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## The Future of Labor Plenary Panel Discussion

### Authors

Jack Ahern, His Eminence Edward Cardinal Egan, Samuel Estreicher, Richard Michael Fischl, Lawrence Joseph, Cynthia Nance, Gene Orza, Bernie Ricke, Judith A. Scott, and Theodore J. St. Antoine

# **THE FUTURE OF LABOR PLENARY PANEL DISCUSSION**

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THEODORE J. ST. ANTOINE  
MODERATED BY: HON. WILMA B. LIEBMAN**

**EDITOR'S NOTE:** "The Future of Labor" panel discussion was moderated by the Honorable Wilma B. Liebman, Chairman of the National Labor Relations Board. The panel was preceded by brief remarks by Professor David L. Gregory and President of the St. John's Labor Relations and Employment Law Society and J.D. Candidate, '12, Melissa Schneer, honoring '73 graduate Gene Orza with the Distinguished Alumnus Award. Mr. Orza accepted the award, giving his own brief remarks.

**GREGORY:** Before we turn the panel over to its moderator, the Honorable Wilma Liebman, Chairman of the National Labor Relations Board, I want to tell a very true story about a dark and stormy night, specifically November 10, 1997. The weather was miserable. Nevertheless, the largest classroom in the building was packed to the brim. Gene Orza, '73, one of our great alumni, spoke about Jackie Robinson. For good measure, Gene, being Gene, brought 200 sets of the great, definitive biography of Jackie Robinson to sign and distribute to the members of the audience. Basil Paterson, '51, was

among the prominent Alumni who attended. It was a magnificent evening—the first time I really saw Gene Orza in action. He is a master of so many things: people skills, generosity, grace. March 31st will be Gene's official last day with the Major League Baseball Players Association, where he has been the Associate General Counsel and, for the past several years, the Chief Operating Officer. Gene has done so much for this Law School, from hiring law clerks to mentoring students and graduates. Gene has returned to St. Johns Law School on many occasions to speak to our students. For example, last June, he was among those who introduced National Labor Relations Board Chairman Liebman, our keynote speaker, at the inaugural annual general reception for our Center for Labor and Employment Law. St. John's has no finer alumnus than Gene Orza. I would like to ask Gene and Melissa Schmeer, his successor as President of the Labor Relations and Employment Law Society for 2011–2012, to please step to the front.

**SCHNEER:** Mr. Orza on behalf of this year's Labor Relations and Employment Law Society, we are giving you this plaque for distinguished alumnus. You are definitely a tough act to follow.

**ORZA:** Thank you. I confess to being thoroughly stunned that this is happening. My immediate reaction when David started saying all these nice things about me was, if he is saying that much just about me, by the time he gets done with the other eight or nine people up here, it will be five o'clock in the evening.

I don't know what to say, really. I love this institution. I love all that it has meant to me. I love the students it has given to me. I hope you love some of the people I have given you back, like

Jeff Fannell. I am not sure I deserve this. I mean that sincerely, but I am gratified to be here and pledge I will always be loyal to the people here at St. John's. You have a distinguished group behind me, far more distinguished than me, and I think perhaps we should best hear from them, but thank you so much. I am literally unhinged by this, so I should add that if, when it's my turn, I am not as eloquent as I may be expected to be, perhaps you might tell yourself that maybe he had an off day because we took him off his skids for a while with this remarkable and wonderful, and perhaps questionably deserved, award. Thank you very much.

HON. LIEBMAN: I have the privilege of moderating this very distinguished panel made up of nine people from the Church, the academy, and from organized labor. Just one word of personal privilege, which is that Gene is immensely deserving of this honor. I have known Gene just about from the first day I started to practice law at the National Labor Relations Board in 1974. Gene was already working there, so I have known him for a long time and have the deepest respect and admiration for him.

To move onto the panel, I am not going to take up time introducing everyone. We will start with Professor St. Antoine, then Judy Scott, Dean Nance, and down the aisle. With so many people on this panel, I proposed two questions for the panelists. I suggested that they could answer one or both. Afterwards, we will have some time left for discussion among them. Let me take a moment to state the two questions that I posed to them.

First of all, we are, today, witnessing a battle over the legitimacy of labor law and collective bargaining rights. One law professor recently

asked why labor law is “open to massive political attack, while merely criticizing anti-discrimination law is a good way [to become] a political pariah.”<sup>1</sup> The professor suggested that religious traditions are part of the answer.

Anti-discrimination law, he said, “holds up the ideal of an individual judged wholly independent of any accidents of birth or identity.”<sup>2</sup> It basically reflects the Protestant view of the moral universe. Anti-discrimination law is, “in large part the creation of [the] Protestant religious tradition, the African-American Christianity of Martin Luther King Jr.,] and the Civil Rights Movement.”<sup>3</sup>

Labor law, on the other hand, he wrote, encourages the association of workers and requires management to bargain with the associations.<sup>4</sup> It basically reflects a Catholic view of the moral universe. “Catholicism accepts the legitimacy of tradition [as a] defining identity and insists that spiritual life requires participation in the ‘community of the saints.’”<sup>5</sup>

“Catholics have always figured prominently in the leadership of the labor movement,” and the professor concluded that, “[d]espite our nation’s laudable commitment to religious diversity, . . . it is unsurprising that a body of law based on Catholic notions of solidarity [in the] community and skepticism about the ultimate merits of unfettered individualism enjoys a more precarious position than its Protestant cousin.”<sup>6</sup>

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<sup>1</sup> Nathan B. Oman, *Religion, Anti-Discrimination and the Decline of Labor Law*, DESERET NEWS (Feb 26, 2011, 12:00 AM), <http://www.deseretnews.com/article/700113449/Religion-anti-discrimination-and-the-decline-of-labor-law.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

My first question is, do you agree with these premises and, if so, what, if anything, do they say about the future of labor law in this country?

With regard to my second question, a European Commission Report said recently that “good labor relations between employers and trade unions helped the European Union through the economic crisis of 2008 [to] 2010.”<sup>7</sup> The report states that the “member states where social partnership is strongest are those that are successfully overcoming the crisis.”<sup>8</sup> The employment commissioner of the EU said we have to “emerge from the crisis with more and not less social dialogue.”<sup>9</sup> This “will also help bolster the competitiveness of Europe’s economy.”<sup>10</sup>

The United States is a member of the International Labor Organization and has ratified the Tripartite Consultation Convention (1976), but it has been observed that the notion of social partnership as normally understood in an industrial relations context does not speak to the reality of the United States where the relationship between unions and employers, and between unions and the government, has often been adversarial.

Do you agree with this? Could European social dialogue be a viable model in this country post-Wisconsin, or is there some other big idea that could be transformative at this time? With that, I will turn to Professor St. Antoine for his comments.

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<sup>7</sup> *BNA Daily Labor Report: Good Relations Between Unions, Employers Said To Help EU Weather Economic Crisis*, TEAMSTERS FOR A DEMOCRATIC UNION (Mar. 9, 2011), <http://tdu.org/node/4599>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

ST. ANTOINE: Thank you, Wilma. Let me just say that one of my views about a subject as broad and complicated as society and relations between employers and employees is that you can often make contrary statements about these large complicated subjects and there will be a good deal of truth in those two contrary statements.

Now, I am fascinated by Wilma's first question. I do think there is a grain of truth in the notion that the Protestant ethic in this country has been highly individualistic. I am struck by the realization that at the end of the twentieth century, the United States was probably the only major industrial democracy in the world that held the three-fold distinction of having the death penalty, employment at will, and no national health insurance. We have made a bit of progress in the twenty-first century and addressed at least one of those deficiencies, but they do support the notion of a highly individualistic society.

I think there is something to the idea that Catholic social teachings place a premium upon the concept of collective action and social justice, but it certainly is not Catholic social teachings alone. There has always been, at the forefront of the labor movement, a significant brand of German-Jewish socialism that has played a role in this collective thinking. And so, again, my original notion is that complicated subjects, like a society and the relationships of the different competing elements within it, often enable you to make quite contrary statements about them.

Wilma authorized some departure from her two questions. Therefore, I am not going to attack the second one directly, but I am going to endorse a



point that Bob King has made in several of his statements. Bernie Ricke may follow-up on this as well.

I deeply hope that Bob King represents a widespread return by the labor movement to the espousing of social activists' areas of concern that do not necessarily simply reflect the membership's personal interests. I think unions have lost a good deal of their stature in the eyes of the public by seeming to be interested exclusively in their own narrow, bread-and-butter issues. In fact, as Sam Streicher so wittingly pointed out during his address at lunch, the labor movement can and should take significant credit for several major landmarks of social progress. Unions were behind the Occupational Safety and Health Act. They were behind ERISA, the Pension Reform Act.

And now I cannot resist finishing off with a short story from my personal knowledge. At the time of the Civil Rights Act debates in 1963 and 1964, I was a junior partner of the General Counsel of the AFL-CIO. George Meany, who was not an obvious civil rights champion like Walter Reuther, was actually deeply dedicated to the elimination of discrimination in the labor movement.

As you may know, at least those of you who were around during that period, the original Kennedy Administration Civil Rights Bill did not contain an equal employment opportunity provision.

