successor contract to that interpreted by the arbitrator. The more traditional appeal mechanism, resort to the courts, obviously must be retained as a necessary curb for those instances when an arbitrator disobeys the mandate granted him. But the teaching of *Enterprise* is that an arbitration opinion and award are not to be viewed as a trial court record and that it is expected that a given result will search beyond the bare words of a collective contract because, if for no other reason, those words most frequently do not and cannot present standards of mathematical precision to be applied to situations unknown at the time of their writing. When Mr. Justice Douglas affirmed that the arbitral award must have a foundation in the "essence" of the agreement, he was, I believe, deliberately granting the widest possible range of action. The Court did not predicate review by a judge as a reexamination of what a contractual provision might or might not mean. Absent disobedience to a specific limitation, errors of an arbitrator are not to be corrected—if the institution of arbitration is to survive—by a determination of a judge that the terms of an agreement have been altered simply because those terms read differently in the scrutiny of the bench than they do in the perspective of the individual chosen by the parties for precisely that task.

II. JUDICIAL REVIEW OF EMPLOYMENT DISCRIMINATION ARBITRATIONS *

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The passage of Title VII of the Civil Rights Act of 1964 [1] has helped place employment discrimination law on a collision course with some of the basic principles of the labor legislation which

*This paper was delivered before both *Rios* v. *Reynolds Metals Co.*, —— F.2d ——, 5 FEP Cases 1 (5th Cir. 1972) and *Alexander* v. *Gardner-Denver Co.*, 4 FEP Cases 1210 (10th Cir. 1972). Accordingly, the paper does not analyze either of these decisions.

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[1] Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970). Title VII is not the only civil rights statute involved in the conflict. The others are the Civil Rights Act of 1866, 14 Stat. 27 (1866); Equal Pay Act of 1963, 29 U.S.C. § 206 (d) (1967); and the Age Discrimination Act of 1967, 29 U.S.C. §§ 621-34 (1970). Both the National Labor Relations Act and the Constitution are involved as well. With regard to the former, see *Packinghouse Workers* v. *NLRB*, 416 F.2d 1126, 70 LRRM 2489 (D.C. Cir. 1969), *cert. denied* 396 U.S. 903, 72 LRRM 2658 (1969). (The Board's decision on remand is *Farmers' Cooperative Compress*, 194 NLRB No. 3, 78 LRRM 1465 (1971).) See also cases cited in note 9. With regard to the Constitution, see, *e.g.*, *Ethridge* v. *Rhodes*, 268 F.Supp. 83 (S.D. Ohio 1967).

preceded it. Both the principle of exclusivity for unions in an appropriate bargaining unit as well as the public policy which promotes the negotiation of grievance-arbitration machinery [2] are at the center of the storm. For Congress, when it prohibited discrimination [3] in employment by unions and employers, had ample reason to believe that a substantial number of the parties on both sides of the bargaining table were implicated in and responsible for the behavior which it now outlawed. All of this made it quite clear that, where minority-group and women workers raised claims both alleging discrimination and susceptible to handling by the arbitration forum, the basic rules of the game could never again be the same. This is especially so in the case of racial discrimination which was the primary reason for the legislation in 1964 [4] and which, as the Fifth Circuit has recently had occasion to say, is one of the most deplorable forms of discrimination in our society.[5]

The rules of labor law, of course, have been articulated by the Supreme Court in cases arising under both the National Labor Relations Act [6] and the Railway Labor Act.[7] The Court has said that exclusivity for unions means that the individual contract of employment is obliterated in the collective interest [8] and, by way of prescribing a palliative for such power, has established a relatively ineffective duty of fair representation to protect individual and group interests when they were trampled upon by the majority.[9] Congress, through the 1947 Taft-Hartley amend-

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[2] Labor Management Relations Act (hereinafter LMRA) § 203 (d), 29 U.S.C. § 173 (d) (1970).

[3] See, generally, General Subcomm. on Labor, Comm. on Education and Labor, House of Representatives, 88th Cong., 1st Sess., Hearings, Equal Employment Opportunity (1963).

[4] See, *e.g.*, Comm. on the Judiciary, House of Representatives, 88th Cong., 2d Sess., H.R. 914, The Civil Rights Act of 1964 (1963); see, generally, Subcomm. No. 5, Comm. on the Judiciary, House of Representatives, 88th Cong., 1st Sess., Hearings, Civil Rights (1963).

[5] *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891, 2 FEP Cases 377 (5th Cir. 1970).

[6] 29 U.S.C. §§ 141 et seq. (1970).

[7] 45 U.S.C. §§ 151 et seq. (1964).

[8] *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 14 LRRM 501 (1944).

[9] See *Steele* v. *L. & N.R.C.*, 323 U.S. 192, 15 LRRM 708 (1944); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 30 LRRM 2258 (1952); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 31 LRRM 2548 (1953); *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967). *Cf.* Herring, "'Fair Representation' Doctrine—An Effective Weapon Against Union Racial Discrimination?" 24 *Md. L. Rev.* 113 (1964). It has since become possible to enforce duty-of-fair-representation rights administratively. See *Miranda Fuel Co.*, 140 NLRB 181, 51 LRRM 1584 (1962), *enf. denied*, 326 F.2d 172, 54 LRRM 2715 (2nd Cir. 1963); *Hughes Tool Co.*, 147 NLRB 1573,

ments, has stated that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." Moreover, the Court, in the *Steelworkers* trilogy,[10] placed its imprimatur upon arbitration as a preferred instrument for resolving disputes arising during the term of the contract.[11] In the *Warrior* and *American Manufacturing* portions of the trilogy, the Court said that all doubts about the arbitrability of disputes ought to be resolved in favor of ordering the parties to arbitration.[12] In *Enterprise Wheel & Car,* it was reiterated that the arbitrator need not provide reasons for the award, and the Court held that the award is enforceable in federal and state courts as long as it manifests fidelity to the contract which the arbitrator is commissioned to interpret.[13] In the absence of a contract clause to the contrary, the union maintains exclusive control over whether an employee claim proceeds to arbitration.[14] In most instances, the employee must exhaust contract procedures before filing court action based upon the collective agreement.[15] And, subsequent to exhaustion, the hazards of challenging the determination of private parties are many.[16]

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56 LRRM 1289 (1964). Few cases have been heard by the Board and apparently few charges filed. This may be attributable to the ineffective remedies devised by the Board. See, *e.g., Local 12, United Rubber Workers,* 150 NLRB 312, 57 LRRM 1535 (1964), *enf. granted* 368 F.2d 12, 63 LRRM 2395 (5th Cir. 1966); *Port Drum Co.,* 170 NLRB 51, 67 LRRM 1506 (1968). It is also attributable to the Board's lamentable record with race discrimination cases under the NLRA. See *Farmers' Cooperative Compress,* 194 NLRB No. 3, 78 LRRM 1465 (1971); *The Emporium,* 192 NLRB No. 19, 77 LRRM 1669 (1971); *Sunbeam Corp.,* 184 NLRB No. 117, 74 LRRM 1712 (1970), *enf. granted* 79 LRRM 2803 (7th Cir. 1972).

[10] *United Steelworkers of America* v. *American Mfg. Co.,* 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 46 LRRM 2423 (1960).

[11] *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra* note 10 at 578-581. This preference for arbitration is derived from LMRA § 203 (d), 29 U.S.C. § 173 (d) (1970).

[12] *United Steelworkers of America* v. *American Mfg. Co., supra* note 10 at 566-567; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra* note 10 at 582-583.

[13] *United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra* note 10 at 598.

[14] *Vaca* v. *Sipes, supra* note 9 at 185.

[15] *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 58 LRRM 2193 (1965).

[16] 386 U.S. at 186-187. "We think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. . . . It is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the

These rules place substantial confidence in the parties' ability to handle their own problems. But many of them were established without consideration of their impact upon discrimination cases. To be sure, arbitration in the steel industry,[17] for instance, has been in some instances a vehicle for eliminating the testing requirement which carried forward the consequences of past discrimination because of the contractual obligation imposed upon management to devise tests that are job related.[18] But the frailties of this private decision-making process take a variety of forms. Most of them ultimately are attributable to one of the basic assumptions of Congress in 1964. A substantial number of unions and employers often discriminate against blacks, Chicanos, and women. The arbitration process is the private machinery of these very same parties.

Indeed, in this connection, it is interesting to note that the National Academy of Arbitrators, whose membership is involved in a substantial portion of the important and prestigious arbitrations (although by no means a significant percentage of all the hearings that take place in the country), can claim only four blacks (two admitted in April 1972) and three women members out of a membership of approximately 350. Apparently, the Academy has no Chicano or American Indian members. In part, these statistics, which compare most unfavorably with even the most discriminatory unions or employers, reflect the attitude of these parties who select the arbitrators. Of course, the racial and sexual composition of the arbitration profession does not indicate that the process cannot be of some benefit to minority-group and women workers in some circumstances. Arbitrators have handed down awards that are favorable to the discriminatee,[19] and one

context of many § 301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy." See also, 386 U.S. at 203-210 (Mr. Justice Black dissenting).

[17] See U.S. Steel & U. Steelworkers, U.S.S.-7636-S (unpublished award, June 2, 1971); U.S. Steel and U. Steelworkers, U.S.S.-5880-R (unpublished award, Nov. 13, 1971); Jones & Laughlin Steel & U. Steelworkers, J & L No. 2-585 (unpublished award, Apr. 12, 1971).

[18] *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971); *cf. United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 3 FEP Cases 589 (2d Cir. 1971).

[19] See, *e.g.*, United States Steel Corporation, Eastern Steel Operations, Grievance No. H.H. 70-416 (unreported 1971), which provides for reference of operable employment discrimination grievances to bilateral civil rights machinery negotiated by the union and the employer. See note 17 *supra* and note 20 *infra*. For support given to black grievants in the arbitral context in relatively unusual circumstances, see *City of San Francisco*, 55 LA 970 (1970), William Eaton; *Port Authority of Allegheny Co.*, 58 LA 165 (1971), Clair V. Duff. *Cf. Ford Motor Co.*, Case No. 29-132, 29-133, 29-134 (unreported Sept. 12, 1969).

would assume that the bulk of the Academy membership is not insensitive to such complaints. Moreover, it must be recognized that there are unfounded and frivolous claims which have the label of discrimination pinned to them and which, therefore, are properly rejected by either the parties or arbitrators. Nevertheless, it is interesting to note that grievances alleging discrimination are rejected in the overwhelming percentage of reported awards at a time when both the EEOC and the federal courts are finding discrimination to be present in a wide variety of contexts where such results were considered impossible a few years ago.[20] And, there are institutional aspects of arbitration which indicate clearly that some of the standards are substantially different from those employed by the EEOC and the federal courts under Title VII and related legislation—and this is cause for concern.

