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Access to Law or Access to Lawyers? Master's Programs in the Public Educational Mission of Law Schools

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Access to Law or Access to Lawyers? Master's Programs in the Public Educational Mission of Law Schools

MARK EDWIN BURGE*

The general decline in juris doctor (“J.D.”) law school applicants and enrollment over the last decade has coincided with the rise of a new breed of law degree. Whether known as master of jurisprudence, juris master, master of legal studies, or other names, these graduate degrees all have a target audience in common: adult professionals who neither are nor seek to become practicing attorneys. Inside legal academia and among the practicing bar, these degrees have been accompanied by expressed concerns that they detract from the traditional core public mission of law schools—educating lawyers. This Article argues that non-lawyer master’s programs are not a distraction from the public mission of law schools, nor are they a necessary evil foisted upon legal education by economic trends. Rather, such degrees reflect a paradigm shift that law schools and attorneys should embrace rather than resist: a move away from law being accessed primarily through a licensed elite

* Professor of Law and Director of San Antonio Programs, Texas A&M University School of Law. Thanks to many Texas A&M colleagues whose experiences with and conversations about the San Antonio Master of Jurisprudence Program helped shape the ideas presented in this article, particularly Charlotte Ku, James McGrath, Susan Phillips, Lisa Rich, Frank Snyder, and Nancy Welsh. My textbook coauthor Jennifer Murphy Romig and her Emory University School of Law colleague Rebecca Purdom deserve special thanks for sharing with me insights regarding legal master’s degrees that transcend any single program. This Article is dedicated with love to my wife, Rhonda, and our children Alaina, Lydia, and Matthew. They, above all, withstood the slings and arrows of program creation and administration, and they gave me unconditional support—even in moments where I hadn’t especially earned it. I am both blessed and grateful.

and toward a greater role for autonomy in public engagement with the legal system. The law school function of serving the public goes well beyond training future lawyers or even marshalling them in the service of access to justice. The expanded legal education vision advocated here includes those functions, but as part of a more encompassing mission. Law schools should aim to ensure access to law rather than simply access to lawyers. This Article then sets forth foundational frameworks for such programs to succeed at their goals, both at the programmatic level and at the course-design level.

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INTRODUCTION

Few would dispute the proposition that legal education has been in a challenging position during the past decade, a challenge echoing changes in the legal profession itself.¹ Identification and analysis of these challenges is so widespread that it has arguably given rise to its own genre of legal scholarship.² Indeed, the fundamentals of the

¹ See James G. Milles, *Legal Education in Crisis, and Why Law Libraries Are Doomed*, 106 LAW LIBR. J. 507, 507–08 (2014) (“Legal education is in crisis Many observers both inside and outside of legal education have concluded that law schools are on an unsustainable path.”).

² See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS*, at x (2012) (“In this book, I explore how law schools have arrived at this sorry state and the implications of this sad condition for the present and future.”); James E. Moliterno, *And Now a Crisis in Legal Education*, 44 SETON HALL L. REV. 1069, 1072 (2014) (“The current crisis in legal education coincides with a crisis in the practice of

“crisis” are well-documented.³ The Great Recession of 2008 initially showed continued growth in law school applicants and matriculants, a development in line with past precedents of higher education running counter-cyclical to the broader economy.⁴ After 2010, however, a post-recession downturn in the legal job market began to hit legal education in full force.⁵ The quantity of the J.D. applicant pool went into a sustained decline, eventually bottoming out at numbers unseen since the 1970s when far fewer law schools were competing for the same number of students.⁶ Universities, many of which were accustomed to their law schools being a cash-generating academic unit, faced the prospect for the first time of subsidizing

law. Law practice has changed as a result of technology, globalization, and economic pressures. The market for legal education’s product, law graduates, has diminished. Law schools cannot remain the same in this environment.”). *But see* Blake D. Morant, *The Continued Evolution of American Legal Education*, 51 WAKE FOREST L. REV. 245, 247 (2016) (“Critics will undoubtedly continue to question the relevance of the present model of legal education. The staid nature of our industry inhibits profound change in the short term. Yet, drastic change is neither necessary nor prudent.”).

³ See, e.g., Derek T. Muller, *Continued Hope for Modest Law School Applicant Increase in 2018*, EXCESS OF DEMOCRACY BLOG (May 29, 2018), <http://excessofdemocracy.com/blog/2018/5/continued-hope-for-modest-law-school-applicant-increase-in-2018> (illustrating longitudinal data on LSAT administrations, J.D. applicants, and J.D. matriculants since 2004) [hereinafter *Continued Hope for Modest Law School Applicant Increase*].

⁴ *Continued Hope for Modest Law School Applicant Increase*, *supra* note 3; Bridget Terry Long, *The Financial Crisis and College Enrollment: How Have Students and Their Families Responded?* in HOW THE FINANCIAL CRISIS AND GREAT RECESSION AFFECTED HIGHER EDUCATION 209, 210 (Jeffrey R. Brown & Caroline M. Hoxby, eds., 2014) (documenting that “previous research has found that college enrollment rates often increase as the unemployment rate grows”).

⁵ See *Continued Hope for Modest Law School Applicant Increase*, *supra* note 3; Press Release, Nat’l Ass’n for Law Placement, Graduates Faced Worst Job Market Since Mid-1900s: Longstanding Employment Patterns Interrupted (June 1, 2011), <http://www.nalp.org/uploads/PressReleases/11SelectedFindings.pdf>.

⁶ See J. Gordon Hylton, *Looking at The Increase in the Number of Law Schools and Law Students, 1950-2010*, MARQUETTE UNIV. LAW SCH. BLOG (July 25, 2012), <https://law.marquette.edu/facultyblog/2012/07/looking-at-the-increase-in-the-number-of-law-schools-and-law-students-1950-2010/>; Derek T. Muller, *Law School JD Enrollment Inches Upward as Non-JD Enrollment Continues to Soar*, EXCESS OF DEMOCRACY BLOG (Dec. 14, 2018), https://excessofdemocracy.com/blog/2018/12/law-school-jd-enrollment-inches-upward-as-non-jd-enrollment-continues-to-soar_

that unit on a large and sustained level.⁷ This unfamiliar situation for law schools gave rise to budgetary pressures to right the ship—or at least minimize the fiscal drain.⁸

Law schools and their universities' responses to the downturn have been varied, yet they fundamentally fall into two nonexclusive categories: cutting expenditures and increasing revenue.⁹ This Article focuses on one significant development on the revenue side, albeit with an acute awareness of its interconnectedness to expenditures. Expanded enrollment in a law school's bread-and-butter J.D. program is, of course, one potential means to address revenue.¹⁰ In an era of a smaller applicant pool, however, expanded J.D. enrollment is likely to come at an unattractive price: either entering class

⁷ See Judith Areen, *Legal Education Reconsidered*, 50 IND. L. REV. 1087, 1088 (2017) (“Because most law schools rely on tuition as their primary source of revenue, the drop in qualified applicants means that a significant number of American law schools are operating in the red—many for the first time ever. This is quite a turnaround from the days not so long ago when many law schools were viewed as cash cows by their universities because they so easily enrolled qualified students.”).

⁸ See, e.g., Jonah Meadows, *Northwestern Law School Cuts Faculty, Staff Amid Budget Deficit*, PATCH (Nov. 9, 2018), <https://patch.com/illinois/evans-ton/northwestern-law-school-cuts-faculty-staff-amid-budget-deficit> (noting that Northwestern Law School cut faculty and staff to ease its “challenging financial position”); Jane Stancill, *UNC Law School's Budget Is Cut – But It Could Have Been Worse*, NEWS & OBSERVER (June 20, 2017, 11:25 AM), <https://www.newsobserver.com/news/local/education/article157121589.html> (detailing the North Carolina Senate's decision to cut \$500,000 from UNC's law school budget).

⁹ See e.g., Meadows, *supra* note 8 (exemplifying the expenditure-cutting strategy); See generally HANOVER RESEARCH, ALTERNATIVE REVENUE GENERATION PRACTICES FOR LAW SCHOOLS 2 (2013) (providing an overview of revenue generation strategies undertaken by law schools).

¹⁰ See, e.g., Stephanie Francis Ward, *Faced with Dwindling Admissions, Some Law Schools Seek out Overachieving 1Ls*, A.B.A. J. (April 21, 2017, 4:15 PM), http://www.abajournal.com/news/article/law_school_transfers_grow_taking_achieving_1ls_to_higher_ranking_schools (“Law schools are increasingly interested in taking transfer students to bring in more revenue.”).

credentials, such as those represented by LSAT scores, can be compromised at the later cost of bar passage rates¹¹ and diminished rankings,¹² or entering class credentials can be maintained by offering increased scholarships or tuition discounts.¹³ The latter approach may be desirable based on other institutional goals, but it then undermines the positive financial impact of having a larger class.¹⁴ Another approach—and one that is the focus of this Article—is to increase the target audience for legal education outside the realm of aspiring lawyers. While law school finances tend to be the crisis¹⁵ that brought expanded legal education to the forefront, I argue here that the development of graduate law degrees not targeted toward prospective or existing lawyers is a positive change for both law

¹¹ Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1701 n.13 (2002) (“Not surprisingly, bar passage correlates to LSAT scores.”); Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT Is Not the Problem and Affirmative Action Is Not the Answer*, 24 STAN. L. & POL’Y REV. 379, 409 (2013) (“As should be clear by now, there is a correlation between LSAT score and LGPA. There is also a strong correlation between LSAT score and bar passage. There is an even stronger correlation among LSAT, LGPA, and bar passage.”).

¹² See, e.g., Heather Baier, *Marshall-Wythe School of Law Drops 12 Spots in U.S. News Rankings Since 2015*, FLAT HAT (April 17, 2018), <http://flathatnews.com/2018/04/17/marshall-wythe-school-of-law-drops-in-rankings/> (“Another factor that drove the ranking down was that the College’s law school maintained a consistent class size despite a large fall in applications after the 2008 recession.”).

¹³ See, e.g., Staci Zaretsky, *Law School Makes ‘Significant’ Tuition Cuts to Compete for Students*, ABOVE THE LAW (July 1, 2019, 1:43 PM), <https://abovethelaw.com/2019/07/law-school-makes-significant-tuition-cuts-to-compete-for-students/> (reporting law school tuition decreases at the University of Hawaii and the University of South Carolina).

¹⁴ See *id.* (noting that the University of South Carolina School of Law was only able to cut tuition after lawmakers agreed to increase the state’s spending on the school by \$8 million).

¹⁵ See generally Bernard A. Burk, Jerome M. Organ, & Emma B. Rasiel, *Competitive Coping Strategies in the American Legal Academy: An Empirical Study*, 19 NEV. L.J. 583, 598 (2018) (“[F]rom its inflation-adjusted peak in 2011-12 until 2016-17, overall average Tuition Revenue fell over one-third (-35 percent). In constant 2018 dollars, we estimate that annual Tuition Revenue for all accredited law schools in 2016-17 was over \$1.5 billion less than it had been in 2011-12—an average decrease of over \$9 million in annual Tuition Revenue per law school.”); see *id.* at 600 (“It would be no exaggeration to call these changes sudden, enormous, and drastic.”).

schools and the public they serve, regardless of prospective financial benefits.

Readers should be aware that—both for better and for worse—I approach the topic of non-lawyer master’s programs from a particular perspective borne of personal experience, so I will briefly recount that experience here. My dean at Texas A&M University School of Law asked me to oversee the launch of and to initially direct Texas A&M’s new San Antonio program, which would feature a master of jurisprudence (“M. Jur.”) degree program in business law and compliance—with business law being broadly conceived as law relevant to business professionals.¹⁶ Thus, the curriculum ranged from courses traditionally included under the “business” heading, like contracts and business associations, to courses with high relevance to business professionals, like employment law, environmental compliance, and intellectual property.¹⁷ The program, in line with university and system administrative goals reflecting the statewide component of our university’s global footprint, was to be built around a physical presence and live classroom setting. For those unfamiliar with Texas A&M and our home state’s geography, the law school is based in Fort Worth, and San Antonio is roughly 268 miles (assuming normal traffic, a four-plus hour drive) away.¹⁸ While launch of any new program comes packaged with a set of challenges, distance magnified those challenges and created new ones.

¹⁶ See generally Master of Jurisprudence Program in Business Law and Compliance, TEX. A&M U. SCH. OF LAW, <http://law.tamu.edu/llm-mjur-programs/san-antonio-mjur-program/m-jur-program> (last visited Oct. 16, 2019) (summarizing Texas A&M’s Master of Jurisprudence Program in Business Law and Compliance, launched in San Antonio in 2017).

¹⁷ *Frequently Asked Questions About Masters of Jurisprudence in Business Law and Compliance*, TEX. A&M U. SCH. LAW, <https://law.tamu.edu/llm-mjur-programs/san-antonio-mjur-program/m-jur-program/faqs> (last visited Oct. 15, 2019).

¹⁸ Driving Directions from Fort Worth, TX to San Antonio, TX., GOOGLE MAPS, <http://maps.google.com> (follow “Directions” hyperlink; then search starting point field for “Fort Worth, TX” and search destination field for “San Antonio, TX”). Arguably complicating matters a bit more is the fact that the main campus of Texas A&M University is in College Station, which is about 175 miles from Fort Worth and 170 miles from San Antonio—both excursions being in excess of two-and-a-half hours’ drive.

In retrospect, however, the distance turned out to be an important and beneficial driver of the launch and ongoing development of the program because it forced a rethinking of nearly every aspect of its design. The less complicated way—in both cost and logistics—for a law school to handle course offerings for a non-lawyer degree is to teach the master’s students as add-ons in existing J.D. classes.¹⁹ That option is impractical where the J.D. courses are taught over a four-hour drive away. Similarly, while bridging distance with fully online courses is an approach growing in popularity (and one that my home institution has successfully implemented elsewhere)²⁰ going wholly online was not an option where the program mission required a physical presence. By design, the program would need to appeal to prospective students who valued face-to-face instruction, but whose professional commitments also placed a premium on having some degree of flexibility. The hurdles of space and time forced a rethinking of ways and means to teach these master’s students. An innovative and building-from-the-ground-up approach is, fortunately, more likely to happen outside the walls of existing structures, whether those structures be physical or administrative.²¹ Here, the curse of physical distance ironically turned out to be a blessing. Working within restrictions forced a top-to-bottom analysis of program purposes and priorities, an analysis that informs this Article. The experience also strengthened my belief in the intrinsic value of non-lawyer master’s degree programs.

¹⁹ See Martin H. Belsky, *Preparing New Students for Legal Practice in a “Flat World,”* 24 PENN ST. INT’L L. REV. 787, 793–94 (2006) (explaining how opening up courses to add additional students from other departments involves only marginal costs); see e.g., *Master of Legal Studies Program*, WILLAMETTE U., <http://willamette.edu/law/programs/degree-programs/mls/index.html> (last visited Oct. 15, 2019) (noting that Master of Legal Studies students may take nearly “all of the courses taught at the Willamette University College of Law”).

²⁰ See *Distance Education Programs*, TEX. A&M U. SCH. LAW, <http://law.tamu.edu/distance-education> (last visited Oct. 16, 2019) (describing fully online legal education specialty programs in risk management and wealth management).

²¹ See MICHELE R. PISTONE & MICHAEL B. HORN, *DISRUPTING LAW SCHOOL: HOW DISRUPTIVE INNOVATION WILL REVOLUTIONIZE THE LEGAL WORLD* 16 <https://www.christenseninstitute.org/wp-content/uploads/2016/03/Disrupting-law-school.pdf> (“Disruptive innovators [in legal education], on the other hand, start with a blank slate. And, as a result, they may approach educational design very differently from traditional law schools.”).

