

PERISH THE THOUGHT OF PUBLICATION?: SCHOLARSHIP’S CRITICAL
ROLE IN EFFECTIVE TEACHING

Michael P. O’Connor*

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I. INTRODUCTION

Faculty scholarship offers institutions of higher learning and the broader society indisputable benefits. Advances in the sciences, mathematics, and medicine based upon scholarly achievements have transformed society and improved the lives of countless millions. Social science research has illuminated our past, improved our lives today, and provided us guidance for our future. This scholarship has also helped define our law, altering critical court decisions concerning our most basic rights and liberties, including, to identify just a few: the rights of workers to safe conditions,¹ the right to a non-segregated public school education,² and the right of juveniles to be

* Professor of Law, Phoenix School of Law, Phoenix, Arizona. J.D.A., Yale Law School, 1990. B.A., Penn State University, 1987.

¹ See *Muller v. Oregon*, 208 U.S. 412 (1908). Most notably, social science research contained in the brief filed by future Supreme Court Justice Louis D. Brandeis helped influence the decision. The aptly named “Brandeis Brief” would become synonymous with extensive briefs employing research from other disciplines.

² See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The Court’s decision rested strongly on social science research that detailed the psychological impact of continued segregation. See *id.* at 494 n.11.

free from infliction of the death penalty.³ While legal scholarship has provided the foundation for establishing rights and changing the face of the law, its status in the academy engenders more than a little controversy.⁴ Some of this controversy concerns the merits of the scholarship produced, but more often, the debate focuses on the proper balance between scholarship and teaching.⁵ Specifically, whether the quality and quantity of scholarship is a good indicator of a professor's teaching abilities.

Scholarship and teaching are subsets of the broader concept of legal education in general. In the past two decades, many have made serious attempts to evaluate and improve legal education; an education stuck in the case-study and Socratic dialogue method. In the nineteenth century, Christopher C. Langdell introduced the Socratic method to Harvard Law School. While earlier studies criticized this model of legal education,⁶ the 1992 MacCrate Report spurred an evolution in thinking about law school teaching and preparation.⁷ The MacCrate Report built on earlier calls for skills-

³ See *Roper v. Simmons*, 543 U.S. 551 (2005). *Roper* relied on developmental psychology research indicating that decision-making capabilities develop in concert with physiological maturity of the brain, specifically citing "the scientific and sociological studies respondent and his amici cite" *Id.* at 568. See also Brief for the Am. Psychol. Ass'n & the Mo. Psychol. Ass'n as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636447.

⁴ This controversy extends beyond the legal profession as many other professional fields continue to evaluate and discuss the relationship between scholarship and teaching. See, e.g., John M. Braxton, *Contrasting Perspectives on the Relationship Between Teaching and Research*, in *NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH, FACULTY TEACHING AND RESEARCH: IS THERE A CONFLICT?* (John M. Braxton ed., 1996).

⁵ By no means should the reader believe that the merits of scholarship have escaped criticism. Many critics argue legal scholarship is biased, narrow, and potentially irrelevant. For a discussion of the development and criticisms of legal scholarship over the past three decades, see Martin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 *SANTA CLARA L. REV.* 353 (2008); see also Deborah L. Rhode, *Legal Scholarship*, 115 *HARV. L. REV.* 1327, 1339 (2002). For a good discussion of the role that law students play in further skewing the type of scholarship eventually published, see Richard Posner, *Against Law Reviews: Welcome to a World Where Inexperienced Editors Make Articles About the Wrong Topics Worse*, *LEGAL AFF.*, Nov.-Dec. 2004, available at http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp.

⁶ Earlier critiques of Langdell's Socratic method include Jerome N. Frank's call for a clinical-based education, which was initiated in the first half of the twentieth century and revised in the 1960s, as well as the movement for greater infusion of ethics in the period following Watergate and President Nixon's resignation. See, e.g., John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 *WM. MITCHELL L. REV.* 303, 330-33 (2007).

⁷ *AM. BAR ASS'N, SEC. OF LEGAL EDUC. AND ADMIS. TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE*

based training and the infusion of ethics into legal education. More recently, in 2007, the Carnegie Foundation for the Advancement of Teaching published a report titled "Educating Lawyers."⁸ The Carnegie Report echoed many of the recommendations found in MacCrate and called on law schools to restructure curriculums to integrate skills and values while increasing connectivity between classes and institutions.⁹

Increasingly, the legal community has accepted that the reforms articulated by the MacCrate & Carnegie Reports are long overdue.¹⁰ Disagreement abounds, however, about how best to achieve these changes.¹¹ In part, the debate over the changes necessary to implement the MacCrate and Carnegie recommendations concerns the nature of effective teaching.¹² In turn, this has reinvigorated the discussion about the role scholarship should play in the selection and retention of law school teachers.¹³

Phoenix School of Law ("PhoenixLaw") has joined this debate in its own unique fashion. Perhaps more than most institutions, we have embraced both the MacCrate and Carnegie recommendations. As a fully accredited, private, for-profit, but young institution,¹⁴ PhoenixLaw's impact

ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT], available in part at <http://www.Abanet.org/legaled/publications/onlinepubs/maccrate.html>.

