

AN ALTERNATIVE TO THE SECTARIAN VISION THE ROLE OF THE DEAN IN AN *INCLUSIVE* CATHOLIC LAW SCHOOL

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I. THE DEAN'S OPPORTUNITY

THERE has never been a better time to be the dean of a Catholic law school. This conclusion may not seem obvious; it may even seem counter-intuitive. In the view of some, *Ex corde ecclesiae*¹ poses an enormous threat to the intellectual, moral, and institutional integrity of American Catholic higher education, including Catholic legal education. In this view, the result of *Ex corde ecclesiae*'s implementation would be, at best, chronic and pervasive divisiveness not only between the Church hierarchy and Catholic universities, but within the universities themselves. At worst, the result would be a divorce of Catholic higher and professional education from the American university tradition and a profound marginalization of Catholic institutions of learning. From this perspective, the responsibilities of Catholic law school dean would seem neither particularly clear nor especially rewarding; the only satisfaction would be that of having fought a rear-guard action as bravely as possible.

My purpose in this essay is not to revisit the ongoing debate over the merits of *Ex corde ecclesiae* or to prognosticate in detail over its implications for the future of American Catholic higher education.² Suffice it to say that I share the reservations

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1. APOSTOLIC CONSTITUTION *EX CORDE ECCLESIAE* OF THE SUPREME PONTIFF JOHN PAUL II ON CATHOLIC UNIVERSITIES (1990). For a concise history of the origin and development of this papal document, see Joseph A. O'Hare, *How It All Began*, ACCU UPDATE, March/April 1999, at 1. For a short description of the place of *Ex corde ecclesiae* in the postwar development of American Catholic higher education, see Monika K. Hellwig, *The Survival of Catholic Higher Education*, AMERICA, July 16-23, 2001, at 23.

2. There has been extensive debate over the significance of *Ex corde ecclesiae* for American Catholic higher education. See, e.g., *Special Supplement: Keeping Colleges Catholic: What's at Stake?* COMMONWEAL, April 9, 1999, at 13 (providing a sampling of opinion); CATHOLIC UNIVERSITIES IN CHURCH AND SOCIETY: A DIALOGUE ON EX CORDE ECCLESIAE (J.P. Langan & L.J. O'Donovan eds., 1993) (providing earlier collections of different viewpoints); *Ex Corde Ecclesiae and Its Ordinances: Is This Any Way to Run a University or a Church?* COMMONWEAL, Nov. 19, 1993, at 6 (same); *Symposium on Ex Corde Ecclesiae*, 25 J.C. & U.L. 645 (1999) (discussing the complex legal issues). Among other thoughtful, although differing, considerations of *Ex corde ecclesiae* are Alan Wolfe, *Catholic Universities Can Be the Salvation of Pluralism on American Campuses*, CHRON. HIGHER EDUC., Feb. 26, 1999, at B6; Richard John Neuhaus, *The Dying of the Academic Light*, FIRST THINGS, April 1999, at 71; Jean Porter, *Misplaced Nostalgia: 'Ex Corde' and the Medieval University*,

of many in Catholic higher education about the wisdom and necessity of creating a juridical relationship between the Church hierarchy and American Catholic colleges and universities.³ I also understand and sympathize with the quandary of many Catholic theologians now faced with an apparent obligation to obtain episcopal certification of the conformity of their work with the Church's authoritative teachings.⁴ These issues may indeed prove to be highly divisive within both the American Catholic academy and the Church itself. That being said, I contend that the principal effect of *Ex corde ecclesiae*, and the debates surrounding it, has been essentially positive.

Ex corde ecclesiae has catalyzed and channeled energies already emerging in the Catholic academy into a widespread, passionate reconsideration of what it means for an educational institution to be "Catholic." That effect may be more important than the substance of the document itself, because it has helped Catholic universities and law schools focus on the sense of lost purpose lingering alongside their status as a respected and sometimes distinguished force in American higher education. It has helped us think more clearly about how our institutions can be both genuinely Catholic and committed to the American university traditions of academic freedom, critical inquiry, intellectual excellence and democratic inclusiveness. The fruits of all of this rethinking are still emerging, but the net result need not be a crippling and alienating neo-orthodoxy, but rather an identity that is distinctive and rich with possibility.

The dean of a Catholic law school today serves in a time of extraordinary intellectual and spiritual opportunity. The opportunity is to contribute to a new understanding of what it means to be a Catholic law school within a Catholic university. The opportunities for rethinking are almost endless. They touch on every aspect of the law school's life—the scope of its curriculum, the parameters of its intellectual and scholarly life, the direction of faculty appointments, admissions policies, the allocation of resources, the thrust of career counseling and, most globally, the way the law school defines, articulates, and lives its values. The dean of a Catholic law school thus need not fight a rear-guard action, but should share in an adventure whose outcome is still incalculable, but which will force us to stretch our imaginative and sympathetic capacities to the utmost.

The heightened self-consciousness of Catholic legal education, as well as a renewed confidence in the vitality of a Catholic approach to legal education, will provide us with a particular way to address the pervasive anomie that deans in all

COMMONWEAL, April 20, 2001, at 12. See generally Charlotte Allen, *Crossroads*, NEW REPUBLIC, Feb. 15, 1999, at 16 (providing a useful journalistic account of the implications of the *Ex Corde* for one major Catholic university).

3. See, e.g., Edward A. Malloy & J. Donald Monan, "*Ex Corde Ecclesiae*" Creates an Impasse, AMERICA, Jan. 30, 1999, at 6 (critique by the president of the University of Notre Dame and the chancellor of Boston College). Some leaders of Catholic universities have been more sanguine about the new structure contemplated by the document. See, e.g., John J. Piderit, *A President's View*, COMMONWEAL, Apr. 9, 1999, at 18; *The University at the Heart of the Church*, FIRST THINGS, June/July 1999, at 22 (Fr. Piderit is president of Loyola University, Chicago).

4. For a vivid description of implications of the *mandatum* for Catholic theologians, see Beth McMurtrie, *Three Theologians Face a Dilemma for Themselves, Their Colleges and the Church*, CHRON. HIGHER EDUC., July 20, 2001, at A8.

law schools face. That anomie has many sources. It is to some extent a function of the “ordinary religion” of the law school classroom.⁵ It reflects the detachment of professionalization from a commitment to justice, the triumph of business values, and the alienation of so many lawyers from their vocations. This is not to say that Catholic law schools possess the only antidote to that anomie. It is merely to suggest that realization of Catholic identity can indeed be *one* such antidote.⁶ That potentiality makes the opportunity to lead a Catholic law school today something very exciting indeed.

