CHAPTER VI

JUDICIAL REVIEW: AS THE PARTIES SEE IT

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CHAIRMAN LLOYD H. BAILER: I am told that this session is going to have to be extra good as it is the last regular session on the last day of this annual meeting. The procedure we are going to follow is this: We have four discussants on the program, each of whom is going to be asked to make a statement of 15 to 20 minutes on the judicial review question, as they see it, from the standpoint of management and union representatives.

We have invited the speakers on the morning program to be present, and we hope that they will be here so that they can hear the comments made by the discussants on the papers they delivered this morning and so that they also may have an opportunity to respond to those comments. We will provide the discussants with an opportunity to reply if they wish, following which we will have questions and brief comments from the audience to the extent those present see fit.

Comment—

MR. ROBERT M. LANDIS: I have long second thoughts about being a commentator or observer or whatever other euphemism might be found to describe the role that the lawyers find themselves in today, as rebuttal speakers, as clarifiers, as equivocators, or as end-men, following these scholarly presentations by the arbitrators who are members of the Academy, the most distinguished aggregation of judges of labor disputes to be found in our land.

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In at least one way it is unique. It's a rare thing for an advocate to have the last word over an arbitrator, so I'll try to make the most of it. It's even rarer to have the chance to second-guess three arbitrators in a row, shoulder-to-shoulder with my own colleagues of the second-oldest profession.

But I do have a few comments I would like to put on record from the advocate's side, if not alone from the management side, on the important issue of the scope of court review of arbitrators' decisions. For one, I doubt that there is very much substantive difference among lawyers who work the union side of the street from those who work the management side of the street on the scope of court review of arbitrators' decisions depending, of course, on who lost the case.

If anything—and I believe this is more a visceral sense than an objective judgment—I suppose management lawyers are a little more inclined to look to what they think of as the security of the courts for arbitral decision review than union lawyers might do. Maybe this is just a function of who loses most of the cases before arbitrators, but I doubt it.

This is not to say that pragmatic management lawyers, and I like to count myself one of these, are unwilling to let arbitration cases end with a decision by the arbitrator. But it is to say that many of my management colleagues lean more heavily on court review than I do, despite its evanescence since the trilogy decisions, as an anchor to windward for cases they have lost.

It's not that judges are necessarily wiser, but it is a world-weary sense of déjà vu of the necromancy of arbitrators' expertise, their mystical insight into "the law of the shop," which the courts, ever since the trilogy decisions, have accepted as an article of faith. It's a court-sanctioned article of faith which depends not so much on infallibility or on the principle that arbitrators never make mistakes, but instead seems to be grounded on a principle which suggests that arbitrators' mistakes are not such important ones to demand court review, since most of them involve ad hoc, one-time-around labor disputes whose impact is not far-reaching enough to justify a second level of review, a reexamination by the courts of decisions which are more significant because they put an end to the immediate labor disagreement than because they proclaim legal precedents which have enduring values for the resolution of future labor disputes.

One recent decision of the Superior Court of Pennsylvania illustrates very well this kind of courts' approach to review of an arbitrator's decision. *Haddon Craftsmen, Inc.* v. *Bookbinder's, Local No. 97* [1] involved an employer's appeal from a decision of the court of common pleas of one of the counties of Pennsylvania in which the lower court had declined to enforce an arbitrator's award granting monetary damages against the union in an employer's grievance where the arbitrator had found that the union violated the collective bargaining agreement in failing to advance apprentices to journeyman status. The lower court refused to enforce the arbitrator's award on the ground that there was an oral demand for damages submitted at the arbitration hearing which had not been included in the written grievance filed by the employer and on the ground that the arbitrator computed damages on the basis of the average hours worked by the three journeymen involved in the grievance without offering any explanation for this award. Following the *Enterprise Wheel & Car* case, the Superior Court of Pennsylvania held that the scope of court review was a narrow one, and since the collective bargaining agreement provided that the arbitrator's decision would be final and binding on both sides, it reversed the judgment of the lower court and directed that judgment be entered for the employer in accordance with the arbitrator's award.

This is a result which I expect that Christensen, Roberts, and Gould would not dispute. Certainly, I don't. It does not invoke the mystique which Mr. Justice Douglas casts about the arbitral process. It was a simple matter of finding the jurisdiction and the authority of the arbitrator to make his decision within the four corners of the contract and letting his decision stand, notwithstanding a lower court's notions about technical procedure and careful, reasoned fact-finding to support an award. And the curious thing is that the same lower court would probably have permitted an amendment to the complaint during the trial of an ordinary civil case, so the court wound up holding an arbitrator to a higher standard of technicality than it would have imposed upon itself.

There is much to be said for this kind of ad hoc lawmaking under collective bargaining agreements. And there is even something to be said for devaluing the principle of stare decisis—a

[1] 220 Pa. Super. 206, 78 LRRM 2525 (1971).

principle dear to the hearts of lawyers, who believe that certainty and predictability are values which contribute to the underlying stability of labor relations.