George Meany took himself over to the White House to remonstrate with the President about that. And I could imagine the scene—I suspect Meany modified this story slightly as he related it to us—Kennedy said to him, “George, I didn’t think there was any need for an equal employment opportunity provision. I assumed that you could

keep your troops in line without any statute behind it." I suspect that Meany replied, "Jack," but as he related it to us, he said, "Mr. President, that's the problem. I can't keep the troops in line. I need a law I can blame!" Thereafter Meany and Reuther, together, were a major factor in the passage of Title VII of the Civil Rights Act of 1964.<sup>11</sup> I am convinced that the future of organized labor will be greatly enhanced by a return to that same kind of crusading spirit, emphasizing matters of value to working people generally and not merely to those who are already unionized.

HON. LIEBMAN: Judy, please.

SCOTT: I often think it is hard to put some of these things into practice, but I want to share some experiences I have had in recent years that I think helps answer a little bit of the questions that Wilma raised.

First of all, we have had a lot of discussion here about the issues of the dignity of work and equality in the workplace. It is my firm belief that without collective bargaining workers cannot truly achieve dignity at work and equality at the work site. Collective bargaining, in its very essence, is about recognition that both parties have something to bring to the discussion. It is a vehicle through which management and labor can treat each other with mutual respect in the process of problem solving.

When I think back on the Clinton Administration, we had a lot of debate during those days about labor law reform and whether we were going to achieve anything significant in improving workers' lives. I think that there was a misconception, in

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<sup>11</sup> See 42 U.S.C. § 2000e (2006).

some progressive communities, that you can address workplace problems through statutes and agency rules, but that you do not need to extend union rights and bargaining to achieve the dignity at work or workplace equality. I disagree: I believe workers cannot really achieve these goals without the ability to join together and take action in their own work sites.

Let me share a concrete example. I was part of the coalition group that worked hard to enact the Pregnancy Discrimination Act, to ban pregnancy discrimination in employment. In 1978, that bill was put into effect.<sup>12</sup> Certainly, you might conclude we achieved our goal that year, but frankly, in many workplaces of America, discrimination persisted. We had to turn to collective action to achieve enforcement of the law's promise. At that time I was with the UAW. We went to the Big Three Auto bargaining table and we said to GM, Ford, and Chrysler, "What are you going to do to implement the new law that is going to change things at the work site and really make a difference?" We made numerous changes in the provisions of the collective bargaining agreement, but that was not enough. The UAW had to go to the work sites and give people the educational tools to know what their rights were and to empower stewards to enforce those rights through grievances and local agreements. All this is about the fact that you may make pronouncements at the top, but unless workers have the ability to enforce their rights in a practical way at the work site through their union, you cannot really achieve dignity at work.<sup>13</sup> That is why the process and practice of collective bargaining are crucial.

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<sup>12</sup> See *id.* § 2000e(k).

<sup>13</sup> See Judith Scott, *Why a Union Voice Makes a Real Difference for Women Workers: Then and Now*, 21 *YALE J.L. & FEMINISM* 233, 233–34 (2009).

I was involved in working with Catholic employers, particularly in the healthcare industry, to craft a joint agreement to apply a fast and fair election process to enable many workers to decide whether to have a union. In addition to union colleagues, I SEIU worked closely with the U.S. Conference of Catholic Bishops, Catholic Health Care of America, and AFL-CIO, to conclude an impressive set of principles entitled “Respecting the Just Rights of Workers; Guidance of Options for Catholic Health Care and Unions.”<sup>14</sup> This document underscores the importance of respect for both parties. It emphasizes that a code of conduct should be worked out beyond the requirements of the National Labor Relations Act to reflect the Catholic social teachings and to promote a fair way in which workers can choose a union that goes beyond the basic protections you get under current labor law.<sup>15</sup>

In addition to recommending a common mission, the parties should spell out practical ways to affect the situation at the work site.<sup>16</sup> For example, the employer will not conduct mandatory group or one-on-one supervisory meetings with employees on the subject of unionization or raise the subject of unionization at mandatory meetings.<sup>17</sup> This policy is about the issue of mutual respect. Workers should not feel that they are coerced into hearing one side and not the other. And employees should have equal access to information from both the union and employer.<sup>18</sup>

Under these principles, neither side, union nor management, will denigrate or disparage the other

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<sup>14</sup> See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Respecting the Just Rights of Workers: Guidance and Options for Catholic Health Care and Unions* 5 (2009).

<sup>15</sup> See *id.* at 6.

<sup>16</sup> See *id.* at 4–5.

<sup>17</sup> See *id.* at 6, 8.

<sup>18</sup> See *id.* at 8.

party's mission: The union will not say bad things about the hospital's leadership; the employer will not say bad things about the union's leadership. Instead parties will talk about resolving workplace issues in a manner of mutual respect.

In one case involving a major Catholic employer—who will go unnamed—the union had serious objections to the way the employer was campaigning under this code. We pursued a big arbitration case to remedy the violation. In that situation, the parties had agreed not to denigrate each other's mission, but the employer put out anti-union leaflets with messages such as how many loaves of bread a worker could buy if she did not have to pay union dues. In describing why this employer tactic violated the parties' agreement, the arbitrator said, "The attitude reflected in the statement, comments, and fliers directed at the employees are totally inconsistent with the teachings set forth by the various papal encyclicals concerning labor unions over the years." The arbitrator discussed the spirit behind various papal encyclicals, and he ultimately concluded the employer's propaganda was not how the parties pledged to carry out their campaigns. The arbitrator also issued some very practical rules about the use and content of leaflets.

I am referring to this arbitration case because it points out that while we can set very lofty goals about what we care about in terms of dignity and equality at work, it often comes down to the details of implementation that truly reflect how real these commitments will be. Here, it was about the words the employer put in its leaflets: They spoke volumes on how it would treat the union in the workplace on a day-to-day basis.

I want to conclude with a reflection on whether commitments to dignity at work may differ based on various religious teachings or distinctions between the Catholic or Protestant traditions. I do not think there is really a fundamental difference to be found here. I draw your attention to a beautiful editorial in the New York Times written by the Dalai Lama: “Many Faiths, One Truth.”<sup>19</sup> The Dalai Lama writes about how he grew up with prejudices about other religions until he had deep discussions with Thomas Merton about other religions. He came to realize with Merton, “how central compassion was to the message of both Christianity and Buddhism.”<sup>20</sup> In the editorial, the Dalai Lama goes on to discuss Hinduism, and Islam, and the fact that again, these traditions are ones of compassion.<sup>21</sup> And at the end he observes: “Harmony among the major faiths has become an essential ingredient of peaceful coexistence in our world. . . . As a species, we must embrace the oneness of humanity as we face global issues like pandemics, economic crises and ecological disaster. At that scale, our response must be as one.”<sup>22</sup> I would suggest that dignity at work is one of those global issues and that collective bargaining is essential to achieving it.

HON. LIEBMAN: Thank you, Judy. Dean Nance?

NANCE: I want to take issue with the professor quoted in your first question’s basic premise that anti-discrimination law is Protestant and part of the African-American Christianity of Martin Luther King, Jr. versus labor law proceeds in

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<sup>19</sup> Tenzin Gyatso, Editorial, *Many Faiths, One Truth*, N.Y. TIMES, May 25, 2010, at A27.

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

<sup>21</sup> *See id.* (“I’ve come to see the centrality of selfless compassion in Hinduism . . . . Compassion is equally important in Islam . . . reflected in the very name of God, ‘The Compassionate and Merciful’ . . .”).

<sup>22</sup> *Id.*

the Catholic tradition. I think that there are some fallacies to this. The first is that if we look at industrial relations research, we find, disproportionately, it is the people of color who favor the right to collective bargaining, and that number has held steady over time. Therefore, within our traditions there is a recognition of the need for, or at least the empowerment that, collective bargaining brings. I query, why is this so? Perhaps it is because there is a clear recognition by people of color of power in balance. People of color, having experienced that in life more broadly—and certainly the workplace is a smaller reflection of life as a whole—there is some notion of the concern of being discharged arbitrarily. For example, frankly, the challenges facing an individual who decides to bring a Title VII or some other individual suit. In the first place, a lot of times it is not really advantageous to the lawyer to take it on because there may not be a large amount of damages involved, the cost of deposing everybody who might be around is expensive, and the suit takes a lot of time. Alternatively you can actualize your rights in much more efficient way through collective bargaining.

The second notion here, that individual identity is really important, is antithetical to the comment about Dr. Martin Luther King because, as you know, a lot of the actions arose out of the Church as a collective movement. For example, consider the whole bus boycott, which had to do with people sticking together and standing up to some of the issues in the neighborhood and the Church outright being a center of a collective response to discrimination.

So I think the quote almost stands, at least in my experience, the reality on its head. I think there is

a long tradition of collective—and very effective—action in the African-American community. That is my response to your first question.

My sort of broader comment is just to remind us of a question that someone during the course of this Conference asked: “Who speaks for workers?” I think that is really a great question. The employers have a place at the table. They have a voice in the halls of Congress. But we have not been doing a very good job of getting our message out on behalf of the workers.

I think this notion, that workers have this and we don't, is only because of a lack of information. I am hoping that the Wisconsin phenomenon will galvanize people. And I am asking all of us, as we leave from here today, to be that voice, whether it be in lobbying or doing lectures from your worship center, from the pulpit, to raise those issues more broadly and help educate folks about the need for protection in the workplace and the kinds of benefits that one gains from collective bargaining.

HON. LIEBMAN: Thank you.