The dean’s role in creating that antidote through a reinvigoration of Catholic identity is crucial. As a “servant leader”⁷ of the law school community, the dean has several roles in the process of realizing the school’s Catholic identity. First, the dean must lead in initiating the discussions among the faculty and other constituencies of the law school about the nature and implications of Catholic identity. This process of discussion should be both informal and formal. As a threshold matter, it should be a process of learning. Catholic, nominally Catholic, and non-Catholic members of the community will be familiar (or unfamiliar) to varying degrees with Catholic thought and values and their possible relevance to legal education and scholarship. Workshops, seminars and open, frank discussions of Catholic thought should create an informed basis for exploring the meaning of Catholic identity for the law school. The dean’s responsibility is to ensure that such an exploration takes place in an energetic and searching manner.

Second, as spokesperson for the institution, the dean is charged with articulating, in both private and public contexts, the law school’s sense of itself as a Catholic institution. This means more than being a mere mouthpiece or an entirely self-effacing transcriber of some conventional wisdom. It means exercising a sensitive receptivity to both the shared understandings and the crosscurrents of meaning within the community. In other words, the dean must be a good “reader” of the institutional culture. But the dean must be a creative, not a passive, reader of the culture. The dean must learn to speak for the school in a way that helps it discover

5. The phrase is from Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 248 (1978). Professor Cramton argues that the skepticism in which law students are trained, when coupled with a tendency to exclude values from the classroom discourse, “deepens into a belief in the meaninglessness of principles, the relativism of values or the non-existence of an ultimate reality.” *Id.* at 253. In my opinion, the consequent devaluation of values that often takes place in that type of law school classroom can produce a sense of spiritual drift and alienation.

6. For a thoughtful discussion of how Catholic legal education poses an alternative to the “spiritual malaise” of law students and lawyers influenced by the “ordinary religion” of the law school classroom, see Steven M. Barkan, *Jesuit Law Schools: Challenging the Mainstream*, CONVERSATIONS, Spring 1993, at 6. See also Calvin G.C. Pang, *Eyeing the Circle: Finding a Place for Spirituality in the Law School Clinic*, 35 WILLAMETTE L. REV. 241 (1999); Lucia Ann Silecchia, *Integrating Spiritual Perspectives with the Law School Experience: An Essay and an Invitation*, 37 SAN DIEGO L. REV. 167 (2000).

7. For discussion of the concept of “servant leadership” in the Catholic tradition, see generally ROBERT K. GREENLEAF, *SERVANT LEADERSHIP: A JOURNEY INTO THE NATURE OF LEGITIMATE POWER AND GREATNESS* (1977). The concept is grounded in *Luke* 22:26: “Let the leader become as one who serves,” and involves a recognition that authority and power are not to be established for the satisfaction of the leader, or for acquiring or preserving privileges, but only for service and the well-being of the community.

its own identity, that helps it construct its own narrative about itself. He or she should seek new ways to express the institutional identity, so that both insiders and outsiders are able to understand that *this* is who we are, and *this* is what we stand for. Of course, all law school deans must be able to construct a defining narrative for their institutions. Such story telling, in fact, may be an essential element of leadership itself. The capacity to speak institutionally, however, is particularly important in times of redefinition, when a self-conscious effort to rethink an institution's identity is underway. The deans of today's Catholic law schools therefore are particularly challenged to articulate, in creative ways, the meanings of Catholic legal education for their institutions.

Finally, at least in the model of Catholic legal education I am about to propose, the dean of a Catholic law school must be a force for inclusion. The reality of American Catholic legal education is that in most Catholic law schools, many faculty members are only nominally Catholic, of different faiths, or wholly irreligious. Indeed, some are unsympathetic or even hostile to Catholicism, either as a matter of principle or of prejudice. Committed or confessional Catholics are a minority in many, if not most, Catholic law school faculties. Even some confessional Catholics, furthermore, draw a sharp distinction between their professional roles as teachers and scholars (and the role of the law school in which they teach) and the role of faith and the Church in their lives.

Inevitably will be a wide range of opinion within Catholic law school faculties not only about the nature of the institution's Catholic identity, but about whether it is desirable to have such an identity at all. Given the importance of this question, and the existential challenge it will pose to some faculty members' sense of themselves (as well as their vision of legal education), this division of opinion may yield sharp and potentially harmful controversy. This controversy among faculty may also replicate itself among students, most of whom do not attend Catholic law schools because of a deep, personal identification with the school's Catholic mission. Such a controversy can be destructive, or it can be helpful and productive. Much depends upon the dean's capacity for leadership in general. More concretely, it depends upon the dean's capacity to show that a Catholic law school can fulfill its Catholic mission *by* being broadly inclusive.⁸

My conviction is that realization of a genuinely Catholic identity in today's Catholic law schools can indeed be a broadly inclusive phenomenon, one that creates an open and welcoming space for people of other faiths or no faith at all, as I will explain below. The dean of such a law school, however, has a special—and complicated—responsibility to ensure that such inclusiveness expresses the law school's Catholic identity and mission. This responsibility is complicated because it requires a thoroughly unapologetic and enthusiastic insistence on the reality and importance of Catholic identity in all aspects of the institution's life; a perpetual invitation to frank and critical discussion of the meaning of that identity and, more generally, the relevance of Catholic thought and values to the law and lawyering; and an earnest and welcoming commitment to diversity (in all its senses) within the

8. For a similar argument regarding the nature of a Catholic university, see Wolfe, *supra* note 2, at B7

law school. However complicated that responsibility, it is essential, and one the dean must be committed to meeting.

There is, however, a vision of Christian legal education that would largely eliminate the need to meet that responsibility, or at least some aspects of it. In fact, in such a "sectarian" vision, the definition of the dean's responsibility in those terms might be seen as inconsistent with or even a betrayal of the school's fundamental Christian identity. Before articulating my vision of how an inclusive law school can be truly Catholic, I must consider both the attractions and weaknesses of the sectarian model as it may be applicable to specifically Catholic legal education.

II. THE SECTARIAN VISION

The most eloquent expression of a sectarian vision of a Christian law school can be found in Thomas Shaffer's provocative article *Erastian and Sectarian Arguments in Religiously Affiliated American Schools*.⁹ Shaffer has long been a leading voice for the expression of Christian values, not only in legal education¹⁰ but also in law and lawyering.¹¹ His vision of a "sectarian" (his own term)¹² law school is one with which anyone committed to Catholic legal education should grapple.

Shaffer's analysis begins with the proposition that the great majority of the almost fifty religiously affiliated law schools in the United States (Catholic and non-Catholic) were functionally secular.¹³ A few others, he argued, operated to some

9 Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859 (1993). Similar arguments can be found in Christopher Wolfe, *The Ideal of a (Catholic) Law School*, 78 MARQ. L. REV. 487 (1995); Randy Lee, *Are Religiously Affiliated Law Schools Obsolete in America? The View of an Outsider Looking In*, 74 ST. JOHN'S L. REV. 655 (2000); Randy Lee, *Catholic Legal Education at the Edge of a New Millennium: Do We Still Have the Spirit to Send Forth Saints?* 31 GONZ. L. REV. 565 (1995/96). I hope these authors will forgive me for eliding differences between them and Shaffer, and between each of them, but their visions do seem consistent with key aspects of Shaffer's sectarian model, even though they might not accept all of the implications of his radical ecclesiology. Wolfe, in particular, acknowledges the potential distance between an ideal Catholic law school and other legitimate possibilities. Wolfe and Lee also draw their inspiration more from specifically Catholic theology than from the separatist wing of Protestantism that seems to be Shaffer's principal inspiration.