For instance, in one of the earlier NLRB duty-of-fair-representation cases,[21] the Board said that a union had failed to

[20] On some of the concepts that have become embedded in the court approach to Title VII, see generally Gould, "Employment Security, Seniority and Race; Title VII of the Civil Rights Act of 1964," 13 *Howard L.J.* 1 (1967); Gould, "Seniority and the Black Worker: Reflections on Quarles and Its Implications," 47 *Texas L. Rev.* 1039 (1969); Cooper & Sobel, "Seniority and Testing Under Fair Employment Laws, A General Approach to an Objective Criteria of Hiring and to Promotions," 82 *Harv. L. Rev.* 1598 (1969); Peck, "Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forms," 46 *Wash. L. Rev.* 455 (1971). As noted above, most arbitration awards deny the grievances of blacks alleging racial discrimination. See, for instance, *United Aircraft Corp.*, 55 LA 484 (1970), Burton B. Turkus; *Agrico Chemical Co.*, 55 LA 481 (1970), Jerome G. Greene; *American Sugar Refining Co.*, 62-1 ARB No. 8111 (1961); *Land-Air Inc., Stepper Motors Div.*, 63-1 ARB No. 8185 (1962); *Mobil Oil Co.*, 64-2 ARB No. 8520 (1964); *National Lead Co.*, 67-1 ARB No. 8134 (1967); *Peer Food Products*, 67-1 ARB No. 8204 (1967); *Columbus Auto Parts Co.*, 69-2 ARB No. 8693 (1969); *Lockheed Aircraft Corp.*, 70-1 ARB No. 8092 (1969); *Simonize Co.*, 70-1 ARB No. 8179 (1969); *Imperial Sugar Co.*, 70-1 ARB No. 8409 (1970); *Lockheed-Georgia Co.*, 70-2 ARB No. 8589 (1970); *Arvin Industries Inc.*, 70-2 ARB No. 8720 (1970); *Downington Paper Co.*, 71 ARB No. 8413 (1970); *American Machine & Foundry Co.*, 66-1 ARB No. 8032 (1965); *General Foods Corp.*, 69-2 ARB No. 8826 (1969); *U. S. Plywood*, 71-1 ARB No. 8160 (1971); *Dist. of Columbia Board of Education*, 70-1 ARB 8257 (1969). Even where grievances involving discharges have been upheld, arbitrators have been reluctant to award back pay. See, for instance, *San Val Inc.*, 70-2 ARB No. 8776 (1970); *Singer Controls Co. of America*, 70-2 ARB No. 8760 (1970); *Cocker Machine & Foundry Co.*, 70-2 ARB No. 8628 (1970). There are some grievances involving racial discrimination that have been sustained by arbitrators. See, for instance, *SCM Paper Co.*, 54 LA 416 (1969), Richard C. Calhoon; *Featherlight Mfg. Co.*, 55 LA 1052 (1970), Maurice H. Merrill; *Tri-City Container Corp.*, 42 LA 1044 (1964), Paul Pigors; *Armco Steel Corp.*, 42 LA 683 (1964), Herbert L. Sherman, Jr.; *Milgrim Food Stores Inc.*, 68-2 ARB No. 8655 (1968). Even in some of the cases where the grievance is sustained, discrimination is not found. See, generally, Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," 118 *U. Pa. L. Rev.* 40, 55. n. 61 (1967); McKelvey, "Sex and the Single Arbitrator," 24 *Ind. & Lab. Rel. Rev.* 335 (1971).

[21] *Local 12, United Rubber Workers*, 150 NLRB 312, 57 LRRM 1535 (1964), *enf. granted*, 368 F.2d 12, 63 LRRM 2395 (5th Cir. 1966).

meet its duty-of-fair-representation obligation in refusing to process grievances of black workers in a seniority dispute. The Board, in fashioning a remedy for the violation, stated that the grievances should be processed to arbitration and expressed optimism about an arbitrator's award on the issues since, said the Board, the arbitrator would not act in a manner contrary to the federal law.[22]

However, the arbitrator ignored the Board's expectations and held that the back pay for wages lost due to the discriminatory promotion system could not be forthcoming since such an award would not comport with the parties' intentions.[23] This, of course, contrasts with federal court decisions requiring the back pay for wages due under similar circumstances where the parties have negotiated discriminatory seniority systems.[24]

Similarly, in *Hotel Employers Association*,[25] an arbitrator relied upon federal law to declare invalid an agreement negotiated between civil rights organizations, employers, and civil rights agencies providing for statistical goals for hiring and promotion of minorities. According to the arbitrator, the agreements were violations of both federal and state laws. Not only do court decisions under both Title VII and the Executive Order [26] contradict this conclusion, but the courts themselves have devised such goals as a remedy for Title VII violations.[27] Here, once again, the arbitral process produced a substantially different result and one which was disadvantageous for the minority group worker.

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[22] "When the Negro employees, in their efforts to utilize the grievance procedure of the 1962 contract to obtain back pay for the periods of layoffs, insisted upon a fair and valid interpretation of the contract, the Respondent refused to process the grievances, relying upon the racially invalid interpretation which had been placed upon that and earlier contracts. . . . Obviously, an arbitrator would not have been bound by the racially invalid interpretation and might have awarded back pay." *Id.* at 316-317.

[23] *Goodyear Tire & Rubber (Gadsden, Ala.)*, 45 LA 240 (1965), Paul N. Lehoczky.

[24] See *e.g.*, *Robinson* v. *P. Lorillard Corp.*, 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971); *Glus* v. *G. C. Murphy Co.*, 329 F.Supp 563, 3 FEP Cases 1094 (W.D. Pa. 1971).

[25] 47 LA 873 (1966), Robert E. Burns. This award is discussed in Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," *supra* note 20.

[26] Exec. Order No. 11246, 3 C.F.R. 579 (1965), 42 U.S.C. § 2000e (1970).

[27] *U. S.* v. *Local 86, Iron Workers*, 443 F.2d 544, 3 FEP Cases 496 (9th Cir. 1971); *Carter* v. *Gallagher*, 452 F.2d 315, 4 FEP Cases 121 (8th Cir. enbanc 1972); *NAACP* v. *Allen*, 340 F.Supp. 703, 4 FEP Cases 318 (D. Ala. 1972); *Contractors Assn. of E. Pa.* v. *Shultz*, 442 F.2d 159, 3 FEP Cases 395 (3rd Cir. 1971).

The Policies of Title VII

Title VII encourages the voluntary resolution of employment discrimination claims without resort to litigation.[28] Accordingly, although the legislative history of Title VII on this subject is silent, arbitration and other private machinery which address themselves to employee grievances have some support under the statute. They can be an appropriate means through which to effectuate compliance with Title VII's requirements without the expense and delay incidental to litigation. But the statutory scheme of Title VII does not ordinarily brook interference with the power of the federal courts to decide employment discrimination cases. Where, for instance, the NLRB has ruled against a Title VII plaintiff, the evidentiary record is not res judicata in federal district court, at least where the trial examiner did not consider racial discrimination allegations.[29] Title VII requires that state fair employment practice commissions are to be deferred to under certain circumstances [30] prior to both EEOC and investigation and conciliation and before an individual maintains suit in federal district court.[31] But the failure of a state agency—as well as the EEOC for that matter—to find reasonable cause to believe that discrimination exists does not preterit federal court action.[32] Indeed, in *Voutsis* v. *Union Carbide Corp.*,[33] the Second Circuit has recently said that an employee cannot be deemed to have elected to pursue state remedies exclusively where she entered into a settlement with the employer in the state proceeding.[34] Said the court: "The Congressional policy sought to be enforced is one of eliminating employment discrimination, and the statutory enforcement scheme contemplates resort to the federal remedy if the state machinery has proved inadequate. The federal remedy is independent and it facilitates com-

[28] See Civil Rights Act of 1964, §§ 705 (g), 706 (a), (e), 42 U.S.C. §§ 2000e-4 (f), 2000e-5 (a), (e) 1970.

[29] *Tipler* v. *E. I. du Pont de Nemours & Co.*, 443 F.2d 125, 3 FEP Cases 540 (6th Cir. 1971).

[30] Civil Rights Act of 1964, §§ 706 (b) - (d), 42 U.S.C. § 2000e-5 (b) - (d) (1970).

[31] Civil Rights Act of 1964, § 706 (a), 42 U.S.C. § 2000e-5 (a) (1970).

[32] *Fekete* v. *U.S. Steel Corp.*, 424 F.2d 331, 2 FEP Cases 540 (3rd Cir. 1969); *Flowers* v. *Local 6, Laborers*, 431 F.2d 205, 2 FEP Cases 881 (7th Cir. 1970); *Beverly* v. *Lone Star Lead Const. Corp.*, 437 F.2d 1136, 3 FEP Cases 74 (5th Cir. 1971).

[33] 452 F.2d 889, 4 FEP Cases 74 (1st Cir. 1971). Accord, *Lopez* v. *State Foundry & Machine, Inc.*, 336 F.Supp. 34, 4 FEP Cases 158 (E.D. Wis. 1972).

[34] *Cf. Antonopulos* v. *Aerojet-General Corp.*, 295 F.Supp 1390, 1 FEP Cases 639 (E.D. Calif. 1968); *Edwards* v. *North American Rockwell Corp*, 291 F.Supp 199, 1 FEP Cases 369 (C.D. Calif. 1968); *Washington* v. *Aerojet-General Corp.*, 282 F.Supp. 517, 1 FEP Cases 300 (C.D. Calif 1968).

prehensive relief." [35] Might one conclude that the same rule is to apply in connection with an individual's consent to have his grievance processed and heard in arbitration? One might assume that the answer provided in *Voutsis* would be more than adequate in order to govern the relationship between federal court proceedings and arbitration awards. State fair employment practice commission proceedings are *specifically* encouraged by the statute inasmuch as Title VII requires deferral to such a forum. No similar policy or deferral rule is written into the statute in the case of arbitration, nor have the courts found one to be implied.[36] Moreover, Title VII does not mention arbitration at all and the legislative history is silent on the subject. Yet, despite the persuasiveness of logical argument, the applicability of *Voutsis* to the arbitration arena is not entirely clear at this time.

The Election-of-Remedy Cases

Does an employee who files a grievance and seeks arbitration under a collective bargaining agreement elect a remedy which precludes Title VII federal district court action? The first case to be presented to a circuit court of appeals on this issue was *Bowe* v. *Colgate-Palmolive* [37] where the Seventh Circuit reversed a district court, holding that an election of remedies between the available fora was required *ab initio*. The Seventh Circuit stated that there was an analogy between arbitration, its impact upon Title VII litigation, and the relationship between arbitration and

[35] 452 F.2d at 893.

[36] *Glover* v. *St. Louis-S.F. Rwy. Co.*, 393 U.S. 324, 70 LRRM 2097 (1969); *Czosek* v. *O'Mara*, 397 U.S. 25, 73 LRRM 2481 (1970). See *King* v. *Georgia Power Co.*, 295 F.Supp. 943, 949, 1 FEP Cases 357 (N.D. Ga. 1968); *Reese* v. *Atlantic Steel Co.*, 282 F.Supp. 905, 906, 1 FEP Cases 283 (N.D. Ga. 1967). *Cf. Dent* v. *St. Louis-S.F. Rwy. Co.*, 265 F.Supp. 56, 1 FEP Cases 172 (N.D. Ala. 1967), *rev'd on other grounds*, 406 F.2d 339, 1 FEP Cases 583 (5th Cir. 1969); *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 2 FEP Cases 377 (5th Cir. 1970).

