Science Evidence*, 29 ARIZ. L. REV. 639, 652 (1987) (citing Eleanor Singer, *Informed Consent: Consequences for Response Rate and Response Quality in Social Surveys*, 43 AM. SOCIOLOGICAL REV. 144 (1978)).

3. As you now enter law school, what general areas of legal practice do you see yourself pursuing as a career? For each practice area listed below, please indicate the likelihood that you will practice in that area after graduating.					
The top percentage indicates total respondent ratio; the bottom number represents actual number of respondents selecting the option	1. Very Unlikely	2. Somewhat Unlikely	3. Possible	4. Somewhat Unlikely	5. Very Unlikely
1. Litigation (i.e., business lawsuits, prosecutor, personal injury lawsuits, criminal defense attorney, etc.)	17% 167	24% 234	29% 283	16% 157	13% 121
2. Transactional (i.e., mergers & acquisitions, corporate practice, real estate transactions, securities transactions, etc.)	21% 200	25% 243	21% 202	17% 165	15% 144
3. Quasi-Legal (academic, political, non-law careers, etc.)	15% 148	26% 254	28% 269	19% 184	11% 104

### 3. Analysis of the Survey Results

#### *a. Survey Says: Transactional Law More Popular than Litigation?*

When I began this research, I believed that at least a solid number of students entering law school had a strong interest in transactional law. The results of some initial test-surveys led me to believe that these numbers were sufficient to conduct a broader study and to plan this law review article. On the other hand, however, I believed that the majority of incoming law students would be inclined towards a career in litigation. I came to this initial conclusion based on two things. First, anecdotally, the students I had taught over the years left me with the impression that they generally leaned toward litigation, with perhaps a few others (mostly with business or accounting undergraduate majors) firmly inclined towards transactional work. Second, I also considered the fact that American popular culture, when focusing on the legal field, does so in the context of litigation. When Hollywood portrays a story in the world of law, it does so by means of depicting a trial or some other form of litigation. After all, trials and depositions can be dramatic. In contrast, Hollywood rarely focuses on an in-depth examination of transactional lawyers or depict plot-lines in the world of transactional law. Therefore, given these influences, I presumed that incoming law students would likely be drawn to litigation, not to transactional careers. This proved incorrect.

For instance, the survey results detail a slight numerical preference towards transactional practice. While only 17% of students were “very likely” to focus on litigation, 21% indicated that they were “very likely” to pursue a transactional career. This is the result that surprised me the most. Furthermore, the second category also

bolsters the conclusion that more students are interested in transactional practice than previously thought: 25% of respondents indicated that they were “somewhat likely” to practice transactional law, compared to 24% giving the same response for litigation. While this difference is insufficient to create a statistically relevant deviation, it is nonetheless remarkable that, of the two “positive” response categories, the mean difference between transactional and litigation is 2.5 % in favor of transactional.

In contrast, however, the “negative” response categories, while showing a preference for litigation, did so only slightly. While 16% of respondents stated that they were “somewhat unlikely” to pursue litigation, the corresponding answer for transactional law was only 1% higher, at 17%. Meanwhile, only a 2% difference exists between litigation and transactional law for the “very unlikely” category: 13% for litigation and 15% for transactional.

While these figures by no means prove that students pervasively prefer transactional law, the results nonetheless lead to the conclusion that there are more students interested in transactional law than previously thought. Indicia of academia’s inexact calculation of the percentage of students interested in transactional law can be gleaned from the percentage of litigation assignments in the first-year LRW course relative to the percentage of transactional law assignments. As discussed in Part III, statistics show that litigation assignments constitute 66.46% of all LRW course assignments nationwide,<sup>43</sup> while transactional assignments comprise only 4.59%.<sup>44</sup> The upper-class writing course numbers paint a more positive picture given that there were 120 transactional drafting courses taught across America in 2006, compared to 111 litigation drafting courses.<sup>45</sup> But a few other statistics undermine even these numbers: (1) 41.67% of those upper-division transactional courses are overenrolled<sup>46</sup> (compared to just 38.46% for litigation),<sup>47</sup> and (2) there were 472 other upper-level writing courses whose titles suggest a litigation-oriented subject matter.<sup>48</sup>

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<sup>43</sup>This number is derived from Question 20 of the Annual Survey of the Association of Legal Writing Directors and the Legal Writing Institute. PHILIP FROST ET AL., ASSOCIATION OF LEGAL WRITING DIRECTORS/LEGAL WRITING INSTITUTE, 2006 SURVEY RESULTS 12 (2006), available at <http://www.lwionline.org/survey/surveyresults2006.pdf> [hereinafter ALWD/LWI Survey]. By adding all the litigation-oriented assignments (office memo (182), pretrial briefs (107), trial briefs (60), appellate briefs (150), pre-trial motion argument (74); trial motion argument (31); and appellate brief argument (147)) and dividing this total (751) by the total number of assignment responses (1130). *Id.*

<sup>44</sup>This number is derived from Question 20 by adding all transaction-oriented assignments (drafting documents 56) and dividing this total by the total number of assignment responses. *Id.*

<sup>45</sup>*Id.* at 21-22.

<sup>46</sup>*See infra* notes 128-30 and accompanying text.

<sup>47</sup>*See infra* note 131 and accompanying text.

<sup>48</sup>This number is derived from Question 35 of the ALWD/LWI Survey, *supra* note 43, at 21-22. While there are 120 transactional drafting courses in American law schools, compared to only 111 litigation-drafting courses, Question 35 also includes drafting classes whose names reflect a litigation orientation: Advanced Legal Writing—General Writing Skills (124);

The point here is that, despite the survey results showing a significant interest in transactional drafting instruction—a collective interest actually greater than or equal to the collective interest in litigation—schools’ curricular choices show an unawareness of this preference. This unawareness is most starkly demonstrated in the first-year writing course, which is virtually devoid of any transactional writing instruction.<sup>49</sup> As I shall explore, the reason that this distinction is important is because, by providing a first-year legal writing curriculum focused mostly upon litigation, perhaps we are artificially and subliminally directing our students towards this area of practice.

*b. Survey Says: Students’ Career Paths are Generally Uncertain as they Enter Law School; thus, the Curriculum Should Expand*

Another striking aspect of the survey results is that students apparently come into law school with an open mind. Rather than beginning their legal studies with a specific career path in mind (i.e., litigation, corporate, securities, etc.) students are apparently willing to explore the breadth of their law schools’ course offerings and subsequently determine where to focus their career-seeking efforts. In the alternative, perhaps students simply want to be lawyers, know that attorneys generally earn a solid income, and are willing to direct their careers where the market takes them. In any event, the survey data show that uncertainty exists in 1Ls’ minds regarding their careers, and I suggest that the lack of transactional instruction in the LRW curriculum (coupled with the litigation-oriented Langdell casebook method) artificially drives many open-minded students towards litigation.

So, how does the data prove this contentious thesis? A graphical illustration of my survey results would be a helpful tool. Assume, hypothetically, that students entered law school already confident in their choice of a legal sub-field. If students were sure of their career paths, one would expect to find high rates of response in the “very likely” and “very unlikely” categories. This would account for students who, knowing they want to be litigators, immediately reject transactional pursuits and, instead, answer affirmatively and clearly for litigation. It would also account for the opposite: Students sure of their intent on practicing transactional law would strongly reject litigation and immediately and clearly choose transactional. A graph of such a

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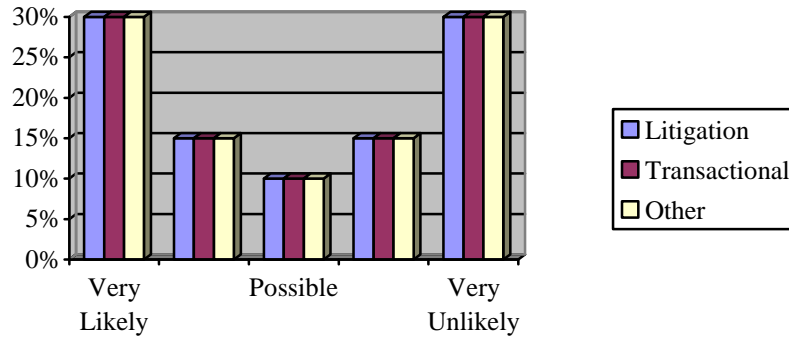
Advanced Legal Writing—Survey Course (44); General Drafting (115); and Advanced Advocacy (189). *Id.* The total of these courses is 472.

<sup>49</sup>Christine Hurt, *Erasing Lines: Let the LRW Professor Without Lines Throw the First Eraser, A Comment on “The Integration of Theory, Doctrine, and Practice in Legal Education,”* 1 J. ASS’N LEGAL WRITING DIRECTORS 80, 84 (2002).

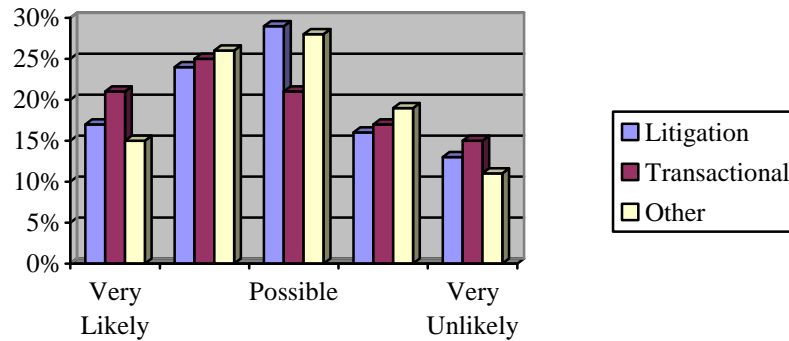
LRW programs have been fairly narrow in scope as to what practice skills are taught. . . . [M]ost LRW programs focus on assignments in a litigation setting. Law schools will not be serving the students by teaching practice skills that only half will use and ignoring practice skills that the other half of students will use.

*Id.* (footnote omitted); see also Sloan, *supra* note 7, at 7 n.16 (“Although litigation is not the only social context in which law exists, it is the one to which first-year students are most commonly introduced, in both doctrinal and legal research and writing classes.”); Silecchia, *supra* note 2, at 281 (“All too often, first year programs are so litigation-focused that they give students the impression that litigation is the only type of law practice.”). Professor Sloan notes, however, that some schools introduce students to transaction drafting in first-year LRW courses. Sloan, *supra* note 7, at 7 n.16. See also Muriel Morisey, *Liberating Legal Education from the Judicial Model*, 27 SETON HALL LEGIS. J. 231 (2003).

circumstance would produce bulges at the extreme ends of the chart and lower numbers in the middle, indicating certainty of students' career choice. Thus, such a chart would look something like this:



The actual results, however, paint a very different picture. Rather than seeing increased numbers at the extreme ends of the categories, we, instead, see a pronounced bulge in the least certain categories: “possible,” “somewhat likely,” and “somewhat unlikely.” The graph of the actual results is pictured below:



The fact that we see this reverse bulge indicates the contrary of the hypothetical graph; it indicates uncertainty in students' career choices. Otherwise, the “very likely” and “very unlikely” categories would be more prominently featured.

