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# PROPOSALS TO COUNTER CONTINUING RESISTANCE TO THE IMPLEMENTATION OF *EX CORDE ECCLESIAE*<sup>1</sup>

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CHARLES J. RUSSO\*\*

*"[I]f the bishops decide to face Rome rather than their people, it may not be all that bad. Trustees, administrators, faculty, and students can find some wiggle room until the document [Ex Corde Ecclesiae] moves slowly to a back shelf and a new [P]ope writes something that rescinds it. A few wacky bishops will try to implement the specifics. Most will hope that it just sits on the shelf in the president's office, gathering dust."*<sup>2</sup>

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<sup>1</sup> Pope John Paul II, Apostolic Constitution on Catholic Universities: *Ex Corde Ecclesiae* (Aug. 15, 1990), in CATHOLIC UNIVERSITIES IN CHURCH AND SOCIETY: A DIALOGUE ON EX CORDE ECCLESIAE 229 (John P. Langan ed., 1993) [hereinafter *Ex Corde Ecclesiae*]. *Ex Corde Ecclesiae* is Pope John Paul II's Apostolic Constitution, issued on August 15, 1990, regarding all Catholic institutions of higher education. An Apostolic Constitution is a Papal document dealing with a matter that is of importance for the universal Church. See *Apostolic Constitution*, in HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM 76 (Richard P. McBrien ed., 1995). "*Ex Corde Ecclesiae*" are the opening Latin words of the document, translated as Born From the Heart of the Church. There is voluminous literature on *Ex Corde Ecclesiae*. Most of the commentary consists of individual essays. Some of the most impressive essays include those appearing in *Symposium on Ex Corde Ecclesiae*, 25 J.C. & U.L. 645 (1999), and James Tunstead Burtchaell, *Everything You Need to Know About Ex Corde Ecclesiae*, CRISIS, July/Aug. 1999, at 10.

<sup>2</sup> Tim Unsworth, *Wiggle Room, Common Sense Will Save Church From Ex Corde*, NAT'L CATH. REP., Nov. 5, 1999, at 16, 17; see also *infra* note 25 (discussing

## I. APOCALYPSE (RIGHT!) NOW!

Constitutional law professor Larry Flynt, notorious *Hustler* magazine publisher and pornographer, begins teaching his class at the Catholic Law School. He opens his first class session, not with a prayer, but by grabbing his crotch and declaring, "the [Catholic Church] has had its hand on our crotch for two thousand years."<sup>3</sup> Hell on earth? Well, yes. Beyond all imagination? Unfortunately, no. Save for the fact that Mr. Flynt does not have a law degree, Mr. Flynt addressed approximately nine hundred Georgetown University students on April 30, 1999, and opened his diatribe with the above remarks and actions.<sup>4</sup> Despite the protestations of Cardinal Hickey and the Archdiocese of Washington, D.C.,<sup>5</sup> Georgetown University administrative bureaucrats perversely defended Mr. Flynt's depraved charade as the exercise of protected "academic freedom."<sup>6</sup> In the spring of 2000, however, the retirement of

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statements made by Rev. Richard P. McBrien, the Crowley-O'Brien Walter Professor of Theology at the University of Notre Dame, indicating that he does not intend to comply with *Ex Corde Ecclesiae*). We stand in complete opposition to Unsworth and McBrien.

<sup>3</sup> Julia Duin, *Flynt Stirs up Georgetown; Porn Publisher's Visit Leaves Campus Catholics Furious*, WASH. TIMES, May 1, 1999, at A2 (quoting remarks made by Larry Flynt during a lecture at Georgetown University); see also Caryle Murphy, *Archdiocese Blasts Talk by Flynt at Georgetown; About 900 Hear Publisher of Hustler*, WASH. POST, May 1, 1999, at B27 (calling the Georgetown University decision to allow Flynt to speak "unbelievable" and "indefensible," Auxiliary Bishop William Lori said, "[n]o Catholic university should provide a platform which furthers the degradation of women, immoral behavior and the anti-religious opinions Mr. Flynt represents"); Martin Van Der Werf, *Georgetown's Growing Pains: Eager Applicants, Troubled Finances*, CHRON. HIGHER EDUC., Jan. 28, 2000, at A38, A39 ("[Georgetown] University officials say they would have rather not had Mr. Flynt speak on the campus, but defended his right to be there."). Daniel R. Porterfield, Georgetown Vice President for Communications and Public Affairs and Chief of Staff for Georgetown University President Rev. Leo J. O'Donovan, S.J., indicated that: "We don't accept anybody's premise that we are somehow less Catholic because we are more diverse or more committed to academic freedom . . . . That means sometimes a controversial speaker will be on campus." *Id.*; see also, *Georgetown Exorcised*, WALL ST. J., Apr. 7, 2000, at W17 (criticizing editors of the *Hoya*, the Georgetown University newspaper, and University officials for censoring a student written article critical of a performance of "The Vagina Monologues" on the campus).

<sup>4</sup> See Duin, *supra* note 3, at A2.

<sup>5</sup> See Murphy, *supra* note 3, at B27.

<sup>6</sup> Van Der Werf, *supra* note 3, at A39 (quoting Daniel R. Porterfield, Georgetown Vice President for Communications and Public Affairs and Chief of Staff for Georgetown University President Rev. Leo J. O'Donovan, S.J.). Georgetown University is no stranger to controversy involving the impropriety of various

Georgetown University President, Rev. Leo O'Donovan, S.J., was announced. The Holy Spirit moves in mysterious ways, and God's ways are not man's ways. Pope John Paul II was either correct, or incorrect, regarding the need for the revitalization of the Catholic identity of the Catholic colleges and universities. If he was incorrect, there would have been no need for the promulgation of *Ex Corde Ecclesiae*. Notorious incidents such as those at Georgetown University prove that the Pope was, and is, correct.

After the pitched battle fought by many "Catholic" university bureaucrats prior to the bishops' overwhelming 223 to 31 vote on November 17, 1999<sup>7</sup> in favor of the proposed norms<sup>8</sup> designed to implement *Ex Corde Ecclesiae*<sup>9</sup> and to restore, preserve, and enhance the Catholic identity<sup>10</sup> of the 235 Catholic colleges and universities in the United States,<sup>11</sup> the continuing campaign of university resistance to *Ex Corde Ecclesiae* may be

activities on its campus. See Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (holding that while the University did not have to grant official recognition to a homosexual student group, the University could not deny tangible benefits to the group based on the sexual orientation of its members); see also Kit Lively, *A Debate Over Crucifixes Provokes Larger Questions at Georgetown U.*, CHRON. HIGHER EDUC., Nov. 28, 1997, at A43 (discussing the place of crucifixes in the context of the University's Catholic identity).

<sup>7</sup> On November 17, 1999, at the bishops' annual fall meeting, the bishops voted 223 to 31 to approve the draft application of *Ex Corde Ecclesiae* to the United States. See Jerry Filtreau, *U.S. Bishops Address Universities*, BROOK. TABLET, Nov. 27, 1999, at 1, 18; Gustav Niebuhr, *Bishops Vote for Stricter Ties with U.S. Catholic Colleges*, N.Y. TIMES, Nov. 18, 1999, at A1; Thomas J. Reese, *The Bishops' Mandatum*, AMERICA, Dec. 4, 1999, at 3. The Vatican approved the U.S. bishops' application norms in May, 2000. See Beth McMurtrie, *Vatican Backs Rules for Catholic Colleges*, CHRON. HIGHER EDUC., June 8, 2000.

<sup>8</sup> The norms are the product of years of drafting and debate, after the Vatican rejected as insufficient the bishops' 1996 proposal to implement *Ex Corde Ecclesiae* in the United States. See Niebuhr, *supra* note 7, at A1. Anthony Cardinal Bevilacqua of Philadelphia led the successful 1999 initiative to strengthen the norms for the implementation of *Ex Corde Ecclesiae* in the United States.

<sup>9</sup> See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *Ex Corde Ecclesiae: The Application to the United States* (1999).

<sup>10</sup> See, e.g., Peter C. Phan, *To Be Catholic or Not To Be: Is It Still the Question? Catholic Identity and Religious Education Today*, 25 HORIZONS 159 (1998) (discussing different perceptions of what it means to have a Catholic identity).

<sup>11</sup> For background information on Catholic universities in the United States, see CATHOLIC UNIVERSITIES IN CHURCH AND SOCIETY: A DIALOGUE ON EX CORDE ECCLESIAE (John P. Langan ed., 1993); DAVID J. O'BRIEN, FROM THE HEART OF THE AMERICAN CHURCH: CATHOLIC HIGHER EDUCATION AND AMERICAN CULTURE (1994); THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY (Theodore M. Hesburgh ed., 1994) (exploring solutions to contemporary problems of Catholic universities).

less overtly confrontational for the foreseeable future.<sup>12</sup> *Ex Corde Ecclesiae's* powerful opponents,<sup>13</sup> however, may continue to corrode Catholic law schools<sup>14</sup> from within, to further bleach the whitening sepulchres. Some eagerly await the death, or retirement,<sup>15</sup> of Pope John Paul II, resentful of his orthodoxy<sup>16</sup> and his defense of the Magisterial<sup>17</sup> authority of the universal

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<sup>12</sup> The battle over *Ex Corde Ecclesiae* has been underway for several years. See, e.g., Beth McMurtrie, *How Catholic Should Catholic Colleges Be?* CHRON. HIGHER EDUC., Sept. 17, 1999, at A16. For additional background, see Kit Lively, *U.S. Bishops Endorse the Vatican's Policy Statement on Catholic Colleges*, CHRON. HIGHER EDUC., Nov. 22, 1996, at A8.

