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Where to Pray? A Survey Regarding Prayer Rooms in A.B.A. Accredited, Religiously Affiliated Law Schools

David L. Gregory*

I. INTRODUCTION

It was a miserably cold, rainy, and wind-swept evening in the middle of winter. No, this is not the terrible first sentence from an even worse cheap novel. It is, alas, an all-too-true story. A thoroughly rain-drenched law student, looking especially frustrated, came to my office before one of the late evening law school classes that I teach.¹ The student conveyed

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The former Chaplain of the School of Law, Reverend Stephen Macher, C.M., was the first to propose unsuccessfully the inclusion of a prayer room in the St. John's University School of Law, and he has furnished unequivocal support from the inception of my inquiries on this matter. He has been a singular exemplar of decency.

The student editorial board of *The Forum*, the newspaper of the School of Law, "heartily endorse[d] the construction of a meditation room in the law school building." *Editorial: A Meditation Room—Strict Necessity for the Thinker*, FORUM, Dec. 1992, at 2. Beyond this encouragement from some segments of the St. John's community, Thomas Daily, Bishop of the Diocese of Brooklyn; Joseph Cardinal Bernardin, Archbishop of Chicago; Bernard Cardinal Law, Archbishop of Boston; and Roger Cardinal Mahoney, Archbishop of Los Angeles, are Catholic Church leaders who have been especially supportive of my initiative. Several law school deans and administrators also provided letters or other words of encouragement, beyond their prompt responses to the survey, especially John Attanasio, St. Louis; Steven Frankino, Villanova; James B. Malley, S.J., Boston College; Gerald McLaughlin, Loyola of Los Angeles; Carol Mooney, Notre Dame; Laurence Raful, Creighton; and Rodney Smith, Capital, Montana. Helpful comments on prior drafts were generously provided by Professors Angela C. Carmella, Robert F. Drinan, S.J., Frederick M. Gedicks, Thomas L. Shaffer, and Steven D. Smith.

1. Since 1982, I have taught Labor, Employment, and Constitutional Law

chagrin, surprise, and disappointment upon finding the only chapel² on the almost 100-acre campus of our Catholic-affiliated University locked at 7:00 p.m. The student sought a quiet place to pray, and so had naturally, but futilely, gone to

and Jurisprudence courses at St. John's University School of Law in Jamaica, Queens, New York City. St. John's University was founded in 1870 by the Roman Catholic priests of the Congregation of the Mission, perhaps more popularly known as the Vincentians (just as members of the Society of Jesus are popularly known as the Jesuits). St. John's University is the largest university in the United States under the auspices of the Roman Catholic Church, with almost 20,000 students, approximately 1200 of whom are students at the School of Law. The Mission Statement of St. John's University expressly recognizes its Roman Catholic tradition and declares that it is Catholic, Vincentian, and Metropolitan.

We aim not only to be excellent professionals with an ability to analyze and articulate clearly what is, but also to develop the ethical and aesthetic values to imagine and help realize what might be.

St. John's is a Catholic university, founded in 1870 in response to an invitation of the first Bishop of Brooklyn, John Loughlin, to provide the youth of the city with an intellectual and moral education. We embrace the Judeo-Christian ideals of respect for the rights and dignity of every person and each individual's responsibility for the world in which we live. We commit ourselves to create a climate patterned on the life and teaching of Jesus Christ as embodied in the traditions and practices of the Roman Catholic Church. Our community which comprises members of many faiths, strives for an openness which is "wholly directed to all that is true, all that deserves respect, all that is honest, pure, admirable, decent, virtuous, or worthy of praise" (Philippians 4:8). Thus, the university is a place where the church reflects upon itself and the world as it engages in dialogue with other religious traditions.

St. John's is a Vincentian university, inspired by St. Vincent de Paul's compassion and zeal for service. We strive to provide excellent education for all people, especially those lacking economic, physical, or social advantages. Community service programs combine with reflective learning to enlarge the classroom experience. Wherever possible, we devote our intellectual and physical resources to search out the causes of poverty and social injustice and to encourage solutions which are adaptable, effective, and concrete. In the Vincentian tradition, we seek to foster a world view and to further efforts toward global harmony and development, by creating an atmosphere in which all may imbibe and embody the spirit of compassionate concern for others so characteristic of Vincent.

Mission Statement of St. John's University (1991).

2. A "chapel" in Roman Catholicism is a dedicated facility with a repository for consecrated communion hosts. Other religious faiths have decentralized prayer structures and obviously different belief systems. For example, members of The Church of Jesus Christ of Latter-day Saints (Mormons) at Brigham Young University have a strong tradition of geographically arranging their congregations. Congregational worship services regularly held at the BYU Law School may involve persons largely beyond the law school academic community. Throughout this Article, in the survey, and in the proposals I have made internally at St. John's, I use and I prefer the broader, more ecumenical term of a prayer room, rather than a "chapel." The broadest and most ecumenical terms may be a meditation, reflection, or "quiet" room.

the only chapel on campus, located on the ground floor of a University building several hundred yards from the law school. Walking several hundred yards across campus and negotiating several inclines in inclement winter weather would be trying enough; the frustration of the student, finding the chapel locked at 7:00 p.m., added to the consternation. This unfortunate exercise was exacerbated by the student's particular personal circumstances as one severely physically challenged.

While one may quibble pedagogically with the opportunity foregone by the student for a final, thorough review of that evening's assigned material prior to class, one can also appreciate the spiritual need of the harried, full-time working student, doggedly pursuing a law degree in the rigors of a four-year evening program, for a few minutes of prayer and meditation in a quiet room reserved for those purposes. There is no prayer room designated for such a purpose within the law school.³

Since I had occasionally made use of the campus chapel, although never in evening hours, my curiosity was piqued by the student's experience. Within a few days of my conversation with the student, I verified with the St. John's University Campus Ministry office that the campus chapel is normally locked at 7:00 p.m., with even earlier closings on weekends, unless there are special services.⁴ I was told the 7:00 p.m. weeknight locking was due to little perceived use after that time and to prevent vandalism, although I was also told there had never been any prior serious incidents of the latter. I expressed some concern that the University was summarily disenfranchising *de facto* a substantial percentage of the University student population, all of whom are commuters; there are no residential dormitories. Evening students seemed especially, and literally, locked out. I thought little more about any of these things until the fall of 1990.

3. The current law school building has a priest assigned as chaplain, a chaplain's office, and several artifacts and religious statuary, such as a large crucifix displayed over the first floor twin elevators and a Vatican flag in the first floor atrium main entrance, but there is no prayer room in the law school.

4. Years later, on April 2, 1993, as this Article was being written, I again confirmed with the Campus Ministry office that the campus chapel's normal in-semester hours remain 8 a.m.-7 p.m., Monday-Friday; 9 a.m.-3 p.m., Saturday; and 10 a.m.-1 p.m., Sunday, with the weekend hours being somewhat flexible.

