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The “Religious” Exemption from NLRB Jurisdiction

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In this paper, I'd like to turn our attention to a particular case that I'm involved in, the organizing drive at Duquesne University, which has followed a pattern similar in some respects to the organizing drives at St. Xavier University in Chicago and Manhattan College here in New York. First, allow me to briefly recount the series of events. My colleagues and I first starting talking about organizing in the summer of 2011 and we decided to affiliate with the United Steelworkers. We identified three core issues that seemed to us most important: pay, health care, and job security. At the time, we were being paid $2,500 per course and had seen no increases for years. At the official maximum of two courses per semester, that amounted to $10,000 per year, a pay level well below the poverty line even for a single individual with no dependents.¹ Had we been given the opportunity to teach, say, a heavy 4/4 load, we would have been making $20,000 per year. As a point of comparison, according to the Bureau of Labor Statistics, the median salary for janitors in the United States is about $25,000.² And, according to its own figures, full-time, non-tenure-track Instructors at Duquesne made about

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$53,000 on average in 2011, which, at their usual 3/3 load, amounts to $8,800 per course.\(^3\) So we were, and remain, absurdly underpaid. We also had no access to health insurance through the University, even if we had the money to purchase it. And our contracts were drawn up for each individual course, so that we had no job security from one semester to the next. Even when we had a signed contract for a course, it offered no assurance of employment whatsoever, since the contract permitted the employer to break it at any time for any reason—or for no reason. Like adjuncts nationally,\(^4\) the majority of us are career academics, not people who teach on the side and have some other career or source of income. I have colleagues who have been working under these conditions for 25 years, and all but a tiny minority are hired semester after semester to teach the same courses—so we are clearly not “adjuncts” to the institution in any meaningful sense of the word. In fact, we are 51% of the faculty.\(^5\)

So, as you can imagine, when we started talking to our colleagues about unionizing, we found that we had a lot of support. By the end of the Spring semester of 2012, 70% of our colleagues had signed authorization cards. So on 14 May we set up a meeting with the then Vice President for Business and Management, Steven Schillo. We invoked the collaborative conception of labor-management relations advocated in Catholic Social Teaching, and we asked that the Administration voluntarily recognize our union, offering to have our signed cards verified by a neutral third party, Fr. Jack O’Malley. Mr. Schillo told us to “leave Catholic Social Teaching at the door” and insisted that we petition for an election through the NLRB in order to clarify the composition of the bargaining unit. If we won the election, Mr. Schillo stated that the Administration would bargain in good faith. So, that afternoon, we submitted an election petition with the regional office of the NLRB.

A week later, on 25 May, we had a conference call between our attorney at the USW, the Administration’s local labor attorney, their General Counsel, and President Dougherty. After a relatively amicable negotiation, we reached an agreement about the mechanics of the election


\(^4\)According to a recent study by the Coalition on the Academic Workforce (a study that obtained its information from the faculty in question, rather than relying on administrators’ speculations about faculty, and that had a far higher response rate than any other similar study), 73.7% of part-time faculty would accept a full-time, tenure-stream job at the institution where they currently teach. See http://www.academicworkforce.org/survey.html, Table 15.

and the composition of the voting bargaining unit, and we memorialized that agreement in a “Stipulated Election Agreement” executed by both parties. In that document, the Administration accepted the jurisdiction of the NLRB, consented to the election, and waived its right to a hearing in which it might have raised any objections it had to the NLRB’s jurisdiction. But three weeks later, we discovered that the Administration had hired a new attorney, Arnold Perl out of Memphis, and Mr. Perl had filed a motion trying to prevent the election.\textsuperscript{6} His brief appealed to the \textit{Catholic Bishop} and \textit{Great Falls} decisions, and argued that, as a Catholic University, Duquesne should be exempt from the jurisdiction of the NLRB. I want to spend some time examining this argument, but first to bring us up to date: the Regional Director of the NLRB was unimpressed by Mr. Perl’s argument, and noted that the Administration had already accepted the jurisdiction of the NLRB in two previous cases, including a tenure-stream faculty union (which they fought by appealing to \textit{Yeshiva}). It hadn’t objected to the NLRB’s jurisdiction before, so it couldn’t suddenly make itself exempt unless it could show “relevant changed circumstances.” The Regional Director ordered the election to proceed, and when the votes were counted 85% favored forming a union. The University appealed to the national office of the NLRB, and we are currently awaiting a decision from that office.

So I want to examine the argument for this “religious” exemption both in legal and in rational terms. Ideally, the law would comport perfectly with right reason and the will of God, but alas, this is not always the case; so the two need to be considered separately. Let’s start with the legal issues. From a legal standpoint, the Administration’s argument has some real procedural problems. In the Stipulation, they already accepted the jurisdiction of the NLRB, and, as our attorney put it, they surely aren’t claiming to have a religious exemption from contract law. In signing that Stipulation, they also waived their right to a hearing, which means that any documentary evidence they supply is effectively hearsay and inadmissible. So even if they had a case, they couldn’t prove it.