<sup>13</sup> There are many critics of *Ex Corde Ecclesiae*. Our primary focus is on the first bloc of critics who, under the guise of academic freedom, pluralism, and/or vague notions of inclusiveness, decry the very foundations and values upon which all Catholic institutions of higher learning, not just law schools, are founded. See Unsworth, *supra* note 2, at 16–17. Our critical comments are not directed primarily at theologians and other academics and professional organizations, such as the Association of Catholic Colleges and Universities (ACCU), who generally seek legitimate discourse with the bishops. While there are significant theological issues at stake, many theologians, especially those in the religious life who have taken vows of obedience, are going to have to decide whether their loyalty rests with the Church or their academic discipline, especially when guidelines are developed leading to the need to acquire a Mandatum, or mandate, to teach theology from their local bishops. See Niebuhr, *supra* note 7, at A1; see also Una M. Cadegan et al., *Dear Bishops: Open letter on Ex Corde Ecclesiae*, COMMONWEAL, Nov. 5, 1999, at 16 (containing an open letter from faculty and administration at the University of Dayton including Una M. Cadegan, Associate Professor of religious studies, Brother Raymond L. Fitz, President, John O. Geiger, Provost, Father James L. Heft, Chancellor and University Professor of faith and culture, and Terrence Tilley, Chairperson of religious studies, urging the bishops to move slowly in implementing *Ex Corde Ecclesiae*); J. Donald Monan & Edward A. Malloy, *'Ex Corde Ecclesiae' Creates an Impasse*, AMERICA, Jan. 30, 1999, at 6.

<sup>14</sup> While our Catholic faculty affirmative action hiring proposal, see *infra* Parts II, III, applies equally as well to all units of Catholic colleges and universities, we have particularized it especially to Catholic law schools. Our remarks reflect our own experiences as, respectively, professors of law and education for thirty years, and as graduates of Catholic law schools.

<sup>15</sup> Although he subsequently backed off, claiming that he had been misquoted, Archbishop Karl Lehman, head of the German Conference of bishops, and a proponent of such reforms as female priests and married clergy, suggested that because the Church needs a strong leader, Pope John Paul II should retire if his health problems prevent him from performing his duties. See Howard Chua-Eoan, *Is He the Retiring Type?*, TIME Jan. 24, 2000, at 60; John Travis, *Suggestion of Resignation by Pope Seems Premature*, BROOK. TABLET, Jan. 15, 2000, at 9.

<sup>16</sup> See Alessandra Stanley, *Pope Tightens Grip by Rome on its Bishops*, N.Y. TIMES, July 24, 1998, at A1 (discussing the Pope's efforts to tighten his control of bishops' conferences around the world); see also Pope John Paul II, *Address of John Paul II to Members of the Australian Conference of Bishops on their "Ad Limina Apostolorum"* Zenit News Agency, (Dec. 14, 1998) <<http://www.petersnet.net/research/retrieve.cfm?recnum=765>>.

<sup>17</sup> The Magisterium is the official teaching office and authority of the Catholic

Church. Some Catholic universities' bureaucracies may continue to appoint apostate, anti-Catholic administrators, who will, in turn, meticulously avoid recruiting Catholics for new faculty openings<sup>18</sup> and, just as diligently, aggressively recruit those likely to share antipathy toward *Ex Corde Ecclesiae*.<sup>19</sup> At the same time, some Trustees at Catholic universities may remain either actively complicit with, or prefer to remain blithely oblivious to, these insidious schemes.<sup>20</sup> These are not nightmarish, impossible future scenarios. Rather, these are but some of the more egregious examples in the parade of self-inflicted horrors still afflicting Catholic legal education.<sup>21</sup>

Some bishops, meanwhile, may continue to grossly underestimate the depth of embedded, smoldering resistance to *Ex Corde Ecclesiae*. Alternatively, those bishops who realize all-too-well the entrenched opposition to the implications of *Ex Corde Ecclesiae* may be tempted simply to wash their hands of

Church. See Francis A. Sullivan, *Magisterium*, in HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM 805 (Richard P. McBrien ed., 1995); GK. MALONE, 5 NEW CATHOLIC ENCYCLOPEDIA 332 (1967) (describing the role encyclicals play in the *Magisterium*); Pope John Paul II, *Magisterium Exercises Authority in Christ's Name, Address to Congregation for the Doctrine of the Faith*, 24 Nov. 1995 (visited Jan. 1, 2001) <<http://www.ewtn.com/library/papaldoc/jp951124.htm>>.

<sup>18</sup> For a discussion on how an entire faculty, not just members of a theology department, determine how a college or university maintains its Catholic identity, see Charles Zech, *The Faculty and Catholic Institutional Identity*, AMERICA, May 22, 1999, at 11; see also Charles E. Curran, *The Catholic Identity of Catholic Institutions*, 58 THEOLOGICAL STUDIES No. 1 at 90 (1997).

<sup>19</sup> Lesbian theoretician and same-sex marriage advocate Mary Becker was recruited from the University of Chicago Law School faculty by the DePaul University College of Law, a Catholic Vincentian University Law School. See Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U CHI. LEGAL F. 21 (1999) (suggesting a number of policy changes including granting lesbians the right to marry); Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165 (1998) (arguing for greater acceptance of lesbian relationships). Becker was promptly appointed as the Chair of the Faculty Appointments Committee by the Dean, Tere Foster, a graduate of the Loyola University Chicago Law School, a Jesuit Catholic school, where Foster was Editor-in-Chief of the Loyola Law Journal in 1976.

<sup>20</sup> The lead editorial in the October 15, 1999 issue of *DePaulia*, the student newspaper at the Catholic Vincentian DePaul University in Chicago, praised DePaul as a model for toleration and acceptance of homosexuality. See *DePaul is Out and Proud*, WANDERER, Nov. 18, 1999, at 3. DePaul celebrated National Coming Out Week by, among many events, a pajama party announcing the winner of the "Most Out Person on Campus" contest. *Id.*

<sup>21</sup> The lack of leadership in Catholic education is by no means limited to colleges and universities. See Andrew M. Greeley, *A Modest Proposal for the Reform of Catholic Schools*, AMERICA, Mar. 28, 1999, at 234 (decrying the lack of leadership in Catholic elementary and secondary education).

their pastoral leadership obligations and opportunities.<sup>22</sup> Unless particularly troublesome theologians<sup>23</sup> at local universities<sup>24</sup> explicitly refuse to comply<sup>25</sup> with *Ex Corde Ecclesiae*, thereby rendering confrontation unavoidable, some bishops may be thankful to be left alone, save for the occasional ceremonial commencement pageant. This lack of, or inadequate, response from some bishops is exactly what resistant academic

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<sup>22</sup> Archbishop Weakland of Milwaukee, Wisconsin, who voted against the norms, stated, "[p]robably the tension between hierarchy and theologians now is the highest I have seen it." Niebuhr, *supra* note 7, at A1 (quoting Archbishop Weakland).

<sup>23</sup> In a rare display of backbone, or at least of a fear of litigation, administrators at Boston College, a Jesuit Catholic institution, refused to list the classes of Professor Mary Daly who, for twenty-five years, barred men from her theology classes at Boston College. Last year, a male threatened to file suit after she refused to let him register for her class on feminist ethics. See *Judge Denies Bid to Stop Retirement by Professor*, CHRON. HIGHER EDUC., June 4, 1999, at A19; see also Carey Goldberg, *Facing Forced Retirement, Iconoclastic Professor Keeps on Fighting*, N.Y. TIMES, Aug. 15, 1999, at 13; Matt Kantz, *Judge Rules Daly's Classes can be Withheld from Roster*, NAT'L CATH. REP., June 14, 1999, at 8; Katha Pollitt, *No Males Need Apply*, NATION, Aug. 23, 1999, at 10.

<sup>24</sup> See *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995) ("It is well-settled that when a court is required to interpret Canon Law or internal church policies and practices, the First Amendment is violated because such judicial inquiry would constitute excessive government entanglement with religion"); *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334, 336-37 (Ind. Ct. App. 1999) (upholding the dismissal on jurisdictional grounds of a breach of contract action of a professor at a Roman Catholic seminary whose employment was terminated, at least in part, because she signed a petition calling for the ordination of women insofar as such public dissent violated canon law and required her removal from the faculty); Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 229-30 (2000) (discussing how courts cannot rule on clergy placement if canon law is implicated).