10. Former Dean of Notre Dame Law School, Professor Shaffer is the Robert and Marion Short Professor Emeritus of Law at Notre Dame. He has explored the themes elaborated in the Stanford article in a series of highly original pieces. See, e.g., Thomas L. Shaffer, *Moral Implications and Effects of Legal Education, or Brother Justinian Goes to Law School*, 34 J. LEGAL EDUC. 190 (1984); Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605 (1996); Thomas L. Shaffer, *Why Does the Church Have Law Schools?* 78 MARQ. L. REV. 401 (1995); Thomas L. Shaffer & Robert E. Rodes, Jr., *A Christian Theology for Roman Catholic Law Schools*, 14 U. DAYTON L. REV. 5 (1988).

11. See, e.g., THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* (1987); THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981); Thomas L. Shaffer, *Christian Lawyer Stories and American Legal Ethics*, 33 MERCER L. REV. 877 (1982); Thomas L. Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975).

12. See Shaffer, *supra* note 9, at 1860, 1869.

13. See *id.* at 1864. Shaffer was not the first to make this observation. See, *inter alia*, Rex E. Lee, *The Role of the Religious Law School*, 30 VILL. L. REV. 1175, 1175-76 (1985) ("[T]he religious schools which have achieved a share of real prominence in the legal education world are invariably those that have long since ceased to take their religious moorings seriously."). Lee was the founding

extent under a religious ethos,¹⁴ but only four (all non-Catholic) were truly “sectarian” in his sense of the term. For Shaffer, the only truly religious law school is one that defines serving God as its essential purpose, not the state or civil society generally. The goal of such a law school would be to train lawyers fundamentally committed to the Church’s prophetic office to practice law in a world that is often hostile to the Church’s beliefs.

According to Shaffer, this unabashedly sectarian law school would have certain basic characteristics. First and foremost, it would be “communal,” in the sense that students would “receive their legal education in and from the community of the Church. They learn from and within a tradition of value—from the perspective of Christian theology”¹⁵ His assumption, furthermore, is that the graduates of such a law school “would not be diverse.”¹⁶ While he is not explicit about the practical consequences of this concept, it seems inescapable that in a sectarian Catholic law school all, or virtually all of the faculty and students of such an institution would have to be Catholic or at least committed to some Christian faith tradition, or, perhaps, to Judaism. How far he would go beyond that is not clear, but it is clear that he would regard such a law school as a “religious community,”¹⁷ and that there would not be a place for the irreligious. The dean of such a law school, as I suggested above would not, indeed should not, bother herself with inclusiveness; a law school defined as a community of believers would be by definition exclusive.¹⁸

Dean of Brigham Young University School of Law, affiliated with the Church of Latter-Day Saints. For a historical perspective on this process of secularization in both Protestant and Catholic law schools, see Harold J. Berman, *The Secularization of American Legal Education in the Nineteenth and Twentieth Centuries*, 27 J. LEGAL EDUC. 382 (1975). The secularization of American religiously-affiliated law schools was part of an overall secularization of higher education in the United States. For historical analysis, see generally JON H. ROBERTS & JAMES TURNER, *THE SACRED AND SECULAR UNIVERSITY* (2000). For a lament, see generally JAMES TURNSTEAD BURTCHAELL, *THE DYING OF THE LIGHT: THE DISENGAGEMENT OF COLLEGES AND UNIVERSITIES FROM THEIR CHRISTIAN CHURCHES* (1998).

14. Shaffer, *supra* note 9, at 1864-69. Shaffer characterizes those law schools, somewhat obscurely, as “Erastian,” and while apparently acknowledging that they have some religious identity and “are not secular,” claims that “they are for the most part indistinguishable from all other law schools.” *Id.* at 1867. This is principally because the Erastian church, and implicitly its law schools, would “put the State where God ought to be.” *Id.* at 1865. Shaffer regarded seven of the Catholic law schools he surveyed as “Erastian.” *Id.* at 1864 n.18. I presume that Shaffer would regard the model of a Christian law school I will propose below as essentially Erastian. I have some reservations, however, about the sufficiency of the Erastian concept as a description of particular Catholic law schools, and I also believe that dismissal of Catholic law schools that are not sectarian as Erastian (and hence insufficiently true to their religious identity) is far too limiting. Because I remain somewhat puzzled by the relevance of the whole Erastian concept, however, I will not frame my overall argument in terms of it, but will confine critical discussion to *infra* note 30. Also skeptical of the Erastian distinction is Michael Perry. See Michael J. Perry, *The Idea of a Catholic University*, 78 MARQ. L. REV. 325, 357-58 (1995).

15. Shaffer, *supra* note 9, at 1872.

16. *Id.* at 1871.

17. See *id.* at 1864 n.18.

18. According to Shaffer, a sectarian law school “would not regard itself as an ecumenical community.” *Id.*

Second, the graduates of the ideal sectarian law school will be commissioned to go out as ministers from “the community of the faithful.”¹⁹ The responsibility of the “commissioned lawyer-minister,”²⁰ who bears the “authority”²¹ of the faith community’s judgment will be to bear witness to the prophetic voice of the Church.

Third, the communal commission of the lawyer-minister must be regarded as “infallible,”²² in the sense that the “process” of moral reasoning in which the faith community engages will always claim the “dependability of divine authority.”²³ This is not to suggest, Shaffer emphasizes, that the human interpretation of divine authority can never be mistaken, but that faith “gives a confidence that allows the believer to go on as if she were certain Whether that assurance is justifiable depends on whether the right processes are followed in arriving at it.”²⁴ I must confess that I find this point somewhat oracular—how after all, does one define the “right processes?” I am also not sure that this formulation distinguishes adequately between the truth-claims of faith and a hubristic satisfaction in the community’s all-too-human interpretation of the implications of faith. Nevertheless, it may be read, at least, as an insistence that the “commissioned lawyer-minister” be confident that the process of moral reasoning within the faith community of the sectarian law school reflects the undeniable authority of the truth-claims of the Church.

Finally, the sectarian law school must be “specific,”²⁵ meaning that it must address, concretely and clearly, “how to speak out and act in a lethal political world.”²⁶ In other words, it must infuse its graduates with an understanding how they, as individuals, must confront and respond to particular evils in accordance with scriptural ethics.

