ARTICLES

Would Alan Dershowitz Be Hired to Teach Law at a Catholic Law School? Catholicizing, Neo-Brandeising, and an American Constitutional Policy Response

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I. INTRODUCTION

Geraldo: Alan, I've heard a crazy rumor about you.
Alan: No! No! I deny it. I will not be representing Bob Barr.
Geraldo: That's not the rumor. I've heard you're sick of the winter in Cambridge and you're moving south.
Alan: Well, I can't say with certainty. The car wouldn't start last week and that was after I chipped the ice off of it. A sunny winter looks good.¹

If Alan M. Dershowitz wants to move south to escape the miseries of Cambridge, he definitely would want to investigate teaching law in Miami. Not only does Miami boast year-round outdoor weather,² but South Florida serves as home to several law schools.³ Dershowitz would want to keep all options open, and one school he would

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1. The dialogue comes from a law professor's midwinter night fantasy in the midst of watching Geraldo Rivera on CNBC discuss President Bill Clinton's impeachment trial with Alan Dershowitz, Bob Barr, Jerry Falwell, and Mark Levine.
3. See A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 16 (ABA section of legal education and admissions to the bar 1995). The South Florida law schools are the University of Miami School of Law, the Nova Southeastern University, Shepard Broad Law Center, and St. Thomas University School of Law.
want to approach for a teaching position is St. Thomas University School of Law, sponsored by the Archdiocese of Miami. St. Thomas and, for that matter, all other law schools in America would be graced by the talents of Professor Alan M. Dershowitz, Felix Frankfurter Professor of Law at Harvard University. Dershowitz began to teach at Harvard in 1964 after graduating from Yale University Law School, where he served as Editor-in-Chief of the Yale Law Journal. Before joining the Harvard law faculty, Dershowitz clerked for United States Supreme Court Justice Arthur Goldberg and District of Columbia Circuit Chief Judge David Bazelon. As a Harvard law professor, Dershowitz has published numerous law review articles and books. His teaching expertise includes criminal law, constitutional litigation, legal ethics, and human rights. Dershowitz should be warmly welcomed on the faculties of St. Thomas and the more than twenty other Catholic law schools in the United States.

6. Id.
9. AALS DIRECTORY OF LAW TEACHERS, supra note 5, at 385-86.
10. The authors count the following Catholic law schools: Boston College Law School; The Catholic University of America School of Law; Catholic University of Puerto Rico School of Law; DePaul University College of Law; University of Detroit, Mercy School of Law; Duquesne University School of Law; Fordham University School of Law; Georgetown University Law Center; Loyola University School of Law, Chicago; Loyola Law School, Los Angeles; Loyola University School of Law, New Orleans; Marquette University Law School; Notre Dame Law School; St. John's University School of Law; St. Louis University School of Law; St. Mary's University of San Antonio School of Law; St. Thomas University School of Law; University of San Diego School of Law; University of San Francisco School of Law; Santa Clara Law School; Seattle University School of Law; Seton Hall University School of Law; and Villanova University School of Law.
Professor Alan Dershowitz, a Jew,11 might face difficulties in obtaining a teaching position because Jewish law professors on the faculties of America's Catholic law schools teach, write, and provide service12 in the midst of a crisis in American Catholic education. During the past thirty years, the American Catholic Church and its membership have become diverse in thinking and ideology.13 The once conservative American Catholic Church developed a liberal outlook.14 The hierarchical powers of the church have diminished,15 resulting in the emergence of more than one culture within the Church.16 More conservative and hierarchical commentators identify these changes during the last decades as threatening the mission of the Catholic Church17 and seek, through the leadership of Pope John Paul II, to reassert traditional authority and doctrine in church institutions.18

Catholic universities, the homes of over twenty American Bar Association accredited law schools,19 participated in the diversifying and liberalizing trends of the past thirty years.20 Many American Catholic universities have secularized and welcomed challenges to traditional Catholic doctrines.21 Pope John Paul II now seeks to reestablish the ecclesiastical authority of the Catholic Church over Catholic universities,22 assuring local bishops more authority over Catholic universities within their dioceses.23 Law schools sponsored by Catholic

12. The three principal functions of law professors are teaching, scholarship, and service. See AMERICAN BAR ASSOCIATION STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS (Standards 402, 404, 405) (1995).
14. Id. at 285-94.
15. See EUGENE KENNEDY, TOMORROW'S CATHOLICS, YESTERDAY'S CHURCH 7 (1994); BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 42-43 (1994).
18. Id. at 21.
21. See KELLY, supra note 20, at 69-94; KELLY, supra note 17, at 70-77.
23. EX CORDE ECCLESIAE, supra note 22, art. 5, § 2. See also JOSEPH A. KOMONCHAK, The Catholic University in the Church, in CATHOLIC UNIVERSITIES IN CHURCH AND SOCIETY, A DIALOGUE ON EX CORDE ECCLESIAE 50 (John P. Langan ed., 1993). Bishops are responsible for the spiritual needs of the people in a local diocese. THOMAS J. REESE, INSIDE THE VATIC
universities were also included in the movement to enhance the Catholic nature of American Catholic higher education.  

This Article examines the impact of the Catholic identity movement on Jewish law faculty. The existence and roles of Jewish law professors at Catholic law schools appear uncertain. Academic freedom in a new doctrinaire climate appears weakened. Also, the Catholic identity movement seeks to limit the number of non-Catholic on law school and university faculties. The Article focuses on Jewish faculty because the authors can only gauge the impact of Ex Corde Ecclesiae on themselves and other Jewish faculty. The authors remain sensitive to the potential impact of Ex Corde Ecclesiae on all non-Catholic law faculty, but the authors also remain uncertain how a Christian legal document will impact non-Catholic Christians. The authors focus on the Jewish experience because the Jewish experience has traditionally been a disastrously vulnerable one in the context of Christian society. In this light, this Article examines the impact of the Catholic identity movement on Jewish law faculty. The Article will discuss the religious and demographic regimentation of Catholic universities and law schools. The Article will continue by examining the implications for Jewish law professors of the Catholic identity movement, including the risks of a reemerging Jewish quota.


25. The authors possess no data concerning the number of Jewish law professors at Catholic law schools. At St. Thomas, the authors count five Jewish members of the law faculty including the Associate Dean. The faculty has twenty-two members (including the Dean, Associate Dean, and Librarian).

26. "... 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 22, ¶ 12. Hence, academic freedom is tempered by what the Catholic Church and the university community considers "the common good." This implies a potential limitation of academic freedom by community standards.

