

# REGENT UNIVERSITY LAW REVIEW

---

Volume 11

1998-99

Number 1

---

## MISSION, MARKETING, AND ACADEMIC FREEDOM IN TODAY'S RELIGIOUSLY AFFILIATED LAW SCHOOLS: AN ESSAY

*Howard B. Eisenberg\**

Many people find it surprising that until 1994 there was no formal organization of religiously affiliated law schools. After all, many of the first law schools in this country were affiliated with colleges that were founded by religious organizations, and today many of the best law schools in the United States have strong religious identifications and traditions. Yet, it has only been in the last five years that such institutions banded together to discuss common issues, to encourage scholarship, and to consider the unique roles our institutions play in the legal education of women and men.

While there are a number of reasons why religiously affiliated law schools did not "organize" until 1994, the fact is that there are many philosophical and substantive differences among religiously affiliated law schools. Many of these differences were discussed at both the first conference of the Association of Religiously Affiliated Law Schools (ARALS) in Milwaukee in 1994<sup>1</sup> and at the 1998 Virginia Beach ARALS conference at Regent University. One error is thinking that religiously affiliated law schools are fungible—if you've seen one, you've seen them all. In fact, one of our greatest strengths is the differences among religiously affiliated institutions of higher learning. Only in recent years have we begun to acknowledge not only the common issues among religiously affiliated law schools, but also to recognize and support the differences in philosophy and emphasis. In this essay I will briefly examine

---

\* Dean and Professor of Law, Marquette University Law School. President, Association of Religiously Affiliated Law Schools. This essay does not necessarily reflect the views of either Marquette University or the Association of Religiously Affiliated Law Schools.

<sup>1</sup> The papers delivered at the Milwaukee meeting are collected in the Winter, 1995 issue of the Marquette Law Review.

my view of how these similarities and differences play out today, as we look to the new century in legal education.

### I. FROM ISOLATION TO ORGANIZATION

There are two types of religiously affiliated universities, those that are nominally (or historically) religious, and those that are actively religious. Many of the great universities of this country were started by religious organizations or churches and retain some types of connection to the founding religious body. However, those that are only historically or nominally religious make no effort to advance the religious affiliation or religious mission in most of their academic units. Thus, most people would not consider the law schools at Harvard, the University of Chicago, Duke, Yale, or Northwestern to be "religiously affiliated." Indeed, one expert on religiously affiliated colleges and universities has written that many of the first Protestant colleges established in the U.S. lost their religious identities and "became secularized."<sup>2</sup>

For most of us, "religiously affiliated" is a term of art, meaning an institution whose religious affiliation is reflected in its mission, programs, administration and governing board, curriculum, symbols, and choice of activities. Religion, spirituality, or faith plays an important role in how such universities are managed. Certainly, Notre Dame, Brigham Young, Baylor, Boston College, Regent, and Touro fall into this category. To some extent, at least, these institutions wear their religious identification on their sleeves—and are proud of it.

However, historically, this pride was not carried over into the larger community. For most of our history, religion has divided and separated Americans. Jews and Catholics, and other minority religious groups, were not always welcome at some of the best universities in America, just as they were not welcome in certain neighborhoods and social organizations. Although the clergy of different faith traditions occasionally met to discuss issues of mutual concern, commingling of members of different religions for the purpose of discussing faith, values, beliefs, and tradition have been unusual. I grew up in a neighborhood on the West Side of Chicago which was half Catholic and half Jewish. My playmates were Catholic, and yet I knew nothing of their religion. I did not visit their places of worship and had no idea what they believed that made them "different" from me. I knew they had a Christmas tree, and I didn't, but beyond that I really didn't have a clue. There was a bright line of separation between things secular and things religious. I think my childhood in the 1950's was not unique. In fact, I suspect that I had

---

<sup>2</sup> *Religious Colleges and Universities Need to Market their Mission to Compete*, University of Dayton Press Release (visited Mar. 9, 1999) <<http://www.udayton.edu/news/nr/o31197b.html>> (quoting Thomas C. Hunt) [hereinafter Hunt].

more interaction with people of different faith traditions than most of my peers.

The same was true of institutions of higher education. We knew that Notre Dame was Catholic, and Baylor was Baptist, and that each frequently fielded good basketball or football teams, but those from different faith traditions really did not know what the religious identification meant or how one religiously affiliated university differed from another. Nor did the religious institution seek to inform the broader community of its beliefs or its mission.