After a research sabbatical, I returned to St. John's in late November, 1990. At that time, the University newspaper, *St. John's Today*, featured a front page article announcing the formal commencement of a multimillion-dollar fund-raising campaign for a major physical expansion of the law school building.⁵ After I reviewed the relatively detailed plans for the additions to the building, I was surprised to see no provision for a prayer room in either the current building or in the planned addition.⁶ I spoke with members of the law school building committee about the possibility of including a small prayer room, ecumenically open to all and austere designed and furnished, in the expanded law school complex. In late 1990 and early 1991, I sent several memoranda, all of which went unanswered, to the Vice President for Campus Ministry of St. John's University, with copies to the President of St. John's University. I solicited Campus Ministry's thoughts as to my proposal, which I had initiated unsuccessfully and without any support from among the law school faculty.

By the spring of 1991, the law school transitional administration stated that officials at the University had indicated to the law school administration that potential Establishment Clause problems precluded a prayer room within the law school, since the building addition would be at least partially financed by bonds issued through the New York State Dormitory Authority. I replied that while this financing plan perhaps could create some initial constitutional concern, I was nonplussed as to why this was not an issue previously,

5. The major addition to the current law school building will nearly double the school's total size of about 100,000 square feet to approximately 185,000 square feet. The law school building on the St. John's University campus was moved from an outgrown facility in Brooklyn in 1972. When the facility opened more than twenty-one years ago, it was a state-of-the-art building, designed for about 750 students and 25 faculty members. Today, there are approximately 1200 students and 50 faculty members. Some of the features in the new building will include three amphitheater classrooms; five small classrooms; two seminar rooms with large conference tables; and advocacy skills classrooms designed as miniature courtrooms with video cameras and playback units. The current 2700-square-foot cafeteria will be expanded to over 5000 square feet and adjoining it will be a 4000-square-foot student lounge and a 3000-square-foot atrium. Dan Corbett, *Building to Reshape St. John's*, FORUM, Nov. 1992, at 5.

6. I could recall only one Catholic mass liturgy ever portably offered within the premises of the law school between 1982 and 1990. In the late fall of 1990, St. John's University School of Law was in major administrative transition, with a dean search process underway. A prayer room for the law school building complex was not a high priority institutional item.

since the current law school building constructed in the early 1970s was also substantially financed through bond issues of the New York State Dormitory Authority and it included a chaplain's office, an assigned priest chaplain, a large crucifix, the Vatican flag, and other religious statuary and artifacts. There was no further response from the University or the law school transitional administration, and the law faculty, University and law school administration failed to show any support whatsoever for my proposal.

In the fall of 1991, I pursued the matter with the newly appointed Dean of the School of Law, who had come to St. John's from a Jesuit Catholic institution, the St. Louis University School of Law. The new administration indicated that while it was open to the flexible, portable use by Campus Ministry and the law school chaplain of various rooms within the law school building for religious services, it was not receptive to a prayer room as a dedicated, exclusive reserved space.⁷

St. John's University has undertaken a \$50 million building and renovation campaign, with \$15 million raised by a bond issue through the New York State Dormitory Authority,

7. David Markey, *Dean Meets with Students for Q and A*, FORUM, Dec. 1992, at 3 ("Dean Hasl said that he thought a room could be made available for 'religious services,' among other functions, but that he was 'not sure if space should be set aside for that purpose alone.'") Five months following the report of the Dean's quoted response to student questions at an open question and answer session that the Dean periodically conducts, the same student characterized the Dean as having "arrogantly rejected a meditation room to be part of Finley Hall, ignoring that this law school is affiliated with a Catholic university, and in the face of support for such a room among students." David Markey, *Dean Hasl's Crusade to Destroy St. John's Law School*, FORUM, Apr. 1993, at 3.

I have never personally found the Dean either "arrogantly" rejecting the proposed prayer room, or "ignoring" the Law School's religious affiliation. The Dean has indicated to me that while he is "disinclined" to pursue my proposal for a law school prayer room, he is receptive to Campus Ministry conducting religious services within various sites at the law school, as frequently occurred during his prior deanship at the Jesuit Catholic St. Louis University School of Law. It seems to me that the institutional initiatives, or absence thereof, are primarily the responsibility of the Campus Ministry of St. John's University, and not of any single law school administrator. During the most recent academic years, since I initiated and pursued the proposal for a prayer room in the law school in 1990-1991, the law school chaplain has periodically offered portable masses in the Moot Court room during final examination periods, most recently on May 9 and 16, 1993 at 5 p.m., Sunday evenings, although not regularly otherwise during the academic year. Unlike other Catholic law schools, St. John's School of Law does not offer a Red Mass under its law school auspices, a centuries-old practice to mark the commencement of the academic year.

through private bond holders.⁸ The credit rating of St. John's University backs the bonds.⁹ New York has no financial obligation should St. John's University default on the repayment of the indebtedness. The intersection of church and state is utterly *de minimis*.

Rejecting the "advice" of colleagues who have pointedly urged me to cease, I continue to pursue my proposal for a law school prayer room.¹⁰ My curiosity ultimately led to my September 1992 survey of each of the religiously affiliated¹¹ law schools accredited by the American Bar Association, the results of which this Article reports in Part III. If the personal also partially defines the political, I hope that my initial curiosity may also lead to a formally dedicated, exclusive-use prayer room, ecumenically open to all persons within the St. John's University School of Law.

8. N.Y. PUB. AUTH. LAW §§ 1676, 1680 (McKinney 1981) (amended 1984, 1992).

9. *Id.* § 1680(15)(b)(3).

10. These persons have reiterated that it would not be "prudent" for me to pursue such an "unpopular" proposal without any faculty support whatsoever, and in the face of initially major internal institutional indifference, which quickly hardened into institutional opposition to the inclusion of a dedicated-space, exclusive-use prayer room within the St. John's University School of Law. Camille Paglia wonderfully describes the eerie ambiance created by insipid bureaucrats who have pervasively infected what passes for higher education today.

The most interesting and daring minds of my generation did not, as a rule, go on to graduate school or succeed in the academic system. Hence our major universities are now stuck with an army of pedestrian, toadying careerists. Fifties types who wave around Sixties banners to conceal their record of ruthless, beaverlike tunneling to the top.

CAMILLE PAGLIA, *SEX, ART, AND AMERICAN CULTURE* viii-ix (1992). More charitably, I refer these persons to the liberating insights of two recognized establishment authorities, Henry Rosovsky, former Dean of the Graduate School of Arts and Sciences at Harvard University, and Professor Jack Getman of the University of Texas School of Law. See generally JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION* (1992); HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER'S MANUAL* (1990).

11. "Religiously affiliated" admittedly is a more awkward term stylistically than "church-affiliated" law school. "Church-affiliated" law school, however, is a term that does not appropriately indicate the affiliations of, for example, the Jewish-affiliated law schools of Yeshiva University and Touro College. I will therefore use the more awkward but more inclusive term of "religiously affiliated." This is also the terminology used by the American Bar Association and by the Association of American Law Schools. See AMERICAN BAR ASSOCIATION, *STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS*, standard 211 (1992); ASSOCIATION OF AMERICAN LAW SCHOOLS, *1993 HANDBOOK* 53 (1993) (Executive Committee Regulation § 6.17).