Of particular note is the fact that more students answered in the “very likely” or “somewhat likely” categories than for the “somewhat unlikely” or “very unlikely” categories. This shows that students are generally unwilling to rule out a particular career area, thus proving my thesis that students enter law school “with their minds open” and willing to try different subject matters before finalizing their career choice. We can safely conclude from these data, therefore, that American law students generally begin their legal training unsure as to what area of practice on which to focus.

Data showing student career uncertainty is a momentous revelation for LRW pedagogy and for broader law school curricular choices. If students generally enter law schools open to both litigation and transactional law, why then are we feeding them an exclusive diet of litigation? In LRW, we generally teach nothing other than



litigation skills.<sup>50</sup> Meanwhile, in doctrinal courses, the academy reinforces the not-so-subtle litigation push of LRW courses by utilizing the Langdell casebook method, which indoctrinates students on legal subjects by means of reading and discussing litigated appellate cases.<sup>51</sup> Even the few transactional subjects in the first-year curriculum, property and contracts, are taught by using examples from the world of litigation.<sup>52</sup> Students often complete their entire first-year contracts course without ever actually seeing a real contract.<sup>53</sup>

I suggest that this constant and unrelenting focus on litigation in the early stages of law school subliminally pushes students towards careers in that field.<sup>54</sup> This begs the question why schools would do such a thing; why would law schools push

<sup>50</sup>See *infra* notes 108-11 and accompanying text. As will be seen, at best, only 30.43% of schools include any transactional drafting instruction in the first-year LRW course. *Id.* However, this conclusion is a best-case scenario which assumes that all ALWD/LWI Survey respondents interpreted “drafting documents” to exclude litigation drafting. *Id.* In reality, I suspect that the real number is something more like 10-15%. Question 20 of the ALWD/ LWI Survey should be clarified to permit more accurate interpretation of this issue.

<sup>51</sup>Melissa Harrison, *Searching for Context: A Critique of Legal Education by Comparison to Theological Education*, 11 TEX. J. WOMEN & L. 245, 246 (2002).

In 1870, Dean Langdell at Harvard Law School introduced what would become the model for legal education to this day: the casebook method for the “scientific” study of law. “The study of law as a science assumed that doctrinal study of cases would disclose certain immutable principles, and that the graduate armed with knowledge of these principles was prepared to enter law practice.” The whole country followed Harvard’s lead, adopting curricula consisting almost entirely of appellate case study. *Id.* (quoting Greg Munro, *Integrating Theory and Practice in a Competency Based Curriculum: Academic Planning at the University of Montana School of Law*, 52 MONT. L. REV. 345, 346 (1991)). Langdell’s casebook method “advanced a formalist model which depicted the law as a system of autonomous, universal rules that could be applied deductively to pre-existing fact patterns.” Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 MERCER L. REV. 709, 739 n.66 (1998).

<sup>52</sup>See generally Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547 (1997) (discussing the development and current use of the Langdell casebook method). *But see generally* Lawrence M. Friedman & Stewart Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805 (critiquing the use of the casebook method in teaching contract law).

<sup>53</sup>Edith R. Warkentine, *Kingsfield Doesn’t Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112, 112 (2000) (citing Phyllis G. Coleman & Robert M. Jarvis, *Using Skills Training to Teach First Year Contracts*, 44 DRAKE L. REV. 725 (1996)). Professor Warkentine and others, no doubt, teach the contracts class using actual contracts. *Id.* Doing so, she contends, gives students an opportunity for actively learning, gets students excited about their law studies and motivates them to work harder, and makes learning contracts doctrine easier. *Id.*; see also Robert M. Lloyd, *Making Contracts Relevant: Thirteen Lessons for the First-Year Contracts Course*, 36 ARIZ. ST. L.J. 257, 257 (2004) (criticizing modern casebook-oriented contract teaching as focusing on the irrelevant).

<sup>54</sup>Empirical proof of this contention could come from a one-year longitudinal study: the first part would replicate the survey in this article; the second part would ask the same students (one year later) what career field they are focusing on as they enter their second year of law school.

students towards one field while neglecting those who might seek a future career in another field? One explanation is that law schools, eager to aggrandize their job placement statistics and, thus, improve in the all-important U.S. News & World Report law school rankings, push students towards practice areas where the job market has openings.<sup>55</sup> It has long been held that, even when the economy is slow, litigation still persists.<sup>56</sup> This cannot be said for the transactional field, whose hiring needs are generally dependent upon a booming business climate.<sup>57</sup> An example of this trend can be seen in the unprecedented layoffs in the corporate departments of large law firms during the early 2000s, which had been heavily dependent on work generated by the tech boom of the late 1990s.<sup>58</sup> Thus, perhaps law schools, relying on the blue-chip field of litigation, seek to train all students in litigation-oriented skills as a fall-back position should their transactional aspirations fall through.<sup>59</sup>

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<sup>55</sup>See Jeffery Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 240, 265 (2006) (discussing the negative curricular changes law schools make to improve U.S. News & World Report rankings scores); Paul L. Caron and Rafael Gely, Symposium Introduction, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L.J. 1, 7-8 (2006) (expressing the concern that, because of the U.S. News & World Report rankings, “law schools will target resources to move up the rankings hierarchy at the expense of their educational mission and without carefully considering the unintended consequences of such a shift in resources”); Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 688-89 (2005) (showing that litigation and civil procedure courses dominate the curriculum at the expense of ADR courses). See also Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES, July 31, 2005, at 4A (reporting that some schools will temporarily hire their own graduates to pump-up the schools’ U.S. News & World Report ranking).

<sup>56</sup>See Amy Horton, *Where the Hot Jobs Are*, NAT’L JURIST, <http://www.nationaljurist.com/news31071057.aspx> (last visited Mar. 1, 2007) (“Although litigation has its cycles, it’s less cyclical than transactional practices and typically provides steady employment opportunities.”).

<sup>57</sup>See Legal Authority, *One Attorney’s Experience: Making the Switch from Corporate to Litigation?*, <http://www.legalauthority.com/cc/practiceswitch.html> (last visited Mar. 1, 2007). One legal recruiter website states:

Given recent economic conditions, many [lawyers] choose to make the switch from corporate law to litigation each week. While this is not always the best choice . . . , it is an option that [lawyers] have chosen with increasing frequency due to the perceived stability of litigation as opposed to corporate positions. Due mainly to the better economy a couple of years ago, many attorneys were choosing to make the switch from litigation to corporate.

*Id.*

<sup>58</sup>See Horton, *supra* note 56 (discussing the “significant slowdown [in corporate law hiring] due to the burst of the high-tech bubble five years ago”).

<sup>59</sup>I am not suggesting some conscious, nefarious plot on the part of law schools to eschew transactional training in favor of litigation. In fact, given that transactional practice is inherently business-oriented, many schools likely would be quite happy to see their graduates enter such a lucrative field, thus increasing the likelihood of significant donations by alumni. Surely the over-emphasis on litigation also stems from the historical development both of the law school curriculum and LRW courses in general. Much of the reluctance to alter the

Attempting to secure jobs for graduates is certainly a benevolent and appropriate goal. When curricular choices are made based on market trends to the detriment of students otherwise inclined, however, those curricular choices take on a different character. Instead of focusing on the wants and interests of our students, are we not simply becoming proxies of the market?<sup>60</sup> In this way, are we not capitulating our own academic freedom and the futures of our students for the benefit of the market? I suggest that, while accompanied by altruistic intent, this practice subtly pushes students towards a practice area they never anticipated and may even leave them unsatisfied in their careers. This leads to the conclusion, buttressed by the results of the survey showing significant interest in transactional law, that LRW curricula should give equal treatment to all students, not just future litigators.

*B. Qualitative Analysis: Questionnaires Posed to Transactional Law-Oriented Students*

The survey results detailed above provide a picture of the average student and, thus, facilitate debate as to the interest in transactional drafting nationwide and whether LRW courses should adopt transactional instruction in the abstract. Determining how to change the curriculum to accommodate these needs, however, requires a more in-depth analysis of how the current course affects transactional law-oriented students and what methodologies would best serve them. Accordingly, I designed a questionnaire asking these students to describe their experiences in the traditional litigation-based LRW program and seeking their input into what curricular choices might best serve the interests of all students.

1. Methodology

The questionnaire design attempted to seek the opinion of students in the best position to analyze the effect of the traditional LRW course on transactional law-oriented students. Thus, it seemed obvious that students involved in the questionnaire should be inclined towards transactional law and should have completed a traditional litigation-oriented LRW course. Therefore, I chose my own students as participants, knowing both that the curriculum from which they learned was litigation-oriented and knowing which students were inclined toward transactional law.<sup>61</sup>

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composition of the LRW curriculum surely stems from a sort of institutional inertia that compels decision-makers to favor the tried-and-true methods of the past.

<sup>60</sup>DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983) (criticizing the modern paradigm of legal education as a thinly veiled artifice for preparing students for their place in the hierarchy of the legal marketplace).

<sup>61</sup>While the answers of these students necessarily cannot be considered statistically representative of law students nationwide, such reliance upon statistical analysis is not the goal of qualitative research. See EARL BABBIE, *THE BASICS OF SOCIAL RESEARCH* 258 (1999). Instead, the goal of qualitative research is to find a deeper, more contextual source to explain underlying beliefs in the social world. See Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1238 n.4 (2006) (“[Q]ualitative research . . . uses a wide range of empirical materials like interviews, observation, case study, and personal experience to study how social experience is created and given meaning.”) (citing Norman K. Denzin & Yvonna S. Lincoln, *Introduction: Entering the Field of Qualitative Research*, in *STRATEGIES*

However, one aspect of quantitative analysis I sought to retain was anonymity. Realizing that these students were still enrolled in the Law School, I wanted to ensure that they felt no pressure in responding to the questions. Accordingly, in soliciting participants (a total of eight students), I sent an initial email inviting them to participate, ensuring anonymity, and encouraging them to answer honestly even if their answers were critical of my class or the LPS Program.<sup>62</sup> I attached the questionnaire and encouraged participants to answer with as much detail as possible.<sup>63</sup> The introduction to the questionnaire then asked participants, if they chose to respond to the questionnaire, to send their responses to the questions, as attachments, to the LPS Department Administrative Assistant.<sup>64</sup> The Administrative Assistant then saved the document using an anonymous code and forwarded this anonymous document to me.<sup>65</sup> This methodology ensured that I had no knowledge of the name of the respondent.