⁸ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

⁹ *Id.* at 8-10 (Recommendations 1, 4, and 7).

¹⁰ Of course, neither MACCRATE nor CARNEGIE has garnered universal enthusiasm among legal academicians. See, e.g., Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values*, 23 PACE L. REV. 575 (2003); see also Joseph A. Dickinson, *Understanding the Socratic Method in Law School Teaching after the Carnegie Foundation's Educating Lawyers*, 31 W. NEW ENG. L. REV. 97 (2009).

¹¹ See, e.g., Nelson P. Miller, *Meeting the Carnegie Report's Challenge to Make Legal Analysis Explicit—Subsidiary Skills to the IRAC Framework*, 59 J. LEGAL EDUC. 192 (2009); cf. Patricia Grande Montana, *Lessons from the Carnegie and Best Practices Reports: A Look at St. John's University School of Law's Street Law Program as a Model for Teaching Professional Skills*, 11 T.M. COOLEY J. PRAC. & CLINICAL L. 97 (2008) (explaining one university's approach to implementing the recommendations of MACCRATE and CARNEGIE).

¹² See, e.g., Dickinson, *supra* note 10; see also Dennis R. Honabach, *Responding to "Educating Lawyers": An Heretical Essay in Support of Abolishing Teaching Evaluations*, 39 U. TOL. L. REV. 311 (2008); Melissa J. Marlow, *It Takes a Village to Solve the Problems in Legal Education: Every Faculty Member's Role in Academic Support*, 30 U. ARK. LITTLE ROCK L. REV. 489 (2008).

¹³ See, e.g., Honabach, *supra* note 12, at 319; see also James Lindgren & Allison Nagelberg, *Are Scholars Better Teachers?*, 73 CHI.-KENT L. REV. 823 (1998).

¹⁴ PhoenixLaw is part of a consortium of three law schools. Infilaw About Us, <http://www.infilaw.com/aboutus.htm> (last visited July 17, 2010). The Infilaw System, a private for-profit corporation, owns and operates the consortium. *Id.* Sterling Partners, a private equity firm managing approximately \$4 billion in capital, funds Infilaw. Sterling

to date has necessarily been limited.¹⁵ But this mission-driven law school focused on student-centered outcomes, preparing students to be ready to practice law, and serving underserved communities, has a bold goal—to transform legal education.¹⁶ That, of course, is easier said than done.

It is also easier to articulate our goals than to get a diverse group of constituencies to agree upon the best way of achieving those goals. Tension has existed and remains between the business and academic structures of our institution. How to best prepare students for the practice of law, how to measure the achievement of desired student outcomes, how to evaluate, retain and grant tenure to faculty members—all of these areas raise issues relevant to the ongoing dialogue concerning the best ways to implement the recommendations of MacCrate and Carnegie.

This article focuses on one aspect of this debate: The role scholarship plays in ensuring that teachers effectively train students for the practice of law. PhoenixLaw has adopted a set of policies and practices, which *if properly developed, implemented, and maintained*,¹⁷ can become a model for the effective integration of faculty scholarship and teaching. Continued development and adherence to this model will increase the practice-readiness of our students, provide greater services to underserved communities, and achieve other desirable outcomes.

These policies focus primarily on teaching our students to become lawyers. That is the prime and unifying commitment of all at PhoenixLaw. Unlike many institutions, PhoenixLaw seeks to hire faculty with significant experience practicing law. The institution requires faculty to engage in scholarship for retention and promotion purposes, but defines scholarship much more broadly than do traditional institutions. PhoenixLaw values scholarship that has a practical impact on the law and encourages alternatives to the traditional law review article. Refusing to pigeonhole itself as a traditional law school, PhoenixLaw has used this expansive definition of scholarship as a tool for effective teaching—teaching focused on implement-

Partners About Us, http://www.sterlingpartners.com/about_sterling/index.asp (last visited July 17, 2010).

¹⁵ See *infra* Part III.

¹⁶ “PhoenixLaw’s mission is based upon three primary pillars: 1) an educational experience that is student-centered; 2) outcome-driven programs and performances that yield professionally-prepared graduates; and 3) a commitment to serving underserved communities.” Phoenix School of Law About Us, <http://www.phoenixlaw.edu/about/> (last visited July 17, 2010).

¹⁷ As I will discuss in subsequent sections, much needs to be done to develop and implement these policies properly.

ing the MacCrate and Carnegie recommendation of creating practice ready lawyers.

In the following sections, this article will explore the following: Part II explores the literature on the relationship between faculty scholarship and teaching. Part III explores the primacy of teaching at PhoenixLaw. Part IV explores the symbiotic relationship between teaching and scholarship that can be fostered through PhoenixLaw policies. Part V explores a model for the future development of law school teaching.