27. Id. at art. 4, § 4.

28. See infra Parts IV.A-B.

29. See infra Part IV.C. See generally Stephen M. Feldman, PLEASE DON’T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (1997); John Dominic Crossan, WHO KILLED JESUS? EXPOSING THE ROOTS OF ANTI-SEMITISM IN THE GOSPEL STORY OF THE DEATH OF JESUS (1995); Robert S. Wistrich, ANTI-SEMITISM: THE LONGEST HATRED (1991). During Spring 1999, in response to this paper, St. Thomas faculty provided verbal feedback about the paper to the authors. Author Daniel Gordon was stunned when one Christian non-Catholic colleague claimed to him that Ex Corde Ecclesiae would have a more negative impact on Christian non-Catholics than on Jews, because Christian non-Catholics would be pressured to convert to Catholicism. The authors cannot know or understand whether such a fear is realistic or a rational one. However, it is apparent to the authors that Ex Corde Ecclesiae will impact non-Catholics in a variety of ways.
the Article will utilize the educational philosophy reflected in Rosenberger v. Rector and Visitors of University of Virginia to respond to the problems facing Catholic law schools and Jewish law professors.

II. EVANGELISM AND THE CATHOLIC LAW SCHOOL

Professor Dershowitz would be applying to St. Thomas or any other Catholic law school in a climate of rising Catholic evangelicalism because Pope John Paul II, in Ex Corde Ecclesiae, defined evangelizing as a dominant purpose of the Catholic university. The primary mission of the Roman Catholic Church involves evangelizing—preaching the Gospel of Jesus Christ—and the Catholic universities make important contributions to the Catholic mission of evangelizing. The evangelical nature of Catholic universities and their relation to the central mission of the Church explain why Pope John Paul II begins Ex Corde Ecclesiae with the image of a Catholic university born from the heart of the Church. The evangelical role for Catholic universities developed in Ex Corde Ecclesiae remains both a sophisticated and complex one. Evangelism in Catholic higher education means entering into a dialogue. Catholic universities enable the Church to create a dialogue with people of every culture. Catholic universities must be attentive to the cultures of the world not just to enlighten students, society, and the Church, but to promote a dialogue “between the Gospel [of Jesus Christ] and all modern society.”

The dialogue between reason and faith will produce, within the universities, the trained leaders of tomorrow, who serve as witnesses to Christ in whatever context Catholic university graduates serve. The dialogical evangelizing of Catholic universities includes a modern function for the coming decades. Catholic universities possess weighty and urgent tasks of evangelizing for the future of all cultures. In Ex Corde Ecclesiae, Pope John Paul II implies that modern

The authors hope that this Article will stimulate more Catholics and non-Catholic law faculty to express their views and perspectives about Ex Corde Ecclesiae.

31. See infra Part V.
32. EX CORDE ECCLESIAE, supra note 22, was promulgated on August 15, 1990.
33. Id. at art. 5, ¶ 1.
34. Id. at ¶ 48.
35. Id. at ¶ 49.
36. Id. at ¶ 1.
37. Id. at ¶ 43-47.
38. Id. at ¶ 6.
39. Id. at ¶ 45.
40. Id. at ¶ 23.
41. Id. at Conclusion.
cultures face threats that must be addressed by the evangelical message of the Gospel. Catholic universities serve as witnesses to Christ in “... cultures marked by secularism...” The modern age needs the proclamation of the meaning of truth. Catholic universities must play roles in critically examining and evaluating predominant values in modern society and culture, even going so far as speaking uncomfortable truths that defy public opinion. Science and technology, especially, need to be informed by faith and values. Pope John Paul II implies that the Catholic universities must play revolutionary roles throughout the world infusing secularism and valuelessness with spiritual norms of the Catholic Church.

A revolution needs revolutionaries. Evangelism needs evangelists. A dialogue needs leaders. The personnel of Catholic universities serve these roles. Catholic lay people in Catholic universities play an important apostolic role in the Church. Catholic members of a Catholic university community must be personally faithful to the Church, while non-Catholics must respect the Catholic character of Catholic universities. Christians among the faculty must be witnesses and educators of authentic Christian life. Overall, the Catholic identity and evangelical mission of the Catholic universities becomes linked to the quality of the faculty and respect for Catholic doctrine. All Catholic teachers must remain faithful to Catholic doctrine and morals in their teaching and research, while non-Catholics must respect Catholic doctrine and morals. To assure the Catholic evangelical identity of Catholic universities, Catholic faculty must constitute the majority of faculty within a Catholic university. As a result, Catholic universities must recruit adequate personnel to promote the evangelical identity of Catholic universities. Presumably, Catholic universities also must recruit Catholics to assure that a majority of faculty are Catholic.

Pope John Paul II, in Ex Corde Ecclesiae, poses challenges to American Catholic law schools. American Catholic law schools com-
prise components of evangelical universities where the majority of personnel in the universities must be Catholic. One of the authors of this Article, Daniel Gordon, argued in a previously published piece that *Ex Corde Ecclesiae* included an internal conflict between faith teaching and law teaching and the impact of *Ex Corde Ecclesiae* on legal education would be a negative one.\(^5\) Professor Gordon did not focus on the impact of the personnel requirements on existing Catholic law schools.

Existing Catholic law schools possess histories,\(^5\) which means that they are not new ventures without existing faculties and cultures. Tenured and nontenured faculty exist. Many, if not most, faculties in American Catholic law schools predate *Ex Corde Ecclesiae*. The command in *Ex Corde Ecclesiae* that a majority of faculty be Catholic creates uncertainties for the current faculties. Catholic legal education has not authoritatively addressed these issues since the promulgation of *Ex Corde Ecclesiae* in 1990.

The signs of what constitutes an appropriate faculty for a Catholic law school remain unclear. Description of the proportion of Catholic faculty vary. One commentator urged that the faculty be, at a minimum, predominantly Catholic.\(^6\) Another commentator found that a law school needs a critical mass of faculty committed to a Catholic outlook and perspective.\(^7\) Still another commentator argued that Catholic law schools need a core of Catholic faculty to perpetuate the schools' Catholic character.\(^8\) These commentators urge that a large number of Catholics exist on law school faculties, but they fail to specify numbers. Even "predominant" only implies a majority.