Despite the economic downturn in which these innovative programs arose, this Article argues that they are a welcome development, one that law schools should embrace as part of their core public service mission. While the worthy goals of access to justice and to the legal system are traditionally conceived in terms of ensuring access to lawyers, the more appropriate organizing vision for law schools in the twenty-first century is that of providing *access to law*, a term used here to encompass public engagement with law and legal structures—both with and without lawyer guidance.²² Part I of this Article provides background on law schools' evolving position in the larger university setting, ultimately suggesting that the diminution of "law school exceptionalism"²³ is actually an opportunity to prove a larger institutional value proposition within the broader university. Next, Part II argues for specific application of that value in the arena that is the focus of this Article, the non-lawyer master's degree—known variously as a master of jurisprudence ("M.Jur."),²⁴ a juris master ("J.M."),²⁵ a master of legal studies ("M.L.S."),²⁶ and a master of studies in law ("M.S.L."),²⁷ among other names. Part III describes what the meaningful implementation of a legal master's

²² See Robert Grey Jr., *There Is No Justice as Long as Millions Lack Meaningful Access to It*, A.B.A. J. (Aug. 30, 2018, 6:05 AM), http://www.abajournal.com/news/article/there_is_no_justice_as_long_as_millions_lack_meaningful_access_to_it.

²³ Broadly speaking, the term "law school exceptionalism" refers to actual or asserted reasons why a law school is unlike the rest of its university. See, e.g., Peter W. Martin, *Employing Technology to Erode Legal Education's Twin Barriers of Distance and Cost*, 61 RUTGERS L. REV. 1115, 1124 (2009) (criticizing certain special accreditation restrictions imposed upon law schools by the American Bar Association based upon the schools' difference from the rest of the university); Richard A. Matasar, *Higher Education Evolved: Becoming the University of Value*, 66 SYRACUSE L. REV. 689, 698 (2016) (comparing higher education trends with those of law schools) [hereinafter *Higher Education Evolved*].

²⁴ See Master of Jurisprudence ("M.Jur.") Degree Program, TEX. A&M U. SCH. LAW, <http://law.tamu.edu/llm-mjur-programs/san-antonio-mjur-program/m-jur-program> (last visited Oct. 15, 2019).

²⁵ See *Juris Master (JM)*, EMORY L., <http://law.emory.edu/admission/juris-master/> (last visited Oct. 15, 2019).

²⁶ See *Online Master of Legal Studies Degree ("MLS")*, PEPPERDINE L., <https://onlinelaw.pepperdine.edu/mls/> (last visited Oct. 15, 2019).

²⁷ See *Master of Studies in Law ("MSL") Degree*, USC GOULD <https://gould.usc.edu/academics/degrees/msl/> (last visited Oct. 15, 2019).

program looks like where one accepts the proposition that its learning outcomes and subsidiary course designs have significant foundational differences with the outcomes and designs of J.D. programs. This Article concludes by pulling together its normative and practical threads to argue for a robust embrace of non-lawyer legal education by the academy.

While their foundational purpose of educating lawyers must remain intact, law schools in a liberal and democratic republic have a broader public mission. Although that mission certainly does encompass achieving public access to justice through access to educated lawyers, the educational goals should actually be much broader: the core public mission of a twenty-first century law school is and should be *access to law*. Enabling such access through degree programs outside the J.D. and LL.M. is a critical piece of accepting this broader mission.

I. LAW SCHOOL EXCEPTIONALISM AND THE UNIVERSITY

Although much of the debate over the American law school's role in the academy and in the public at large over the past decade was provoked by economic concerns, the underlying issues seeking resolution have a much longer pedigree.²⁸ Until the late nineteenth century, law schools were outsiders to the university, being castigated as a trade school rather than an academic endeavor.²⁹ Arguably, the most consequential of Christopher Columbus Langdell's

²⁸ See Areen, *supra* note 7, at 1088-89.

²⁹ See Peter Toll Hoffman, *Teaching Theory Versus Practice: Are We Training Lawyers or Plumbers?* 2012 MICH. ST. L. REV. 625, 626 (2012) ("The advocates of teaching theory have seized the semantic high ground in the discussion by labeling the teaching of lawyering skills as 'teaching nuts and bolts' and accusing those who advocate for such courses as wanting to 'run a trade school.' In a university-based law school where most of the other academic departments, such as chemistry or physics, pride themselves on engaging in pure knowledge-based research, these labels are serious insults.").

achievements in legal education was not the Socratic method of instruction³⁰ or creation of the casebook,³¹ but rather gaining the acceptance of legal education as a worthwhile endeavor in the university setting.³² Still, the merging of law into the university has been far from seamless and in many respects has never been fully accomplished, both sides having agreed to live in a mutually beneficial ambiguity over the last several decades.³³ The fading mutuality of the benefit has caused universities to rethink the relationships with their law schools,³⁴ occasionally to the dramatic level of severing the relationship.³⁵ Economic stress has brought to the forefront an

³⁰ Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 565 (2015) (“The case-based Socratic method became the dominant method of delivering legal education in 1870, first introduced by Christopher Langdell of Harvard University. Socratic teaching remains foundational to legal education and particularly central to first-year courses and upper-level bar examination courses.”)

³¹ Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2322 (2017) (“Langdell, by then dean of the [Harvard] law school, made good on his proposal by publishing a new kind of book for use in teaching: the first ‘casebook,’ *A Selection of Cases on the Law of Contracts*.”); see generally C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (Boston: Little, Brown, and Co. 1871).

³² Bruce A. Kimball, *Christopher Langdell: The Case of an ‘Abomination’ in Teaching Practice*, in THOUGHT & ACTION 23, 33 (Con Lehane ed., 2004).

³³ See Moliterno, *supra* note 2, at 1071.

³⁴ See, e.g., Maura Lerner, *University of Minnesota Law School Seeks Subsidies to Maintain Top Ranking*, MINNEAPOLIS STAR-TRIBUNE (May 28, 2018, 10:30 AM), <http://www.startribune.com/university-of-minnesota-law-school-seeks-subsidies-to-maintain-top-ranking/483829781/> (“But some regents are growing weary of the law school’s repeated requests for help, after pumping in \$17 million in subsidies to cover its year-end deficits since 2013.”).

³⁵ See, e.g., Sonali Kahli et al., *Whittier Law School is Closing, Due in Part to Low Student Achievement*, L.A. TIMES (Apr. 20, 2017, 8:55 PM), <http://www.latimes.com/local/education/la-me-edu-whittier-law-school-closing-20170420-story.html> (“Radha Pathak, the law school’s associate dean of student and alumni engagement, criticized trustees for failing to keep their pledges even after one-third of the tenured and tenure-track faculty took the buyout to help keep the law school afloat. ‘There are other law schools that receive support in challenging economic times from their institutions,’ Pathak said. ‘We haven’t received that kind of monetary support.’”); Emma Whitford, *Another Law School Will Close*, INSIDE HIGHER ED (Oct. 31, 2018), <https://www.insidehighered.com/news/2018/10/31/valparaiso-law-school-will-close-following-unsuccessful-attempt-transfer-middle> (“In 2017, Valparaiso Law School announced that it would no longer admit new students. Remaining students have the option

inevitable question, albeit one significantly unresolved since Langdell's day: is the law school an integral part of its university, or is it an exceptional and luxury add-on to be dispensed with if necessary? This Part addresses the history behind law schools' ambiguous—and now occasionally precarious—status in the academy. Such background enables exploring and justifying the non-economic benefits of non-lawyer master's degrees as a desirable further integration of law schools into the DNA of its parent university.

A. *Breaking into the Academy*

Law school in the United States is an immigrant to the university, not a native.³⁶ Until the latter part of the nineteenth century, “most preparation for admission to the bar in the United States had taken place outside of the university, as it had in England.”³⁷ Prospective lawyers typically worked under practicing lawyers to learn the profession while also reading law books in the office.³⁸ Alternatively, where the supervision of a practicing attorney was unavailable, “the student might read law independently.”³⁹ Where formal law schools did appear, they tended to be proprietary and practitioner-driven.⁴⁰

The practical apprenticeship approach to learning law faced a challenge in earnest with the appointment of C.C. Langdell as the

to transfer out of the law school, and current faculty and staff have signed an agreement with the university to stay until the end of this [2018-2019] academic year”).

³⁶ See Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education — A Case for Cultural Competency*, 38 S.U. L. REV. 1, 1 (2010) (“Prior to the late nineteenth century, both medical education and legal education existed outside universities.”).

³⁷ Carlo A. Pedrioli, *Constructing Modern-Day U.S. Legal Education with Rhetoric: Langdell, Ames, and the Scholar Model of the Law Professor Persona*, 66 RUTGERS L. REV. 55, 55 (2013) (internal footnotes omitted).

³⁸ *Id.*

³⁹ *Id.* at 55-56.

⁴⁰ Gene R. Shreve, *History of Legal Education Law School: Legal Education in America from the 1850s to the 1980s*, 97 HARV. L. REV. 597, 598-99 (1983) (“The most significant law schools of the early 1800’s were not closely affiliated branches of established universities, but rather proprietary law schools . . . which were outgrowths of the law offices of practitioners who had shown themselves to be particularly accomplished teachers.”).

dean of Harvard Law School in 1870.⁴¹ Langdell is remembered for his lasting innovations in legal education, including the use of Socratic questioning and the case method.⁴² He is also known for the ultimately discredited notion⁴³ that law is susceptible to being considered as a “science” under which proper analysis must inexorably lead to a single correct result.⁴⁴ The adoption of language and methods of science, while destined to fade, immediately aided Langdell in a quest where his argument ultimately prevailed: law is an academic discipline that ought to be housed in the natural home of academia—the university.⁴⁵ The hard sciences had been particularly embraced by universities in the late nineteenth century.⁴⁶ Association of law with scientific methodology could and did achieve a similar admission of law into respectable academia.⁴⁷ By undertaking “the scientific approach to law,” law schools consciously “sought to move from trade-school status to attain standing as true professional schools and legitimate members of the scholarly academy.”⁴⁸

Though universities had housed law schools on-and-off well before 1870,⁴⁹ the concept that law was an academic endeavor was far

⁴¹ See *id.* at 599–600.

⁴² Abrams, *supra* note 30, at 565; Gersen, *supra* note 31, at 2321.

⁴³ See Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WIS. INT’L L.J. 295, 300 (2006) (“Langdell’s notion of law as a science did not survive the realism movement of the 1920s and 1930s.”).

⁴⁴ Mark Edwin Burge, *Without Precedent: Legal Analysis in the Age of Non-Judicial Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 143, 147 (2013); Nancy Cook, *Law as Science: Revisiting Langdell’s Paradigm in the 21st Century*, 88 N.D. L. REV. 21, 34 (2012) (“In a very short time, the scientific theory paradigm attributed to Langdell was ‘obsolete in entirety.’”) (quoting Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 635 (2007)).

⁴⁵ Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 129 (1994) (asserting that part of Langdell’s motive in conceptualizing law as a science was “to secure the place of law schools within the American university.”).

⁴⁶ Moran, *supra* note 36, at 5 (“Instead of seeing the university as a place to infuse upper-class young men with ‘civilization’ through studies of Greek, Latin, Theology, and History, [nineteenth century] universities began to picture themselves as centers of knowledge production that trained scientists and engineers and housed researcher/scholar faculties.”).

⁴⁷ *Accord id.* at 5.

⁴⁸ Findley, *supra* note 43, at 299.

⁴⁹ Shreve, *supra* note 40, at 599 (observing that “[t]he 1850’s brought renewed interest by universities in legal education”).

from self-evident.⁵⁰ “Many within the liberal arts elite strongly resisted the view that either law in particular or professional training in general had a place within the college or university curriculum.”⁵¹ Legal education was in many respects a branch of the legal profession rather than an academic discipline.⁵² Even today, legal education is arguably “in fact jointly owned and managed by the academic branch of the [legal] profession, by the practicing branch of the legal profession through the accreditation and licensing processes, and by the universities.”⁵³ This background makes it less surprising that turn-of-the-century economist and sociologist Thorstein Veblen could remark that “the law school belongs in the modern university no more than a school of fencing or dancing.”⁵⁴ Legal academia has, both then and now, fought against any perception that law school is a technical trade school.⁵⁵ The term “trade school” is generally used as an agreed pejorative in discussions of legal education, a fate unquestionably to be avoided.⁵⁶ Indeed, advocates of practical skills

⁵⁰ See W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 3 (1997) (describing “those within the university who believed that law was not appropriate for study there”).

⁵¹ *Id.*

⁵² See Pedrioli, *supra* note 37, at 55.

⁵³ Moliterno, *supra* note 2, at 1071.

⁵⁴ John Henry Schlegel, *Langdell's Legacy or, the Case of the Empty Envelope*, 36 STAN. L. REV. 1517 (1984) (citing THORSTEIN VEBLEN, *THE HIGHER LEARNING IN AMERICA* 211 (1918)).

⁵⁵ This struggle is by no means unique to the United States, as Australian experience indicates. See Susan Bartie, *Towards a History of Law as an Academic Discipline*, 38 MELB. U. L. REV. 444, 458 (2014) (“When eventually the Vice-Chancellor proclaimed that the time had come to include law within the [New South Wales, Australia] University he was criticised for his vulgar resort to ‘utility’ in legal education. [Professor Linda] Martin suggests that the movement of legal education into the University was not delayed by lack of funding, but by a pervasive belief that there was little value in practical university legal studies.”).

⁵⁶ See Martin Katz, *Why This Time Is Different: The Perfect Storm and the Future of Legal Education*, U. DENVER: INST. FOR ADVANCEMENT AM. LEGAL SYS. BLOG (Oct. 10, 2011), <https://online.iaals.du.edu/blog/why-time-different-perfect-storm-and-future-legal-education> (recounting several decades where “most law schools were trying to build their reputation by distancing themselves from anything that might cause them to resemble a “trade school” (a term that tended to be used quite pejoratively”).

education in law schools often feel the need to affirmatively disclaim any attempt to turn law school into a trade school.⁵⁷

Nonetheless, Langdell's position, as carried forward by the sustained influence and example of Harvard's law school, ultimately resulted in "two important, permanent gains" for legal education in establishing its place in the academy.⁵⁸ Specifically, "[u]niversity law school training 'was established as *de rigueur* for leaders of the profession,' and 'law was accepted, finally and irrevocably, as an appropriate study for university education.'"⁵⁹ With legal education obtaining the prestige and respectability as part of the university,⁶⁰ what benefit was there to the university in absorbing law into its intellectual infrastructure? Beyond the reflected respectability of law as a then-ostensibly scientific endeavor, universities secured two practical benefits. First, the university obtained access to the primary occupation of influential elected officials.⁶¹ While legislators and others in the government were not exclusively lawyers, they

⁵⁷ See, e.g., Carol Goforth, *Transactional Skills Training Across the Curriculum*, 66 J. LEGAL EDUC. 904, 918 (2017) ("Certainly some faculty members resist the push for more skills training, seeing it as an effort to turn law schools into 'trade schools' rather than institutions of higher learning."); Elizabeth Adamo Usman, *Nurturing the Law Student's Soul: Why Law Schools Are Still Struggling to Teach Professionalism and How to Do Better in an Age of Consumerism*, 99 MARQ. L. REV. 1021, 1043 (2016) ("The legal academy long resisted such reforms, viewing practical skills training as the 'grubby' stuff of 'trade schools,' rather than the more rarified theoretical air of graduate education.") (internal quotations and footnotes omitted); Matthew J. Wilson, *U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems*, 18 CARDOZO J. INT'L & COMP. L. 295, 350 (2010) ("Some legal educators harbor concerns that an excessive emphasis on practical skills courses will transform law schools from reputable academic institutions into technical trade schools."); Dianne Molvig, *Learning to Be A Lawyer*, WIS. LAW., Sept. 1996, at 12 ("You don't want law school to become a trade school; it's a professional school.") (quoting Gerald Thain).

⁵⁸ Shreve, *supra* note 40, at 600 (reviewing and quoting ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 36 (1983)) (internal citations omitted).

⁵⁹ *Id.*

⁶⁰ See Penelope Pether, *Measured Judgments: Histories, Pedagogies, and the Possibility of Equity*, 14 LAW & LITERATURE 489, 501 (2002) (arguing that many of Langdell's categories of legal doctrine were "necessitated by the battle to turn law into an intellectually respectable university discipline.").