JOSEPH: In 1988, in the *Washington and Lee Law Review*, in an essay entitled *Catholic Labor Theory and the Transformation of Work*, David Gregory addressed what he called “the tremendous interdisciplinary potential that the synergy of law and theology holds for labor law.”<sup>23</sup>

Up until then, no legal literature had ever directly examined the impact of theology on labor law. David's emphasis was expressly on “the potential for the Catholic Church's social teaching” on the

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<sup>23</sup> David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH & LEE L. REV 119 (1988).



world of labor.<sup>24</sup> The “essential purpose” of his essay was to present “a Catholic vision of labor theory” that “promises to transform the world of work.”<sup>25</sup> Also, up until David’s essay, no legal scholarship had ever directly examined the Catholic Church’s social Magisteria and its effect on American law. David was the first to write on what has since become a vast legal literature on Catholic social teaching.

I note, specifically, David’s use of the word “vision.” It is clear that David Gregory has become our true visionary of labor law, and of the worldwide influence of Catholic labor theology on it. This remarkable Conference is solely a result of David’s vision, which as we have seen and heard during this Conference, is, for those of us who have witnessed and participated in it, ever alive and profoundly open to the deeply human and spiritual truths of work and of labor.

One issue that Chairman Liebman has asked us possibly to consider in our brief remarks in this panel discussion is the ongoing battle—quite visible again at this time in American history—over the legitimacy of labor law and collective bargaining rights. She points to a recent opinion piece by Nathan B. Oman, a law professor at The College of William and Mary, in *Deseret News*, a Salt Lake City newspaper, in which Professor Oman asks why, in today’s political climate, “labor law [is] open to massive political attack, while merely criticizing anti-discrimination law is a good way of becoming a political pariah.”<sup>26</sup> Oman is referring to a comment by Senator Rand Paul of

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<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See Oman, *supra* note 1.

Kentucky, whose expressed skepticism about anti-discrimination laws proved an embarrassment even to Rand's political allies.

Religion, Oman writes, presents one possible answer. Ideals of individual equality—the individualistic foundation of anti-discrimination laws—embody a religious ideal that is Protestant, grounded on Martin Luther King, Jr.'s vision and insistence on the irrelevancies of identities based on accidents of birth and community. Anti-discrimination laws, Oman says, are in large part the creation of a Protestant religious tradition, which includes “the African-American Christianity of Martin Luther King Jr. and the civil rights movement.”<sup>27</sup>

In contrast to Protestantism, Professor Oman posits what he calls Catholicism's insistence on a communal life, on community and solidarity. He adds that “Catholics have always figured prominently in the leadership of the labor movement.”<sup>28</sup> For example, Senator Robert Wagner, author of the 1935 National Labor Relations Act, although a Protestant at the time, “kept a heavily annotated copy of a papal encyclical on the workplace in his papers.”<sup>29</sup>

Oman's piece concludes with an assessment of labor's future. “Despite our nation's laudable commitment to religious diversity,” he writes, “the majority of religious Americans are Protestants and Protestant assumptions are deeply embedded in our culture. In such a culture, it is [not surprising] that a body of law based on Catholic notions of solidarity, community[,] and skepticism

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

about the ultimate merits of unfettered individualism enjoys a more precarious position than its Protestant cousin."<sup>30</sup>

Even allowing for the opinion form in which it is written, I find these characterizations of American Protestantism and Catholicism—especially as to economic and civil rights—overwhelmingly simplistic. Martin Luther King, Jr. was murdered in Memphis while he was there, in witness and in solidarity, with striking black sanitation workers. As Bob Herbert pointed out in one of his many recent, crucial opinion pieces in the *New York Times* on the social and political war being waged against organized labor, working people, and the poor,<sup>31</sup> in April 1968, the month that Dr. King was killed, Walter Reuther, the president of the UAW, traveled to Memphis to give the striking sanitation workers critically needed financial support, the largest contribution that they would receive. Reuther, like Dr. King, was Protestant. He stood beside Dr. King as he gave his speech from the Lincoln Memorial in the 1963 March on Washington. He believed that solidarity and commitment to economic justice was the very essence of the union movement.

If one looks closely at the Catholic Church's social magisteria on labor since Pope Leo XIII's 1891 Encyclical *Rerum Novarum*,<sup>32</sup> one sees that notions of solidarity and economic justice are rooted in spiritual and moral truths. Notions of solidarity and social and economic justice are rooted in moral laws. The moral laws that provide the bases for

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<sup>30</sup> *Id.*

<sup>31</sup> See Bob Herbert, Editorial, *Absorbing the Pain*, N.Y. TIMES, Feb. 26, 2011, at A19.

<sup>32</sup> LEO VIII, ENCYCLICAL LETTER *RERUM NOVARUM* (1891).

the dignity of work and of workers are always present: They were present in the past and will be present in the future.

What makes labor's position in the United States precarious today—what has, in fact, made labor's position precarious throughout American history, back to the original Constitution which endorsed slave labor as part of its fundamental law—are violations of these moral laws, which, in Catholic social teaching, are the bases for the unequivocal recognition of the universal right of workers to form unions to secure fair wages and working conditions with those who employ them. The fact that this moral dictate is a truth of the Catholic faith does not mean that it has not been violated by those who profess to the Catholic faith; nor does it mean that this dictate is not steadfastly adhered to by those who do not profess to the Catholic faith. Labor's future in the United States will not be determined by characterizations of religious faiths, but rather by the profound synergy—another one of David Gregory's visionary words—that exists within those moral and social truths that reveal to us, to all of us, those political and economic conditions essential to assure the dignity of work, the dignity of the worker.

HON. LIEBMAN: Thank you.

FISCHL: Let me begin by thanking David for including me on this most distinguished panel. I am honored, and I hope my remarks will not give him any cause for regret. The theme of the conference—the connection between theology, in particular Catholic theology, and the dignity of workers—prompted me to reflect a bit on my own life story and what my Catholic upbringing may have had to do with my

decision to become a labor lawyer and ultimately a scholar whose work focuses on the plight of workers and unions.

So here is a little bit of personal history. I grew up in the Midwest and starting in the late 1950s attended St. Athanasius, a parochial school in Evanston, Illinois. The nuns who taught us were Sisters of Providence, and our priests hailed from a variety of orders. Some of the most formidable among them were Jesuits studying nearby at Northwestern University. Watching them in action, I did not doubt for a moment the truth to the punch line of a then-popular joke among Catholics—that God signs all of His correspondence, “God, S.J.” There were about seventy students in the class with whom I marched, usually single file, from kindergarten through the eighth grade. Together we saved pagan babies; we fasted overnight before taking communion and had “rolls and milk” at our desks afterward; we knelt uncomfortably through the Stations of the Cross and dozed fitfully through many a Low Mass; we prayed at length four times a day, offered a brief “all-for-Thee” incantation on the half-hour bell, and chanted hundreds of Memorares in an unforgettable fifth-grade nun’s class; and we went to confession far more often than our then very innocent lives should have warranted. In retrospect, this may have been my introduction to the role of transaction costs in human behavior, for St. A’s was on the way home from the Evanston Theater, and the weekly confession times were conveniently scheduled for right after the Saturday matinee.

We lived very Church- and school-centered lives. Our neighborhood was full to the brim with large Catholic families, all active members of St. A’s parish: the Benedicts had fourteen children; the

Rudigers nine; the Mckearnan's eight; the Fords four; and the Hartzells and Fischls each checked in with six. There were a lot of station wagons and very tired mothers.

For most of the boys, it was "All St. A's, All the Time." We were the altar boys who learned the "Prayers at the Foot of the Altar" in Latin and then the post-Vatican II "New Coke"-like mass; we were the choir boys who bade a reluctant farewell to the Gregorian Chant as the Church embraced the Mass in the Vernacular; and we were the proud members of the St. A's football squad—bloodied but unbowed—and Boy Scout Troop. In third grade, boys and girls alike cheered when one of our own was elected president, and we prayed and wept together, and then prayed some more, when he met his most untimely death a scant three years later. In the course of this decidedly parochial education, I learned a lesson that has stuck with me, especially as a lawyer and a law professor, about the differences between the Old Testament and New Testament approaches to normative prescription. The Old Testament, at least as we studied it, presented the Ten Commandments as a highly formal system of shalls and shall nots: thou shall not commit adultery; thou shall honor thy mother and thy father; thou shall not kill; and so on. The temptation to "game" that rule structure was irresistible to some of us, and on the playground we would argue at great length about the precise point at which you stepped "over the line" from admiring to coveting thy neighbor's goods or from borrowing to stealing them. As we got older and it was no longer the neighbor's goods we were busy coveting, the stakes of our game increased dramatically as we flirted, literally and figuratively, with the first occasions of real sin we encountered in our oh-so-sheltered lives.

We also learned that a good confession could get you off the hook for all manner of line-crossing, but the nuns had put the fear of the Lord in us that en route from sin to sacrament we might get hit by a truck—or, in those days, a stray Russian A-bomb—and thus face eternal damnation unforgiven. We might have relaxed a bit if we had enjoyed access to the device dreamed up by a law school classmate who is a former seminarian with a gift for entrepreneurship that has served him well as president of a major university: a pop-up confessional that would apparate the moment you crossed the line into Mortal Sin and spare you the possibility of vehicular, nuclear, or other intervention. But it was all about the close parsing of sacred texts—of walking versus crossing the line—and it is surely not a coincidence that several of us who were the most adept at that particular form of playground banter went on to academic careers.