This much is sure, in my view: The resolution of issues, the final disposition of them, has a therapeutic value which is important. Generalized elements of rightness or wrongness, even as they may bear upon longstanding and future collective bargaining relationships, are not as important, perhaps, as the resolution of immediately pending disputes. The main thing should be to assure the parties of a fair hearing, to let them know that their positions have been fairly evaluated, and that whatever the outcome of the immediate case, it has been fairly determined.

It is only the rarest kind of case that comes to arbitration which has long-range potentials for the future bargaining relationships of the parties. Disciplinary judgments, which are the grist of the arbitrators' mill, certainly are not among these earthshaking precedents. Control of wildcat strikes is a little closer to the bone. Exercise of what is conceived to be management prerogatives may cut even closer, both for the employer and the union. And I have been involved in a few of these.

One of them turned on the explicit provisions of the collective bargaining agreement which limited resort to arbitration to "violations of the specific provisions of the collective bargaining agreement," in which the U.S. District Court for the Eastern District of Pennsylvania, affirmed by the Court of Appeals for the Third Circuit, held that in the face of such a provision, the union could not contest in arbitration the company's discontinuance of a long-standing practice of giving Christmas turkeys to the employees of the Boeing Co.

Another involved the arbitrator's reliance on a long-standing practice of permitting management employees to bump down into bargaining unit positions during layoffs, notwithstanding the absence of any provisions in the collective bargaining agreement which would have sanctioned, or prohibited, this kind of displacement of bargaining unit employees.

I cite these examples not just because they were winners—even though labor lawyers, unlike fishermen, don't like to talk about the big ones that got away—but because they exemplify the different approaches of the courts and arbitrators to problem-solving in

the context of the common law of the shop. When it comes right down to the basics, there is very little that the courts can contribute to review of arbitration awards. It is only the extraordinary case that presents questions of law that demand the extra attention of judicial review. The *H. K. Porter* case, referred to by Professor Christensen, is an example. It is only the extraordinary case that commands the extra dimension of consideration the courts can give it in which arbitrators may not sense its potentiality for the future relationship of the parties or its implication in other cases.

Although I am sometimes tempted to call for another level of review of the results of arbitration, another time at bat, I am generally satisfied with the limits that the courts have cast around their jurisdiction to review arbitration decisions—limitations well covered by Christensen and Roberts. Sometimes the essence of fairness may be lost in the process, but these occasions are rare enough that I would not advocate expanding the jurisdiction of the courts to intervene and to have the courts attempt to correct these results as a board of super-arbitrators. This is not because I am a fanatic about the mystique of arbitrators' expertise; I have seen enough of them to know that they wear the same feet of clay that I wear as an employer's hired gun. This is because I believe that a solution is a solution; a prompt resolution of an unresolved labor dispute is generally better than a protracted contest in the courts.

While there are lines that must be drawn and there are basic principles that must be contested at the appellate court level, I hold with Roberts and Christensen that these lines are fundamental lines that strike at the basics of arbitral decisions, the contract coverage of the dispute, the authority of the arbitrator, the corruptibility of the arbitrator, and undue influence that may bear upon the decision. But these fundamentals do not extend to the essence of arbitral discretion in the interpretation of contracts, which is what the parties look to in an arbitrator.

In fact, I defended one of the misconduct cases cited by Roberts, in which the union challenged an arbitrator's failure to apply his own ruling on the sequestration of witnesses. The federal judge who considered the union's appeal sustained the action of the arbitrator, not only because there was a total absence of evidence that the chance encounter of a couple of wit-

nesses who should have been sequestered in no way affected the outcome of the proceeding, but because, above all, the trial judge was convinced of the absolute fairness of the arbitrator in arriving at his decision.

Professor Gould raises some especially troublesome problems for arbitrators in cases involving racial and sex discrimination, with the potential conflict of interest between the grievant and the union which represents him in arbitration proceedings. These are, of course, very special problems for the arbitrator, but I doubt that they can be solved by the arbitrator's assumption of EEOC jurisdiction and his freewheeling application of his own notion of what the EEOC might do in a similar case, as Professor Gould seems to suggest.

The complications of enforcing an employee's rights against discriminatory action by his employer and his union are difficult enough, as with the deferral provision under the law which permits a state or a municipal antidiscrimination agency to act with coordinate jurisdiction with the EEOC, and the supervening jurisdiction of the EEOC and private enforcement actions under Title VII. Arbitrators simply can't cop out on discrimination cases because of these complications, and they surely shouldn't try to subrogate themselves to the EEOC or try to apply their notions of the EEOC's attitude in discrimination cases.