Perhaps this was because religiously affiliated universities did not think people from different religious backgrounds cared about the religious mission of the institution. Or perhaps, it was because the religious university did not want to get embroiled in a debate about its religious beliefs and practices. Or perhaps, the religious institution feared a backlash from those who saw outreach as an effort to convert or indoctrinate "nonbelievers." Except where the mission of the university mandated or encouraged interaction with others outside the faith,<sup>3</sup> there was seldom an effort to reach out to others to explain or promote the faith values that were driving the institution.

This has changed gradually in the last twenty years, as more religious institutions actively market their missions and beliefs. This reflects, to some degree, a substantial increase in dialogue between and among religious groups of all kinds, and more tolerance in our society generally. It also reflects two somewhat contradictory phenomena. On the one hand, there has been an increased tolerance for persons of different backgrounds and beliefs. For some religiously affiliated universities, this includes the idea that even if someone comes from a different religious tradition, that person can still advance the mission of the institution and be a caring and good human being.

On the other hand, the political and social changes of the period following the end of World War II have emboldened and empowered other religious organizations to speak out assertively, to publicly espouse their beliefs, to publicly seek converts, to be visibly active in the political arena, and to denounce (or at least identify) aspects of our society that

---

<sup>3</sup> For example, most of the Jesuit universities in the United States were established in urban centers to provide the opportunity for higher education for immigrants and the children of immigrants, mostly Catholic. However, the Jesuit law schools, as inspired by the teaching of St. Ignatius of Loyola, had a much more liberal policy regarding the admission of persons of color and Jews. Thus before World War II many Jesuit law schools had a much larger number of non-white and non-Christian students than their non-Jesuit, or even public, counterparts. Steven M. Barkan, *Jesuit Legal Education: Focusing the Vision*, 74 MARQ. L. REV. 99, 104-07 (1990).

they see as sinful and contrary to the teachings of God—as that religious group understood such teachings.

In both cases, religiously affiliated universities have begun to publicize their religious beliefs and character to a broader community. The presidents of some religiously affiliated universities have become public figures who speak out on social, political, and moral issues. Rev. Theodore Hesburgh, C.S.C. at Notre Dame and Rev. Pat Robertson at Regent, are two obvious examples. We have also become more aware of the role religiously affiliated universities play in shaping both the debate and the context of social discourse. As religious universities have been more willing to share with others their specific religious beliefs, it has become obvious that many issues cut across a broad range of religious institutions and that some issues impact every religiously affiliated college and university.

It is not entirely coincidental that public visibility of religiously affiliated universities and colleges has occurred at a time when increasing amounts of state and, particularly, federal, money was being directed to religiously affiliated universities and the students of such institutions. As usual, with financial support has come government regulation. Such regulation sometimes challenged the autonomy of private colleges and universities on such questions as the admission of persons of diverse backgrounds, the role of women, matters of sexual preference and activity, and issues of the extent to which a religiously affiliated institution could favor co-religionists when making hiring and admission decisions. While there has been a short-term benefit of providing needed funding to such institutions, some fear that “the long term cost may be loss of religious distinctiveness.”<sup>4</sup> One of the challenges faced by religiously affiliated colleges and universities is to maintain their religious identity, while accepting public funding.

One of the reasons religiously affiliated universities have organized together is that now, more than ever, issues of common concern cut across religious groupings and denominations. In addition, there is an unprecedented willingness to discuss these issues across denominational and religious lines.

## II. MARKET FORCES

Higher education is a tough, competitive, business. Private colleges and universities enter the market with a distinct handicap when compared to their public counterparts. Public colleges and universities are publicly subsidized, if not publicly supported. This means that tuition at

---

<sup>4</sup> Ralph D. Mawdsley, *Government Aid to and Regulation of Religious Colleges and Universities*, in *RELIGIOUS HIGHER EDUCATION IN THE UNITED STATES A SOURCE BOOK 1*, 27 (Thomas C. Hunt and James C. Carper eds., 1996).

private institutions must be two or three times greater than tuition at public institutions, simply to support the same level of activity. In many states, the quality of the classroom teaching in public institutions is high, and it is difficult to argue that the difference in the quality of classroom instruction justifies the cost differential. The tuition gap between public and private universities has widened substantially in the past twenty years, so it is frequently the primary reason students opt against matriculating at a religiously affiliated college or other private institutions of higher learning.