Shaffer concludes with a lament and, implicitly, a challenge:

A religiously affiliated law school cannot account for itself theologically by being or aspiring to be like law schools maintained by the state or by non-religious private sponsors. . . . To the extent that a religiously affiliated law school is content with being secular, it denies its heritage and its purpose. Most religiously affiliated law schools in the United States are in practice secular. I do mean to suggest . . . that these schools, their universities, and their law faculties are not faithful to themselves and that what they are doing denies both their heritage and their purpose. It is hard to know why their religious sponsors continue to maintain them.²⁷

This challenge has, as one commentator has pointed out, a “certain bracing and radical attraction to it.”²⁸ It possesses a moral clarity and a call to purity drawn from

19. *Id.* at 1873. In a later article, Shaffer refers to a “distinct theological image of the law-school-as-priestly-people.” Shaffer, *Why Does the Church Have Law Schools?* *supra* note 10, at 403.

20. Shaffer, *supra* note 9, at 1874.

21. *Id.*

22. *Id.*

23. *Id.* at 1875.

24. *Id.*

25. *Id.* at 1875-76.

26. *Id.* at 1876.

27. *Id.* at 1878.

28. Daniel J. Morrissey, *The Catholic Moment in Legal Education*. 78 MARQ. L. REV. 413, 422

a separatist vision of the Church best expressed in some reform Protestant traditions, which Shaffer regards as exemplary.²⁹ It also lays out a blueprint for a *type* of Christian law school whose presence should be welcomed by American legal education and, perhaps more significantly, the accrediting agencies, although it may function more as an *ideal* type than the design of a real law school. Furthermore, it establishes provocatively a set of principles that should be considered by anyone attempting to articulate a different vision for a religiously affiliated law school. It should be asked, however, whether the sectarian vision of legal education is the *only* compelling Christian vision of legal education or, indeed, whether it is a genuinely *Catholic* vision at all. Is the choice only between an essentially secular law school (with which the Church, according to Shaffer, should not bother) and a sectarian law school? Is there not a third way, and one that more clearly expresses a specifically Catholic tradition?³⁰

(1995). It should be pointed out that Shaffer's approach departs from mainstream Catholicism in its conception of the relationship of the Church in the world. His notion of a "lawyer-priest" also has little resonance in terms of the Catholic understanding of the priestly office. His perspective seems more consistent with the so-called radical orthodoxy movement, which shares his profound aversion to entanglement of the Church with the state (derided by both Shaffer and this type of theologian as "Constantinism"), and regards the Church as a locus of resistance to a modern culture inimical to gospel values. For useful collections of essays by many of the leading voices in these movements, see generally RADICAL ORTHODOXY: A NEW THEOLOGY (John Milbank et al. eds., 1999); THE CHURCH AS COUNTERCULTURE (Michael L. Budde & Robert W. Brimlow eds., 2000). For useful shorter discussions from a sympathetic perspective, see Ashley Woodiwiss, *Ecclesial Profiling*, 36 WAKE FOREST L. REV. 557 n.1 (2001) (citing R.R. Reno, *The Radical Orthodoxy Project*, FIRST THINGS, Feb. 2000, at 37). For a more critical discussion, see Eugene M. McCarragher, *Theology at the Barricades*, COMMONWEAL, July 13, 2001, at 21. For a comprehensive vision of a Catholic university that embodies the central aspects of more mainstream Catholic ecclesiology, see generally Perry, *supra* note 14.

29. See Morrissey, *supra* note 28, at 422.

30. The third way which Shaffer acknowledges, then rejects as theologically inadequate, is the Erastian path discussed at *supra* note 13. Shaffer acknowledges that Erastian law schools support theological scholarship, permit religious discourse in the classroom and provide convenient opportunities for worship, and that the "Erastian commitment preserves [certain] lines of inquiry and formation as both religiously and civilly important." Shaffer, *supra* note 9, at 1868. He points out, however, that all of those things can and do happen in secular law schools, and cites two believing scholars at state institutions. See *id.* at 1867. Even worse, he argues, the Erastian church and its law schools "incorrectly put the state where God ought to be," by serving "Christian America," much as the Anglican Establishment in England serves Christian society in that country. *Id.* at 1865-66. The worst consequence of this deep involvement with the state, he argues, is that the Erastian church "often becomes a cheering section for state violence" (*id.* at 1868) using as examples "the tombs of imperial conquerors in Westminster Abbey" and the fact that the "institutional Roman Catholic Church in Austria supported the Germans in World War II, virtually without dissent." *Id.* at 1868-69. The Erastian law schools, because of their complicity with the state, make the fundamental theological error of choosing to serve Caesar rather than God, and thus "drift toward the day when some naive believer will describe what they do and wonder why the churches and religious orders that sponsor these schools should bother to consider doing so." *Id.* at 1867.

I suppose that my conception of an inclusive Catholic law school would fall into Shaffer's Erastian category, although I would hardly describe its mission as that of serving "Christian America," or "bless[ing] the army's tanks in time of war." *Id.* at 1865. I would also disagree that the type of Catholic law school that I (and others) have proposed has placed Caesar before God, and that in such an institution we would not "clearly and frequently proclaim our faith," which Shaffer characterizes as a "sectarian" position. *Id.* at 1867. Furthermore, Shaffer's devaluation of the Erastian law school's

III. THE INCLUSIVE VISION

It seems to me that definition of a third way is necessary, both as a practical matter and as a matter of principle. The practical question is straightforward. How likely is it that the many supposedly “secular” Catholic law schools can be transformed into the communities of believers, modeled on the primitive Church, advocated by Shaffer? How many Catholic law school faculty are likely to redefine themselves as “professor/priests” charged with commissioning “lawyer/priests?” Shaffer’s highly symbolic use of the term “priestly” perhaps should not be pressed too far: he may simply be talking about the role of the Christian law school in training laymen who will heed the call to holiness and participate, as laity, in the mission of Christ. But even that is likely to jar most faculty’s conception of their roles in a way that does not permit accommodation.

Deans are often accused (by faculty, usually) of a professional bias toward the practical, rather than the principled. I may be a victim of that bias, but I must confess an inability to understand how most existing Catholic law schools could be transformed into the type of exclusive community that Shaffer advocates without violating the existing trust relationships among the many different members of law school communities. A new law school could be created by religious sponsors on Shaffer’s principles, but I believe that any attempt to change an existing Catholic law school into such a community—on the inherently limiting terms defined by Shaffer—would be achieved at enormous and unnecessary personal cost to those valuable members of the community who do not share a sectarian conception of a Catholic law school’s religious commitment. Few Catholic university