Furthermore, I do not share Professor Gould's expressed hope for the "swift burial" of *Dewey* v. *Reynolds Metals Co.*[2] The courts have had some difficulty in articulating the reasons for giving effect to arbitration awards in discrimination cases, sometimes referring to the election-of-remedies doctrine and sometimes referring to the doctrine of estoppel, as in the series of cases decided by the Sixth Circuit which have followed *Dewey* and which are referred to by Professor Gould in his paper: *Spann* and *Newman*. In fact, as recently as last month in *Thomas* v. *Carey Manufacturing Co.*,[3] the Sixth Circuit has expressly adhered to the principles set out in the *Spann* case, and they seem like sensible principles to me. They are best articulated in the passage from Judge Peck's opinion, in which he said in the *Spann* case: [4]

[2] 429 F.2d 324, 2 FEP Cases 687 (6th Cir. 1970), *aff'd by equally divided court*, 402 U.S. 689, 3 FEP Cases 508 (1971).
[3] 4 FEP Cases 466 (6th Cir. 1972).
[4] 446 F.2d 120, 3 FEP Cases 831, 833 (6th Cir. 1971).

". . . Spann did not seek to follow these paths simultaneously, but rather sought four separate bites of the apple: (1) arbitration; (2) the Michigan Civil Rights Commission; (3) the EEOC; (4) the judiciary. This 'successive monogamy' of remedies is forbidden by *Dewey*."

In an arbitration case involving a claim of discrimination under a collective bargaining agreement, which expressly prohibits racial and sex discrimination and which also contains a clause providing that arbitration shall be the exclusive remedy for resolving disputes under the agreement, I do not see how an arbitrator can avoid a decision under some concept of deferring to the jurisdiction of other administrative agencies, as Professor Gould seems to advocate.

My own view is that if the issues of discrimination are fairly raised and fairly decided in an arbitration case, an arbitration award should be just as binding on the parties as an award in any other kind of case and subject to no greater scope of appellate review. The guidelines developed by the Sixth Circuit in the decisions following the *Dewey* case, complicated as they may seem, to me represent a reasonable accommodation of the arbitration process with the other judicial and administrative remedies in discrimination cases.

Too many bites of the apple, whether they are taken in the arbitration tribunal, in the courts, or in administrative agencies are not sure guarantors of industrial justice even in discrimination cases. I've been around this business too long to think that the employers whom I represent are always entitled to another time at bat, where only the courts will serve up those fat pitches.

While I accept with some modicum of skepticism Mr. Justice Douglas' pronouncements on the omniscience of arbitrators in labor disputes, I'm quite content to have you call the shots as you want to call them. I'm willing to take my chances with labor arbitrators, remembering that famous colloquy of the three baseball umpires who were discussing their philosophy of umpiring in the dugout one day.

The first umpire said: "I call 'em as I see 'em."

The second umpire said: "I call 'em as they are."

The third umpire said: " 'Til I call 'em, they ain't anything."

Finally, I want to share with you a fascinating memento that I found crumpled up in a wastebasket in an American Arbitration Association hearing room one day. Scrawled on this crumpled piece of paper, written in a shaking hand, was the following text:

"Four Rules for Survival as an Arbitrator

"(1) Always stay in with the outs.
"(2) Never rock the boat.
"(3) Always exploit the inevitable.
"(4) Never get between the dog and the lamppost."

Comment—

MR. MICHAEL H. GOTTESMAN: I would like to appeal to arbitrators for some help with respect to a problem discussed here this morning. Although the consequences of this problem are felt most severely by the parties to arbitration, in large part, I suspect, the solutions must come from the arbitrators themselves.

The problem was identified by Tom Christensen in his discussion. He has discerned, I think correctly, a tendency on the part of some courts to dip their fingers just a little bit into the merits of arbitration decisions which come before them on judicial review. That trend, if it continues, will be disastrous for the arbitration process itself, because even if courts reverse only 5 percent of the arbitration decisions that come before them on the merits, the knowledge that that potentiality is there is going to invite a lot of effort to secure that kind of reversal.

In part, my concern arises from self-interest. Unions are much less financially able than employers to go running to court for that second bite of the apple. They have also, I think, shown much less tendency to do so in the 13 years since the *Steelworkers* trilogy was decided. But I truly think the existence of any such avenue or opening for substantive review of arbitration awards inherently destroys the process. And I think the tendency on the part of some of the lower courts to try to get into the merits of arbitration decisions has stemmed in part from an unfortunate conception about why arbitrators have been given this final and binding power, and why the Supreme Court delegated to them such great responsibilities in the *Enterprise Wheel* decision in 1960.

When I first got into this business, which was in 1961, I was

immediately imbued by my colleagues with the "godliness" concept of arbitrators. I was told that arbitrators had been afforded very broad and sweeping power to render what were essentially unreviewable decisions because of their extraordinary expertise in this field. I was imbued with that spirit, and I kept it until I arrived at my first arbitration proceeding.