<sup>25</sup> The first public prominent proclamation of intended non-compliance came from Rev. Richard P. McBrien, the Crowley-O'Brien Walter Professor of Theology at the University of Notre Dame. See Richard P. McBrien, *Why I Shall Not Seek a Mandate*, AMERICA, Feb. 12, 2000, at 14. In an interview on February 8, 2000, McBrien not only reiterated his intended refusal to seek a mandate, stating that, "I'm simply the first one to come out," but also predicted that most of his colleagues would also refuse to do so. *Theologian: Most Profs Will Skirt Bishops' Edict*, DAYTON DAILY NEWS, Feb. 9, 2000, at 3A; see also *From the Heart of the Church to the Classroom*, ST. JOHN'S U. ALUMNI MAG., Spring, 2000, at 6, 7 ("Mercy Sr. Margaret Farley, Professor at Yale Divinity School and President of the Catholic Theological Society of America, told the *National Catholic Reporter* that she'd talked to many theologians who were 'very worried' about [*Ex Corde Ecclesiae's* Mandatum requirement]."). Professor Farley has noted that: "Clearly some theologians who see their role as a kind of mission are pleased with this . . . However the great majority are dismayed and worried, wondering what the consequences of this will be. It will create a climate of suspicion not conducive to scholarly work or education." *Id.*

bureaucracies are banking on. They hypocritically proclaim full adherence to *Ex Corde Ecclesiae*, while intending that nothing whatsoever will change, and thereby preserve campus business as (un)usual. Many faithful Catholics who labor in the groves (graves?) of academe (and elsewhere) endeavoring to witness to the Faith are consequently left completely vulnerable to, and abandoned by their bishops to deal alone with, hostile Catholic university bureaucracies and administrators.

Sadly, Catholics who are committed to the witness of the Faith are sometimes effectively rendered persona non grata as faculty and as faculty candidates. Catholic and non-Catholic law students<sup>26</sup> are at special risk of being deprived of an authentic Catholic educational ethos.<sup>27</sup> Student applicants may continue to glance approvingly at the glossy highlights in law school catalogues, touting commitment to Catholic values, usually phrased as education in the "tradition" of the religious community operating the particular Catholic law school.<sup>28</sup>

Larry Flynt and Frances Kissling<sup>29</sup> analogs are indeed operating within some Catholic law school faculties. They may teach a wide range of courses with, at best, indifference, if not thinly veiled—or open—hostility to the Catholic Church and its

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<sup>26</sup> For a discussion demonstrating the role of students in carrying out the mission of Catholic higher education, see William M. Watson, *Pastoral Reflections on Catholic Higher Education*, AMERICA, May 22, 1999, at 7; see also *Students Mark New Year By Focusing on Faith*, NAT'L CATH. REP., Jan. 15, 1999, at 6.

<sup>27</sup> The National Conference of Catholic Bishops Final Draft of *Ex Corde Ecclesiae: The Application to the United States* specifically states: "Catholic students have a right to receive from a university instruction in authentic Catholic doctrine and practice [and] . . . [c]ourses in Catholic doctrine and practice should be made available to all students." NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *Ex Corde Ecclesiae: The Application to the United States*, art. 4(5)(a)-(b) (1999).

<sup>28</sup> The catalogs may prefer not to use the term "Catholic," lest any applicants be put off by terminology that is perceived as sectarian. Hence, alternatives may be more references to the "Ignatian" tradition, for example.

<sup>29</sup> Frances Kissling, a former student at St. John's University who considered becoming a Catholic Nun, founded and leads "Catholics for Free Choice." See Connie Lauerma, *Frances Kissling: I Think of Myself, In Some Ways, as a Very Traditional Catholic*, CHI. TRIB., Sept. 28, 1986, at 3C; *The Cardinal of Choice*, WASH. POST, Aug. 24, 1986, at 6. This abortion rights initiative is funded by non-Catholic sources. See *id.* (noting criticism that Catholics for Free Choice accepts money from non-Catholic sources including the Ford Foundation). Kissling has not been formally excommunicated. She is currently leading an initiative to rescind the Holy See's permanent observer status at the United Nations. See Teresa Malcolm, *Campaign Against Vatican U.N. Status*, NAT'L CATH. REP., May 26, 2000, at 8; Sean Scully, *House Votes 416-1 for Strong Vatican Voice in U.N.*, WASH. TIMES, July 12, 2000, at A1.



teachings. Same sex marriage practitioners and advocates, like Professor Mary Becker at the Catholic Vincentian DePaul University College of Law, chair faculty appointment committees.<sup>30</sup> Professor William Eskridge, in his latest book, *Gaylaw*,<sup>31</sup> “analyzes” the practice within some segments of the male homosexual S & M community of—quite literally—“consensually” nailing one’s own penis to a board.<sup>32</sup> At the Annual Meeting of the Association of American Law Schools in January, 1999 in New Orleans, Professor Eskridge publicly thanked the Catholic Jesuit Georgetown University Law Center faculty and administration for giving him a friendly academic home for developing his “ideas” after he was denied tenure at the University of Virginia Law School, and before he went off to teach at his law school alma mater, Yale Law School.<sup>33</sup>

Everyone knows that there are virtually no Catholics teaching at Yale, Harvard, or the other elite private or public secular law schools.<sup>34</sup> Professor Mary Ann Glendon is tolerated,

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<sup>30</sup> See *supra* note 19.

<sup>31</sup> WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

<sup>32</sup> See Richard A. Posner, *Ask, Tell*, THE NEW REPUBLIC, Oct. 11, 1999, at 52, 55 (reviewing WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999)). Posner criticized Eskridge’s view that

if two people want to have a relationship in which one inflicts physical pain on the other—Eskridge illustrates with the practices of a homosexual S/M ring that included ‘nailing a man’s penis to a bench,’ . . . then the infliction of that pain need not be thought coercive, even though the external manifestations of the pain-inflicting act are identical to those of a violent rape.

*Id.*

<sup>33</sup> Yale denied the Christian Legal Society (CLS) the right to interview Yale Law students through the on-campus Yale Law School Placement office because the CLS “discriminates” by requiring one to believe in the Divinity of Jesus in order to aspire to be a CLS lawyer. The University of Chicago Law School regrettably followed Yale’s “lead.” See Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 464 (2000).

<sup>34</sup> “It has been many years since the poet and essayist Peter Viereck called anti-Catholicism ‘the anti-Semitism of the intellectuals.’” Peter Steinfelds, *Catholic ‘Power’ a Concern for Some*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE, July 5, 1997, at 8B. Viereck’s actual words were that “Catholic-baiting is the anti-Semitism of the liberals.” PETER VIERECK, SHAME AND GLORY OF THE INTELLECTUALS 45 (1953). While Viereck’s words are misquoted regularly, the spirit of what he said remains true. See Joseph Gallagher, *Slouching Toward Baltimore: Pope’s Visit and Thoughts on the End*, SUN (Baltimore), Sept. 10, 1995, at 7J (“In our own century, the historian Arthur M. Schlesinger Sr. spoke of anti-Catholicism as the deepest-grained prejudice in American culture. And the scholar Peter Viereck described anti-Catholicism as ‘the anti-Semitism of the intellectuals.’”); John Seiler, *Pope’s*

barely, at Harvard.<sup>35</sup> Judge Guido Calabresi, now serving on the United States Court of Appeals for the Second Circuit, continues to be an adjunct lecturer at the Yale Law School.<sup>36</sup> This spot quiz is an interesting exercise, for it yields a disturbingly short list of prominent Catholics who are teaching at elite secular law schools. Anti-Catholicism within the elite law school faculties is the open and notorious “secret” of the legal academy.<sup>37</sup> There are virtually no Catholics on the elite private and public secular law school faculties; there are only a few actively committed non-Catholic Christians.<sup>38</sup>

Some of the Nation’s twenty-seven<sup>39</sup> Catholic law schools<sup>40</sup>

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*Visit Unleashes Attacks from Big Media Using Disguised Bigotry*, BUFFALO NEWS, Aug. 15, 1993, at H6 (“For weeks I’ve been reading almost daily attacks on [the Pope] and the Catholic Church in the New York Times and the Los Angeles Times. As philosopher and poet Peter Viereck (not a Catholic) has written, anti-Catholicism is the anti-Semitism of the intellectuals.”); Peter Steinfeld, *Beliefs*, N.Y. TIMES, Mar. 4, 2000, at A13 (“[A]nti-Catholic animus rooted in the theological polemics of the 16th-century Reformation still exists in the United States.”). Of course, anti-Catholicism is not risk-free, thanks to, for example, the rapid-response of President William Donohue and the Catholic League for Religious and Civil Rights.

<sup>35</sup> Glendon was upbraided by the Harvard General Counsel for writing pro-life and Catholic correspondence on her Harvard office stationary letterhead. The General Counsel has since become a member of the Supreme Judicial Court of Massachusetts. See Cosmo Macero, Jr., *Furor Grows Over Bias Charge vs. SJC Pick*, BOSTON HERALD, Sep. 29, 1999, at 1.

<sup>36</sup> Judge Calabresi graduated from Yale Law School in 1958 and then went on to complete a judicial clerkship with Associate Justice Hugo Black of the United States Supreme Court. Following many years on the law school faculty at Yale, he became Dean of the school from 1985–94. He is a leading member of the committee to refurbish the Thomas More Catholic Chapel at Yale University, where he attends Mass.

