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## A Higher Authority for Collective Bargaining: 2018

John Lavin<sup>1</sup>

Relatively early in his ministry, Dr. Martin Luther King, Jr. spoke to the AFL-CIO executive council in the midst of their 1961 Constitutional Convention in Miami, Florida. Dr. King's purpose was crucial. He was there to articulate the territory shared by the Civil Rights and Labor Movements and to advocate the end of segregation and to engage worker organizations in an imperative that many met with defensiveness, fear, and anger: integration. Put simply, though, his point was to bring people together.

Amid the plea that he made was for national leadership to guide working people of all races to solve their problems together at a time when this was regarded by many as inconceivable. Within this context, he distilled this humane purpose in his reading of the "Wagner Act," which he explained was "like any other legislation, [and] tended merely to declare rights but did not deliver them."<sup>2</sup>

Those rights, however, formed the heart of Dr. King's non-violent fight against segregation and constituted his appeal to the nation to uphold equality, equity, and human dignity for African Americans. His address to the AFL-CIO summoned the events of the past century, since the end of slavery, to remind Labor of important union successes. To that end, Dr. King reiterated unions' achievements during the Depression of the 1930s, declaring, "Labor had to bring the law to life by exercising its rights in practice over stubborn, tenacious opposition."<sup>3</sup> Thus, by way of hard-won, historical union organizing efforts, King concluded, "The day of economic democracy was born." While the racism practiced by unions also had a long history which Dr. King acknowledged, he looked forward to action joining the Southern Christian Leadership Conference with AFL-CIO affiliates. The premise intoned in his speech rests on a moral bond knitting speaker to audience, black people to white people and healing both the divisions and the

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<sup>2</sup> Speech given to the AFL-CIO Fourth Constitutional Convention Miami Beach, Florida, DEC. II, 1961. University of Maryland, University Collections & Special Archives.

<sup>3</sup> Speech given to the AFL-CIO Fourth Constitutional Convention Miami Beach, Florida, DEC. II, 1961. University of Maryland, University Collections & Special Archives.

impediments. In Dr. King's words of praise for the shared ethos of Labor and Civil Rights advocates, "... it was always the right time to do what was right ..."<sup>4</sup>

By contrast, the 2018 scenes of conflict regarding human rights and legal issues of both equality and equity have become sore reminders of the need for what Dr. King called "creative tension."<sup>5</sup> The appointment nomination hearings in the Senate Committee on the Judiciary that resolved in Judge Brett Kavanaugh ascending to the Supreme Court did not reveal a jurist capable of the wisdom needed to lead senators to see the deeper commitment shared by the judiciary and legislature. The hearings reduced themselves to a win/lose proposition. The losses incurred there, lamentably, are suffered by the people whose rights are those same people whose rights Dr. King honored in striking a tone of conciliation, deliberation and, ultimately, establishing the ability to work with adversaries.

With Justice Kavanaugh's appearance on the Supreme Court, his labor-related decisions as a former judge on the U.S. Court of Appeals have come under review and display a pattern of disengaging government from the National Labor Relations Act's (NLRA) purpose "to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."<sup>6</sup> A few poignant examples include the 2012 Trump Plaza case,<sup>7</sup> in which Judge Kavanaugh refused to uphold a National Labor Relations Board (NLRB) order directing management to bargain in good faith with the union. Trump Plaza was claiming that a politically charged press conference wherein elected officials endorsed union organizing efforts had created an erroneous impression in workers' minds. Management was claiming, therefore, that the NLRB was perceived to be biased in favor of the union and had, consequently, tainted the original election ratifying the United Auto Workers as the bargaining agent (324 Union Yes-149 No). The company's refusal to deal with the union was based on an alleged distortion in the workers' minds. Mr. Kavanaugh and two other judges quashed the union efforts to establish a contract as well as the lawful assertions of elected leaders that the workers' rights to bargain deserve to be recognized. The result is a shadow dance choreographed according to images that may or may not have occurred in affected employees' minds regarding a pro-union prejudice at the NLRB. Consistent in opposing union organizing rights, Judge Kavanaugh's

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<sup>4</sup> Speech given to the AFL-CIO Fourth Constitutional Convention Miami Beach, Florida, DEC. II, 1961. University of Maryland, University Collections & Special Archives.

<sup>5</sup> Letter from Birmingham City Jail. Dr. Martin Luther King, Jr. King Center Archives/Stanford University. (<https://kinginstitute.stanford.edu/king-papers/documents/letter-birmingham-jail>)

<sup>6</sup> National Labor Relations Act, Preamble. (<https://www.nlr.gov/resources/national-labor-relations-act-nlra>)

<sup>7</sup> *Trump Plaza Associates v. AFL CIO*. U.S. Court of Appeals. Washington D.C. Circuit. May 11, 2012.

opinion in the Venetian Casino case<sup>8</sup> reversed an NLRB determination that the management had interfered with a lawful union organizing campaign and sided with the Casino's First Amendment rights by calling in police to issue citations to union protesters trespassing on company property. The impact of the decision chilled options for workers to bargain, to be heard, and to negotiate better living standards. These decisions, as well as Judge Kavanaugh's dissent in the case of *Seaworld of Fla., LLC v. Perez*<sup>9</sup> coldly limit workers' interests. In *Seaworld*, he states that OSHA was erroneous in fining Seaworld \$7,000 for failing to take protective measures where a series of three employees had been killed by dangerous fish with whom they worked. His reasoning was that, like NFL players, these workers knew the job was dangerous and that the government agency had no right to impose protective conditions and responsibilities upon the employer.