creation of a space for religious inquiry and discourse on the ground that there are scholars doing religiously-based work at secular institutions also ignores the considerable evidence that such work is widely devalued and regarded with suspicion in secular institutions. *See id.* at 1867 (“No rules at the University of Kentucky or Boalt Hall bar theological scholarship.”). *See also* authorities cited *infra* note 38. Most importantly, Shaffer’s critique of the Erastian law school is fundamentally ecclesiological, and depends upon a conviction that the only true church is one that takes a position of radical opposition based on the model of the primitive Church and certain separatist Protestant traditions. *See* Shaffer, *supra* note 9, at 1866 n.23 (citing various sources, especially the work of the Mennonite theologian John Howard Yoder). If one takes a different view of the Church and its role in the world, maybe then what he calls the “Erastian” church, and its law schools, may not appear as fundamentally corrupt as Shaffer suggests, and more consistent with a specifically Catholic tradition of worldly involvement. *Cf.* Morrissey, *supra* note 28, at 422. In fact, Shaffer’s notion of the “sectarian” is largely at odds with mainstream Catholic theology’s understanding of the role of the Church in the world, which emphasizes the necessity of engagement as well as the Church’s ecumenical nature. *See generally* SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, *GAUDIUM ET SPES* (1965). A Catholic law school that in Shaffer’s terms is not “sectarian”—i.e., a non-ecumenical community of believers in which faith-based discourse is both universal and central, and which is prepared for hostility from “the rulers of this world of darkness”—thus can be Christian and Catholic. A Catholic law school that is not “sectarian” stands in a complex relation to civil society, in that it at once serves social ends and stands in opposition to political and social forces repugnant to its moral tradition. but, as I will suggest below, it serves God in a way that is not corrupt. In any event, it is not clear to me that the use of the term “Erastian” in the context of defining a law school’s Catholic mission is useful unless one accepts Shaffer’s ecclesiology as exclusively valid.

administrations would believe that cost is either justifiable or required for realization of their Catholic missions.³¹

Of course, from the radically sectarian perspective, my practical reservations would simply be an expression of faint-heartedness, inadequate commitment or, even worse, a fundamental corruption of the spirit. Faith, it would be argued, is often "impractical." My practical reservations are ancillary, however, to my reservations on principle. There are many paths to serving God in the world, and the sectarian path, although legitimate, is but one of them, and not necessarily the best for a Catholic institution. Realization of a genuinely Catholic identity by Catholic law schools should be achieved without adoption of the type of separatist and exclusionist ethos explicit in the sectarian vision. With complete respect for the passionate clarity of Thomas Shaffer's arguments, I would suggest that the debate is not over *whether* the primary purpose of a Catholic law school should be the service of God, but rather *how* the Catholic law school may serve God. I share Shaffer's premise that a law school is not essentially Christian if it does not define its priority as the service of God, not Caesar, but I disagree with the proposition that only a sectarian institution (as defined by Shaffer) genuinely serves God.

There is a well-established Catholic tradition that would support a law school quite different from that contemplated by the sectarian model. The tradition was crystallized explicitly in *A Statement on the Nature of the Contemporary Catholic University*, a 1967 statement by a group of clerical and lay leaders in Catholic higher education (usually known as the "Land O' Lakes Statement").³² The *Statement* not only affirmed the necessity for a Catholic university's independence from external

31. Shaffer himself demonstrated in a later article considerable pessimism about the ability of the usual academic decision-making process to achieve his type of "church as law school" or "law school as church." Shaffer, *Why Does the Church Have Law Schools?* *supra* note 10, at 410. He advocates:

I do not suppose that either of the agendas I have described for the church as law school is going to be worked out in faculty meetings, university-wide commissions that formulate long-range plans, boards of trustees, or meetings of deans. I have spent more hours than I even like to think about in such settings, and I am here to tell you that they are incapable of working out a sound theology for higher education.

Id. at 411. I would also point out however, that trust is a two-way street. Non-Catholic or non-religious faculty in Catholic schools, while completely and warmly encouraged to differ, have an obligation to be respectful of the law school's Catholic mission, should be willing to engage in conversation with Catholic teaching, and should be encouraged to serve the school's mission in their own distinctive ways.

32. *Land O' Lakes Statement: The Nature of the Contemporary Catholic University*, reprinted in *THE CATHOLIC UNIVERSITY: A MODERN APPRAISAL* 336-37 (Neil G. McCluskey ed., 1970) [hereinafter *Land O' Lakes Statement*]. While the *Statement* is not a canonical document, many of its principles are restated authoritatively in *CATHOLIC HIGHER EDUCATION AND THE PASTORAL MISSION OF THE CHURCH* (1980), issued by the United States Catholic Conference, which represents the bishops of the United States. That document draws heavily on *The Catholic University in the Modern World* (1972), reprinted in *AMERICAN CATHOLIC HIGHER EDUCATION, ESSENTIAL DOCUMENTS, 1967-1990* (Alice Gallin ed., 1992), which was issued by the Second Congress of Delegates of the Catholic Universities of the World, convened by the Vatican's Sacred Congregation of Catholic Education. Both of those documents strongly express the influence of the Vatican II document *Gaudium et Spes*. See *supra* note 30.

authority, lay or clerical, it articulated how such an independent Catholic university would serve God and the Church. The *Statement* emphasizes that just as any university should “serve as the critical reflective intelligence of its society,” the Catholic university “has the added obligation of performing this same service for the Church.”³³ The goal of the Catholic university therefore, “is a continual examination of all aspects and all activities of the Church The Church would thus have the benefit of continuous counsel from Catholic universities.”³⁴ In other words, the Catholic university—and hence, the Catholic law school—is where the Church does its thinking. This is not to suggest that the result of such thinking should be a suspension of moral judgment, a feeble value-neutrality or a squeamishness about the truth-claims of Catholic belief. It is to suggest that the Catholic campus should be an arena for unrestricted engagement with all the traditions of humanity, for the benefit of the Church itself, and as a service to God. I am not sure that the sectarian vision necessarily would preclude such an engagement, but I suspect that its insistence upon separation from the world, and its preoccupation with purity of faith, could make dialogue and inquiry of that type less, rather than more likely. That would, in my opinion, be unfortunate, not just because of the violence it would do to the secular liberal tradition of academic freedom, but because it could undermine the Catholic university’s unique mission of serving as a privileged space in which the people of God can explore the meaning of their faith in the broadest possible context.

This conclusion necessarily implies something about the apparent premise of the sectarian model that the truly Catholic university and law school would be exclusively a community of believers—committed Catholics, Christians, or at least members of a consistent religious tradition. Without such exclusivity, the law school could not be “communal,” a characteristic apparently essential to the sectarian vision.³⁵ Only such a non-diverse law school could discharge its “priestly” function of commissioning “lawyer/priests.” There may be a place in some religious traditions for such a priestly institution, but a Catholic university and law school can serve its religious mission by welcoming those outside of its faith, both as students and faculty colleagues, into its community. Dialogue with those outside the Catholic faith tradition would be fruitful, because it would facilitate the type of open inquiry the *Statement* defined as essential to the Catholic university’s mission of serving as the Church’s “critical and reflective intelligence.” That mission would

33. *Land O’ Lakes Statement*, *supra* note 32, at 336-37.