In the *Steelworkers* trilogy, the Supreme Court was given by the union the same conception and imbued with the same spirit about arbitration. It was told how wonderful arbitrators were and how uniquely they had experience and knowledge in this area. The Court was convinced by those briefs that this uniqueness did indeed exist, and so Mr. Justice Douglas wrote an opinion which has been widely understood to say that the reason arbitrators' decisions are not reviewable by the courts is that arbitrators are wonderful. Courts subsequently, as they received cases in which the decisions didn't look so wonderful to them, began to think to themselves: "This isn't the arbitrator Mr. Justice Douglas was talking about; therefore, the principles of *Enterprise Wheel* can't possibly be applicable here. This arbitrator is out of his mind and we have got to do something about it."

That approach, which I'll come back to in a moment, has stemmed from what I think was the unfortunate wording of the *Enterprise Wheel* decision. The real gist of that decision was that arbitration awards are final and binding and not reviewable, not because arbitrators are wonderful, but because the company and the union contracted to make their awards final and binding. If the parties write a contract and they say the arbitrator's award is going to be final and binding, that is a contract, and we of the Steelworkers, and I think of most unions, expect our adversaries to live up to their contractual undertakings, just as we are constantly reminded that we have to live up to ours. If the parties have contracted for a final-and-binding arbitration award without limitations and without restriction, it should not lie with either party, when it gets the award, to run to court and say that this is that outrageous case which should justify a court's coming in and intruding on the process and telling us that this one has got to be set aside.

Parties don't have to sign agreements to make arbitrators' awards final and binding, but when they do, it seems to me, they

are stuck with the results. And the results are that they have contracted for a final-and-binding award and the courts must stay out of the merits altogether.

Now, of course, there are questions of the arbitrator's being tainted in some manner or other, but I'm talking about review of the merits of the award. If *Enterprise Wheel* is correctly understood in what I think was its true holding, which is not that arbitrators are wonderful but that the parties had contracted to make their decisions final and binding, it would seem to follow rather clearly that the courts must stay out of the merits when reviewing such decisions, no matter how outrageous they may think the arbitrator's treatment of the merits may have been. Very few courts are willing to say it that strongly, since *Enterprise Wheel*. The Supreme Court did, of course, but the lower courts have always in the succeeding years dropped little caveats, usually in enforcing the award, that "in case such-and-such happens, maybe we would view this differently."

Those caveats are slowly coming back to haunt us. The most intriguing, I think, is something that has appeared in a number of Fifth Circuit decisions, which is that in reviewing the merits of an arbitration award, the court must affirm the award unless it concludes that the decision is so outrageous that no federal judge could possibly have rendered that decision, had the case been before him. That's a kind of intriguing approach. It's sort of a "lowest common denominator of federal judge" approach, and I think that there are certainly some arbitrators whose decisions would safely pass that test. Indeed, the statistics would suggest that most are doing it.

The point is that, seemingly hospitable as it appears on its face, it is a wrong test. It is itself an intrusion on a process where the intrusion should not exist at all. The parties did not contract that those arbitration awards that look *judicial* would be final and binding; they contracted that *all* of the arbitration awards would be final and binding, and that ought to be the end of the matter.

Some courts have paid lip service to the idea that they don't review the merits, but have sought to sneak in through the back door. The Supreme Court did say in *Enterprise Wheel* that the award was to be affirmed as long as it drew its "essence" from the contract. Courts can view essences differently, I guess. It was sort

of an exotic word to describe a process that isn't very exotic. But in part, the difficulties that we have had in defending arbitration awards which were later attacked are that the arbitrators frequently have not devoted enough attention to writing those awards with a recognition of the fact that one of the parties may later go running to court complaining about it.

My appeal to arbitrators is that when they are writing decisions in cases which may be taken to court—and I think arbitrators know the situations where that's not going to happen and they should reasonably assume that except for those cases, it can always happen—they should be especially careful to write a decision which reflects an understanding of what their contractual responsibilities are under the particular contract and which demonstrates in the award that in reaching their result, they have drawn it from the essence of the contract.

Frequently we have the problem of receiving a wonderful award (and whenever we win, it's wonderful) which reads as though it were coming out of the clouds somewhere—no reference to the contract, no reference to the contractual provision. In marches the employer to the court saying that this award did not draw its essence from the contract. We have done pretty well in these, but it has always been discomforting to me that the arbitrator, in writing the award, had not tied the award more closely to the contractual provisions and had not demonstrated that he was doing the thing the Supreme Court assumed he was doing: interpreting and applying the agreement.

So my appeal, which stems from Tom Christensen's paper, is that arbitrators, when writing awards, be conscious (1) of the fact that it may eventually go to court, and (2) of the desirability of writing an award which reflects what I think is virtually always the case, namely, that they have indeed performed the functions which the Supreme Court assumed they would—applied the contract and extracted a result from those contractual provisions.

A whole new area of arbitral competence, I think, is going to arise from the kinds of things that Bill Gould talked about today, and I start with a basic disagreement with Bill as to the role arbitration has played to date in the discrimination area.

Bill's paper begins with a serious charge: that arbitration has contributed very little to the advancement of minority employee

interests. I think, in reality, it has contributed a great deal more than Bill has suggested. It's true that if one were to read all the arbitration awards issued in a given year and looked for those which recite on their face, "We are upholding a minority employee's interests in the face of a claim of discrimination," the number might be relatively small.