The New Testament—the Bible’s “pocket part supplement,” as my Orthodox (Jewish not Greek) friends put it—presented us with a very different approach to normative prescription. It featured stories in the form of parables; it offered lessons rather than Commandments; it reasoned by analogy and metaphor rather than through the policing of “lines”; it emphasized principles rather than rules. Indeed, we learned that when Jesus was asked to identify the greatest among His Father’s Commandments, he responded with a resounding “None of The Above” and spoke instead about loving God and loving your neighbor.<sup>33</sup>

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<sup>33</sup> See *Matthew* 22:34–39 (One of the Pharisees, “a lawyer, asked [Jesus,] . . . ‘Teacher, which commandment in the law is the greatest?’ [Jesus] said to him, ‘You shall love the Lord your God with all your heart, and with all your soul, and with all your mind.’ . . . ‘You shall love your neighbour as yourself.’”) (New Revised Standard).

So what do you get when you combine a facility with rules with a forthright embrace of solidarity, a penchant for stories, and a willingness to second-guess authority? In retrospect, it is not difficult to fathom how an education packing the one-two punch of Testaments Old and New might have produced a lefty labor lawyer—or, for that matter, a critical legal scholar. But though there is a profound connection between the particular form of Catholicism on which I was raised and my most cherished ethical and political commitments, I do not agree at all with the suggestion of the scholar provocatively quoted by our Chair that Catholics might somehow hold a corner on the market of such commitments. It is a standing joke among union-side labor lawyers and their fellow travelers in government and the academy that virtually of us all are either Catholic or Jewish; indeed, some fellow panelists were trading stories over coffee this morning about how many of us come from *both* Catholic and Jewish roots—thank you, Grandfather Fischl. So it is pretty clear that you do not need nuns—as wonderful as some of them were—or indeed the New Testament, let alone the Catholic version of the New Testament, to impart those values.

I remember being struck by this demographic convergence as I started working for the National Labor Relations Board in the late 1970s, when our Chair and Gene Orza were already legends at the agency. To be sure, there were other connections among my new colleagues—many had studied law at the University of Michigan or Wayne State; many had interned with Judy Scott when she was at the UAW; and a striking number had been inspired to a career in labor law by Ted St. Antoine. But the predominance of Catholic and Jewish lawyers was unmistakable, and my sense was that their common affinity for the labor



movement was more the product of shared cultural experiences than of religious beliefs. When you are raised, as so many urban Catholic and Jewish children were in the 1950s and 1960s, with a sense that the basic unit of life was not self but *social*—your family, your neighborhood, your church or synagogue, your larger religious community—the notion of solidarity as an ideal form of human association is not so much a belief as it is a *given*. And for many of us it was a given that was reinforced by an experience of separation from the larger culture (also known as “public school”) borne of these affinities and of our daily and very public identification with them—an experience, in other words, of “outsider”-ness that produced a sense of connection to the powerless as well as to solidarity as a strategy for coping with and perhaps overcoming powerlessness.

But if the scholar whom our chair quoted was a bit off the mark in that respect, I take even greater issue with his assumption that anti-discrimination law and labor law represent conflicting normative frameworks. As it happens, I have written about—and criticized—this supposed conflict.<sup>34</sup> Rather than rehearsing those scholarly arguments here, I will close instead with one final story—this one a tale from the St. A’s Boy Scouts.

When I was in eighth grade, my Scout patrol set out on a hike called “Beat the Bounds,” an urban route that took us around the twenty-mile perimeter of our home town. To the east was Lake

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<sup>34</sup> See Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMPL. & LAB. L. 163, 216 (2007) (“[T]he greatest danger lies in the messages unwittingly conveyed by the separation of employment discrimination from labor law—i.e., that workers can organize or sue but not both, and that the struggle for workplace equality has little to do with the struggle for workplace democracy. Important recent developments suggest that the opposite is increasingly the case, and we ought to treat that as the starting point for the project of rethinking American work law in a new century.”).

Michigan and the gorgeous campus of Northwestern University; to the North was the tony suburb of Wilmette; and to the West was the more modest, though still very middle class, Village of Skokie. But to the south was Howard Street, the great and gritty northern boundary of Chicago.

Now despite the fact that Chicago was right next door, the city was not a big part of my childhood. Apart from an occasional family trip to a movie theater or to the Riverview amusement park, my only excursions to Chicago as a young boy were with my grandmother to Holy Name Cathedral or to see the Christmas tree at Marshall Fields. So we were exploring *terra incognita* and really pushing the envelope by walking the length of Howard Street without adult supervision.

As we passed a large commercial parking lot, we encountered a startling and heartbreaking sight: an older man yelling at a younger man, telling him he was fired and directing him to leave the lot immediately. ("Older" and "younger" from the perspective of a thirteen-year-old, of course; the older man was probably fifty, and the younger man was probably in his mid-thirties. For the record, I think of them both as younger men now.) The younger man kept trying to explain something, but the man we took to be his boss was interrupting and shouting at him, and the younger man began crying. The scene was all the more poignant for a half dozen white boys from Evanston because the older man was white and the younger man was African-American, and we all stopped and stared because we had never seen anything like that. We spent the rest of the hike talking about it, recounting and arguing about what we had seen and whether we had lived up to the Boy Scout motto of being prepared. Several of us wished we

had said or done something, instead of watching silently as what struck us as a manifest injustice unfolded. Upon hearing the story that night over family dinner, my father—who is as wise and thoughtful as he is conservative—gently pointed out that it was not entirely fair in the absence of a bit more evidence to conclude that the dismissal was itself unjust, let alone racially based. But he was greatly sympathetic with our reaction to what we had witnessed, emphasizing the importance of “respecting the dignity of others” and condemning the very public firing on that basis.

Needless to say, the image of the man’s face was forever seared in my memory. But I do not recall thinking of his pain and palpable humiliation in an either/or fashion—*either* as the product of racial discrimination *or* as the result of an apparent workplace injustice. Nor did I feel that one dimension of the experience—from his perspective or from ours—was somehow at odds with the other. His vulnerability was born of racial as well as workplace subordination. In the phrase made famous by the Memphis sanitation workers—whose cause was fated to be the last one championed by Dr. Martin Luther King, Jr.—*he was a man*, and it was the attack on his dignity that so moved a half dozen Boy Scouts from Evanston all those years ago and played no small part in the eventual decision of one of them to make labor’s cause his life’s work. (And Dr. King, for the record, was neither Catholic nor Jewish.)

HON. LIEBMAN: We will skip over Professor Estreicher for now and ask Cardinal Egan to pick up.

CARDINAL EGAN: I could never do that. I defer to the good professor.

ESTREICHER: I defer to the man of God.

CARDINAL EGAN: I would like to treat just one of your questions about labor law. Some might think that I am "pushing the envelope" a bit. Still, I believe that the current controversy in Wisconsin and elsewhere offers a splendid opportunity to address a very serious issue, and address it well.

I am not one of those who hold that all controversies can be effectively handled with conversation or, as they say today, "dialogue." Some, it seems to me, require real confrontation of ideas and positions if a worthy solution is to be found. Moreover, I am convinced that the collective bargaining controversy is not so abstruse that it cannot be made understandable to the average citizen. It is, of course, complicated. There is a real difference between the relationship of workers in the public sector with their employers and that of workers in the private sector with theirs. In my estimate, however, that complexity and others can be clarified, and the controversy can be brought to a satisfactory and lasting conclusion if all elements are discussed and debated enthusiastically.

Moreover, I firmly believe that there is much to be gained for labor and management if this controversy is not dismissed or sidestepped. Rather, I would prefer to see it addressed with eagerness, with clear definitions of terms, with precise distinctions, and with the whole nation involved.

In my judgment, there was not adequate discussion and debate when we got ourselves into the tragic wars in which we are still involved. For a host of reasons, a much-needed confrontation of ideas and positions was simply not had until it was too late, and for this we have paid and are paying dearly.

We came closer to the proper approach, it seems to me, in certain phases of the civil rights struggle. When Dr. Martin Luther King came to Chicago to lead the open-housing marches, for example, I was Vice-Chairman of the Chicago Conference on Religion and Race. With a certain "fervor," if I might put it that way, a wonderful minister from the Chicago Presbytery and I discussed the controversial marches with Dr. King and Dr. Andrew Young, his first counselor, in detail. The minister and I were not anywhere near as prominent or important as Dr. King and Dr. Young. Still, an altogether forthright "back and forth" was had, and in my estimate it resulted in the best available outcome, all things considered.

Thus, it is my plea that the collective bargaining controversy be discussed and debated eagerly and courageously until a fair and proper resolution is achieved. It is too important and too dangerous to be left mired in questionable slogans and half-truths.

As regards the differences between Jewish, Protestant, and Catholic approaches to handling controversies, I am not deeply concerned. For it would appear to me that the basic positions of the three groups as regards labor and management are quite close. Indeed, it is largely for this reason that I believe that religious communities have much to contribute to assisting labor and management as they work through their disputes and differences.

Much of the success of religious communities in this regard will, of course, depend upon their mutual respect and friendship. Permit me to tell a little story in this connection.