The questionnaire asked nine in-depth questions.<sup>66</sup> These questions sought input into some of the issues of debate relating to transactional drafting instruction. I sought to determine the effect of the litigation-based LRW program on transactional law-oriented students, their feelings about how the course could change for the better, and whether legal writing even had an effect on their learning of transactional law.

## 2. Questions and Answers

The first question sought merely to ensure that the participants were, in fact, transactional law-oriented students. It read: "As you entered law school, were you primarily inclined towards non-litigation careers (i.e. Intellectual Property, Corporate

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OF QUALITATIVE INQUIRY 1, 8, 24 (Norman K. Denzin & Yvonna S. Lincoln eds., 1998)); Richard K. Neumann, Jr. & Stefan H. Krieger, *Empirical Inquiry Twenty-Five Years After THE LAWYERING PROCESS*, 10 CLINICAL L. REV. 349, 353 (2003) ("Quantitative empirical research gathers numeric information, often from a large number of cases, and subjects it to statistical analysis. In contrast, qualitative research collects and analyzes nonstatistical data using methods such as case studies, ethnographic field work, and comparative historical analysis."). *But see* Lee Epstein & Gary King, Exchange: Empirical Research and the Goals of Legal Scholarship, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 35 (2002) (arguing that all empirical research, even qualitative analyses, should conform with the statistical requisites of quantitative analysis).

<sup>62</sup>At Suffolk Law, the LRW program is called "Legal Practice Skills," or "LPS." See Suffolk University Law School, Legal Practice Skills Program, <http://www.law.suffolk.edu/academic/lps/> (last visited Mar. 1, 2007).

<sup>63</sup>See e-mail from Louis N. Schulze, Jr., Assistant Professor of Legal Writing, Suffolk University Law School, to Former Students (June 16, 2006, 14:52:00 EDT) (addressees and e-mail on file with author).

<sup>64</sup>*Id.* Again, I chose this methodology to ensure anonymity.

<sup>65</sup>*Id.* My thanks to Trish McLaughlin, our department's excellent Administrative Assistant, for her assistance with this project.

<sup>66</sup>See Transactional Questionnaire (on file with the author).

Law; Transactional Law, etc.)? If no, please explain.”<sup>67</sup> All participants answered affirmatively.<sup>68</sup>

The next question was posed to delve into my theory that the LRW course subliminally pushes students towards litigation careers. It read: “If [you answered] yes [to Question 1], now that you have finished at least one year of law school, has that inclination changed? If so, please explain.”<sup>69</sup> Each respondent actually affirmed their interest in transactional work and their disinterest in litigation.<sup>70</sup> One student noted that it seemed, from studying law, that every practice area involves litigation.<sup>71</sup> Another student specifically noted that, for him or her, law school could not have changed his or her mind.<sup>72</sup> For students who came into law school unsure of their future practice area, however, it could possibly artificially sway them.

The third question was a follow-up to Question 2 and asked: “If that inclination changed, what effect did your LPS course have upon this change? In other words, was LPS the source of your change of focus? Please explain.”<sup>73</sup> One student noted that, after studying law for two years, he or she was even more convinced that they wanted no part of the courtroom experience.<sup>74</sup> All other responses merely reaffirmed that their chosen field had not changed.<sup>75</sup>

The fourth question inquired into the utility of the litigation-oriented LRW course for these transactional law-oriented students. It asked: “Given your interest in non-litigation subjects, and given that LPS is taught in the context of litigation problems, was LPS at all useful to you? Please explain why or why not, giving specific examples.”<sup>76</sup> Most students noted that the course did not directly help them with their *specific* career area, but also commented that the class provided fundamental instruction in legal writing, legal research, and, most importantly (accordingly to at least a few), legal analysis.<sup>77</sup> Also, one student noted that, while the documents students wrote for their assignments were litigation oriented, it was helpful that one of the problems upon which the assignment was based centered upon transactional

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<sup>67</sup>*Id.*

<sup>68</sup>Qualitative Study Responses (on file with the author).

<sup>69</sup>Transactional Questionnaire, *supra* note 66.

<sup>70</sup>Qualitative Study Responses, *supra* note 68.

<sup>71</sup>*Id.* response 2. This either is a very perceptive comment or evidence of the effect of the casebook method on law students. This student either recognizes that all practice areas could lead to litigation (i.e., a transaction breaks down, a will is contested, etc.) or is so barraged with the casebook method that she or he does not realize that litigation is not a part of each lawyers’ practice. Personally, I think the explanation is the former and not the latter.

<sup>72</sup>*Id.* response 4.

<sup>73</sup>Transactional Questionnaire, *supra* note 66.

<sup>74</sup>Qualitative Study Responses, *supra* note 68, response 4.

<sup>75</sup>*Id.*

<sup>76</sup>Transactional Questionnaire, *supra* note 66.

<sup>77</sup>Qualitative Study Responses, *supra* note 68. One student put it this way: “Simply because you are not litigating does not mean you will never have to write a memo where you are trying to convince someone of something.” *Id.* response 6.

law.<sup>78</sup> Specifically, the student noted that having a contract-law-based assignment functioned as a cross-over between litigation and transactional law.<sup>79</sup>

The fifth question delved more deeply into this utility question and focused on a particular aspect of the LRW curriculum which most identify as strictly litigation-oriented: “Was the oral argument at the end of LPS at all useful for you? Will the skills learned therein be of any use to you in your transactional career? Please explain.”<sup>80</sup> This is where transactional-oriented law students took issue with the LRW course. For the most part, the participants appreciated the experience and recognized that the skills developed will help them in the future by means of negotiations with adversaries, convincing others of their position, etc.<sup>81</sup> Several students, however, felt that this experience was the least beneficial aspect of the course for future transactional lawyers.<sup>82</sup> Two participants specifically noted the large amount of preparation time required for the arguments,<sup>83</sup> which can take study time away from the substantive courses upon which students may be focusing the most time and energy.

The sixth question looked into whether the LRW curriculum was of any use to transactional law students: “Did the LPS course aid in your development of legal analysis skills, despite the fact that you will likely practice transactional law? Please explain.”<sup>84</sup> As with Question 5, most participants found a way to relate LRW to the bigger picture, focusing on the fact that basic writing skills will benefit both litigators and transactional lawyers (clarity, brevity, and simplicity—the three tenets expressed in my class—were particularly noted).<sup>85</sup> At least one student asserted, however, that the development of legal analysis skills was not as critical in LRW as

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<sup>78</sup>*Id.* response 5. This problem actually involved two legal issues: personal jurisdiction and breach of contract. I assume that the student is referring to the second issue. Actually, this problem was something of a pedagogical experiment, but on a different issue unrelated to my research into the transactional/litigation dichotomy. I included those two subjects, as the cumulative assignment at the end of the first semester, because those two issues would be on students’ mid-terms in Contracts and Civil Procedure. I decided to pursue this experiment after reading Joseph W. Glannon et al., *Coordinating Civil Procedure with Legal Research and Writing: A Field Experiment*, 47 J. LEGAL EDUC. 246 (1997). Apparently, the experiment had multiple benefits.

<sup>79</sup>*Id.* One school’s legal writing curriculum specifically adopts this approach. At New England School of Law, although the first-year legal writing course follows the traditional litigation-oriented curriculum, the second-year mandatory course exposes students to other subject matters, including litigation and transactional subjects. See New England School of Law, Academic Program, <http://www.nesl.edu/academics/academics.cfm> (last visited Mar. 1, 2007). Although the writing assignments are all appellate briefs (and, thus, litigation-oriented), students inclined towards other practice areas (including transactions) are at least exposed to writing in that milieu.

<sup>80</sup>Transactional Questionnaire, *supra* note 66.

<sup>81</sup>Qualitative Study Responses, *supra* note 68.

<sup>82</sup>*Id.* responses 2, 4.

<sup>83</sup>*Id.* responses 2, 3.

<sup>84</sup>Transactional Questionnaire, *supra* note 66.

<sup>85</sup>Qualitative Study Responses, *supra* note 68.

in Contracts or Property.<sup>86</sup> Several students explicitly noted that simple contract drafting exercises could have gone a long way to achieving this goal, while also appealing to transactional law-oriented students.<sup>87</sup>

Question 7 sought to determine whether the litigation-based LRW course perhaps helped students in their other courses, which (due to the use of the casebook method) are generally litigation-oriented as well. It asked: “Did the LPS course aid you with respect to your performance in other law school classes? Please explain.”<sup>88</sup> The responses to this question ranged from “yes” to “maybe” to “I don’t know.”<sup>89</sup> Several students recognized that LRW writing was nearly indistinguishable from writing exams.<sup>90</sup> Others noted that it helped earlier in the year by teaching how to extract information from cases in a more efficient way.<sup>91</sup> One student noted that “[h]oning of the writing process in LPS has helped in all subsequent courses other than Basic Tax.”<sup>92</sup> I certainly cannot argue with that logic.

The eighth question asked students to give their input into how to structure the LRW course to include transactional drafting training.

If you could do your first-year over again, knowing what you know now, would you have preferred to choose an LPS course which: (1) focused strictly on transactional writing skills; (2) covered transactional writing and litigation writing equally; or (3) focused on a litigation context (i.e., the LPS course as-is)? Please explain.<sup>93</sup>

Participants chose the second option at a margin of over two-to-one.<sup>94</sup> While noting their view that seeing transactional drafting would have been beneficial, students almost universally saw the upside of seeing litigation as well.<sup>95</sup> No student

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<sup>86</sup>*Id.* response 2.

<sup>87</sup>*Id.* response 5.

<sup>88</sup>Transactional Questionnaire, *supra* note 66.

<sup>89</sup>Qualitative Study Responses, *supra* note 68.

<sup>90</sup>*Id.* responses 1, 2, 6.

<sup>91</sup>*Id.* responses 3, 5, 7.

<sup>92</sup>*Id.* responses 3.

<sup>93</sup>Transactional Questionnaire, *supra* note 66.

<sup>94</sup>Qualitative Study Responses, *supra* note 68.

<sup>95</sup>*Id.* One student stated that:

I think number 2 would be helpful. It would be nice to learn more about the transactional side of writing and research, but it is important too to have an understanding of the litigation side. It is also useful for summer work. Even though I don’t plan on focusing on litigation after law school I have been working in a firm for a year that does civil litigation. I think my research skills have been invaluable.