⁶¹ See Paula A. Monopoli, *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, 2012 MICH. ST. L. REV. 1745, 1754 (2012) (citing

were disproportionately so. Second, “law schools, with large lectures and without expensive laboratories, were profit centers for universities.”⁶² Historically, universities have “profited significantly by the legal profession’s process of creating new members.”⁶³ That opportunity for university profit has diminished significantly along with the past decade’s diminished demand for legal education.⁶⁴

While universities still benefit from the place of lawyers as leaders in American society,⁶⁵ the consistent status of law schools as university profit centers has vanished over the past decade and seems ill-positioned to return, at least not to the sustained levels of past decades.⁶⁶ This adjustment to the underlying economic relationship between universities and their law schools suggests that law schools should rethink the scope of their missions, a rethinking that should be generated within the law school, but also one that certainly could be imposed by the university.

B. *In the University—Not of It.*

Law schools have been characterized, correctly on many points, as having a “very different academic culture” from the rest of the university.⁶⁷ Despite the fact that law schools sought and ultimately obtained the standing and prestige that accompanied being a university-recognized academic endeavor, they simultaneously retained a

William D. Henderson, *The Inferiority Complex of Law Schools*, NAT’L JURIST, Mar. 2012, at 4, 4–5).

⁶² *Id.*

⁶³ Moliterno, *supra* note 2, at 1071.

⁶⁴ *Id.*

⁶⁵ Laura Stein, *Reflection on Lawyers as Leaders*, 69 STAN. L. REV. 1841, 1841 (2017) (“Lawyers as leaders have long used the law to make a real difference, to matter, and to help.”).

⁶⁶ See David Yellen, *Post-Crisis Legal Education: Some Premature Thoughts*, 66 SYRACUSE L. REV. 523, 528 (2016) (“There was a time when many law schools were profit centers for their universities . . . Today, however, many universities are, in effect, subsidizing their law schools, often to the tune of millions of dollars a year . . . If the financial outlook of legal education does improve, universities will look to recoup some of the losses they have suffered while supporting their law schools during the crisis.”).

⁶⁷ Victor G. Rosenblum, *Book Reviews*, 46 J. LEGAL EDUC. 308 (1996); DAVID DAMROSCH, *WE SCHOLARS: CHANGING THE CULTURE OF THE UNIVERSITY* (1995).

certain amount of distance from their academic home.⁶⁸ Law schools tend to persist in a certain amount of exceptionalism among units of a university, much of it stemming from their sustained position of economic self-sufficiency that characterized these units during most of the last century.⁶⁹ This Section suggests that, while law schools do have many inherently distinguishing qualities among the academic units, traditionally high degrees of insulation from university programs and practices are contributing to a hindrance of imagination in means of serving the public. Non-lawyer graduate programs are one area where law schools' imaginations ought to flourish in finding means of reaching the public, but legal education is, in many respects, a latecomer to this notion.

The circumstances of law schools' existence within their universities are varied, and some of these circumstances are not exclusive to law. Consider, for example, the lack of an undergraduate connection.⁷⁰ A number of distinctions between law and other academic units arises as an unavoidable consequence of law's adoption into academia as a professional school without any undergraduate academic programs.⁷¹ In the United States, almost no one "majors" in law,⁷² at least not in the sense that law schools teach the field. The

⁶⁸ F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 L. LIBR. J. 563, 572 (2002) ("Traditionally, law schools tended to keep aloof from other schools in the university. Law schools usually have their own buildings. The law library is separate from other university libraries and contains almost exclusively legal materials. The segregation of students has been nearly total. Undergraduate programs in law are rare; virtually no one but law students take law courses, who in turn take nothing outside the law school.").

⁶⁹ See Monopoli, *supra* note 61, at 1754.

⁷⁰ See Hanson, *supra* note 68, at 572.

⁷¹ *Id.*

⁷² One noteworthy exception to this absence of an undergraduate major in law is at the University of Arizona, which offers a bachelor of arts that it characterizes as the "nation's only undergraduate law degree." U. ARIZ. JAMES E. ROGERS C. L., <https://law.arizona.edu/> (last visited Feb. 14, 2019). The University of Arizona may not be alone in this field for long, however. See Karen Sloan, *Ahead of the Curve: Here Come the Undergraduate Law Degrees*, LAW.COM (Jul. 9, 2019, 3:42 PM), <https://www.law.com/2019/07/09/ahead-of-the-curve-here-come-the-undergraduate-law-degrees/> ("At the end of June, the State University of New York at Buffalo Law School announced its plans to launch an undergraduate degree in law, taught by the law faculty. It will become just the second such program in the United States.").

same distinction applies to other professional programs, such as medical schools and dental schools,⁷³ however, and thus does not fully stand out as a difference. More telling is the fact undergraduates who wish to become lawyers are unlikely to find much agreement on what a “prelaw” curriculum should look like—or even whether such a thing truly exists.⁷⁴ Such openness contrasts with the medical fields where matriculants are required to have a robust and particularized undergraduate background in relevant science and math courses.⁷⁵

Even where law schools adopted the trappings and practices of other parts of academia, implementation has remained distinctive. Law reviews have certainly been a means by which law schools have contributed “to the larger university setting” by adding to the university’s output of scholarly journals.⁷⁶ But as American legal academics know full well, the leading journals in law do not operate like their counterparts in other disciplines.⁷⁷ Law review editors are

⁷³ Allen Chen, *From Premed to Physician: Pursuing a Medical Career*, BUREAU LAB. STAT., <https://www.bls.gov/careeroutlook/2017/article/premed.htm> (Dec. 2017).

⁷⁴ *Pre-Law: Preparing for Law School*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/pre_law/ (last visited Oct. 15, 2019).

⁷⁵ One popular preparatory advice site for medical school identifies courses in biology, chemistry, physics, and mathematics as being “nearly universal” prerequisites for admission to medical school. *The Prerequisites for Medical School*, KAPLAN, <https://www.kaptest.com/study/mcat/the-prerequisites-of-medical-school/> (last visited Oct. 15, 2019). Many schools have additional but varying requirements beyond these. *See id.*

⁷⁶ Pedrioli, *supra* note 37, at 63–64.

⁷⁷ *See* Albert H. Yoon, *Editorial Bias in Legal Academia*, 5 J. LEGAL ANALYSIS 309, 311 (2013).

upper-level students rather than academics.⁷⁸ Acceptance for publication is typically not based on a peer-review process.⁷⁹ These differences may or may not be positive ones,⁸⁰ but they unquestionably make legal academic publishing a different creature than exists in other disciplines.⁸¹ Furthermore, scholarship in law has tended to be less collaborative than that done in other units of the university where collaboration and co-authorship are the norm rather than the exception, a situation perhaps attributable to the traditional solo nature of law practice.⁸²

The J.D. academic program has, within the graduate programs of the university, maintained pedagogical traits that broadly defy classification as fish or fowl, being neither intensely practical nor profoundly theoretical.⁸³ Legal pedagogy, coming from such a different place with its signature (though not exclusive) Socratic

⁷⁸ *Id.* (“Law reviews differ from peer-review journalsMost significantly, the editors are law students, not faculty.”); *see also* Miami Law Review Staff, *University of Miami Law Review Volume 74 Editorial Board Announced*, U. MIAMI SCH. L. (March 19, 2019), <https://www.law.miami.edu/news/2019/march/university-miami-law-review-volume-74-editorial-board-announced>.

⁷⁹ Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 9 (2013) (recognizing that “student editors generally do not use peer review” in law reviews’ article selection process).

⁸⁰ *See* Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 57 (2015) (acknowledging the existence of an argument that reform efforts in legal scholarship “are hopeless because legal scholarship would simply trade one set of problems (e.g., article selection bias by students) for another (e.g., article selection bias by peers).”).

⁸¹ *Id.* at 57-58.

⁸² *See* Carol Weisbrod, *Building Community in Sarastro’s Dungeon*, 9 YALE J.L. & HUMAN. 443, 455 (1997) (noting that David Riesman suggested in 1951 that lawyers showed a tendency to become “hard-working isolates”). *See also* Randy Frances Kandel, *Whither the Legal Whale: Interdisciplinarity and the Socialization of Professional Identity*, 27 LOY. L.A. L. REV. 9, 14 (1993) (“Lawyers, for the most part, work with and against other lawyers rather than in teams comprised of people from different specialties.”).

⁸³ Kandel, *supra* note 82, at 19 (suggesting that law schools “have met the requirements of mass mental feeding by purging legal education of the visceral experiences apprentices receive and the abstract theoretical mastication graduate students must do”).

method of instruction has tended to be behind the curve on innovation as compared to other academic units.⁸⁴ While “general research on teaching adult learners has been conducted in universities (mainly in Schools of Education) for a long time,” such research “rarely filtered down to law faculties.”⁸⁵ Moreover, the research that did “usually did not deal directly with the somewhat unique law school setting.”⁸⁶

Until the financial upheaval of the last decade, law schools had the luxury of being insulated from university integration due to their financial independence.⁸⁷ As net contributors to the central coffers in a way that would be neither possible nor expected for most departments in, for instance, the liberal arts and social sciences, law schools could (and did) skirt much in the way of university integration and administrative mandates.⁸⁸

Taken together, these factors resulted in law schools that were housed within universities yet were in many respects isolated from them.⁸⁹ Law as a profession trained in the academy will always have

⁸⁴ Abrams, *supra* note 30, at 562-63.

⁸⁵ Arturo L. Torres & Karen E. Harwood, *Moving Beyond Langdell: An Annotated Bibliography of Current Methods for Law Teaching*, 29 GONZ. L. REV. 1, 2 (1994).

⁸⁶ *Id.*

⁸⁷ See, e.g., Gregory W. Bowman, *The Three Pillars of A Successful Law School*, W. VA. LAW., Autumn 2019, at 10 (“For many decades and until very recently, law schools could operate with relatively high levels of autonomy within their universities, due largely to law school finances and to the fact that their professional educational programming was relatively independent from the educational programming of their home university.”); Eli Wald, *A Thought Experiment About the Academic “Billable” Hour or Law Professors’ Work Habits*, 101 MARQ. L. REV. 991, 1015 (2018) (recounting that “[l]aw schools and their professors tend to be relatively insulated from pressures affecting other parts of the university.”).

⁸⁸ Accord David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 269 (2010) (noting that law schools “have been largely insulated from public scrutiny by their connection to the ABA and status as parts of the university institution”).

⁸⁹ See Kandel, *supra* note 82, at 18 (observing that “the decision to make law schools postgraduate institutions resulted in the study of law being separated from the study of philosophy, political science, economics, and other related subjects.”).

a core essence, and will include an expectation that “someone aspiring to the profession is to be immersed in” that essence.⁹⁰ The distinctiveness that makes law something other than sociology, medicine, or economics is not going away. Other distinctions, however, do face the prospect of diminishment in the legal academy’s upcoming years and decades, especially given the faded financial independence of law schools.⁹¹ It is beyond the scope of this Article to analyze or opine upon the relative desirability of the breakdown of all aspects of law school exceptionalism. To be sure, not every distinction will break down in what remains a distinctive field. Nonetheless, unresolved contradictions have been inherent in the transformation of law schools into the *legal academy* by virtue of their naturalization as citizens of the university. To some degree, the matters that are unresolved are coming ripe for resolution. One positive and appropriate means of resolution of these contradictions is by law schools’ robust adoption of non-J.D. master’s-level graduate education, as discussed in the following Part.

II. TOWARD AN EXPANDED PUBLIC MISSION

Roughly two decades into the twenty-first century, legal education stands at a crossroads for defining its future public educational mission.⁹² Will law school be lawyer school, or will it be something

⁹⁰ Robert K. Rasmussen, *Law Schools and the University*, 66 SYRACUSE L. REV. 451, 453 (2016).

⁹¹ See Yellen, *supra* note 91, at 528 (“If the financial outlook of legal education does improve, universities will look to recoup some of the losses they have suffered while supporting their law schools during the crisis.”); Eric A. Chiappinelli, *Just Like Pulling Teeth: How Dental Education’s Crisis Shows the Way Forward for Law Schools*, 48 SETON HALL L. REV. 1, 7 (2017) (“A great many law schools connected with universities clearly face similar problems but are able to conceal those problems from the public because the central university quietly covers the law school’s revenue shortfall.”).

⁹² By use of the term “public *educational* mission,” I intentionally focus this Article on the teaching role of law schools and not on their role in facilitating and producing legal scholarship. While I am a firm believer in the value of legal scholarship, the debates over that point are outside of the scope and purpose of this article and are robustly covered elsewhere. See generally Ray Worthy Campbell, *A Comparative Look at Lawyer Professionalism: Contrasting Search Engine Optimization, Lawyering, & Law Teaching*, 50 U.S.F. L. REV. 401, 425–26 nn.58–60 (2016) (“At present, the value of legal scholarship is under attack both from within and without the legal academy. Law professors have noted that, even in an

broader than that? This Section advocates the broader mission as a normatively desirable development in a participatory liberal democracy, and further posits that non-lawyer master's degrees are the key present step toward advancing that development.⁹³ The sustained turbulence in J.D. applications and matriculation over the last decade⁹⁴ has set the stage for a "master's-degree moment" in legal education.⁹⁵ Law schools have unavoidable systemic financial incentives to do what they should be doing anyway—facilitating more widespread public access to law. The well-known political maxim is appropriate for legal education at this time: "Never let a crisis go to waste."⁹⁶ The fiscal pressures encouraging law schools to venture outside of longstanding practices ultimately means that useful change has a greater chance for success. The concept of a non-J.D. public mission for law schools is, despite its innovative and disruptive qualities, actually within the well-established aspirational goals of law schools as facilitators of public good. Not only is the M. Jur./J.M./M.L.S. concept not a distraction from the public mission of law schools, but these degrees are actually a *fulfillment* of that mission in its ultimate sense.

The most significant normative justification for the Master of Jurisprudence degree (and its J.M. and M.L.S. cohorts) rests on the nature of law itself in a liberal democracy. Lawyers are necessary and beneficial in facilitating the operation of the legal system, but lawyers do not "own" the law in any real sense. Instead, the law ultimately belongs to the populace upon whom it imposes its duties

academic field that is notoriously footnote mad, around half of all legal scholarship never gets cited by anyone. Others inside the academy have questioned the cost. The sitting Chief Justice of the United States has mocked the value of law review scholarship.") (internal footnotes omitted).

⁹³ See Rasmussen, *supra* note 90, at 461–62 ("Just as lawyers need to understand the cognate professions to operate more effectively, the other professions need to understand the law. Law schools that do not see the value of law to non-lawyers sell themselves short. Law increasingly intrudes into everyday life on multiple fronts.").

⁹⁴ Moliterno, *supra* note 2, at 1072.

⁹⁵ See sources cited *supra* notes 24–27.

⁹⁶ Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 *FORDHAM L. REV.* 3067, 3083 (2014) (attributing the most famous recent use of the phrase to then-candidate Barack Obama's campaign advisor, Rahm Emanuel, speaking of the 2008 financial meltdown that sparked the Great Recession).

and obligations.⁹⁷ Historically, however, law schools have tended to define their principal service to the public in terms of creating lawyers who would themselves engage in societally-beneficial activities.⁹⁸ The lawyers, in turn, would be on the front line of facilitating the legal system's operation by skilled and informed representation of clients.⁹⁹ While that perspective on lawyer production as public service is not wrong, it is cramped and dated in its restrictiveness. Law has continued to grow in complexity,¹⁰⁰ even concurrently with the last decade's decline in the job market for lawyers.¹⁰¹ Much of that decline was attributable, whether directly or indirectly, to growth in technologies that replaced or automated many bread-and-butter tasks previously handled by lawyers.¹⁰² Those same technological trends, however, also empower informed laypersons in legal compliance.¹⁰³

Law schools, while continuing to prepare lawyers to counsel and represent clients (and indeed to do so at increasingly high levels of expertise), should also embrace the role of facilitating legal compliance by the lay public. Non-lawyer master's degree programs are not merely a new function for legal education in the United States, but actually a logical advancement of its existing functions. They are also consistent with the public-service concept of the American universities¹⁰⁴ in which most domestic law schools are now housed.

⁹⁷ See Judy Perry Martinez, *How Lawyers and Judges Can Help Rebuild Public Trust and Confidence in Our Justice System*, A.B.A. J. (Aug. 9, 2018, 6:00 AM), http://www.abajournal.com/news/article/how_lawyers_and_judges_can_help_rebuild_public_trust_and_confidence (emphasizing that “justice belongs to the people.”).