Before presenting the results of the survey, this Article will briefly review the salient First Amendment Establishment Clause and Free Exercise Clause case law. No definitive case law absolutely prohibits a prayer room within a religiously affiliated law school, even when the law school is constructed with substantial funds raised through the bond issues of the state.¹² There is also no definitive case law unequivocally endorsing the presence of a prayer room within a religiously affiliated law school; the point is self-evident. The broadly pertinent case law generally supports the constitutionality of a prayer room within a religiously affiliated private law school, even when the law school building is constructed in part with funds raised through state bond mechanisms.¹³

There is voluminous jurisprudence regarding the Establishment Clause and the Free Exercise Clause; this Article will not present an elaborate exposition of the broad scope of First Amendment religion jurisprudence.¹⁴ This Article's discussion of First Amendment jurisprudence, rather, is more modestly designed as a background to present the results of my survey of American Bar Association accredited, religiously affiliated law schools, regarding the presence and

12. For discussion of the constitutionality of government aid to religiously affiliated institutions of higher education, see Mark P. Gibney, *State Aid to Religious-Affiliated Schools: A Political Analysis*, 28 WM. & MARY L. REV. 119 (1986); Marjorie Maguire, Comment, *Having One's Cake and Eating It Too: Government Funding and Religious Exemptions for Religiously Affiliated Colleges and Universities*, 1989 WIS. L. REV. 1061; David H. McClamrock, Note, *The First Amendment and Public Funding of Religiously Controlled or Affiliated Higher Education*, 17 J.C. & U.L. 381 (1991); Al McConnell, Note, *Abolishing "Separate but (Un)equal" Status for Religious Universities*, 77 VA. L. REV. 1231 (1991).

13. See *infra* part II.

14. I have explored aspects of the First Amendment Religion Clauses' jurisprudence in some of my other writings. David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992); David L. Gregory, *Actualizing What Ought to Be: A Response to Professor Milner S. Ball*, 20 CAP. U. L. REV. 55 (1991); David L. Gregory, *The Role of Religion in the Secular Workplace*, 4 NOTRE DAME J.L. ETHICS, & PUB. POL'Y 749 (1990); David L. Gregory, *Teaching Moral Values in Public Schools: Some Constitutional Considerations*, 31 CATH. LAW. 173 (1987); David L. Gregory, *The First Amendment Religion Clauses and Labor and Employment Law in the Supreme Court, 1984 Term*, 31 N.Y.L. SCH. L. REV. 1 (1986); David L. Gregory & Charles J. Russo, *Let Us Pray (but Not "Them")! The Troubled Jurisprudence of Religious Liberty*, 65 ST. JOHN'S L. REV. 273 (1991); Charles J. Russo & David L. Gregory, *The Return of School Prayer: Reflections on the Libertarian-Conservative Dilemma*, 20 J.L. & EDUC. 167 (1991); David L. Gregory, Book Review, 29 CATH. LAW. 344 (1985); David L. Gregory, *Religion, State & the Burger Court*, 32 WAYNE L. REV. 191 (1985) (book review).

availability of dedicated, exclusive-use prayer rooms or equivalent spaces within their law school facilities. Furthermore, this brief overview will demonstrate that constitutional objections to having a prayer room in a religiously affiliated law school are minor, even if governmental bonds have been used in the construction of the school's facilities.

II. THE PERTINENT DECISIONS OF THE SUPREME COURT

A. *Tilton v. Richardson*

In 1963, the Congress of the United States passed the Higher Education Facilities Act,¹⁵ providing federal grants and loans to institutions of higher education. The law expressly excluded from eligibility any facility "intended to be used for sectarian instruction or as a place for religious worship."¹⁶ The federal government also presumed to retain a twenty-year interest in facilities constructed with the funds. The twenty-year interest provision was designed so that if the facility reverted to sectarian use, the government could claim an interest and be reimbursed for the present value of the funds originally expended.¹⁷ The Court, in *Tilton v. Richardson*,¹⁸ sustained the constitutionality of the federal law and struck down a challenge by a taxpayer-plaintiff who had alleged First Amendment Establishment Clause violations.¹⁹

In *Tilton*, four Catholic-related colleges and universities in Connecticut had received federal construction grants: Sacred Heart University for a library building; Annhurst College for a music, drama, and arts building; Fairfield University for a science building and for a library building; and Albertus Magnus College for a language laboratory.

The *Tilton* Court began its analysis by reviewing *Walz v. Tax Commission*.²⁰ According to *Walz*, the three main government intrusions into religion against which the Establishment Clause sought to protect were government sponsorship, financial support, and active involvement of the sovereign in reli-

15. Pub. L. No. 88-203, 77 Stat. 363 (1963) (repealed 1972).

16. *Id.* § 401(a)(2)(c).

17. *Id.* § 404.

18. 403 U.S. 672 (1971).

19. *Id.* at 689.

20. 397 U.S. 664 (1970).

gious activities.²¹ In *Tilton*, however, the Court stated that, "Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper that can be used to measure the precise degree to which these three factors are present or absent."²² The Court eschewed any bright line objective test, and applied, instead, "a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause."²³

The Court then applied the now-classic multipart Establishment Clause test set forth in *Tilton's* companion case, *Lemon v. Kurtzman*.²⁴ "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"²⁵ *Lemon* involved a Rhode Island program to grant a fifteen-percent supplement to the salaries of church-related, private school teachers of secular courses and a Pennsylvania program to reimburse church-related private schools for the cost of secular courses offered in public schools. The *Lemon* Court held that both state aid plans failed the third part of the test—that of excessive government entanglement with religion.²⁶

In *Tilton*, the Court posed and resolved each of the classic *Lemon* questions in favor of the federal aid, in addition to answering in the negative a fourth question: Did the implementation of the 1963 Federal Act inhibit the free exercise of religion? The Court also reminded everyone that "the simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*."²⁷ In *Bradfield*,²⁸ a federal construction grant to a hospital operated by Roman Catholic nuns in Washington, D.C. was upheld. The hospital provided medical care for poor, sick persons without regard to the patient's religion. The plaintiff in *Tilton* challenged the federal law on the grounds

21. *Id.* at 668.

22. *Tilton*, 403 U.S. at 677.

23. *Id.* at 677-78.

24. 403 U.S. 602 (1971).

25. *Id.* at 612-13 (citation omitted).

26. *Id.* at 613-14.

27. *Tilton*, 403 U.S. at 679.