*Id.* response 2. I think this response supports my assertion, at least anecdotally, that law schools’ curricula push students artificially toward filling market demands. One gets the sense from this student’s response that he or she may obtain employment at the firm in transactional practice but, if necessary, can also switch to litigation.

responding to the questionnaire chose option number one.<sup>96</sup> Nonetheless, despite asserting in previous answers their acceptance of the *status quo* of a litigation-only course, the students clearly would have appreciated transactional instruction.<sup>97</sup>

Finally, Question 9 asked for students to consider several curricular choices that would work transactional instruction into the mandatory writing curriculum. It asked:

Which model of curriculum do you think would best serve non-litigation-oriented law students: (1) the current model (i.e. first-year LPS focusing on litigation, then elective courses in the second and third year focusing on transactional drafting); (2) a modified model (i.e. first-year LPS course focusing on litigation; then a required “LPS II” course in subsequent years allowing students to choose transactional or litigation writing instruction) or (3) an overhauled model (i.e. first-year LPS course focusing either on transactional writing or litigation writing). Please explain your answer.<sup>98</sup>

To my great surprise, students almost universally chose to give themselves more work, choosing option two at a two-to-one margin over any other choice.<sup>99</sup> I sincerely thought that students, always critical of the large amount of work required in an LRW course, would prefer to jam transactional law and litigation into one first-year course and be done with it. Instead, participants in the questionnaire felt quite strongly that a post-first-year course, giving students the choice of transactional or a

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<sup>96</sup>*Id.* responses 1-6.

<sup>97</sup>*Id.* This contradiction (noting their acceptance of solely litigation curriculum while simultaneously yearning for transactional instruction) also leads to the conclusion that our students are perhaps less quarrelsome, prone to dissatisfaction, and difficult as some in the academy seem to assert.

<sup>98</sup>Transactional Questionnaire, *supra* note 66.

<sup>99</sup>Qualitative Study Responses, *supra* note 68. Apparently unmindful of my concern regarding the subliminal, artificial push of the litigation-driven curriculum, one student chose option two, stating:

Entering law school most students are not exactly sure what type of law they plan on practicing. LPS is a good introduction to litigation and is helpful to all law students. Having another option during 2[d] year would be very beneficial, especially for students who know at the end of their first year that they are not interested in litigation.

*Id.* response 4.



litigation focus, was preferable.<sup>100</sup> Students remarked in forceful language that the law school curriculum should require more practice-oriented writing experience.<sup>101</sup>

### 3. Conclusions

The conclusions to be drawn from the qualitative research described above are somewhat contradictory. First, surprisingly, transactional law-oriented students generally are content receiving legal writing instruction in the context of litigation. This likely stems from their realization that the skills gained in such a course are fundamental and transcend the transactional/litigation dichotomy. Second, if given the choice, on the other hand, they would advocate for *additional* legal writing training—after the first year—in the transactional area. Third, rather than advocating that the first-year course be changed to include a mix of transactional and litigation writing, students assert that the legal writing curriculum should instead be *expanded* to include additional semesters of training after the first-year course teaches them the fundamentals. As will be demonstrated, these conclusions streamline some of the difficulties that otherwise present themselves in attempting to integrate transactional writing instruction into the mandatory LRW course.

#### III. A GLIMPSE OF MANDATORY LRW CURRICULA NATIONALLY: IS THE DEMAND FOR TRANSACTIONAL DRAFTING INSTRUCTION BEING SATISFIED?

Having determined that a significant demand exists, the next step is to determine whether LRW courses are meeting this demand sufficiently. Two problems emerge in such an endeavor. First, although most LRW professors' gut reaction to this inquiry would likely support the conclusion that the course is litigation-oriented, that gut reaction should not serve as the sole basis for the consideration of altering the curriculum. Second, can one really aggregate all LRW courses nationwide so as to draw conclusions as to what constitutes "the nationwide LRW curriculum"? Despite these methodological problems, this Part draws support from numerous sources,

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<sup>100</sup>In choosing the second option, one student stated:

I think more writing classes are necessary. It is a large part of what lawyers do and there should be a focus on that. It may also be helpful to be a better writer when taking the essay portion of the bar. I think sometimes too students don't know exactly what they are going to end up doing in the future and . . . may enter school with one thought and then end up changing your mind. It may be dangerous to allow 1[st] years to choose right off the bat between a litigation LPS and a transactional LPS. I like the idea of learning both skills.

*Id.* response 2.

<sup>101</sup>One respondent, echoing the thoughts of others, focused both on the fundamental importance of the litigation-oriented class while noting the need for more writing opportunities:

I would go with 2. You need to see the basics, which I feel were terrifically covered in LPS. If you then choose to follow the transactional route, you should have the transactional writing class. That would probably be the most helpful. I really think you would need the current model to begin with, because that really creates the foundation for the transactional writing class.

*Id.* response 6.

including the ALWD/LWI Survey,<sup>102</sup> in concluding that the aggregated “national LRW curriculum” does, in fact, under-stress transactional writing skills.

*A. ALWD/LWI Survey: The National LRW Curriculum Includes Little Transactional Skills Training*

The annual ALWD/LWI Survey is an extensive empirical analysis of many subjects germane to legal writing pedagogy.<sup>103</sup> The Association of Legal Writing Directors and the Legal Writing Institute, two trade organizations comprised principally of legal writing professors, jointly sponsor a nation-wide survey of legal writing programs.<sup>104</sup> The survey collects information on “program design, curriculum, salary, workload, and status issues.”<sup>105</sup> The ALWD and LWI have conducted the survey since 1999, a year in which approximately 140 law schools responded.<sup>106</sup> In 2006, a record 184 law schools responded.<sup>107</sup> The pertinent inquiries possibly resolved by the survey include: (1) whether law schools’ general curricula include courses on transactional drafting skills; (2) if so, whether law schools entrust this task to LRW professors; and (3) whether law schools are meeting student demand levels for these courses.

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<sup>102</sup>See ALWD/LWI Survey, *supra* note 43.

<sup>103</sup>Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. REV. 253, 255 n.14 (2004) (“The comprehensive survey began in 1999 with 117 law schools responding (66% of ABA-accredited law schools) and grew in 2004 to 183 schools responding to the survey (over 90% of ABA-accredited law schools).”).

<sup>104</sup>Legal Writing Institute, ALWD/LWI Survey Results Introduction Page, <http://www.lwionline.org/survey/surveyresult.asp> [hereinafter Survey Results Introduction Page] (last visited Mar. 1, 2007).

<sup>105</sup>*Id.* The survey is an outstanding source of evidence demonstrating the status issues faced by legal writing professors. Scholars have used the survey on countless occasions to conclude that the academy treats such professionals as second-class citizens. Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding The Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ASS’N LEGAL WRITING DIRECTORS 108, 110 (2006). Many conclude that this treatment is the result of the fact that over 70% of legal writing faculty are female. See generally Kathryn M. Stanchi & Jan M. Levine, Commentary, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 1 (2001) (discussing salary, tenure, and other status disparities between doctrinal and LRW faculty, and implicating issues of gender discrimination). In a subsequent piece, I will propose that the lack of transactional drafting skills in the LRW curriculum is a function of historical development, sexism, and classism. See Louis N. Schulze, Jr., *The Historical Development of Legal Writing Courses: Is the Absence of Transactional Drafting Instruction a Quirk or Evidence of Illegitimate Hierarchy?* (unpublished manuscript, on file with author).

<sup>106</sup>Survey Results Introduction Page, *supra* note 104.

<sup>107</sup>ALWD/LWI Survey, *supra* note 43. According to its table of contents, issues addressed include staffing models, curriculum, upper-level writing courses, technology, directors, full-time legal writing faculty members, LRW adjunct faculty, teaching assistants, survey use, and “hot topic issues.” *Id.*

1. Do Law Schools' General LRW Curriculum Adequately Include Courses on Transactional Drafting Skills?

The threshold issue is to determine how many of these courses are offered in American law schools, regardless of the sufficiency of this number. Question 20 of the ALWD/LWI survey asked respondents: "What writing assignments are assigned (choose a. through i.) . . . in the required LRW program? *Please mark all that apply.*"<sup>108</sup> Of the fifteen listed choices, just one can arguably be transactional in nature: "drafting documents."<sup>109</sup> Of the 184 responding schools, just fifty-six schools include writing assignments for this subject. The following chart shows the responses to this question over several years:<sup>110</sup>

2003	2004	2005	2006	
172	170	174	182	a. Office memoranda
85	92	93	100	b. Client letters
87	97	95	107	c. Pretrial briefs
45	56	55	60	d. Trial briefs
142	142	142	150	e. Appellate briefs
6	5	6	7	f. Law review articles
44	48	52	56	g. Drafting documents
8	10	12	11	h. Drafting legislation
48	31	34	40	i. Other writing assignment
63	56	65	74	j. Pretrial motion argument
22	28	25	31	k. Trial motion argument
133	138	142	147	l. Appellate brief argument
54	62	71	82	m. In-class presentation
40	42	51	56	n. Oral report to senior partner
25	16	19	27	o. Other oral skill

These results beg two questions, though: first, whether the respondents interpreted the term "drafting documents" to include only transactional instruction (or whether litigation documents such as complaints and answers were included); and, second, what proportion of the course is devoted to instruction on drafting transactional documents? Even if these questions are answered with the best case scenario (i.e., all respondents took the question to mean transactional instruction AND all affirmative respondents' courses include a substantial amount of instruction on this topic), it still leads to the conclusion that only 30.43% of schools include *any* transactional instruction in the first-year LRW curriculum. This seems to be a staggeringly low number given that one would expect legal writing instruction to teach law students skills from a broad range of contexts.<sup>111</sup>

<sup>108</sup>*Id.* at 12.

<sup>109</sup>*Id.*

<sup>110</sup>*Id.*

<sup>111</sup>*Id.* The good news is that in each year the ALWD and LWI have conducted the survey, the number of positive responses to drafting has increased. Although each year has included additional responding schools, the increased positive responses indicate a slight increase in the percentage of drafting courses.

Other questions in the survey help clarify the ambiguity of the term “drafting documents.” For instance, Question 33 asks: “Must students satisfy an upper-level writing requirement, beyond the required program, for graduation? *Please mark all courses that are required or count toward the requirement.*”<sup>112</sup> Fifty-one of the 184 responding schools indicated that they offered an upper-level transactional drafting course.<sup>113</sup> Of these, forty-seven indicated that the course was not required but could be used to satisfy the upper-level writing requirement.<sup>114</sup> The following table shows these numbers:<sup>115</sup>

2003 Total	2004 Total	2005 Total	2006			
			Required	Not Required But Counts Toward Requirement	2006 Total	
40	45	52	5	52	57	a. Advanced legal writing—general writing skills
16	21	23	2	21	23	b. Advanced legal writing—survey course
35	40	48	9	46	55	c. Drafting, general
37	35	42	5	44	49	d. Drafting, litigation
18	22	27	1	27	28	e. Drafting, legislation
32	35	44	4	47	51	f. Drafting, transactional
49	56	66	4	75	79	g. Advanced advocacy (excluding student-run moot court programs)
129	130	146	73	83	156	h. Scholarly writing
8	15	13	1	15	16	i. Judicial opinion writing
37	42	43	10	39	49	j. Advanced research
33	24	26	9	22	31	k. Other

Year	Percentage of Schools in Which LRW Curriculum Includes “Drafting Instruction.”
2003	25.58
2004	27.27
2005	29.21
2006	30.43

*Id.* A theme will arise in comparing the 2006 numbers to previous years: Schools are beginning to recognize the need for increased transactional drafting instruction, but schools are not choosing legal writing faculty to teach these skills.