[37] 416 F. 2d 711, 2 FEP Cases 223 (7th Cir. 1969). The commentary on this subject is growing. See Block, "Race Discrimination in Industry and the Grievance Processes," 16 *Howard L.J.* 42 (1970); Blumrosen, "Labor Arbitration, EEOC Conciliation and Discrimination in Employment," 13 *Arb. J.* 88 (1964); Edwards & Kaplan, "Religions Discrimination and the Role of Arbitration Under Title VII," 69 *Mich. L Rev.* 559 (1971); Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," *supra* note 20; Gould, "Non-Governmental Remedies for Employment Discrimination," 20 *Syracuse L. Rev.* 865 (1969, reprinted in American Bar Assn. National Institute Proceedings, Mar. 29, 1969); Meltzer, "Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination," 39 *U. Chi. L. Rev.* 30 (1971); Platt, "The Relation Between Arbitration and the Civil Rights Act of 1964," 3 *Ga. L. Rev.* 398 (1968); Hebert & Reichel, "Title VII and the Multiple Approaches to Eliminating Employment Discrimination," 46 *N.Y.U. L. Rev.* 450 (1971); McKelvey, "Sex and the Single Arbitrator," *supra* note 20.

the National Labor Relations Act—and that the analogy was not merely "compelling," but rather "conclusive." [38] The court noted that a burden would be placed upon the party that defended in each forum, but because of "crucial differences" between the process and the remedy afforded in each, the election-of-remedy doctrine was inappropriate. The court stated that the arbitrator might consider himself to be precluded by contract from providing the kind of remedy available under the statute and, in this connection, the court gave as an example the remedy of back pay. Moreover, it noted that in Title VII actions, the court bears a special responsibility to resolve the dispute presented by the allegations regardless of the position of the individual plaintiff and the merits of his or her case. Said the court: "Accordingly, we hold that it was error not to permit the plaintiffs to utilize a parallel prosecution both in court and through arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in unjust enrichment or windfall to the plaintiffs." [39]

The approach of the Fifth Circuit, in *Hutchings* v. *U. S. Industries, Inc.*,[40] was more elaborate. Plaintiff, a black worker, had applied for the position of leadman, and the position was assigned to a white man who had less experience and seniority. Hutchings then filed a grievance complaining of the job assignment to a less senior employee, and the grievance was taken to the third step of the procedure, at which stage the grievance was decided against plaintiff. Accordingly, the matter was not submitted to arbitration, and subsequently Hutchings filed a charge with the EEOC. Subsequently, the leadman's position came open again, and after Hutchings applied for it, the company abolished the job. Once again a grievance was filed, and this time the matter proceeded to arbitration. The arbitrator determined that the company did not violate the agreement by refusing to hire replacements for the job.

Here again the court reversed a district court's granting of the company's motion for a summary judgment based upon the arbitration award. The Fifth Circuit noted that the federal courts "alone" were given the power by Congress to enforce compliance with the statute. The court, citing *Bowe*, noted that it had a

[38] *Id.* at 714.
[39] *Id.* at 715.
[40] 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970).

special responsibility to determine the facts regardless of the individual plaintiff's position. Considering the function of grievance-arbitration machinery against this backdrop, the court said the following:

> "An arbitration award, whether adverse or favorable to the employee is not *per se* conclusive of the determination of the Title VII rights by the Federal Courts nor is an intermediate grievance determination deemed 'settled' under the bargaining contract to be given this effect." [41]

The court then noted that in an arbitration proceeding, the arbitrator's role was to determine the contract right as distinct from the rights afforded by statutes such as Title VII. Moreover, said Judge Ainsworth speaking for the court, the arbitrator might feel himself "constrained" not to provide the kind of remedies provided for by Title VII. The court noted that a contrary decision would penalize the employee who had unsuccessfully pursued his contractual remedies to conclusion and discourage reliance upon voluntary compliance with the Act which, after all, is an object of Title VII.[42] In any event, the court concluded, the federal courts were the final arbiters under the statutory scheme.

To date, a conflict with the Fifth and Seventh Circuits' holdings exists because of *Dewey* v. *Reynolds Metals Co.*,[43] a Sixth Circuit ruling which has been substantially modified, if not completely reversed, by the same court that rendered it. In *Dewey*, a plaintiff claimed that he was wrongfully discharged by the defendant, Reynolds Metals Co., because of his religious beliefs and accordingly prayed for reinstatement with back pay. Simultaneous with bringing a grievance under the contract, plaintiff Dewey filed a complaint with the Michigan Civil Rights Commission. The Commission and an arbitrator, who heard Dewey's grievance filed pursuant to the contract procedures, dismissed the complaint. The EEOC, however, determined that there was reasonable cause to believe that an unlawful employment practice had been committed. The Sixth Circuit, in dealing with the effect of the arbitration award, noted that if the arbitrator had ruled in favor of Dewey, the award would have been final and binding

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[41] *Id.* at 311.
[42] *Id.* at 313.
[43] *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 2 FEP Cases 687 (6th Cir. 1970), *rehg. denied* 429 F.2d 334 (6th Cir. 1970).

upon the employer under the *Steelworkers* trilogy.[44] If the employer, and not the employee, were bound by arbitration, the "efficacy" of arbitration would be "destroyed," said Judge Weick, writing for the majority. Said the court:

> "This result could sound the death knell to arbitration which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street; *i.e.*, that the awards are binding on them but not on their employees." [45]

On rehearing, the same court stated that an employer would have no incentive to become party to arbitration procedures if employees could upset finality through suit in federal court.[46] The Supreme Court affirmed the majority's denial of plaintiff's claims through a four-to-four tie vote.[47] It is not clear, however, whether the tie vote refers to the religious discrimination issue in *Dewey* or whether the Justices were contemplating the arbitration aspects of the case. Moreover, *Dewey* also relied upon factors which made it clear that the speculation quoted above was unnecessary to the result. The court emphasized the fact that suit here had been brought in court subsequent to the time at which the grievance had been finally disposed of through arbitration. The court said that the question of whether or not resort to the courts and arbitration could be made simultaneously was not involved. As a practical matter, this qualification is a bit puzzling since it appears to discourage reliance upon administrative agencies, the prompt filing of a court action being a potential escape route from the *Dewey* holding.

Subsequently, the Sixth Circuit has so limited *Dewey* as to place the viability of that holding in great doubt even in that court itself. In *Spann* v. *Joanna Western Mills Co.*,[48] a discharge case where the arbitrator granted reinstatement without back pay, a panel declared its adherence to *Dewey* but emphasized the limited scope of the holding, intimating "no opinion" on those cases beyond its reach.[49] Said the court: "We hold only that where all issues are presented to bona fide arbitration and no

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[44] See *supra* note 3.

[45] 429 F.2d at 332.

[46] *Id.* at 337.

[47] *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689, 3 FEP Cases 508 (1971).

[48] 446 F. 2d 120, 3 FEP Cases 831 (6th Cir. 1971).

[49] *Id.* at 123.

other refuge is sought until that arbitration is totally complete, *Dewey* precludes judicial cognizance of the complaint." [50]

More recently, in *Newman* v. *Avco Corp.*,[51] the same court has explained further the narrow holding that was posited in *Dewey*. In *Newman*, the plaintiff, a black worker, requested a transfer because of injuries sustained in an automobile accident. This request was denied and, shortly after returning to the job from which transfer was sought, plaintiff was discharged on the ground of inefficiency. Previously, plaintiff had been suspended for inefficiency three days after assignment to the job and was not given at this time a training period which he claimed was due him under the collective bargaining agreement.

Plaintiff filed a timely grievance seeking reinstatement and amended it so as to include a charge of racial discrimination. The amendment was made because the union indicated that it would not allege in the arbitration proceeding that there had been racial discrimination in the discharge. Plaintiff personally retained an attorney to argue the points relating to racial discrimination in the arbitiration hearing. A week after the hearing was held, charges were filed with the EEOC against both the company and the union alleging racial discrimination for failing to give blacks adequate training. Meanwhile, the arbitrator, subsequent to the filing of the charge with the EEOC, found against the plaintiff on all grounds and held that the discharge was for failure to perform the job adequately. As the Sixth Circuit's opinion notes, the arbitration opinion ". . . seemed to ignore the plaintiff's underlying position that he could not perform other chores well because due to racial discrimination he had never been so trained. . . . " [52]

The district court granted defendant's motion for summary judgment and dismissed the plaintiff's class action as well because of election of remedies. Preliminarily, the Sixth Circuit distinguished *Dewey* on the ground that because the district court granted the motion for summary judgment, there was no evidentiary record available to the court in *Newman*, unlike the situation in *Dewey*. But what followed was much more surprising.

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[50] *Id.*

[51] 451 F.2d 743, 3 FEP Cases 1137 (6th Cir. 1971).

[52] *Id.* at 745.

The court spoke of the *Dewey* rationale as predicated upon "estoppel." Said Judge Peck, speaking for the court:

> "Congress, intimately familiar with arbitration in labor-management contracts, employed no languge in Title VII which even intimates support for the election of remedy doctrine. And several courts have squarely rejected it [citing *Hutchings* and *Bowe*] . . . we do not read *Dewey* as based upon the doctrine of election of remedies. The majority opinion of this court in *Dewey* did not so characterize this reasoning. On the contrary, as has been indicated, it seems apparent that the second ground relied on for the decision in *Dewey* was the doctrine of estoppel. This equitable doctrine holds that where the parties have agreed to resolve their grievances before 1) a fair and impartial tribunal, 2) which had *power to decide them,* a District Court should defer to the fact-finding thus accomplished." [53]

The court reasoned that neither of these two factors were present in *Newman.* The court said that the employee had no real voluntary choice in filing his grievance since the collective agreement "required" prompt filing. In this connection, the court claimed that the failure to file might have confronted the plaintiff with a motion to dismiss for failure to exhaust contractual remedies.[54] However, it seems highly unlikely that such a motion would be properly granted inasmuch as exhaustion of contractual remedies had not been regarded as a prerequisite to the filing of Title VII actions [55] and, moreover, the same rule seems to govern claims of racial discrimination arising under the National Labor Relations Act [56] as well as the Railway Labor Act.[57]

But the court was on far stronger ground when it distinguished *Dewey* as a case alleging a "long-standing conspiracy to maintain a system of race discrimination participated in by both company and union (the contracting parties which created the arbitration machinery and chose the arbitrator), an element totally lacking in *Dewey.*" [58] While this element is not totally lacking in *Dewey,* the case was essentially concerned with idiosyncratic employee behavior which, unlike racial discrimination claims generally speaking, does not seem as likely to occupy the attention

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[53] *Id.* at 746-747.
[54] *Id.* at 747.
[55] *Supra* note 36.
[56] *NLRB* v. *Union of Marine & Shipbuilding Workers,* 391 U.S. 418, 68 LRRM 2257 (1968).
[57] See *Glover* v. *St. Louis-S.F. Rwy. Co., supra* note 36. *Cf. Norman* v. *Mo. Pac. R.R.,* 414 F.2d 73, 1 FEP Cases 863 (8th Cir. 1969).
[58] 451 F.2d at 747-748 (footnote omitted).

of most unions and employers, and therefore more unlikely to be the object of conspiracy. In our country, racial discrimination by labor and management is more pervasive than the alleged religious discrimination involved in *Dewey*.[59] Moreover, the court in *Newman* noted that the union had declined to support the claim that the discharge was caused by racial discrimination and that this attitude was noted by the arbitrator in deciding that there was no merit to the claim of racial discrimination. In *Dewey*, the arbitrator, an able and respected member of the National Academy, specifically disclaimed consideration of both statutory and constitutional claims. In the *Dewey* arbitration hearing, which was relatively advantageous to the grievant because the union apparently did not disagree with the employee in front of the arbitrator, these issues were not even argued in the arbitration forum.