II. SURVEY OF THE LITERATURE ON SCHOLARSHIP AND TEACHING RELATIONSHIP

As mentioned above, the debate over the role that faculty scholarship plays in the quality of legal education is long and contentious.¹⁸ The MacCrate Report is one seminal document highlighting this debate. As MacCrate recognized:

While law schools vary in the emphasis placed on scholarship, there are few, if any ABA-approved law schools that do not incorporate a scholarship component into the requirement for tenure. A strong academic cultural commitment to research and scholarship arises from the university's academic requirements, the law school's self-imposed academic standards, ABA accreditation standards and AALS membership requirements, and the intellectual aspirations of individual faculty.¹⁹

Some scholars argue that production of scholarship has a negative impact on the quality of teaching a professor engages in.²⁰ Others argue that scholarship bears no relation to quality teaching.²¹ Still others argue that

¹⁸ See MACCRATE REPORT, *supra* note 7.

¹⁹ *Id.*

²⁰ See, e.g., Fred R. Shapiro, *The Published, Not Perished, but Were They Good Teachers*, 73 CHI.-KENT L. REV. 835, 840 (1998); see also Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 423-424 (1998) ("Good teaching no doubt requires keeping abreast of scholarship, but there is little reason to suppose that good teaching requires producing scholarship one's self.").

²¹ See, e.g., Braxton, *supra* note 4, at 6 ("There may be a lack of correspondence between teaching and research specializations."); Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 369 (1990) (citing Virginia W. Voeks, *Publications and Teaching Effectiveness*, 33 J. HIGHER EDUC. 212, 218 (1962) and concluding little or no relation exists between scholarship and effective teaching).

scholarship does inform quality teaching.²² A number of scholars who have considered this relationship focus on whether being a “productive scholar” positively predict whether an individual will be a “good teacher.”

If the correlation seeks to determine whether a “productive scholar” means an individual will be a “good teacher” then naturally how the studies define the terms “productive” and “good” are important questions to ask. In many studies, scholars define productivity by focusing on the number of *articles* written.²³ Others, such as authors James Lingren and Allison Nagelberg, note that in their study there was a “substantial positive correlation between a professor’s number of scholarly *citations* and his or her student course evaluations.”²⁴ Thus, they focus not on the number of articles published, but the frequency with which the professors are cited in other legal works.²⁵ Still others argue that even the number of citations is not an accurate measure of the quality or value added by any scholarly piece.²⁶

Divergent opinions also exist on how to define who is a “good” teacher. Most studies utilize student evaluations as the measure: Equating student satisfaction as the equivalent of quality teaching.²⁷ Others use measures

²² See, e.g., Braxton, *supra* note 4, at 7 (“Linsky and Strauss (1975) postulate that there is a spill-over effect into teaching from doing research, and vice versa. For example, excitement generated by engagement in research may be communicated to students during the course of instruction.”); David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993, 999 (1991) (“If professors do not engage in scholarship, they cannot fully foster critical analytical skills in their students because their own skills will atrophy. Squandering these intellectual professional resources is inexcusable.”).

²³ See, e.g., K. Feldman, *Research Productivity and Scholarly Accomplishments of College Teachers as Related to Their Instructional Effectiveness: A Review and Exploration*, 26 RES. HIGHER EDUC. 227 (1987).

²⁴ Lingren & Nagelberg, *supra* note 13, at 823.

²⁵ Some scholars critique using the number of citations as the measure for determining the quality of scholarship. They note that things such as gender and race can play a role in determining citation frequency. See, e.g., Deborah Jones Merritt, *Scholarly Influence in a Diverse Legal Academy: Race, Sex and Citation Counts*, 29 J. LEGAL STUD. 345 (2000).

²⁶ See Richard S. Markovitz, *The Professional Assessment of Legal Academics: On the Shift from Evaluator Judgment to Market Evaluations*, 48 J. LEGAL EDUC. 417, 423-24 (1998) (noting that many factors—such as “succinct statements of boilerplate propositions of law or of a particular academic approach to some set of issues or because they fall squarely within a particular academic paradigm whose proponents make a practice of citing each other”—aside from the quality of the scholarship, play a role in determining the frequency of whether an article or author is cited).

²⁷ See, e.g., Benjamin Barton, *Is There a Correlation Between Law Professor Publication Counts, Law Review Citation Counts, and Teaching Evaluations? An Empirical Study*, 5 J. OF EMPIRICAL LEGAL STUDS. 619 (2009). Some authors note the limitations in using such devices to measure “quality” but suggest that there is no better vehicle for measuring quality teaching. See, e.g., Lingren & Nagelberg, *supra* note 13.

such as teaching awards to assess quality.²⁸ However, even those who rely on student evaluations note the many limitations in utilizing the data gleaned from those evaluations. This is particularly the case in studies that analyze data from multiple schools.²⁹ This data may be statistically inaccurate because of the variances in the methodology of assessing student evaluations at different institutions and because student evaluations will necessarily be determined based on the strength of a particular institution's faculty.³⁰

A review of these studies suggests one common theme: The variables used to measure good teaching and productive scholarship largely influence a studies' outcome. Given the infinite number of ways to identify these variables, it is difficult to assess whether there is any use to such studies. For example, one study showed that one of the most important traits of effective teaching was whether the teacher was recognized as an expert in her field.³¹ Thus, perceptions of expertise influenced teaching evaluation scores, but the number of law review publications or citations created the initial perception. Simply put, the studies comparing student evaluation scores with the number of publications or citations may be looking at one measure rather than engaging in a comparative analysis.