28. 175 U.S. 291 (1899).

that its primary effect was to aid the religious purposes of church-related colleges and universities. The Court responded that the construction grants, although aiding the institutions in the construction of the buildings and thus enabling them to perform and fulfill various functions, were not unconstitutional governmental assistance. "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."²⁹

The Court there held that:

The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship.³⁰

Further, the Catholic-affiliated colleges also "presented evidence that there had been no religious services or worship in the federally financed facilities, that there [were] no religious symbols or plaques in or on them, and that they had been used solely for nonreligious purposes," problematic certifications which religiously affiliated law schools could not, and indeed should not, provide in otherwise similar circumstances today. The Court was not receptive to the absolute position of the plaintiff that education provided by church-related colleges and the church's religious functions were inseparable. The Court focused upon the fact that two of the five federally financed buildings involved in the case were libraries, one a science building, and one a music, drama, and arts building. The Court concluded that, "There is no evidence that religion seeps into the use of any of these facilities."³¹

While theology courses were required as part of the undergraduate curricula at these four Catholic universities, the Court was impressed with the schools' institutional and professional commitment to academic freedom, and with the non-proselytizing of students or faculty. None of the universities had a requirement that students be a member of a particular

29. *Tilton*, 403 U.S. at 679.

30. *Id.* at 679-80.

31. *Id.* at 681.

religion; and, in fact, the student bodies, while primarily Roman Catholic, were quite heterogeneous in terms of religious faith.

The only part of the Act that was found unconstitutional by the Court was the twenty-year government interest provision. This provision permitted the government to recover an amount equal to the proportion of the facility's present value that the federal grant bore to the original cost, in the event of sectarian religious use of the particular facility that was federally financed.³² The twenty-year period after completion of construction was termed by the Court in *Tilton*, as " 'the period of federal interest' and reflects Congress' finding that after 20 years 'the public benefit accruing to the United States' from the use of the federally financed facility 'will equal or exceed in value' the amount of the federal grant."³³ Therefore, the recipient institution's obligation not to use the facility for sectarian religious instruction expired at the end of the twenty-year period. The Court found that

[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

To this extent the Act therefore trespasses on the Religion Clauses. The restrictive obligations of a recipient institution under § 751(a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value.³⁴

The Court severed this single provision, and the balance of the Act was sustained as constitutional.³⁵ Thus, federally financed buildings at religiously affiliated institutions of higher education could never revert to primarily sectarian religious uses.

The Court made important distinctions between higher education and primary and secondary education.

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools There is substance to the contention that college

32. Higher Education Facilities Act, Pub. L. No. 88-203, § 404(a), 77 Stat. 363 (1963) (repealed 1972).

33. *Tilton*, 403 U.S. at 683 (quoting Pub. L. No. 88-203, § 404(a), 77 Stat. 363 (1963) (repealed 1972)).

34. *Id.*

35. *Id.* at 684.

students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students.³⁶

The Court found on the facts that none of the four Catholic religious institutions of higher education deviated from principles of academic freedom, that they had intellectual commitment, and that they were not primarily devoted to religious proselytization.³⁷ The Court favorably noted the ecumenical dimensions of the curricula, in that "some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis."³⁸ Thus, the Court concluded that it was simplistic and specious to proclaim a bright-line bifurcation between educational and religious dimensions of religiously affiliated institutions of higher education.

Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws.³⁹

36. *Id.* at 685-86 (footnotes omitted).

37. *Id.* at 686-89.

38. *Id.* at 687.

39. *Id.*

Finally, the Court found no excessive entanglement of government with religion. The government aid in *Tilton* was a one-time, single-purpose construction grant.

There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact.

No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in *Lemon* and *DiCenso*.⁴⁰

The *Tilton* principles articulated in 1971 were re-endorsed and expanded by the Court in 1973.

B. *Hunt v. McNair*

South Carolina passed the Educational Facilities Authority Act which allowed the state to issue bonds, the proceeds of which were to be applied to the construction of higher education facilities in the state.⁴¹ These institutions would convey the property to the state, lease it back, and then have it reconveyed upon full repayment of the bonds.⁴² The Act included a limitation that the bonds could not be issued for the construction of any facility for sectarian purposes.⁴³

The Act expressly provided that the bonds would not be issued by the state, but rather by the facility being underwritten.

Revenue bonds issued under the provisions of this chapter shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement to the effect that neither the State of South Carolina nor the Authority shall be obligated to pay the same or the interest thereon except from

40. *Id.* at 688.

41. Educational Facilities Authority Act for Private Nonprofit Institutions of Higher Learning, S.C. CODE ANN. §§ 59-109-10, 59-109-50 (Law. Co-op. 1990).

42. *Id.* §§ 59-109-70, 59-109-80.

43. *Id.* § 59-109-30(b).

revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds.⁴⁴

*Hunt v. McNair*⁴⁵ involved a Baptist College that had requested "the issuance of revenue bonds totaling \$1,250,000, of which \$1,050,000 would be applied to refund short-term financing of capital improvements and \$200,000 would be applied to the completion of dining hall facilities."⁴⁶ The lease agreement between the authority and the college contained a clause "obligating the Institution that neither the leased land, nor the facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination."⁴⁷

The Court applied the multipart *Lemon* test, determined that the Act was constitutional, and sustained the State's approval of the bond issue proposed by the Baptist College.⁴⁸ The Court first found that the purpose of the statute was manifestly secular. "The benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation."⁴⁹ Second, the Court cited *Walz* and *Tilton* with approval, and stated implicitly that the primary effect of the legislation was secular.

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.⁵⁰

There were no religious qualifications imposed by the Baptist College for faculty membership or for student admission; sixty percent of the college population was Baptist, which generally

44. *Id.* § 59-109-110.

45. 413 U.S. 734 (1973).

46. *Id.* at 738.

47. *Hunt v. McNair*, 187 S.E.2d 645, 647 (S.C. 1972), *aff'd*, 413 U.S. 734 (1973).

48. *Hunt*, 413 U.S. at 741-49.

49. *Id.* at 741.

50. *Id.* at 743.

corresponded to the percentage of Baptists in that particular area of South Carolina.⁵¹ The *Tilton* Court established that formal denominational control of a liberal arts college does not render indirect government aid to the institution a violation of the Establishment Clause.⁵²

In applying the third prong of the *Lemon* test, the *Hunt* Court at some length discussed the form of the bond mechanisms of the state aid, which was representative of most states with similar provisions.⁵³

The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." The South Carolina Supreme Court . . . described the role of the State as that of a "mere conduit."⁵⁴

Following the *Tilton* rationale which recognized the adult status of students in institutions of higher education, and given the very peripheral involvement of the bond process with the particular institution, all but the most rigidly doctrinaire religiously affiliated colleges would qualify for such state assistance under *Tilton* and *Hunt*. The *Tilton* "trilogy" was completed in 1976.

C. *Roemer v. Board of Public Works*

Maryland enacted a statute which provided annual non-categorical grants to private colleges.⁵⁵ Maryland provided funding for any private institution of higher learning within

51. *Id.* at 743-44.

52. *See supra* part II.A.

53. *Hunt*, 413 U.S. at 737-38.

54. *Id.* at 745 n.7 (citation omitted).