Finally, the court, in *Newman*, in refusing to dismiss plaintiff's action (and accordingly reversing the district court), noted that the collective agreement did not prohibit race discrimination in connection with hiring, promotion, or discharge. Accordingly, the court stated that substantial portions of the complaint either were not submitted to arbitration or were beyond the arbitrator's power of decision. Having disposed of *Dewey*, the court still had to deal with *Spann*, for in the latter case, the union officials actually brought about the grievant's discharge by bringing alleged misbehavior to the company's attention. Moreover, the employee in *Spann* claimed that the union "failed to vigorously pursue the racial question." [60] And *Spann*, like *Newman*, involved racial discrimination as distinguished from the alleged religious discrimination involved in *Dewey*.

But in *Spann*, the plaintiff had been successful in obtaining reinstatement; it was the back-pay remedy which had been denied by the arbitrator and which the court refused to hear on its merits. Accordingly, *Newman*, while conceding that some of the same factors in that case were "arguably present" in *Spann*, distinguished the case as follows:

> "In that case, not only was there an arbitration award, but the award largely favorable to Spann was accepted by him. Equitable

[59] *Cf. Jones* v. *Mayer*, 392 U.S. 409 (1968). Section 701 (j), a new provision in Title VII added by the 1972 amendments reverses the Sixth Circuit's decision on the religion aspects of *Dewey*.

[60] 446 F.2d at 122.

considerations under the doctrine of estoppel argue strongly against allowing a litigant to make full use of arbitration up to the point of acceptance of the award (reinstatement to his job) and then permitting him to sue in another forum for the back pay which the arbitrator denied. No one should be allowed to accept the fruits of an award and then dispute its validity." [61]

The Sixth Circuit has recently reaffirmed its adherence to *Spann*,[62] thus stressing its belief that the decision can coexist with *Newman*. This is indeed unfortunate. Without consideration of the facts in *Spann*, which cast serious doubt on the quality of union representation received by plaintiff, it is ludicrous to penalize an employee for accepting reinstatement and thus mitigating damages. But, regardless of whatever discrepancies between *Spann* and *Newman* exist or do not exist, the latter decision indicates that the *Dewey* election-of-remedies doctrine is severely undermined. Of course, it may be contended that the Sixth Circuit's retreat is not so significant inasmuch as four Justices of the Supreme Court voted affirmance of the *Dewey* holding. In the first place, however, the tie vote per curiam affirmance by the Court does not constitute a precedent.[63] Perhaps even

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[61] 451 F.2d at 748-749.

[62] *Thomas* v. *Philip Carey Mfg. Co.*, 455 F.2d 911, 4 FEP Cases 468 (6th Cir. 1972). *Cf. Rios* v. *Reynolds Metals Co.*, 332 F.Supp. 1209, 4 FEP Cases 130 (S.D. Tex. 1971); *Corey* v. *Avco Corp.*, 2 FEP Cases 738 (Conn. Sup. Ct. 1970); *Lazard* v. *Boeing Co.*, 3 FEP Cases 643 (E.D. La. 1971); *Jamison* v. *Olga Coal Co.*, 335 F.Supp. 454, 4 FEP Cases 532, 540-1 (S.D. W.Va. 1971); *Page* v. *Curtiss-Wright Corp.*, 332 F.Supp. 1060, 3 FEP Cases 1187 (D.C. N.J. 1971); *Rosenfeld* v. *Southern Pac.*, 293 F.Supp. 1219, 1225, 1 FEP Cases 450 (C.D. Calif. 1968); *Mack* v. *General Electric Co.*, 329 F.Supp. 72, 3 FEP Cases 733 (E.D. Pa. 1971); *U.S.* v. *H. K. Porter Co.*, 296 F.Supp. 40, 1 FEP Cases 515 (N.D. Ala. 1968); *Younger* v. *Glamorgan Pipe & Foundry Co.*, 310 F.Supp. 195, 2 FEP Cases 37 (W.D. Va. 1969). For an extraordinary extension of the *Dewey* rationale to joint union-employer committees, see *Taylor* v. *Springmeier Shipping Co.*, 4 FEP Cases 322 (W.D. Tenn. 1971). *Cf.* Atleson, "Disciplinary Discharge, Arbitration and NLRB Deference," 20 *Buffalo L. Rev.* 355 (1971). For cases supporting the superior authority of public agencies and courts, see *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268, 55 LRRM 2042 (1964); *Smith* v. *The Evening News Assn.*, 371 U.S. 195, 197-198, 51 LRRM 2646 (1962); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 1 FEP Cases 364 (5th Cir. 1968); *United Steelworkers* v. *American International Aluminum Corp.*, 334 F.2d 147, 56 LRRM 2682 (5th Cir. 1964), *cert. denied* 379 U.S. 991, 58 LRRM 2256 (1965); *Amalgamated Assn. of Street Employees* v. *Trailways of New England, Inc.*, 232 F.Supp. 608, 56 LRRM 2186 (D. Mass. 1964), *aff'd* 343 F.2d 815, 58 LRRM 2848 (1st Cir. 1965), *cert. denied* 382 U.S. 879, 60 LRRM 2255 (1965). One of the best discussions on the relationship between arbitration and the law—and one which contends that the search for reform engaged in in this paper is not a futile one—is Summers, "Labor Arbitration: A Private Process With a Public Function," 34 *Revista Juridica de la Universidad de Puerto Rico* 477 (1965).

[63] The Sixth Circuit has explicitly adopted this view in *Biggers* v. *Neil*, 448 F.2d 91 (6th Cir. 1971). It there was decided that where the question upon which the U.S. Supreme Court granted certiorari was stated in the application to be whether petitioner was deprived of his rights by being compelled by police to speak words

more important, however, is the fact that it is unclear what each Justice was affirming, for, as I have already noted, the Court's opinion in *Dewey* dealt with both an allegation of religious discrimination as well as the impact of an arbitration award upon a Title VII action. One cannot say with certainty whether any or all of the votes cast related to both of the issues involved. Accordingly, the weight to authority is very much against the *Dewey* opinion insofar as it relates to arbitration.

This is as it should be, for putting aside the relatively unimportant defendant arguments relating to multiplicity of litigation and fora, one of the major premises underlining the *Dewey* opinion, *i.e.*, that the *Steelworkers* trilogy-*Boys Markets* [64] policy encouraging voluntarily negotiated arbitration machinery would receive its "death knell," is a false one. It is to be recalled that a similar kind of reasoning was employed in a far more plausible context by Mr. Justice Brennan in *Boys Markets* when, in order to justify the Court's reversal of a previous holding which viewed the Norris-LaGuardia Act as a bar to the issuance of injunctions in breach of no-strike clause cases,[65] the Court stated that employers would have little incentive to enter into grievance-arbitration agreements if they were deprived of their most effective remedy, *i.e.*, an injunction. But the fact of the matter is that employers continued to enter into such agreements in more than 90 percent of the collective bargaining agreements signed subsequent to the Court's 1962 decision which had deprived employers of the injunction remedy.[66] The no-strike provision is one of the most important aspects of the labor contract from the employ-

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which had been spoken by a rapist, an equally divided affirmance of the Tennessee Supreme Court's decision did not constitute a final adjudication of all due process issues arising out of the pretrial identification measures employed and did not preclude a federal district judge from entertaining a habeas corpus petition and from taking testimony upon the pretrial identification process. "An equal division of an appellate court does not settle any principle of law or issue of fact for that court. It represents affirmance of the judgment appealed from because there were insufficient votes for reversal." *Id.* at 97-98. *Cf. United States* v. *Pink*, 315 U.S. 203 (1941); *Hertz* v. *Woodman*, 218 U.S. 205 (1910); *Hartman* v. *Greenhour*, 102 U.S. 672 (1880); *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107 (1868); *Etting* v. *Bank of the United States*, 24 U.S. (11 Wheat) 59 (1826).

[64] *Boys Markets, Inc.* v. *Retail Clerks, Local 770*, 398 U.S. 235, 74 LRRM 2257 (1970). For a discussion of the impact of the *Boys Markets* discussion, see Gould, "On Labor Injunctions, Unions, and the Judges: The Boys Markets Case," 1970 *Sup. Ct. Rev.* 215 (1970).

[65] *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 50 LRRM 2420 (1962), interpreting § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1964).

[66] Bureau of Labor Statistics, U.S. Dept. of Labor, *Major Collective Bargaining Agreements—Arbitration Procedures*, Bull. No. 1425-6 (1966).

er's point of view. But even here, the attractions of arbitration were such that an inability (though not a complete inability [67]) to secure effective relief in connection with violations of this clause did not dissuade employers from continuing to agree to arbitration.

If employers are not dissuaded from accepting arbitration procedures when deprived of the most effective remedy for enforcement of the *quid pro quo* for that machinery,[68] it is not likely that arbitration will be abandoned by management simply because Title VII charges may be heard in federal district court subsequent to an unfavorable arbitration award. But might not the parties exclude discrimination cases from the grievance-arbitration machinery if such cases, unlike others, are to be reviewed on their merits in court? In the first place, the most important benefit which the employer derives from the collective agreement is uninterrupted production and not the finality of negotiated procedures. *Enterprise Wheel,* which establishes the legal framework for finality, is not an ingredient, which, in my judgment, is inextricably bound up with the *Steelworkers* trilogy doctrine. Indeed, it would seem that the liberal rule for ordering the parties to arbitrate, adumbrated in *Warrior & Gulf* and *American Manufacturing,* which is logically consistent with a policy favoring finality in arbitration proceedings, argues, if anything, for a more careful standard of judicial review if any kind of meaningful limitation upon arbitral authority is to exist.

But, second, this exclusion of such complaints in the machinery would be extremely undesirable for minority-group and women employees since arbitration still presents a more expeditious

[67] Since *Atkinson* applied only to federal courts in some states, it was possible to obtain injunctions. But see *Avco Corp.* v. *Aero Lodge, No. 735,* 390 U.S. 557, 67 LRRM 2881 (1968).

[68] Mr. Justice Brennan reasoned thus in *Boys Markets:* ". . . [A] no-strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration. [Citation omitted here.] Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." 398 U.S. at 248. It is interesting that no reference is made to discharge and discipline remedies which could be provided for by agreement between the employer and the union.

route than heavily clogged administrative and judicial procedures, and there is always the possibility that the matter will be settled to the satisfaction of all involved. As I have previously said, the Civil Rights Act encourages voluntary compliance. The result, where there are a substantial number of workers, would be divisiveness, surely a result unanticipated by either Title VII or the *Steelworkers* trilogy.