The empirical link between productive scholarship and quality teaching may be difficult to establish. But in the wake of changes within legal education spurred by the MacCrate and Carnegie Reports, opportunities now exist to use scholarship to advance teaching in new and innovative ways—ways, which may establish a concrete link between scholarship and teaching. This author believes it is important to look at the question of the scholarship/teaching dynamic by focusing on maximizing the potential benefits of each activity and considering if the synergistic effect of combining both may be the way to produce the best balance. This is what PhoenixLaw is attempting to achieve.

²⁸ See, e.g., Lindgren & Nagelberg, *supra* note 13, at 833 (citing Michael A. Faia, *Teaching and Research: Rapport or Mesalliance*, 4 RES. HIGHER EDUC. 235 (1976)).

²⁹ See Barton, *supra* note 27.

³⁰ See *id.* For example, the ranking of a teacher as average at an institution that has an excellent teaching staff is not comparable to a teacher assessed as average at an institution where the teaching staff was particularly poor.

³¹ James B. Levy, *As Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher*, 58 ME. L. REV. 49, 76-77 (2006).

III. PRIMACY OF TEACHING AMONG VALUES AT PHOENIX LAW

PhoenixLaw self-identifies as a teaching institution.³² From its inception, PhoenixLaw has not aspired to join the elite research institutions. This is not a goal of PhoenixLaw as our governing documents make clear. Scholarship is mentioned for the first time in the faculty handbook on page thirty-one, and then only to cite to American Bar Association Standard 401 governing the qualifications of law school faculty.³³ By that time, the handbook mentions “teach” or “teaching” seven times and mentions student fifty times.³⁴ Correspondingly, Infilaw makes no mention of scholarship on the corporation’s website.³⁵ Instead, the site contains discussions focused on student-centeredness, a commitment to student outcomes, and preparing students for the practice of law.³⁶

The importance of teaching and student outcomes contained in these documents reflects a shared understanding of the primacy of teaching and

³² This, of course, is our objective. But the practice of hiring only professors with significant practice experience means that we are often not hiring those who have been steeped in the academic culture. Necessarily, then, we must continue to ask ourselves whether our practices are the “best practices” for teaching. Our hiring practices offer advantages in discovering the best teaching practices. Advantages flow from the fact that many of our faculty are not set in a particular pattern of teaching and are not resistant to learning new methods. We engage the literature. We hire long-time experts in teaching who are not afraid to expose the inadequacies of traditional methods and at the same time retain the good aspects. Gerry Hess and Scott Taylor have both joined our faculty as visitors and brought tremendous insight and inspiration to our faculty. Some of us have been teaching for a significant time in addition to our practice, but all of us are open to learning. Despite some of us being a bit long in the fang, among us there are no old dogs unwilling or unable to learn new tricks.

³³ AM. BAR ASS’N, SEC. OF LEGAL EDUC. & ADMIS. TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 401 (2010) [hereinafter STANDARDS AND RULES]. The Standard provides:

Qualifications: A law school shall have a faculty whose qualifications and experience are appropriate to the stated mission of the law school and to maintaining a program of legal education consistent with the requirements of Standards 301 and 302. The faculty shall possess a high degree of competence, as demonstrated by its education, experience in teaching or practice, teaching effectiveness, and scholarly research and writing.

Id.

³⁴ Phoenix School of Law Faculty Handbook, 1-31 (2008) [hereinafter Faculty Handbook] (on file with author).

³⁵ The Infilaw System, <http://www.infilaw.com> (last visited July 17, 2010).

³⁶ *Id.*

student outcomes among the faculty and administration at PhoenixLaw.³⁷ We believe that teaching is the most critical way an educational institution can define the culture and community that will guide the ethos of the entire institution.³⁸ PhoenixLaw faculty members typically have extensive backgrounds as practicing lawyers or judges.³⁹ This is a deliberate hiring preference because of the belief that practicing lawyers have important insight into the skills and values identified in the MacCrate and Carnegie reports as necessary for the successful practice of law.

Unlike the positions taken by some engaged in the debate over the relationship between scholarship and teaching, the thorough embrace of teaching by PhoenixLaw faculty is not accompanied by a disdain for scholarship.⁴⁰ On the contrary, PhoenixLaw faculty members strongly believe in the importance of scholarship.⁴¹ Some already are noted scholars with significant publications, while others are eagerly beginning their scholarly endeavors.⁴² This is consistent, of course, with the requirements imposed by

³⁷ There are, of course, many constituents that play important roles in the achievements of any academic enterprise. PhoenixLaw is no different in this respect. Staff, administration, and most notably students, all play a vital role in any successful academic endeavor. Successful teaching, though, is impossible without the commitment of a talented and dedicated faculty.

³⁸ PhoenixLaw strives to be the antithesis of those institutions whose faculty view teaching as “a necessary evil”: A description provided to this author while interviewing for my first full-time law school *teaching* position.

³⁹ Some current, PhoenixLaw faculty have spent as many as twenty years practicing law and representing clients. Others have spent five, ten, or fifteen years in the active practice of law. Four of our members served on the judiciary in addition to their years of practice, combining for more than sixty-five years of judicial experience. Additionally, thirteen full-time faculty members have more than twelve years experience practicing law.