<sup>37</sup> It may be less secret, and considerably more open, since January 6, 2000. At the Annual Meeting of the Association of American Law Schools (AALS) in Washington, D.C., the Law and Religion Section conducted a three-hour panel on the subject of religion in the workplace. The primary author of this article, Chairperson of the AALS Employment Discrimination Section for 2000, asked the panel during the open question session to comment on the embedded anti-Catholicism within the elite secular law schools, as manifested in the virtual absence of Catholic faculty at those schools. No one on the panel responded. Professor Michael McConnell did say that the Yale Law School’s prohibition of the Christian Legal Society from use of Yale’s placement services was “hypocritical and illiberal.”

<sup>38</sup> Steve Carter, an Episcopalian, teaches at Yale Law School and writes extensively and eloquently about his faith commitment. See, e.g., *Sunday Morning* (CBS Television Broadcast, Sept. 20, 1998).

<sup>39</sup> The Catholic law schools—not including the new Ave Maria Law School, which admitted its first students in the fall of 2000, the re-opened University of St. Thomas Law School in St. Paul Minnesota, which will admit students in the fall of 2001, Seattle University, and Barry University of Orlando—are included in David

may not have significantly more visible, or quantitatively or qualitatively deeper, Catholic faculty presence than the Harvards and the Yales of the legal educational world. Those Catholic law schools with numerical, but utterly quiescent and co-opted, Catholic faculty majorities may be barely above a Catholic flatline. In some instances, these nominally Catholic law schools are, overtly or instinctively, doing their perverse best to reduce their number of Catholic faculty.<sup>41</sup> The prospects for the nominal Catholic law school in affirmatively recruiting Catholics to the faculty who are committed to the witness of the Faith will probably remain non-existent, absent effective leadership by the Catholic bishops.

Catholic law schools need a battle plan for implementation of, and full compliance with, *Ex Corde Ecclesiae*. Their faculties, unfortunately, are perhaps the last (lost!) constituency to develop any *Ex Corde Ecclesiae* battle plan, especially with some administrative bureaucrats indifferent to *Ex Corde Ecclesiae*. The task for insuring proactive implementation of *Ex Corde Ecclesiae* therefore must fall to the bishops. As we suggested in *The Bishop's Role in the Catholic Law School*,<sup>42</sup> the Catholic law school faculty and administration should invite the local bishop to lunch.<sup>43</sup> The bishops also must proactively initiate dialogic engagement, person-to-person and face-to-face, with the faculties of the Catholic institutions of higher education.<sup>44</sup> Archbishop

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L. Gregory, *Where to Pray? A Survey Regarding Prayer Rooms in A.B.A. Accredited, Religiously Affiliated Law Schools*, 1993 BYU L. REV. 1287, 1304 n.68; Daniel J. Morrissey, *A Catholic Moment in Legal Education?*, AMERICA, Oct. 29, 1994, at 4 ("When the University of Seattle acquired Puget Sound Law School . . . it became the 25th Catholic university in the country with a law school.").

<sup>40</sup> For earlier discussions on the status of Catholic law schools, see Christopher Wolfe, *The Ideal of a (Catholic) Law School*, 78 MARQ. L. REV. 487 (1995) as part of the *Symposium on Religiously Affiliated Law Schools* in the *Marquette Law Review*; see also Andrew L. Anderson, *Ex Corde Ecclesiae: Obstacle or Opportunity for Catholic Affiliated Law Schools?*, 34 GONZ. L. REV. 103 (1999); Daniel Gordon, *Ex Corde Ecclesiae: The Conflict Created for American Catholic Law Schools*, 34 GONZ. L. REV. 125 (1999).

<sup>41</sup> For a discussion of the role of Catholic Law Schools see John T. Noonan, Jr., *The Heart of a Catholic Law School*, 23 U. DAYTON L. REV. 7 (1997); see also Aloysius A. Leopold & Marie E. Kaiser, *The Lord in the Law: Reflections on a Catholic Law School*, 25 ST. MARY'S L.J. 385 (1993).

<sup>42</sup> David L. Gregory, *The Bishop's Role in the Catholic Law School*, 11 REGENT U. L. REV. 23 (1998).

<sup>43</sup> See *id.* at 27 ("Does the administration and faculty of the Catholic law school periodically invite their bishop to lunch . . . . If not, why not?").

<sup>44</sup> At least one Catholic University President recently suggested that he may

Zenon Grocholewski, the Prefect of the Congregation for Catholic Education, told the theological faculty in Split, Croatia, in April, 2000 that:

[The bishop's responsibility] involves by its very nature the authoritative proclamation of the truth to believe, as well as the promotion and realization of those ecclesial conditions necessary for the faith to be scientifically promoted and illustrated. All this requires that the bishop be and feel actively involved in the life of the theological faculty.<sup>45</sup>

The bishops are pastorally obligated to overcome the continuing resistance to implementing *Ex Corde Ecclesiae* in Catholic law schools.<sup>46</sup> We are inspired by the hope of a genuinely flourishing Catholic legal education,<sup>47</sup> one that will lead to a fuller appreciation of Catholic educational identity in all academic and professional disciplines. We offer these proposals as witnesses to Catholic values, beliefs that can be potentially counter-cultural in our relativistic contemporary age

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facilitate a meeting between the bishop and the University's Theology faculty. "At some point, I'd like to allow the bishop to sit down with the theology department." *The Master Planner: Father Harrington Discusses Key St. John's Issues*, THE TORCH 1, 3 (Feb. 2, 2000) (quoting Rev. Donald J. Harrington, C.M., President of St. John's University, on the implementation of *Ex Corde Ecclesiae*).

<sup>45</sup> *Vatican Gets New Education Prefect*, THE TURNAROUND, Spring 2000, at 11 (quoting Archbishop Zenon Grocholewski) (alteration in original).

<sup>46</sup> Pope John Paul II has repeatedly and expressly instructed the bishops regarding their non-delegable pastoral responsibilities to the Catholic colleges and universities. See *Ex Corde Ecclesiae*, supra note 1, ¶ 28, art. 5, §§ 1, 2, at 238, 247; see also Gregory, supra note 42, at 25 n.6 (quoting these provisions of *Ex Corde Ecclesiae*). The Holy Father reiterated these duties in his address to the bishops of the United States on May 30, 1998: "The Catholic identity of a university necessarily includes the university's relationship to the local church and its bishop." Pope John Paul II, Address to the bishops of the United States (May 30, 1998), in FELLOWSHIP OF CATH. SCHOLARS Q., Fall 1998, at 37, 39.

<sup>47</sup> For an article that supports the spirit of such a move, see Morrissey, supra note 39, at 4 (discussing why legal education in the United States seems to be searching for groundwork to support a caring ethic). According to Archbishop John C. Favalora of the Archdiocese of Miami, Morrissey, who served as Dean of the St. Thomas University School of Law in Miami, Florida from 1994–1999, left that school with more Catholics on its faculty than he found in 1994, in terms of the number of Catholics on the faculty who are actively committed to the witness of the Faith in teaching, scholarship, and service. See Letter from Archbishop John C. Favalora to David L. Gregory, Professor of Law, St. John's University School of Law (Mar. 28, 2000) (on file with author) ("When Dan began as Dean at St. Thomas University there were relatively few Catholics in the law faculty. By the time he left, there were a significantly greater number of Catholics in the faculty than when he arrived. Dan worked very hard to bring Catholics on board and he did so in the face of some opposition . . .").

wherein the "pall of [liberal] orthodoxy"<sup>48</sup> has gripped the academy. We believe, based on an amalgam of experiential and anecdotal information, that *Ex Corde Ecclesiae* will not be implemented effectively within some Catholic law schools for the foreseeable future absent the bishops' direct pastoral oversight.<sup>49</sup>

The more subtle passive-aggressive academic resistance to *Ex Corde Ecclesiae* is likely to manifest itself in university proclamations of having always been in compliance with the best elements of *Ex Corde Ecclesiae*. By bureaucratic fiat—viola!—compliance with *Ex Corde Ecclesiae* will be declared. If the bishops then adopt "hands-off" postures, as declared by several bishops on or within days of the November 17, 1999 vote on the implementation norms, despite the express language of *Ex Corde Ecclesiae* and the Holy Father,<sup>50</sup> *Ex Corde Ecclesiae* will continue to be frustrated and undermined by the very pastoral leaders responsible for its full implementation.

Therefore, let us examine what will help realize the mission of what we will call the John Paul II Catholic University Law School,<sup>51</sup> a hypothetical future composite of the vibrant Catholic law schools in the United States. We propose affirmative action in the hiring of Catholic faculty<sup>52</sup> as a primary

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<sup>48</sup> This expression was first used in *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), where the court held that state statutes and regulations effectuating the removal of a college faculty member upon words or acts of sedition were contrary to the First Amendment and therefore, unconstitutionally vague. *See id.* at 603.

<sup>49</sup> Assuming that university and law school administrators would respond honestly, an ongoing investigation into the degree to which *Ex Corde Ecclesiae* is being implemented would be a fascinating quantitative and qualitative study. *See* Bruce Buckley, *Are Law Schools Holier Than Ever?*, NAT'L JURIST, Nov. 20, 1999, at 20.