Other commentators remain even more vague. One commentator urges that there be, on university faculties, a predominant presence of individuals dedicated to furthering the growth of Catholic universities.\(^9\) This perspective is university-wide and fails to clarify whether only Catholics would be dedicated to such a task. Another commentator is even more open about who can support the growth of a Catholic law school. He contends that rather than hiring people on the basis

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\(^9\) Noonan, supra note 24, at 1045.

of their religious affiliation, Catholic law schools should recruit people who support the intellectual mission of the Catholic Church. 60 No one suggests wholesale firing of non-Catholic faculty, including Jewish faculty. In fact, one commentator explicitly warns against conditioning continued employment as a law professor on membership in the Catholic Church. Instead, efforts to build a core of Catholic faculty must center on faculty recruitment. 61

The application of Ex Corde Ecclesiae to law school faculty recruitment and retention policies remains uncertain. How the requirement for recruitment of a majority of Catholic faculty in Ex Corde Ecclesiae 62 impacts law school faculty also remains unclear. Interestingly, this lack of certainty about the demographics of Catholic universities and law schools is shared by American Catholic bishops. The Catholic bishops implicitly recognized the evangelical nature of Catholic universities when they stated, “According to Ex Corde Ecclesiae, ‘the objective of a Catholic university is to assume in an institutional manner a Christian presence in a university world confronting the great problems of society and culture.’” 63 However, the bishops failed, in their first proposed ordinances, to mention the religious persuasion of faculty. 64 The uncertainties created by Ex Corde Ecclesiae exist for Jewish faculty of Catholic law schools as Jewish faculty think about their professional future. Those same concerns also face prospective faculty at Catholic law schools, including Professor Dershowitz, should he want to seek a teaching position at St. Thomas or at any other Catholic law school. One Catholic university and its law school have begun to implement Ex Corde Ecclesiae, and the shaky implementation process should create concern for Jewish faculty at all Catholic law schools.

III. IMPLEMENTING EX CORDE ECCLESIAE:
THE ST. THOMAS MODEL

At St. Thomas, Professor Dershowitz would find a community pioneering the implementation of Ex Corde Ecclesiae. Though Ex Corde Ecclesiae remains a relatively new and uncertain doctrine, St.

61. Noonan, supra note 24, at 1045.
62. Ex Corde Ecclesiae, supra note 22, art. 4, § 4.
64. Id. at Part Two: Ordinances.
Thomas University decided to conform its educational and other programs to the new evangelizing policies. St. Thomas made a choice to be on the cutting edge of responding to *Ex Corde Ecclesiae* by being one of the first American Catholic universities to develop a Catholic identity philosophy and statement.65

The problem of the Catholic identity arose at St. Thomas University during the early 1990s. In a period of financial strain,66 St. Thomas University changed sponsors in 1988. The Archdiocese of Miami assumed sponsorship of the university from the Order of Augustinian Friars.67 St. Thomas faced a routine reaccreditation review by the Southern Association of Colleges and Schools in the early 1990s.68 One university programmatic element reviewed by the accreditors involved institutional purpose.69 The accreditors required St. Thomas to publish a stated purpose in clear and concise terms.70 In preparation for the reaccreditation review, the university undertook a wide-ranging self-study process.71 One element of the self-study process included institutional purpose,72 and the Principal Committee on Institutional Purpose found that with the change of sponsorship to the Archdiocese of Miami, the university needed to articulate the meaning of its Catholic identity. The committee alluded to *Ex Corde Ecclesiae* without naming the document.73 The committee recommended that the university president "design and implement a plan of action to clarify the meaning of Catholic identity at the university."74

The Southern Association of Colleges and Schools never focused on the Catholic identity of the university, but criticized more generally the university’s mission statement as lacking clarity.75 Nonetheless, the university president appointed the University Task-Force on Catholic Identity in 1992 to draft the "Catholic Identity Statement."76

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66. St. Thomas University, Crossroads of the Hemisphere, Self-Study for Reaffirmation of Accreditation 11 (Feb. 18, 1993) (on file with authors) [hereinafter Crossroads].
67. Id. at 10.
69. Id. at 13-14.
70. Id. at 13.
71. Crossroads, supra note 66, at 6-9.
72. Id. at 10-19.
73. Id. at 18.
74. Id.
76. See History of the Document (A history of St. Thomas University’s Catholic Identity, A Living Document, received from Dr. Edward J. Holland, Chairperson, President’s Task Force
The task force spent two years consulting university constituencies. A core group drafted an identity statement, while a wider community resource group consulted with the core group. By 1994, the Catholic Identity Statement had been written and affirmed by the university community. The St. Thomas Catholic identity process and document make St. Thomas one of the first American Catholic universities to respond in an organized fashion to Ex Corde Ecclesiae. The St. Thomas University Task Force on Catholic Identity sought, through its pioneering work with Ex Corde Ecclesiae, to assist the United States National Conference of Catholic Bishops in developing guidelines for implementing Ex Corde Ecclesiae in the United States.

The Catholic identity of St. Thomas University basically remained faithful to the evangelical thrust of Ex Corde Ecclesiae. St. Thomas University helps South Florida to find a healing path, formulating intellectual and moral resolutions for the spiritual, social, and ecological crises of the period around the turn of the millenium. The university's tasks of research, teaching, and service must bring Jesus' message to a modern culture wounded by secularization, social injustice, and ecological devastation. The subjects of evangelizing are university students, who will carry their academic experience into society, affirming good and transforming evil. However, the evangelical role of St. Thomas is a complex and textured one. Evangelizing at St. Thomas must be nonexclusionary and nonrepressive. The university recognizes that Catholics should avoid imposing values on others. Evangelizing at St. Thomas involves a dialogue. The university consists of colearners, and the university initiates students to Catholic values. All dialogues must occur within a pluralistic community that is diverse in its makeup.

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on Catholic Identity) (on file with authors) [hereinafter History of the Document].
77. Id. One member of the Core Committee and two members of the resource group were Jewish. A list of members of both groups appears at St. Thomas University's Catholic Identity, A Living Document 20-21 (1996) (on file with authors) [hereinafter Catholic Identity].
79. See Letter from the Archbishop of Miami, in Catholic Identity, supra note 77.
80. Catholic Identity, supra note 79, at 19 n.9.
81. See supra notes 32-64 and accompanying text.
82. Catholic Identity, supra note 77, at 1.
83. Id. at 5.
84. Id. at 7.
85. Id. at 4.
86. Id. at 5.
87. Id. at 4.
88. Id. at 3.
89. Id.
90. Id. at 4.
St. Thomas University creates its Catholic identity by creating a balance between evangelizing the Gospel of Jesus and fostering an open dialogue between a diverse group of people. This balanced identity was reflected in discussions about the Catholic identity of St. Thomas at a university meeting. Catholic universities were portrayed as intellectually open and universalist institutions that fostered diversity of beliefs. The research function of Catholic universities was portrayed as involving freedom and truth. The president of the university stated clearly that the community will remain diverse and that all are welcome. St. Thomas recognizes a need to balance an evangelical role with a universalist openness to diverse ideas and people because the university remains cognizant of the multicultural and international context of South Florida, the area primarily served by the university.

The university's surroundings encourage a universalist-open approach to education and discourage a parochial-doctrinal approach to religious advocacy. St. Thomas is located in Dade County, Florida, where human diversity shapes elements of daily life. Not only does Dade County include a balanced racial, ethnic, and linguistic mix, but it also includes a religious mix. St. Thomas seeks to serve what the university characterized in the early 1990s as "the crossroads of the hemispheres." To serve such a diverse community, the university must remain open to a variety of belief systems. For instance, in 1990, in Dade County, while eighteen percent of the population was Catholic, ten percent of the population was Jewish. In 1990, in neighboring Broward County, eighteen percent of the population was Catholic and fourteen percent of the population was Jewish.