But the point is that on a day-to-day basis, in innumerable arbitration cases, arbitrators are in fact correcting acts of discrimination without reciting the fact on the face of the opinion. Indeed, it isn't even relevant that discrimination was the cause and the need for the arbitrator's decision.

Let me give some examples. The employer, for discriminatory reasons, bypasses a senior black employee and promotes a more junior white employee. A grievance is filed. The grievance does not necessarily allege discrimination; it alleges the failure to promote the senior employee. The case is tried with the demonstration that the senior employee was indeed able to do the job to which he sought promotion. The grievance is won, and the arbitrator writes a decision saying that the senior employee should have been promoted. An act of discrimination has been cured, but when Bill goes and tots up the statistics on discrimination cases this year, I suppose that one wouldn't count. There is nothing on the face of the opinion that says that this is a discrimination case.

As Bill acknowledges, testing practices which are in fact discriminatory or in effect discriminatory in the steel industry, and I'm sure in other industries, have been very effectively eradicated through arbitration proceedings in which no discussion of discrimination appeared on the face of the award, but the effect was to eliminate testing which was not job related and, by so doing, to achieve precisely the results which the EEOC is seeking to achieve under Title VII. The same is true in disciplinary cases where a foreman has visited discipline on an employee because that employee may have been black and the foreman may have been prejudiced. These cases are frequently won not on the ground of discrimination, but on the ground of no just cause for the discipline.

Indeed, I think one could cover almost the entire gamut of problems that arise in the plant and find, if he investigates into the particular facts and who the employees were, that arbitration

as a process had made a very great contribution to the solution of minority employee problems.

There are, of course, limitations to that contribution, and the principal limitation is where there is something defective in the contract itself. The arbitrator has been hired to interpret and apply a contract, not to vitiate that contract in the name of the federal law. We have federal agencies whose function it is to do the latter. I think we make a mistake if we even suggest that it's the role of the arbitrators to do that, unless the parties give a mandate broader than the usual "interpret and apply."

The structural changes that are required in contracts—and most often these are seniority changes—are going to come in the first instance from federal agencies and federal courts, to the extent that the parties aren't able to make them themselves. Of course, there may be situations where the parties will agree to hire arbitrators for the very purpose of bringing about those structural changes in their contracts, but I think in large part these things are going to be done either voluntarily or through agencies of the Federal Government.

That doesn't mean that arbitrators aren't going to be implicated in this process. I think they are going to be implicated very greatly because when a court issues a decision saying that a seniority system is discriminatory and that it must be changed in certain respects, invariably those changes are enormously complicated. They raise thousands of questions, not of great constitutional weight, but of individual weight and involving specific applications of that judicial decree. And the parties, on a day-to-day basis, are being called upon and are required to try to implement and apply that decree to specific factual situations.

I foresee a very major role to be played by arbitrators in the process of implementing judicial decrees, both in seniority systems and in other aspects of employment discrimination. The court orders generally have not recognized the role of the arbitrator in this process, but we have suggested in some cases, and intend to suggest in still more, that the court make as a provision in these decrees that in the first instance questions as to the application of the decree to particular factual situations be processed through the grievance procedure, and that if not resolved by the parties in the grievance procedure, they then be taken on to arbitration.

We perceive that what's going to happen in this process is that arbitrators will be called upon not only to apply the contract, but to interpret and apply the decree of the federal court to the day-to-day activities in a particular plant. We think (1) that this is desirable because the arbitrator does have expertise and experience which puts him in a better position to do this than a federal court; (2) that it's enormously beneficial to the minority employees who are the beneficiaries of the court decree because they can't afford to run back every day to the federal court with every little grievance that involves a temporary vacancy or a promotion, but they will have the benefit of the arbitration procedure and process for the handling of these matters; and (3) that, in the long run, it's going to be much more expeditious than going back to court every time there's a problem under a decree.

We recognize that courts are not going to and should not give arbitrators the final and determinative decision on the implementation of federal decrees. We recognize, and in this respect I think we disagree rather severely with Bob Landis, that ultimately an employee, dissatisfied with the arbitration process, has the right to go to court over alleged violation of Title VII, whether it be before there has ever been a decree or whether it be with respect to the implementation of a decree. We assume that though we create a grievance and arbitration process for the resolution of these kinds of problems, if the employee is dissatisfied, he will get that second bite of the apple from a court. But we think that creating the arbitral forum for these problems and putting the grievance procedure to work in handling these problems in the first instance is going to resolve most of the problems to everybody's benefit, including, of course, the federal courts which, after a few more of these cases have been brought forward, are going to run out of time and room to handle the implementing problems.