Many years ago, when I was secretary to Cardinal Cody of Chicago, a fire-bomb was thrown into a small Jewish temple very near a Catholic parish in Evanston, Illinois to which one of our previous speakers referred. The Cardinal gave me a check to bring to the rabbi as an expression of the affection and support of the Archdiocese. Out of this came a warm friendship between the rabbi and myself.

Thirty years later, shortly after I was installed as Archbishop of New York, I was invited to speak to a Jewish organization on a rather controversial topic, and I was deeply concerned about how my presentation would be received. In introducing me, the master-of-ceremonies read a letter from the son of the rabbi whose temple had been fire-bombed. It concluded with a statement that the rabbi—and his wife—considered me a “real mensche.” Thanks to this, I spoke far more plainly than I had planned, and what eventuated from the talk was far more positive than I had expected. Genuine discussion and debate, seasoned with no less genuine respect and friendship, can do much to settle the most troubling of controversies. At least, such is my belief.

RICKE:

I would also like to talk a little bit about the future of labor law and kind of pick up on some of the points Ted made and some things were previously discussed at this Conference. I think religion has little to do with why it is socially acceptable to attack unions and workers today in our country, while attacking anti-discrimination laws is not acceptable. I think you have to go back to the beginning. I think the labor and civil rights movement were both started as a social movement. The difference is once we organized workers, we then had a duty to negotiate contracts and represent them in the workplace. I believe over a

period of time we became an institution that represented workers in the workplace and lost our way as a social movement. Under Bob King's leadership at the UAW and Richard Trumka's leadership at the AFL-CIO, we still have to have the institutional base and represent our members at the highest level possible, but we cannot lose sight of our responsibility to be a social movement too. The institutional part of what we do by representing workers is what we do, the social movement aspect of unionism needs to be what we live.

Really, in both the civil rights and union movements, both protect individual rights because at the end of the day, when you talk about "justice," it doesn't matter what religion you are, it affects the individual. How you are affected—whether at your workplace or because of your gender or ethnic heritage—it is because of a group distinction you were identified with. Workers' rights and civil rights go hand in hand. Martin Luther King, Jr. was assassinated in Memphis fighting for collective bargaining rights for the sanitation workers. I can tell you that organizing the Ford Rouge Complex would not have been successful without the support of the United Mine Workers and the support of the Protestant black ministers, and I am sure this diversity of support is true in other union organizing drives during this time.

I think the big difference is that you have to look at the motivation behind people that want to attack civil rights or anti-discrimination laws: their motivation is emotion, fear, jealousy, and hatred. The whole campaign against workers' rights is different. It is a very well-financed, calculated plan. It is about power and greed, and that is the bottom line. They are two completely different

animals, and until we understand the motivation behind both situations, we are not going to fix this. So at the end of the day, the future of labor law depends on how we redefine ourselves as a social movement while continuing to represent our members' rights. Thank you.

HON. LIEBMAN: Mr. Orza.

ORZA: I was not sure if today was about the future of our labor laws or the future of our laborers. I thought it was the latter, but I may have read that wrong.

I think it is important to understand that virtually everything that labor has accomplished has been accomplished at a time when the government embraced labor as a partner. Creation of the Department of Labor itself, in the aftermath of the Depression, was intended to be the counterpart to the Department of Commerce. The Secretary of Labor was supposed to be, in counseling the President, arguing the case of labor in front of him. President Roosevelt famously said—in encouraging people to join unions—that if he were a working person, he himself would join a union.<sup>35</sup> The National Labor Relations Act itself says that it encourages people to engage in collective bargaining.<sup>36</sup> So the government, historically, had been a partner of labor in virtually every gain it made, up to and including the aftermath of World War II. I don't know how many people are familiar with the Treaty of Detroit, but that was the case in which President Truman expressly embraced labor as a governmental partner.<sup>37</sup>

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<sup>35</sup> See John Nichols, *Roosevelt Formed a More Perfect Union*, MADISON CAPITAL TIMES, Sept. 7, 2000, available at <http://www.commondreams.org/views/090800-102.htm>.

<sup>36</sup> See 29 U.S.C. § 151 (2006) ("It is hereby declared to be the policy of the United States . . . [to encourage] the practice and procedure of collective bargaining . . .").

<sup>37</sup> See Roger Lowenstein, *Siphoning G.M.'s Future*, N.Y. TIMES, July 10, 2008, at A21.



I think you can trace what has happened to labor in this country back to Taft-Hartley.<sup>38</sup> As Senator Wagner said at the time, it broke the contract that government had with labor as a partner.<sup>39</sup>

I want to come back to this point because we have seen something—I think remarkable—in the aftermath of our own economic crisis that suggests how valuable it is to have labor as a partner. But from a universe in which government was embracing labor and saying it was a partner and then moving ahead to where we are today, I think the finest expression of the divorce was from a President of the United States who plucked from amidst the thousands of labor lawyers who would gladly have taken the job as Chairman of the National Labor Relations Board, a man who actually said he saw collective bargaining as the destruction of human freedom. That suggests to me that for a long time we have stopped thinking of labor as a partner of government.

That statement was made in 1980. And from 1980 to 2004, this country went ten years in a row, twice—ten years one time, nine years, eleven months, the other—without an increase in the minimum wage. I don't know how many of the young people here know this, but minimum wage was changed every year or two from the origin of the minimum. It simply was a given that we would periodically—but no more than two years at the outside—that we would raise the minimum wage. That we could go ten years twice in the last thirty without any increase in the minimum wage is further evidence of the complete divorce between government and labor.

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<sup>38</sup> 29 U.S.C. § 141 (2006).

<sup>39</sup> William S. White, *Bill Curbing Labor Becomes Law as Senate Overrides Veto*, N.Y. TIMES, June 24, 1947.

Imagine President Obama going on national television today and saying he encourages everybody to join a union. Imagine Congress today passing a law which said, "We think that it should be the policy of the United States that there should be collective bargaining in all of our industries and we encourage that policy and that is why we are passing the following law." It would have no chance. The question then becomes, Why is that? Why have we broken the compact between labor and government?

We dance around this subject so often, perhaps now is the time to think and talk about it: the role of race in our attitude toward labor. The political will of a country to do something usually reflects what it believes it will do to re-election prospects. Put conversely, the degree to which the government can separate itself from labor reflects a determination by those in government that it is in their best interest to do so: the electorate will put up with it; the electorate may even want it.

Why do working people empower the government today to the degree they do to break the partnership with labor? There are a variety of reasons for it and, in some respect, it is labor's own success. Professor St. Antoine alluded to some of the great successes that organized labor has caused. I can argue that that may be, in fact, a case of the chicken coming home to roost because, in fact, by virtue of so many people getting those benefits, they are no longer interested in unions. But putting that to the side, I think we have to consider that the great separation we have witnessed in this country is the great, unresolved issue of race.

We do not speak about it enough. We don't like to think of paying the price for eight generations of

slavery in this country. Quite the opposite, we actually made it fashionable to say to the people of the country, in our advertising and political campaigns, "It's not your fault, you didn't do anything wrong, you aren't discriminating against people like that, so don't worry about it. Don't feel responsible for those neighbors of yours."

I hear people say this all the time, "That has nothing do with me, my parents came over in the 1920s." But where those parent came to, matters. The candy store above which they were dwelling, just like the candy store itself, had a certain history that preceded it. It's not something you can escape. I think the labor movement lost a lot of working people over the issue of race.

What has led so many people to abandon their support of the government when the government was acting in partnership with labor? By virtue of telling people for so long, for so many years, "You have no responsibility in this area, don't worry about it, your parents came over on a boat in 1920, you were born six generations later, it's not your problem, don't worry about it." Far too many people have been led to believe that their lives are being compromised by these strange people in government who are taking things away from them to help these other people over here whose problems are not of their own doing.

Race simply has caused the Democratic party to lose the support of many working people and that has produced a political calculus which makes partnership with labor—a firm, articulated, proud partnership with labor—politically impossible. So the future of the labor movement may reside in nothing less than its ability to make people who otherwise would be aligned with the interests of labor to see that their economic interests are not

compromised by the government confronting the vestiges of racial discrimination, and thereby create a political electorate that will make our political establishment see the embrace of labor as a governmental partner politically advantageous.

In the aftermath of the 2008 global economic crisis, the first thing the Germans did was to meet with the unions and develop a global compact for their economy, and the German recovery from the economic crisis of 2008 is the envy of not only Europe, but this administration too. A compact with labor, a partnership with labor, has always proven, historically, to be good for this country. In fact, it won World War II. We have lost the political ability to form that partnership because too many working people saw politicians in Washington as depriving them of the things of this world on behalf of people whose problems they thought they had no relationship to. But they do. They are the grandchildren and the great grandchildren of the people who left an enormous stain on this country.

Today we debate the size of the deficit and we say, "Gee, what are we doing to generations that come after us?" That attitude represents, at the minimum, recognition that you can do things today that will have an impact on generations that will come after you. That is the nature of the beast: We can do things today that have a rippling effect, that will affect generations far in advance of the future.

And that is what happened where race is concerned. We did certain things we are still paying, and must pay, a price. We have to figure out some way to make this country have better race relations and a better equality of the races; and when that happens you will see working

people band together in numbers once more. That will allow politicians to, once again, embrace the idea that being in partnership with labor is a good thing for the country.

HON. LIEBMAN: Thank you. Jack Ahern, it is your turn.