55. MD. ANN. CODE art. 77, §§ 65-69 (1957).

the State of Maryland, provided the institution was accredited by the State Department of Education, maintained one or more Associate of Arts or Baccalaureate degree programs, agreed not to use the funds for religious purposes, and refrained from awarding only seminarian or theological degrees.⁵⁶ A qualifying institution could receive for each full-time student, excluding students enrolled in seminarian or theological academic programs, an amount equal to fifteen percent of the State's appropriation for a student in the state college system.⁵⁷

In 1971, \$1.7 million was disbursed to seventeen private institutions in Maryland.⁵⁸ Of the seventeen institutions, five were church related, and these received \$520,000 out of the \$1.7 million.⁵⁹ An additional \$1.8 million was to be awarded to eighteen institutions in the second year of the grant program, with \$603,000 of that total to go to church-related institutions.⁶⁰ The five church-affiliated institutions receiving aid were one Methodist-affiliated college—Western Maryland College—and the other four were Catholic-affiliated—the College of Notre Dame, Mount St. Mary's College, St. Joseph College, and Loyola College.⁶¹

In *Roemer v. Board of Public Works*,⁶² the Court began its

56. *Id.* §§ 65-66, 68A.

57. *Id.* § 67.

58. *Roemer v. Board of Public Works*, 426 U.S. 736, 743 (1976).

59. *Id.*

60. *Id.*

61. *Id.* at 744.

62. 426 U.S. 736 (1976). For commentary on the *Tilton*, *Hunt*, and/or *Roemer* cases, see G. Sidney Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000 (1981); J. Morris Clark, *Comments on Some Policies Underlying the Constitutional Law of Religious Freedom*, 64 MINN. L. REV. 453 (1980); Kent Greenawalt, *Constitutional Limits on Aid to Sectarian Universities*, 4 J.C. & U.L. 177 (1977); James Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, LAW & CONTEMP. PROBS., Spring 1981, at 3; Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499 (1973); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989); John E. Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Education*, 70 NW. U. L. REV. 883 (1976); Leo Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561 (1980); Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195

analysis with a review of case law back to *Bradfield v. Roberts*,⁶³ and cited with special approval both *Tilton* and *Hunt*. Of particular relevance to this Article's survey—whether a religiously affiliated law school may have a prayer room within the law school facility when the facility was constructed in part, directly or indirectly, through government financial assistance—the *Roemer* Court stated,

The colleges employ Roman Catholic chaplains and hold Roman Catholic religious exercises on campus. Attendance at such is not required; the encouragement of spiritual development is only "one secondary objective" of each college; and "at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience." . . . "[R]eligious indoctrination is not a substantial purpose or activity of any of these defendants."⁶⁴

Thus, the seemingly absolute prohibition on the use of government funds for sectarian purposes dissolved in light of the practical realities of contemporary higher education. Provided that the primary objective of the institution is education for other than purely the ministry, the religiously affiliated college can constitutionally receive government assistance.

The Court in *Roemer* also reviewed the undergraduate curricula of each of these religiously affiliated colleges in Maryland. Although finding that theology courses were required as part of the program, and even that some classes were begun with a prayer, these facts did not trigger violations of the Establishment Clause. The great majority of the students at the colleges were members of the particular faith of the individual colleges—Methodist or Roman Catholic, respectively—but this did not make the aid unconstitutional. As in prior cases, the Court found that the theologically required courses were taught with maximum academic freedom and spanned a variety of intellectual approaches. The Court concluded:

There is no exact science in gauging the entanglement of church and state. The wording of the test, which speaks of

(1980); James A. Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, LAW & CONTEMP. PROBS., Spring 1981, at 143; Michael R. Smith, *Emerging Consequences of Financing Private Colleges with Public Money*, 9 VAL. U. L. REV. 561 (1975).

63. 175 U.S. 291 (1899).

64. *Roemer*, 426 U.S. at 755 (citation omitted).

"excessive entanglement," itself makes that clear. The relevant factors we have identified are to be considered "cumulatively" in judging the degree of entanglement. They may cut different ways, as certainly they do here.⁶⁵

Each case in the *Tilton* trilogy incrementally liberalized the constitutional scope of permissible government financial assistance to religiously affiliated institutions of higher education. The accommodationist super-majority of the Rehnquist Court today is even more likely to endorse such assistance than was the Burger Court in the *Tilton* trilogy almost two decades ago.⁶⁶ A small ecumenical prayer room within a large law school building of a religiously affiliated university, though constructed through some indirect state bond support, should not trouble any but the most unrealistic and rigidly absolutist strict separationists.

III. THE SURVEY

On September 17, 1992, I sent a survey⁶⁷ to the dean of each religiously affiliated law school accredited by the American Bar Association.⁶⁸ The survey asked whether the law

65. *Id.* at 766 (citation omitted).

66. In the 1992 Term, the Court dramatically supported governmental aid that was accommodating to religion, ruling that a state-provided sign language interpreter could work with a hearing impaired student in a private religious school, and that religious groups can use public school forums open to all other community groups after school hours. See *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993).

67. The survey questionnaire, the quantifiable results, and representative non-quantifiable narrative responses are reproduced at the end of this Article. See *infra* Appendix.

68. Many prominent universities in the United States, beginning with Harvard, have religious origins. I surveyed, however, only those law schools with continuing current or very recent affiliations with a major institutional religion. I did not survey St. John's, my home institution. The fifty-two surveyed institutions, listed alphabetically, are the following: American, Baylor, Boston College, Brigham Young, Capital, Campbell, Catholic University of America, Catholic University of Puerto Rico, Creighton, Cumberland, Dayton, DePaul, Detroit, Drake, Duke, Duquesne, Emory, Fordham, Georgetown, Gonzaga, Hamline, Inter-American, Loyola of Chicago, Loyola of Los Angeles, Loyola of New Orleans, Marquette, McGeorge, Mercer, Mississippi College, Notre Dame, Oklahoma City, Pepperdine, Puget Sound, Regent, Richmond, San Diego, San Francisco, Santa Clara, Seton Hall, Southern California, Southern Methodist, St. Louis, St. Mary's, St. Thomas, Stetson, Syracuse, Touro, Valparaiso, Vanderbilt, Villanova, Wake Forest, and Yeshiva. Several of these schools were not on the list of religiously affiliated law schools provided by the Office of the Consultant on Legal Education of the A.B.A.: Brigham Young,

schools currently contained prayer rooms, or whether such rooms are provided for in future building plans.

Thirty-two⁶⁹ of the fifty-two surveyed schools responded.⁷⁰ Ten respondents have a prayer room on site within the law school itself, within a larger interconnected campus complex, or immediately proximate to the law school.⁷¹ Twelve additional respondents indicated they were located in relatively close, although not immediate, proximity to an off-site prayer room under the auspices of the law school's university.⁷² Sev-

Catholic University of America, Catholic University of Puerto Rico, Cumberland, Dayton, DePaul, Detroit, Drake, Fordham, Mercer, Richmond, Wake Forest. Simultaneously, other schools expressly listed by the Office of the Consultant disclaimed any institutional religious affiliation: Duke, McGeorge, Southern California, and Syracuse; these four schools removed themselves from the survey, and did not otherwise respond. I erred on the side of inclusion, and thus surveyed each of the fifty-two listed institutions.