⁹⁸ See, e.g., Robert Post, *Leadership in Educational Institutions: Reflections of a Law School Dean*, 69 STAN. L. REV. 1817, 1818–19 (2017) (observing that “legal educators were informed during the recent crisis that there was agreement that “the basic purpose of law schools is to train lawyers”).

⁹⁹ *Id.*

¹⁰⁰ Hanson, *supra* note 68, at 563.

¹⁰¹ Moliterno, *supra* note 2, at 1072.

¹⁰² Hanson, *supra* note 68, at 563 (2002) (determining in 2002 that “the upheaval in the management of legal information has produced a number of fundamental transformations in the process and products of legal research and, indeed, in the structure and practice of the law itself.”).

¹⁰³ *Id.* at 593.

¹⁰⁴ *Accord Mission*, AAUP: AM. ASS'N U. PROFESSORS, <https://www.aaup.org/about/mission-1> (last visited Oct. 25, 2019) (stating a purpose across all university members “to ensure higher education’s contribution to

To be sure, post-Langdell legal education in the United States has tended to conceive of itself in narrow terms, even when espousing admirable aspirations of service to the broader public. In that vein, Roscoe Pound's 1951 remarks at the dedication of the new University of California, Los Angeles law school building (which would contain the young law school that Pound had joined as a member of faculty after his Harvard deanship)¹⁰⁵ are representative:

[T]o teach law in the grand manner means . . . *to raise up lawyers* as conscious members of a profession; as members of an organized body of men pursuing a common calling as a learned art *in the spirit of a public service*—no less a public service because it is incidentally and so only secondarily a means of livelihood.

. . . .

There is no way of learning a field of the law like teaching it to well-educated students such as alone are now admitted to study in accredited American law schools.

. . . .

I submit that a duty is cast upon *the faculty of the law school* of a state university, both as members of the teaching profession and as members of the legal profession, *to exercise the learned arts* they pursue in the spirit of a public service in the great and needed

the common good.”). The typical U.S. law schools’ mission statement explicitly includes a public service component, as well. *See also* Margaret Martin Barry, et al., *Justice Education and the Evaluation Process: Crossing Borders*, 28 WASH. U. J.L. & POL’Y 195, 203 n.22 (2008) (collecting law school mission statement sources).

¹⁰⁵ *See* Rachel F. Moran, *Clark Kerr and Me: The Future of the Public Law School*, 88 IND. L.J. 1021, 1025 (2013) (describing the context of Dean Pound’s UCLA remarks).

service of *taking upon themselves the role of a Ministry of Justice*.¹⁰⁶

Here, Pound touches on two streams of law school public service. Both streams are important, but for legal education on the cusp of the 2020s decade, one of the streams is narrow and diminishing while the second has breadth and momentum for growth. The first stream, represented in his reference to “public service” by law schools,¹⁰⁷ is implicit and indirect. The street-level and direct public service he references is performed, not by the school itself, but by the “well-educated students such as *alone*” law schools train into the profession.¹⁰⁸ Note that such service, while impactful, is inherently elite in nature, with lawyers effectively acting as a buffer between the law school and the general public whom the law school serves, albeit indirectly. Pound’s second reference to “the spirit of public service,” in contrast, is broad and direct, referring to public service performed by the law school directly through its faculty.¹⁰⁹ They engage in the “great and needed service” that Pound characterized as “the role of a Ministry of Justice.”¹¹⁰ Advocacy of a “ministry of justice” in American law actually was articulated four decades earlier with Benjamin Cardozo’s concern about the need to improve communications between courts and legislatures.¹¹¹ This Article, in contrast, concerns itself with Pound’s formulation because he advanced law schools (acting through their law faculty) as the means for improving the function of public governance.

This “Ministry of Justice” concept promoted by Pound is relevant and explanatory here because it is at the headwaters of a law school mission that is separate from training lawyers. This “other” mission is the function of law schools mediating a gap between law

¹⁰⁶ Roscoe Pound, *A Ministry of Justice: A New Role for the Law School*, 38 A.B.A. J. 637, 637, 705 (1952) (emphasis added).

¹⁰⁷ *Id.* at 637.

¹⁰⁸ *Id.* at 705 (emphasis added).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921) (“This task of mediation is that of a ministry of justice. The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged. The thought is not a new one. Among our own scholars, it has been developed by Dean Pound with fertility and power.”).

and legal institutions on the one hand, and the governed public on the other.¹¹² Pound's 1951 address was focused on faculty service *to public institutions* rather than directly *to the public* served by those institutions.¹¹³ The advancement of diverse public interests through institutions that fit within the notion of a ministry of justice frequently does involve law faculty aiding public institutions. On matters of statutory revision and reform, for example, the Uniform Law Commission ("ULC") primarily navigates public policy matters—not directly with the public—but with the public's elected representatives in state legislatures.¹¹⁴ For another example, the American Law Institute ("ALI"), whose members were and are drafters of the influential restatements of the law,¹¹⁵ has expressly been identified as advancing the mission of a ministry of justice.¹¹⁶ Legal academics do indeed play substantial roles in the law reform efforts of both the ULC¹¹⁷ and the ALI.¹¹⁸ Such activities are certainly within the public service contemplated by Pound. While the public benefits from these organizations' efforts, the ULC and ALI do not reach the public directly.

Non-lawyer master's programs—innovations that Pound certainly did not envision in 1951—are nonetheless consistent with and a fulfillment of the larger goal of the "Ministry of Justice" law school. These degrees directly reach the public by mediating the gap

¹¹² Pound, *supra* note 106 at 637.

¹¹³ *Id.* at at 640–41.

¹¹⁴ The ULC is historically also known as the National Conference of Commissioners on Uniform State Laws. See *Overview: About Us*, UNIF. L. COMM'N, <http://www.uniformlaws.org/aboutulc/overview> (stating that the ULC "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.").

¹¹⁵ See American Law Institute, *About ALI*, A.L.I., <https://www.ali.org/about-ali/> (last visited Oct. 16, 2019) (stating that ALI's "distinguished members have the opportunity to influence the development of the law in both existing and emerging areas, to work with other eminent lawyers, judges, and academics, to give back to a profession to which they are deeply dedicated, and to contribute to the public good.").

¹¹⁶ See Kristen David Adams, *The American Law Institute: Justice Cardozo's Ministry of Justice?*, 32 S. ILL. U. L.J. 173, 200 (2007) ("At least three other authors have raised the possibility of a comparison between the American Law Institute and Justice Cardozo's Ministry of Justice, but none of these have fully explored the contours of such a comparison.").

¹¹⁷ UNIF. LAW COMM'N, *supra* note 114.

¹¹⁸ American Law Institute, *supra* note 115.

between law and those it governs. The principal difference is that they approach the task from the side of the public rather than from the side of legal institutions. Bringing the law directly to the public is not part of the traditional task in which law schools have engaged themselves over the last century,¹¹⁹ but doing so improves the service of legal systems to the public. Rather than simplifying, systematizing, or otherwise making sense of the law itself—roles typified by the ULC and ALI—non-lawyer education better empowers the public itself to navigate the law as it stands. Empowering the public is, in many respects, the ultimate fulfillment of legal education as a public service.

The public service provided by extending legal education beyond the realm of training future lawyers also has a basis apart from the law school mission; it is consistent with the American concept of a university, a concept that differs substantially from its medieval European origins because of the impact of the creation of land-grant universities starting in 1862.¹²⁰

Land-grant universities bear that name from being financial beneficiaries of grants of federal land to the states for the purpose of funding institutions of higher education.¹²¹ Congressman Justin S. Morrill sponsored the land-grant concept that bears his name as the Morrill Act,¹²² which sought an extension of public higher education that “aimed at the widest possible dissemination of learning.”¹²³ Many universities already existed in the United States, but their focus tended to be more elite, consistent with the European origins.¹²⁴ Both Representative Morrill and President Abraham Lincoln saw

¹¹⁹ Post, *supra* note 98, at 1818–19.

¹²⁰ 6 KELLOGG COMM’N ON THE FUTURE OF STATE & LAND-GRANT UNIVS., RENEWING THE COVENANT: LEARNING, DISCOVERY, AND ENGAGEMENTS IN A NEW AGE AND DIFFERENT WORLD 26 (2000) [hereinafter KELLOGG COMM’N], <http://www.aplu.org/library/renewing-the-covenant-learning-discovery-and-engagement-in-a-new-age-and-different-world/file>.

¹²¹ Land grant colleges and universities now exist in every state, and my home institution, Texas A&M University, is by way of example, the oldest land-grant university in the state of Texas. See *The Morrill Act, Explained*, TEXAS A&M TODAY (July 1, 2018) <https://today.tamu.edu/2018/07/01/the-morrill-act-explained/>.

¹²² See 7 U.S.C. §§ 301 et seq. (2012).

¹²³ Rex R. Perschbacher, *The Public Responsibilities of a Public Law School*, 31 U. TOL. L. REV. 693, 694 (2000).

¹²⁴ Moran, *supra* note 105, at 1.

proposed land-grant universities as different, as they affirmatively were “the public’s universities.”¹²⁵ Their focus explicitly included practical education, described by Morrill as an “opportunity in every State for a liberal and larger education to larger numbers, not merely to those destined to sedentary professions, but to those needing higher instruction for the world’s business, for the industrial pursuits and professions of life.”¹²⁶ In other words, land-grant schools would emphasize practical education, with the explicit goal of bringing it to the public at large.¹²⁷

The impact of the original Morrill Act on shaping higher education in the United States cannot be over-emphasized, as it established the *ethos* in which programs like the post-World War II Servicemen’s Readjustment Act of 1944, better known as the G.I. Bill, were not only possible but were broadly supported.¹²⁸ American higher education, while still firmly committed to the traditional liberal arts, nonetheless has a distinctive practical streak that encompasses empowering the public.¹²⁹ On the cusp of the twenty-first century, the Kellogg Commission on the Future of State and Land Grant Universities articulated this goal as being the facilitation of “[l]earning environments that meet the civic ends of public higher education by preparing students to lead and participate in a democratic society.”¹³⁰ While distinctions still exist between public and

¹²⁵ Perschbacher, *supra* note 123, at 694.

¹²⁶ S. RES. 502, 112TH CONG., 2D SESS., 158 Cong. Rec. S4374-02, S4374 (2012) (quoting Representative Morrill in commemoration of the 150th anniversary of passage of the Morrill Act).

¹²⁷ James O. Freedman, *Liberal Education and the Legal Profession*, 39 SW. L.J. 741, 745 (1985) (“Rather than perpetuating an elite of gentlemen-scholars, the Morrill Act called into being a new kind of university, created without European precedents, hospitable to all comers, and designed to prepare Americans to be Americans. The land-grant university opened the pursuit of excellence to farmers’ children, artisans’ children, and storekeepers’ children.”).

¹²⁸ See Omari Scott Simmons, *Class Dismissed: Rethinking Socio-Economic Status and Higher Education*, 46 ARIZ. ST. L.J. 231, 266-67 (2014) (“Nonetheless, the G.I. Bill had an unprecedented transformative impact on higher education access and social advancement in the United States. The G.I. Bill democratized higher education and home ownership, which ultimately led to a post-war expansion of the middle class and the flattening of class hierarchies.”) (internal citations omitted).

¹²⁹ KELLOGG COMM’N, *supra* note 120, at 15.

¹³⁰ *Id.* at 10.

private university education, these differences have eroded significantly in the century-and-a-half since the Morrill Act put into motion “a growing convergence between all public and private institutions.”¹³¹ Indeed, one would be hard pressed to find either a private university or private law school in the United States that explicitly denies having a mission of public service to a broad public.¹³² In many respects, in American higher education, we are all land-grant schools now.

Both the law school and the university in the United States have a longstanding mission of public service grounded in their history and in the traditions arising in a democratic society. Roscoe Pound’s formulation of law schools’ role as a “Ministry of Justice” has, at its heart, the goal of bridging the disconnect between the governed public on one side and law and its instrumentalities on the other.¹³³ While Pound (and legal education generally) envisioned this bridging role as being accomplished on the legal institutional side,¹³⁴ a bridge runs two ways. The public is empowered to better and more effectively navigate law through access to legal education of the sort now offered by non-lawyer master’s programs.

Moreover, the offering of such degrees is consistent with the Morrill Act’s vision of profoundly *public* universities that reconceived higher education with a role that includes, rather than excludes, the teaching of practical knowledge.¹³⁵ While not all are lawyers, all will engage with the law. Instruction in the means of effective engagement is in furtherance of the public and practical land-grant mission.¹³⁶ That mission, in its most fundamental sense, is no longer exclusive to land-grant universities or even to public universities.¹³⁷ With this history and in this environment, law schools are well-justified in offering new master’s degrees. Far from being a source of distraction, these degrees further the institutional mission.

¹³¹ Richard A. Matasar, *Private Publics, Public Privates: An Essay on Convergence in Higher Education*, 10 U. FLA. J.L. & PUB. POL’Y 5, 9 (1998).

¹³² See, e.g., *Mission*, *supra* note 104.

¹³³ Pound, *supra* note 106, at 637.

¹³⁴ *Id.*

¹³⁵ Freedman, *supra* note 85, at 745.

¹³⁶ *Id.*

¹³⁷ Matasar, *supra* note 131, at 17–18.

III. EXECUTING THE EXPANDED PUBLIC MISSION

Furthering law school and university institutional missions through new programs presupposes that the programs are well-designed for their goals. The principal commonality among the new breed of legal master's degrees in the United States is that they are targeted at non-lawyers who do not intend to become lawyers.¹³⁸ The endgame for students in an M. Jur. program is not licensure to practice law but rather the ability to operate skillfully and knowledgeably in and around the law.¹³⁹ The key differentiation in programmatic and course design for an M. Jur. program, as compared to a J.D. program, is that the goal of the former is not to facilitate a change of career but instead to enhance an existing career.¹⁴⁰ This foundational fact is a game changer for how law schools should teach master's courses. A student who does not intend to represent clients needs different information than one who does, and many justifications for why law schools do things a certain way will, upon reflection, fall by the wayside in a master's setting. Programmatic goals are different, grading should be different, and pedagogy should be different, especially in view of the lack of a bar examination following receipt of the degree.¹⁴¹

The typical enrollee in a J.D. program, of course, intends to pass the bar exam and represent clients.¹⁴² Likewise, the typical student in an LL.M. program is already a lawyer, albeit sometimes one

¹³⁸ See Joni Hersch, *Increasing Diversity by a New Master's Degree in Legal Principles*, 67 J. LEGAL EDUC. 86, 100–01 (2017).

¹³⁹ *Id.* at 101.

¹⁴⁰ *Id.*

¹⁴¹ See *id.* at 100–01.

¹⁴² See Sabrina DeFabritiis, *1L Is the New Bar Prep*, 51 CREIGHTON L. REV. 37, 39 (2017) (recognizing that course design around bar passage is sanctioned by ABA Standard 301(a), “which provides that the new goal of legal education is to prepare ‘its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as a member of the legal profession.’”). See AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018-2019, at 15 (2018), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAS-standardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf [hereinafter ABA STANDARDS AND RULES OF PROCEDURE].

whose prior education and licensure was in a non-U.S. jurisdiction.¹⁴³ In both instances, the identity of the law student is inextricably intertwined with the legal profession.¹⁴⁴ This identity is manifested either in the goal of becoming a lawyer (J.D.) or in expanding the realm in which one operates as a lawyer, whether geographically or in expanding subject-matter experience and expertise (LL.M.).¹⁴⁵ The new legal master's degrees, in contrast, do not portend entry into or advancement within the legal profession.¹⁴⁶ This foundational difference is not trivial, and it calls for an imagining of program design from the ground up. Most importantly, it cautions against the easiest and, facially, most cost-effective method of launching this degree—dropping master's students into existing J.D. courses.¹⁴⁷

While master's and J.D. students can benefit from interaction with one another, an instructor who is not mindful of her two divergent student populations risks educational malpractice,¹⁴⁸ and the students who are injured will almost certainly be on the master's side. Such an outcome harms not only the students themselves in the

¹⁴³ See Carole Silver, *States Side Story: Career Paths of International LL.M. Students, or "I Like to Be in America"*, 80 *FORDHAM L. REV.* 2383, 2384 (2012) ("For most international students, the typical U.S. law school path is through a one-year course of study leading to an LL.M. degree. Students earn their first degree in law in their home country before coming to the United States, and the LL.M. serves as an add-on, a taste of sorts of the world of international lawyering and legal education.").