AHERN: Thank you very much. First, let me say how happy I am to be part of this distinguished panel. I am here because I represent working men and women in New York City. I don't pretend to be a theologian or anything else.

I wanted to thank our moderator for the two questions. Besides moderating a very large panel, the two questions are excellent and, without a doubt, I am in favor of the future of labor law in our country because, unfortunately, the working men and women many times have only seen opportunity; we have to have justice, and many times the balance of power is so out of balance that any straw is worth grabbing at. When I looked over the question and the article that had prompted the question, it came to me very clearly that it is a shell game.

Economic discrimination is discrimination. If there is not economic equality, there is discrimination. So attacking labor and labor law and attacking the right to collective bargaining, to have working men and women have a right to have a say and enjoy the fruits of their labor, is an intrinsic attack on economic equality. And not just on economic equality for some distant group of people someplace, but for our vibrant middle class that keeps our society moving.

As you heard before, Martin Luther King, Jr. spoke often about economic discrimination, economic equality, and, in fact, did so in support of the

sanitation workers in Memphis. He was there supporting the sanitation workers who were fighting for the right to collectively bargain to have economic equality.

I think he touches on what our previous speaker and many of the other speakers spoke about in our agreement with society: that society has a responsibility to set some standards to really make sure that people not only have an opportunity for economic equality—which is equality after all—but also have an opportunity to have a say in what is going on in this society.

It is amazing that I am often in groups, social or business groups, when people are pressed, almost driven to explain to me that their father, their brother, their uncle, or their grandfather, was a union worker or came to this country and either worked in a candy store, as referred to here or worked in one of the sweatshops or anything else like that. Nobody has ever come to me and said, “You know, my father was a scab. My father worked non-union his entire life. He worked for less. We’re very proud of him.” Or, “My mother came here. She was discriminated against, we’re happy about that. We’re humble. We hope to get ahead in the future.”

During the panel discussion on the Triangle Shirtwaist Fire, I was very moved by Serphin Maltese.<sup>40</sup> I was not aware that his relatives had actually been there, that his grandmother had been there. One of the things I said during that

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<sup>40</sup> This Conference featured an earlier panel on the triangle fire. The panel featured Jack Ahern, Lee Ielpi, Hon. Serphin Maltese, Vincent Maltese, and Christina Papadopoulos; was moderated by Karen Farnbach; and was introduced by Julia Upton. See Jack Ahern et al., *Commemorating the 100th Anniversary of the Triangle Shirtwaist Factory Fire* (Mar. 18, 2011) (transcript available with the *St. John's Law Review*).

panel discussion was that 100 years ago, maybe two or three generations ago, the concept of union organizing in the workplace was viewed as actions of agitators, Communists, Anarchists, and only because of that fire, were the most critical people in society forced to pause and look inward and realize unions were a moral force of change and that brought about a change in the law.

I don't think it has been lost on anyone, whether you are in labor or involved in labor in any way, that the same level of venom we saw 100 years ago where troops were brought in to disperse Anarchists and there was a police strike or a couple of years after that in Boston—when, I believe, the police chief was assassinated in City Hall. I think that we need to look beyond the simple answers as far as Catholic or Protestant and really look at what we are doing as a society and where we are going as a society if we are going to fulfill that social compact to help make our society a little bit better. During the course of this Conference, we talked about the American Dream, a great idea to get everybody here.

I think this really speaks to the economic discrimination against workers right now, against the middle class that no longer have pensions they can rely on, but, instead are subject to the ups and downs of the market. That somehow people are not entitled to healthcare and should not be able to enjoy a retirement is a sad commentary, and hopefully our partners in religion, both Protestant and Catholic, will be able to help us as a society to move forward.

The second question I thought was even more interesting when I read it. I recently had an opportunity to speak with an Australian labor organization who was very proud to tell me they

were shocked at not only the minimum wage here in the United States, but the fact that there is no position at the table for the population that is looking to enjoy the fruits of their labor through collective bargaining. We went through which unions that have been frozen out completely where there are no principles of empathy anymore or fairness when it came to the workplace. And places where labor was, effectively left standing in the midst of a deluge, constantly calling for economic equality.

There has to be somewhat of a human consequence for us as a society. I think Governor O'Malley said that one of the reasons that he ran for public office was that he was driven to do good for the people who it was most expensive to do good for, and his personal history brought him to that. On the other side, we have people that are bombastic for the sake of being bombastic on TV, not only Wisconsin, but New Jersey. We have people saying they are going to stomp out public employee unions and teacher unions, lay off people for the sake of laying off people. We have a mayor of this city who discovered two million dollars in his budget and when questioned about how that would affect his layoffs, he said they were going to keep that in the rainy day fund and continue with the layoffs.

I think, without a doubt, social dialogue is needed, particularly in light of the fact that there is so much confusion. Even in the article that was the premise of the first question, there was a portion of the article that said budget deficits, equity between taxpayers and public employers, are of the opinion that public employees don't pay taxes and account for most of the political pyrotechnics in Madison. I believe now we can look back and see that is not true. The fact of the matter is, in Wisconsin, a decision was made that they did not want to sit at



the table and collectively bargain with public employees over wages, benefits, and the terms and conditions of their jobs.

In conclusion, this is not something that began happening recently. In the past thirty years there has been a lot of change in union representation: the amount of people represented by unions in 1970 was about twenty-five percent; now it is down to about seven percent. In Britain, union representation also went down. Public employees declined from forty-four percent to fifteen percent. The public sector declined from eighty-two percent to fifty-six percent. The public sector in the United States went from five percent to thirty-five percent because there was a social dialogue for public employees, at least on a statewide basis, in most of our states. There was an opportunity to become part of society, part of having a seat at the table; there is a need for all of us to get back involved. If we looked at any other sector of our population, whether it be by race, gender, creed, or sexual orientation, and said that the number of working individuals in that sector fell from thirty-five percent to seven percent, that would be a human crime.

I think at the end of it, economic equality, the path to middle class, and a voice for workers has always been labor unions. It is very important that we continue to look for a viable model that is similar to what is used in European social dialogue. Thank you very much.

HON. LIEBMAN: I thought we would take the opportunity now for the panelists to talk to each other. Professor Estreicher, would you like to start?

ESTREICHER: I know I got into trouble this morning with my questioning of the theology of work, but I want to introduce here a bit of a cautionary note.

I think we have to tie our ideals and criticisms to facts. And what we are experiencing in the United States is not an isolated phenomenon.

In every developed country, putting aside China which is a developing country, the labor movement is strong in the government sector, but it is increasingly weak in private sector work. This pattern holds across the board, irrespective of the labor laws of these countries, the political bargaining power of the labor movement, or the presence of a so-called "social dialogue" between the "social partners."

Regarding the U.S. public sector, labor's current reversal is temporary. Public sector unions will regain their position with the next election, even in Wisconsin. The problem with the public sector for the labor movement, in my view, is that they have to start articulating a public interest case for what they are doing, and, frankly, they have been too effective at the bargaining table. Public management has not done its job.

I am giving a talk soon at Northwestern on the challenges facing public management. There are places where the unions have too much clout; and they have too much clout because government has not done a good job of defending public interests in effective management. I am not defending what Wisconsin is presently doing. I am not arguing against some legal change necessarily.

To illustrate the problem, consider retirement from government service with a full pension after twenty years, with the last year of work chocked

full of unnecessary overtime at premium pay. That is an example of the problem for beleaguered cities and the people living there.

This problem started with John Lindsay who was, basically, running for the Democratic nomination—and I know something about this because one of my areas of expertise, and maybe my only one, is the 1966 transit strike. As a high school student, I ran three election districts in the Bronx for John Lindsay. As a reward, I was taking my mother to the inauguration and there was a strike, the '66 strike of Michael Quill. This was a disastrous strike for Lindsay and for the people because he had not prepared the City for it. He had no plans for providing critical services during the strike.

And New York City public management has yet to take a strike. They should take a strike by attempting to maintain operations during the strike. It is the only way collective bargaining works. It can't be a question of when the public caves. All these years, that has been the only question for New York City: when will the people say enough is enough and insist that management give in to government labor's demands. That is not collective bargaining; it is collective surrender. So Lindsay, in order to run for the presidential Democratic nomination in 1968, changed parties. Largely to further his political ambitions and because he had provoked a strike in 1966 without preparing an alternative means of transit, he gave the Transport Workers Union full pensions after twenty years. Experienced transit workers, not surprisingly retired immediately; and they went to Florida: forty year old workers with full pensions working in Florida towards a second pension, not to mention Social Security. And the twenty-year service rule was applied nearly across the board. It has been a very expensive precedent for the City.

Most of the people in this city travel on subways, live in outer boroughs which do not enjoy the prosperity of Manhattan, and will toil until they are sixty-five at salaries far lower than public sector workers whom they fund with their taxes and acquiescence in poor municipal services. Before I continue in this contrarian vein, perhaps I should first right the balance by identifying the issues from the other side as well.

I support the insistence of teachers that the seniority principle that is the hallmark of their contracts continue in full force in deciding who gets laid off. But it cannot be the case when you are accused of sexual misconduct that you have the right to stay the job at full salary until an arbitrator decides your case. The public interest does not lie in maintaining a "rubber room" where the admitted "bad apples" continue to be on the payroll and get paid waiting for a union-friendly arbitrator. When people are accused of serious misconduct, they should be fired and severed from the job. They can then sue, and if the arbitrator agrees the termination was wrong, they get their job back with lost pay. There should be remedies for wrongful termination. But the idea that you sit there for two-and-a-half years waiting for a chosen arbitrator is wrong. It does not serve the public interest, and it besmirches the entire concept of public sector collective bargaining. The union should be representing the hard-working teachers in the public school system, not the bad apples.