This year's climate of chilling worker rights has been pervasive. Prior to Justice Kavanaugh joining the Supreme Court, the ruling in June in the case of *Janus v. AFSCME Council 31*<sup>10</sup> has jeopardized unions' ability to collect dues from workers, consequently, weakening worker organizations' ability to employ staff and to cover the expenses necessary for bargaining, resolving conflicts, and organizing. Federal employees must now "opt in" as dues paying members rather than work with the assumption that dues be deducted from their pay to cover reasonable union expenses. Workers are free to opt out of paying dues.

Contributing to this chilling climate and similarly debilitating the collective bargaining process, President Trump issued Executive Orders in May charging unions rent for office space in government buildings previously provided for labor-related activities and scaling back time allotted to federal workers to fulfill their responsibilities as union representatives in grievance hearings and other union activities. The President's Orders were overturned in August by U.S. District Judge Ketanji Brown Jackson, and the rights in support of negotiating, grieving and organizing were restored. In this setting, President Trump also has sought to set back to zero both a 2.1% pay increase for civilian federal employees and their locality pay adjustments. The federal government has become an environment hostile to workers' rights.

While state labor relations acts and other settings wherein workers' equities may or may not be consistent with outcomes in cases such as *Janus* and patterns of anti-union intent implicit in Justice Kavanaugh's extensive experience and/or President Trump's sweeping Orders

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<sup>8</sup> *Venetian Casino Resort v. National Labor Relations Board*. U.S. Court of Appeals. Washington D.C. Circuit. Decided: July 5, 2015.

<sup>9</sup> *Seaworld of Fla., LLC v. Perez*. U.S. Court of Appeals. Washington D.C. Circuit. Decided: April 11, 2014.

<sup>10</sup> *Janus v. AFSCME District Council 31*. Supreme Court of the United States. Decided: June 27, 2018.

destabilizing the collective bargaining process, there is a compelling need for leadership with the ability to bring insight to the process at the level of employees' humanity.

This year, the crucial call for transformative, risk-taking innovation in employment policy and practice has emerged more fully in colleges and universities where the disparities in compensation between adjunct instructors and tenure-track professors have historically been a scene of gross inequality. To address this historical trend of injustice, a national labor campaign of solidarity has merged the efforts of four unions from different corners of the workforce (i.e. the United Auto Workers, Service Employees International Union, UNITE-Here, and the American Federation of Teachers (AFT)) in a cause this year to forestall the looming anti-worker impediments to adjunct instructors' rights that impend at President Trump's appointed NLRB. According to the UAW website's March 14<sup>th</sup> announcement, "unions and their allies delivered letters today to the presidents of Yale, Columbia, Boston College, the University of Chicago, and Loyola of Chicago in joint demands that the administrators honor recent democratic majority votes in favor of unionization."<sup>11</sup> The effect of unions working together on the basis of rights-based advocacy is a sign of hope for employees who feel under siege. The initiative to engage management without relying on the government agency of President Trump's appointed NLRB has brought a tone of unity to promoting workers' best interests in spite of union-busting policies and practices.

Also, in the academy, as expressed in the concluding chapter of the 2018 book, *Professors in the Gig Economy: Unionizing Adjunct Faculty in America*, Kim Tolley and Kristen Edwards observe with an awareness of the potential for policy change that

some of the nation's largest unions have joined forces to issue recommendations for the reauthorization of the Higher Education Act (HEA)... The National Education Association, the AFT, and the American Association of University Professors Collective Bargaining Congress have recommended that the next reauthorized HEA "[p]rovide incentives for investment in instruction and student support services that lead to greater student success, including incentives for institutions that make progress in reversing harmful employment trends among faculty and that transition from a majority contingent instructional workforce to a well-supported, predominantly full-time and tenure-track faculty."<sup>12</sup>

The action inherent in this initiative is the collective sharing of union resources and the intention to establish clarity for employees to gain a degree of democracy and participation with the forces that define their equities as well as to advance their rights to participate in the governance of the colleges and universities where they teach.

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<sup>11</sup> United Auto Workers web site. (<https://uaw.org/graduate-workers-four-major-unions-launch-unprecedented-national-campaign-bring-private-universities-bargaining-table/>)

<sup>12</sup> *Professors in the Gig Economy: Unionizing adjunct faculty in America*. Kim Tolley (ed.). Johns Hopkins University Press. 2018.

My reflection here opened by considering the struggle for human and labor rights this year that harkens back to Dr. King's reading of the NLRA to the sisters and brothers of the AFL-CIO in 1961. That call for essential human dignity and spirituality is heightened by witnessing the attack in 2018 on workers' safety, the casting aside of laws protecting their lives, and the ignoring of policies instilling equitable compensation and benefits for their livelihoods. Dr. King's manner and his spirituality elicit a deep appreciation for the ethical and moral purpose of collective bargaining rights. Those rights keep people safe at work and insure workers a just quality of life.

Dr. King spoke outside the safety of his church to enunciate values intrinsic in the balances required for collective bargaining to establish and sustain dialogue between workers and their managers, between people separated by race, by political borders, or by differences of class. With the ongoing integration of the United States workforce, the spirit resonating in the words of Dr. King has the power to motivate leaders with sensitivity for the contract between workers and managers and to instigate new, more humane relationships regardless of whether those workers are employed in universities, government offices, casinos, parks, factories, or farms. The ethic of recognizing the common sense that connects people through respectful dialogue is at task at this moment of our history.