Moreover, the exclusion of no-discrimination claims, which, after all, involve a basic element of employment conditions, from arbitration would separate minorities and women from the mainstream of complaint resolution. It would encourage the all-too-prevalent belief or attitude among trade union officials that discrimination matters are to be heard *exclusively* by fair employment agencies and that, accordingly, the union has no responsibility for the processing of such claims. And, finally, it is quite possible that exclusion of discrimination grievances from arbitration constitutes a violation of both the duty of fair representation [69] and Title VII itself.[70]

Query, however—could an employer refuse to arbitrate in a motion to compel arbitration under Section 301 of the NLRA where the contract provides for finality and where the union and workers involved refuse to specifically waive their right to maintain a Title VII action? The union might contend that such a waiver would not be recognized by the courts. It is, however, perhaps more than arguable that the union might waive its right to sue on behalf of the workers where it is seeking arbitration.[71] But what of the employees themselves? May the union effectively waive anything for them? May they ever waive such rights for themselves? Just as courts ought to read a conciliation agreement waiver as ineffective in the case of a "soft settlement"

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[69] A company's refusal to bargain about eliminating discrimination constitutes an unfair labor practice. *United Packinghouse Workers* v. *NLRB,* 416 F.2d 1126, 70 LRRM 2489 (D.C. Cir. 1969), *cert. denied sub nom., Farmers' Cooperative Compress* v. *United Packinghouse Workers,* 396 U.S. 903, 72 LRRM 2658 (1969). Arbitration is "part and parcel of the collective bargaining process itself." *United Steelworkers* v. *Warrior & Gulf Navigation Co., supra* note 10 at 578.

[70] *Sciaraffa* v. *Oxford Paper Co.,* 310 F.Supp. 891, 2 FEP Cases 398 (D. Maine 1970); *Austin* v. *Reynolds Metals Co.,* 327 F.Supp. 1145, 2 FEP Cases 451 (W.D. Va. 1970); *Moreman* v. *Georgia Power Co.,* 310 F.Supp. 327, 1 FEP Cases 702 (N.D. Ga. 1969).

[71] But see, generally, *Lodge 743, Machinists* v. *United Aircraft Corp.,* 337 F.2d 5, 57 LRRM 2245 (2nd Cir. 1964), *cert. denied,* 380 U.S. 908, 58 LRRM 2496 (1965); *United Aircraft Corp.* v. *Lodge 700, Machinists,* 314 F. Supp. 371, 74 LRRM 2518 (D. Conn. 1970).

(at least in the absence of competent counsel),[72] so also, it seems to me, union waivers cannot bar an attempt by employees to sue under Title VII.[73] Even where an employee is involved individually, the minimum prerequisite to waiver would seem to me to be worker representation by his own counsel when the settlement is made. But in light of *Voutsis,* even this judgment may be too preclusive.

Can the employer resist an arbitration under such circumstances? Unless the parties have negotiated a contract specifically providing that arbitration cannot be initiated where one side refused to commit itself not to sue, it would seem improper as a matter of federal labor policy to devise an implied obligation permitting the employer to escape its contractual obligation to arbitrate under such circumstances. Where the parties have addressed themselves to the issue, the employer should be permitted not to arbitrate, since the process is too consensual to permit another result.[74] The absence of effective finality may tempt the parties to use self-help as well as litigation as an alternative to arbitration. But, as I said, I am of the view that the courts can provide support for arbitration without the *Enterprise Wheel* half of the *Steelworkers* trilogy equation, *i.e.,* provision for finality through judicial enforcement. Dean Shulman argued persuasively for an arbitral system in which the law, although not the lawyers, would stay out.[75] Surely, this system, which, after all, put on its essential trappings prior to extensive legal involvement with private machinery, need not be so rigid in order to thrive. It is sometimes forgotten that, although the *Steelworkers* trilogy has probably had a substantial impact upon the behavior of unions

[72] See *Manning* v. *General Motors Corp.,* ..... F.Supp. ....., 3 FEP Cases 968 (D.C. Ohio 1971); *McGrif* v. *A. O. Smith Corp.,* 51 F.R.D. 479, 3 FEP Cases 131 (D.C. S.C. 1971).

[73] "Article VII, § 1 of the 1967 Ford-UAW agreement reads in part as follows: 'No employee or former employee shall have any right under this Agreement in any claim, proceeding, action or otherwise on the basis, or by reason, of any claim that the Union or any Union officer or representative has acted or failed to act relative to presentation, prosecution or settlement of any grievance or other matter as to which the Union or any Union officer or representative has authority or discretion to act or not to act under the terms of this agreement.'" R. Smith, L. Merrifield, & T. St. Antoine, *Labor Relations Law: Cases and Materials* (New York: Bobbs-Merrill Co., 1968), 987. Compare *Haynes* v. *U.S. Pipe & Foundry Co.,* 362 F.2d 414, 62 LRRM 2389 (5th Cir. 1966), with *Telephone Workers* v. *New England Tel. & Tel. Co.,* 240 F.Supp. 426 (D. Mass. 1965). *Cf. Elgin, Joliet & Eastern Ry.* v. *Burley,* 325 U.S. 711, 16 LRRM 749 (1945).

[74] Shulman, "Reason, Contract, and the Law in Labor Relations," 68 *Harv. L. Rev.* 999 (1955).

[75] *Id.*

and employers during the term of collective agreements,[76] the institutions were shaped prior to the legal doctrine which rationalized them. Accordingly, finality and, more important, its legal props may not be quite so important as they are made out to be.

But suppose that the parties make finality the price of arbitration? It would then seem that the employer must prevail in refusing to accede to arbitration at the union's request, unless the parties have made such a rule solely applicable to employment discrimination complaints. However, even under these circumstances, while arbitration cannot be compelled, the union's duty is not at an end. I would suggest that here, and perhaps in other situations as well, the union fulfills its duty of fair representation by representing the employees as a charging party in administrative proceedings before fair employment practice commissions as well as in a suit in court. A demonstrated unwillingness to perform this role, it seems to me, argues persuasively for a failure to meet the union's duty of fair representation obligation.

How will the arbitrators themselves respond if Title VII actions will be heard subsequent to the issuance of an arbitration award in court de novo? On the one hand, it might be said that arbitrators would be more careful about examining no-discrimination clauses and the claims arising under them in detail and the Title VII implications of such charges.[77] But arbitrators, because they perceive their role as circumscribed by the narrow grant of authority given them by private parties and thus are unable to chart the course of reform in industrial relations and, perhaps more nearly correct, do not regard themselves as competent to resolve issues of public law, generally attempt to

[76] Gould, "Book Review," 16 *Wayne L. Rev.* 384 (1969). *Cf.* H. Wellington, *Labor and the Legal Process* (New Haven: Yale University Press, 1968).

[77] However, most arbitrators claim to be uneasy about utilizing any public law. The prevailing view among arbitrators seems to be reflected in Meltzer, "Ruminations About Ideology, Law and Arbitration," 34 *U. Chi. L. Rev.* 545 (1967) and in *The Arbitrator, the NLRB, and the Courts,* Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 1. See also Mittenthal, "The Role of Law in Arbitration," in *Developments in American and Foreign Arbitration,* Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 42; Howlett, "The Arbitrator, the NLRB, and the Courts," in *The Arbitrator, the NLRB, and the Courts,* Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 67; and Sovern, "When Should Arbitrators Follow the Federal Law?" in *Arbitration and the Expanding Role of Neutrals,* Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, Gerald G. Somers and Barbara D. Dennis, eds. (Washington: BNA Books, 1970) 29.

avoid civil rights law matters.[78] It is equally possible that, rather than taking more care in dealing with no-discrimination allegations, arbitrators may opt for playing it safe and avoiding discussing or deciding such issues. This is likely to be especially true where the parties, as is so often the case, do not raise the discrimination and Title VII issues themselves. Rather than risk scrutiny and criticism, arbitrators may defer to administrative and judicial fora established to hear these cases.

The Patching-Up Process Revisited [79]

This prospect of neglect is a disturbing one and makes relevant the prospects for adapting the arbitration process to the effective handling of discrimination cases. This is not to say that the critique of *Dewey* is to be qualified or modified. Although, as I have indicated below, a patched-up process will warrant varying degrees of judicial deference, under no circumstances can plaintiffs be deemed to have waived their rights to raise statutory and constitutional issues in federal district courts. Insofar as *Dewey* is consistent with a contrary view, it must be disregarded.

But if the arbitration process can be geared to handling cases raising issues of employment discrimination, there may be circumstances under which the courts, while not *precluding* themselves from entertaining the suits through an election-of-remedies doctrine, may defer to arbitration in a manner similar to that employed by the National Labor Relations Board.[80] *Hutchings* specifically left this question open. This is not intended as support for the *Spielberg* rule itself or its application by the Board. Its deficiencies have been made clear previously.[81] What I am

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[78] See McKelvey, *supra* note 20.

[79] See Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," *supra* note 20.

[80] § 10 (a) of the NLRA provides that the power of the Board to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement law or otherwise." 29 U.S.C. § 160 (a) (1964). This means that the Board has power to make its own determination without regard to arbitration agreed to by the parties. Despite the federal policy favoring use of the grievance-arbitration machinery in labor disputes, the Supreme Court has indicated that the NLRB need not be deterred from taking cases where issues of contract interpretation are intertwined with charges of Taft-Hartley violations. See generally, *Acme Industrial Co.* v. *NLRB*, 385 U.S. 432, 64 LRRM 2069 (1967); *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 64 LRRM 2065 (1967). See generally, Schatzki, "NLRB Resolution of Contract Disputes Under Section 8 (a) (5)," 50 *Texas L. Rev.* 225 (1972).

[81] The best work done on the relationship between the Board and arbitration in the discharge-discipline area is Atleson, "Disciplinary Discharges, Arbitration and NLRB Deference," *supra* note 62. The principal cases are *Spielberg Mfg. Co.*, 112

proposing are special and, it must be admitted, rather rigid rules for deference to arbitration awards by the federal district courts. Adoption of such rules ought to be the minimum requirement for deference.

It makes good sense to keep the rules for deference tight, for, in the first place, as I have indicated, the arbitrator generally views his grant of authority narrowly. This may account for the references that courts have made to differences in the remedy that can be forthcoming from a court as distinguished from the arbitration forum.[82] The example often given is back pay. The implication is that courts can provide this remedy and that arbitrators cannot or are less likely to do so. Of course, back pay has been an implied remedy in arbitration proceedings even where the contract does not specifically provide for it.[83] However, even though arbitrators generally have the implied or explicit authority to grant back pay, it is quite often not the part of the arbitral remedy in discharge cases. Where arbitrators view the discharge as improper and yet perceive some employee impropriety, they are prone to grant reinstatement without back pay. In part, the reasoning behind this kind of approach is best explained by the Supreme Court's comment to the effect that arbitration is part and parcel of the collective bargaining process.[84] That process is give and take and compromise.[85] It is more than questionable to assert that racial discrimination grievances which present issues of statutory and sometimes constitutional significance can be placed in this mould.

This is especially true in cases like *Spann*, where the arbitrator, albeit in accord with Supreme Court doctrine at least in a nonracial context,[86] relied upon factors such as employee discontent

NLRB 1080, 36 LRRM 1152 (1955); *International Harvester Co.*, 138 NLRB 923, 51 LRRM 1155 (1962). See most recently, *Collyer Insulated Wire*, 192 NLRB No. 150, 77 LRRM 1931 (1971).

[82] See *e.g.*, *Hutchings* v. *U.S. Industries, Inc.*, 428 F.2d at 311-313; 2 FEP Cases 725 (5th Cir. 1970); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d at 714-715, 2 FEP Cases 121 (7th Cir. 1969).