⁴⁰ See generally *supra* Part II.

⁴¹ This support for scholarship is clearly expressed in our governing Faculty Handbook and governance through faculty decisions. See Faculty Handbook, *supra* note 34, § 2.1.6.3.c.

⁴² Over the past couple of years, some of our more junior faculty members have been selected for publication, while also shouldering the enormous administrative burdens placed upon all faculty members in a start up institution. By way of non-limiting example, see Claudine Pease-Wingenter, *Does the Attorney-Client Privilege Apply to Tax Lawyers?: An Examination of the Return Preparation Exception to Define the Parameters of Privilege in the Tax Context*, 47 WASHBURN L. J. 699 (2008); Claudine Pease-Wingenter, *Prophetic or Misguided?: The Fifth Circuit’s (Increasingly) Unpopular Approach to the Work Product Doctrine*, 29 REV. LITIG. 121 (2008); Claudine Pease-Wingenter, *The Application of Attorney-Client Privilege to Tax Accrual Workpapers: The Real Legacy of United States v. Textron*, 8 HOUS. BUS. & TAX L. J. 337 (2008); Jennifer E. Spreng, *It’s All About the People: Creating a Community of Memory in Civil Procedure II*, 4 PHOENIX L. REV. (forthcoming 2011); Jennifer E. Spreng, *The Private World of Juvenile Court: Mothers, Mental Illness and the Relentless Machinery of the State*, 17 DUKE J. GENDER L. POL’Y 189 (2010); Jennifer E. Spreng, *The Food and Drug Administration and the Pharmacy Profession: Partners to*

the ABA that faculty members be engaged in “scholarly research and writing.”⁴³ However, this requirement is not taken on as a burden separate from the responsibility to teach but because we believe it helps make us better teachers.⁴⁴

The Legal Education issue of *Phoenix Law Review* that contains this article is one way in which faculty and students have collaborated in a scholarly endeavor that serves the purpose of teaching. The articles themselves discuss topics focused on teaching, requiring faculty to think critically, write, and inform our student editors about the subject of our teaching and learning. PhoenixLaw fosters this collaboration recognizing the importance of involving our students in a process of learning that includes engagement with and production of scholarship. The goal is to produce a process that is academically demanding and pedagogically sound, without ever losing sight of its practical importance to our students’ ultimate goals of graduating, passing the bar, and becoming useful, effective attorneys.

While PhoenixLaw faculty embrace the value of scholarship, they have had to contend with some factors usually not present at other law schools. All start-up institutions face competing demands on faculty members’ time. Institution building is time-consuming and requires an inordinate amount of committee and administrative work. In addition, most law schools must navigate a relationship between the law school and some outside entity, such as a provost, or governing board. The familiarity of this outside entity, with the daily challenges facing law school faculty and the related requirements of faculty under the ABA Accreditation Standards, can have a substantial impact on the ability of faculty to meet their obligations. PhoenixLaw, as one of three consortium schools, shares the Infilaw objectives to

Ensure the Safety and Efficacy of Pharmacogenomic Therapy, 13 J. HEALTH CARE L. & POL’Y 77 (2010); Jennifer E. Spreng & Roberto J. Escobar, *Solving the Burklow Problem: Federal Question Jurisdiction of Tucker Act and Labor-Management Relations Act Cases After Textron Lycoming v. UAW*, 55 WAYNE L. REV. 941 (2010); Jennifer Spreng, *Conscientious Objectors Behind the Counter: Statutory Defenses to Tort Liability for Failure to Dispense Contraceptives*, 1 ST. LOUIS U. J. HEALTH L. & POL’Y 337 (2008); and Jennifer Spreng, *Pharmacists and the “Duty” to Dispense Emergency Contraceptives*, 23 ISSUES L. & MED. 215 (2008).

⁴³ See generally STANDARDS AND RULES, *supra* note 33.

⁴⁴ While this conclusion is drawn from many sources—including the bi-weekly, best practices sessions attended by faculty members that incorporate both scholarly presentations and best practices for teaching—it is also borne out by a survey conducted by the author. The survey examined PhoenixLaw faculty members’ opinions concerning the use and benefits of scholarship in their classroom teaching. Approximately seventy-five percent of faculty respondents believed their scholarly endeavors enriched learning in their classrooms (survey on file with author).

maximize student outcomes. However, as a private, for-profit institution, the bottom line impact of faculty scholarship on the institution's outcome-based objectives was not always readily apparent to corporate decision-makers. This is hardly surprising because the qualitative impact of scholarship on the teaching environment and measurable student outcomes is not easily quantifiable.

PhoenixLaw has achieved significant goals in its early years, obtaining full accreditation in the shortest period possible under ABA rules.⁴⁵ However, the early years at PhoenixLaw have been a learning process for all involved. Faculty members have had to learn both the benefits and the requirements of the corporate structure that provided capital and other resources to start and sustain our institution.⁴⁶ At the same time, the corporate officers and stakeholders have had to learn the nuances of an effective academic culture and how that culture sometimes varies from corporate models.⁴⁷ In many ways, the ABA accreditation process enabled this learning to occur for all parties by providing time and significant incentives to all stakeholders.