¹⁴⁴ See Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 *J. LEGAL EDUC.* 480, 481 (2002) ("Legal education and the legal profession are inextricably intertwined.").

¹⁴⁵ See DeFabritiis, *supra* note 142, at 38–39; see also Silver, *supra* note 143, at 2384.

¹⁴⁶ See Hersch, *supra* note 138, at 90 (recognizing that "master's degrees for nonlawyers" are both outside the legal profession and tend to be terminal in nature).

¹⁴⁷ See, e.g., *Master of Legal Studies Program*, *supra* note 19 (advertising that Master of Legal Studies students may take nearly "all of the courses taught at the Willamette University College of Law").

¹⁴⁸ My use of the term "educational malpractice" here is metaphorical and meant to describe inapt delivery of a course of study. Others have used the term quite literally, recommending the existence of tort liability, a result I certainly do not mean to suggest. See Stjepko Tokic, *Rethinking Educational Malpractice: Are Educators Rock Stars?*, 2014 *BYU EDUC. & L.J.* 105, 124–29.

short term, but it also harms the law school and its master's program in the long term. Effectively reaching and serving an adult professional audience whose aspirations do not include practicing law or representing clients calls for a substantial rethinking of traditional legal education in areas ranging from top-level programmatic learning outcomes to the design of individual courses. Notwithstanding the potential benefits of the blended approach, my experience teaching under both approaches has persuaded me that, where feasible, separate master's classes offer a significant suite of educational benefits for the student. The needs of a group of master's students are objectively different than those of a group of J.D. students.¹⁴⁹

Regardless of the program format, however, this Section identifies some key identity and process implications for law schools accepting the expanded public mission. Teaching law to professionals whose goals are not law licensure and law practice is a game changer for both the law schools and their new population of students.

A. Degree Program Learning Outcomes

Programmatic learning outcomes have become ubiquitous in legal education during the last decade, particularly following their formal adoption into the American Bar Association ("ABA") accreditation standards for law schools in August 2014.¹⁵⁰ Regional accrediting bodies have pushed for the assessment of learning outcomes at the university level well before that,¹⁵¹ so the ABA standards were more at the tail end of the trend than at its leading edge. Nonetheless,

¹⁴⁹ See Hersch, *supra* note 138, at 100–01.

¹⁵⁰ AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, EXPLANATION OF CHANGES 6–11 (2014), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201408_explanation_changes.pdf. See also Steven C. Bahls, *Adoption of Student Learning Outcomes: Lessons for Systemic Change in Legal Education*, 67 J. LEGAL EDUC. 376, 377 (2018) ("The formal process of amending the standards to reflect assessment of student learning outcomes began in 2009 and did not conclude until August 2014 when the ABA's House of Delegates finally approved of the measures.")

¹⁵¹ Bahls, *supra* note 150 at 406 ("[S]tarting in the late 1990s, regional accreditation organizations 'have all moved from an input-based, prescriptive system of accreditation to an outcome-based system of accreditation.' While law schools could once 'fly beneath' the regional accreditation radar screen, they increasingly were no longer able to do so.) (quoting CATHERINE L. CARPENTER ET AL., REPORT OF THE OUTCOME MEASURES COMMITTEE 47 (2008)).

the idea of learning outcomes is by now substantially entrenched in law schools, but the particular implementations advocated based upon ABA standards is ultimately a nonstarter for the new master's programs.¹⁵² The ABA standards, unsurprisingly, are tied to the goal of students becoming lawyers.¹⁵³ Suggested assessment methods for law schools have included bar exam passage rates, job placement in J.D.-required and J.D.-advantaged positions, and surveys of attorneys and judges in relevant legal communities served by the school.¹⁵⁴ On their face, these measurements are substantially irrelevant to the career paths of professionals who are not lawyers. Legal master's degree students are obtaining advanced knowledge, but they are not preparing for licensed entry into the legal profession.¹⁵⁵ This distinction is actually a strength of the master's degree approach. For example, the Texas A&M Master of Jurisprudence program in San Antonio has been designed for access by working professionals.¹⁵⁶ Thus, the typical criticism that general legal education offers nothing "that prepares a young law graduate for a career as a corporate executive, an investment banker, a management consultant, or an entrepreneur" is turned on its head.¹⁵⁷ Law school master's programs are bringing the law component to those who are *already* executives, bankers, consultants, and entrepreneurs.¹⁵⁸ The program objectives for non-lawyer master's degrees should thus be positioned to build on the strengths of what legal education does, rather than to backfill something it does not do.

¹⁵² See *id.* at 405.

¹⁵³ See Judith Welch Wegner, *Law School Assessment in the Context of Accreditation: Critical Questions, What We Know and Don't Know, and What We Should Do Next*, 67 J. LEGAL EDUC. 412, 417 (2018) (explaining that ABA requirements mandate law schools "to identify and assess their students' learning through certain lenses or with an eye to certain 'competences' that are needed by legal professionals and that may increasingly be embedded in evolving bar examination practices . . . or considered by prospective employers when recruiting students or evaluating associates early in their careers.").

¹⁵⁴ Bahls, *supra* note 150, at 403 (listing types of outcome assessment suggested for compliance with ABA standards).

¹⁵⁵ See Hersch, *supra* note 138, at 101.

¹⁵⁶ See Master of Jurisprudence Program in Business Law and Compliance, *supra* note 16.

¹⁵⁷ Robert J. Rhee, *Specialization in Law and Business: A Proposal for a JD/MBL Curriculum*, 17 CHAP. L. REV. 37, 51–52 (2013).

¹⁵⁸ See Hersch, *supra* note 138, at 101.

Dismissal of the lawyer paradigm for program objectives raises the question of what objectives would be relevant. A fair starting point is Nora Demleiter's observation that "[g]eneral knowledge about contract formation, litigation, and employment law as well as upper-level specialized materials should be especially suitable for many non-legal professionals who desire focused legal knowledge."¹⁵⁹ A master's program should cover both general legal knowledge and focused legal knowledge. General knowledge information should be addressed, essentially, as a type of literacy and comprehension. Other information (or "focused legal knowledge") calls for higher-order learning where the learner will be capable, in at least some settings, of analysis and evaluation.¹⁶⁰

An appropriate point of division between these lower and higher-order learning outcomes lies in the distinction between public law and private law.¹⁶¹ The well-established visualization of Bloom's Taxonomy¹⁶² provides a useful model for the location of learning outcomes. Common illustrations of Bloom's Taxonomy of higher and lower-order learning outcomes place the types in a pyramid,¹⁶³ with the most basic learning (such as fact memorization) at

¹⁵⁹ Nora V. Demleitner, *Higher Education Under Pressure: What Will the Future Hold?*, 66 SYRACUSE L. REV. 649, 666 (2016).

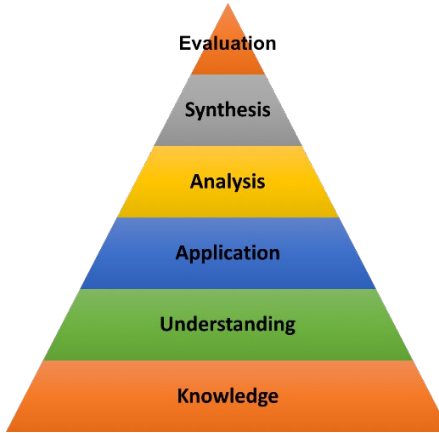
¹⁶⁰ *But see* Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 254 (1996) (suggesting in a J.D. setting that "it is difficult to isolate [certain skills] and assign exact percentages to the coverage of any one [and] it is nearly impossible to isolate the skill of "legal analysis" from any of the other skills").

¹⁶¹ *See generally* Christian Turner, *Law's Public/Private Structure*, 39 FLA. ST. U.L. REV. 1003, 1010–13 (2012) ("The contract law of the states tends to fall entirely within this category [of private law]. But so too does some other law, such as gifts, easements, and real covenants, which might not be considered 'contract law' by some").

¹⁶² *See* Susan P. Liemer, *Embodied Legal Education: Incorporating Another Part of Bloom's Taxonomy*, 95 U. DET. MERCY L. REV. 69, 77 (2017) ("[T]he cognitive domain of Bloom's taxonomy focuses on learning objectives for students' abstract thinking skills.") (citing TAXONOMY OF EDUCATIONAL OBJECTIVES, HANDBOOK I: COGNITIVE DOMAIN 18 (Benjamin S. Bloom ed., 1956)).

¹⁶³ Yes, the graph has only two dimensions and is technically a triangle, not a pyramid. The construct is nonetheless most frequently described as a pyramid, a convention followed in this article. *See, e.g.*, Joni Larson, *Getting Up to Speed: Understanding the Connection Between Learning Outcomes and Assessments in a Doctrinal Course*, 62 N.Y.L. SCH. L. REV. 11, 26 (2017-2018) (describing use

the bottom and increasingly sophisticated learning shown as the pyramid narrows.¹⁶⁴



As a general matter, public law material will tend toward the lower-order, seeking outcomes of remembering and understanding knowledge, with occasional bouts of application when law intersects with compliance. As to public law, contextual understanding is sufficient and appropriate for the non-lawyer.¹⁶⁵ A legally-literate professional should, for example, be generally aware of how litigation operates, even though the actual shepherding of litigation falls to licensed attorneys who operate as officers of the court.¹⁶⁶ In contrast, specialized courses beyond contextual basics should skew more heavily to the operation of private law. Why? The simple answer is that non-lawyers have considerably more responsibility and autonomy in matters of private ordering. They do not represent the private parties; rather they *are* the private parties. As such, they have great autonomy over their own business affairs, with or without the

of Bloom's taxonomy in a law school course as a means of "moving students from the bottom of the skills pyramid to the top over the semester's term.")

¹⁶⁴ Bnummer, *File:Blooms-pyramid.png*, WIKIMEDIA COMMONS (July 7, 2016, 3:49 PM), <https://commons.wikimedia.org/wiki/File:Blooms-pyramid.png>.

¹⁶⁵ See Hersch, *supra* note 138, at 101.

¹⁶⁶ See *id.*

benefit of outside counsel.¹⁶⁷ Much of modern contract law is premised upon rules of formation¹⁶⁸ and construction¹⁶⁹ that neither contemplate nor require the presence of lawyers. In sum, the study of public law should be foundational, but the study of private law should ultimately have primacy. Learning outcomes for private law topics should tend to aim higher on the pyramid, with much rising to the level of application but frequently calling for analysis, synthesis, and evaluation.

In the public law arena, non-lawyer master's programs in the United States typically should include learning outcomes that one might classify as "legal literacy."¹⁷⁰ Examples of these include the following:

- Graduates will have a foundational working knowledge of the operation of adjudicatory legal institutions, particularly courts and their private alternatives;
- Graduates will be able to identify the general common-law, statutory, and regulatory sources of legal duties imposed by public law regimes, such as tort law and criminal law;
- Graduates will recognize the compliance obligations of natural and institutional actors to public

¹⁶⁷ Alvin M. Podboy, *The Shifting Sands of Legal Research: Power to the People*, 31 TEX. TECH L. REV. 1167, 1193 (2000) ("The average citizen-client can now find the law. She has access to the cases, statutes, and regulations that rule her life An informed client is a better client. She gives her advocate a clearer focus and a better definition of the result required.").

¹⁶⁸ See, e.g., U.C.C. § 2-207(3) (AM. LAW INST. & UNIF. LAW COMM'N 2019) (providing for formation of a contract for the sale of goods based upon the parties' conduct where their writings defy contract formation in and of themselves).

¹⁶⁹ See, e.g., U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM'N 2019) (permitting explanation or supplementation of contracts for the sale of goods based upon the parties' course of performance and course of dealing).

¹⁷⁰ Special thanks here to Jennifer Romig for introducing me to the "legal literacy" terminology and the richness of its implications for legal master's programs. The term became a cornerstone of a text we co-authored for legal master's students. See JENNIFER MURPHY ROMIG & MARK EDWIN BURGE, LEGAL LITERACY AND COMMUNICATIONS SKILLS: WORKING WITH LAW AND LAWYERS (forthcoming 2020) (manuscript at 1–11) (on file with author).

law, as well as general means of enforcement of compliance; and

- Graduates will recognize activities that clearly constitute the practice of law, along with the need to avoid the unauthorized practice of law.

The first two of these public-law oriented program objectives require that a master's program cover much information that would appear at the beginning of a first-year J.D. curriculum, such as the structure of court systems and the nominal hierarchy of legal authority.¹⁷¹ The outcomes are heavily embedded in the realm of knowledge and understanding—unsurprising for foundational material.¹⁷² The coverage could (and, for many programs, should) be more contextual in nature. Rather than re-creating full courses in torts, criminal law, and civil procedure, for example, a program might simply emphasize the existence, boundaries, and general role of these fields of law.¹⁷³

The third of the above objectives straddles the line between understanding and application, requiring a grasp not only of the fact that law requires a response but also the ability to formulate a response; that is, a recognition of the duty to comply that is combined with the skill to chart a path in fulfillment of the duty.¹⁷⁴ For master's-program skeptics concerned that such application ventures too close to the practice of law,¹⁷⁵ my response is that the law itself requires compliance by its subjects without regard to the availability of legal counsel.¹⁷⁶ Empowering such compliance can hardly be an illicit act. Indeed, recognition of when one *should* obtain legal counsel when serious matters arise is a significant benefit to achieving

¹⁷¹ *Id.* at 19–23.

¹⁷² *Id.* at 19.

¹⁷³ *Id.* at 21–23.

¹⁷⁴ *See id.* at 42–43.

¹⁷⁵ *See* MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR ASS'N 2016).

¹⁷⁶ The popular truism that no one is above the law has been stated in many forms. *See, e.g.,* United States v. Lee, 106 U.S. 196, 220 (1882) (“No man in this country is so high that he is above the law.”); Theodore Roosevelt, Third Annual Message (Dec. 7, 1903), *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 576 (Justin Kaplan ed., 16th ed. 1992) (“No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it.”).

this learning outcome.¹⁷⁷ Tied to this concern, quite naturally, is the fourth learning outcome. Anyone dealing with law at the level of depth contemplated by a master's program needs a working understanding of areas clearly demarcated as the practice of law.¹⁷⁸ The "clearly" qualifier attached to the concept of "the practice of law" is important in this instance. The definition of what precisely constitutes the practice of law is notoriously murky,¹⁷⁹ but clarity does exist on the margins, in areas such as representing clients in legal proceedings and providing legal advice to others.¹⁸⁰ Professionals outside of the licensed bar should be aware of both the clear prohibitions and the existence of hazy areas.

The private law learning outcomes for master's programs are trickier insofar as the range of possible topics is as diverse as the range of potential constructs for private ordering.¹⁸¹ Both are conceivably infinite. Nonetheless, examples of private law foundational learning outcomes illustrate the form and possibilities of program

¹⁷⁷ See Podboy, *supra* note 167, at 1194.

¹⁷⁸ ROMIG & BURGE, *supra* note 170, at 43–44.

¹⁷⁹ See, e.g., Deborah L. Rhode & Benjamin H. Barton, *Rethinking Self-Regulation: Antitrust Perspectives on Bar Governance Activity*, 20 CHAP. L. REV. 267, 269 (2017) ("Despite forty years of UPL research and critique, the bar has continued to offer vague and expansive definitions of the practice of law . . ."); Thomas E. Spahn, *Is Your Artificial Intelligence Guilty of the Unauthorized Practice of Law?*, 24 RICH. J.L. & TECH. 1, 28 (2018) (observing that "practice of law" has an "uncertain definition"); Victor Li, *Talk to Me: Issues Papers Seeking Feedback on How Legal Services Are Regulated Prompt Lots of Comments but Little Consensus*, A.B.A. J., Sept. 2016, at 65, 66 (reporting a determination by the ABA Commission on the Future of the Legal Profession that "defining the practice of law, and by extension, what constitutes the unauthorized practice of law, is 'extremely difficult' and that individual state definitions are 'notoriously vague and circular.'").