91. A "Catholic Identity Study Day" occurred on February 23, 1996. All members of the university faculty, administration, and staff were encouraged to attend.
92. Dr. Francis Sicius, Newman's Idea of a University 3 (a Background Paper for the St. Thomas University Task Force on Catholic Identity) (on file with authors).
93. Donna Price, Research at St. Thomas University 2 (on file with authors).
97. Id. at 268.
100. Id. at 83.
Palm Beach County, Catholics constituted thirteen percent of the population, while Jews constituted fourteen percent of the population.\textsuperscript{101}

Assertions about the need for Catholic faculty to fulfill the evangelical mission of the university must be read in the diverse universalalist context of South Florida. In fact, St. Thomas University seeks a "critical mass of Catholic faculty and administrators."\textsuperscript{102} At the same time, the assertion about the need for a critical mass of Catholics is made in the context of "welcoming people from all religious and humanistic traditions."\textsuperscript{103} St. Thomas avoids a strict definition of "critical mass." Instead, the use of the term "critical mass" remains deliberately ambiguous, and St. Thomas University asserts "[i]t is conceivable that a strict majority of Catholics will not be required in the U.S. case."\textsuperscript{104}

St. Thomas aims to create a balance between avoiding secularization of the university and rigid sectarianism.\textsuperscript{105} Overall, the St. Thomas University context facially promises to be a learning and teaching venue friendly to Jewish and other non-Catholic faculty. However, the university also makes an ominous assertion about Jewish and other non-Catholic faculty. The balance between secularization and rigid sectarianism constitutes a middle ground conceived as "institutional hospitality," where the university is clearly a Catholic home to which many non-Catholic guests are invited to be treated with honor and gratitude for entering the evangelical dialogue.\textsuperscript{106} The Jewish professor becomes converted from member of a learning community into a mere guest. Professor Dershowitz would be seeking a teaching position in an intellectual environment where he would be a guest and implicitly not a full member of the community.

IV. PORTENTS: NEO-BRANDEISING AND THE EMERGENCE OF THE MARGINALIZED JEWISH LAW PROFESSOR

The American Catholic bishops refuse to make Professor Dershowitz's academic life or, for that matter, the academic life of any Jewish law professor who aspires to teach, or who teaches at, a Catholic law school, an easy one. The bishops have decided to reduce the non-Catholic law professor to a tolerated minority status. In 1996 the American bishops adopted a proposed local ordinance that would apply \textit{Ex Corde Ecclesiae} to American Catholic universities and their

\begin{enumerate}
\item [101.] \textit{Id}. at 90-91.
\item [102.] Catholic Identity, \textit{supra} note 77, at 3.
\item [103.] \textit{Id}.
\item [104.] \textit{Id}. at 18 n.5.
\item [105.] \textit{Id}.
\item [106.] \textit{Id}.
\end{enumerate}
law schools.\textsuperscript{107} That proposed ordinance did not mandate religious staffing requirements for university and law school faculties. In May 1997 the Vatican rejected that proposed local ordinance because the proposal failed to assure the strengthening of the Catholic identities of Catholic institutions of higher education.\textsuperscript{108} In response to the Vatican rejection of the proposed ordinance, the National Conference of Catholic Bishops \textit{Ex Corde Ecclesiae} Implementation Committee rewrote the proposed local ordinance with the help of a subcommittee consisting of canon lawyers.\textsuperscript{109}

The newly rewritten proposed American local ordinance for \textit{Ex Corde Ecclesiae} would create specific norms to be followed by all American Catholic universities and their law schools.\textsuperscript{110} Not only would Catholic law schools be required to recruit "faithful Catholics" to the law faculty, but Catholics "committed to the witness of the faith" must constitute a majority of the faculty.\textsuperscript{111} Law faculty should participate in religious life and activities of the law school and university.\textsuperscript{112} Non-Catholic law professors must be aware and respectful of Catholic traditions.\textsuperscript{113} All professors must exhibit academic competence and "integrity of doctrine and good character."\textsuperscript{114} The American bishops consulted with Catholic university officials in the United States before finalizing the proposal.\textsuperscript{115}

\textit{Ex Corde Ecclesiae,}\textsuperscript{116} the proposed American local ordinance\textsuperscript{117} and implementation processes, such as the one at St. Thomas University,\textsuperscript{118} place Professor Dershowitz and other Jewish and non-Catholic law professors seeking teaching positions at or teaching at Catholic law schools into a lower status. Practicing Catholics, especially those who actively profess Catholic faith and live their lives in the context of Catholic doctrine, become prioritized in faculty recruitment and, pre-

\begin{thebibliography}{99}
\bibitem{108} See Association of Catholic Colleges and Universities Update (July/August 1997) (on file with authors); United States Catholic Conference News Release (May 27, 1997) (on file with authors).
\bibitem{109} See Memorandum from Bishop John J. Leibrecht, Chair, \textit{Ex Corde Ecclesiae} Implementation Committee, to the Bishops, Presidents of Catholic Colleges and Universities, Sponsoring Religious Communities and Learned Societies (October 15, 1998) (on file with authors).
\bibitem{110} See "\textit{Ex Corde Ecclesiae}”: An Application to the United States, 28 \textit{ORIGINS} 438, 440 (Part 2, art. 1(1)) (Dec. 3, 1998).
\bibitem{111} Id. at 441 (Part 2, art. 4(4)(a)).
\bibitem{112} Id. (Part 2, art. 4(4)(b)).
\bibitem{113} Id. (Part 2, art. 4(4)(a)).
\bibitem{114} Id. (Part 2, art. 4(4)(c)).
\bibitem{115} Id. at 438.
\bibitem{116} See supra notes 32-64 and accompanying text.
\bibitem{117} See supra notes 110-15 and accompanying text.
\bibitem{118} See supra notes 65-106 and accompanying text.
\end{thebibliography}
sumably, retention. They become preferred, while non-Catholics, including Jewish law professors such as Professor Dershowitz, become tolerated as long as they remain respectful of Catholic traditions and possess integrity of doctrine and good character. Presumably, these traits must also be exhibited in teaching and scholarship. Such a faith dichotomy makes some Jewish faculty members, including the authors of this Article, feel demeaned and demoted to a new lower status. This new religious class system promises to change the social relations between Jewish faculty and their Catholic law schools.

A. The Modern American Jewish Experience and the Original St. Thomas Experience

The experience of Professor Dershowitz and other Jewish professors working or seeking work at Catholic law schools departs from the modern Jewish experience in the United States. America allowed Jews to break away from the rigid social structures of Europe, which had marginalized Jewish communities as outside the main and dominant society. America also allowed Jews to seek equality and a sense of belonging instead of just being tolerated as different. America posed the Jewish community with a new challenge, surviving in the context of cultural pluralism. In fact, many Jews became involved in furthering and nurturing pluralism and ethnic assimilation in America.