Concurrent with this "tuition gap," many religiously affiliated institutions found themselves losing a substantial portion of their traditional student base. To some extent this loss represented a decrease in the number of traditional college age persons, but it also represented a decline in the number of graduates of religiously sponsored high schools. Second, third, or fourth generation Americans have been less attracted to religiously affiliated colleges than were their parents and grandparents, for whom religiously affiliated colleges might have been the only practical and available option. This was particularly true for many first and second generation Americans who found that state colleges and universities were located far from home, thus dramatically increasing the cost of such education. It is no accident that many religiously affiliated colleges, particularly Catholic institutions, were located in the heart of urban areas, easily accessible to those students who wanted to attend.

By the 1990s, many religiously affiliated universities found themselves in the middle. On one side were the elite universities that could "cherry pick" the best students. And now, unlike a generation or two before, these elite schools admitted students regardless of religion or race. On the other side were community and junior colleges, state universities, and state university *systems*. These taxpayer-supported institutions offered a range of programs in most states, from elite residential colleges to open enrollment commuter schools. Reasonably priced college education was now accessible and affordable for the large majority of high school graduates. Everything from pre-remedial education to Ph.D.'s were being offered by public institutions at a fraction of the cost of private schools, most within driving distance for the majority of students.

Subsequently, some private colleges have closed and others have merged, while most have adopted a wide variety of strategies to recapture market share. Many of these schools have attempted to establish a "niche" market based on substantive areas of asserted excellence, geographical region, or emphasis on certain types of students.

As religiously affiliated institutions have been affected by market forces, the need to prove an added value to justify the substantially higher tuition has become essential. While many religious colleges and

universities place an emphasis on classroom teaching, it would be difficult to make a convincing argument that education at a religious institution is qualitatively "better" than at a public or non-religious private institution. In fact, we don't really know how to measure what kind of education is "better" or why.

Religious colleges and universities do offer something that no public, and most non-religious private, institutions can offer: a set of basic values based on morality and faith. The most important value of religiously affiliated institutions is the fundamental belief in a set of immutable principles from which education proceeds. Moreover, while some of the traditional base of co-religionists has deteriorated over the years, there remains a significant number of prospective students, and their parents, who are looking for value-based education. The problem has been that many religiously affiliated institutions have become too wishy-washy on the issue of "mission." During the previous 30 years, as enrollments increased, there was little reason to emphasize religious mission. Then, in the 1990s, when the students stopped coming, "[t]oo many religious colleges and universities [had] lost their sense of mission. In these tight economic times for higher education, people have to find value in that mission and be willing to pay for it."<sup>5</sup>

In some ways, religiously based higher education is itself a market niche. We are directing our programs and institutions to those prospective students who, because of religious affinity or a desire to reinforce fundamental values, seek a religiously based institution. Value based education resonates with many students from a variety of faith traditions, and even with many students who do not come from a church-going or "religious" background. While it would be too glib and crass to say that value based education "sells," it would be disingenuous not to recognize the market forces at work. Nowhere is this more true than at religiously affiliated law schools. "Universities with a religious orientation must demonstrate their value, why students should pay more tuition there than at a public institution. They're going to have to do much more marketing."<sup>6</sup>

It is important to note that religiously affiliated universities have taken two distinct approaches to the marketing challenge. One group of religiously affiliated institutions has sought to expand its market share by making its religious message and values explicitly relevant and accessible to people from different religious backgrounds. Such institutions emphasize the universality of the values advanced by the institution and the fact that the institution not only tolerates, but welcomes, people from

---

<sup>5</sup> Hunt, *supra* note 2.

<sup>6</sup> *Id.*

different religious backgrounds, with no intention of trying to persuade the prospective student that its religion is "better" than the one practiced in the student's home. Under this strategy, the goal is to expand the pool of people from which the institution draws students, even if the representation from the sponsoring religious groups drops—Jesuit universities, as well as many Protestant and Jewish institutions, fall in this category.

The other approach has been to emphasize the specific religious character of an institution and to direct market strategy to capturing those who adhere to such beliefs. Such schools as Regent, Brigham Young, Notre Dame, and Pepperdine fall into this group. While such institutions accept students from different religious backgrounds, it is always with the understanding that a primary purpose of the institution is to advance a particular type of religious belief. This strategy does not intend to expand the pool of people from whom the institution draws, but to attract a greater percentage of the adherents of one religion or one philosophy of religion.