<sup>50</sup> For an influential article urging the bishops to disengage, see J. Donald Monan & Edward A. Malloy, *'Ex Corde Ecclesiae' Creates an Impasse*, AMERICA, Jan. 30, 1999, at 6–8, 10, 12 (voicing the authors' fears that *Ex Corde Ecclesiae* fails to safeguard qualities essential to American Catholic universities). This is probably the best, and most startling, of the numerous articles in opposition to the *Ex Corde Ecclesiae* norms adopted by the National Conference of Catholic Bishops.

<sup>51</sup> Professor Michael Perry offered his model of a Catholic law school called John XXIII University at The First National Conference of the Religiously Affiliated Law Schools. *See* Michael J. Perry, *Symposium on Religiously Affiliated Law Schools: The Idea of a Catholic University*, 78 MARQ. L. REV. 325 (1995).

<sup>52</sup> We would directly adapt the lawful affirmative action jurisprudence and practice repeatedly endorsed by the United States Supreme Court. *See* *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987) (upholding an affirmative action plan for hiring and promoting minorities and women); *United*

method of preserving and enhancing the religious identity of Catholic law schools.

## II. CATHOLIC AFFIRMATIVE ACTION IN FACULTY HIRING

*Ex Corde Ecclesiae* expressly declares that "Catholic members of the university community are also called to a personal fidelity to the Church with all that this implies. Non-Catholic members are required to respect the Catholic character of the university, while the university in turn respects their religious liberty."<sup>53</sup> *Ex Corde Ecclesiae* continues: "All teachers and all administrators, at the time of their appointment, are to be informed about the Catholic identity of the institution and its implications, and about their responsibility to promote, or at least to respect, that identity."<sup>54</sup> Furthermore, "[t]hose university teachers and administrators who belong to other churches, ecclesial communities, or religions as well as those who profess no religious belief, and also all students, are to recognize and respect the distinctive Catholic identity of the university."<sup>55</sup> *Ex Corde Ecclesiae* thus contours the employment relationship of the law professors at the Catholic law school.

Law professors are entitled to an environment within Catholic law schools that supports and invigorates Catholic understanding, and that in turn, is reflected in teaching, scholarship, and service. Non-Catholic faculty are likewise entitled to the Catholic architecture of moral grounding and religious tradition. *Ex Corde Ecclesiae* expects an institutional dynamic whereby "the number of non-Catholic teachers should not be allowed to constitute a majority within the institution, which is and must remain Catholic."<sup>56</sup> All else in the

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States v. Paradise, 480 U.S. 149 (1987) (holding that a hiring quota requiring the Alabama Department of Public Safety to refrain from engaging in discrimination in its employment practices withstood heightened judicial scrutiny); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (upholding an affirmative action plan reserving 50% of openings in training programs for African Americans to account for racial imbalance in the employer workforce); see also Robert John Araujo, *The Harvest Is Plentiful, But the Laborers Are Few: Hiring Practices and Religiously Affiliated Universities*, 30 U. RICH. L. REV. 713 (1996) (discussing the need for religiously affiliated universities to preserve their identity and proposing affirmative action as a solution to the secularization of these institutions).

<sup>53</sup> *Ex Corde Ecclesiae*, *supra* note 1, ¶ 27, at 238.

<sup>54</sup> *Id.* art. 4, § 2, at 246.

<sup>55</sup> *Id.* art. 4, § 4, at 247.

<sup>56</sup> *Id.*

employment relationship of the law professors within the Catholic law schools flows from, and is grounded within, the salient provisions of *Ex Corde Ecclesiae*.<sup>57</sup>

The hysteria of critics notwithstanding, *Ex Corde Ecclesiae* is also powerfully committed to principles of academic freedom, consonant with truth.<sup>58</sup> *Ex Corde Ecclesiae* is best read and appreciated in conjunction with the Papal Encyclicals *Veritatis Splendor* (The Splendor of the Truth) issued in 1993<sup>59</sup> and *Fides et Ratio* (Faith and Reason) issued in 1998.<sup>60</sup> The Church and its Magisterium, of which *Ex Corde Ecclesiae* is certainly part, is ultimately about truth.<sup>61</sup>

*Ex Corde Ecclesiae*'s terms are contractually incorporated within the employment relationship of law professors at Catholic law schools. *Ex Corde Ecclesiae* is direct and straightforward and will settle some issues, while inspiring new ones. As some have stated, *Ex Corde Ecclesiae* is a "work in progress."<sup>62</sup> In the

<sup>57</sup> For an analogous article on the core features of the contemporary employment relationship of the law professor, see David L. Gregory, *The Employment Relationship of the Law Professor in the Consent Decree Era*, 30 GA. L. REV. 259 (1995).

<sup>58</sup> *Ex Corde Ecclesiae* states "[the Catholic university] possesses that institutional autonomy necessary to perform its functions effectively and guarantees its members academic freedom, so long as the rights of the individual person and of the community are preserved within the confines of the truth and the common good." *Ex Corde Ecclesiae*, *supra* note 1, ¶ 12, at 234. This is reiterated by the National Conference of Catholic Bishops: "Academic freedom is an essential component of a Catholic university." NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *Ex Corde Ecclesiae: The Application to the United States*, art. 2, § 2 (1999).

<sup>59</sup> Pope John Paul II, Encyclical Letter, Addressed by the Supreme Pontiff Pope John Paul II, The Splendor of Truth: *Veritatis Splendor* (St. Paul Books & Media 1993) (1993) [hereinafter *Veritatis Splendor*].

<sup>60</sup> Pope John Paul II, Encyclical Letter, *Fides et Ratio* of the Supreme Pontiff John Paul II to the bishops of the Catholic Church on the Relationship Between Faith and Reason (U.S. Catholic Conference 1998) (1998) [hereinafter *Fides et Ratio*].

<sup>61</sup> "I was born and for this I came into the world, to testify to the truth. Everyone who belongs to the truth listens to my voice." Pilate said to him, "What is truth?" *John* 18:37-38. The subsequent Papal encyclicals *Veritatis Splendor* (The Splendor of the Truth), *supra* note 59, and *Fides et Ratio* (Faith and Reason), *supra* note 60, reflect the artistic qualities, deep and genuine humanity, and cultural anthropology of the Holy Father, and his philosophical phenomenology. Most fundamentally, however, they reflect his continuing emphasis on the central reality, truth, and mystery of God. The challenge for scholars is to explore the ramifications of *Ex Corde Ecclesiae* fully within this broader Magisterial dynamic.

<sup>62</sup> I am indebted to former New York Court of Appeals Judge Joseph W. Bellacosa, Dean of the St. John's University School of Law, for this phrase, in our correspondence on *Ex Corde Ecclesiae*.

pilgrim Church, the Magisterial dynamic of *Ex Corde Ecclesiae* necessarily reflects the timeless, and timely, truth of Jesus.<sup>63</sup>

The dynamics for resistance to *Ex Corde Ecclesiae* can rest on bureaucratic manipulation of a specious and facile quantitative architecture. Assume, for example, that there are 500 faculty within the John Paul II Catholic University.<sup>64</sup> Assume further that 300 faculty members, sixty percent of the faculty, "check the Catholic box" at the time of hire, designating, while filling out income tax withholding forms, that they are "Catholic." With 300 of the 500 faculty members thereby institutionally considered, and bureaucratically counted, as "Catholic," Catholics thus constitute a significant numerical majority of the faculty teaching at John Paul II Catholic

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<sup>63</sup> "Christ is 'the way, and the truth, and the life.'" *Veritatis Splendor*, *supra* note 59, at 10 (quoting *John* 14:6); see also *supra* note 61 (quoting *John* 18:37-38).

<sup>64</sup> We have not endeavored to examine the percentages of Catholic faculty at the Catholic universities and law schools. That would be an interesting exercise, but beyond the immediate bounds of this article. St. John's University, the largest Catholic university in the United States, with approximately 19,000 students, recently reported the religious affiliation of its faculty, as of the fall of 1999, as: 54% Catholic and 46% non-Catholic (14% Jewish; 12% "None;" 10% Protestant; 10% "Other"). See *From the Heart of the Church to the Classroom*, ST. JOHN'S ALUMNI MAG., Spring 2000, at 7.

Professors Leonard Pertnoy and Daniel Gordon at the St. Thomas University School of Law in Miami, Florida recently stated that the St. Thomas faculty has five Jewish faculty members, among a total law faculty of twenty-two members. See Leonard Pertnoy & Daniel Gordon, *Would Alan Dershowitz Be Hired to Teach Law at a Catholic Law School? Catholicizing, Neo-Brandeisizing, and an American Constitutional Policy Response*, 23 SEATTLE U. L. REV. 355, 358 n.25 (1999). They also state that they "possess no data concerning the number of Jewish law professors at Catholic law schools." *Id.* They obviously conducted some sort of informal count of their colleagues at St. Thomas. They also note that the Jewish population in the law school's metro area is in the range of about 14%. Thus, it would appear that the Miami metro area Jewish population is very well represented among the St. Thomas Law School faculty, according to Professors Pertnoy and Gordon. See *id.* at 365. It would be interesting to know whether St. Thomas Law School has a Catholic faculty presence favorably proportionate to the Catholic population of the Miami metro area.