America provides Jews with an egalitarian home where a universalist social value system assures that individuals are judged on the basis of competencies and merit instead of inherited traits such as familial religion. Jews in the United States are free to participate in American society as equals and are not automatically marginalized as Jews. Social status for American Jews is attainable through individ-

125. Id. at 4.
126. Id. at 5.
ual effort and not through ancestral religious affiliations and history. As a result, Jews compete equally in America with those of other faiths. America has been a good place for Jews to gain acceptance and prosperity.

The authors' experiences at St. Thomas University School of Law prior to the mid-1990s reflected the modern Jewish experience in America. St. Thomas involved the authors in a three-dimensional process. The school was new and focused heavily on training competent lawyers to serve South Florida. Creation of learning environ-

127. Id. at 9-10.
128. Id. at 11.
129. Id. at 7-8.
130. See St. Thomas University School of Law Faculty Handbook (Mission of the Law School) 1 (1990-1991) [hereinafter Faculty Handbook]. In 1990-1991, the School of Law Mission stated:

The St. Thomas University School of Law is part of a Catholic university dedicated to the moral and spiritual values of the Judeo-Christian tradition. The School of Law strives to develop the intellectual capacities and spiritual values of the women and men who attend its program. The faculty is committed to imparting to every student a respect for the role of law in a civilized society, a sensitivity to the qualities of mercy and justice, and a commitment to protecting the dignity and liberty of all people in equality before the law.

The School of Law expresses its dedication to these values by adopting as its Mission the following goals:

1. To provide the opportunity to study law to a wide diversity of students, especially to those groups which traditionally have been denied the opportunity to attend law school and are under-represented in the Bar.
2. To train highly competent lawyers who will serve South Florida.
3. To emphasize the role of professionalism and professional ethics in the practice of law.
4. To provide an understanding of the role of law in the international context of South Florida.
5. To create a personal, caring, and individualized teaching environment for all students and to maintain a low student-faculty ratio.
6. To develop the Catholic heritage of St. Thomas University.

1. To provide the opportunity to study law to a wide diversity of students, especially to those groups which traditionally have been denied the opportunity to attend law school and are under-represented in the Bar.

The practice of law is a form of intellectual community leadership and the School of Law is committed to providing access to such opportunities to members of all racial, religious, ethnic and socio-economic groups, as well as the handicapped. The School of Law has a special commitment to training lawyers who are members of South Florida's Hispanic and Black communities, who will then serve those communities that have traditionally been underserved by the bar. There can be no equality before the law unless there are practitioners dedicated to assuring that legal services are accessible to every community.

The School of Law also has made a commitment to students of all ages. Nontraditional students who seek career changes or students who have delayed their law school educations because of home-making responsibilities or financial considerations are encouraged to apply. The School of Law also recognizes that not all graduates will practice law. Students who are in fields such as law enforcement, business, real estate,
ment became the top dimension and consumed a lot of individual and institutional resources.

insurance, local government, or teaching may choose to remain in their field after graduation.

The School of Law recognizes that it has a continuing obligation to assist marginal students who may require remedial work to complete the law school program. These students have the ability to be successful in law school but may need help in developing the skills necessary for law school success.  
2. To train highly competent lawyers who will serve South Florida.

The School of Law is committed to training highly-qualified lawyers to serve all segments of the community. Because our students will practice in a wide variety of settings, including small firms, government agencies and legal-aid organizations, the curriculum is designed to prepare students to deal with recognized problems of the present and anticipated problems of the future. This is accomplished by offering a traditional curriculum, with emphasis on developing analytical and practical skills through, among other means, rigorous examination and demanding clinical programs.  
3. To emphasize the role of professionalism and professional ethics in the practice of law. 

Students are trained to be officers of the court who serve the interests of clients while at the same time serving the ends of justice and the common interest. The faculty strives to make students aware of their duties to provide their services with integrity and with the highest ethical standards. Students should be taught that membership in the bar is a privilege which requires that lawyers willingly make contributions to the community by providing pro bono work and civic leadership.  
4. To provide an understanding of the role of law in the international context of South Florida. 

South Florida is at the crossroads of cultures, nationalities and legal systems. Miami is a quintessential international city connecting the United States to the Caribbean, and Central and South America. The School of Law is sensitive to the needs of the international communities that are converging in South Florida and to the many transnational transactions that occur in the Miami metropolitan area. Not only does the School of Law provide instruction in international commercial law, students are made aware of the legal needs of immigrants to this community through the study of immigration law and immigration placements in our clinic. Special emphasis also is given to the role of international law in assuring world peace and serving the ends of political and economic justice.  
5. To create a personal, caring, and individualized teaching environment for all students and to maintain a low student-faculty ratio.

St. Thomas is, by design, a small law school. At full capacity, the School of Law can accommodate approximately 420 students. Because some of our students may require remedial assistance, a small class environment should be more conducive to achieving individual success. The School of Law is designed to maintain a low student-faculty ratio. Students are encouraged to meet with their advisors and professors for special help and advice. In addition, students with writing problems are given special assistance on a one-to-one basis in the required Skills Enhancement program.  
6. To develop the Catholic heritage of St. Thomas University. 

St. Thomas University has always had a Catholic identity. Originally sponsored by the Order of St. Augustine, it is now sponsored by the Archdiocese of Miami. The life experiences of the founders and sponsors of St. Thomas University have sensitized the institution to the role of law in a civilized society, the qualities of mercy and justice, the dignity of all people, and the importance of liberty and equal justice for all. The faculty rededicate themselves to those basic institutional values.
The second dimension involved the gatekeeper role of St. Thomas in educating future members of the bar. St. Thomas devoted itself to providing legal educational opportunities to a wide variety of students, including, and especially, members of groups such as South Florida's Hispanic and African-American communities who traditionally were denied the opportunity to attend law school and be represented in the ranks of the bar.\textsuperscript{131} St. Thomas recognized that previous generations of lawyers had experienced discrimination on the basis of race.\textsuperscript{132} Both of these priorities fit well with the Jewish-American experience involving egalitarianism and individual competence.\textsuperscript{133}

The third dimension of St. Thomas involving the authors created a context based generally on the Catholic environment of St. Thomas. One of the missions of the law school involved developing the Catholic heritage of St. Thomas,\textsuperscript{134} and the law school dedicated itself to developing the spiritual values of law students in the Judeo-Christian tradition.\textsuperscript{135} This religious context allowed the law school to prioritize moral values, emphasizing professionalism and professional ethics in legal practice.\textsuperscript{136} St. Thomas provided the authors with the freedom to engage in moral value-laden dialogue with students. One of the authors developed an entire segment of his professional responsibility class around a student-based and developed moral model that enhanced rule-based professional responsibility analyses of professional problems.\textsuperscript{137} The religious context of the law school strongly supported such an approach and created an extra dimension to academic freedom, which not only allowed discussions concerning moral values but even concerning the presence of a God as a basis for those moral values.\textsuperscript{138}