<sup>112</sup>ALWD/LWI Survey, *supra* note 43, at 20. One hundred forty-eight respondents indicated that an upper-class writing assignment was required for graduation, while just twenty-one respondents answered in the negative. *Id.*

<sup>113</sup>*Id.*

<sup>114</sup>*Id.*

<sup>115</sup>*Id.*

The way this question is posed, however, it is unclear whether these fifty-one schools include this class in an upper-level LRW class or in a non-LRW course.<sup>116</sup> In any event, only 27.71% of schools include upper-level instruction in transactional drafting.<sup>117</sup> The good news, however, is that this figure is up from 24.71%.<sup>118</sup> Thus, one can surmise, from this 3% increase in just one year, that law schools are recognizing the need for transactional drafting instruction.

## 2. In Schools Where Transactional Drafting Skills are Taught, are LRW Faculty Entrusted with Teaching this Course?

The analysis above still leaves the open question, however, whether schools are entrusting this teaching to LRW professors—those in the law schools charged with, and experts in, teaching legal writing to law students. To that end, Question 35 asks: “What courses are taught in the elective writing curriculum and who teaches those courses? *Please mark all that apply.*”<sup>119</sup> One hundred twenty responses indicated that a transactional drafting class was taught, up from 110 in 2005 and ninety-three in 2004.<sup>120</sup> The following table demonstrates these data:<sup>121</sup>

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<sup>116</sup>*Id.*

<sup>117</sup>*Id.* I should note, however, that other categories of responses to the question could indicate classes in which students possibly receive instruction in transactional drafting skills. *Id.* Twenty-three schools answered that an advanced legal writing course was available and that its subject matter was “survey course.” *Id.* Fifty-five schools indicated that a similar course was available in the area of “general drafting.” Some interpretive problems arise from these statistics. First, many of these respondents likely overlap. For instance, a school that offers the transactional drafting course may also offer the general drafting or survey course. Thus, one should not add up each of these responses, totaling seventy-eight, and conclude that seventy-eight schools offer a course in which some transactional drafting instruction occurs. Second, one must question what portion of the “general drafting” and “survey” courses are devoted to transactional drafting. Instead, like first-year required LRW courses, perhaps these courses are litigation-centric as well.

<sup>118</sup>See KRISTIN GERDY, ET AL., ASSOCIATION OF LEGAL WRITING DIRECTORS/LEGAL WRITING INSTITUTE, 2005 SURVEY RESULTS 20-21 (2005), available at <http://www.lwionline.org/survey/surveyresults2005.pdf>.

<sup>119</sup>ALWD/LWI Survey, *supra* note 43, at 21.

<sup>120</sup>*Id.* at 22. The survey makes clear, though, that this number does not represent the total number of schools offering a course on transactional drafting. “These totals do not represent the number of schools responding because each school could check more than one instructor type for each course.” *Id.* at 21. Because multiple instructors could teach the course at a given school (i.e., if there are two sections of transactional drafting, or one per semester), this does not adequately report the number of schools teaching this subject. However, one can assert that the increase reinforces the conclusion from Question 33 that law schools are recognizing the necessity of adding transactional drafting instruction. In other words, even if the total responses do not reflect the number of schools teaching transactional drafting (an issue covered by Question 33, really), we can deduce solely from the increase from 110 to 120 in responses to Question 35 that schools are focusing more on transactional drafting.

<sup>121</sup>*Id.* at 22.

	LRW Director	LRW Full-time Faculty	LRW Adjuncts	Non-LRW Full-time Faculty	Non-LRW Adjuncts	Librarians	Other	Total
f. Drafting, transactional	2006:6 2005:7 2004:2 2003:6	2006:23 2005:22 2004:11 2003:7	2006:7 2005:10 2004:7 2003:5	2006:48 2005:37 2004:37 2003:38	2006:35 2005:33 2004:35 2003:34	2006:0 2005:0 2004:0 2003:0	2006:1 2005:1 2004:1 2003:4	2006:120 2005:110 2004:93 2003:94

However heartening this increase in transactional drafting instruction may be, these data demonstrate that law schools generally are not turning to LRW faculty to teach this subject. For instance, of the 120 responses in 2006, LRW faculty taught only 36 of these courses.<sup>122</sup> The other eighty-four were taught by other full-time faculty, non-LRW adjunct faculty, or “other” instructors.<sup>123</sup> Additionally, while the number of transactional courses is going up, the number of transactional courses taught by LRW faculty has actually gone down both numerically and by percentage.<sup>124</sup> Of the 110 responses in 2005, LRW professors taught thirty-nine of those courses; In 2006, that number shrunk to thirty-six.<sup>125</sup> Thus, in 2005 LRW faculty taught 35.45% of these courses, while in 2006, that percentage dropped to 30%.<sup>126</sup> Therefore, one can conclude, fairly authoritatively, that because the percentage of LRW faculty teaching this essential writing skill is a paltry 30% (and

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<sup>122</sup>*Id.*

<sup>123</sup>*Id.*

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*Id.* There is a bright-side to this news, though. While the numbers and percentages did decrease from 2005 to 2006, they have increased significantly since 2004. In that year, there were just ninety-three responses to this question, and LRW professors taught only twenty (or 21.5%) of them. In 2003, the numbers were even lower: LRW faculty taught just eighteen of the ninety-four reported courses, for a percentage of 19.15%. Thus:

Year	Number of Transactional Drafting Courses	Number of Such Courses Taught by LRW Faculty	Percentage of Such Courses Taught by LRW Faculty
2006	120	36	30.00%
2005	110	39	35.45%
2004	93	21	22.58%
2003	94	18	19.15%

*Id.*

is decreasing), academia is not entrusting the teaching of this skill to those whose profession it is to teach legal writing and drafting.<sup>127</sup>

### 3. If Schools Are Teaching Transactional Drafting Skills, Are We Meeting the Student Demand That Exists?

A final issue, unrelated to the role of LRW faculty in teaching transactional drafting, is whether law schools are sufficiently meeting student demand for transactional drafting. Question 36 of the survey asks: “Approximately how many students enroll each year in the following upper-level writing courses? Is the demand for each upper-level course greater than its availability? (In other words, do more students want to take the course than there are spaces available?)”<sup>128</sup> This question potentially answers the question as to whether law schools are meeting the student-demand for transactional skills training.

The sixty schools that responded to this question in 2006 indicated that the average number of students enrolling in an upper-level transactional drafting class was 32.28, up a whopping 6.13 (from 26.15 in 2005) in just one year.<sup>129</sup> Twenty-five of these, or 41.67%, indicated that demand exceeded availability.<sup>130</sup> Meanwhile, litigation drafting commands little more demand from students: the average enrollment is 40.15 (just 7.87 more than transactional), about twenty out of fifty-two

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<sup>127</sup>In presenting the substance of this article at the 2006 LWI Conference in Atlanta, Georgia, I briefly explained my theories for why the traditional LRW course emerged historically without any transactional instruction. My first theory is structural: Law schools transitioned in the late 19th Century into the Langdell, or casebook, method of instruction. This methodology uses the study and discourse of published cases as the central source of indoctrination of legal rules. It seems natural that LRW courses would emerge from this litigation orientation as primarily focused on litigation. My second theory is historical. Several schools (Harvard and Chicago the primary members among them) created courses that became the precursors to the modern LRW course. A central facet of these courses, which were somewhat ancillary to doctrinal courses, was a moot court experience. Since this was the case, obviously the course that emerged around that moot court experience focused on litigation. My final two theories are a bit more controversial. First, I posit that the legal academy’s disparate treatment of female doctrinal professors runs parallel to its disparate treatment of LRW faculty, most of whom are female. It seems too much a coincidence that a course taught primarily by women (LRW) lacks the subject-matter (transactional instruction) that the academy has refused, on the doctrinal side, to entrust to female faculty. Second, I also posit a classism-basis for LRW’s lack of transactional training. LRW courses began, in some schools, as remedial writing and grammar instruction for World War II veterans of a blue-collar background now able to attend law school by means of the G.I. Bill. Since LRW, therefore, was seen as strictly a “skills” (i.e., blue-collar) course, it was denied the privilege of the white-collar subject matter of transactional drafting instruction. David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 127-136 (2003).

<sup>128</sup>ALWD/LWI Survey, *supra* note 43, at 23.

<sup>129</sup>*Id.* at 24. The maximum enrollment jumped from sixty-five in 2005 to 173 in 2006. *Id.* Obviously, this jump had a significant role in increasing the average, and one might conclude that a school created a mandatory upper-level course that required transactional drafting, thus, skewing these numbers somewhat. *Id.*

<sup>130</sup>*Id.*

(38.46%) responses reported overflow, and the maximum enrolment of 160 (down from 175 in 2005) is thirteen less than transactional training.<sup>131</sup> Thus, although a few more students enroll in litigation drafting courses, there is less overflow than in transactional courses, the maximum enrollment is less than that in transactional courses, and the enrollment has gone down.<sup>132</sup> Legislative drafting fails to compete at all with litigation or transactional drafting, receiving only an average of 18.66 students per course, twenty-nine total courses, and nine (or 31.03%) of which were over-filled.<sup>133</sup> All of these numbers are reflected in the following table:<sup>134</sup>

	Number of Students who enroll (Average Min. Max.)				Number of schools with greater demand than availability				Total Responses 2006
	2006	2005	2004	2003	2006	2005	2004	2003	
f.	32.28	26.15	32.03	27.41	25	23	16	26	60
Drafting, transactional	5	5	3	3					
	173	65*	120**	90					
d.	40.15	43.0	34.21	33.10	20	14	20	24	52
Drafting, litigation	5	12	10	10					
	160	175	117	96					
e.	18.66	19.92	17.32	17.90	9	6	10	6	29
Drafting, legislation	8	10	5	8					
	40	50	40	45					
	* 5 answers $\geq$ 150 excluded ** 3 answers $\geq$ 150 excluded								

### B. Conclusions: Teach More and Teach Better

So, what lessons can this hodge-podge of numbers teach? First, I conclude that law schools nationwide are not offering sufficient numbers of transactional drafting instruction. I base this conclusion on three facts: (1) only 28% to 33% of schools offer instruction in transactional drafting;<sup>135</sup> (2) twenty-five of these, or 41.67%,

<sup>131</sup>*Id.* at 23-24.

<sup>132</sup>*Id.*

<sup>133</sup>*Id.* at 23. Each and every category of upper-class legal writing reports higher student demand than available courses. *Id.* at 23-24. This is significant because it shows that students value the material learned in these courses. Meanwhile, the same cannot be said for law school administrators who seem to undervalue these courses by offering them in insufficient numbers. Thus, the devaluation of legal writing professors continues unabated despite empirical proof of their courses' academic benefits to students and the financial opportunities to law schools by means of increased enrollment.