While not every religiously affiliated college and university has responded the same way to the market changes, every college and university—except perhaps for the most elite institutions—has had to make serious decisions regarding the marketing and mission of its institution. While those of us in higher education seldom talk publicly about the marketing of the institution, it has become critical for private institutions. Thus, one of the reasons it is logical for religiously affiliated institutions to organize is the same reason commercial businesses have trade organizations. There is strength in our numbers, there are common issues that may benefit from a common response, and there is a benefit in learning what the "competition" is doing. Even though we might not agree on an approach or strategy, we do believe in the importance of religiously connected education and, specifically, religiously connected legal education.

### III. THE LAW SCHOOL

Law schools often occupy a sensitive position in comprehensive universities. A law school adds prestige, wealth, and reputation to a comprehensive university. In the large majority of situations, law schools bring in revenue for the university. While the term "cash cow" is sometimes used, it is not necessary to use bovine metaphor to understand that because law schools tend to have higher tuition, tend to be fully enrolled, and tend to have larger classes with no laboratories to fund, there

is substantial potential for excess income from tuition revenue.<sup>7</sup> Unlike most undergraduate and some graduate school programs, very little law school tuition is spent for student scholarships.<sup>8</sup> This allows a higher percentage of tuition revenue to be applied to program, indirect expenses, or unrelated university costs. Additionally, law graduates tend to be among the more affluent alumni of private colleges and universities who have resources to share with their alma mater. It is also important to note that law alumni make up virtually all of the judges in the Untied States, and a good percentage of members of the executive and legislative branches of government. Universities, public and private, like to have alumni who are well placed, affluent, and kindly disposed to the institutions from which they graduated.

More negatively, law schools are often isolated from the rest of the university. Sometimes the law school is physically isolated, but more frequently law schools are socially and intellectually isolated from the rest of the university community. Law alumni frequently do not have allegiance to the central university, and thus they are more generous to their undergraduate college than their law school. Faculty in other units, most of whom have doctoral degrees, can resent the highly paid law faculty, virtually none of whom have terminal degrees. Often law school scholarship is denigrated by other faculty as being insubstantial, too descriptive, and appearing in non-refereed journals that are student run. Faculty in other units can be skeptical of the intellectual credentials of their law school colleagues. Of course, many law faculty avoid faculty from other parts of the university. They do not participate in many campus-wide activities, and tend to regard themselves as "above" their Ph.D. colleagues in other colleges and departments. It has even been observed that some law faculty are arrogant, although there is little empirical data showing that members of law faculties are more arrogant than members of faculties in other disciplines. The pity of this is that neither the faculties of law schools nor their Ph.D. counterparts in other units realize how similar most of the issues are which impact on them as faculty members.

One of the ways this separation plays out is that law faculties are not always imbued with the same zeal for the religious mission of the

---

<sup>7</sup> For a discussion of some of the issues relating to law school income and the university's relationship to its law school see Paul Butler, *The Law School as Good University Citizen*, LEGAL TIMES, April 27, 1998, at 21.

<sup>8</sup> It is not unusual for many private colleges to pay out in the form of student scholarships between 30% and 40% of all undergraduate tuition income. This reduction, or "discount," is made available to virtually all students, regardless of need. This "discount rate" means that undergraduate tuition rates are significantly inflated at many institutions. However, few law schools return more than ten percent of the tuition income in scholarships, and most law schools have a discount rate in the single digits.



university as are persons in other departments.<sup>9</sup> A few years ago, I was interviewing faculty candidates at the AALS recruiting forum. During these interviews I routinely asked graduates of religiously affiliated law schools what impact the religious nature of the institution had on their education and growth as a lawyer-scholar. Without exception, the response was "none." In fact, one faculty applicant answered the question: "None, thank God." I must admit, I was greatly troubled by these responses.

Although there are certainly exceptions, in most instances the law school and the law school faculty are not as committed to the religious mission of the university as other units and other faculty. Underlying this fact is some vague notion that questions of religion and religious mission are inappropriate for discussion and application in a law school, even if the law school is part of a comprehensive religious university. "Logical positivism, fear of indoctrination, and a narrowly academic conception of education" have been cited as the reasons that "American college teachers have been less reticent about the espousal of liberal secular values than of religious values during the twentieth century."<sup>10</sup> In law schools, First Amendment concerns are sometimes raised when the private, religiously affiliated, institution, takes action designed to advance its religious mission in manner not supported by all of its stakeholders.<sup>11</sup>