[83] *International Harvester Co.* and *United Farm Equip. & Metal Workers*, 9 LA 894 (1947), W. Willard Wirtz.

[84] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* note 10.

[85] Mr. Justice Brennan's statement in *NLRB* v. *Insurance Agents' Intl. Union*, 361 U.S. 477 at 488, 45 LRRM 2705 (1960): "Discussion conducted under that standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take."

[86] See *e.g.*, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, *United Steelworkers* v. *American Mfg. Co.*, all *supra* note 10. Mr. Justice Douglas noted in his

with the fact that a black worker attempted to date a white co-worker, to justify a remedy which would not make the grievant whole for a discharge resulting from that incident. Quite obviously, plant morale and productivity are considerations, as the Supreme Court has told us in *Steelworkers* trilogy, which the arbitrator must take into account. But I would doubt that the Sixth Circuit is on sound ground in *Spann* by refusing to entertain an employee's suit for back pay because, in essence, the biases of the white worker community were offended. It is rather difficult to believe that such intent can be ascribed to the Court in the name of the *Steelworkers* trilogy which, ever since *Brown* v. *Board of Education*[87] has taken the lead in unremitting attack upon racism in our society. The bruised feelings of white workers, even when they trigger morale and productivity problems, are not so overriding as to justify any limitations placed upon Title VII rights.[88]

What I have called the institutional deficiencies of arbitration, insofar as discrimination cases are concerned, are highlighted by the facts of *Newman* where both union and employer, who themselves appointed the arbitrator, were accused by the grievant as co-conspirators in racial discrimination. Even where only the employer is formally charged with discrimination, the union can be implicated—a factor the Sixth Circuit conveniently overlooked in *Spann*, where union officials reached into a wastepaper basket to piece together notes sent by a black employee to a white co-worker, brought the notes to the attention of management, and then purported to defend the employee in arbitration. As Professor Atleson has noted, the interests of union and employers in arbitration are quite often the same.[89] One cannot say with

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Warrior & Gulf opinion: "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished." At 582.

[87] 347 U.S. 483 (1954). See *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Green* v. *County School Board,* 377 U.S. 218 (1964); *Cooper* v. *Aaron,* 358 U.S. 1 (1958).

[88] *Cf. Brown* v. *Board of Education,* 349 U.S. 294 (1955), wherein Chief Justice Warren, speaking for a unanimous Court, said: "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Id.* at 300.

[89] See Atleson, *supra* note 62, at 364 and 377.

certainty that there is an actual union-employer controversy under the reported facts of either *Spann* or *Newman*. Moreover, a difficulty here is that transcripts (where they are used in arbitration proceedings) do not always reveal this sort of thing and, as *Spann* itself indicates, the courts can easily ignore more than subtle hostility against minority-group employees. Ordinarily, the union will not demonstrate its racial animosity so openly, and even in *Spann* the court heeded form rather than substance in citing the fact that the union had taken the case to arbitration as a test of its good faith. Yet, but for the very same union officials in *Spann*, no discharge would have been instituted at all.

No-discrimination claims involving the same subject matter which is at the heart of the subsequent Title VII action may not be raised in arbitration because grievants lack faith in the arbitral process or, as in *Newman*, the union does not wish to press it. Perhaps the union officials lack the skill and expertise to present such issues.

Racial and sexual discrimination are very serious charges in our society. Arbitrators are most often reluctant to find their existence where blame would be heaped upon the parties appointing them, and may, as in *Newman*, refer to the union's refusal to agree with the grievant. Also, arbitrators may not consider the discrimination charge where raised. This appears to be the case in *Spann* where the court cited an "equal pay for equal work" clause as permitting the arbitrator to remedy discrimination and where, apparently in the absence of testimony that white workers had been disciplined for the same kind of offense engaged in by the black grievant, it stated that it was pure speculation to assume that the same penalty would not be imposed upon workers of both races. And, of course, most arbitrators are reluctant to consider and interpret Title VII requirements, a law containing obligations which appear to have been violated in *Spann*.

Accordingly, there are problems enough with the arbitration process to justify a swift burial of *Dewey*. In addition to all of this, the election-of-remedies doctrine, which appears to be somewhat outmoded,[90] does not seem to fit the arbitration-Title VII

[90] The traditional election-of-remedies doctrine was fashioned as a device to protect parties from being compelled to undergo repetitive and vexatious litigation. Simply stated, a party who has two alternative remedies and proceeds to pursue one of them will be precluded from seeking the other in certain circumstances. Those circumstances usually involve a material change of position on the part of the other

context at all. It seems to involve the use of mutually inconsistent theories before a forum which has the authority to grant remedies under each. This is hardly the kind of problem that is involved here and, thus, the court in *Newman* seems to have properly sounded the retreat from *Dewey*.

But rejection of *Dewey* hardly settles the question specifically left open by the Fifth Circuit in *Hutchings, i.e.*, whether the courts ought to defer to arbitration awards under certain circumstances, just as the National Labor Relations Board does under its so-called *Spielberg* doctrine.[91] It seems to me that, under certain conditions, a *Spielberg*-type rule is appropriate. I believe that the following factors should be examined by the courts when determining what weight, if any, should be given to the arbitration award.

1. *Selection of Arbitrator.* The arbitrator should be selected from a source that specifically promotes the use of arbitration for problems involving minority-group and women employees. For instance, the Center for Disputes Settlement of the American Arbitration Association has played a leading role in this respect, and parties that wish to have their awards deferred to should be required to seek out such an organization for a roster of arbitrators (although it would seem to be a good idea for the EEOC and state agencies to maintain such lists themselves). While the arbi-

party in reliance on the election. The doctrine applies usually where conflicting and inconsistent remedies are sought on the basis of conflicting and inconsistent rights. Thus, a party is protected from having to face in the future a different theoretical approach to the same set of facts (or an alternative set of facts supporting an identical claim) with which he is confronted in a given law suit. For example, where a suit is brought on a contract as written, a later suit cannot be brought to reform the same contract. *Hennepin Paper Co.* v. *Fort Wayne Corrugated Paper Co.*, 153 F.2d 822 (7th Cir. 1946). See Restatement of Contracts, Election of Remedies §§ 381-84 (1932); Restatement of Judgments § 65, comment *f* at 275-276 (1942); 25 Am. Jur. 2d Election of Remedies §§ 1-35 (1966). Although the doctrine of election and that of res judicata appear grounded in the same soil of equity, they are decidedly different. The election doctrine does not necessarily depend upon the rendition of a judgment in the original action, while the existence of a prior final judgment is universally an element of the doctrine of res judicata. Because the doctrine is a technical rule of procedure or judicial administration, grounded in considerations of equity, it is now considered largely obsolete, especially since the advent of the Federal Rules of Civil Procedure and their adoption by most states. It is now possible to plead totally irreconcilable fact patterns and seek irreconcilable remedies with the same action. Rule 8, Fed. R. Civ. P. The doctrine has long been in disrepute, especially where it has appeared as an instrument of injustice or oppression. *Friedericksen* v. *Renard*, 247 U.S. 207 (1918); *Great American Ins. Co.* v. *Merchants & Mfr. Mut. Ins. Co.*, 423 F.2d 1143 (6th Cir. 1970); *Newman* v. *Avco Corp.*, 451 F.2d at 746-47, 3 FEP Cases 1137.

[91] See note 80, *supra*.

trator need not necessarily have the EEOC stamp of approval, it would seem as though the parties should select their third-party impartial from such a source or its equivalent.

2. *Arbitration Procedures.* If the claim of discrimination relates to a class of employees, the hearing should, where a no-discrimination clause is in the contract, delve into all of the relevant information as it relates to the class.[92] Where the union cannot obtain such information from the employer, it should file refusal-to-bargain charges requiring disclosure of that information with the NLRB.[93]

Once arbitration is commenced, the employees, if they distrust union representation, should be permitted to have their own counsel and representation. To date, the weight of authority seems to be that since arbitration cannot be initiated without the union's consent, the union can control the way in which arbitration proceeds and not even permit individual grievants to attend the arbitration hearing.[94] This, as both Professor Shapiro and I have pointed out,[95] is a complete *non sequitur.* The right to intervene is completely independent of the right to initiate. This

[92] For a good discussion of some of the discovery approaches in arbitration proceedings, see Jones, "Blind Man's Buff and the Now-Problems of Apocrypha, Inc. and Local 711—Discovery Procedures in Collective Bargaining Disputes," 116 *U. Pa. L. Rev.* 571 (1968); Jones, "The Accretion of Federal Power in Labor Arbitration —An Example of Arbitral Discovery," 116 *U. Pa. L. Rev.* 830 (1968); Jones, "The Labor Board, the Courts, and Arbitration—A Feasibility Study of Tribunal Interaction in Grievable Refusals to Disclose," 116 *U. Pa. L. Rev.* 1185 (1968). Discovery under the Federal Rules of Procedure affords plaintiffs more protection than grievants receive in arbitration.

[93] *Cf. NLRB* v. *Acme Industrial Co.,* 385 U.S. 432, 64 LRRM 2069 (1967).

[94] See *Acuff* v. *Papermakers & Paperworkers,* 404 F.2d 169, 69 LRRM 2828 (5th Cir. 1968), *cert. denied,* 394 U.S. 987, 70 LRRM 3378 (1969). *Cf. Humphrey* v. *Moore,* 375 U.S. 335, 349-351, 55 LRRM 2031 (1964).

[95] Shapiro, "Some Thoughts on Intervention before Courts, Agencies, and Arbitrators," 81 *Harv. L. Rev.* 721 (1968). My views are set forth in Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," *supra* note 20 at 58-64. For discussion of the third-party problem in a different context, see Bernstein, "Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel," 78 *Harv. L. Rev.* 784 (1965); "Jurisdictional Dispute Arbitration: The Jostling Professors," 14 *U.C.L.A. L. Rev.* 347, 351 (1965) (debate with Jones); Jones, "Autobiography of a Decision: The Function of Innovation in Labor Arbitration, and the National Steel Orders of Joinder and Interpleader," 10 *U.C.L.A. L. Rev.* 987 (1963); Jones, "An Arbitral Answer to a Judicial Dilemma: The Carey Decision and Trilateral Arbitration of Jurisdictional Disputes," 11 *U.C.L.A. L. Rev.* 327 (1964); Jones, "Power and Prudence in Arbitration of Labor Disputes: A Venture in Some Hypotheses," 11 *U.C.L.A. L. Rev.* 675 (1964); Jones, "Compulsion and the Consensual in Labor Arbitration," 51 *Va. L. Rev.* 369 (1965); Jones, "On Nudging and Shoving the National Steel Arbitration into a Dubious Procedure," 79 *Harv. L. Rev.* 327 (1965); "Jurisdictional Dispute Arbitration: The Jostling Professors," 14 *U.C.L.A. L. Rev.* 347, 351 (1966) (debate with Bernstein).

has been made clear most recently by the Supreme Court in *Trbovich* v. *United Mine Workers,*[96] where the Court held that union members could not be barred from intervention in a suit arising under the Labor-Management Reporting and Disclosure Act [97] simply because the complaint could be initiated only by the Secretary of Labor.