Because we see the court as the ultimate tribunal for all of these cases, we disagree very strongly with Bill Gould's suggestion that the arbitral structure itself be changed. He suggests, for example, that when a minority employee has a complaint, he should be free to bring his own lawyer into the arbitration proceedings and process the case in his own behalf. We see that as doing more damage to the structure than any benefits that can be gained, and the employee's ultimate protection and ultimate recourse, as we see it, is that the arbitration process is not the end

of the road for him if he has a true discrimination claim. He has to rely on the union to process his grievance through the arbitration stage, but he retains his federal statutory right to go elsewhere if he believes that the union hasn't done an adequate job on his behalf.

Indeed, when the *Dewey* case was decided in the Sixth Circuit and when a petition for certiorari was filed from that decision, the Steelworkers gave serious thought to filing a brief seeking reversal of that decision. We were going to argue that we wanted employees to use our grievance procedure; we felt that this was the best way to get these problems resolved to the extent that they can be. But if the courts were going to say that a minority employee, by using the grievance procedure, waived his right to go to the federal agency, very few minority employees would use the grievance procedure. They would go right to the federal agency for fear that they were going to waive their right to get there eventually. We were willing to live with two bites of the apple because we thought the benefit we got, which was the encouragement of employees to utilize the grievance procedure, was worth the price.

I say we considered filing a brief, but we did not file one, and the reason is that we learned that while we were preparing this brief, the AFL-CIO was preparing a brief on the other side, arguing that *Dewey* was right and that there shouldn't be two bites of the apple. So we compromised our difference of opinion, as good attorneys do, by filing no brief at all on either side, and the court was so disabled by not having the usual union presentation to guide it in its decision that it came out voting four to four.

One final note: Title VII has been the only subject today with respect to the involvement of arbitrators in federal law. But arbitrators should be aware that their agenda may be broadened very much beyond that. There have been two Supreme Court decisions in the last year involving arbitration clauses somewhat broader than the usual. We always think of arbitration clauses as saying that questions of the interpretation and application of the contract will go to an arbitrator. But there are many contracts that say that all disputes between the parties will go to arbitration, and there have been two cases in which the Supreme Court has indicated at least serious interest in saying that under con-

tracts which submit "all disputes" to arbitration, the parties are required to take any allegations, even of certain federal laws, to the arbitrator.[1]

For example, if the employer believes that the union has committed a secondary boycott and wants to sue the union for damages, that's a dispute between the parties. The parties have agreed that all disputes are to be resolved through arbitration; so, the argument goes, these parties have agreed that the secondary boycott claim will go to arbitration. Similarly, claims of violation of the Fair Labor Standards Act might wind up being processed through arbitration under an all-disputes arbitration clause. Arbitrators, therefore, had better pull out their U. S. Codes and start boning up on a variety of federal statutes which may be coming before them for interpretation under the all-disputes provisions.

I think in the long run Title VII is not one of those statutes that is going to be held to be the exclusive province of an arbitrator, largely because many Title VII disputes are not disputes between the two parties to the agreement, the union and the employer, but rather are disputes between the employees on the one hand and unions and employers on the other. It seems to me inconceivable that the Supreme Court is going to say that Title VII problems will be subordinated exclusively to the arbitration process, no matter what the contract says.

But the kinds of disputes which are the traditional disputes between employer and union, whether they arise under the Fair Labor Standards Act, the secondary boycott provisions of the NLRA, or other statutes, may indeed wind up being arbitrable disputes under contract clauses making all disputes between the parties arbitrable.

Comment—

MR. EMANUEL DANNETT: "The passage of Title VII of the Civil Rights Act of 1964," Professor Gould has observed, "has helped place employment discrimination law on a collision course with some of the basic principles of the labor legislation which preceded it." I would add that Title VII is also on a collision course with the "rule of universal law pervading every well-regulated

[1] *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, 76 LRRM 2161 (1971); *Iowa Beef Packers* v. *Thompson*, 405 U.S. 228, 20 WH Cases 488 (1972).

system of jurisprudence" [1] that a party should not be subject to litigious harassment by being compelled to retry the same issue in multiple fora.

The question is to what extent there should be an accommodation between, on the one hand, Title VII rights and, on the other, the right of a party who has received a favorable arbitration award not to be compelled to relitigate the same issue in a Title VII judicial proceeding. Professor Gould would permit accommodation of such rights by having the courts defer to arbitration awards, but only under unduly circumscribed conditions, and, according to Professor Gould, "the court and the EEOC must be extremely careful in applying any kind of *Spielberg* rule." I will endeavor to show, first, that his deferral rule is founded upon discrimination cases to which one might well apply the well-known maxim that bad cases make bad law; second, that his narrow referral rule is predicated, in part, upon an overly restrictive reading of the authorities and, finally, upon his basic mistrust of the impartiality of arbitrators.