But how does their argument fare on its merits? The National Labor Relations Act itself includes a list of exemptions of several categories of employees, including government employees, railway workers (whose collective bargaining rights were covered by the Railway Labor Act), and union officers. But the Act does not exempt employees of non-profits, employees

\textsuperscript{6}For the legal documents from both parties, see http://www.nlrb.gov/case/06-RC-080933.
of universities, employees of religiously-affiliated universities, or even employees of churches themselves. The Taft-Hartley Act of 1947 originally added such an exemption, but that exemption was struck from the Act (apart from an exemption for non-profit hospitals, itself removed in 1974). The exemption for “church-operated schools” was eventually forced into labor law by the Catholic Bishop decision. The majority opinion in that decision provided no litmus-test for what would count as a “church-operated school,” and subsequent rulings have varied quite a bit in what criteria they invoked. But the Court indicated the sort of problem they had in mind by citing the following from Lemon v. Kurtzman:

In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook’s content is ascertainable, but a teacher’s handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.

So the worry seems to have been that, by enforcing the collective bargaining rights of teachers at religious schools, the federal government would be spending money that ultimately could be used to support a teacher’s endeavor to propagate religious doctrines. They also suggested that the opposite could be the case and the NLRB might step in to protect a teacher whose statements in class were inconsistent with the religious doctrines propagated by the school.

Mr. Perl’s brief does not give any examples of how, exactly, the NLRB might be perniciously “entangled” in religious affairs at Duquesne. But President Dougherty’s letter on the issue cited exactly the sort of concern I just quoted from Catholic Bishop. Here is his complete

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7Section 2(2), 29 U.S.C. 152(2).
9The Administration’s counsel cited in its Motion to Withdraw the criteria in University of Great Falls, 331 NLRB 1663 (2000), criteria which are extremely vague (despite the odd habit of calling them a “bright-line test”). A more relevant precedent, with clearer criteria, is Livingstone College, 286 NLRB 1308 (1987), and it is criteria along those lines that the Board’s Region 13 has recently applied in Saint Xavier University v. Service Employees International Union, Local 1, Case 13-RC-092296 (2012). Duquesne does not satisfy either set of criteria, including its attorney’s preferred criteria from Great Falls. For example, it does not “hold[] itself out to students, faculty[,] and the community as providing a religious educational environment,” both because it does not require that students study Catholicism at all in any class and because its advertisements frequently don’t even mention the University’s religious history. The most common Duquesne billboard in the Pittsburgh area, for example, reads “Duquesne University: Experience Tradition” and includes a close-up picture of Duquesne’s distinctive class ring—the billboard gives no hint of any kind whatsoever that the University has any connection to any religion.
10617, 91 S.Ct., at 2113, emph. mine.
litany of anxieties:

Our specific concerns related to a union formed under the jurisdiction of the NLRB include the following. Could we lose our right to hire faculty members who would best advance our mission? Could our right to require mission orientation for faculty be challenged? Would we lose our ability to employ merit pay based on criteria that include commitment to the mission? Would grievance processes impede our ability to remove or refuse to rehire adjuncts who are hostile to our mission? Would an adversarial relationship develop between the University and our adjuncts, undermining our ability to build and sustain a sense of community around the academic core of our mission? Where would potential concessions on mission issues end? In short, the Steelworkers appear to be opening a path that could lead to the compromise or loss of our Catholic and Spiritan identity.\footnote{See http://newsroom.duq.edu/2012/06/22/president-doughertys-letter-addressing-an-nlrb-issue/\footnote{It is worth noting that the foundational statement on academic freedom, the AAUP's 1915 "Declaration of Principles on Academic Freedom and Tenure," itself makes a clear distinction between "a proprietary school or college designed for the propagation of specific doctrines prescribed by those who have furnished its endowment" and "ordinary institutions of learning" where faculty "are not strictly bound by their founders to...}}

Hyperbole aside, the only substantive worry here is that a faculty member (or applicant for a faculty position, raise, etc.) might either personally deviate from Catholic doctrine or perhaps make statements inconsistent with Catholic doctrine.

So are there grounds for either of these concerns? The University’s Human Resources department’s “Employee Information and Policy Guide,” includes a section on “Faculty Hiring & Diversity Recruitment” that states as follows:

It is important to recognize that Duquesne University does not require or ask that an applicant believe in the Catholic doctrine, nor does it preclude discussion of doctrine in an academic context.

The University's explicit policy, then, is that faculty are neither required nor requested to be Catholic. Faculty are also explicitly permitted to engage in academic discussion of Catholic doctrine, and the University's explicit policies give faculty freedom of intramural speech “in an academic context.”\footnote{It is worth noting that the foundational statement on academic freedom, the AAUP’s 1915 “Declaration of Principles on Academic Freedom and Tenure,” itself makes a clear distinction between “a proprietary school or college designed for the propagation of specific doctrines prescribed by those who have furnished its endowment” and “ordinary institutions of learning” where faculty “are not strictly bound by their founders to...} This is what you would expect of a University aspiring to be a major
research institution, since such basic protections of academic freedom are essential to recruiting and retaining a high-quality faculty. But plainly the University’s own policies require that its faculty be free to do exactly the things that the Catholic Bishop decision was at pains to prevent and that the President claims to dread will come to pass. If faculty are not required to adhere to Catholic doctrine, no possible conflict could arise in bargaining that would even need to mention Catholic doctrine, much less damage in some way the University’s mission.