34. *Id.*

35. Indeed, Shaffer later speaks of the law school as a church. See Shaffer, *Why Does the Church Have Law Schools?*, *supra* note 10, at 410-11. In contrast, note the words of the late Joseph Cardinal Bernardin:

The substance of the consistent ethic yields a style of teaching it and witnessing to it. The style should ... not [be] sectarian.... [W]e should resist the sectarian tendency to retreat into a closed circle, convinced of our truth and the impossibilities of sharing it with others.... We should be convinced we have much to learn from the world and much to teach it.... A confident church will speak its mind, seek a community to live its convictions but leave space for others to speak to us, to help us grow from their perspectives.

also be served by rigorous adherence to the highest standards of intellectual inquiry and the application of reason to our social and moral problems. Furthermore, people of faith should have nothing to fear from direct encounters with those of different faiths and even no faith at all. The Catholic law school would be most genuinely Catholic if it is genuinely ecumenical, and willing to contemplate “the possibility and indeed the reality of grace and truth in non-Catholic religious traditions, non-Christian as well as Christian, and in non-religious traditions of thought.”³⁶

Inclusion of such faculty and students would also serve another Catholic mission. The goal of the sectarian law school, in Shaffer’s conception, is to commission “lawyer/priests.” This is an ideal goal, perhaps achievable in a truly inspired community. A Catholic law school, however, also can serve God by instilling in a wide variety of people, especially those who do not or cannot conceive of themselves as “priestly,” a set of values that reflects the institution’s Catholic, and more broadly, theistic traditions. The extent to which the school’s graduates will accept those values, the ways in which they will integrate those values into their own belief structures and use them to guide their careers and lives will vary tremendously, but the key is the potential *influence* that the Catholic law school can have beyond the circle of already committed believers. As much as believers can learn from open engagement with other traditions, those from other traditions can learn from their involvement with Catholic thought and values. This is a way for

36. Perry, *supra* note 14, at 341. Perry has recently expanded upon this notion to emphasize that even Catholics teaching on Catholic law school faculties should have the ability to differ—after respectful conversation—with the *magisterium*, the “official” teaching of the Church. He begins by asking:

Should a Catholic law school, as such, insist that in their role as teachers and scholars, faculty members submit to the view—that they not challenge the view—that the magisterium’s answer to a contested question of morality or justice is the only answer a faithful Catholic may affirm? Relatedly, should a Catholic law school expect faculty members who are Catholic to give their “religious assent” to the magisterium’s answer to a contested issue of morality or justice in virtue of the fact that it is [the] magisterium’s answer?

Michael J. Perry, *Catholics, The Magisterium, and Moral Controversy: An Argument for Independent Judgment (With Particular Reference to Catholic Law Schools)*, 26 U. DAYTON L. REV. 293, 302-03 (2001). Perry answers these questions by concluding:

In my judgment, it would be a mistake—a grave mistake—for a Catholic law school to fail to insist that faculty members, including those who are Catholic, have the freedom to profess that different view. More generally, it would be a grave mistake for a Catholic law school to ground its intellectual life on the view (among others) that the magisterium’s answer to a contested question of morality or justice is always, in virtue of being the magisterium’s answer, the only answer a faithful Catholic may affirm.

Id. at 303. Perry’s position on the consistency of dissent from the *magisterium* with faithfulness is a position in a larger controversy about dissent within the Catholic Church, and it is not uncontested. Compare Wolfe, *supra* note 9, at 495-99, with Gerard V Bradley, *Grounds for Assent*, COMMONWEAL, Sept. 9, 1994, at 29 (letter to the editor). Without attempting to intervene in that larger controversy, I would argue that respectful and principled disagreement with the *magisterium* in the Catholic university and law school is entirely appropriate.

the *inclusive* Catholic school to serve as a light in a dark and hostile world, and by so doing serve its prophetic mission.

But *how* can the inclusive Catholic law school serve as such a light in a hostile world? What would its essential characteristics be, beyond those basic commitments to open inquiry and earnest engagement with those who do not share the Catholic faith tradition? Certain characteristics seem to me essential.

The first is what I have called an unapologetic stance on the school's Catholic identity. Catholic identity should not be downplayed or de-emphasized because some members (or potential members) of the community may find a frank expression of Catholic character uncomfortable. There should be no reservations, for example, about the use of Catholic symbols in law school buildings or in law school publications, about the presence of prayer at law school functions, the observance of Christian holidays or the flourishing of a liturgical life within the law school. Of course, there should never be a message that non-believers are unwelcome, that belief would be compelled, that indoctrination in Catholic faith is necessary, or that expressions of different or dissenting views or beliefs is anything other than entirely appropriate. Similarly, the commitment to rigorous intellectual inquiry always should be defined as essential to the law school's functions. Nevertheless, the Catholic law school never should pretend that it is not an institution committed to Catholic beliefs and values, and it should proclaim its identity enthusiastically. A Lutheran educator has made this point more precisely: "A Christian university privileges and seeks to transmit ... in myriad .. ways, a particular tradition of thought, feeling, and practice."³⁷ This goal of teaching *within* a tradition does not mean that the university or law school is closed to the expression of other views, or that the tradition itself is beyond criticism, but it does mean that the tradition should remain central to the character of the institution, and should be expressed in many ways.

That conclusion underlies a second important characteristic—the Catholic law school must create a space for religious discourse about the law. Defenders of a more sectarian version may argue that there are many religious voices within secular institutions, and that there is thus nothing truly distinctive about a Catholic law school that attempts to give a home to such voices.³⁸ I disagree both with this observation and its relevance. While there are indeed scholars and teachers with religious orientations who have found homes in secular institutions, my impression, after many years of my own in state and private non-religiously affiliated law schools, is that religious discourse often is devalued, discouraged, or regarded with suspicion.³⁹ This is but a particular example of the equivocal place of religious

37 Mark R. Schwehn, *A Christian University: Defining the Difference*, FIRST THINGS, May 1999, at 25, 29.

38. See, e.g., Lee, *Are Religiously Affiliated Law Schools Obsolete in America?* *supra* note 9, at 657-58; Shaffer, *supra* note 9, at 1867.

39. This is hardly a unique observation on my part. For extended discussion of the phenomenon, see GEORGE M. MARSDEN, THE OUTRAGEOUS IDEA OF CHRISTIAN SCHOLARSHIP 3-24 (1997). See generally GEORGE M. MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NON-BELIEF (1994). Michael J. Perry describes the phenomenon in these terms: "There are, after all, too many institutions of higher learning that, as a fundamental part of *their* basic culture, dismiss religious questions preemptorily and even contemptuously and repress

discourse in the public square.⁴⁰ Thus, while it is true that some religious voices have flourished in secular law schools, few of those law schools have committed themselves to *encouraging*, as opposed to tolerating, open and passionate inquiry into the meanings of religious beliefs and values for the law and those who have chosen lives in the law. In contrast, support of such inquiry should be a central mission of the Catholic law school. In the Catholic law school that encouragement should include full support for faculty whose scholarship expresses a religious perspective and for the development of courses within the curriculum that give students the opportunity to engage with that perspective. In particular, a serious effort should be made to develop an array of courses that reflect Catholic and other religious perspectives on topics that are especially relevant to religious concern (i.e., jurisprudence and philosophy of law; professional ethics; the law of life and death; bioethics generally; war and peace; family law; poverty law; church and state, and so on), as well as to find ways to transmit Catholic thought in the curriculum generally. Especially important in such a Catholic law school would be classroom inquiry into the rich implications of Catholic Social Thought for law and policy.⁴¹ Nothing in this recommendation would inhibit the law school in developing as broad or diverse a curriculum as any other law school. It simply insists that there should be a more important place for religious discourse on the law than is likely to be found in a secular law school. My conception of the place of religious discourse in the law school, furthermore, is not intended to conflict with the fundamental principle that intellectual inquiry is at the core of our educational and scholarly enterprises. The role of religious discourse in the law school and the university is not the simple proclamation of faith; it is to participate in a reasoned dialogue on all things, including religious faith and religious practice themselves.