We have refrained from any internal surveying, polling, or "counting" of any of our colleagues at either the St. John's or Dayton Law School faculties unless a faculty member affirmatively declares their religious affiliation. We believe the law school has the right to ask during the interview and application process and again at the commencement of the employment relationship. Third-party surmise based on, for example, surnames, scholarship, teaching, and service manifestations would be inaccurate at best, and potentially simplistic and insulting after-the-fact. While everyone could probably venture reasonably accurate "guesstimates" as to their colleagues' religious affiliations, or lack thereof, in almost any employment context, we, for many reasons, refrain from doing so.



University. There would appear to be no further need for John Paul II Catholic University to do any Catholic hiring for the foreseeable future. Meanwhile, assume the John Paul II Catholic University Law School has only fifteen Catholics among its law faculty of fifty. Consequently, the Law School need not hire any Catholics to its law faculty for the foreseeable future, "protected" and insulated because sixty percent of the total University faculty are Catholic. Given the Catholic "presence" of 300 out of 500 faculty members, many years may elapse before that sixty percent Catholic faculty majority at John Paul II University is reduced by retirements and attrition to a Catholic bare majority of fifty one percent and finally, the recalcitrant Law School is pressured to hire Catholic faculty. Manipulating this numbers game may implicitly be at the heart of the emerging pattern of the passive aggressive resistance to the implementation of *Ex Corde Ecclesiae*.

We maintain that such a pernicious dynamic fundamentally violates the rights of all law professors within Catholic law schools. Professors are entitled, by the incorporation of *Ex Corde Ecclesiae* into their employment relationships, to have a Catholic University and Law School structure committed to *Ex Corde Ecclesiae*'s full implementation.<sup>65</sup> The environment within the John Paul II Catholic University Law School otherwise could constitute a hostile environment, ironically antagonistic—and unlawfully so—particularly for Catholics.<sup>66</sup> Unless Catholic leadership adopts a proactive *Ex Corde Ecclesiae* agenda, either palpable anti-Catholic hostility, or more subtly, corrosive sabotaging of an ethos conducive to Catholic identity, teaching, scholarship, and service, can inexorably metastasize at John Paul II Catholic University Law School.

At the very least, therefore, each and every department, school, and college within John Paul II University must practice Catholic affirmative action hiring at all times, with each component of the University always being majority Catholic in quantitative presence. Unless it is impossible,<sup>67</sup> Catholic

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<sup>65</sup> See *supra* notes 53–57 and accompanying text.

<sup>66</sup> Unlawful hostile working environments can result in significant monetary liability for employment discrimination in violation of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 1981(a)(1) (1994) (allowing for punitive and compensatory damages if the complaining party demonstrates that the respondent engaged in a discriminatory practice).

<sup>67</sup> Article 4 of the November 17, 1999 *Ex Corde Ecclesiae* norms approved by

affirmative action hiring must operate throughout all components in the John Paul II University whenever any of the University's schools, colleges, or departments are recruiting faculty.<sup>68</sup> Although the requirement in *Ex Corde Ecclesiae* that those teaching theology obtain a mandate from the local bishop has not been expanded to other faculty or administrators, we also fully agree with Father Richard McBrien's (rhetorical) query:

And what about Catholic faculty members in other departments of a university? Why are the mandates limited to theologians? If there is an erosion of Catholic identity in our universities today, it is more likely to occur *outside* of departments of theology, not inside . . . . By focusing only on Catholic theologians while leaving Catholic vice presidents, deans, directors, chemists, economists, biologists, philosophers, mathematicians, engineers, lawyers and accountants completely off the hook, we may be revealing that our vision of this sensitive matter is of tunnel quality. If we are really concerned about the Catholic character of our Catholic universities, we should be concerned about the whole faculty and the whole administration, not just the theology department, the president and the board of trustees. Is it asking too much that the drive to insure Catholicity be itself catholic in scope?<sup>69</sup>

On others grounds, we markedly disagree with Father McBrien.

### III. A PRACTICAL AGENDA

Where do we go from here? That is, how do we ensure, as a matter of transformative practice, that *Ex Corde Ecclesiae* will be incorporated into, and undergird, the employment relationship of all professors within the John Paul II Catholic University Law School? How are pastoral, dedicated Church leaders to achieve and maintain a truly Catholic institutional identity at Catholic universities? To this end, we primarily offer modest, simple proposals, all of which are consistent with the

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the National Conference of Catholic Bishops states that "the university should strive to recruit and appoint Catholics as professors so that, to the extent possible, those committed to the witness of the faith will constitute a majority of the faculty." NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *Ex Corde Ecclesiae: The Application to the United States*, art. 4, § 4(a) (1999).

<sup>68</sup> See *id.*

<sup>69</sup> McBrien, *supra* note 25, at 15.

four distinctive characteristics that are essential for Catholic identity: Christian inspiration in individuals and the university community; reflection and research on human knowledge in the light of the Catholic faith; fidelity to the Christian message in conformity with the Magisterium of the Church; and institutional commitment to the service of others.<sup>70</sup>

Administrators at Catholic universities and their law schools, especially local bishops who are responsible for implementing *Ex Corde Ecclesiae* in their dioceses, must assert their leadership by insisting on the development of explicit Mission statements, supplemented internally by Catholic faculty affirmative action hiring plans, goals, and timetables.<sup>71</sup> These documents, analogous to secular affirmative action plans that have effectively brought about diversity in faculties and student bodies, are important in any endeavor to achieve and reinvigorate Catholic identity at Catholic law schools. Catholic identity can be institutionally fostered in several interrelated ways. Moreover, consistent with literature in the school reform movement and other areas of organizational change<sup>72</sup> over whether new initiatives should begin from the top down (by administrative leadership or bureaucratic fiat) or the bottom up (through calls for reform by faculty and students), we would clearly prefer both pastoral leadership and a grass roots

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<sup>70</sup> See *Ex Corde Ecclesiae*, *supra* note 1, ¶ 13 at 234.

<sup>71</sup> For a study of recent practices in Catholic institutions, see James L. Heft & Fred Pestello, *Hiring Practices in Catholic Colleges and Universities*, 20 CURRENT ISSUES IN CATH. HIGHER EDUC. 89, 97 (Fall 1999) (concluding that because administrators are aware of the need to preserve Catholic identity, they are taking steps to preserve and strengthen that identity.); see also Andrew Anderson, *Ex Corde Ecclesiae* Obstacle or Opportunity for Catholic Affiliated Law Schools?, 34 GONZ. L. REV. 103 (1998-99) (concluding that Catholic law schools best serve the greater community by remaining faithful to their religious identity through hiring practices, mission statements, and the manner in which material is taught); Howard B. Eisenberg, *Mission, Marketing, and Affiliated Law Schools*, 11 REGENT U. L. REV. 1 (1998-99) (stressing the importance of hiring and operating law schools to advance the religious nature of religiously affiliated institutions).

<sup>72</sup> See generally MICHAEL FULLAN, CHANGE FORCES: PROBING THE DEPTHS OF EDUCATIONAL REFORM 37 (1993) (discussing the necessity "of both top-down and bottom up strategies" to bring organizational change); GARETH MORGAN, IMAGES OF ORGANIZATIONS (1997) (discussing the role of leaders as having to shape and create contexts in which self-organization and change can occur); PETER SENGE, THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION 108-12 (1994) (discussing the need to maximize the intelligence of an organization by working together in teams to effectuate change).

campaign by faculty.<sup>73</sup> In light of the abysmal conditions present in some Catholic law schools, where Catholic faculty members who are committed to the witness of the Faith are all but absent (figuratively and literally), however, we urge especially resolute, proactive, aggressive, and pastoral leadership by the bishops.<sup>74</sup>

*Ex Corde Ecclesiae*, in its call for a majority of Catholic faculty members, does not distinguish between individual units (or schools) within a college or university.<sup>75</sup> Nothing forbids Catholic institutions from seeking a Catholic majority in each of its schools, colleges, and departments.<sup>76</sup> As part of the *Ex Corde Ecclesiae*-inspired renaissance in Catholic law schools, we urge leaders and policy makers—most especially the bishops—to require regular written reports from the administrations of the Catholic law schools, showing cause why each institution is worthy of retaining its affiliation as Catholic. These periodic reports, to be forwarded to local bishops and Boards of Trustees, should be prepared by presidents of Catholic universities and deans of Catholic law schools to demonstrate good faith compliance toward achieving and enhancing institutional Catholic goals and a Catholic majority faculty, consistent with *Ex Corde Ecclesiae*.<sup>77</sup>

We recognize fully that confronted with the malaise that has long infected some Catholic law schools, it may take years before the vision of *Ex Corde Ecclesiae* is fully achieved. It is crucial to initiate immediate and aggressive good faith efforts toward compliance. The accountability measures we suggest are not particularly burdensome, and are fully consonant with general practices already present in higher education. For example, each faculty member is already required to file a periodic report, citing achievements in teaching, scholarship, and service. Deans distill and summarize these faculty accomplishments in Dean's Reports to provosts and presidents, who in turn, report to graduates and friends of the university.

Presidents and provosts should now also require deans to demonstrate affirmatively the Catholic dimensions of the

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<sup>73</sup> This article, for example, is one such faculty initiative.