Both Professor Atleson and Professor Meltzer, however, have pointed out [98] that with one's own counsel, third-party intervention can work against the grievant's own interests since the union may not be interested in assembling witnesses and information under such circumstances, and since the arbitrator may resolve doubts against the employee when it becomes clear that there are tensions between union and worker, possibly attributed to the union's lack of enthusiasm for the case. This difficulty is countered by choosing arbitrators from the source referred to above or involving the employee, along with union and employer, in the selection of the arbitrator. Moreover, it cannot be gainsaid that the worker third-party only invokes representation at his own initiative. There are many local unions that will do perfectly adequate work in protesting management discrimination on the basis of race or sex.[99]

3. *Arbitral Reliance Upon Public Law.* Arbitrators are not considering the same complaint which can come before federal district court unless they are reviewing the complaint in light of the requirements of Title VII. Although an arbitrator cannot exceed the contractual grant of authority provided him, there is no bar, particularly in discharge cases,[100] to relying upon statutes such as Title VII in making arbitral determinations. As a matter of fact, the parties when they negotiate no-discrimination clauses (which sometimes speak specifically of the law) and separability clauses, specifically purport to being in compliance with the law through the negotiation of the contract. Indeed, the Court, in *Enterprise Wheel & Car,* specifically noted that the arbitrator may look to many sources even though his award must manifest fidelity to the contract. But without considering the

[96] 404 U.S. 528, 79 LRRM 2193 (1972).
[97] 29 U.S.C. §§ 401-531 (1964).
[98] Atleson, *supra* note 62; Meltzer, *supra* note 77.
[99] *Cf.* Dietsch, "Civil Rights and Loyalty," *Boston Globe,* Apr. 11, 1972, p. 32.
[100] Here the "just cause" criterion provides the arbitrator with ample room to look to other sources; *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra* note 10 at 597.

inability of the parties to cope with legal complexities, arbitrators are not often competent to utilize the law. I would therefore subscribe to Professor Mark Kahn's proposal that Title VII should be amended so as to require the EEOC to issue an advisory opinion.[101] I would propose that such an opinion be made available by the EEOC when it is requested by union, employee, employer, or arbitrator as a basis for the legal interpretation necessary to the award. It would have the sensible by-product of making the arbitrator less unpopular with those upon whom he is dependent for his daily bread.

Another way to effectuate the same goal without statutory amendment might be through the EEOC or state fair employment practice commission agreements or working arrangements which might involve organizations like the Center for Disputes Settlement—the latter providing arbitrators who could be instructed in both procedural and substantive law by the EEOC. Quite obviously, this may be an unattractive procedure for many parties, and yet if they avail themselves of it, they are more likely to obtain some degree of deference for the award than results from an arbitration hearing under other circumstances. For most members of the National Academy of Arbitrators, involvement in such a procedure will be equally unattractive because of the tendency to transform the process into something which is quasi-public rather than predominantly private. By itself, however, this lack of enthusiasm, to characterize the reaction euphemistically, presents no formidable obstacle, for the by-product of such an arrangement between public and private agencies can be a decline in the shortage of arbitrators through an influx of new entrants who are more dedicated to law than their predecessors. One would hope and assume that a substantial portion of such arbitrators would be both young and female or minority-group members.

The most critical problem in all of this is whether the patching-up process is worth the candle. If arbitration is to play a meaningful role in coping with employment discrimination problems, then reform is necessary. But whether such reform can be undertaken, especially along the lines prescribed above, is questionable in light of the obstinate resistance of unions, employers,

[101] Professor Kahn provided me with this proposal during a telephone conversation in 1969.

and arbitrators to any shift from the same old "business as usual" which has prevailed since World War II. It may be that what has evolved initially as essentially both a voluntary and private forum cannot be altered to reflect the public policy considerations that are necessary. After all, there are many aspects of the arbitration process which would be necessarily affected by these proposals. Can arbitrators refuse to entertain class action or group discrimination claims filed by one worker whose own grievance may be without merit? [102] What about the conventional arbitral wisdom concerning the propriety of an arbitrator's asking questions of the parties? Certainly traditional notions about leaving the parties to their own devices so as not to embarrass or disturb will need some reevaluating.

If these proposals cannot be implemented as a practical matter, it makes absolutely no sense to accord any weight or significance whatsoever to arbitration awards in subsequent Title VII proceedings. Even their use as evidence would then seem to be a gesture at best.[103] Under such circumstances, acceptance of the implied invitation in *Hutchings* to formulate *Spielberg* criteria would be a disaster.

But I believe there are very good reasons for proceeding along the lines of reform. In the first place, there is a tremendous backlog of EEOC cases which may grow once the 1972 amendments expanding coverage of Title VII become operative.[104] This, coupled with what will be the more crowded state of most federal district dockets, makes the search for an informal and expeditious procedure all the more imperative. Moreover, while there are instances where the conflict between law and contract makes it impossible to follow the former because of *Enterprise*, if arbitrators were to require unlawful employment practices because of contractual obligations contained in collective agreements or, where such conflict cannot be found they were to ignore

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[102] Compare the approach taken by the federal courts under Title VII in permitting class actions in *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 1 FEP Cases 364 (5th Cir. 1968); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 2 FEP Cases 231 (5th Cir. 1969); *Oatis* v. *Crown Zellerbach Corp.* 398 F.2d 496, 1 FEP Cases 328 (5th Cir. 1968) with the arbitration process impliedly approved by the NLRB in *The Emporium*, 192 NLRB No. 19, 77 LRRM 1669 (1971).

[103] *Cf. U. S.* v. *H. K. Porter Co., supra* note 62 at 109-10.

[104] The amendments extended coverage of Title VII to state and local government and, in a year's time, to employers and unions with 15 or more employees or members. For the first time, the EEOC has the authority to sue against discrimination in federal district court.

public law considerations in formulating their awards, the effect upon minority-group and women workers would be undoubtedly a deleterious one. In my judgment, it is both against national labor policy and antithetical to the goal of diminishing, rather than exacerbating, racial tensions and divisions to place the discriminatee at the mercy of time-consuming reviews of arbitration awards which assist those who discriminate. This will increase discouragement already present in the minority community and, ironically enough, undermine the principle that is valued in *Dewey, i.e.,* finality. To avoid such consequences, arbitrators in discrimination cases must be cognizant of and adhere to public law in discrimination cases and strain to avoid conflict between law and the contract under the guidance of the EEOC.

Finally, if the arbitrator and the courts are reaching different conclusions under the same circumstances, there will be confusion and disharmony between the fora. Since national labor law provides some of the props for the private process, it is appropriate that this law which is to be fashioned by the federal courts in both the labor contract [105] and employment discrimination contexts have some bearing upon the behavior of the arbitrators. The major deficiency of the arbitrators—lack of expertise in labor and civil rights law—is overcome by EEOC involvement along the lines proposed above. Although most members of the National Academy of Arbitrators and their constituents will not like it, we must make some effort at patching up this very leaky ship.

Another Incentive to Negotiate Grievance-Arbitration Machinery for Employment Discrimination Cases

It is quite possible and indeed probable that both the parties and the arbitrators will opt for preserving the status quo in their relationship and taking chances in court, even if the judiciary goes beyond *Newman* in precluding arbitration awards and even if it fills in the gaps left open by *Hutchings* along the lines that I have advocated. After all, the burden of litigation is on the grievant or (as a result of the 1972 amendments to Title VII)

[105] See, *e.g., Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 40 LRRM 2113 (1957): "We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate the policy. The range of judicial inventiveness will be determined by the nature of the problem." *Id.* at 456-457.

the Equal Employment Opportunity Commission which will be more than ever besieged with cases. Moreover, it has never been an easy matter for a worker to allege discrimination for a sustained period of time while in the employ of a party which is the defendant. This becomes even more of a problem when the union is unsympathetic. Many workers will give up after an adverse arbitration award. That unions and employers understand this fact of life makes the patching-up process all the more likely to be consigned to the dreams of academics who are distant from everyday occurrences in the industrial world.

There is, however, one factor which could alter all of this in certain circumstances. The *Steelworkers* trilogy has enunciated the doctrine that grievance-arbitration machinery and the obligation to refrain from striking during the term of a contract contained in the no-strike clause are the *quid pro quo* for one another.[106] This has assisted the Court mightily in devising rules which order the parties to arbitration and provide for injunctions against strikes over arbitrable grievances.[107] But if the grievance-arbitration machinery is inadequate in its handling of grievances alleging employment discrimination, can it serve as a *quid pro quo* for relinquishment of the right to industrial action by workers? If the no-strike clause is ineffective as a matter of federal labor law in prohibiting strikes, walkouts, and picketing, the result does not make the use of such weaponry unlimited since the NLRB may enjoin strikes which have as their object the modification or termination of existing contracts.[108] But the result undermines the goal of preserving industrial peace. However, as I have already indicated, our national labor policy has been preoccupied with this aspect of federal law to the detriment of other portions protecting employees against discrimination on account of race and sex. There are very considerable reasons for undoing what, impliedly, the *Steelworkers* trilogy has put together when grievances involving employment discrimination claims are presented.

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[106] This policy is embodied in the decision in *Boys Markets, Inc., supra* note 60.

[107] *Boys Markets* v. *Retail Clerks, supra* note 60.

[108] See *Lion Oil Co.*, 109 NLRB 580, 684, 34 LRRM 1410 (1954), *aff'd NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 39 LRRM 2296 (1957); *Mastro Plastics* v. *NLRB*, 350 U.S. 270, 284-89, 37 LRRM 2587 (1956); *United Furniture Workers of America* v. *NLRB*, 336 F.2d 738, 55 LRRM 2990 (D.C. Cir. 1964); *McLeod* v. *Compressed Air*, 292 F.2d 358 (2d. Cir. 1961); *General Electric Co.*, 181 NLRB No. 111, 73 LRRM 1526 (1970); *International Union, UMW* v. *NLRB*, 257 F.2d 211, 42 LRRM 2264 (D.C. Cir. 1958).

In the first place, both the right to strike [109] and to protest what employees believe to be poor working conditions [110] are important rights and are protected by Section 7 of the National Labor Relations Act.[111] The justification for a no-strike limitation on such conduct is both the industrial peace rationale and the notion that the grievance-arbitration forum can cope with problems that might be resolved on the picket line. Moreover, the Supreme Court has already invoked public policy to limit the impact upon the no-strike clause, when the right of the employer to retaliate with disciplinary measures against employees was concerned, in *Mastro Plastics* v. *NLRB* [112] where it was held that employer unfair labor practices could exonerate the violation of a broad no-strike prohibition. Although *Mastro Plastics* involved employer commission of "major" unfair labor practices, the decision is good authority for the use of public policy considerations in dealing with the viability of no-strike prohibitions. And the public policy behind Title VII, seeking the elimination of discriminatory employment practices, argues against any similar "major-minor" limitation in disputes involving racial or sexual discrimination.[113]

Moreover, if employers can discipline and discharge workers for protesting discrimination through walkouts and picketing, employees will be deterred from raising such issues at all. Thus, unimpeded access to both the Equal Employment Opportunity Commission as well as the National Labor Relations Board to protest discrimination would be less of a reality.[114]

To date, there are two cases decided by the Board which have some bearing upon this subject. The first is *Tanner Motor Livery, Ltd.*,[115] a case involving two white drivers employed by a

[109] See Section 13 of the NLRA. *Cf. NLRB* v. *Drivers Local Union*, 362 U.S. 274, 45 LRRM 2975 (1960).