While these tensions have always existed, in recent years the clash has been more obvious in the area of accreditation by the American Bar Association and the Association of American Law Schools. The accreditation standards promulgated by the A.B.A. and A.A.L.S. arguably require law schools to adopt policies, or at least make statements, that some members of the sponsoring religious groups find offensive and contrary to the teachings and beliefs of that faith. These issues were explored at the first ARALS conference in 1994.<sup>12</sup> In fact, ARALS was founded spe-

---

<sup>9</sup> The late Rex Lee, then President of Brigham Young University, stated the matter this way at the first ARALS conference: "A significant number of both educators and non-educators hold the view that a religious influence only deflects from the quality of a law school program." Rex Lee, *Today's Religious Law School: Challenges and Opportunities*, 78 MARQ. L. REV. 255, 255 (1995).

<sup>10</sup> MANNING M. PATTILLO, JR. & DONALD M. MACKENZIE, CHURCH-SPONSORED HIGHER EDUCATION IN THE UNITED STATES; REPORT OF THE DANFORTH COMMISSION 72 (1966), citing RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 38-40 (1963).

<sup>11</sup> Dean Howard Glickstein, of Touro Law School, made this point when describing what happened when a student publication referred to circumcision as "child abuse" and when another group invited a person with anti-Semitic viewpoints to speak at the Jewish Law School. Howard Glickstein, *A Jewish-Sponsored Law School*, 78 MARQ. L. REV. 481, 485-86 (1995).

<sup>12</sup> E.g., Robert A. Destro, *ABA and AALS Accreditation: What's 'Religious Diversity' Got to Do with It?* 78 MARQ. L. REV. 427 (1995); Steven R. Smith, *Accreditation and Relig-*

cifically because some schools opposed positions taken by the American Bar Association on controversial issues.<sup>13</sup>

Although many of those issues remain today, the ABA Accreditation Standards have been the subject of unprecedented attack, litigation, and some modification since the first ARALS meeting in 1994.<sup>14</sup> While such efforts to change the Standards have come from the federal government and groups other than religiously affiliated schools, the controversy around the Standards has given those of us connected with religious institutions an opportunity to again examine how we fit into the larger picture of legal education and how our religious affiliation informs our work as legal educators. It seems to me that two areas, in particular, require consideration—hiring for mission and academic freedom.

#### IV. HIRING FOR MISSION

If religiously affiliated law schools are to maintain their religious character and, indeed, enhance the religious nature of the university, the administrators and faculty must be committed to the mission of the institution. Nothing is more important to the character of the institution than “hiring for mission.” One thing that was clear from our discussions at the Virginia Beach conference, “hiring for mission” is an essential part of assuring and advancing the religious character of the law school.

“Hiring for mission” is frequently misunderstood by those not associated with religiously affiliated institutions as code words for some kind of right wing political agenda. Inordinate attention has been paid to the positions of various religious groups on questions of sexual preference, sexual conduct, and reproductive issues on which many religious groups take the same position as conservative political groups in the United States. Many people lose sight of the fact that “religious mission” extends beyond issues related to sex and reproduction.

The Old Testament, New Testament, Book of Mormon, and the Koran include many values that have nothing to do with sexual or reproductive issues, and not all such values are commonly thought of as being part of “conservative” philosophy. Many religious groups oppose capital punishment, favor greater rights for non-citizens, and favor more pro-

---

*iously Affiliated Law Schools*, 78 MARQ. L. REV. 361 (1995); Carl C. Monk, *Remarks Delivered at the Conference of Religiously Affiliated Law Schools, Commentary on Destro*, 78 MARQ. L. REV. 377 (1995).

<sup>13</sup> See Dr. Francis M. Lazarus, *Genesis of a Conference*, 78 MARQ. L. REV. 397 (1995).

<sup>14</sup> See Ken Myers, *Students: ABA Accreditation is a Consumer Protection Device*, NAT'L L.J., May 20, 1996, at A15; Ken Myers, *ABA Annual Convention Mantra: Give More Power to Institutions*, NAT'L L.J., August 19, 1996, at A14; George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation And Legal Education*, 19 CARDOZO L. REV. 2091 (1998).

grams that aid poor people. For example, the Society of Jesus espouses a policy of preferring programs that benefit poor people. Thus part of the mission of Jesuit law schools might well be outreach into the community, establishment of legal clinics, or an emphasis on poverty law.