Let's look at the police. There have been controversial cases of police shootouts resulting in the death of unarmed individuals. I generally support the police. I have been against a community-based Police Review Board since day one because I think it politicizes the process. But the idea that when the police are involved in a

serious incident with unarmed people, their employer—the New York Police Department—cannot investigate and promptly take some corrective action where it is warranted, but instead has to wait for the grand jury to come down with an indictment, is flat wrong. That practice just breeds further distrust of the police, which disserves everyone.

There is a public interest case for public sector collective bargaining, but there is equally a public interest case for some limitations. These limitations have to be negotiated, not imposed by law. But they will not be negotiated if public sector management continues to default on its responsibilities.

Let's move to the U.S. private sector. By the way, the union density number is a fraction. The numerator is the number of workers represented by collective bargaining. That number has remained essentially static for a long time. I know it dips a little bit, but by and large the problem is not in the numerator. The problem is in the denominator. The denominator is the number of jobs, which drives the economy, and it has historically kept growing. The only way to actually maintain union density is to have no growth in the denominator. Except for the very recent period, new jobs were being created in the private sector far in excess of the change in the denominator—or the number of employees involved in union elections or organizing campaigns—and those new jobs were not getting unionized. That is the reason for the decline in density.

Now, in the private sector, labor faces a major challenge. I disagree with those who compare the alleged weakness of the Wagner Act to the potency of Title VII of the 1964 Civil Rights Act and blame

labor's woes on weak labor laws. Title VII is inapt. Title VII involves a distribution among workers. Title VII does not challenge company prerogatives.

Let's say women are seeking positions that have gone to men or are making harassment claims. Resolutions involve taking from one group of workers and giving the jobs to another. The company may not like litigation but they are generally not very concerned about this redistribution, as long as it continues to have qualified personnel.

Historically, in the South, most of the large employers would have wanted black employees if they were not going to get resistance and negative fallout from white workers and supervisors. I am not talking about the courageous CIO locals, but the general phenomenon.

Let's take disabled people with obvious, visible, real disabilities, people who are in wheelchairs, blind. These folks do not get hired. Nothing happens. The employers don't hire them. The antidiscrimination laws fall flat here. The reason Title VII has been basically accepted by the population is that it does not really involve net costs for employers; and where it does involve net costs to employers, statutory goals remain unmet.

On the other hand, labor law involves real net costs to employers, and that is why we see a good deal of employer resistance, lawful and unlawful, to union organization. So the question is, what can be done about those costs?

Here, I think it is helpful to divide the functions of the private sector union into three parts. One part is that unions have an important role to play in representing workers who complain of wrongful

dismissal or other discipline. Unions are more efficient, better advocates for ordinary workers than the litigation system; and one that should be supported by public policy. I was not here for Ted's remarks. I am not sure we would totally agree, but I know that Ted has been for a low-cost workplace representation system. That is what unions do. They do it well. And most cases are not really discrimination cases. They get shoehorned into a discrimination rubric. There is, here, a sustainable role for unions.

There are two other roles unions perform. One is to provide portable benefits: for example, for seasonal, project-based employment like construction, entertainment industry jobs. Unions provide a bridge between jobs, both in maintaining benefits and helping build careers in the industry. This, too, can be a sustainable role for unions. One thing I do not fully understand is why the unions have put so much pressure on the Obama administration to provide healthcare insurance as a statutory entitlement for all workers. I don't say this as a moral matter, but if people are going to pay for union representation, they should get something more than they will under law.

Now, there is a third role for unions, an important role. That role is to seek to increased wages and benefits beyond what employers are willing to pay their workers on their own. This is the principal reason why workers pay dues. Most workers are not going to want to pay dues for the dispute resolution alone, or even the portable benefits alone—especially once healthcare reform takes hold. They want the ability to obtain better wages for themselves over time and better benefits over time—"better" than they can get on their own without representation.

The question is, how does the employer pay for the costs of union representation? If the employer is in the public sector where there is no substitute for the government service, the employer may scream and howl. But it is all a charade because, at the end of the day, the public has no choice but to continue to fund the public service. In the private sector, unless the unions can achieve what I call the “Gompers 101” strategy,<sup>41</sup> unless you can credibly promise organized employers that you are going to organize the competition, unions will continue to decline in private companies.

HON. LIEBMAN: Judy?

SCOTT: I don’t disagree with Sam’s discussion about organizing the competition. Clearly, the unions have a challenge—and I think all of the students in this room will be facing it—which is the global question of how unions and management relate on the global scale. We have done a lot of work on local campaigns, but the U.S. labor movement needs to work on achieving global organizing agreements by focusing on one multi-national corporation (“MNC”) at a time with other unions around the world. That is key. We don’t have an effective international legal forum to deal with unfair labor practices by MNCs—the way that the business community can address unfair business practices that impact trade. The World Trade Organization (“WTO”) has ruled that labor standards are not a part of its debate over unfair global competition; thus it is irrelevant to the WTO if people earn substandard wages in a one country versus another.

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<sup>41</sup> Referring to Samuel Gompers (1850–1924), a labor union leader and a key figure in the history of the American labor movement. See *Samuel Gompers (1850–1924)*, AFL-CIO, <http://www.aflcio.org/aboutus/history/history/gompers.cfm> (follow “Continue to AFLCIO.org” hyperlink) (last visited Nov. 15, 2011).



I want to talk about another role of unions: the role of a political organization. This relates to the debate in Wisconsin because this is about whether unions and working families are going to be taken out of the political equation in this country and whether they will be stripped of having an effective voice through their own associations.

The U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*<sup>42</sup> opened the door to corporate money going into the system without any checks. The suggestion that unions should like that decision—that they are going to be able to put as much money into the system as the corporations—is laughable. Look at the kind of money that flowed into the 2010 election—before everyone got organized on the corporate side—and compare it to what the unions moved into the system. It is clear that union contributions are just a pebble in the sea of corporate money. So what we need to mobilize in the social justice union movement is not money, but people: people who can be mobilized on issues; people who can be registered to vote.

It is interesting to look at the statistics. If you are a union member in a low income sector, you are more likely to be registered to vote than if you are not in a union, because you are more likely to have an organization that is talking to you about participation in the political system.

The big issues of this country today are being debated out in the political arena, such as immigration. SEIU and other unions are taking this issue into our local communities, into our

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<sup>42</sup> See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

states, and into the federal government, about the critical need for fair and comprehensive immigration reform.

The other issue, of course, is health care. We were asked by the Democratic leadership to defer labor law reform until health care reform was passed. We were willing participants in that because we knew that health care was critical for all working families. A lot of our people and resources were dedicated to helping in the fight to get health care reform passed.

At our SEIU convention in 2008, we had to debate what was going to be our theme for the next four years, and it was “Justice for All,”<sup>43</sup> because everybody knew—as union members—it is not only about what happens to you as a union member, it is about your family, your neighbor, and your community. We have to work together. We cannot just go for one issue, not just pursue our own collective bargaining agreements without regard to other workers’ interests. I am not, nor have I ever been, a believer that by passing social legislation we are weakening the labor movement. The more rights that people have in this country—workers, working families—the better off we all are, and the stronger we are to speak up for other issues. When workers are not afraid that they are going to be discriminated against for race or pregnancy, they feel more empowered to speak up on other issues. To pursue collective bargaining one factory, one work site, or one public sector unit at a time, is a total mistake.

The unions have power in France. They are very strong. They represent whole industries even though their membership is at ten percent. That is

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<sup>43</sup> See YES WE DID AND YES WE WILL: SEIU 2008 ANNUAL REPORT, SERV. EMPs. INT’L UNION (2008), available at [www.seiu.org/ourunion/Annual\\_Report\\_08.indd.pdf](http://www.seiu.org/ourunion/Annual_Report_08.indd.pdf).

because they are seen as a political player and their society affords unions an important role with their industry counterparts in what we call the “three-legged stool” approach: government, business, and labor consultation.

U.S. unions don’t have that kind of recognition here for the important role that workers’ unions play in creating and maintaining a fair economy that works for everyone. SEIU believes that we need to advocate for all workers, not just for union members.

HON. LIEBMAN: Thank you, Judy. Jack Ahern?

AHERN: Regarding a couple of things Sam said, John Liu, the New York City Comptroller, recently released a report comparing wages from private industry to public workers’ wages.<sup>44</sup> In his report he discusses wage compression in New York City: there is a narrow range between the lowest and highest paid New York City public workers. Where it is true that some of the lowest paid workers who work for the city make more than their private counterparts when their benefits are taken into account, overall, the private industry workers make thirteen percent more than public workers.<sup>45</sup>

The New York Times article about the report emphasized the pay difference between public and private workers.<sup>46</sup> He did take out police and firemen, which are not organized in the private sector. By not including them, he has come across very strongly—and I think that is in sharp

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<sup>44</sup> Press Release, John C. Liu, NYC Comptroller, New York City Government Workers Paid Less Than Private Sector Peers, Study Finds (Mar. 9, 2001), available at [http://www.comptroller.nyc.gov/press/2011\\_releases/pr11-03-023.shtm](http://www.comptroller.nyc.gov/press/2011_releases/pr11-03-023.shtm).