Throughout the ABA accreditation process, all parties in this rather unique enterprise worked to gain trust in each other's motives and capabilities.⁴⁸ Our shared mission fosters this mutual trust. As a now fully accredited law school, PhoenixLaw has embarked on a new journey. The destinations we all seek are high bar passage rates *and* graduates who are prepared for the practice of law.⁴⁹ To achieve these ends, the primacy of teaching must remain the center focus at PhoenixLaw: teaching fueled by the practice experience of faculty and their engagement in relevant scholarship.

⁴⁵ See STANDARDS AND RULES, *supra* note 33, Rule 4(a) & (c). PhoenixLaw was founded in 2004 and obtained full ABA accreditation in June 2010.

⁴⁶ See *infra* Parts IV-V. Some of the benefits of corporate ownership are integrally related to aspects of this model that initially seemed ill suited to an academic endeavor.

⁴⁷ For instance, an issue as seemingly innocuous as the difference between fiscal calendars and academic calendars provided a number of unnecessary points of friction. Fortunately, a number of Infilaw officers, who had substantial experience as teachers and administrators in ABA accredited law schools, aided the learning process for all parties involved.

⁴⁸ In short, different constituents had to accept that the right people were on the bus and that control could be relinquished in areas and discretion could be more appropriately exercised by others. See generally JIM COLLINS, *GOOD TO GREAT: WHY SOME COMPANIES MAKE THE LEAP—AND OTHERS DON'T* (2001).

⁴⁹ Of course, achieving and maintaining high bar passage rates will not necessarily create professionally prepared graduates. One struggle PhoenixLaw will necessarily face as we continue to grow in size is how to manage that growth to ensure that our curriculum contains sufficient skills training without sacrificing content necessary to guarantee high bar passage rates.

The following section will discuss how the policies adopted by PhoenixLaw, if implemented properly, provide the impetus for successful integration of scholarship and teaching that will enable us to achieve many of the reforms identified by the MacCrate and Carnegie Reports.

IV. IMPLEMENTING MACCRATE AND CARNEGIE: PHOENIXLAW'S POLICIES AND PRACTICES FOSTER A SYMBIOTIC RELATIONSHIP BETWEEN SCHOLARSHIP AND TEACHING

In the MacCrate Report, the authors discuss the need to restructure legal education to include the skills necessary to become a lawyer, noting there is a gap between what the profession requires of a lawyer and what law schools deliver instructionally.

The lament from the bar is a steady refrain. "They can't draft a contract, they can't write, they've never seen a summons, the professors have never been inside a courtroom." Law schools offer the traditional responses: "We teach them how to think, we're not trade schools, we're centers of scholarship and learning, practice is best taught by practitioners."⁵⁰

Unlike many who have decried the state of affairs in the legal academy, PhoenixLaw faculty is not inclined to throw out the baby with the bath water. For all the failures of legal education identified by critics, the current system has educated many good lawyers. Further, much practical good has come from even traditional forms of legal scholarship.⁵¹

The question we repeatedly address at PhoenixLaw is how to modify current practices to take the best of both the old and new.⁵² The answer is found in a combination of several factors that make PhoenixLaw a model for the successful integration of practical scholarship and effective teaching. The factors include: 1) the commitment to hiring experienced legal practitioners; 2) the broad definition of scholarship adopted by our institution; 3) the corporate commitment to technological integration across the consortium; and, 4) the accreditation requirements of the ABA. PhoenixLaw's stated mission, of serving underserved communities, focusing on student-centered outcomes, and preparing students for the practice of law, supports

⁵⁰ See MACCRATE REPORT, *supra* note 7.

⁵¹ See *supra* Part I.

⁵² We do not suggest or pretend that we are writing on a blank slate. Many PhoenixLaw faculty have taught at other institutions. Some of these institutions have attempted to integrate the recommendations of MacCrate, Carnegie, and others. These efforts have succeeded to varying degrees.

this unique model—a model that successfully integrates the MacCrate and Carnegie recommendations.⁵³

PhoenixLaw is committed to hiring experienced legal practitioners. Having a faculty comprised largely of members with significant experience in the practice of law is essential to implementing the MacCrate and Carnegie reports call for skills-based training.⁵⁴ PhoenixLaw does not aim to hire the young Ivy League graduate fresh from a federal clerkship. While we have no opposition to graduates of Ivy League institutions or candidates with clerkships on their résumés, we believe that our students are better served when taught by more seasoned practitioners.⁵⁵ As many commentators have expressed, there is often a separation, bordering on chasm, between law professors and legal practice.⁵⁶ By committing to hire predominantly from among those who have actually engaged in the practice of law, PhoenixLaw seeks to bridge this divide.

PhoenixLaw has adopted standards that broaden the definition of what qualifies as scholarship to include more practice-oriented publications, such as professional journals and reports for professional or governmental organizations.⁵⁷ While more traditional forms of scholarship are also expected for

⁵³ As with any vital institution, PhoenixLaw is not static. We continue to discuss and debate what should be the appropriate measures of student outcomes. We generally agree on some measure—such as the bar passage rate and the student job placement percentage.