[110] See 29 U.S.C. §§ 157, 158(a) (1964); *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 50 LRRM 2235 (1962).

[111] *Id.*

[112] 350 U.S. 270, 37 LRRM 2587 (1956).

[113] This is not to say that there may not be a protest against discrimination which involves incidents so minor or isolated that they do not warrant protection as a matter of public policy under the *Mastro Plastics* doctrine.

[114] See *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1 FEP Cases 752 (5th Cir. 1969); *Green* v. *McDonnell-Douglas Corp.*, 4 FEP Cases 577 (8th Cir. 1972).

[115] 148 NLRB 1402, 57 LRRM 1170 (1964), *reman'd* 349 F.2d 1, 59 LRRM 2784 (9th Cir. 1965), *aff'd in supplemental decision and order*, 166 NLRB 551, 65 LRRM 1502 (1967), *vac'g and reman'g*, 419 F.2d 216, 72 LRRM 2866 (9th Cir. 1969).

company who were active in civil rights organizations and who demanded that a black driver be hired into the employer's lily-white work force. Subsequent to this demand, one of the drivers was fired and filed a grievance under the labor agreement. A union-company panel proceeding ruled against this worker's reinstatement. Shortly after this discharge, a second employee joined a picket line outside the employer's premises with a sign bearing the emblem "Jim Crow Shop." He was then fired. The trial examiner found that both employees were discharged because of their protests against the alleged discriminatory hiring practices of the employer, but determined that the firings were not unfair labor practices within the meaning of the Act. A unanimous Board reversed and held that the workers had been involved in protected, concerted activity under Section 7. In so holding, the Board noted that the employees were protesting what they considered to be unfair hiring policies and practices of the employer.

On appeal, the Ninth Circuit remanded for the Board to consider the question of whether employees who protested discriminatory hiring practices were required to act through their collective bargaining representative where the representative had negotiated a contract with the employer.[116] The court stated that "this question 'stated another way' was to what extent the Section 9(a) [providing for exclusive bargaining authority] limited or removed the protection afforded by Section 7." [117] The court then went on to express the view that the purposes of the Act in support of the principle of collective bargaining might be undermined if employees could resort to picket line action relating to "grievances" which were to be settled through arbitration.

The Board, on remand, stated that the record did not indicate whether the employees had attempted to act through their exclusive bargaining representative.[118] Finding it unnecessary to decide whether the workers were attempting to bargain individually with the employer, the Board said that it would not find that the employees were acting "in derogation" of their bargaining representative by seeking to eliminate "morally unconscionable, if not an unlawful, condition of employment." [119] Accordingly,

[116] 349 F.2d 1, 59 LRRM 2784 (9th Cir. 1965).
[117] *Id.* at 3.
[118] See note 115, *supra.*
[119] 166 NLRB 551 at 2-3, 65 LRRM 1502 (slip opinion).

the Board held, without any rationale to support its view, that it would be offensive to public policy to render such conduct unprotected because of an existing collective bargaining agreement negotiated by the parties.

The second appeal to the Ninth Circuit resulted in another remand, the Ninth Circuit once again expressing its dissatisfaction with the Board's resolution of the problem and expressing its disagreement. The court held that the employees had "an obligation to go to the union with their desire for non-discriminatory hiring." [120] Since the record in *Tanner* did not reveal whether the employees had approached the union nor whether the union had given its sanction to such actions, the exclusive bargaining representative principles contained in the statute rendered it unprotected.

In a second and more recent case, *The Emporium*,[121] a majority of the Board, with two new members since *Tanner*,[122] has indicated that it has lost its will to fight against the Ninth Circuit's myopic analysis of the problems. The retreat has been sounded by the Board's affirmance of the trial examiner's conclusion that picketing and literature protesting (in rather vituperative language [123]) an employer's alleged discriminatory practices constituted unprotected activity subjecting the employees to discharge and discipline. In this case, the parties had negotiated a no-strike and lockout provision, a no-discrimination clause, and machinery for the resolution of disputes concerning the agree-

[120] 419 F.2d 216, 72 LRRM 2866 at 2870 (9th Cir. 1969). For a discussion of the issue involved in *Tanner* as well as other cases involving both the principles of exclusivity and breach-of-contract problems, see Getman, "The Protection of Economic Pressure by Section 7 of the National Labor Relations Act," 115 *U. Pa. L. Rev.* 1195 (1967); Gould, "The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act," 52 *Cornell L.Q.* 672 (1967); Gould, "Black Power in the Unions: The Impact upon Collective Bargaining Relationships," 79 *Yale L.J.* 46 (1969).

[121] 192 NLRB No. 19, 77 LRRM 1669 (1971). Two basic distinctions between *Emporium* and *Tanner* are that the latter involved hiring and the former promotion, and that in *Emporium* the union was involved in the subject matter under dispute, *i.e.*, the failure to promote minority workers.

[122] Chairman Miller and Member Kennedy were the new additions to the Board between *Tanner* and *The Emporium*. Members Jenkins and Brown dissented in *The Emporium*, both of them having been part of the *Tanner* majority. Member Fanning was part of the majorities in both cases. See, however, *Graziano Construction Co.*, 195 NLRB No. 5, 79 LRRM 1194 (1972), where the same Board took into account Landrum-Griffin policies in determining the scope of protected activity without mentioning *Emporium*.

[123] *Cf. NLRB* v. *Electrical Workers*, 346 U.S. 464, 33 LRRM 2183 (1953); *Patterson-Sargent Co., Sunbeam Corp.*, 184 NLRB No. 117, 74 LRRM 1712 (1970), *enf. granted* 451 F.2d 91, 79 LRRM 2803 (7th Cir. 1972).

ment culminating in arbitration. Prior to the events which led to the litigation before the Board, the union had taken the official position that discrimination against minority races existed at the employer's San Francisco store. The union offered to take grievances alleging racial discrimination up through the machinery on an individual basis, but minority employees objected to this procedure and insisted that allegations involving racial discrimination be heard on a group basis. When the union refused to do this, two employees involved in the Board proceeding walked out of the union meeting.

Subsequent to the union meeting, one of the two employees attempted to present his views to the employer's president and advised the company representative that he wished to discuss what was "happening among the minority employees." [124] When this route proved unsuccessful, the two employees as well as two or three others held a press conference in which they set forth the evidence for what they viewed to be the employer's discriminatory policies. Following this, the two employees along with at least two other employees picketed the employer's premises, distributed pamphlets alleging discrimination, and invited a boycott of the employer because of alleged discrimination. The two employees were then discharged.

The trial examiner found that the employees who picketed had a belief that the employer was discriminating. Because the employees rejected the union advice to have their appeals heard through the grievance-arbitration machinery on an individual basis and invited discussion with company representatives, the Board held that the protests engaged in were unprotected because they had the effect of undermining both the principle of exclusivity and the goal of industrial peace.

My judgment is that both the Ninth Circuit's holding in *Tanner* and the Board's opinion in *The Emporium* are bad law. Even before *The Emporium,* as I have stated on another occasion,[125] the Board invited problems for itself by failing to devise any kind of rationale in its *Tanner* holdings. Both *Tanner* and

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[124] In his dissenting opinion, Member Brown quite properly pointed out that such a statement did not amount to a demand for a kind of bargaining that would interfere with the principle of exclusivity. *Cf.* Summers, "Individual Rights in Collective Agreements and Arbitration," 37 *N.Y.U. L. Rev.* 362 (1962). See also *Moss-American Inc.* 178 NLRB No. 30, 72 LRRM 1078 (1969).

[125] Gould, "Black Power in the Unions," *supra* note 120 at 57-63.

The Emporium are wrongly decided because they fail to even consider the inadequacy of the grievance-arbitration machinery for cases of this kind. Moreover, the union's insistence upon processing grievances on an individual basis once again highlights one of the institutional deficiencies involved in the process. Class actions looking to the entire gamut of employer practices are integral to Title VII litigation.[126] To fail to permit the same scope of inquiry in arbitration hearings makes that forum an inferior one. These points, however, as well as the *Mastro Plastics* analogue, have not been even mentioned, let alone discussed in any thorough manner, by either the Board or the Ninth Circuit. They argue persuasively for making protected what would otherwise be unprotected under the Act. They argue for "judicial inventiveness" [127] which could, in industries where the strike weapon has an impact, make the parties think again about reforming the arbitral process.

Conclusion

The shortsightedness of *Dewey* is to be found in its preoccupation with one portion of national labor policy, *i.e.*, the promotion of arbitration of contract disputes as a means to implement the Taft-Hartley goals of industrial peace.[128] The courts must take into account all aspects of federal labor law and those include the policies against discrimination which are reflected in Title VII.[129] Indeed, if anything, these policies are paramount to the principles which guided the Sixth Circuit in *Dewey*.[130]

Newman seems to spell the decline of that holding even in the Sixth Circuit itself. The important question is under what circumstances deference to arbitration should be granted at all. Both the court and the EEOC must be extremely careful in applying any kind of *Spielberg* rule. An effort must be made to see that arbitration provides much of the same protection contained in Title VII. This is particularly important since the 1972 amendments to Title VII specifically mandate the appointment

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[126] See note 92 *supra*.

[127] *Textile Workers Union* v. *Lincoln Mills, supra* note 105 at 456-457. Accord *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 10 LRRM 544 (1942).

[128] See note 2, *supra*, as well as notes 10-16 and 68.

[129] This principle is required by *Lincoln Mills*. See *supra* note 105. *Cf. Black* v. *Cutter Laboratories*, 43 Calif.2d 778, 35 LRRM 2391 (1955), *writ dismissed* 351 U.S. 292 (1956).

[130] See *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552, 561, 2 LRRM 592 (1938).

of masters in Title VII litigation under certain circumstances.[131] Quite often arbitrators may be appointed as masters. One would hope that this provision will not carry with it the bad habits of arbitration described above and thus impede the effective implementation of employment discrimination law. One would also hope that the 1972 statute provides a vehicle for the judiciary to encourage arbitrators, unions, and employers to adopt the reforms advocated here and that this will have an impact even outside Title VII litigation.

Even though it is highly improbable that many bargaining relationships will adopt such procedures in the near future, adherence to the factors noted above is a minimum prerequisite to deference. Otherwise, the strong policy against interfering with federal court jurisdiction of employment discrimination claims would be eroded.

III. JUDICIAL REVIEW OF "MISCONDUCT" CASES *

BENJAMIN C. ROBERTS **

At the 24th Annual Meeting of the National Academy of Arbitrators, Alex Elson, in a paper on "The Case for a Code of Professional Responsibility for Labor Arbitrators," discussed the need of the Academy to take a fresh look at its Code of Ethics. He recommended that the immediate role of the Academy is to commence the draft of a Code of Professional Responsibility for Labor Arbitrators. He cautioned that not only should arbitrators avoid engaging in improper conduct, but that each individual labor arbitrator had to do everything he could to achieve the objectives of the arbitration process. The point was that acceptability was not a guarantee of impartiality.[1]

At the same meeting, in a sequel to an earlier article published

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[131] Section 706(f)(5) of the Act, as amended, stated that "[i]t shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred twenty days after issue has been joined, that judge may appoint a master pursuant to Rule 53 of the federal rules of procedure."

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[1] *Arbitration and the Public Interest*, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), 194.