So the merits of the Administration’s legal argument strike my amateur eye as rather thin. But do they have some rational grounds to feel that the law here is unreasonably intrusive? Should their Catholic affiliation free them from the obligation to negotiate with their employees’ chosen collective bargaining representative? This argument depends on the First Amendment, of course, but it also depends on Catholic doctrine, since this is what they claim to protect and defend. And human laws only have so much weight in Catholic doctrine. As Pope Leo XIII puts it in *Rerum Novarum*, “laws only bind when they are in accordance with right reason, and, hence, with the eternal law of God.” According to Catholic doctrine, right reason and the eternal law of God require the following fundamental rights for all workers: (1) “the right to a just wage” (the Church defines a “just wage” as a wage sufficient that a worker “may be furnished the means to cultivate worthily his own material, social, cultural, and spiritual life and that of his dependents”—a much higher standard than a “living wage”), (2) “the right to a pension and to insurance for old age, sickness, and in case of work-related accidents,” (3) “the right to appropriate subsidies that are necessary for the sub-

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... and, whatever be their own views, are obligated to carry out the terms of the trust. If a church or religious denomination establishes a college to be governed by a board of trustees, with the express understanding that the college will be used as an instrument of propaganda in the interests of the religious faith professed by the church or denomination creating it, the trustees have a right to demand that everything be subordinated to that end.” In the latter case, however, the trustees are charged with “a public trust” (rather than “a private trust”) and therefore “Trustees of such universities or colleges have no moral right to bind the reason or the conscience of any professor.” Absolutely every aspect of Duquesne University, from its mission statement to its financial plans, makes perfectly plain that it is an example of the latter kind of university, charged with “a public trust,” and therefore cannot claim exemption from the laws instituted by the public to protect workers. See http://www.aaup.org/report/1915-declaration-principles-academic-freedom-and-academic-tenure.

13See http://www.duq.edu/about/administration/strategic-plan.


15It is worth noting that the Catholic Church, unlike the majority opinion in Catholic Bishop, does not exclude any class of workers whatsoever from these rights.

16Effectively, the idea of a “living wage” suggests that social responsibility is limited to bare life, a standard that is plainly too low since we could satisfy that standard just by putting the poor in prison.
sistence of unemployed workers and their families,” and (5) “the right to assemble and form associations.” Duquesne currently denies its adjunct faculty all of these rights. Elaborating on the last of them, “The Magisterium recognizes the fundamental role played by labour unions, whose existence is connected with the right to form associations or unions to defend the vital interests of workers employed in the various professions. . . . Such organizations, while pursuing their specific purpose with regard to the common good, are a positive influence for social order and solidarity, and are therefore an indispensable element of social life.” If that isn’t plain enough, the US Conference of Catholic Bishops put it this way: “The Church fully supports the right of workers to form unions or other associations to secure their rights to fair wages and working conditions. . . . No one may deny the right to organize without attacking human dignity itself.” Duquesne cannot be simultaneously too Catholic for the government and not Catholic enough for the Church.

By contrast, consider the following quotation from the “Just Employment Policy” of another Catholic university, namely Georgetown:

everyone in the Georgetown community has a right to a safe and harassment-free environment, . . . all working members have a right to freely associate and organize, and . . . the University will respect the rights of employees to vote for or against union representation without intimidation, unjust pressure, undue delay or hindrance in accordance with applicable law. Georgetown will provide, and will seek commitments from its contract employers that they will provide, full-time jobs when possible and part-time or temporary work only when necessary.

To my ear, that is what a Catholic university sounds like. SEIU’s Local 500 is organizing Georgetown’s adjunct faculty right now—their ballots just went out—and Georgetown has lived up to those promises.

As for Duquesne’s Administration, I have my doubts that they even believe their own arguments. We discovered the truth of the matter quite by chance when President Dougherty sent

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our organizing committee an email that was intended for the President of the Association of Catholic Colleges & Universities (and cc’d to the Presidents of St. Xavier University and Manhattan College). In that email, he said that they expect to lose at the NLRB. And if they expect to lose, the only reason to keep throwing money at it is to cause delay. But they are delaying the inevitable. Everyone recognizes that, as Dan King, the executive director of the American Association of University Administrators, recently put it, “colleges and universities are going to have to rethink their model for how they compensate adjuncts. It’s clear to me over time the current model isn’t going to be sustainable.” And at Duquesne, we have no intention of awaiting legal certification to act like a union. For us, legal certification is merely one tactic among many. We have already been busy building constructive working relationships with lower-level administrators and tenure-stream faculty that have led to improvements in our members’ working conditions. Indeed, since we went public with our organizing effort, the pay of all the adjunct faculty in the University has increased to $3,500 per course minimum, a 40% raise. That’s a step in the right direction. And we will be delighted to work with the upper Administration to develop a financially responsible plan for securing the academic future of the University, just as soon as they commit themselves to helping right reason and the will of God prevail.