<sup>45</sup> See *id.*

<sup>46</sup> Patrick McGeehan, *Private Sector Pays Better in New York City, Study Finds*, N.Y. TIMES, Mar. 9, 2011, <http://cityroom.blogs.nytimes.com/2011/03/09/private-sector-pays-better-in-new-york-city-study-finds/>.

contrast, particularly when you see other publications constantly put out information that is wrong. For example, I recently read an article from the *The Economist*, (*Government*) *Workers of the World Unite!*, that said that public employees are paid so much more and their benefits are so much higher that each public employee could retire after twenty years.<sup>47</sup>

I represent these employees. There is no way they can retire after twenty years, and it is often lost in the debate that public employees now—in the City of New York—contribute for their retirement. There is a contribution that they pay for their retirement along with the city contribution to their retirement.

I think the discussion about retiring in twenty years is similar to talking about “rubber rooms” for teachers<sup>48</sup>: The teachers’ union has lobbied for, and has been successful in many cases, having rubber rooms removed. That was a case of justice delayed, justice denied: where teachers were sent under disciplinary action to a room, and instead of the Board of Education moving quickly on their cases, which is the responsibility of management, not the union—it is a responsibility of the union to advocate for them, but the responsibility of the management to move that process along. Some people were up in those rooms much longer than they should have been. I don’t think you can lay that on the teachers’ union.

I think there has been an opportunity taken here to demonize city workers in particular—public workers, across the country—but also city workers

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<sup>47</sup> (*Government*) *Workers of the World Unite!*, *ECONOMIST*, Jan. 6, 2011, at 21, 21–23, available at <http://www.economist.com/node/17849199> (discussing international retirement entitlement ranging from fifteen to thirty-five years).

<sup>48</sup> *Id.*

in the City of New York, without any real, honest look at what is going on in private industry. If it was true that there is a balance in private industry, every German car would be manufactured in the United States. The workers make considerably more money in Germany manufacturing cars than they do here, but we never seem to be compared to the other industrialized countries.

I think the argument that there is going to be a flight of industry is out of touch; there has already been a flight of industry, and I don't think that was caused by wages or benefits—particularly of public workers.

HON. LIEBMAN: Professor St. Antoine?

ST. ANTOINE: I would simply like to follow-up, emphasizing something Judy Scott referred to, and that is the problem of globalization, and the competition of foreign companies versus American industry. Former Secretary of Labor Ray Marshall and a few others, more often economists than lawyers, have been speaking—I hope knowledgeably, but certainly eloquently—about something that is really a moral concern. That is the notion of trying to establish—through the ILO, the International Labor Organization—the standard of a global living wage: a minimum living wage for workers and their families around the world. Of course, the standard would not be uniform everywhere. Instead, the living wage would have to take into account the varying economic conditions of individual countries.

I assume that the only effective enforcement would have to be through the World Trade Organization. That is quite contrary to much current market-oriented thinking. Nonetheless, this visionary

concept is well worth exploring. First, it is morally justified. Pope Leo XIII, in his famous encyclical *Rerum Novarum* clearly called for it without using the term “living wage.” Second, it would be economically advantageous for advanced industrial societies like the United States if all countries that engaged in international trade were required to insist upon a local minimum wage for all employees in those countries.

HON. LIEBMAN: Bernie Ricke?

RICKE: I would like to say that the UAW knows better than most of the importance of union density in specific industries and its effect on collective bargaining. When I was hired into Ford in 1973, most parts suppliers had wage and benefit parity with the big three, and some even had better contracts. This was a direct result of the fact that the auto parts suppliers were over eighty percent unionized. Over the last forty years, that union density has declined significantly and so has the bargaining power of those workers. They now, on average, make about half the wages that the workers at GM, Ford, and Chrysler make.

During this same time period foreign based automakers began building plants in the rural, predominately non-union South, and they use every legal and illegal tactic and loophole they can to fight union organizing. These are the same companies from Europe—like Mercedes and BMW—and Asia that embrace unions in their home country because it is socially unacceptable to use union busting tactics there. So it is a systemic problem that Bob King has begun to address since being elected President of the UAW by going to these employers and saying, “We want you to recognize your employees’ First Amendment rights.

Let's have an open and honest debate on a level playing field." To this day not one of these companies has accepted this.

The UAW knows the value of working with employers so that they can be successful and the value of union density in collective bargaining, but the cards have been stacked against us in organizing new workers. It is a matter of a balance of power between employers and workers, and until that balance of power is restored, workers' strength at the bargaining table will continue to erode, and the middle class in this country will continue to disappear at an alarming rate.

HON. LIEBMAN: Anybody else want one last word?

CARDINAL EGAN: I would like to say quickly that I believe we should indeed seize the opportunity to debate the issue between unions in the public sector and unions in the private sector. Each side has a position, as we have heard this afternoon, and each side is tempted to shade away the truth in pursuit of its own interests. This is not an acceptable approach.

What we need to do is honestly face that about which we are speaking. There is a basic difference between the public employee and the private employee. You cannot fairly say, "Here is an argument for the private employee," and apply it without distinction to the public employee. That tactic may get you through an opinion piece in a newspaper, but it will not work in a serious discussion where the participants are free to demand precise definitions and, above all, clear distinctions.

I am persuaded that we could have a most valuable debate on this subject and others connected with it,

but only if we are willing to argue our positions with the aforementioned precise definitions and clear distinctions.

HON. LIEBMAN: Thank you.

Anyone want the last, last word?

NANCE: I guess the ultimate question is, what exactly do we want our society to look at? How long will we want the disparities between the working person and other people? Just because we have a particular model does not make it right.

I have to disagree with the moralists here. I am with you, Professor St. Antoine, and I think, step back, look at what we have, and look at what it should be, and ask the more enormous question. And I think approaching this, the people of faith answer that question very differently, so I will just leave it at that.

FISCHL: A lot of the union organizing and collective bargaining successes in the past decade have come in the context of jobs that cannot be sent overseas, including landscaping, janitorial work, hands-on health care, hospitality work, and the like. But I worry that for much the rest of the economy—where employers *can* credibly threaten to take jobs elsewhere if workers unionize—the prospect of reversing the precipitous decline in union representation is depressingly small. To the extent that we value the importance of employee voice and employee dignity in the workplace, then, we can't afford to wait for the tide to turn in favor of union success and should therefore be looking at additional mechanisms for promoting voice and dignity. We need to be exploring worker centers, health and safety committees, work councils, and other institutions that might provide for a measure



of democracy even in the absence of a union. Especially in these very difficult times, we should not be making the best the enemy of the good.

HON. LIEBMAN: Thank you all. Let's give the panel a big hand. Thank you very much.

SIMONS: I am going to end by talking about the importance of coming together. And whether it is coming together for conversation and dialogue—as we academics tend to prefer—or for argument and debate—as Cardinal Egan tends to prefer—none of that can happen unless we are in the same boat.

And this bilevel panel discussion is a wonderful example of that coming together: with union leaders, lawyers, academics, professors, deans, former deans, public officials, theologians, and Church leaders—all part of the same conversation, the same dialogue, the same debate.

That coming together is the result of the person behind the Center for Labor Employment Law, and that is Dave Gregory, but Dave has—and always has—an ulterior purpose.

We are a law school and our job is to educate our students, and the Center for Labor and Employment Law exists and is animated by the next generation of labor and employment lawyers; and seeing and being here for this and participating in the conversation, the dialogue, the debate, has been an invaluable experience for those future lawyers and, for that, I thank our panelists, but I especially thank my friend and colleague, Dave Gregory, and I am happy to give him the podium for the last, last word. Thank you.

GREGORY: Well, this landmark Conference begins, I think, an interesting new step in labor management

relations. If you liked this Conference, we have more in store. On June 8 at our Manhattan campus, Mr. Bob King, the President of the UAW will provide opening remarks at our second annual general reception on the eve of the 64th annual program on labor and employment that we are co-sponsoring with NYU and Cornell ILR.

On July 20th–22nd at Cambridge University, England we are presenting *Worlds of Work: Employment Dispute Resolution Systems Across the Globe*, featuring, in addition to Dean St. Antoine as the Cambridge Conference keynote speaker, a plenary panel with Director of the Federal Mediation and Conciliation Service George Cohen, Stanford Law School Professor and former NLRB Chair Bill Gould, University of Texas Law Professor Jack Getman, and Sam Estreicher. Again, I thank Cardinal Egan and Richard Trumka, all of our speakers and panelists, all attending, our great support staff—Nancy, Paula, Maureen, Susan, Lori, and, especially our terrific law student volunteers so ably led by Marcus Cheung '11 and Melissa Schmeer '12. Cesar Chavez was the first featured speaker in my tenure here since 1982. Fittingly enough, he spoke to a standing-room-only crowd on November 2, 1987, All Souls' Day. In the spirit of Cesar Chavez, I say, let us go in peace to make peace. And, may your heart's desire inspire your vocations and renew each one of us for the important work that lies ahead. At five o'clock, Cardinal Egan will be the principal celebrant of the Mass at St. Thomas Church on campus. Everyone is invited. Everyone is welcome. Thank you.