In addition, the culture at many religious institutions includes an understanding of how people interact with one another. Such institutions expect students and staff to be honest, respectful, and caring. Given our profession's adverse public image, we can all benefit from treating each other with compassion and respect. Part of the mission of most religiously affiliated law schools is instilling in its students a higher set of standards and principles than simply those found in the Model Rules of Professional Conduct.

"Hiring for mission" has different meanings at different religiously affiliated law schools. For some it means hiring a person of *any* religious faith who can advance the mission of the institution. Thus it is possible to have a Jewish person as Dean of a Jesuit law school. In fact, when I was appointed Dean at Marquette in 1995 I was the fifth Jewish person then serving as Dean of a Jesuit law school. In such cases, "hiring for mission" obviously means something other than a person who is a member of the religious group that sponsors the institution. The "mission" is sufficiently broad to encompass persons from different faith traditions.

At other institutions, the religion of the administrator or faculty member does matter.<sup>15</sup> Members of the administration and the majority of the faculty—sometimes the substantial majority of faculty—are expected to be practicing members of the sponsoring religious organization. In such cases the "mission" of the institution requires leadership and a critical mass of faculty who are not only people of good will and committed to the moral goals of the institution, but are also women and men who are committed to the sectarian religious goals of the institution through practice of a specific religion or groups of religions.

One of the purposes of ARALS is to support and defend "hiring for mission" in both of its forms. Many of us have grown up in a time and environment when "discrimination" of any kind was not only politically incorrect, but also morally wrong. Thus, some of us recoil at the notion that "hiring for mission" means adopting a preference for co-religionists.

---

<sup>15</sup> Indeed, Catholic Bishops in the United States have been developing guidelines and mandates for implementing Pope John Paul's 1990 statement, *Ex Corde Ecclesiae*, regarding the nature of Catholic higher education. Patricia Rice, *Role of Universities, Dioceses Are Studied Panel of Bishops Offers Revised Draft: Keeping Church's Identity in a Key*, ST. LOUIS POST DISPATCH, Nov. 22, 1998, at B7. During the Bishops' November, 1998 meeting in Washington, a draft of such guidelines was circulated which called for the hiring of more "faithful" Catholic faculty and administrators and carrying out Catholic "ideals, principles, and attitudes" in research and teaching, which preserving academic freedom. *Id.*

But if we are serious about wanting to promote religiously affiliated institutions, the moral values espoused by such schools, and diversity of thought and purpose in law schools, such preferences must be respected, supported, and defended. Otherwise, we are saying that the government or an accrediting body can control what the sponsoring religious organizations believe.

Many of us in legal education believe that "diversity" is a good thing, and that different people, with different backgrounds and experiences, enrich the classroom experience and law school environment. Increasingly, we have also recognized that there is a similar advantage to diversity in legal education. Not every law school has, or should have, the same mission, and this applies to public and private institutions. This is part of the larger debate over the A.B.A. Standards, which tend to envision law schools that are quite similar, or at least have similar goals and aspirations; however, that is true only to a point.

Certainly, we all want to assure that our students are well schooled in the substance, ethics, and skills necessary to practice law, but there are a number of ways to achieve these goals. We who are involved with religiously affiliated law schools must glory in the fact that there is diversity among our institutions. For some, "hiring for mission" means that you seek out people committed to advancing the religious mission of the sponsoring institution. Yet, for others it means finding staff who are committed to the morals and values of the sponsoring institution.

Although some view "hiring for mission" as discriminatory, is it really any more discriminatory than basing a hiring decision on scholarship, practice experience, area of specialization, or even law school grades? Some in legal education "discriminate" against the graduates of certain law schools, refusing to even interview such people for fear that it will tarnish the reputation of the institution. We assume that someone who was on law review will make a better faculty member than someone in the middle of her class. In each case, we have in our minds certain standards or criteria by which we hire faculty and staff. Those standards and criteria are designed to fit the character and mission of the institution.