69. The survey respondents, in alphabetical order, are the following: American, Baylor, Boston College, Brigham Young, Capital, Catholic University of Puerto Rico, Creighton, Dayton, Detroit, Drake, Emory, Fordham, Georgetown, Gonzaga, Hamline, Loyola of Los Angeles, Loyola of New Orleans, Mercer, Mississippi College, Notre Dame, Oklahoma City, Puget Sound, Richmond, St. Louis, San Francisco, Santa Clara, Southern Methodist, Stetson, Touro, Vanderbilt, Villanova, and Yeshiva.

70. On November 5, 1992, I sent a brief two-question follow-up to each respondent school that had indicated that it had a prayer room or a portable equivalent within or in very near proximity to the law school building on the larger campus. That follow-up asked, (1) "Did your law school or parent university receive any government funding, directly or indirectly, to construct or maintain your law school building?"; and (2) "If yes to #1, please discuss briefly whether a First Amendment Establishment Clause problem was ever raised, and, if so, how it was addressed and met." None of the respondents indicated an affirmative response to the first question, thus mooted the second question.

71. American ("next door" to the law school); Boston College ("Within the academic buildings of the law school, there are no prayer rooms, but in the complex of academic buildings, is the large and separate chapel, seating over 600 persons In 1989, what had been the choir loft of the larger chapel was converted into a small chapel suitable for daily services and for meditation. This small chapel is readily accessible to law students, is reflective/prayerful in ambience and is entirely 'ecumenical' in tone and furnishings A Sunday liturgy is held for law students and mass is celebrated at noon on weekdays for what is almost exclusively a law school congregation."); Detroit (law school immediately adjacent to historic church which is also under the auspices of the Jesuits); Fordham (prayer room located in larger campus building complex, to which the law school is physically connected); Georgetown (chapel located in the middle of the ground floor of the Law Center, where mass is celebrated daily at 12:15 p.m. and the Blessed Sacrament is always reserved); Hamline (prayer room chapel "across the street" from law school); Loyola of Los Angeles (prayer room twenty yards from law school, and within the law school campus); Notre Dame (prayer room located on first floor of law school, adjacent to two large class rooms); Oklahoma City (chapel "next door" to law school); San Francisco (law school immediately across street from campus church, with seating capacity of 900-plus persons).

72. Baylor (200 yards); Catholic University of Puerto Rico (1511 feet);

en⁷³ respondents, four⁷⁴ of which also indicated relatively close proximity to prayer rooms located beyond the immediate area of the law school, also indicated that they regularly provided for prayer and worship services within the law school facility, by creatively adopting suitable law school classrooms, moot court, or conference room facilities. Four respondents indicated possible future on-site prayer rooms at their law schools.⁷⁵ Only two of the thirty-two responding law schools did not indicate either an on-site prayer room, a portable equivalent, or any law student access to a college or university prayer room within reasonable proximity of the law school. Twenty of the thirty-two responding law schools affirmatively indicated that they have official or unofficial law school chaplains⁷⁶ and/or clergy or theology-degreed persons on the law faculty.⁷⁷

Creighton (two of the five dormitories open to law students have chapels, in addition to the campus main chapel; Creighton's medical and dental schools also have prayer rooms); Drake (one block); Emory (several campus chapels, prayer facilities, and a church are all within a four-minute walk); Gonzaga (campus church, chapel, and a mosque are all within walking distance); Loyola of New Orleans (400 yards); Richmond (500 yards); Santa Clara (200 yards); St. Louis ("The University church is only a block away and with four daily Masses this church is often frequented by law students. For our Jewish students, there is a working relationship with Hillel Center. Informational Literature for Jewish students is sent here and is posted."); Southern Methodist University (ten minutes from law school); Villanova ("There is a monastic chapel across the street from the School's building and a church and chapel on the main University campus—a ten to fifteen-minute walk.").

73. Brigham Young ("Church services are held in several locations in the law building each Sunday"); Creighton ("Mass here at various times"); Gonzaga ("Mass celebrated on Wednesdays at noon in the Moot Court Room"); St. Louis ("The Liturgy of the Mass is celebrated in a seminar room every Thursday, and is followed by a Scripture study. On Catholic holy days the Mass is held in the School Courtroom for the entire faculty, staff and student body."); Touro (students are free to meet on the law school premises); Villanova ("Regular Mass is celebrated at the School of Law in our Board Room. The Mass is sponsored by the Catholic Law Students Association and a campus minister comes to the School each Thursday to celebrate. The Board room is our formal meeting room where the University Board of Trustees and the School's Faculty meet The use of a public room for weekly mass has served this purpose well."); Yeshiva (students are free to meet on the law school premises).

74. Creighton, Gonzaga, St. Louis, Villanova.

75. Capital, Creighton, Mississippi College, Villanova ("[W]hen we expand the school of Law I am confident we will include a chapel in our plans since we have identified a need for a place of worship.").

76. Boston College, Catholic University of Puerto Rico, Creighton, Dayton, Detroit, Fordham, Georgetown, Loyola of Los Angeles, Loyola of New Orleans, Notre Dame, San Francisco, St. Louis, Villanova.

77. Boston College, Brigham Young, Detroit, Emory, Fordham, Georgetown, Loyola of New Orleans, Mississippi College, Notre Dame, Richmond, St. Louis, San Francisco, Santa Clara, Touro, Yeshiva.

The vibrancy, vitality, and variety of manifestations of religious commitment at the thirty-two of the fifty-two religiously affiliated law schools responding to the survey is cumulatively quite impressive. And, of course, some of the nineteen schools who did not respond to the survey may have on-site prayer rooms or their near-equivalents.⁷⁸ Energetic and creative campus and law school ministries, chaplains, students, faculty, and staff can affirmatively corroborate the scriptural truths that the "kingdom of God is within"⁷⁹ and that where two or more are gathered in God's name, God will be in their midst.⁸⁰

IV. CONCLUSION

A prayer room exclusively reserved for meditation, prayer, and worship, ecumenically open to the law school community, should be available within each religiously affiliated law school, where such a room is consonant with the school's religious tradition. What these rooms are formally titled and how they are designed, appointed, or funded are less important than that they be brought into existence as important symbols and tangible realities.

This is a secular age. Law is a primary power instrument in public, secular society.⁸¹ Throughout the secular legal realm, there are many lawyers and prospective lawyers with deep religious commitment.⁸² The paradigm of the public lawyer and the private person of deep religious faith is Thomas More, the Catholic Church's patron saint of lawyers.⁸³ Catholic-affiliated law schools especially should have prayer rooms dedicated and reserved in the spirit of Saint Thomas More, the Man for All Seasons,⁸⁴ and, more contemporaneously, in the

78. For example, Seton Hall University School of Law has the St. Thomas More Chapel in its law building, where mass is celebrated daily at 12:40 p.m. I decided not to "re-survey" the non-respondents.

79. *Luke* 17:20-21.

80. *Matthew* 18:20.

81. See generally W. MICHAEL REISMAN & AARON M. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* (1987).

82. See generally FREDERICK M. GEDICKS & ROGER HENDRIX, *CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE* (1991); David L. Gregory, *The Religious, the Ethical, the Communal, and the Future*, 41 CATH. U. L. REV. 651 (1992) (book review).