⁵⁴ See generally MACCRATE REPORT, *supra* note 7; CARNEGIE REPORT, *supra* note 8.

⁵⁵ We have numerous faculty members with degrees from the most prestigious institutions in the country and several who served as appellate court clerks. But the distinguishing characteristic of all our faculty is that they have all in some way worked as lawyers and/or judges. Many of us practiced our respective professions for well over a decade.

⁵⁶ See *supra* Part II.

⁵⁷ See Faculty Handbook, *supra* note 34, § 2.9.1.2. The Faculty Handbook defines scholarship in the following terms:

Publication is one way of demonstrating contemporaneity in an academic field. This category of activity includes but is not limited to publishing books, chapters, notes, comments, book reviews, teaching materials, and articles; presenting seminars, speeches, lectures, scholarly papers and workshops; obtaining competitive grants or fellowships; performing original research; doing field work; attending workshops or conferences; presentation to official bodies or publication of statutes or regulations; preparation and submission of written reports or studies to and for governmental agencies or nongovernmental organizations concerned with the operation, evaluation, further understanding, or improvement of the law; and, engaging in formal studies or continuing education. The emphasis that is given to particular scholarly activities will depend on the level of maturity of the faculty member, and performance planning objectives and expectations. The following guidelines will assist faculty engaging in scholarly activity for performance planning

promotion or tenure, a faculty member's overall participation in scholarly activities will be judged much more broadly.⁵⁸

These policies in tandem, a broad definition of scholarship and hiring experienced faculty create two effects. First, the policies allow PhoenixLaw to avoid the entire debate about the role of scholarship in predicting effective teaching. Because the measurements used to judge effective or productive scholarship vary so substantially from the PhoenixLaw model, their value to our endeavor is minimal at best.⁵⁹ For example, while traditionally the number of articles a professor has written would influence the decision to hire, at PhoenixLaw the experience of the professor is the main factor. Therefore, it is unnecessary for PhoenixLaw to debate what type of scholarship produces the most effective teacher. Further, PhoenixLaw avoids the traditional arguments about what creates productive scholarship. Instead, the school uses its definition of who is an effective teacher to inform what productive scholarship should be—principally scholarship that serves a practical purpose. While scholarship that is “practical” in its impact is often frowned upon by many academics that may have very little practice expe-

purposes and those assessing faculty scholarly efforts but are not intended to be exclusive:

- a. For a doctrinal member of a law faculty, publishing in law journals and reviews is an expected but not exclusive outlet of scholarship and form of scholarly activity. (While support of the School's law review is encouraged, scholarship placed in outside law reviews and journals is preferred).
- b. Scholarship that is reviewed by fellow scholars is of greater merit than that which is not.
- c. Scholarship that correlates to and advances the school's mission is particularly valued.
- d. The number and type of beneficiaries of the scholarship.
- e. The extent to which the scholarship enhances the faculty member's academic professional skills.
- f. The amount of time and effort devoted to the scholarship.
- g. The impact of the scholarship on law, society, or the legal profession.
- h. The extent of the contribution to the program and standing of the law school.
- i. The clarity of writing, the depth of analysis, and the creativity of the approach.

Id.

⁵⁸ Admittedly, the broadened definition of scholarship is due, in significant part, to Infilaw's initial disdain for scholarship. Ultimately, Infilaw realized the potential value of scholarship to teaching and student-centered outcomes and helped pave the way for a more inclusive and productive definition of scholarship.

⁵⁹ Additionally, the earlier literature is fairly irrelevant to our measures of teaching effectiveness, because we seek *objective* measurements of student-outcomes.

rience, it is of value to the student who needs to learn not only how to analyze, but how to practice law the first day on the job.⁶⁰

Second, PhoenixLaw's hybrid approach brings the scholarship activities of the faculty into the classroom. Because PhoenixLaw makes a conscious effort to hire people with significant practice experience, the faculty is more likely to draw on their own practice backgrounds and practical scholarship when attempting to teach skills and values across the curriculum. This integration of scholarship and teaching maximizes the value drawn from time devoted to scholarship. Further, because PhoenixLaw encourages practical scholarship, the institution maximizes the real world and classroom impact of the scholarly work itself.

Another factor in the PhoenixLaw model is Infilaw's commitment to incorporating technological advances across the consortium. Utilizing technology is a perfect complement to the infusion of skills and values across the curriculum called for by MacCrate and Carnegie. While we have barely scratched the surface of what is possible through the technological capacity the consortium possesses due to strains caused by exponential growth and the accreditation process, the school has started integrating across institutions as recommended in the Carnegie Report.⁶¹ Outfitted with the latest technology, the consortium schools have tremendous capacity to link students and faculty across the three institutions. There are already classes co-taught between faculty at Florida Coastal School of Law and PhoenixLaw. Further, different professors can link different sections of the same class through social networking sites. This technology allows professors to post outside material and helps facilitate discussion outside of the classroom. Plans to expand these groups to include classes from other consortium schools are already underway. Effectively using technology has proven to be the perfect vehicle for incorporating scholarship into the everyday curriculum, thereby enriching the students' education across institutions.⁶²

⁶⁰ Top ranked journals rarely publish "practical" scholarship. Further, articles written by practitioners rarely find their way into elite journals. Therefore, while faculty joining PhoenixLaw from practice backgrounds have probably had little time to publish anyway, if they did, they are unlikely to have published in journals from elite institutions. These factors would skew the traditional analyses of scholarship and teaching identified in Part II, *supra*. However, under PhoenixLaw's model, these issues do not make their scholarship less valid, nor do they make their promise as a teacher less hopeful. Moreover, some of our faculty did, during their practice careers, publish in peer-reviewed and other well-regarded publications.