<sup>134</sup>*Id.*

<sup>135</sup>These numbers derive from the answers to Question 33 (showing that 51 of 184 (27.71%) responding schools offer transactional drafting and Question 36 (showing that sixty of the 184 (32.61%) responding schools offer transactional drafting). See *supra* notes 112-17, 128-29 and accompanying text. While there is slight inconsistency between these numbers, possibly due to interpretive errors, the 4.9% difference is statistically insignificant.



indicated that demand exceeded availability;<sup>136</sup> and (3) at best, 30.43% of mandatory LRW courses include transactional drafting.<sup>137</sup>

Second, I conclude that “if you build it, they will come.”<sup>138</sup> In other words, if law schools offered more transactional skills training, students would fill those classes. I base this conclusion upon the fact that 41.67% of all transactional courses nationwide are overenrolled, a statistic that exceeds that of all other specialty drafting courses.<sup>139</sup> Furthermore, as more transactional skills courses have been added over the last few years, the number of students enrolling has increased and actually continues to create more over-enrollment.<sup>140</sup> It seems incredible that in a time when schools are seeking any marketing angle to lure students, schools are ignoring or only slightly acknowledging the over-enrollment numbers for transactional training courses.

Finally, I conclude that where transactional drafting instruction is offered, law schools are generally not entrusting this course to LRW professors. I base this conclusion upon the statistic that LRW professors currently teach only 30% of transactional courses nationwide, and the fact that this number decreased from 35% last year.<sup>141</sup> The fact that LRW professors generally do not teach this course defies logic for two reasons. First, LRW professors’ entire *raison d’etre* is to teach students legal writing. Since lawyers engage in transactional drafting in practice, one would think that LRW professors would teach transactional drafting in law school. Second, if such significant over-enrollment exists, one would think that law schools would seek the personnel resources to meet that demand.

Ultimately, by analyzing both the demand-side and the supply-side of this issue, the inevitable conclusion is that law schools are not adequately offering transactional drafting instruction.

#### IV. TOWARDS A UNIFIED THEORY OF LEGAL RESEARCH AND WRITING: PROBLEMS AND SOLUTIONS IN INTEGRATING TRANSACTIONAL SKILLS

Having demonstrated the demand for increased legal writing training, particularly in the area of transactional law, and having demonstrated students’ thoughts on whether to do so, I turn now to some of the obstacles to integration and the solutions to them. While there are many such obstacles, most relate more to the question of “how to integrate” rather than “whether to integrate.” Accordingly, this section presumes that a law school has made the decision to add transactional writing instruction to the required LRW course and focuses on issues relating to

<sup>136</sup>See *supra* notes 129-30 and accompanying text.

<sup>137</sup>See *supra* notes 108-15 and accompanying text.

<sup>138</sup>FIELD OF DREAMS (Gordon Company Productions 1989).

<sup>139</sup>See *supra* notes 128-34 and accompanying text. Transactional is 41.67% overenrolled; litigation is 38.46% overenrolled; legislation is 31.03% overenrolled; scholarly writing is 16.67% overenrolled; judicial opinion writing is 41.18% overenrolled; and Advanced Research is 25.27% overenrolled. *Id.*; ALWD/LWI Survey, *supra* note 43, at 23-24.

<sup>140</sup>ALWD/LWI Survey, *supra* note 43, at 23-24. As the number of offered courses increased, so did over-enrollment. *Id.* A clear explanation for this conundrum is that when a school offers the transactional course, students literally line-up to take it.

<sup>141</sup>See *supra* notes 122-27 and accompanying text.

implementing such subjects. Furthermore, I analyze these issues not necessarily to provide definitive answers to these complex questions, but, instead, to chronicle as many of them as possible to allow institutions and LRW professors to weigh the pros and cons involved.

A. *The Obstacles in Integrating Transactional Drafting Instruction into the LRW Curriculum*

While the research compiled above clearly indicates a need to teach transactional skills, implementation is easier said than done. Many choices confront schools seeking to further this endeavor. Should a school cram transactional drafting skills into the first-year required course, or should schools instead teach this material later in a law student's career? In either event, how can schools possibly afford the cost of adding additional LRW professors to teach these courses? Furthermore, given that most LRW professors hail from a litigation background, how will they now teach a subject that, perhaps, they have never practiced? Additionally, while litigation-based LRW problems are relatively easy to design (given that case law is available to the public), how does an LRW professor find resources for problems in the transactional realm when most "deals" are made between private parties? This section discusses these issues.

1. *Issues Related to the Proper Placement of Transactional Drafting Training in the LRW Curriculum*

The traditional LRW course, which focuses on litigation writing skills, is a busy year. Students learn a huge amount in a relatively short amount of time. Just some of the major subjects taught include general legal analysis skills, predictive memo writing, persuasive memo writing, oral argument, client letters, citation skills, and legal research (both traditional and computer-aided legal research).<sup>142</sup> It is no wonder that many students, new lawyers, seasoned lawyers, and judges describe LRW as the most important class law students will take.<sup>143</sup> Therefore, it would seem very difficult to introduce yet more information by means of adding transactional drafting instruction.

Added to this problem is the fact that learning transactional drafting requires knowledge of the doctrinal fields underlying the writing. At the very least, one would expect that, to draft transactional documents, students should, at least, have a full year of Contracts under their belts. Additionally, given that "transactional drafting" encompasses far more than just writing contracts, a background in business organizations, wills and estates, and real estate transactions would seem necessary. All these factors, therefore, lead to the conclusion that the first-year LRW courses may be an inappropriate place for an extensive journey into the details of transactional drafting.<sup>144</sup>

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<sup>142</sup>Chestek, *supra* note 2, at 62 (identifying "legal analysis[,] . . . predictive writing, research, and persuasive writing," as the substance of most first-year LRW courses).

<sup>143</sup>Stanchi & Levine, *supra* note 105, at 5.

<sup>144</sup>I am not suggesting that the first-year should be devoid of any transactional drafting. For instance, in a Contracts course, a professor could assign students to draft a simple contract. In the first-year Property course, professors could assign students to draft a lease. In this way, even a small exposure to non-litigation writing would contribute to a law student's writing

On the other hand, placing transactional drafting skills within the first year, even in relatively small amounts, might work to counter the effects (described above) of the “subliminal push towards litigation” that may accompany the traditional first-year LRW model. As previously discussed, the strictly litigation-oriented subjects in LRW courses, coupled with the litigation-oriented Langdell casebook method in their doctrinal courses, may subliminally push law students towards litigation. Adding transactional instruction in the first-year LRW curriculum could counter that effect by providing at least some exposure to non-litigation assignments. Whether this benefit outweighs the burdens associated with placing transactional instruction in the first year is an issue for individual schools.

## 2. Issues Related to Staffing

In addition to *where* to place the new teaching of transactional skills, schools also must confront the issue of *who* will teach them. The first concern is the need to hire more LRW professors and the costs associated with that hiring. Given that most LRW professors already have large teaching loads that leave little time for scholarship,<sup>145</sup> adding additional teaching responsibilities vis-à-vis a second year LRW course or even an augmented first-year course would seem burdensome.<sup>146</sup> This leads to the conclusion that schools intent on adding transactional instruction should hire more LRW professors to meet this expansion; obviously, such an expansion costs money. While schools might consider cutting costs by assigning the teaching of transactional drafting skills to adjunct LRW faculty, the part-time model of legal writing instruction may be considered less favorable than full time

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skills. This methodology is generally known as “writing across the curriculum.” Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS’N LEGAL WRITING DIRECTORS 73, 74 (2004).

<sup>145</sup>See Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 LEGAL WRITING: J. LEGAL WRITING INST. 3, 47 n.212, 55 (2005). Many of our doctrinal colleagues are unaware of the disparate teaching loads between doctrinal professors and LRW professors. Although LRW faculty have fewer students, unlike doctrinal faculty (who usually must grade only two exams per year per course taught), LRW faculty generally grade (and provide extensive written comments on) at least six papers of ten to fifteen pages each year, hold formal conferences with each student twice a year, and judge the oral arguments of each student. Professors Pollman and Edwards articulate the situation well by saying:

[I]nstitution[s] should adjust the legal writing faculty member's load to be more equivalent to that of other faculty members or provide sufficient release time to even the field. A law school should not burden legal writing members with heavy teaching and administrative loads and then use the very loads they themselves imposed to argue that legal writing faculty members do not have the time to write, and therefore, should not be included as tenure-track faculty.

*Id.*

<sup>146</sup>*Id.* Continuing on the theme that high teaching loads leave LRW professors with little time to engage in scholarship, Professors Pollman and Edwards explain that “the traditional institutional support, important as it is, does not address the primary impediment to writing: heavy teaching loads and high student/faculty ratios. When more legal writing professors are given the same institutional support other faculty members receive, undoubtedly they will write even more.” *Id.* at 55.

professionals dedicated solely to teaching.<sup>147</sup> On the other hand, given the resource issues involved with teaching transactional drafting,<sup>148</sup> perhaps an adjunct model for such instruction would be possible. I will explore this notion in Part IV.B.

Second, teaching transactional drafting requires specialized training.<sup>149</sup> Most LRW professors nationwide have practice experience in litigation.<sup>150</sup> Accordingly, adding a transactional component to LRW would require, at the very least, a fairly extensive expansion of LRW professors' universe. Some contend that because LRW professors generally hail from a litigation background and become familiar over their years of teaching with litigation-oriented writing, they are not ideal candidates for the teaching of transactional drafting. This argument fails for two reasons. First, presuming that LRW professors cannot be "cross-trained" in transactional skills demeans talented legal educators. Assuming their inability to teach in the transactional realm is as illogical as presuming that doctrinal professors who teach transactional subjects cannot also transition into the teaching of transactional writing instruction.<sup>151</sup> Second, while most LRW professors are quite comfortable with the expertise they have developed in litigation-oriented writing, expansion into transactional drafting might be just the sort of change that can aid with the oft-noted mid law-teaching career doldrums. Thus, the expansion of LRW teaching into transactional areas can serve several purposes: making further strides in eradicating the illegitimate hierarchical distinctions forced upon LRW professors,<sup>152</sup> aiding to ease mid-career teaching doldrums, and creating interdisciplinary networking between LRW faculty and commercial and transactional faculty.

### 3. Issues Related to Resources

Teaching a first-year legal writing course with a litigation focus permits faculty to design problems whose resources are readily available to students in the public

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<sup>147</sup>*Id.* at 10 n.16 (stating that the "graduate student or young associate" model of LRW instruction generally has been replaced by the "full time professional" model).

<sup>148</sup>See *infra* Part IV.A.3.

<sup>149</sup>See Hurt, *supra* note 49, at 84.