This same accusation of insufficient distinctiveness may be raised by what I would define as a third characteristic of the genuinely Catholic law school: a preoccupation with values and ethics. In the Catholic law school, law must be studied in the context of ethics. The tension between law and morality has always been a fundamental concern of a Church that has never regarded the demands of the State as absolute, and has always required legal obligation to be viewed through the lens of a conscience informed by Christian values and prepared for principled opposition to state action repugnant to those values. Of course, there is nothing exclusively Catholic about this perspective on the law. Secular ideologies and non-Christian faith traditions both express similar beliefs, so it can be argued that a

the pursuit of intellectual projects from religious perspectives or for religious reasons." Perry, *supra* note 14, at 327 (emphasis added). For discussion of the importance of the Catholic law school in engaging with questions not sufficiently addressed elsewhere, see Fernand N. Dutilleul, *A Catholic University, Maybe; But a Catholic Law School?* in *THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY* 71, 76-77 (Theodore M. Hesburgh ed., 1994).

40. Stephen L. Carter uses an even stronger description of this condition in *STEPHEN L. CARTER, THE CULTURE OF DISBELIEF* (1993), which he subtitles "How American Law and Politics Trivialize Religious Devotion." For a sharp critique of Carter's concept of trivialization, see Leslie Griffin, *The Trivialization of Religion*, 1994 WISC. L. REV. 1287.

41. For discussion of the place of Catholic Social Thought in a Catholic law school curriculum, see Wolfe, *supra* note 9, at 488-89. For a concise discussion of the key principles of Catholic Social Thought, see Lucia A. Silecchia, *Reflections on the Future of Social Justice*, 23 SEATTLE U. L. REV. 1121, 1135-53 (2000).

Catholic law school that integrates rigorous ethical inquiry into its teaching of the law is not doing anything uniquely "Catholic." This truism, however, is essentially irrelevant. The important point is that it would be distinctly *non-Catholic* for a Catholic law school *not* to insist upon the ethical dimension of the law and legal study. It is something that a Catholic law school must do to be faithful to its Catholic identity. What difference does it make if secular institutions find other paths to a similar ethical stance? Catholic law schools can serve God by exemplary commitment to an ethical critique based on Catholic values.

This means, however, that the Catholic law school cannot take the kind of "grocery store" approach to values so characteristic of modern education. In today's academic grocery store a strict value neutrality is maintained, and a wide variety of values are laid out on the shelves for the students to browse. There may be a weak consensus among the faculty that values are somehow important, but there is usually no attempt to define which values are most important to the institution. This may reflect principled doubt that the institution should attempt to embody and transmit any particular values at all, or it may simply result from the academic tendency to avoid confrontation and hard choices. In any event, that kind of value-neutrality cannot be the institutional style of a law school that calls itself Catholic. Catholic law schools are fortunate, furthermore, in that they already possess a value compass that can guide decisionmaking within the school but, more importantly, convey a message to students that certain conceptions of human dignity and the purpose of human life have a universality and are not merely "the idols of particular tribes of modern Western democracies."⁴² An understanding of those fundamental moral values will provide students with the ability not just to recognize ethical dilemmas, but to resolve them in a principled way. Of course, a law school cannot be responsible for a student's entire moral formation, for our students come to us almost fully formed, but we can help them turn from a careless and comfortable relativism to serious engagement with a coherent set of values.

Those values that should animate a Catholic law school are clear, for they derive from a Christ-centered ethos. They include, for example, a profound respect for the dignity of the individual, because "[e]ach man and woman is personally known and loved by God, and the human effects of every encounter and transaction must be considered and evaluated."⁴³ This is more than a platitude or a bromide, and it is certainly more than a call to being nice to each other. It is a moral imperative that requires a radical focus on the *consequences* of legal decisions and lawmaking on

42. Schwehn, *supra* note 37, at 27. The phrase is from Schwehn's critical description of the relativism implicit in much current Liberal thought.

43. Barkan, *supra* note 6, at 13. Barkan's article attempts to define in detail a structure of Catholic values necessary to Catholic education. *Id.* at 112-14. An article by Robert J. Araujo does as well. See Robert J. Araujo, *Legal Education and Jesuit Universities: Mission and Ministry of the Society of Jesus?* 37 *LOY. L. REV.* 245, 275-76 (1991). Shaffer describes their arguments as "Erastian." See Shaffer, *supra* note 9, at 1864 n.8. For an interesting description of how one Catholic law school is attempting to critique and reform law practice and the self-conception of lawyers from a religious perspective, see Rose Kent, *What's Faith Got to Do With It?* *FORDHAM LAW.*, Summer 2001, at 11. For a variety of perspectives from different faiths on the possible roles of religion in lawyering, see Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 *FORDHAM URB. L.J.* 821 (1999).

individual human beings, and implicitly critiques any view of the law in which human beings can be treated instrumentally. These values also include a commitment to recognizing and honoring the humanity of the Other, because the Catholic faith requires us to see the face of Christ in all people, regardless of how different and alien they might appear. This type of engagement with the Other is an important strand of current Catholic thinking about the nature of communion. The value of communion with the Other has obvious implications not only for how the law school defines its community and how its members treat each other, it provides a basis for principled consideration of a huge variety of legal issues including poverty, inequality, and discrimination. Similarly, a set of values centered ultimately on the spiritual welfare of the human soul requires a law school to communicate to its students, regardless of their faith, the falseness of the soul-destroying traits of much of the law world: lust for material wealth, pursuit of personal ambitions at the expense of others, perfection of craft with indifference to consequences and a cynical belief in the irrelevance of justice or the importance of truth. Indeed, one of the fruits of a Catholic legal education should be a critical understanding of those false idols that many, whether religious or secular, recognize as afflicting the legal profession. Those idols should be replaced, through a Catholic legal education, by a devotion to justice and to the truth that must be discerned before justice is possible. A concern for justice, which for Catholics derives from a faith-based conception of human dignity, tends to disappear as a student is immersed in law-craft, but it is our duty to find ways to instill in our students a “hunger and thirst for justice.”⁴⁴

A fourth characteristic of a Catholic law school is that it should devote substantial resources to clinical legal education and pro bono service to the poor. This reflects the “preferential option” for the poor central to Catholic Social Thought.⁴⁵ A Catholic law school has an obligation to instill in its students—Catholic and non-Catholic alike—an awareness of their ethical and spiritual obligation *as lawyers* to serve those afflicted with poverty or oppression. At Villanova University School of Law, our new clinical and pro bono programs were conceived under the inspiration of St. Thomas of Villanova, who said that “the Lord hears the cry of the poor.” This is *why* we decided to give our students the opportunity to encounter and contend with the reality of poverty and oppression. Of course, there are many reasons why a law school may commit itself to clinical legal education in service to the poor: an entirely secular commitment to remedying injustice and inequality, simple human compassion, or just a belief that clinical education is effective pedagogy. Those reasons all help justify the dedication of resources to these programs, and are entirely consistent with the core Catholic inspiration.