<sup>74</sup> See *supra* notes 39–50 and accompanying text.

<sup>75</sup> See generally *Ex Corde Ecclesiae*, *supra* note 1.

<sup>76</sup> See *id.* art. 4, § 4 at 247.

<sup>77</sup> It is, of course, problematic if a majority of the Board of Trustees at a Catholic university are not Catholic, despite the requirements of *Ex Corde Ecclesiae*, as they may be less likely to comply with its directives.

faculty's teaching, scholarship, and service. Presidents and provosts should especially require deans to demonstrate affirmatively and specifically the steps taken by deans and appointment committees to recruit Catholic faculty in every recruiting initiative. If non-Catholics are to be hired, presidents and provosts should require deans to first prove how and why it is "impossible" to recruit Catholics.<sup>78</sup> Bishops should require symmetrical reports from the Catholic colleges and universities within their particular diocese.

Whenever hiring, leadership at Catholic institutions must insure that the majority of faculty candidates in every recruiting pool constituted by any of its schools, colleges, and departments must be Catholics. If Catholics are not the majority within every faculty hiring pool, then logically, few, if any, Catholics will receive faculty job offers.<sup>79</sup> Failure by the academic institution's responsible leadership to ensure a majority of Catholics in every hiring pool will quickly sap and further undermine the essential features of *Ex Corde Ecclesiae*. There is a great opportunity, and a responsibility, placed upon every person, Catholic and non-Catholic, within the administration and faculty of a Catholic law school, beginning with Catholic affirmative action faculty recruitment. An approach of this kind requires very aggressive "affirmative action" Catholic hiring at some Catholic law schools, because some of these institutions currently have so few, if any, Catholic faculty.<sup>80</sup> Until a Catholic faculty majority is achieved and thereafter maintained, as in other affirmative action situations, the administration must demonstrate that it has made special efforts to reach Catholic candidates. *Ex Corde Ecclesiae* implicitly requires aggressive outreach by the administration in Catholic law schools to, for example, the

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<sup>78</sup> See *Ex Corde Ecclesiae*, *supra* note 1, art. 4, § 4 at 247. Rev. Donald J. Harrington, C.M., President of St. John's University, now requires such affirmative action measures with regard to race. "We've instructed the deans not to fill any faculty position unless we can document that we've advertised in the appropriate minority outlets to draw more people of color." *The Master Planner: Fr. Harrington Discusses Key St. John's Issues*, THE TORCH, Feb. 2, 2000, at 1; Saskia D. De Caires, *St. John's Lacking Minority Faculty*, THE TORCH, Feb. 9, 2000, at 1. Although we believe that the Catholic law schools could exclusively hire Catholics as a legally-defensible matter, we believe that continuing to hire non-Catholic faculty in some circumstances is, on balance, probably more conducive to ecumenical discourse and to academic excellence.

<sup>79</sup> See *supra* note 78.

<sup>80</sup> See *supra* notes 39-41 and accompanying text.

Catholic Lawyers Guild,<sup>81</sup> the local bishop, and the Catholic and appropriate legal press to advertise prominently all faculty openings in order to recruit Catholic faculty.

Adopting the proactive measures that we suggest should also dramatically enhance the prospects for desired ethnic diversity among Catholic law faculties. Over the next few decades, the majority of the Catholic Church community within the United States will become Hispanic,<sup>82</sup> historically a rich cultural base of Catholic presence. Likewise, the Asian and Asian-American communities, from Vietnam to the Philippines, along with the African and African-Caribbean populations such as, for example, Nigerians and Haitians, can also be powerful sources for enhancing Catholic faculty presence.

*Ex Corde Ecclesiae* is neither a tool to convert academicians to the Catholic faith (or drive them from campus) nor an instrument designed to return Catholic colleges and universities to a pre-Vatican II intellectual ghetto,<sup>83</sup> wherein academic inquiry could be periodically viewed by some individuals as suspect.<sup>84</sup> Rather, *Ex Corde Ecclesiae* is rightfully concerned

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<sup>81</sup> The Catholic Lawyers Guild may or may not choose to be a positive "factor," as the President of one Diocesan Catholic Lawyers Guild recently told the primary author.

<sup>82</sup> The 21 million Catholic Hispanics in the United States are about forty percent of the American Catholic population. By 2050, Catholic Hispanics will comprise a majority of American Catholics and 24.5% of the entire U.S. population, according to the United States Census Bureau. Hispanics are now more than one-third of the Catholic population in the Archdiocese of New York. See Kevin McCoy, *Diversity a Hallmark of the Archdiocese*, DAILY NEWS, May 6, 2000, at 4 ("By some estimates, their numbers are expected to approach 50% when this year's census results are tallied."). The Diocese of Brooklyn in New York has the largest Black population of Catholics in the nation. See David Barstow, *A Catholic Parish Finds Its Black Voice*, N.Y. TIMES, Feb. 6, 2000, at A29.

<sup>83</sup> Two prominent situations wherein academic inquiry was viewed as suspect involved John Courtney Murray, S.J., and Pierre Teilhard de Chardin, S.J. Murray, an American theologian, who in 1954 was ordered to refrain indefinitely from writing about Church-state relations, was subsequently rehabilitated and vindicated by his work at Vatican Council II on the Declaration for Religious Freedom. See Todd D. Whitmore, *Murray, John Courtney*, in HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM 897-98 (Richard P. McBrien ed., 1995). Teilhard de Chardin, a French theologian, paleontologist, biologist, and philosopher, spent the bulk of his life trying to interpret the findings of modern science in the light of the Christian message, although the Church forbade him from publishing. After his death, his works on theology were published to wide acclaim. See Thomas F. O'Meara & John H. Wright, *Teilhard de Chardin, Pierre*, in HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM 1242-43 (Richard P. McBrien ed., 1995).

<sup>84</sup> Even though it predated both of the incidents in the previous footnote, *Divino Afflante Spiritu* (1943), a Papal Encyclical issued by Pius XII, indicated that change

that all academicians, Catholic and non-Catholic, who work in a Catholic environment, regardless of their personal value or faith systems, respect the Church's teachings and traditions.

Creating hiring pools containing a majority of Catholics alone may not be enough. To this end, the words of the Rev. James Heft, S.M., Chancellor and University Professor of Faith and Culture at the University of Dayton and the former Chairman of the Board of Directors of the Association of Catholic Colleges and Universities,<sup>85</sup> are worth noting. First, he points out that the *Ex Corde Ecclesiae* norms adopted by the bishops call for hiring faculty members who are "committed to a witness of the faith,' rather than 'faithful Catholics.'"<sup>86</sup> While stopping short of an absolute litmus test, Father Heft posits that it will be difficult to identify who truly qualifies as a Catholic intellectual, absent documentation actively integrating such pursuits. Or, put another way, "you will recognize [Catholic intellectuals] by their fruits."<sup>87</sup> Second, the best Mission statements aside, Heft observes that "[o]ne of the biggest challenges to achieving the goals of *Ex Corde* is that, although many Catholics [have law degrees], few are Catholic intellectuals . . . [who are] nourished by the sacraments and who draw[] inspiration and guidance from the tradition and teachings of the Church,"<sup>88</sup> and are thus

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was in the offing. See Pope Pius XII, *Divino Afflante Spiritu*, Encyclical Letter on Promotion of Biblical Studies (National Catholic Welfare Conference 1943) (1943). In this encyclical, the Vatican approved the use of modern Biblical exegesis for Catholic scholars, thereby ushering in the modern era of Biblical criticism, a movement that Protestant academics had initiated in the early Nineteenth Century.

<sup>85</sup> Rev. James L. Heft, S.M., former Chairman of the Board of Directors of the Association of Catholic Colleges and Universities, perceived by many as less than an enthusiastic supporter of *Ex Corde Ecclesiae*, recently clarified his position. "I am in full agreement with the goals of the Pope's 1990 statement on Catholic higher education, *Ex Corde Ecclesiae*. Where I may differ with some theologians and bishops touches only upon the best way to achieve those goals." James L. Heft, Letter to the Editor, *Bishops Failed to Lay Foundation for Decision*, DAYTON DAILY NEWS, Jan. 9, 2000, at 7B. Incidentally, Heft expressed displeasure with the heading assigned to his letter as misrepresenting his remarks.

<sup>86</sup> James L. Heft, *Have Catholic Colleges Reached an Impasse?*, CHRON. HIGHER EDUC., Nov. 12, 1999, at B2, B5.

<sup>87</sup> *Matthew* 7:20.

<sup>88</sup> Heft, *supra* note 86, at B6. Father Heft goes on to say that Catholic intellectuals undertake scholarly work with certain presuppositions. For example, they believe that the more deeply one gets into what it means to be human, the more inescapable are ethical and religious questions; the more deeply one gets into any form of knowledge, the more necessary it is to make connections with other areas of knowledge; the more intellectually vibrant a religious culture is, the more

ready to engage fully in Catholic scholarship.<sup>89</sup> Consequently, it is important for Catholic institutions to engage in the serious academic work of the Catholic intellectual tradition in order to assert more effective leadership in Catholic law schools.