The topics of LRW content and LRW hiring are truly a chicken-and-the-egg dynamic. LRW programs across the country are very litigation-oriented. LRW faculty across the country are more likely to have litigation experience than transactional experience. Therefore, LRW programs will find it difficult to design transactional problems or coordinate with a contracts professor on a drafting assignment when none of the LRW faculty have any transactional experience.

*Id.*

<sup>150</sup>*Id.*

<sup>151</sup>This logically leads us to the notion of teaching transactional drafting by means of a "hybrid course," jointly taught by one legal writing professor and one transactional law doctrinal professor. See discussion *infra* Part IV.B.

<sup>152</sup>By this I mean that by teaching transactional subjects, traditionally one of the more prestigious areas in the legal academy, LRW faculty can pull themselves up from the "pink ghetto" that exists now. See generally Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000) (criticizing the modern law school hierarchy as illegitimately constraining female LRW faculty by means of lower salary, fewer opportunities to teach "prized" courses, and under-funding scholarship).

domain. Cases, statutes, and administrative regulations (the sources of authority and, thus, decision-making in litigation) are available in law libraries and from the various vendors of Computer Aided Legal Research. Therefore, LRW faculty can create hypothetical problems involving litigated legal disputes, and students can “solve” these problems through reliance on sources easily available to them.

Such an endeavor is not quite as simple in transactional drafting instruction. The sources of that subject—contracts, wills, corporate documents, etc.—are not nearly as publicly available. Although the authority that shapes the rules used in transactional drafting is the same (i.e., statutes, case decisions, administrative regulations), the resources to create the problems are not so openly available as in litigation. This problem is compounded where LRW faculty hail from a litigation background,<sup>153</sup> while they may have many cases in their experience that they can turn into hypothetical problems, they lack deal-making experience that they can similarly turn into hypothetical transactions.<sup>154</sup> This factor also leads towards the conclusions outlined in Part IV.B.

#### 4. Conclusions

Clearly, difficulties exist in implementing transactional drafting instruction. There are, however, solutions to each of these issues. Some solutions may be mutually exclusive of others, thus necessitating that schools make difficult choices based on their own particular goals. Nonetheless, the next section addresses the solutions to the problems noted above.

##### *B. Four Model Programs Integrating Transactional Drafting Instruction into the Mandatory Legal Writing Curriculum*

A number of issues related to the integration of transactional drafting instruction into the LRW curriculum exist: costs, placement, resources, and others. Recommending a “model” program, therefore, is impossible given that each school will have its own idiosyncratic priorities in dealing with these issues. In other words, constructing, in this article, a one-size-fits-all model program that solves all the obstacles to integration simply cannot happen. Each school must weigh the benefits and burdens of this expansion according to its own particular needs and resources. For instance, smaller schools, perhaps, will not have to worry as much as larger schools about adding a second-year course for transactional drafting because accommodating their relatively smaller number of students can occur with little or no additional hiring. On the other hand, smaller schools may have a more difficult time implementing transactional skills into their first-year course without adding more professors because the existing faculty in a smaller school may not include former transactional practitioners.

Accordingly, rather than attempt the futile exercise of recommending one allegedly perfect model of integrating these skills, I will instead set out to describe three different models that address the different needs of different programs. The first, the “integration model” simply adds transactional subject matter to the first-year course. The second model, the “expansion model,” recommends adding a

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<sup>153</sup>See Hurt, *supra* note 49, at 84.

<sup>154</sup>*Id.* My thanks to Dean Robert Smith, Suffolk University Law School, for his contributions to these thoughts.

second-year course in which students can choose to be in one of the litigation sections or one of the transactional sections. The third model, “writing-across-the-curriculum,” places instruction in drafting skills (transactional or otherwise) within doctrinal courses. Finally, the fourth model, the “hybrid model,” recommends elective upper-division courses taught jointly by LRW professors and doctrinal/transactional professors.

### 1. The Integration Model

In this model, transactional drafting instruction is integrated into the mandatory first-year LRW course. While this does, indeed, create some crowding, some programs have made the decision to place transactional drafting instruction at the end of a two-semester, first-year course. For instance, at St. John’s University School of Law, at least one professor adds transactional drafting instruction at the end of the first year.<sup>155</sup> Furthermore, at Liberty University School of Law, the program employs a five-credit, two-semester LRW program, including transactional drafting and analysis instruction in the second semester.<sup>156</sup> About one-third of the second semester is devoted to basic contract drafting and contract analysis.<sup>157</sup> A mandatory “Skills Program,” which runs throughout the entire six-semester curriculum, augments this first-year course.<sup>158</sup> In this program, students continue to receive training in transactional drafting, including a fairly extensive series of assignments of varying lengths.<sup>159</sup>

My research discovered only a few schools, however, that included transactional drafting instruction in the first-year program. In scanning many, many law school websites and in contacting LRW programs directly,<sup>160</sup> I found very few programs

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<sup>155</sup>See e-mail from Robin Boyle Laisure, Professor of Legal Writing, Coordinator of Academic Support Program, Assistant Director of Writing Center, St. John’s University School of Law, to author (Aug. 25, 2006, 09:41:00 EDT) (on file with the author); e-mail from Robin Boyle Laisure to author (Aug. 27, 2006, 17:46:00 EDT) (on file with author). My thanks to Professor Laisure for her input.

<sup>156</sup>E-mail from Scott E. Thompson, Director, Center for Lawyering Skills, Assistant Professor of Law, Liberty University School of Law, to author (Aug. 25, 2006, 10:36:00 EDT) (on file with author). My thanks to Professor Thompson for his input.

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

<sup>158</sup>E-mail from Scott E. Thompson, Director, Center for Lawyering Skills, Assistant Professor of Law, Liberty University School of Law, to author (Aug. 25, 2006, 10:57:00 EDT) (on file with author).

<sup>159</sup>*Id.* As part of this curriculum, students must complete a number of short daily homework assignments on contract drafting and draft one complete contract of about five to eight pages. *Id.* A contract analysis assignment is also included, and is usually within five to eight pages. *Id.* Later in the students’ law school career, they must draft a complete Limited Liability Company plan, which can total as much as thirty pages. *Id.* It should be noted, however, that the assignments detailed in this footnote are part of an upper-level course, not the first-year course. *Id.*

<sup>160</sup>To do this, I utilized the listserv of the Legal Writing Institute. See Legal Writing Institute, Legal Writing Listservs, <http://www.lwionline.org/resources/listserv.asp> (last visited Mar. 1, 2007). This listserv delivers e-mails written by the poster to over 600 members of the legal writing community. *Id.* While I received many, many responses to my posting, the vast

that spend significant time on transactional drafting in the first year. This leads to a bit of a conundrum: Do schools avoid first-year instruction on transactional subjects for pedagogical reasons or because so many other schools do so? In other words, is this a matter of schools consciously deciding to focus on litigation or, in the alternative, is this a matter of everyone simply following the *status quo*?

The benefits of the integration model seem mostly to relate to cost. Obviously, if a school implements transactional drafting within the already-established first-year course, no additional hiring is required. Furthermore, legal writing faculty will not require extensive extra training because the amount of instruction, by necessity, will not be extensive. Additionally, another benefit of the integration model is that including transactional training in the first-year course undermines the subliminal push toward litigation created by the litigation-centric traditional LRW course and the Langdell casebook method.

The downsides of the integration model, however, are several. First, this model risks crowding the first-year course. Those of us who teach LRW know that two semesters allows only the most basic exposure to legal writing. Adding transactional training, therefore, risks creating a wide-but-shallow experience for students, who would receive only the most cursory experience in both litigation and transactional law. Additionally, being in their first year of law school, students lack a background in transactional law. This downside is minimized, I think, by the approach of teaching contract drafting at the end of the first-year LRW course.

## 2. The Expansion Model

In this model, transactional drafting is implemented in post-first-year LRW courses. The first-year course, therefore, can be reserved for the traditional curriculum of predictive writing, persuasive writing, and oral argument. Meanwhile, the third-semester course can take on different formulations: (1) a third-semester course offering students the choice of either a transactional drafting course, litigation drafting course, or other subjects; or (2) a third-semester course offering inclusion of advanced instruction on litigation drafting and transactional drafting.

An example of this model is Indiana University School of Law at Indianapolis. In that program, LRW is a required, three-semester curriculum.<sup>161</sup> In the third semester, students learn both appellate advocacy and contract drafting, split about evenly.<sup>162</sup> In this way, all students get at least some exposure to contract drafting.<sup>163</sup>

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majority fell into three categories: (1) schools with a one-year LRW program which ignores transactional subjects; (2) schools with a one-year LRW program but with upper-class electives which offer transactional drafting; or (3) schools with a LRW program of three or more semesters which includes transactional drafting in the second or third year of law school. *See Responses to Listserv Posting* (on file with the author).

<sup>161</sup>*See* e-mail from Kenneth D. Chestek, Clinical Associate Professor of Law, Indiana University School of Law, Indianapolis, to author (Aug. 25, 2006, 08:05:00 EDT) (on file with author). My thanks to Professor Chestek for his input.

<sup>162</sup>*Id.*

<sup>163</sup>Other schools also expand their LRW programs into the second year. *See, e.g.*, Case Western Reserve University School of Law, CaseArc Curriculum, <http://law.case.edu/curriculum/content.asp?id=400> (last visited Mar. 1, 2007); Chicago-Kent College of Law, Course Descriptions, <http://www.kentlaw.edu/academics/courses.html#required> (last visited

The pedagogical upsides to this approach are extensive. First, it avoids overcrowding the first-year course by placing transactional drafting instruction in the second year. Second, by expanding LRW into subsequent years, the program reinforces the writing improvements that students achieved in the first-year and, thus, avoids the phenomenon experienced in two-semester programs where students' writing skills regress in the final two years of law school. Third, this approach avoids the wide-but-shallow effect of cramming transactional drafting into the first-year course.

On the other hand, this model suffers from important downsides, mostly related to costs and resources. First, adding a third semester requires either substantially increasing LRW faculties's already large teaching load or hiring many new LRW professors. Second, because the transactional aspects of this course will likely go beyond simple contract drafting, professors must have some background in transactional law both for experience and to undermine the difficulties of problem-creation identified in Part IV.A. Also, placing transactional training in the second year does little to undermine the effect of a completely litigation-centric first-year LRW course coupled with the Langdell casebook model in all other classes.

However, tweaking various aspects of the curriculum can account for several of these downsides. For instance, at Indiana University School of Law at Indianapolis, students may take the third-semester course either in the fall or spring semester.<sup>164</sup> This allows LRW faculty to spread the second-year class in two, thus undermining the effect of increasing LRW professors' teaching load. An additional means by which to effectuate this result is by making the third-semester course an elective rather than a requirement.<sup>165</sup> While this nuance lessens the teaching load, it also represents a pedagogical compromise because, obviously, fewer students will take the course.