At a religiously affiliated law school, commitment to "mission" is as much a job requirement as a J.D. degree or sound scholarship. Moreover, every law school must define its own "mission." Neither the A.B.A. nor ARALS can tell a religiously affiliated law school what its mission is or how it must hire faculty to advance that mission. To do so invades the substantive religious prerogatives of the institution and its sponsoring religious body. One basic purpose of any organization of religiously affiliated law schools must be to defend member schools from encroachment on the religious prerogatives of the institution by either govern-

ment agencies or accrediting bodies. Unless, and until, restrictions are shown to be necessary to protect our students, the public, staff, and applicants from inferior education, fraud, or illegal conduct, religious institutions should not be required to adopt social, political, or philosophical positions that are inimical to the teachings of the religious body. Only the religious body itself can decide what it believes and what restrictions violate its religious tenets.<sup>16</sup>

Of course, it is essential that anyone being considered for a position at a religiously affiliated institution know the rules before accepting the job or matriculating as a student. It is unfair and inappropriate for the institution to first hire someone and then, after the individual has been there for some period, inform that person that his or her work is not advancing, or is inconsistent with, the mission of the law school. The "mission" cannot be a moving target, subject to either the whims of a given university (or law school) administration or political vicissitudes.<sup>17</sup> If the mission is clearly articulated, prospective faculty members can be expected to advance it through teaching, service, and scholarship.

"Hiring for mission" is of great importance in attracting students, staff and financial support. Many students come to a law school because of its character, and many people give money to educational institutions because of a desire to advance the religious mission. When the mission is not clear, students have a harder time separating a religiously affiliated law school from other institutions, and donors have little interest in supporting the school. Acrimony, litigation, and public embarrassment can occur if faculty and staff do not understand the mission of the school. Thus, as competition among law schools has increased, the need to carefully define "mission" has become more and more important, as has hiring people—and recruiting students—to support that mission.

## V. ACADEMIC FREEDOM

Academic Freedom is related to the mission of the university or law school. The A.B.A. Standards require that law schools have an established policy on academic freedom and tenure.<sup>18</sup> Appended to the A.B.A.

---

<sup>16</sup> See *Maguire v. Marquette University*, 627 F. Supp. 1499, 1503 (E.D. Wisc. 1986), *affirmed in relevant part*, 814 F.2d 1213 (7th Cir. 1987) (federal court is neither competent nor allowed to determine religious beliefs of institutions).

<sup>17</sup> This same point was made by Working Group of the Executive Committee of the Association of American Law Schools which called upon religiously affiliated law schools to "give clear notice of the religious tenants and values of the institution to prospective" faculty and that such applicants for faculty positions "become fully aware of the culture of the institution so that they can make informed decisions about whether they will feel comfortable in an environment where they will be expected to conform their behavior to those tenants and values." Monk, *supra* note 12, at 387.

<sup>18</sup> American Bar Ass'n, Standards for the Approval of Law Schools § 405(b) (1998).

Standards, as an example of an appropriate statement regarding academic freedom and tenure, is the "1940 Statement of Principles on Academic Freedom and Tenure" of the American Association of University Professors.<sup>19</sup> Although the Statement generally requires "full freedom" in speech and publication and "freedom in the classroom in discussing his (*sic*) subject," the 1940 Statement recognizes that the religious mission of the institution may limit the broadest notion of academic freedom.<sup>20</sup> The Statement provides: "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of appointment."<sup>21</sup> This Statement acknowledges what is sometimes obfuscated—the religious affiliation of a sponsoring institution may indeed limit "academic freedom" in its broadest sense.

Some religiously affiliated institutions embrace academic freedom as part of its mission and are prepared to defend actions and writings by faculty that are seemingly inconsistent with the teaching of the sponsoring religious body. Thus, for example, at some Catholic institutions faculty members who have publicly criticized and disagreed with positions taken by the Church on various moral and personal issues have been tolerated and respected, if not encouraged.<sup>22</sup> In fact, from my experience being first at two public law schools and now at Marquette, I find the degree of academic freedom significantly greater here than at a public institution. Political pressures in a public institution can have an enormous chilling effect on the academic or personal freedom of a faculty member. Just ask Professor Anita Hill at the University of Oklahoma whose testimony at the Clarence Thomas confirmation hearing brought a firestorm of protest that included trying to close the Law School because of her testimony.<sup>23</sup>

Although there may be occasions when academic freedom is limited at a religiously affiliated law school because of its religious nature, a re-

---

<sup>19</sup> American Bar Ass'n, Standards for the Approval of Law Schools App. I (1998).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Daniel Maguire, a former priest who teaches Theology at Marquette University (a Catholic and Jesuit institution) was featured in a September 14, 1987 article in *People Magazine* on nine Americans Pope John Paul II "won't want to meet." Susan Reed, *The Pope Rediscovered American: Nine Americans He Won't Want to Meet—and Why*, *PEOPLE*, Sept. 14, 1987, at 112, 112. Professor Maguire held opinions on abortion opposite those of the Catholic Church. *Id.* On the other hand, Marquette did reprimand a mathematics professor who first tried to remove a crucifix from a classroom wall before covering it with a book bag. See *MU Prof Who Covered Crucifix with Backpack Apologizes*, *MILWAUKEE JOURNAL*, Sept. 2, 1994 at A1.