\textsuperscript{131} Id.
\textsuperscript{132} See, e.g., State ex rel. Hawkins v. Board of Control of Florida, 47 So. 2d 608 (Fla. 1950).
\textsuperscript{133} See LIPSET & RAAB, supra note 124, at 4-5.
\textsuperscript{134} See Faculty Handbook, supra note 130, at 1 (1990–1991).
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} One of the authors devoted the first two to three weeks of the semester to facilitating a student-developed moral model based on values learned by students and the professor early in life. The facilitation aimed at creating a consensus or near consensus. Students compared their own moral model with a law school-learned due process model of values. The professor presented the class with his hypothesis that many attorneys and judges face disciplinary charges because they forget or avoid the discomfort created when the individual moral model lacks synchronization with the due process model. The professor urges students to accept a sense of discomfort in law practice as a means of avoiding disciplinary problems.
\textsuperscript{138} One of the authors asserts in class that some people believe that the moral individual model originates with God. Overall, classes have not accepted such assertions well. There is often discomfort in class. The author feels glad to be in a religious context when he makes such assertions, and fears that such assertions in a secular or publicly funded law school would be
B. Neo-Brandeising Jewish Faculty at Catholic Law Schools

The three dimensions of St. Thomas—competency, diversity, and the opportunity for value oriented legal education—which involved the authors until the mid-1990s, reflected well the universalist, individualist, and meritocratic experience of the modern American Jewish community. In the mid-1990s, however, the inclusive atmosphere changed and Jewish faculty at the law school became more marginalized through the formulation of a Catholic identity policy. The extent of the marginalization of the Jewish law professors at St. Thomas and other Catholic law schools remains unclear. The movement to Catholicize the faculty only started in the mid-1990s, and the overall impact for the future will remain unmeasurable for quite awhile. However, a new role for Jewish law professors at St. Thomas, which repeats an older Jewish role in American history and European society, may be emerging. St. Thomas and all other Catholic law schools may be required by the implementation of Ex Corde Ecclesiae to “neo-Brandeis” their Jewish faculties.

The concept of neo-Brandeising is an adaptation of a discussion about Justices Louis Brandeis and Felix Frankfurter by Robert A. Burt, who compared and contrasted the social identities of Frankfurter and Brandeis. Burt conceived of Frankfurter as striving for insider status in American society. Frankfurter embraced Americanism and American patriotism, attempting to erase any social-political distinctiveness of Jewishness in American society. On the other hand, Brandeis stood alone and apart. Brandeis was neither an American insider nor outsider. He was an American who had strong sympathies for others whom America defined as outsiders.

Burt connected his social characterizations of Brandeis and Frankfurter with Hannah Arendt's earlier characterizations of social roles of Jews in European society during the last centuries. Frankfurter fit the role of Arendt's parvenu, seeking social acceptance in a non-Jewish society as a Jew, while Brandeis fit generally the role of

deemed politically incorrect.

139. See supra notes 65-106 and accompanying text.
140. ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN A PROMISED LAND (1988).
141. Id. at 41-42.
142. Id. at 9.
143. Id. at 13.
144. Id. at 29-30.
146. See BURT, supra note 140, at 62.
147. See ARENDT, supra note 145, at 66.
148. See BURT, supra note 140, at 62.
Arendt's pariah, being relegated to an outsider status in mainstream society.\textsuperscript{149} Burt found that Brandeis avoided being just an outsider. Instead, Brandeis was marginalized socially, being placed on the boundary of American society, as an insider-outsider.\textsuperscript{150} Arendt believed the European Jews became cast in the \textit{parvenu} and pariah roles because Jews lived in Europe as a defamed people.\textsuperscript{151} For Burt, Frankfurter's and Brandeis' social identities reflected an earlier American social experience where Jews were not as welcome in American society, especially in the legal profession, as they are today.\textsuperscript{152} Burt argued that Jews have become more accepted in modern American society because the role of outsider has been accepted and assumed by many groups in American society.\textsuperscript{153}

Neo-Brandeising means that Jews are again being cast in the role of marginal boundary people. Jews fail to be clear outsiders, but they also fail to be insiders. Jews no longer merit consideration on individual and meritocratic bases in a social system based on universalist values, in which all are judged as individuals. Instead, Jews become members of an inherited or adopted sectarian group. Neo-Brandeising describes well what will occur to Jewish faculty at St. Thomas University School of Law and other Catholic law schools as \textit{Ex Corde Ecclesiae} is implemented. Existing faculty remain part of the faculty, but they become part of a separate class, which must shrink to create a majority of Catholics. Jewish faculty still participate, but they receive a different form of consideration. Expectations of performance even seem different. No matter how good one is as a teacher, a Jew will never be part of the preferred class. St. Thomas implies a recreation of Arendt's vision of European social life, in which the Jews who succeed became something exceptional.\textsuperscript{154} Hopefully, conversion will not again become a necessity for acceptance and professional advancement.\textsuperscript{155}

Neo-Brandeising will become a predominant Jewish faculty social role if the application of \textit{Ex Corde Ecclesiae} is accepted by all Catholic law schools. Jewish faculty members, along with other non-Catholic faculty, will be transformed from integrated, participant members of their law school communities to guests among their law

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\textsuperscript{149} See ARENDT, supra note 145, at 66.
\textsuperscript{150} See BURT, supra note 140, at 62-63.
\textsuperscript{151} Id.
\textsuperscript{152} See ARENDT, supra note 145, at 66.
\textsuperscript{153} See BURT, supra note 140, at 2.
\textsuperscript{154} Id. at 3.
\textsuperscript{155} See ARENDT, supra note 145, at 58, 64.
\textsuperscript{156} Id. at 64.
school faculty. One commentator recognized the danger of insularity when a law school faculty lacks religious and ideological diversity. One way around that insularity would be visiting professorships. Interestingly, Ex Corde Ecclesiae and the proposed American local ordinance create a middle ground. Jewish faculty become permanent or semipermanent guests instead of visitors. The Jewish professor lends some divergent religious color to the Catholic law school home. Such imagery is reminiscent of Arendt’s description of Jews as exotic in the European social structure in past centuries.