A final method for cutting costs and avoiding the expansion of LRW faculty teaching loads is to use adjuncts to teach the third-semester course. This approach: (1) reduces cost (because hiring adjuncts costs less both in salary and benefits); (2) leaves the full-time LRW faculty's teaching load the same; (3) brings teachers to the school with experience in transactional law; and (4) solves the resources (i.e., problem creation) obstacle. While the general momentum of the LRW community has been to transition to a full-time model,<sup>166</sup> teaching the expanded LRW course may be a worthy exception to this rule due to the advantages noted above.<sup>167</sup>

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Mar. 1, 2007); *see also* Chicago-Kent College of Law, Faculty Spotlight (July 2003), [http://www.kentlaw.edu/faculty/spotlight/strubbe\\_07-03.html](http://www.kentlaw.edu/faculty/spotlight/strubbe_07-03.html).

<sup>164</sup>*See* e-mail from Kenneth D. Chestek, Clinical Associate Professor of Law, Indiana University School of Law, Indianapolis, to author (Aug. 25, 2006, 10:33:00 EDT) (on file with author).

<sup>165</sup>This is the approach at many schools, including Cleveland-Marshall College of Law. *See* e-mail from Karin Mika, Legal Writing Professor, Cleveland State University, Cleveland-Marshall College of Law, to author (Aug. 24, 2006, 19:07:00 EDT) (on file with author); e-mail from Karin Mika to author (Aug. 25, 2006, 10:40:00 EDT) (on file with the author). My thanks to Professor Mika for her input.

<sup>166</sup>*See* Pollman & Edwards, *supra* note 145, at 10 n.16.

<sup>167</sup>Throughout this project I have also tinkered with the idea of requiring or offering the expanded model in the third year of law school, possibly only in the spring semester. The



### 3. The Writing-Across-the-Law-School-Curriculum Model

In this model, transactional drafting is not specifically added or apportioned to any one place in the curriculum, or even in the LRW department. Instead, as with all other writing components, it is interwoven throughout the doctrinal curriculum and provides a more system-wide writing experience.<sup>168</sup> Specifically, in doctrinal courses, students would not only learn the substantive law, but also prepare legal documents related to the practice of law in that area. This enhances not only the students' writing, but also their understanding of the doctrine.<sup>169</sup> In this system, both litigation and transactional writing would be pervasive in the law school curriculum: in civil procedure, students might draft complaints and answers; in contracts, students might draft simple contracts; in business organizations, students might draft a corporation's articles of incorporation. Meanwhile, the LRW course would tie all of this together by focusing on rhetoric theory, communication devices, and the like. In this regard, the law school curriculum would offer students both breadth and depth.<sup>170</sup>

The nationally acclaimed legal writing program at Mercer University School of Law best typifies the writing-across-the-curriculum model.<sup>171</sup> At Mercer, students are required to take courses in legal analysis, legal research, legal writing (two courses), and either "Contracts or Criminal Law with a Writing Component."<sup>172</sup> In the writing component courses, students are enrolled in small sections of the doctrinal course and are required to produce two or three writing assignments, receiving feedback on each.<sup>173</sup>

The upsides of this program are obvious. Students receive pervasive writing training—in the first-year and later—not only in legal writing courses, but also relating to their doctrinal courses. The direct effect is that students learn more writing and they learn more doctrine. The indirect effect is that students receive the implied message that writing is important in the practice of law. That message is perhaps a stronger method of encouraging student learning than any other model. Additionally, the costs of this program seem to be fairly reasonable because the teaching load for writing instruction is distributed not only throughout the writing

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benefit of this approach would be two-fold: (1) students would get one last exposure to writing training prior to the bar and practice; and (2) the course would be placed at the time in the students' career when they have the most extensive experience in substantive transactional law.

<sup>168</sup>Lysaght & Lockwood, *supra* note 144, at 74.

<sup>169</sup>*Id.* This theory embraces both the "writing to learn" approach and the "learning to write in the discipline" approach discussed by Professors Lysaght and Lockwood. *Id.* at 74-75. In other words, students' writing fosters their understanding of the substance of the doctrinal course while also teaching students how to communicate within the legal discourse community. *Id.*

<sup>170</sup>*Id.* at 104-05.

<sup>171</sup>*See* Mercer University School of Law, Legal Writing Program Required Courses, [http://www.law.mercer.edu/academics/legal\\_writing/courses/required.cfm](http://www.law.mercer.edu/academics/legal_writing/courses/required.cfm) (last visited Mar. 1, 2007).

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

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

professors, but also the doctrinal faculty.<sup>174</sup> Furthermore, this approach seems to solve many of the other problems associated with transactional implementation.<sup>175</sup>

The downsides to this approach are few, but potentially significant. A writing-across-the-curriculum model requires participation by doctrinal faculty. In a school that has followed a traditional legal writing approach, it may be quite difficult to convince those who teach these courses to include “writing components” to alter their course so dramatically. Mercer’s approach to this concern seems viable, however, in that it has integrated writing-across-the-curriculum components only to criminal law and contracts. In this respect, therefore, only doctrinal professors teaching those subjects would have to be convinced that implementation of this model is a worthy undertaking. Additionally, doctrinal professors are given the incentive of teaching smaller classes in the writing sections than they would in the non-writing sections. This incentive, coupled with the obvious pedagogical benefits, should convince many faculty members to pursue this model.

#### 4. The Hybrid Model

In this model, LRW faculty and doctrinal faculty with transactional backgrounds team up to teach transactional writing. This solves several problems. First, many doctrinal faculty shy away from writing courses due to the extensive amount of grading and commenting that takes up a great deal of time. In this model, LRW faculty, who are accustomed to the teaching load of writing courses, would likely be responsible for much of the grading and commenting. Second, this model also solves the problem of the relative lack of experience of LRW faculty in transactional law. The doctrinal faculty can focus on the substance, while the writing faculty can focus on the writing elements. Third, this model also solves the resource issue of where to find hypotheticals because doctrinal faculty will likely have such materials from their days in practice.<sup>176</sup> Finally, this model also creates a bridge between doctrinal and LRW faculty, establishing better relationships and ultimately leading to the betterment of LRW faculty in law schools.

There are downsides, or obstacles, to this approach. First, expending resources on two professors to teach a class may cause many law schools to think twice about this model. On the other hand, because co-teaching would reduce the preparation

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<sup>174</sup>Notably, the Mercer program uses instruction by many different players in the system: student mentors are involved in introductory courses, tenure-track faculty are involved in both writing and doctrinal courses, and practitioners are used as adjuncts in teaching upper-level drafting courses. Mercer University School of Law, Mercer’s Approach to Teaching Legal Writing and Research, [http://www.law.mercer.edu/academics/legal\\_writing/approach.cfm](http://www.law.mercer.edu/academics/legal_writing/approach.cfm) (last visited Mar. 1, 2007). This methodology deals effectively with the concern about finding sources for transactional problem hypotheticals.

<sup>175</sup>It certainly deals effectively with the “subliminal push towards litigation” issue because students would be drafting transactional documents in their first-year contracts courses.

<sup>176</sup>For information on pedagogical theories on transactional drafting issues, see Victor Fleischer, Essay, *Deals: Bringing Corporate Transactions Into The Law School Classroom*, 2002 COLUM. BUS. L. REV. 475 (2002); Robin A. Boyle, *Contract Drafting Courses for Upper-Level Students: Teaching Tips*, 14 PERSPECTIVES: TEACHING LEGAL RESEARCH & WRITING 87 (2006). For an example of a text that includes transactional drafting exercises, see PETER C. KOSTANT, BUSINESS ORGANIZATIONS: PRACTICAL APPLICATIONS OF THE LAW (1996).

time for each faculty member, perhaps professors, both transactional and writing, would be willing to split the salary increase involved. Second, some doctrinal professors may be resistant to the notion of co-teaching with LRW faculty. It seems, however, that for this model to be feasible, co-teaching between doctrinal and LRW faculty would be a pre-condition. Despite these possible short-comings, the hybrid model offers not only a viable methodology for teaching, but also side-effects that are beneficial both to students and faculty.

### C. Conclusion

With all these curricular choices, it seems untenable that schools would fail to include significant drafting instruction in legal writing courses. While there are upsides and downsides to each model, schools' individual needs may dictate which model is viable at that school.

In my opinion, the writing-across-the-curriculum approach not only solves many of the difficulties in implementing transactional drafting, it is also the best model for teaching students writing skills in general. It undermines the subliminal push towards litigation by including transactional writing in the first year; it does not overburden the first-year writing course because the increased teaching is distributed broadly; it does not compromise depth for breadth, because numerous courses share the burden of dispersing the transactional curriculum. While schools might be slow to adopt what they see as a radical and perhaps revolutionary change, that change is one that benefits students and, thus, ultimately benefits the practice of law. Law faculty, therefore, should reject mere resistance for the sake of resistance.

Even if schools do resist the writing-across-the-curriculum approach, it seems that the expansion model is just as viable. Many of the obstacles to its implementation are solved by simple tweaks: Allowing adjuncts to teach the upper-level transactional courses is cost-effective and solves the problems of problem-creation and background experience. In short, there seems to be no excuse for omitting a set of skills from the law school curriculum that so many of our students will need.<sup>177</sup>

## V. CONCLUSIONS

Writing is a fundamental part of a lawyer's day-to-day function. Only half of our students, however, will ever write in a litigation context. Why, then, are we teaching our students as if every single graduate will try cases, argue motions, and author appellate briefs? Instead, we should recognize that we fail in our role as educators of future lawyers by teaching only to a portion of that group. What opinion would we have, for instance, of medical schools that taught only podiatry?

This Article demonstrates that a demand exists and that law schools are not satisfying it. The survey of nearly one-thousand incoming law students shows that when students enter law school, more than half are at least open to the idea of practicing transactional law. Furthermore, the questionnaire of transactional students

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<sup>177</sup>See Hurt, *supra* note 49, at 84.

LRW programs have been fairly narrow in scope as to what practice skills are taught. . . . [M]ost LRW programs focus on assignments in a litigation setting. Law schools will not be serving the students by teaching practice skills that only half will use and ignoring practice skills that the other half of students will use.

*Id.*

shows that they are expressing some legitimate gripes about the nature of their writing training. While more than half of incoming law students have an interest in transactional careers, we provide such courses in only about one-third of all schools. Based on this short-coming, I propose four models that schools could adopt to implement transactional drafting instruction: (1) the integration model; (2) the expansion model; (3) the writing-across-the-curriculum model; and (4) the hybrid model.

Schools should examine the means by which they prepare tomorrow's lawyers to write. A thorough, thoughtful examination, free from the assumptions and self-interest-oriented decision-making that led to the marginalization of writing instruction in the first place, would demonstrate a need for change. That change would result in a more holistic education of future lawyers, a more equitable environment for legal writing faculty, and better representation for consumers of legal work-product.