83. See generally RICHARD MARIUS, *THOMAS MORE: A BIOGRAPHY* (1984).

84. Catholic-affiliated law schools have an especially strong mandate to provide opportunities for prayer. On September 25, 1990, the Vatican issued the Apos-

spirit of the great twentieth-century contemplative Trappist monk and mystic, Thomas Merton, and the Jesuit philosopher, Teilhard de Chardin.

Members of the religiously affiliated law school community who do not practice the particular religion of their law school's affiliation and those who profess no religion should also be able to make good use of the law school prayer rooms, in the spirit of the timeless wisdom and the classic humanist models of Platonic and Aristotelian philosophy: the unexamined life is not worth living. The study and practice of law are very intense, pressurized, stressful activities. Disaffection and distress within the legal profession are disturbingly high.⁸⁵ This makes it all the more compelling that the religiously affiliated law school provide through a prayer room a real symbol of the spiritual dimension of the integrated mission that the religiously affiliated law school professes. The prayer room may make the entire institution a more humane and decent place.

tolc Constitution on Catholic Universities, *Ex Corde Ecclesiae* ("Born from the Heart of the Church"). It provides that "[a]s a natural expression of the Catholic identity of the University, the university community should give a practical demonstration of its faith in its daily activity, with important moments of reflection and of prayer." Pope John Paul II, *Apostolic Constitution of the Supreme Pontiff: Ex Corde Ecclesiae*, 5 CATHOLIC INT'L 202, 211 (1990) (approved English translation).

Notre Dame is probably the paradigm for the Catholic-affiliated law schools. The on-site law school prayer room is always open, and it is on the first floor and adjacent to two large classrooms. The prayer room has no other or joint uses. In addition, the law school has Sunday evening mass in the law school student lounges. Two ordained Catholic priests are on the law faculty, and they function unofficially as the law school chaplains from their regular faculty offices. Beyond the law school, which is located on the University's main campus, there is a campus church seating approximately 750, and twenty-six chapels seating 100 to 200 persons, with a chapel located in each campus residence hall. The campus church is approximately ¼-mile diagonally across campus, and the nearest dormitory chapel is approximately fifty yards from the law school. The chapels are open seven days per week. Their response stated "[f]or our law students, most of whom live off campus, the law school building is the center not only of their academic life, but also of their community life, and a chapel in the law school building is appropriate." Many other Catholic-affiliated law schools responding to the survey also evidenced thorough, real implementation of the values they profess.

85. The popular and legal presses and various studies and surveys abound with reports of deep dissatisfaction within and about lawyers and the legal profession. See generally ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); Michael Orey, *Misery*, AM. LAW., Oct. 1993, at 5 (reporting on deep dissatisfaction within legal profession); Amy Stevens, *This Breed of Rodent Is Becoming a Pest at Major Law Firms*, WALL ST. J., Aug. 20, 1993, at A1 (reporting on a nationally circulated underground paper by dissatisfied associate attorneys at major national law firms).

Fifty-two religiously affiliated law schools comprise almost one-third of the 176 law schools accredited by the American Bar Association.⁸⁶ They are a critically important and indispensable component of contemporary legal education. Manifestations, in part through prayer rooms, of the important values of faith communities can be important positive symbols in a society increasingly looking for deeper affirmations.

Dorothy Day of the Catholic Worker movement often rhetorically said that if one gives to God that which is God's, there ought not to be much left for Caesar.⁸⁷ Nevertheless, if any law school, having taken Caesar's money indirectly through bond debt for law school building expansions before all private funds are fully raised, reflexively and unthinkingly plays only by Caesar's rules and fails or, worse, deliberately refuses even to consider the possibility of including a prayer room, then there indeed may be little left for God. Major airports, constructed with public revenues, are among the most quintessentially public contemporary places with chapels on site. If this does not pose an Establishment Clause problem, and it does not, there is certainly no constitutional prohibition of a prayer room within a partially publicly financed religiously affiliated law school. Law schools at religiously affiliated universities that have prayer rooms on their main campuses, nevertheless, are also entitled to and deserve prayer rooms within the law school facilities, because of the special needs and pressures of law school professional students.

Fine legal education can be furnished without extraneous or extra-curricular reference to God or religion. More than two-thirds of the law schools in the United States have no religious affiliation, and the level of legal education that these schools furnish can be outstanding. But religiously affiliated law schools have a special role to play,⁸⁸ and the quiet reality and

86. See *supra* note 68.

87. See generally WILLIAM D. MILLER, *A HARSH AND DREADFUL LOVE: DOROTHY DAY AND THE CATHOLIC WORKER MOVEMENT* (1973).

88. In many instances, there may be little functional difference between public secular and religiously affiliated private law schools. "[T]here is no reason to believe that secular humanism will cease to be the predominant force in American legal education generally It must be candidly admitted that the new church-related law schools have not yet done very much to develop anything truly distinctive in their curricula." Carl S. Hawkins, *Accreditation of Church-Related Law Schools*, 32 J. LEGAL EDUC. 172, 188 (1982); see Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859, 1878 (1993) ("A religiously affiliated law school cannot account for itself

symbol of the prayer room can enhance the actualization of the missions and the values these schools profess to believe. Otherwise, the Bismarkian Kulturkampf, which rigorously sought to purge religious influences from Germany in the nineteenth century,⁸⁹ will perniciously further recur and accelerate, with similar disastrous consequences in the contemporary legal, social, and political cultural structure in the United States. The religiously affiliated law schools should vigorously resist and offer viable alternatives to, rather than acquiesce in, the wholesale and indiscriminate secularization of the legal regime. Dedicated space for prayer rooms would be a symbolic and significant step in that alternative direction.

theologically by being or aspiring to be like law schools maintained by the state or by non-religious private sponsors. It cannot be faithful to itself and also be secular. To the extent that a religiously affiliated law school is content with being secular, it denies its heritage and its purpose. Most religiously affiliated law schools in the United States are in practice secular. . . . [T]hese schools, their universities, and their law faculties are not faithful to themselves and . . . what they are doing denies both their heritage and their purpose. It is hard to know why their religious sponsors continue to maintain them."); see also Robert J. Araujo, S.J., *Legal Education and Jesuit Universities: Mission and Ministry of the Society of Jesus*, 37 LOY. L. REV. 245 (1991); Rex E. Lee, *The Role of the Religious Law School*, 30 VILL. L. REV. 1175 (1985); Leonard J. Nelson, III, *God and Man in the Catholic Law School*, 26 CATH. LAW. 127 (1981); Thomas L. Shaffer, *The Catholic Tradition*, 22 VAL. L. REV. 669, 674 (1988) ("My religious tradition bears witness in and before the law . . . we could use a Roman Catholic university law school."); Thomas L. Shaffer & Robert E. Rodes, Jr., *A Christian Theology for Roman Catholic Law Schools*, 14 U. DAYTON L. REV. 5 (1988). A statement by Steven M. Barkan is of particular note:

In today's mainstream of legal education, to claim a religious orientation is to become suspect. Religiously-affiliated law schools are suspected of being less than rigorous in their academic programs, compromising in their approach to intellectual and academic freedom, and insensitive to the value of diversity, among other things. It is frequently suggested that a law school cannot be both prominent and religious at the same time, and that there is no appropriate role for religion in the law school. Many prestigious law schools that were religiously-affiliated at their founding are no longer so affiliated. Most religiously-affiliated law schools are religious in official affiliation only; religion rarely works its way into the life of the law school.