C. The Threat of a New Jewish Quota

Ex Corde Ecclesiae and the proposed American local ordinance threaten the return of a Jewish quota. For much of the first half of the twentieth century, Jews suffered from the American collegiate religious quota, specifically a Jewish quota. Deans of America’s top educational institutions discussed their “Jewish problem,” large numbers of Jewish students applying to and attending their colleges and universities. President Lowell of Harvard took a leadership role in creating a Jewish quota to restrict access of Jewish students to American higher education. Seven hundred liberal arts schools followed the lead of the best schools. American law schools followed by restricting the number of Jews admitted. A faculty quota existed, which paralleled the student Jewish quota. Again, Harvard Law School took a leadership position in restricting the number of Jewish faculty, and other law schools followed.

The Jewish quota struck at the heart of modern Jewish social life. For European Jews, especially German Jews, education represented the means of learning how to fit into Christian society. For people who were socially marginalized, the independent professions, such as law and medicine, allowed legitimacy on the fringes of society.

157. See Wolfe, supra note 56, at 501.
158. Id.
159. See ARENDT, supra note 145, at 56-62.
161. Id. at 239-40.
162. Id. at 233-34; see also LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 230 (1986).
163. See Synott, supra note 160, at 250.
164. Id. at 258-59.
165. See BAKER, supra note 162, at 232.
166. Id. at 232-33.
167. Id. at 233.
168. See ARENDT, supra note 145, at 60.
169. Id.
Minimizing bias involved avoiding mainstream social and economic institutions, and law and medicine provided an independent status that avoided bias.\(^\text{170}\) After the end of the Jewish quota, America’s law faculties became havens for Jews.\(^\text{171}\) The law faculties combined professional independence with the traditional Jewish commitment to analytical learning.\(^\text{172}\) The commitment of *Ex Corde Ecclesiae* to a majority of Catholic faculty and the creation of predominantly sectarian classes hint at a soon-to-be limit on the nonbelievers, and for Jewish faculty, that implies a quota. Oddly, the Jewish quota traditionally developed at Protestant educational institutions,\(^\text{173}\) and the Catholic law schools developed as places where recent immigrants could avoid religious and ethnic prejudice.\(^\text{174}\)

The hint of a Jewish quota at Catholic law schools as a result of *Ex Corde Ecclesiae* is particularly threatening. Such a quota may seem defensible as a property concept. Those who own the institution, in the case of St. Thomas, the Archdiocese of Miami, should control the institution.\(^\text{175}\) Naturally, those who control should populate the institution. This is analogous to possessors of property also possessing the right to inhabit the property.\(^\text{176}\) However, the evangelical nature of Catholic educational institutions raises the stakes on this simple property model. *Ex Corde Ecclesiae* does more than just reserve Catholic higher education properties for Catholic teachers and students. *Ex Corde Ecclesiae* establishes a moral imperative for Catholic universities to establish a moral standard and tone for all of modern society. The Catholic university possesses a compelling role in proclaiming the meaning of truth.\(^\text{177}\) The objective of the Catholic university involves an intellectual presence in confronting the great problems in society and culture.\(^\text{178}\) Research at a Catholic university will be devoted to discovering the root causes of the serious problems of our modern times.\(^\text{179}\) The Catholic university brings its witness of Christ to cultures marked by secularism.\(^\text{180}\) The evangelical role of the Catholic

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170. See Lipset & Raab, supra note 124, at 22.
171. See Burt, supra note 140, at 64-65.
172. See Lipset & Raab, supra note 124, at 22-23.
173. See Synott, supra note 160, at 234.
176. Id.
177. Ex Corde Ecclesiae, supra note 22, ¶ 4.
178. Id. at ¶ 13.
179. Id. at ¶ 32.
180. Id. at ¶ 49.
university implies that modern secularized society suffers from a lack of spiritual truth and that the Catholic university possesses a moral role to instill truth and spirituality.

The Catholic university takes on a moral leadership role for, and in, secularized society. A commitment to a majority of Catholic faculty and the creation of sectarian castes that move toward a Jewish quota in law schools become particularly threatening in the context of the imperatives of moral leadership. Jewish quotas in Catholic universities transform from a means to regain Catholic ownership of Catholic law schools into a by-product and component of spiritual, moral exemplification for a secularized society. Sadly, the evangelical imperative clothes a Jewish quota with a moral imperative to be followed by all of American society. If those who espouse moral and spiritual truth can create a Jewish quota to assure control of their law schools, secularized society should possess no moral qualms about tapping into the traditional reservoir of antisemitism.\textsuperscript{181} \textit{Ex Corde Ecclesiae} risks becoming a moral mask that legitimates a religious caste system in America. The moral imperative nature of \textit{Ex Corde Ecclesiae} combines with the requirement that a majority of law teachers be Catholic, creating a moral example for all American institutions, religious and nonreligious, in their hiring and retention practices. If Catholic universities that possess an evangelical role in proclaiming truth can discriminate on the basis of religious belief, then certainly all other institutions that do not possess the weighty task of proclaiming God's truth can discriminate. The Catholic universities and law schools would be estopped from protesting the immorality of religious discrimination. The authors would argue the same about religious law schools, Catholic, Jewish, Protestant or other, which utilized religious law to justify religious hiring restrictions or quotas.

\textbf{D. Catholicism and the Bases for Antisemitism}

Neo-Brandeising, marginalizing Jewish law professors, even along with all non-Catholic law professors, and the threat of a new Jewish quota reinvigorate a role that the Catholic Church would want to avoid in the context of the objectives of \textit{Ex Corde Ecclesiae}. The Catholic university is a crucial instrument in dialogue between Catholicism and other cultures.\textsuperscript{182} The evangelical medium involves a dialogue.\textsuperscript{183} Such a dialogue will fail if the Catholic Church revisits its historical role in castigating Jews. Neo-Brandeising as a form of mar-

\begin{itemize}
\item \textsuperscript{181} See LIPSET \& RAAB, supra note 124, at 77.
\item \textsuperscript{182} EX CORDE ECCLESIAE, supra note 22, ¶ 6.
\item \textsuperscript{183} Id.
\end{itemize}
ginalization sadly reflects a Catholic tradition of marginalizing Jews. As early as St. Augustine, the Catholic Church vilified Jews, reinforcing images of Jews as rejected people.\(^\text{184}\) The Crusades further isolated European Jewry.\(^\text{185}\) Canon Law by the thirteenth century legitimated the subordinate position of Jews in Catholic-dominated Europe.\(^\text{186}\) During the Sixteenth Century, Pope Paul IV played a role in forcing Jews into centuries of ghetto life.\(^\text{187}\) The ambiguity of the role of the Catholic Church in creating the political context for Nazism and the Holocaust\(^\text{188}\) remains a concern for many Jews.\(^\text{189}\)

Oddly, the potential for neo-Brandeising implicit in the application of *Ex Corde Ecclesiae* to American law schools conflicts with the efforts of the Catholic Church during the past thirty years to improve relations with Jews,\(^\text{190}\) especially American Jews.\(^\text{191}\) Pope John Paul II has gone far to bridge the historical division between Catholics and Jews.\(^\text{192}\) He has spoken eloquently about the suffering of the Jews during the Holocaust.\(^\text{193}\) The concept of Catholic faculty majoritarianism seems to defy the American Catholic dialogue.\(^\text{194}\) Oddly, *Ex Corde Ecclesiae* fits well with a dialogue between Catholics and Jews. However, Catholic law schools depopulated of new Jewish faculty and students would possess little potential for dialogue, especially with remaining Jewish faculty marginalized into the role of house guests.