¹⁸⁰ Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2588 (1999) ("UPL statutes usually proscribe three broad categories of activity: (1) representing another in a judicial or administrative proceeding; (2) preparing legal instruments or documents which affect the legal rights of another; and (3) advising another of their legal rights and responsibilities.").

¹⁸¹ See *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (lauding "the peculiar genius of private-law systems in general-flexibility in ordering private rights and obligations to reflect the intentions of the parties."); Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769, 780 (2015) (asserting that private law "empowers parties to adjust to legal parameters and craft their dealings within the shadow of the law.").

design. Private law programmatic learning outcomes might include some of the following:

- Graduates will be able to recognize and explain the role of private ordering in creating legal entities and organizational regimes;
- Graduates will be able to synthesize legally significant events in discrete doctrinal areas at the level of an informed client to identify issues in those areas that are worthy of further investigation or consultation with an attorney;
- Graduates will recognize and be able to analyze of the impact of common terms within one or more categories of transactional documents; and
- Graduates will be able to articulate and justify solutions to problems in contract law at a level sufficient to communicate them to both lawyers and internal organization management with a high degree of accuracy.

These learning outcomes reflect the greater depth of activity on the side of private law that, while including significant overlap into functions often handled by lawyers, nonetheless remains in the realm appropriate to the non-lawyer client in a professional setting.

The first of these sample learning outcomes for non-lawyer master's programs is still at the low end of the Bloom's Taxonomy pyramid, but it represents the acquisition of important baseline knowledge. A program geared toward private and autonomous actors requires achieving an understanding of where and how private ordering occurs.¹⁸² Courses with the typical coverage of law school courses in contracts and business organizations advance this understanding across the board¹⁸³ and would appropriately be cornerstones of understanding the means and methods of private ordering of transactions and entities.

¹⁸² See generally ROMIG & BURGE, *supra* note 170, at 49–106 (teaching foundational recognition and synthesis skills).

¹⁸³ See Mark Edwin Burge, *Too Clever by Half: Reflections on Perception, Legitimacy, and Choice of Law Under Revised Article 1 of the Uniform Commercial Code*, 6 WM. & MARY BUS. L. REV. 357, 380 (2015) (“The notion of treating

The second and third of these private law learning outcomes perhaps reach closest to the work of lawyers, but they also are the most flexible in allowing for program specification.¹⁸⁴ These outcomes involve the upper half of the pyramid, which includes application, analysis, and synthesis. Synthesizing the meaning of legally significant events overlap with a lawyering skill,¹⁸⁵ but the master's degree version of it differs in a critical way. The target level of synthesis is that of an "informed client,"¹⁸⁶ not a legal specialist. The individual benefit of this outcome is twofold. It first empowers the client to guide events and decisions at a granular level that tends to avoid legally-problematic situations.¹⁸⁷ More simply, the knowledge facilitates client autonomy,¹⁸⁸ a value clearly acknowledged by the governing rules of the legal profession.¹⁸⁹ When achieved, this outcome also prepares the client to better recognize the need to call upon legal counsel.¹⁹⁰

contract law different from, say, tort or criminal law, arises from the fact that contracts are essentially a *private* ordering of transactional obligations rather than a matter of public interest.").

¹⁸⁴ See generally ROMIG & BURGE, *supra* note 170, at 233–93 (teaching transactional literary skills).

¹⁸⁵ See Bridget McCormack, *Teaching Professionalism*, 75 TENN. L. REV. 251, 252 (2008) ("The traditional law school curriculum focuses primarily on one set of skills lawyers need to succeed, which is comprised exclusively of doctrinal analysis, synthesis, and effective argument.").

¹⁸⁶ Cf. Podboy, *supra* note 167 at 1193 ("The average citizen-client can now find the law. She has access to the cases, statutes, and regulations that rule her life An informed client is a better client. She gives her advocate a clearer focus and a better definition of the result required.").

¹⁸⁷ See *id.* at 1193.

¹⁸⁸ See *id.* at 1193 (discussing the benefits of an informed client, such as being capable of accessing legal materials).

¹⁸⁹ See Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 199 (2001) (recognizing that legal ethics rules proceed "from the assumption that client autonomy is a good thing and paternalism towards clients is bad."). *But see id.* at 203 (noting the legal profession's competing interest in minimizing "the risk that the exercise of autonomy will be self-destructive.").

¹⁹⁰ See Podboy, *supra* note 167, at 1194 (discussing how "[t]he volume of legal resources and their complexity insures the need for sound professional advice. A well-informed, intelligent client will recognize the value of legal service received.").

The third of the above learning outcomes recognizes the fact that many transactional actors create and revise their own documents.¹⁹¹ In its fundamentals, contract law operates without regard to the presence or absence of lawyers. Parties have famously created binding agreements with nary a lawyer in sight by scribbling terms on the back of a restaurant check.¹⁹² Lawyers can bring valuable deal-making skills to the table, but much contracting and other law-related work occurs outside the presence of counsel.¹⁹³ For lawyers and legal education to pretend otherwise would be foolish. Obtaining private-actor skill in analyzing and revising basic transactional documents is one of the most reasonable expectations that a legal master's program graduate can have.¹⁹⁴

The fourth of the above sample learning outcomes for the program focuses on building internal-facing and external-facing communications skills that facilitate successful access to the legal system. Put another way, legal master's graduates need the ability to speak and write about law in the contexts of (1) inter-organizational problem solving and assessment, and (2) communications with outside counsel who are not as informed about the business issues facing the organization as are its inside actors.¹⁹⁵ The outcome suggested here tends toward the top end of the Bloom's Taxonomy pyramid.¹⁹⁶ Graduates should be able to synthesize a lawyer's legal analysis with their own understanding of non-legal issues (e.g., financial constraints, public relations, branding, market status, etc.) and use that synthesis to evaluate prospective decisions. In effect, the outcome seeks the existence of team members who make their

¹⁹¹ Cf. Ray Worthy Campbell, *The End of Law Schools: Legal Education in the Era of Legal Service Businesses*, 85 MISS. L.J. 1, 87 (2016) (addressing how consumers and businesses can complete transactions without assistance from experts).

¹⁹² See *Lucy v. Zehmer*, 84 S.E.2d 516, 518 (Va. 1954).

¹⁹³ See, e.g., Campbell, *supra* note 191, at 29 ("Interpreting and applying the tax code, for example, is as much the work of tax accountants as tax lawyers.").

¹⁹⁴ See generally ROMIG & BURGE, *supra* note 170, at 233–93.

¹⁹⁵ See, e.g., *Master of Studies in Law in Corporate Compliance*, FORDHAM U. SCH. L., <https://onlinelaw.fordham.edu/master-studies-law/> (last visited Oct. 16, 2019).

¹⁹⁶ See Larson, *supra* note 163, at 22 (explaining the top levels of the pyramid as engaging in "critical thinking, such as making decisions based on analysis, synthesizing different elements to create something new, or applying knowledge in various contexts.").

organizations work more effectively through the integration of legal and non-legal knowledge into an evaluative decision-making process.¹⁹⁷ This final task is no small order, but it is one worthy of careful program design and improvement to achieve.

The public law and private law program objectives described here are representative of how the goals of a master's degree program can and should differ from those of a juris doctor program. Most legal master's programs will likely include significant doses of both public law and private law subject matter. The comparative engagement and autonomy of non-lawyer actors in those two broad realms should substantially impact the selection of programmatic learning outcomes.¹⁹⁸ Public-law oriented topics should tend toward the lower half of Bloom's Taxonomy pyramid because they center around access to legal-system instrumentalities¹⁹⁹ where the zone of

¹⁹⁷ Though not necessarily identical, the role of legal master's students may have considerable overlap with employment positions identified by law schools as "J.D. Advantage." See Kathleen Harrell-Latham & Daniel Spicer, *Think Like a Lawyer, Act Like a Mogul: Tackling Practical Business Problems in a Changing Legal Landscape*, 43 MITCHELL HAMLINE L. REV. 1014, 1019 n.18 (2017) ("J.D. Advantage roles include compliance analysts, contract managers, law school administrators, and regulatory analysts, among others."). One advantage that master's students have over their J.D. counterparts in this setting is the ease of avoiding career misunderstanding over their individual desire to be in a non-lawyer job position. See *id.* at 1020 (acknowledging that "many lawyers encounter resistance from non-lawyers in charge of hiring" for a role in which a license to practice law is not a requirement).

¹⁹⁸ See J. Lyn Entrikin & Richard K. Neumann Jr., *Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More*, 55 DUQUESNE L. REV. 9, 33 (2017) ("Public rules are enacted, issued, or adopted by public bodies or entities with authority to issue legal rules. They include electors, legislatures, judicial officers, state governors, and administrative agencies. In that respect, public rules differ from private law, which is negotiated by individuals or organizations to govern impending transactions or current and ongoing relationships.").

¹⁹⁹ See Douglas S. Eakeley, *Role of the Legal Services Corporation in Preserving Our National Commitment to Equal Access to Justice*, 1997 ANN. SURV. AM. L. 741, 741 (1997) ("All too often, access to a lawyer is necessary to have access to the courts and to justice in civil legal matters. Conversely, denial of legal representation often can be tantamount to denial of justice."); Jeffrey R. Pankratz, *Neutral Principles and the Right to Neutral Access to the Courts*, 67 IND. L.J. 1091, 1109 (1992) ("The simple fact is that today a right of access to the courts is meaningless without access to the services of lawyers. Our legal institutions are designed to be operated by lawyers, not laypersons.").

the lawyers' role is most expansive.²⁰⁰ Programmatic outcomes grounded in private law should tend toward the upper half of Bloom's pyramid because those topics are more structurally suited to private actors' engagement in areas that do not necessarily require the persistent involvement of lawyers,²⁰¹ even though such involvement can be highly beneficial.²⁰² The sample program learning outcomes outlined here illustrate these tendencies and, hopefully, provide insight into the value that law schools can offer master's-trained students by creating value that these students can bring back to their organizations and professions.

B. *Principles of Master's-Focused Course Design*

In a well-designed academic program, the overall programmatic objectives feed into and impact the design of individual courses.²⁰³ Such design, in turn, is reflected in both course objectives and assessment methodology.²⁰⁴ Master's-only courses in law have the distinct advantage of being capable of top-to-bottom design with the goals of master's students in mind—goals that do not involve bar passage or client representation.²⁰⁵ The challenge for mixed J.D. and master's classes is that the design of most mixed courses is premised

²⁰⁰ See Larson, *supra* note 163, at 23 (addressing the expectations of lawyers in the lower level of the pyramid to “apply knowledge and skills in situations similar to the context in which the knowledge was learned.”).

²⁰¹ See, e.g., Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 498 (2007) (observing that, notwithstanding the value lawyers can add, transaction costs can also effectively be reduced by non-lawyer advisers).

²⁰² Charles Silver & Frank B. Cross, *What's Not to like About Being a Lawyer?*, 109 YALE L.J. 1443, 1491–92 (2000) (contending that clients pay lawyers to complete tasks that they could do on their own because lawyers “use law efficiently and expertly.”).

²⁰³ See Ruth Jones, *Assessment and Legal Education: What Is Assessment, and What the *# Does It Have to Do with the Challenges Facing Legal Education?*, 45 MCGEORGE L. REV. 85, 88 (2013) (asserting that “program assessment is useful to assure that the students meet learning objectives in multiple courses with cohesive program learning objectives . . .”).

²⁰⁴ Accord Gerald F. Hess, *Collaborative Course Design: Not My Course, Not their Course, but Our Course*, 47 WASHBURN L.J. 367, 376 (2008).

²⁰⁵ See *id.* at 386–87 (discussing how course design with students' goals and interests in mind leads to maximized performance and motivation).

upon the end goal of becoming an attorney.²⁰⁶ While that premise does not necessarily make course coverage irrelevant for non-J.D. students, it does mean that the coverage will have a higher intellectual transaction cost for these students. They will have to translate hypotheticals, problems, and perhaps even the Socratic method itself within a framework that is at variance with their own present or intended professional identity. Faculty must engage in this translation process as well.²⁰⁷ Classes designed for J.D. students necessarily presume and speak the language of the future lawyer,²⁰⁸ not that of the future client or business professional.²⁰⁹

These differences between a master of jurisprudence program and the lawyer-focused J.D. (and the inherently second-law-degree LL.M. as well) program raise a baseline structural question: should master's students be taught primarily in separate classes or primarily alongside J.D. students? As an initial matter, both approaches have genuine pedagogical and institutional benefits. As of this writing, the more common approach, apart from some introductory courses,

²⁰⁶ Cf. Jamie L. Wershbale, *Collaborative Accreditation: Securing the Future of Historically Black Colleges*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 67, 94 (2010) (describing in the accreditation context the necessity for an educational institution to "ensure that [its] courses . . . are of sufficient quality to achieve . . . the stated objective for which the courses or programs are offered." (quoting 20 U.S.C. § 1099b(a)(4)(A) (2008))).

²⁰⁷ See, e.g., Michael J. Madison, *Writing to Learn Law and Writing in Law: An Intellectual Property Illustration*, 52 ST. LOUIS U. L.J. 823, 838 (2008) ("Before I accept an LL.M. or other non-J.D. student into my course, I brief the student . . . on the character of the assessment method and my expectations.").

²⁰⁸ The different and specialized language of law school for J.D. students is highly consequential, as Elizabeth Mertz has established. See, e.g., Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 491 (2007) (recounting of J.D. students that the "first-year, first-semester . . . is the time period during which students experience their first re-orientation to language as they enter their new chosen profession."). Masters students, in contrast, are neither primed nor necessarily inclined to undergo this "initiation rite, a time when entrants to a new social status are taught to shift old patterns in favor of new ones." *Id.* See also ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 4–5 (2007).

²⁰⁹ See, e.g., Shayna Joubert, *Master of Legal Studies vs. Juris Doctor: Which is Right for You?*, NE. U. GRADUATE PROGRAMS (Apr. 24, 2018), <https://www.northeastern.edu/graduate/blog/what-is-the-difference-between-legal-studies-vs-law-degree/> ("[Legal master's programs] give students the skills to analyze legal matters specific to their field by examining real-world case studies from their industry.").

is to combine the master's and J.D. students.²¹⁰ The justifications for the combined approach include a cross-pollination between future lawyers and the generally more life-experienced professionals who may be future clients.²¹¹ The value of life experience in the classroom is quite real, as most professors who have taught in a part-time evening program would attest.²¹² Additionally, program blending in the context of a robust J.D. curriculum should, in theory at least, improve the course-subject availability for the master's students because they could draw from a larger catalog of existing courses.

The elephant in the room supporting blended design is economic, however. Placing master's students in J.D. classes typically causes the least amount of draw on expensive (and in many places, scarce) faculty resources.²¹³ The marginal cost of adding five or ten master's students to a 1L section of Contracts, for example, is considerably less than the cost of creating a new class to teach those five or ten students separately.²¹⁴ This Section focuses on the design of courses for master's students, however, with their presence being the signal fact that dictates structure. Whether implemented in a master's-only course or in a mixed course, design with regard to the presence of master's students should be intentional, not an afterthought.

Like the Article as a whole, this consideration of course design is informed by the author's own experiences, victories, and defeats on the instructional battlefield. The examples here are principally

²¹⁰ See, e.g., *Id.*

²¹¹ Cf. Deborah Burand, *Crossing Borders to Create Value: Integrating International LL.M.'s into a Transactional Clinic*, 19 LEWIS & CLARK L. REV. 441, 447 (2015) (recounting the "rewards generated by these J.D.-LL.M. student collaborations" where international LL.M. students take roles akin to transactional clients in concert with J.D. students).

²¹² See, e.g., Bonny L. Tavares & Rebecca L. Scalo, *Teaching After Dark: Part-Time Evening Students and the First-Year Legal Research & Writing Classroom*, 17 J. LEGAL WRITING INST. 65, 85 (2011) ("Generally, part-time evening students are older than full-time division students. This may account for the spirit of cooperation seen in part-time students, who tend to eschew competitiveness and approach law school as a shared experience.").

²¹³ Belsky, *supra* note 19, at 794 (noting in a cross-disciplinary context that "[h]aving additional [non-J.D.] students in classes usually involves only marginal costs.").