Progress toward forging a Catholic identity can also be facilitated through the curriculum and related activities in the lives of Catholic law schools. In order to inculcate Catholic values, jurisprudential concepts, and justice throughout the curriculum, faculty should be encouraged to integrate these values in their teaching, scholarship, and service. In addition, Catholic law schools should offer an array of electives in canon law, jurisprudence, and Catholic social thought. In fact, insofar as Catholic law schools usually are on Catholic university campuses, presidents, provosts, and other academic officers should encourage joint appointments of some faculties, so that theologians, lawyers, and others can engage in a creative synergy leading to an intellectually transformative activity that transcends individual faculty capacities. At the same time, in light of the growing reliance on clinical field placements,<sup>90</sup> sites should be chosen that encourage prospective (and even practicing) attorneys and faculty to give witness to the Church's eloquent statement of the preferential option for the poor.<sup>91</sup> Reinvigorating and recontouring the curriculum can help Catholics and non-Catholics alike to recognize, and appreciate, the Church's rich academic and service heritage.

Along with curricular modifications, the formal course of study can be supplemented by sponsoring related activities, such as symposia for faculty and students along with guest speakers who further illustrate the Catholic intellectual tradition.<sup>92</sup> Together, all of these activities will serve as powerful witness of

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it will learn from and shape the wider culture. The Catholic intellectual is a believer . . . .

*Id.*

<sup>89</sup> For an interesting discussion of this topic, see GEORGE M. MARSDEN, *THE OUTRAGEOUS IDEA OF CHRISTIAN SCHOLARSHIP* (1997).

<sup>90</sup> See Arline Jolles Lotman, *Like Doctors, Lawyers Should Serve Residencies*, NAT'L L.J., Dec. 9, 1996, at A18 (proposing that law schools should adopt the medical school model which "combines pro bono service with education by letting the fledgling doctor practice medicine under the supervision of an experienced practitioner").

<sup>91</sup> See CATECHISM OF THE CATHOLIC CHURCH 587 (2d ed. 1994).

<sup>92</sup> The Third National Conference of the Association of the Religiously Affiliated Law Schools held at St. John's University School of Law on July 10, 2000 is one such example.



the need to create a synergistic relationship between and among research, teaching, and service at Catholic law schools.

Even as we offer these proposals, it is important to be aware of one noteworthy red-herring argument that opponents of *Ex Corde Ecclesiae* are likely to raise over whether compliance with its dictates may lead to a potential loss of government funding<sup>93</sup> in higher education, especially as it relates to guaranteed student loans. Insofar as the cases wherein the United States Supreme Court has struck down aid to religious schools have evidenced judicial fears of unconstitutionally assisting "pervasively sectarian" institutions, the disputes typically arose in the context of K-12 schools, rather than in higher education.<sup>94</sup> There should be little fear that the courts will limit or deny aid to students as *Ex Corde Ecclesiae* is fully effectuated. Ample precedent<sup>95</sup> supports the use of public funds to assist religiously

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<sup>93</sup> Dennis J. O'Brien, President Emeritus of the University of Rochester, has expressed the fear that that while the potential loss of state funding should give pause to the bishops, the even greater concern is that Catholic colleges and universities will return to an intellectual ghetto. See Dennis J. O'Brien, *Living by the Loopholes*, AMERICA, July 31, 1999, at 18; see also F. King Alexander & Klinton W. Alexander, *The Reassertion of Church Doctrine in American Higher Education: The Legal and Fiscal Implications of the Ex Corde Ecclesiae for Catholic Colleges and Universities in the United States*, 29 J. L. & EDUC. 149 (2000). See our response, Charles J. Russo & David L. Gregory, *The Constitutional Vitality of Ex Corde Ecclesiae, and a Response to the Alexanders' Despair*, 29 J. L. & Educ. (forthcoming 2000).

<sup>94</sup> The U.S. Supreme Court's reluctance to assist religious schools coalesced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), where the court struck down aid programs in Maryland and Rhode Island on the basis of *Lemon's* now seemingly ubiquitous test which requires that government interactions with religious institutions have a secular legislative purpose, a principal or primary effect that neither advances nor inhibits religion, and avoids excessive entanglement. See *id.* at 612-13. This judicial reluctance has dissipated in the face of the reinvigorated child benefit test. See *Agostini v. Felton*, 521 U.S. 203 (1997) (dissolving an injunction prohibiting the on-site delivery of Title I services to children enrolled in religiously affiliated non-public schools in New York City, where sufficient safeguards were in place to ensure that the program was no excessive entanglement with religion); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (permitting the on-site delivery of the services of a sign language interpreter for a Catholic high school student in Arizona on the ground that the benefit went to the student and not to the school); see also Charles J. Russo et al., *State Aid to Religiously Affiliated Non-Public Schools: An Emerging Trend or Same Old Same Old?*, 8 J. RES. ON CHRISTIAN EDUC., No. 2, 267-89 (1999) (discussing the history of and parameters of state aid under *Lemon* and the child benefit test).

<sup>95</sup> For early cases involving higher education, see *Tilton v. Richardson*, 403 U.S. 672 (1971) (distinguishing *Lemon* on the ground that federal aid for church-related colleges and universities under Title I of the Higher Education Facilities Act of 1963, which provides construction grants for buildings and facilities, was

affiliated colleges and to assist the students in religiously affiliated institutions of higher education, without running afoul of the First Amendment's Establishment Clause.<sup>96</sup>

### CONCLUSION

The transformation of Catholic legal education must begin with pastoral oversight by the bishops of the faculty hiring dynamic. This does not mean that the bishops should micro-manage the John Paul II Catholic University Law School or function as front-line recruitment personnel officers.<sup>97</sup> Rather, we implore the bishops simply to carry out the serious pastoral work that their vocations demand. They must follow through on

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constitutional because it was used exclusively for secular educational purposes); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding a South Carolina statute that provided aid to colleges and universities, including those that were religiously affiliated, by permitting them to issue revenue bonds for projects and excluding facilities for sectarian study or religious worship, where the institutions conveyed the projects to the state authority which would lease them back and reconvey them on payment of the bonds with limitations being placed on their use before and after reconveyance); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976) (upholding a Maryland statute that provided public aid in the form of non-categorical grants, in the form of an annual fiscal year subsidy, to eligible colleges and universities on the basis that it passed the three parts of the *Lemon* test). These cases essentially extended the limits of the child benefit test into higher education by upholding grants to students attending religious colleges on the rationale that the aid went to the students and not the institutions. For a more recent case, see *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (holding that the First Amendment did not preclude a state from extending aid under a vocational rehabilitation assistance program to blind student who chose to study at a Christian college to become a pastor, missionary, or youth director on the basis that the help was generally available without regard for the sectarian or non-sectarian nature of the institution), *reh'g denied*, 475 U.S. 1091 (1986). The Supreme Court of Washington in *Witters v. State of Washington Commission for the Blind*, 771 P.2d 1119 (Wash. 1989), subsequently found that language in the state constitution prohibited the use of public funds for religious instruction.

<sup>96</sup> For an extensive discussion of prior decisions finding no bar to funding religiously affiliated colleges, see Gregory *supra* note 39, and Russo & Gregory *supra* note 93; see also Gerald V. Bradley, *Legal Beagle: ECE's Best Friend May Be the Civil Law*, 22 FELLOWSHIP OF CATH. SCHOLARS Q. 24 (1999) (discussing propriety and lawfulness of Catholic faculty hiring under *Ex Corde Ecclesiae* and "direct aid" to "pervasively sectarian" schools).

<sup>97</sup> Recent comments by Bishop John J. Leibrecht, who headed the committee that drafted the norms implementing *Ex Corde Ecclesiae*, when referring to Catholic colleges and universities, reiterated not only that the bishops expect that "as academic institutions, their governance is and remains internal to the institution," but also that the norms must be implemented "in light of 'relevant provisions of applicable federal and state law, regulations and procedures.'" *Bishop Stresses Flexibility of Catholic Education Norms*, AMERICA, Feb. 19, 2000, at 4.

their charges to be pastors, the shepherds of their flocks. Prodigal though some may be, the law schools at Catholic universities are clearly within the ambit of the bishops' pastoral functions, cares, and responsibilities. The Catholic law schools deserve the best bishops that the Spirit can provide. The most practical and immediate tool may be the aggressive adaptation and implementation of affirmative action principles to hire Catholic faculty, supplemented by the oversight of a national vicar for education, for example.

Of course, these are only preliminary observations about this "work in progress." Over the next several months, indeed, years, *Ex Corde Ecclesiae* will progress within the pilgrim Church. At the same time, the employment relationship of the Catholic law professors in the era of *Ex Corde Ecclesiae* will be determined by a challenging and demanding, but ultimately more rewarding, fulfilling, and meaningful contract with the John Paul II Catholic University Law School as employer. It will also redound to the benefit of students, faculty, the profession, the public at large, and the Church. Individuals who are committed to the witnessing of the Faith are entitled to, and bound to, transform indifferent and perhaps even ugly hostile environments inimical to the Church into communities receptive to Catholic teaching, scholarship, and service. Our students, faculties, staff, administrators, and graduates, whatever their faith traditions, and the Church, not to mention society at large, deserve nothing less. On that future day, the John Paul II Catholic University Law School will deserve to be called Great—for great it shall be.