V. PREVENTING NEO-BRANDEISING: AN AMERICAN CONSTITUTIONAL POLICY RESPONSE TO *EX CORDE ECCLESIAE*

The best way to prevent the neo-Brandeising of Jewish faculty and marginalization of all non-Catholic faculty at American law

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185. See generally Wistrich, supra note 184.

186. Id. at 25-26.


188. Id. at 295-96, 314-15.


190. See Nostra Aerare, Declaration on the Relationships of the Church to Non-Christian Religions (1965) (portions relating to the Jewish religion can be found in The Catholic Almanac 290-93 (1996)).


193. Id.

194. See Singer, supra note 191, at 386-89.
schools would be to focus on the educational enterprise. The United States Supreme Court provided insights into the higher educational enterprise in *Rosenberger v. Rector and Visitors of University of Virginia*.\(^\text{195}\) In *Rosenberger*, a Christian magazine at the University of Virginia claimed that the University of Virginia violated constitutional free speech, religious exercise, and equal protection protections\(^\text{196}\) by refusing to pay, out of student supported funds, the costs of printing the magazine.\(^\text{197}\) The United States Supreme Court sided with the magazine, finding viewpoint discrimination by the University of Virginia\(^\text{198}\) and holding that the Establishment Clause does not prohibit payment of printing costs for a religious magazine.\(^\text{199}\)

The constitutional doctrine of *Rosenberger* applies to public universities and should not impact directly St. Thomas and other private and sectarian educational institutions. However, what Justice Kennedy states about American higher education applies generally to all institutions, private and public. His remarks about the nature of the educational enterprise also apply in the sectarian educational context. Kennedy found that Virginia acted within a general context implicating a "tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."\(^\text{200}\) For Kennedy, the modern American university represents a vital center of America's intellectual life.\(^\text{201}\) The vitality of intellectual life depended on the quality and creative power of intellectual life at universities.\(^\text{202}\) Justice Kennedy found that discourse about a deity and alternate realities formed a basic component of educational creativity.\(^\text{203}\) Restrictions on religious discourse undermine educational inquiry, and would have hindered such scholars as Karl Marx, Bertrand Russell, and Jean Paul Sartre.\(^\text{204}\)

Kennedy's image of American higher education is vibrant, and it has much in common with Pope John Paul's II image of education. In fact, Kennedy referred, in *Rosenberger*, to the intellectual awakening in the early Catholic universities in Bologna and Paris.\(^\text{205}\) Pope John Paul II also alluded to the early Catholic origins of the modern univer-

\(^\text{196}\) Id. at 827.
\(^\text{197}\) Id. at 822-23.
\(^\text{198}\) Id. at 832.
\(^\text{199}\) Id. at 841.
\(^\text{200}\) Id. at 835.
\(^\text{201}\) Id. at 836.
\(^\text{202}\) Id.
\(^\text{203}\) Id.
\(^\text{204}\) Id. at 837.
\(^\text{205}\) Id. at 836.
Like Justice Kennedy, Pope John Paul II recognized the creative vitality of the university experience. The Pope's own university experience "deeply enriched" him. The university experience involves "the joy of searching for, discovering, and communicating truth." That search for truth is an impartial one involving courageous exploration. For John Paul II, the Catholic university involves the Catholic Church in a "fertile dialogue with people of every culture."

Both Pope John Paul II and Justice Kennedy embrace images of vitality, excitement, and diversity in the educational enterprise. Rosenberger enhanced educational vitality in America's public institutions by assuring religious discourse, and Ex Corde Ecclesiae enriches the Catholic university by assuring courageous, impartial, and fertile dialogue among diverse cultures. Diversity and openness underlie both Pope John Paul II's and Justice Kennedy's educational models.

Diversity and openness depend on the presence of a variety of views within an educational institution. A dialogue between cultures implies the existence of diverse cultures and voices in the academy. The Catholic faculty majoritarianism and emerging personnel processes at Catholic law schools threaten a courageous and vital dialogue. If the more than twenty American law schools follow Ex Corde Ecclesiae, the potential richness of legal education as a quest for impartial truth will suffer. Neo-Brandeising Jewish faculty and marginalizing all non-Catholic faculty hinders the seriousness of any dialogues. When non-Catholics are demoted to the status of house guests in the academy, that demotion implies that some voices must remain weakened and careful. After all, the house guest wants to avoid angering the host and becoming unwelcome.

VI. CONCLUSION: THE CATHOLIC CHURCH FACES DECISIONS

The Catholic Church faces some critical decisions about the nature and value of the dialogue to be sponsored by the Catholic law schools. Will Catholic law schools reject their Jewish faculty and prospective Jewish law faculty and students of the future? Will Catholic law schools avoid true diversity and, therefore, complete and equal membership in an intellectual community? Will Catholic law schools be willing to hire Professor Dershowitz or a future Professor Der-

206. Ex Corde Ecclesiae, supra note 22, ¶ 1.
207. Id.
208. Id. at ¶ 2.
209. Id. at ¶ 1.
210. Id. at ¶ 5.
211. Id. at ¶ 6.
showitz? Will Catholic law schools pioneer the return of the Jewish quota? Most important, what really seems unclear is the lesson about equality that Catholic law schools will teach their students in the years ahead. Will Catholic law schools play a role in fostering the bias and hostility to religion that Justice Kennedy worried about in *Rosenberger*? When students see that some faculty voices are accorded guest status while others are accorded preferred status, the message is one about the legitimacy of inequality. The non-Catholic voice is unequal. The Jewish voice is unequal. Will Catholic law schools exemplify inequality, and shy away from teaching a future generation of lawyers about the value of equality?

*Ex Corde Ecclesiae* provides the world with a message of hope. Education is a vital and exciting process, and the dialogue created in the Catholic evangelical context seeks truth so that cultures can live together. The message is a dynamic one. Catholic law schools should play a role in creating a dialogue in American society about truth. What is uncertain is how strong or hollow the dialogue and message of hope are. A dialogue between cultures that excludes one or more cultures seems like a weak one. A dialogue without Professor Dershowitz and other Jewish law professors as integrated and equal members of a scholarly community is incomplete. A dialogue that requires some of its participants to marginalize other participants, such as Jewish law professors, seems like an unjust one. Catholic law schools have some choices facing them. They can neo-Brandeis their Jewish faculty or they can welcome all, including Professor Dershowitz, in an exciting evangelical quest.

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