²¹⁴ *Id.*

drawn from two courses. The first of these is Contracts, a doctrinal staple of the J.D. curriculum²¹⁵ that I have taught in three forms: the fully-J.D. format, the mixed J.D.-and-master's format, and the master's-only format. The second course is Legal Analysis and Writing for Clients, a master's-only course created as an adaptation of J.D. lawyering-skills and legal writing curriculum for the needs of working professionals.²¹⁶ Both courses have played important roles in bringing me to the viewpoints expressed here regarding how master's students should be accounted for in course design as compared to their J.D. counterparts.

The specific topical coverage of any law course can be as varied as the doctrine and skills encompassed by law itself. For that reason, I focus here on *principles* of master's course design rather than bright-line rules. Any attempt at stating hard-and-fast requirements for master's courses as compared to their J.D. counterparts is certain to face death by counterexample. Something will inevitably not fit within the rigid rules. For that reason, a principles-based approach²¹⁷ is the preferable way to conceptualize course design in this space, recognizing that aspiration must have the flexibility to give way to reality. General principles are critical, however, to answering the specific questions faced by law school master's programs.²¹⁸

²¹⁵ See Pether, *supra* note 60, at 501 (asserting that the J.D. curriculum “doctrinal staples of Contracts, Torts, Property, Civil Procedure . . . reifies the doctrine whose invention was necessitated by the battle to turn law into an intellectually respectable university discipline.”).

²¹⁶ Adaptation is necessary because the fundamental purpose of the traditional 1L course is at extreme variance with the fundamental purpose of a legal master's program. See Edward D. Re, *Increased Importance of Legal Writing in the Era of “The Vanishing Trial,”* 21 *TOURO L. REV.* 665, 672–73 (2005) (identifying legal writing courses as having “a special purpose in the law school curriculum” that is grounded in “the preparation and training of law students *for the practice of law.*”) (emphasis added).

²¹⁷ Reference to principles tends to be the better approach where a decision-maker is expected to need to maximize discretion and judgment, though the downside is uncertainty and a lack of bright lines. Cf. Neal F. Newman, *The U.S. Move to International Accounting Standards - A Matter of Cultural Discord - How Do We Reconcile?*, 39 *U. MEM. L. REV.* 835, 844 (2009) (describing the comparative costs and benefits of principles-based systems of financial accounting).

²¹⁸ Judith Wegner, *The Changing Course of Study: Sesquicentennial Reflections*, 73 *N.C. L. REV.* 725, 746 (1995) (noting that the inclusion of non-J.D. students in a course raises critical questions, including “how educational offerings

The following three principles, while hardly an exclusive list, state tendencies that will best align master's courses with their appropriate programmatic outcomes, which in turn will fulfill the expanded law school public mission advocated by this Article:

- (1) Focus legal text comprehension on structural legal literacy.
- (2) Avoid premising problems and writing assignments on simulated law practice.
- (3) Prefer practical reality over theory.

The passages that follow address each of these principles with a goal of illustrating how they might look in practice.

1. Focus legal text comprehension on structural legal literacy.

Understanding the general meaning and structure of legal texts—especially cases, statutes, and regulations—is a critical goal for professionals who will deal with lawyers or will be the first line of defense for an organization's legal compliance.²¹⁹ The baseline level of this comprehension should be *structural legal literacy*—a broad-based ability to recognize and identify a legal text's design features. For cases, this recognition would cover judicial rule statements, analogies to precedent, and ultimate holdings.²²⁰ For statutes and regulations, the identification of elements, factors, and code-defined terminology (such as statutory definitions) would likewise be

could be designed to maximize the benefit for both traditional J.D. and non-J.D. students.”).

²¹⁹ See *Master of Studies in Law in Corporate Compliance*, *supra* note 195.

²²⁰ Legal literacy would, however, tend to exclude the traditional lawyering skill of crafting predictive analysis. Cf. Mark K. Osbeck, *Lawyer As Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PENN ST. L. REV. 41, 53 (2018) (“The principal tools lawyers have traditionally used to predict case outcomes are: (1) an element-focused analysis of each asserted cause of action and defense in the case, looking to prior decisional law to determine whether these elements are met; (2) lawyerly experience; and (3) certain types of empirical information that may provide insight into how a prospective judge or jury would decide the instant matter.”).

a core competency.²²¹ Such parsing of legal text is an early focus of J.D. legal education, but from there it builds out toward more diverse concepts like the temporal development of common law and the discernment of legislative intent.²²² For master's students, the structural comprehension is not merely a *means* to other ultimate goals; rather, it *is* itself an ultimate goal.

That distinction between being an end rather than a means to an end is a substantive one that impacts fundamental pedagogy. Most significantly, the signal, historical pedagogy of legal education—the Socratic method—²²³is ill-advised for master's-type legal education. As others have observed in the J.D. context, the Socratic method has some significant educational value,²²⁴ but it is inefficient for teaching the law.²²⁵ Indeed, the Socratic method's purpose, in the apt articulation of the famous-but-fictional Professor Kingsfield, is *not* to teach the law, but rather to train students to think like

²²¹ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 19 MICH. L. REV. 34, 38 (1992). Statute and regulation reading is an example of where a legal master's program core competency would appropriately overlap the coverage of a J.D. program.

²²² *Id.* (discussing the importance that law students be able to “analyze, interpret and apply cases, statutes, and other legal texts.”).

²²³ Abrams, *supra* note 30, at 565.

²²⁴ See, e.g., Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 984 (2005) (“Even critics of Kingsfield and the demanding Socratic method admit that students are better prepared in a demanding environment.”)

²²⁵ See, e.g., David D. Garner, *Socratic Misogyny?—Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, 2000 BYU L. REV. 1597, 1610 (recounting that a “complaint against the Socratic method is that it is an inefficient way to convey large amounts of information. Indeed, the time necessary to develop a point of law through Socratic dialogue creates ‘the temptation on the teacher’s part to revert to lecture in order to achieve ‘coverage,’ thus falling back on the poorest form of learning pattern.’” (emphasis and footnote omitted) (quoting Frank R. Strong, *The Pedagogic Training of a Law Faculty*, 25 J. LEGAL EDUC. 226, 235 (1973))).

a practicing lawyer.²²⁶ While “thinking like a lawyer” is a time-honored and worthy goal in the halls of the legal academy,²²⁷ it is inapposite for students in a program that, by definition, is not designed to turn them into lawyers.

In the master’s program setting, accordingly, the primary purpose of reading a case involving contract law primarily is to learn the contract law—both in its abstract, black-letter sense (the rule) and in its applied-example sense (the immediate story of how the rule operates). The top-level goal is not to discern procedural nuances and the murky role of dicta, nor is it to construct the historical development of doctrines like consideration or promissory estoppel.²²⁸ Consequently, the students would seldom benefit from “hide the ball”²²⁹ type classroom engagements as those detract from the principal task of top-level legal literacy. Likewise, the study of statutes or regulations requires focus on navigating and discerning the meaning of rule texts, including integrated codes. It can rightfully exclude excessive focus on ambiguity, drafting errors, and legislative history. Hypotheticals directed toward teasing out absurd results of statutory canons may well be fun,²³⁰ but they are beside the point. A non-lawyer needs a working level of comfort with assimilating legal texts, the vast majority of which has meaning that is not in serious and consequential question.²³¹ The more complex—and less

²²⁶ THE PAPER CHASE (Twentieth Century Fox 1973) Professor Kingsfield famously stated that students come to law school “with a skull full of mush” and “leave thinking like a lawyer.” *Id.*

²²⁷ See Mertz, *supra* note 208, at 492 (“[L]aw students are urged to give up old approaches to language and conflict and adopt new ones. ‘Thinking’ like a lawyer turns out to depend in important ways on speaking (and reading, and writing) like a lawyer.”).

²²⁸ See *id.*

²²⁹ See, e.g., Garner, *supra* note 225, at 1611 (quoting James Eagar, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 GONZ. L. REV. 389, 402 (1996–97)).

²³⁰ See generally THE PAPER CHASE, *supra* note 226.

²³¹ Accord Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530, 547–48 (2013) (“The linguistic meanings of legal texts are not radically indeterminate, because linguistic communication works.”).

common—arguments over legal meaning can (and should) be brought to the lawyers.²³²

2. Avoid premising problems and writing assignments on simulated law practice.

Legal master's programs typically accept the proposition that legal analysis and writing are needs and provide value within the curriculum.²³³ The value exists both where courses are primarily skills oriented and also where writing is a method of formative assessment in a principally doctrinal course.²³⁴ This noncontroversial premise can lead to difficulty in its execution. The baseline starting point for many law schools' curriculum development in the area of analytical writing skills, not surprisingly, is that with which they are already familiar: the 1L legal research and writing course that already exists in some form in every ABA-accredited J.D. program in the United States.²³⁵ That legal analysis and writing course is quite appropriately grounded in expressing the application of actual law to simulated facts in a setting where students play the role of a lawyer.²³⁶ Writing assignments in doctrinal courses, while usually not playing

²³² See, e.g., Schwarcz, *supra* note 201, at 507 (explaining how transactional lawyers are secured in their professions because even though non-lawyers can accomplish some of the same tasks, lawyers' expertise reduce regulatory costs and add value).

²³³ See, e.g., *Online Master of Legal Studies*, WASH. U. ST. LOUIS SCH. OF L., <https://onlinelaw.wustl.edu/mls-degrees/online-mls/> (last visited Oct. 16, 2019) ("The skills based curriculum prepares students to draft legal documents, conduct legal research and analyze new laws and regulations.").

²³⁴ *Id.*

²³⁵ See ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 142, at 16 (requiring that the J.D. program of legal education at an ABA-accredited law school include "one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised").

²³⁶ See e.g., *Practical Legal Skills Training*, SETON HALL L., <https://law.shu.edu/students/academics/legal-skills-training/index.cfm> (last visited Oct. 15, 2019) (Throughout the course students are required to step into the role of a lawyer and perform legal skills within complex simulations that reflect the challenges of real-world practice.").

as dominant a course role as their skills-course counterparts, nevertheless follow the same paradigm.²³⁷ The problems are premised on assuming the role of a lawyer who is practicing law.²³⁸

Simulated law practice is the problem. The crucial value added in a J.D. course setting is, in fact, a distraction to the master's students, frequently to the point of detriment. Why would this be so? The programmatic and course outcomes for master's students do not contemplate their representation of clients. Time and instruction spent on the underlying assumption of taking on the lawyer's role undermines the developing professional identity of the affiliated non-lawyer professional by, in effect, forcing it through a level of translation. While students whose goals include taking the bar exam and representing clients are well-served by assignments prompting the imagination of themselves in the role of the attorney,²³⁹ other students are not. If we in legal education believe, as we certainly should, in the crucial role that J.D. legal education plays in formative professional development, then recognizing the need for analogous development of the professional identity of legal master's students is but a small and logical next step.

A related and ever-present issue in a legal master's program is discouraging the unauthorized practice of law.²⁴⁰ A well-designed program will build in training and frequent cautioning against unauthorized practice of law throughout the curriculum. Perhaps the most important aspect of any such training, however, is repeated emphasis on the bright-line prohibition against non-lawyers taking on and advising clients in legal matters. All United States jurisdictions share this rule in some fashion, despite their variance on numerous other questions of what does and does not qualify as unauthorized

²³⁷ See Madison, *supra* note 207, at 825.

²³⁸ See, e.g., *Practical Legal Skills Training*, *supra* note 236.

²³⁹ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 185–203 (2007). See also William M. Sullivan, *After Ten Years: The Carnegie Report and Contemporary Legal Education*, 14 U. ST. THOMAS L.J. 331, 334 (2018) (advocating greater support by law schools in training future lawyers by “providing entrants to the field effective ways to engage and make their own the ethical standards, social roles, and responsibilities of the profession, grounded in the profession’s fundamental purposes.”).

²⁴⁰ See ROMIG & BURGE, *supra* note 170, at 31–48 (explaining to legal master's students the known and unknown parameters of the unauthorized practice of law).

practice.²⁴¹ Accordingly, a further problem with the pedagogy of simulated law practice is that it actively engages legal master's students in doing the one thing, above all else, that they are expressly prohibited from doing in real life in connection with the law.

If the lens of simulated law practice is where a fundamental disconnect occurs between master's curriculum and its students, then it requires a pedagogical replacement to fill the hole in problem analysis and legal writing. Though the replacement lens could take several possible forms, the most useful descriptive category is *simulated client practice*. What would such a simulation look like and what would it seek to elicit from the student? Consider three examples from the Legal Analysis and Writing for Clients ("LAWC") course at Texas A&M. In all three examples, the learning outcomes include the teaching of legal concepts and communications, but the experience is designed to be from the perspective of a client rather than a lawyer.

The first LAWC example is tied to the course unit covering basic legal analysis and introducing, by example, the traditional legal memorandum. The memo, however, is not the end goal; rather, it serves as an illustration of the paradigmatic means by which lawyers document and support their analysis of a legal problem. The unit is tied to understanding why lawyers do what they do, and, most critically, *recognizing* work product in which lawyers are employing traditional analysis, such that a client can be empowered to take counsel's predictive analysis into account.

The summative assignment for this unit involves giving the student a legal case file, much like in a 1L course, except that the case file already includes what would be the J.D. course final product—a predictive memorandum. And that is because the actual assignment is still to come. Accompanying the case file is an assigning memorandum, which is addressed—not to a "Junior Associate" at a law firm—but to the "Assistant Risk Manager" at the client com-

²⁴¹ See Leonor E. Miranda, Note, *Finding a Practical Solution to Bridging the Justice Gap for Immigrants in the United States*, 30 GEO. IMMIGR. L.J. 163, 183 n.135 (2015) ("All 50 states have rules and laws prohibiting the unauthorized practice of law, mainly to protect consumers. Non-lawyers are generally prohibited from practicing law; however, what constitutes the 'practice of law' or the 'unauthorized practice of law' is by no means uniform, even within the same jurisdictions[.]") (internal quotation marks omitted).

pany. The risk manager must read the case file, the legal memorandum, and additional facts regarding the company's business situation. These documents form the basis of the ultimate assignment: writing a report to a supervisor that (1) summarizes the legal findings, (2) summarizes the business situation, and (3) makes recommendations for the company in light of the combination of both the legal analysis and the business reality. The legal prediction and the business facts frequently do not point in the same direction. For example, a memorandum predicting that the client company could win a breach of contract lawsuit may ultimately be offset by the probable negative impact of burning the business relationship with the prospective defendant. Ultimately, the legal master's student is accounting for the lawyer's role, but is accomplishing something quite different with her report.

A second example from the LAWC course arises from a unit on understanding common and foundational litigation documents, particularly pleadings and motions. In the underlying simulation, the students are given access to selected documents from the docket of an actual case. For federal court cases, the raw PDF documents are available through PACER,²⁴² which most legal educators can access through Bloomberg Law.²⁴³ The real case is not random, of course, but is one selected for its relevance and application to the final project, which is (again) an internal company report. Out of the wealth of real and comparatively recent federal cases that are no longer active, the instructor should select and carefully curate one involving a business dispute and parties that can serve as background for a new simulation.

Consider, for the present description, the use of a breach of warranty lawsuit regarding the quality of commercial building supplies. For the new assignment hypothetical, the company employing the

²⁴² See generally PUBLIC ACCESS TO COURT ELECTRONIC RECORDS [HEREINAFTER PACER], <https://www.pacer.gov> (last visited Oct. 16, 2019).