44. Jeffrey S. Brand, *Jesuit Law Schools and the Pursuit of Justice: Unique Opportunities, Unique Responsibilities*, CONVERSATIONS, Spring 2001, at 28 (quoting Father Stephen Privett, President of the University of San Francisco). For an eloquent analysis of the Christian imperative for justice in legal education, see Gerald F. Uelman, *Justice in the Law School Curriculum*, EXPLORE, Fall 1999, at 2.

45. See Wolfe, *supra* note 9, at 489, 492 (briefly discussing this concept). See also Silecchia, *supra* note 41, at 1146-49.

There is nothing uniquely “Catholic” about strong institutional support for such service to the poor.⁴⁶ But that is once more beside the point. The Catholic law school, in my opinion, *must* commit to such service learning *because* it is Catholic. The providing of service to the poor, and, perhaps more significantly, the attempt to persuade students that they as lawyers should serve the poor, is, in essence, an essential part of the law school’s Catholic mission. The fact that non-Catholic law schools attempt to teach similar lessons and that Catholic law schools are not uniquely distinctive because of their commitment to such service establishes nothing of any great importance. What is important is *why* Catholic schools choose to follow the path of service. Clinical and pro bono programs are tangible expressions of the quest for human solidarity and the hunger and thirst for justice grounded in the Catholic conception of human dignity.

Finally, the Catholic law school must include within its community, including its faculty, a critical mass of Catholics. This requirement by no means conflicts with the inclusive character of the Catholic law school I have envisioned. That law school invites people from all perspectives to become members of its community and to share in its commitment to unfettered inquiry, and asks only that its non-Catholic members be respectful of the institution’s Catholic mission, and that they seek in good faith to find their own distinctive ways to contribute to the accomplishment of that mission. Nevertheless, there must be a core of Catholic faculty and students committed to that mission. Without this “critical mass”—a phrase often used in discussions of the implications of *Ex corde ecclesiae* for faculty hiring⁴⁷—it is hard to see how the institution can remain Catholic.

It is crucial, however, to specify what the goal of achieving a critical mass of Catholics, particularly Catholic faculty, really means. It does not mean, for example, that the law school should hire only Catholic faculty. It also does not mean affirmative action for Catholics. There should never be any desire (or need) to compromise standards of excellence in either hiring faculty or admitting students in order to recruit more Catholics (although the “standard of excellence” should not be interpreted or applied to exclude categorically those committed to religiously-based scholarship and teaching). It does mean there should be an attempt to search out and recruit outstanding candidates whose Catholic identity will contribute to the law school’s mission, particularly in those subject areas where the expression of a Catholic perspective would be most relevant. It would also be desirable to surround that core with faculty who identify strongly with other faith traditions to foster the type of intensive dialogue that should be the hallmark of the inclusive Catholic law school. In other words, “hiring towards mission” should be regarded by Catholic law school faculties as an important and legitimate aspect of their hiring agendas. Identification as a Catholic obviously should not be a *sine qua non* for hiring; quality standards should never be compromised, and goals for gender, racial and ideological diversity should be pursued as vigorously as ever, but the importance of

46. See Lee, *Are Religiously Affiliated Law Schools Obsolete in America?*, *supra* note 9, at 656-57; Wolfe, *supra* note 9, at 495.

47. See, e.g., Dutile, *supra* note 39, at 77. Cf. Wolfe, *supra* note 9, at 500 (arguing that “most” of the faculty in an ideal Catholic law school should be deeply committed to the institution’s Catholic purpose).

preserving a critical mass of faculty whose Catholic identity will help preserve the law school's Catholic identity should not be forgotten. It should be added, however, that the critical mass of Catholic faculty should be committed themselves to an inclusive vision of the law school and to the principle of open and unrestricted intellectual inquiry

IV CONCLUSION

At one time, Catholic universities and law schools did not have to spend a lot of time worrying about what it meant to be "Catholic." With faculties and student bodies overwhelmingly Catholic, with a strong clerical presence, and a sense (at least tacit) of separation from a non-Catholic social and academic mainstream often ambivalent, if not hostile to Catholicism, it was difficult for those institutions not to be and to feel Catholic.⁴⁸ They were also part of the cradle-to-grave network of institutions provided by the immigrant Church⁴⁹ for its people from the late nineteenth century through the middle of the twentieth: the parish church, the parochial schools, the social organizations for men, women and children, the charitable societies, the Catholic colleges and professional schools, the Catholic law firms, the Catholic professional associations, and finally, the Catholic funeral homes and cemeteries. These comforting and comfortable institutions eased the integration of immigrant and second generation Catholics into American society, but they also preserved the otherness of American Catholics.

With the waning of immigrant identity, the diminishing presence of the clergy, and the very successful integration of Catholic institutions into the American academic mainstream, the easy sense of identity as Catholic began to vanish on Catholic campuses. Awareness of that vanishing identity spurred the reconsideration of what it means to be Catholic so prevalent on those campuses today. The sectarian vision of a Catholic law school has emerged from that reconsideration and provides a compelling image of how one theological tradition can be used to create a law school that serves God through passionate opposition in a society often fundamentally hostile to Catholic values. The sectarian vision, most importantly, reminds us that any law school that calls itself Catholic must define itself as primarily serving God, not Caesar. My quarrel with the sectarian vision, however, is over the question of *how* the Catholic law school can serve God. My conception of service to God and the Church through open inquiry in an ecumenical community that is not composed entirely of "priestly" believers, and which reflects the liberal academic tradition, cleaves true to Catholic values and embodies, in particular, the Catholic tradition of service to God in the world.

48. See Hellwig, *supra* note 1, at 23. She suggests, however, that these institutions "were Catholic in the 1950's in an inattentive kind of way," and that since then, and long before *Ex Corde Ecclesiae*, "the scholars and their administrative leaders [in Catholic universities] had seized the initiative by a deeper quest for the inner reality of the tradition." *Id.* at 24.

49. It should be noted that the "immigrant Church" is still alive and well, as it performs similar functions for the enormous number of immigrant Latino Catholics throughout the United States.