PROFESSOR GOULD'S ILLUSTRATIVE CASES

Spann v. *Kaywood Div., Joanna Western Mills Co.*[2] is an example of one of the extreme cases heavily relied upon by Professor Gould. There the employer knew of the existence of two notes written by the plaintiff, a black employee, to white women, only because the notes were brought to the employer's attention by the union president. Although the union contested plaintiff's discharge, it was patent that the union position was ambivalent, to say the least. After the arbitrator reinstated the plaintiff, albeit without awarding back pay, the plaintiff brought a Title VII action in the federal court to secure a back-pay judgment. The court of appeals affirmed the dismissal of the action on the ground that "where all issues are presented to bona fide arbitration and no other refuge is sought until that arbitration is totally complete, *Dewey* [3] precludes judicial cognizance of the complaint." [4]

Needless to say, the union's action in *Spann* in first fingering the plaintiff and then processing his discharge to arbitration

[1] 50 C.J.S. § 592.
[2] 446 F.2d 120, 3 FEP Cases 831 (6th Cir. 1971).
[3] *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 2 FEP Cases 687 (6th Cir. 1970), *aff'd by equally divided court*, 402 U.S. 689, 3 FEP Cases 508 (1971).
[4] 446 F.2d at 123.

raises serious doubt as to the union's good faith and as to the validity of the award. In an emotionally aroused moment one would applaud duplicative proceedings which would assure the plaintiff in *Spann* of a complete and fair hearing.

However, the situation in *Spann* would hardly justify the adoption of a deferral rule based upon the assumption that collusion between employers and unions is normative, rather than exceptional, conduct. Professor Gould's insistence that no award should foreclose independent judicial determination of a Title VII claim unless the arbitrator is selected from a panel, such as that furnished by the Center for Disputes Settlements of the American Arbitration Association, leads one to conclude that the requirement is predicated upon Professor Gould's pervasive fear of collusion between unions and employers in discrimination cases.

Further, just as Professor Gould has succeeded in citing an extreme case which might under some circumstances justify duplicative proceedings, it is not difficult to find instances in which employees who have asserted frivolous claims allegedly grounded upon Title VII violations should be entitled to a single trial only of their claims.

Thus, I can mention from my own experience the following case: An employee, who was discharged for having been absent from work on 17 successive Fridays without notice or excuse and who refused to have his shift changed so that Friday would become his day off, was discharged for cause. Pursuant to the terms of the collective bargaining agreement, which contained the employer's undertaking not to discriminate against an employee by reason of race, sex, or creed, the matter was submitted by the employee's union to arbitration. The arbitrator, rejecting the claim that the discharge was for discriminatory reasons, sustained the discharge. The employee thereupon filed an unlawful discrimination charge with the EEOC, which in turn dismissed the charge. The employee then commenced a federal court action seeking relief for the alleged violation of his Title VII rights.

Since the arbitrator in my case had not been selected from a panel of the Center for Disputes Settlements, the award would not bar the employee from litigating the issue. I might pose the rhetorical question: How much social waste and litigious harassment should the public and an employer be saddled with in order to satisfy the whims of an unreasonable employee?

With these comments, I turn to the cases relied upon by Professor Gould for his conclusion that there exists a strong policy against interfering with federal court jurisdiction of employment discrimination claims.

THE AUTHORITIES RELIED UPON BY PROFESSOR GOULD

Professor Gould, citing decisions of the Second, Fifth, Seventh, and, to some extent, Sixth Circuits, reaches these conclusions:

First, that the Second Circuit holds that an employee who has entered into a settlement with an employer in a proceeding other than one before the EEOC is not barred from pursuing other remedies, including a Title VII judicial proceeding.

Second, that the overwhelming weight of authority is to the effect that an employee who seeks arbitration under a collective bargaining agreement is not required to elect between arbitration and a Title VII federal district court action.

Third, that an employee whose charge of racial discrimination is not sustained in arbitration is not barred by either the doctrine of res judicata or collateral estoppel from pursuing a Title VII remedy in the federal district court.

THE EFFECT OF A SETTLEMENT UPON A TITLE VII PROCEEDING

Professor Gould properly observes [5] that:

> "Title VII encourages the voluntary resolution of employment discrimination claims without resort to litigation. 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."

However, he cites *Voutsis* v. *Union Carbide Corp.*[6] as a holding for the proposition "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*" [7] (emphasis added). Professor Gould then asks: [8] "Might one conclude that the same rule is to apply in connection with an

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[5] Gould, "Judicial Review of Employment Discrimination Arbitrations," in *Labor Arbitration at the Quarter-Century Mark,* Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1972), 120.

[6] 452 F.2d 889, 4 FEP Cases 74 (2d Cir. 1971), *cert. denied sub nom. Union Carbide Corp.* v. *Voutsis,* 92 S.Ct. 1768, 4 FEP Cases 754 (1972).

[7] Gould, *supra* note 5 at 120.