⁶¹ See CARNEGIE REPORT, *supra* note 8, at 9.

⁶² The potential expansion of these connections is almost limitless: As Infilaw is backed by Sterling Partners, a private equity firm, which owns or is the principle investor in universities throughout the world—including law schools or departments in Central and South America, Asia and Europe.

Finally, the accreditation requirements of the ABA provide a structured reminder of the importance of scholarship and practical skills development. These are particularly helpful in ensuring the proper allocation of resources to competing projects in a for-profit environment. Collectively, these policies have infused scholarship and teaching creating an effective education model, which implements many of the recommendations of the MacCrate and Carnegie Reports.

V. MODEL FOR THE FUTURE

As the preceding section argues, PhoenixLaw has the potential for setting the standard for practical legal education in the twenty-first century. This model will continue to flourish if all of the constituent groups remain committed to PhoenixLaw's mission and continue to evaluate the best methods of achieving that mission. Further, continued success will require the following commitments.⁶³

Faculty must be willing to engage in hard work, something PhoenixLaw's faculty has showed a great appetite for to date. Hard work encompasses more than just teaching, faculty must continue their scholarly output while maintaining connections with the practice of law.⁶⁴ As we become further removed from the active practice of law, the knowledge we gained from that experience will diminish if not replenished and refreshed.⁶⁵ For

⁶³ The scope of this article concerns the use of scholarship as an effective teaching tool. It is important to note that this is just one area where continued growth will advance PhoenixLaw's mission. Outside of creating practical scholarship, providing other experiential learning is vitally important. No areas of legal education are more clearly suited to teaching skills and values than are legal writing and the experiential learning opportunities of clinical programs. While PhoenixLaw has an award-winning General Practice Skills course, and is currently engaged in an aggressive and largely successful externship program, we are seriously deficient in our clinical offerings. Funding needs to be made available for a live-client clinical program. It is in a clinical setting that "the rubber meets the road" insofar as skills training. A clinical program will do more to inculcate skills and values than a half-dozen other courses that have skills components in them.

⁶⁴ Teachers can maintain connections to the practice of law by handling cases on an appointed or pro bono basis, consulting with counsel in cases, or assisting lawyers or organizations in other ways.

⁶⁵ Some scholars argue that junior faculty members, with little teaching experience, are in some ways better teachers because of their more recent practice experience. See Gregory W. Bowman, *The Comparative and Absolute Advantages of Junior Law Faculty: Implications for Teaching and the Future of American Law Schools*, 2008 BYU EDUC. & L.J. 171. However, Bowman also explains the need to better train junior faculty due to the many areas in which they show a deficiency as compared to senior faculty. *Id.* at 175.

our students to benefit from practical wisdom in the classroom, faculty must stay engaged with the profession.

Scholarship is one tool faculty can use to refresh the knowledge they learned in their respective fields of practice. When a teacher researches and writes in practical areas of the law or uses pertinent empirical data as a basis for a scholarly article, it allows faculty to stay sharp with knowledge of current legal issues and fosters a connection with practitioners. Incorporating these experiences in the classroom whether in anecdotes, problems, or hypotheticals creates practice-ready moments for the students.

Infilaw must be willing to support and encourage faculty scholarship and the delivery of a quality education that truly incorporates skills and values across the curriculum. Although there has been a great commitment of resources to PhoenixLaw and an evolution of thinking about scholarship, more can and should be done to encourage further scholarly endeavors. For example, faculty scholarship stipends are one problem area. Scholarship stipends at PhoenixLaw are well below the national average and that provides economic incentives for faculty to do other things besides scholarship. The benefits of practical scholarship may be lost without a change to the current stipend policy.

Finally, and most importantly, our students must be committed to a process of engaged learning. Infilaw can provide all of its considerable resources and faculty can spend countless hours preparing each class, but all will be for naught if the students are not committed to the educational process.

One of the three prongs of our mission statement at PhoenixLaw is “serving the underserved.” In part, that means reaching out to underserved communities to offer the opportunity to obtain a law degree and the chance to sit for the bar. But it means more than that. Many of our graduates will go on to serve underserved communities. It is our job—all of us—Infilaw, PhoenixLaw administrators, faculty and students, to make sure that our graduates are as ready to serve those underserved communities as they can possibly be upon graduation. We must continue to recognize scholarship’s critical role in this puzzle. Infilaw must cultivate this scholarship through financial backing, and teachers must reform this scholarship by writing on less-traditional, experiential based topics. Through this model, practical scholarship becomes a tool for effective teaching. This model makes scholarship relevant to legal education in the twenty-first century, and those who buy in will never perish the thought of publication.