<sup>23</sup> As a result of Professor Hill's testimony, conservative members of the State legislature tried to close the Law School. See Mark Potok, *Controversy Again Finds Anita Hill*, *USA TODAY*, Dec. 8, 1995, at 4A. One legislator referred to Professor Hill as a "cancerous growth." *Id.*

ligiously affiliated institution can offer academic freedom greater than at a public institution because we are free to discuss the religious, moral, and spiritual aspects of what we teach, without fear of violating the rights or sensitivities of our students. Although the A.B.A. Model Rules allow counsel to discuss with a client the moral and social factors which relate to a legal matter,<sup>24</sup> at a religiously affiliated institution, students can—and are—encouraged to regularly discuss the morality and “rightness” of the client’s action, as well as the legality of such contemplated conduct. When discussing such hot-button issues as abortion, homosexuality, or the death penalty, the moral or religious perspective is just as important as the legal aspects of the issue. Unless students understand the moral and religious issues involved in such important areas, they are not prepared to completely advise a client or advocate their cause, regardless of what side of the issue they are representing.

Even if there are profound differences of opinion, discussing issues of value, faith, and morality inform our discussion of law. Sometimes providing advice to a client or deciding what action to take requires consideration of moral questions and our students have to understand that it is okay to raise moral issues with a client or to resolve issues based on “what’s right” so long as that course of action is also “legal.” And so, although the Supreme Court has said that the death penalty can be constitutional, that does not mean that states must or should adopt capital punishment. The fact is that our students will be the legislators and judges of the future. They have to know when the constitutions and laws preclude adopting legislation that limit certain activities, and when it is proper and appropriate to consider the moral ramifications of adopting laws or pursuing a particular course of action. Students must be given the freedom to consider not only what is legal and ethical, but what is moral and right.

Some religiously affiliated law schools require the discussion of morality in each course or ask faculty to include biblical reference in courses. Still other school would find it inappropriate if faculty said certain things in class or wrote on certain subjects. Clearly, compelling that courses be taught in a certain way or declaring that certain subjects are off limits seems contrary to traditional notions of academic freedom. And yet, “Academic Freedom” can mean that the institution and its faculty are free to declare that its religious mission require teaching in a certain way or forbids or discourages writing on certain subjects. So long as there is advance and timely notice to both faculty and students, and so long as the students are receiving the appropriate and necessary sub-

---

<sup>24</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983).

stantive instruction, placing such limitations on faculty are justified, if required to advance the mission of the university or law school.

Many of us would not feel comfortable at such an institution, and a few of us believe that such institutions should not be accredited as a "real" law school. And yet, if everyone (faculty and students) has notice of the nature of the institution, and the expectations for teaching and scholarship, it is hard to see a principled objection to teaching morality and even religion in addition to substantive law. We must be serious about the need for diversity and pluralism in legal education. So long as the students are learning the law, we must recognize the importance of allowing institutions to teach consistently with what they believe. "Academic Freedom" can mean the institution's freedom to decide on how its religious mission should be reflected in its faculty's teaching and scholarship. This may not be acceptable to everyone, but these institutions have the duty to inform prospective employees of the mission and the right to expect faculty to adhere to that mission as a condition of employment.

#### IV. THE FUTURE

Through most of the 1990s, the number of law school applications has been decreasing. Although it is probable that the number of applications will slightly increase in the next few years, the heady days of the 1970s and 1980s are over. Competition for qualified students will remain keen, as will the need to show students and their parents the "value added" which justifies high tuition at our law schools. Religiously affiliated law schools have an important message that can attract many students. Although the ultimate value is the strength of the morals, values, and faith each of our sponsoring religious bodies represents, we still must get the students in the door if we are to have an impact on their lives and on the future lives of our communities.

Strategies will differ. Politics and approach will vary. But in the end, we must respect each other and protect each of our approaches to value-based legal education, in the context of religiously affiliated institutions. We must hire for mission and operate our law schools with the mission in mind. If we do that, we not only will advance the religious nature of the institution, we will also fill our classrooms with qualified students, sensitive to the religious mission of the school, and produce better lawyers for the next millennium.