Steven M. Barkan, *Jesuit Legal Education: Focusing the Vision*, 74 MARQ. L. REV. 99, 99 (1990) (footnotes omitted).

89. See generally STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (1993) (arguing that liberal elites in United States today are culturally uncomfortable with and myopically hostile to religiously-based value manifestations by non-elites in the larger populations); RICHARD J. NEUHAUS, *AMERICA AGAINST ITSELF* (1992) (asserting that liberal secular elites seek to impose their anti-religious will on the religious majority populace, fracturing the social-political systems).

APPENDIX

THE SURVEY: LAW SCHOOL PRAYER ROOMS
(SEPTEMBER 17, 1992)

1. Is a Prayer Room (Meditation-Reflection Room, Chapel, etc.) located within (or in *immediate* proximity to) the law school premises?

| | | |
|-----|----|-----|
| Yes | 10 | 31% |
| No | 22 | 69% |

2. If YES to #1, please answer these sub-questions in #2 below.

- a) What is the law school Prayer Room's approximate square footage?

300 square feet (Only one school responded)

- b) Approximate seating capacity?

15-1,600 (ranges)

- c) What are the hours and days that the Prayer Room is open for use by members of the law school community?

7:00 a.m.-4:00 p.m. to always open, 24 hours/7 days per week (ranges)

- d) How old is the law school? (date of founding)

1869-1971 (ranges)

- e) For how many years has the Prayer Room been located within the law school premises? (date of Prayer Room's creation)

1912-1986 (ranges)

- f) Briefly describe the physical location of the Prayer Room within the law school premises (adjacent to clinic, chaplain's office, etc.).⁹⁰

90. See *supra* notes 71-74 and accompanying text.

- g) Does the Prayer Room have any other or joint uses (e.g., seminar or class room)? If yes, explain and briefly describe.

Music room, blood drives, classes (common responses)

- h) Briefly describe the official uses of and times and days of the religious services officially offered within the Prayer Room (e.g., Scripture readings, Monday-Wednesday at noon; mass daily at 8 a.m., etc.).
- i) Is the Prayer Room ecumenically available for services by any students or persons not members of the religion with which the university is affiliated?

| | | |
|-----------|---|-----|
| Yes | 3 | 30% |
| No | 1 | 10% |
| No answer | 6 | 60% |

- j) If YES to #2i, please briefly describe the ecumenical services and their frequency and availability.

3. Is a new law school building, or an addition to the current building, planned?

| | | |
|-----------|----|-----|
| Yes | 16 | 50% |
| No | 7 | 22% |
| No answer | 9 | 28% |

4. Is a new law school building, or expansion to the current law school building, currently underway?

| | | |
|-----------|----|-----|
| Yes | 5 | 16% |
| No | 18 | 56% |
| No answer | 9 | 28% |

5. If YES to #3 or #4, will a Prayer Room be included within the law school premises?

| | | |
|-----------|----|-------|
| Yes | 2 | 6.5% |
| No | 12 | 37.5% |
| No answer | 18 | 56% |

6. If YES to #5, please briefly describe the plans for the new Prayer Room to be located within law school premises.

- a) What is the law school Prayer Room's approximate square footage?
- b) Approximate seating capacity?
- c) What are the hours and days that the Prayer Room will be open for use by members of the law school community?
- d) Briefly describe the physical location of the Prayer Room to be located within the law school premises (adjacent to clinic, chaplain's office, etc.).
- e) Will the Prayer Room have any other or joint uses (e.g., seminar or class room)?
- f) Briefly describe the official uses of and times and days of the services to be officially offered within the Prayer Room (e.g., Scripture readings, Monday-Wednesday at noon; mass daily at 8 a.m., etc.)
- g) Will the Prayer Room be ecumenically available for services by any students or persons not members of the religion with which the university is affiliated?

7. Does the law school have an official or unofficial chaplain minister?

| | | |
|-----------|----|-----|
| Yes | 13 | 41% |
| No | 12 | 39% |
| No answer | 7 | 22% |

8. If YES to #7, briefly describe the chaplain's title, role and function, and salary source (e.g., law school, university, larger religious institution with which the law school and university are affiliated).

9. If YES to #7, does the chaplain teach any law school or university courses?

| | | |
|-----|---|-----|
| Yes | 7 | 54% |
| No | 6 | 46% |

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10. If YES to #9, please briefly describe the chaplain's academic credentials and the courses taught.

11. Is the chaplain an attorney?

| | | |
|-----|---|-----|
| Yes | 7 | 54% |
| No | 6 | 46% |

12. If YES to #7, please briefly describe the chaplain's office and location within the law school.

13. Apart from a law school chaplain, are any ordained clergy on the law school faculty, staff, or administration?

| | | |
|-----------|----|-----|
| Yes | 13 | 41% |
| No | 12 | 39% |
| No answer | 7 | 22% |

14. If YES to #13, briefly describe each such person, their credentials, and their law school functions.

15. The law school and university are (Baptist, Lutheran, Catholic, etc.) affiliated (optional).

16. Law School student population:

a) Full time

380-2093 (ranges)

b) Part time

14-499 (ranges)

17. University total student population.

398-26,000 (ranges)

18. Is the law school located on the university's main campus?

| | | |
|-----------|----|-----|
| Yes | 13 | 41% |
| No | 9 | 28% |
| No answer | 10 | 31% |

19. Apart from the law school, is a Prayer Room(s) located otherwise on the university campus?⁹¹

| | | |
|-----------|----|-------|
| Yes | 20 | 62.5% |
| No | 4 | 12.5% |
| No answer | 8 | 25% |

20. If YES to #19:

- a) What is the campus Prayer Room's approximate square footage?

150-20,900 square feet (ranges)

- b) Approximate seating capacity?

8-1300 (ranges)

- c) What are the hours and days that the Prayer Room is open for use by members of the law school community?

9:00 a.m.-5:00 p.m. to always open, 24 hours, 7 days per week (ranges)

- d) Briefly describe the physical location of the campus Prayer Room and distance from the law school building.

21. Are there dormitories available to law students on the campus?

| | | |
|-----------|----|-----|
| Yes | 14 | 44% |
| No | 8 | 25% |
| No answer | 10 | 31% |

22. If YES to #21 above, are Prayer Rooms located within any student dormitories?

| | | |
|-----|---|-----|
| Yes | 7 | 50% |
| No | 7 | 50% |

23. Law School Name: (optional)

24. Additional Comments/Suggestions:

91. See *supra* notes 71-74 and accompanying text.