²⁴³ Although it is a comparative latecomer to the commercial online research arena, Bloomberg Law has carved a recognized niche in its expansion of academic access to federal court dockets and documents. See, e.g., *Dockets and Court Documents in Bloomberg Law: Getting Started*, UCLA SCH. L. HUGH & HAZEL DARLING L. LIB., <https://libguides.law.ucla.edu/dockets> (last updated Feb. 13, 2019 5:05 PM) ("Bloomberg Law is an excellent alternative to PACER. It provides access to all dockets available in PACER, and there is no charge to search dockets or to retrieve court materials from Bloomberg Law.").

master's students as risk managers happens to have a similar problem with the seller who is a defendant in the previous litigation. Upon learning that the seller had been sued before, the company president obtains the key lawsuit documents from the longtime outside counsel, who provides them as a favor to a valued client. The president then tasks the risk manager (the student) with reviewing the documents and preparing a report in light of information about the company's present situation involving the same seller. The report assignment requires the student to provide (1) a summary of the underlying dispute from the prior litigation, (2) a summary of what—procedurally—occurred in the prior litigation, and (3) an identification of potential problems that may arise in a new lawsuit against the seller. In essence, the students are required to demonstrate literacy in litigation documents sufficient to recognize their own possible business concerns and cautionary tales from others. In one version of this assignment in the Texas A&M program, the students could discern that the seller operates as several, similarly-named entities, some of which were not subject to the court's personal jurisdiction. The students could also report on potential causes of action from the previous litigation. In the end, the students are able to make a low-cost evaluation of their company's situation in advance of incurring the cost of bringing in outside counsel—a worthwhile contribution to the cause of client autonomy.²⁴⁴ Once again, the purpose of the assignment is not to simulate the role of the lawyer; rather, the goal is to simulate the role of a legally-literate business professional—a potential client in the making.

The third assignment example from the LAWC course at Texas A&M involves contract drafting; more specifically, it involves the intersection of contract drafting and working effectively with lawyers. The assignment is, again, not directed to a junior attorney, but to a company "Contracting Officer" who is provided the details on either a preliminary deal or an area in which her employer needs to create a form contract. In initial substance, the assignment packet

²⁴⁴ See Anthony J. Sebok, *What Do We Talk About When We Talk About Control?*, 82 *FORDHAM L. REV.* 2939, 2959 (2014) ("[T]he fear that nonlawyers will use control to influence the reasons that clients receive concerning legal decisionmaking, while genuine, needs to be balanced against client autonomy: loyalty to clients may require lawyers (and nonlawyers) to allow clients to hear opinions from whomever the client chooses.").

has much in common with what one might find in a J.D. contract drafting course.²⁴⁵ In the lead-up to the assignment, the students receive instruction in contracting literacy, including typical document structures, purposes, and examples of boilerplate, and methods of presenting substantive terms. The shift away from the J.D. framework comes in the ultimate assignment. The students are provided with specific business goals and concerns that the company wants dealt with in the final contract, and the student assignment is to prepare an annotated first draft contract to be sent to the company's general counsel. "First draft" in this context does not mean a rough draft. It means a polished product that is nonetheless understood to be a precursor to the final product.²⁴⁶ Perhaps the most important aspect of this document is that it is annotated. What does *annotated* mean in this assignment? The comment-bubble notes are (1) explanations of why the initial drafter did what she did, and (2) questions for the general counsel that arose in the drafting process.

For learning purposes, the annotations are sometimes more important to this assignment than is the actual contract text. The master's students are achieving two critical learning outcomes with this assignment. First, they are developing legal literacy with regard to working in and around contract documents. Business decision makers ought to be able to understand the private-law agreements to which they are or might be bound.²⁴⁷ Contending otherwise is anti-

²⁴⁵ See, e.g., TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 38–55 (2d ed. 2014) (illustrating a leading approach to contract drafting instruction and assignments designed for a J.D. program setting).

²⁴⁶ Perhaps oddly, this situation is analogous to legal writing practices that predominated among many lawyers before the widespread adoption of word processing technology. See Lucia Ann Silecchia, *Of Painters, Sculptors, Quill Pens, and Microchips: Teaching Legal Writers in the Electronic Age*, 75 NEB. L. REV. 802, 806 n.15 (1996) ("A legal writer in this earlier environment would be concerned primarily with ensuring that a first draft was relatively polished, given the practical difficulties in editing. . . . A lawyer in the pre-electronic age would, most likely, write with the expectation that there would be less rewriting and revision than is possible today.").

²⁴⁷ See Hanna Hasl-Kelchner, *The Law-Abiding Executive*, BIZED (Nov. 1, 2006), <https://bized.aacsb.edu/articles/2006/november/the-law-abiding-executive> (observing that, twenty percent of the time, business executives are dealing with legal issues for which it is important for them to be legally literate).

thetical to the purpose of private law autonomy, which is empowering parties with substantial legal control over their own destinies.²⁴⁸ Second, the students are developing the skill of effective collaboration with lawyers, a skill that involves and requires a recognition of when and how to ask questions. Legal issues do not always show up on a company's doorstep in the prepackaged form of a citation and summons. The contract-creation assignment provides an opportunity for initial issue spotting by the client at a far more subtle level, empowering the client with greater facility in knowing when to bring in a lawyer.²⁴⁹

All three of these example assignments teach legal-interaction skills but do not place them in the developmentally counterproductive context of simulating the practice of law. The replacement model is simulated client practice. Legal master's programs should not only address students where they *are*, but courses should be constructed around the imagination of where they *will be*. Although these examples are drawn from a skills course, their underlying philosophy should impact doctrinal courses, as well. The problems and hypotheticals grounded in a call of the question like "How would you advise your client?" should be replaced with the client-side perspective, ranging from "What legal risks concern you here?" to "What would you do?" realizing that answers to the latter question will more than occasionally include the phrase, "I'd consult a lawyer regarding"

3. Prefer practical reality over theory.

²⁴⁸ Burge, *supra* note 183, at 380–81 ("Proponents of choice-of-law autonomy thus find it foundational that in the absence of third-party effects, the parties to the transaction should be permitted to choose the applicable law through contract without reference to any limiting test. In this view, law is not and should not be different from any negotiated and fully private contract term: let law be part of a marketplace.") (internal quotation marks omitted).

²⁴⁹ Such empowerment on the client side would also arguably support a client-centered approach to representation by the lawyer. See Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 127 (2010) (describing the client-centered approach as "directly responsive to the problem of legal objectification" in that it "urges lawyers to unlearn the professional habit of 'issue-spotting' their clients and to approach their clients as whole persons who are more than the sum of their legal interests.").

While the principle of avoiding simulated law practice is rich in specifics, the admonition to prefer practical reality is at a high level of generality. Most legal academics will intuitively understand what it means, even those who involuntarily bristle at such advice. To be clear, the principle of focusing on operational legal reality is not a knock on legal theory, which has—and should have—a valued place in the education of future lawyers. This is true whether we define theory as “a doctrinal theory explaining a case or series of cases, a school of jurisprudential thought, or a perspective on examining and understanding the law.”²⁵⁰ A grounding in big-picture theoretical understanding of the law is part of the value added that lawyers bring to the table, whether that be the ability to develop a creative argument or to recognize policy tradeoffs inherent in taking a certain legal position. In these arenas and in applying broad-based theoretical knowledge, the attorney truly earns the appellation of *counselor*,²⁵¹ a title law faculty should aspire to develop thoroughly in their J.D. students.

Once again, however, the purposes and aspirations of a legal master’s student are not those of a future lawyer.²⁵² The overarching goal is to be a legally-informed professional in a career frequently adjacent to the law, such as risk management, contract management, or human resources. If we take career application as seriously in a legal master’s program as we should, then that means shifting course resources into practical reality. How might that look in practice? A legal master’s course in the doctrinal law of contracts provides examples for applying the “prefer practical reality” principle, even though the practical differences will certainly vary among subjects.

A contracts course that is more focused on real-world application will tend to minimize time spent on offer and acceptance.²⁵³

²⁵⁰ Hoffman, *supra* note 29, at 627 (internal footnotes omitted).

²⁵¹ See Jeffrey M. Lipshaw, *What’s Going On? The Psychoanalysis Metaphor for Educating Lawyer-Counselors*, 45 CONN. L. REV. 1355, 1362 (2013) (asserting that “great lawyers as counselors seek out the interdisciplinary overlap and are comfortable operating within it.”); Michael Sullivan, *The Lawyer as Counselor*, 78 DEF. COUNS. J. 253, 256 (2009) (“The Counselor is a value added attorney for the client.”).

²⁵² See Hersch, *supra* note 138 at 100.

²⁵³ See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 17–70 (AM. LAW INST. 1981) (collecting common law rules on the establishment of mutual assent to contract, most frequently through the process of offer and acceptance).

The question of what theoretically should or should not qualify as a contract is an interesting one, raising questions of the proper role of government in enforcing private agreements and of drawing the line between gratuitous promises and enforceable ones. In the vast majority of real-life commercial settings, however, offer and acceptance matter far less than the broader principle of mutual assent, of which offer and acceptance is merely a species. Where assent to a negotiated contract is effectively simultaneous, the question of who went first will matter very little. Suggesting that offer and acceptance can be minimized certainly does not mean it will be eliminated. Factual scenarios invoking the common law “mirror image rule”²⁵⁴ and its infamously divergent counterpart, the Uniform Commercial Code’s “battle of the forms”²⁵⁵ have substantial consequences for the content of an agreement and deserve coverage. Most bar-exam nuances of whether a statement actually is an offer or an acceptance do not deserve more than a passing glance. The disappointing but unquestioned reality for those of us who teach the law of contracts is that no one in real life is going to offer you \$100 to walk across the Brooklyn Bridge.²⁵⁶

Similarly inconsequential is the doctrine of consideration,²⁵⁷ at least beyond the basic proposition that a promise must generally be exchanged for something of legal value to be enforceable. The overwhelming majority of commercial transactions—even those involving consumers—do not raise questions of consideration because

²⁵⁴ *E.g.*, *VLM Food Trading Int’l, Inc. v. Illinois Trading Co.*, 811 F.3d 247, 251 (7th Cir. 2016) (“Under the mirror-image rule . . . a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.”) (alterations and internal quotation marks omitted).

²⁵⁵ *See* U.C.C. § 2-207 (AM. LAW INST. & UNIF. LAW COMM’N 2019).

²⁵⁶ Mark B. Wessman, *Is “Contract” the Name of the Game? Promotional Games as Test Cases for Contract Theory*, 34 *ARIZ. L. REV.* 635, 647 (1992) (recounting how contracts professors have “generated hours of classroom debate over the proper treatment of offers of money in return for a stroll across the Brooklyn Bridge when the offeror revokes while the hapless offeree is halfway to Manhattan”). The hypothetical originated with Professor Maurice Wormser. *See* I. Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 *YALE L.J.* 136, 136 (1916).

²⁵⁷ *See generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 71–109 (collecting rules of the common law related to the necessity of consideration or a substitute for consideration as a prerequisite of contract formation).

there is little doubt that the promisor is receiving something valuable and not promising a gift. For a legal master's student, a comparatively swift treatment of illusory promises (no legal value and therefore no contract)²⁵⁸ and promissory estoppel (no legal value but the promise is enforced to avoid injustice)²⁵⁹ could suffice. Peppercorns and bargain theory certainly have pedagogical value, but that value is most appropriately realized in the J.D. version of the contracts course.

If topics like offer, acceptance, and consideration can get the short shrift, then what deserves the full-scale treatment? An evaluation of doctrine that has more real-world application would surely have the parol evidence rule²⁶⁰ near the top of the list. The legal suppression of prior and contemporaneous statements from the negotiations leading up to contracting is enormously consequential to real-life commercial contracting, both in its ultimate substance and also as a cautionary tale about *how* and *why* the ultimate written agreement matters. Also, contract interpretation deserves the full-force treatment.²⁶¹ When private parties reach a point of dispute in their transaction, someone at some point is going to read the contract, in many cases well in advance of the involvement of counsel. Empowering these parties with an early chance to perceive the legal layout of the land is a good thing. Finally, no area of contract law is more client-consequential than the law of remedies. Future clients are well-served by understanding the foundations of what they are getting—or losing—in the event of a breach of contract.

The illustrative use of contract law here is more a thumbnail sketch than a completed portrait, but it makes the point. Legal master's courses are not watered-down versions of their J.D. counterparts—rather, they are rebalanced in favor of practical reality in topic allocation. In contract law, subjects like the parol evidence rule, interpretation, and remedies are amongst the most challenging

²⁵⁸ See *id.* § 77.

²⁵⁹ See *id.* § 90.

²⁶⁰ See *id.* §§ 209–218.

²⁶¹ See *generally id.* §§ 200–204; see also *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 166, 117 (S.D.N.Y. 1960) (illustrating contract interpretation principles with a famously robust evaluation of the question, “[W]hat is chicken?”).

for students.²⁶² Their preference here, thus, is not because they are easy. They certainly are not. Rather, the topics are meaningful for career professionals who become legal master's students because they will more likely have cause to use them. Probable use should be a touchstone for course topic emphasis in legal master's programs.

The three principles discussed in this Part—focusing on structural legal literacy, shifting problems to simulated client practice, and preferring practical reality in instructional allocation—highlight the ways in which a course serving legal master's students must differ from a J.D.-only course. The differences are critical if the courses are to be successful in leading toward master's-appropriate student learning outcomes. Achieving the course outcomes should, in turn, ultimately result in successful programmatic outcomes where the two sets of outcomes are properly aligned. At the program level, law school master's programs are bringing substantial and functional legal literacy to professionals whether they are executives, managers, bankers, consultants, or entrepreneurs.²⁶³ The program objectives for legal master's degrees should build on the strengths of what legal education does, but that does not mean legal education should do the exact same thing as it does for J.D. students.

The future could be quite bright for legal master's programs aimed at working professionals who interact with the law but who do not seek to practice law. That bright future will only come about, however, with intentional program and course design that meets the educational goals and needs of legal master's students. All design should lead to *access to law*. Even when sharing space in a J.D. classroom, master's students deserve much more than to be a J.D. afterthought.

CONCLUSION—TOWARD ACCESS TO LAW

If legal master's degree programs are structured correctly, they benefit the public at large and are an appropriate priority for legal education. These degrees are part of a larger conceptual shift for law schools—prioritizing broad *access to law* over the narrower *access*

²⁶² See AMY C. BUSHAW, STRATEGIES AND TECHNIQUES FOR TEACHING CONTRACTS 40–41, 44 (2012) (explaining that parol evidence, interpretation, and remedies are often confusing for law school students).

²⁶³ See Hersch, *supra* note 138, at 91.

to lawyers that has traditionally been the dominant priority in legal education. Legal master's degrees, whether labeled master of jurisprudence ("M. Jur."), juris master ("J.M."), or otherwise, are a development that law schools and attorneys should embrace: a move toward greater autonomy in public engagement with the legal system.

Although these innovative degree programs arose at a time of economic downturn for legal education, their ultimate value is not one of economic opportunism. Rather, they advance the longstanding core public service mission of law schools. While the worthy goals of access to justice and to the legal system are traditionally conceived in terms of ensuring access to lawyers, the more appropriate organizing vision for law schools in the twenty-first century should be that of providing access to law—enabling access and understanding of legal systems both with and without lawyer guidance. Law schools' position within the larger university has evolved and diminished prior tendencies toward "law school exceptionalism."²⁶⁴ Recent financial concerns in legal education present an opportunity for law schools to prove their larger institutional value proposition within the broader university. Specific application of that value could take many forms, but the non-lawyer master's degree is a readily available means for law schools to expand their mission by mediating the gap between the public and legal institutions.²⁶⁵ Meaningful implementation of a legal master's program, however, requires far more effort than throwing an additional population into J.D. courses. Learning outcomes in legal master's programs have significant foundational differences as compared to J.D. programs because the students in these programs are not seeking a law license or the ability to represent clients. Rather, the master's students want to achieve professional advancement through obtaining a level of legal literacy, a level that empowers both decision making and also informs the process of working with lawyers. Empowering students to reach practical legal literacy requires intentionality on the part of legal educators. The M. Jur. is not a duplicate of the J.D. at the curricular or program level, and master's program course objectives must recognize that fact. The principles for master's-centered program design and course design described in this Article are key

²⁶⁴ See *supra* Part I.

²⁶⁵ See *supra* Part II.

touchstones for outcomes that align with the worthy aspirations of the new generation of master's students.²⁶⁶

While law schools' traditional mission of educating lawyers remains vibrant and intact, law schools in a liberal and democratic republic have a broader public mission. In an age of unprecedented access to technology and data, the core public mission of a twenty-first century law school is and should be access to law. Enabling such access through degree programs outside the J.D. and LL.M. is a critical piece of accepting this broader mission.

²⁶⁶ See *supra* Part III.