[8] *Id.* at 121.

individual's consent to have his grievance processed and heard in arbitration?" He answers his query with the observation that 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." [9] Nevertheless he concludes that "the applicability of *Voutsis* to the arbitration arena is not entirely clear at this time." [10]

It is perhaps well that he questions the teaching of *Voutsis*. Decisions dealing with settlement agreements uniformly held that the making of the settlement agreement foreclosed the employee from pursuing proceedings under Title VII.[11] The parallel between a settlement that the grievant accepted and an arbitration award resulting from his consent to submit his grievance to arbitration is indeed a close one, and it would follow that the settlement rule should apply, with equal force, to the arbitration award. Such a result would most assuredly be consistent with the policy of Title VII to encourage the voluntary resolution of discrimination claims.[12]

It would therefore be astonishing to find that the Second Circuit holds that even an agreed-to settlement does not preclude an employee from bringing a Title VII proceeding. But we need not be astonished. *Voutsis* does not stand for any such proposition.

There the plaintiff had entered into a purported settlement agreement in a New York State Human Rights proceeding. Under that agreement plaintiff agreed to accept employment in a nonexempt, nonroutine administrative position with higher pay points and a higher salary level conforming to similar assignments with Union Carbide. Commenting on this agreement, Circuit Judge Oakes observed [13] that the "vague 'settlement' left open a number of questions—e.g., what is a 'non-routine administrative position'—which have yet to be finally answered in the

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[9] *Id.* at 121.

[10] *Id.* at 121.

[11] See, e.g., *Parham* v. *Southwestern Bell Tel. Co.*, 433 F.2d 421, 2 FEP Cases 1017 (8th Cir. 1970); *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 2 FEP Cases 506 (5th Cir. 1970); *United States* v. *Hayes Intl. Corp.*, 415 F.2d 1038, 2 FEP Cases 67 (5th Cir. 1969); *Rosen* v. *Public Serv. Elec. & Gas Co.*, 409 F.2d 755, 1 FEP Cases 708 (3rd Cir. 1969); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 1 FEP Cases 364 (5th Cir. 1968).

[12] See e.g., *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498, 1 FEP Cases 328 (5th Cir. 1968).

[13] 452 F.2d at 893, 4 FEP Cases at 76 (2d Cir. 1971).

New York State proceedings, despite two appeals and an elapsed time of more than two years." [14]

The court of appeals rejected the employer's claim that plaintiff, by entering into the "settlement" agreement, had elected to pursue a nonfederal remedy exclusively, with this final comment:[15] "Suffice it to say here that *no settlement* has been effectuated with or without EEOC consent" (emphasis added).

Thus, contrary to Professor Gould's observation, *Voutsis* did not pass upon the question as to the effect of a settlement agreement on a Title VII proceeding, since the court there was of the opinion that no settlement had in fact been effected. *Voutsis* hardly supports Professor Gould's view that there is a strong policy against interference with federal court jurisdiction in Title VII proceedings.

THE ELECTION-OF-REMEDY CASES

I concur in Professor Gould's view that every case that has passed upon this issue, with the exception perhaps of *Dewey* v. *Reynolds Metals Co.*,[16] supports the proposition that an employee who seeks to arbitrate racial or sex discrimination issues will not be compelled to elect between the arbitration and his Title VII judicial remedy. Despite my distaste for duplicative proceedings and the cost they impose upon the public and the employer of having the issue litigated again and again, I think the courts have properly rejected the election-of-remedy defense, not because of any strong policy against interference with Title VII proceedings in federal courts but because it would be inequitable to require an employee at his peril in advance of arbitration—and without knowledge as to whether the arbitral determination will be based on standards compatible with Title VII—to make an election between arbitration and a Title VII proceeding.

RES JUDICATA OR COLLATERAL ESTOPPEL

Professor Gould does not deal directly with the question of res judicata or estoppel. However, I believe it is his view that the Second, Fifth, and Seventh Circuits would not apply the doctrine of res judicata and collateral estoppel to an arbitration award. As

[14] *Id.*
[15] *Id.* at 894; 4 FEP Cases at 77.
[16] *Dewey* v. *Reynolds Metals Co.*, *supra* note 3.

the Fifth Circuit noted in a Title VII case, "[t]o the federal courts alone is assigned the power to enforce compliance with section 703 (a) . . . ." [17]

But Professor Gould is not certain as to the continued viability of the Sixth Circuit's holdings in *Dewey* v. *Reynolds Metals Co.*[18] and its progeny (*Spann* v. *Kaywood Div., Joanna Western Mills Co.*[19]), which did give collateral estoppel effect to the arbitration awards in those cases. It is my reading of those cases, especially in the light of that court's recent decision in *Thomas* v. *Carey Mfg. Co.*,[20] handed down on March 3, 1972, that the viability of the estoppel rule has not been undermined in the Sixth Circuit.

This is clear from the following explanation of *Spann* given by the Circuit Court in *Newman* v. *Avco Corp.*: [21]

> "In that case not only was there an arbitration award, but the award largely favorable to Spann was accepted by him. *Equitable 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 backpay which the arbitrator denied*" (emphasis added).

Does the refusal of a court to give res judicata or collateral estoppel effect to an arbitration award *as a matter of law* support Professor Gould's conclusion as to the existence of a strong policy against interference with federal court jurisdiction in discrimination cases? I believe not, since refusal would not in a proper case prevent the court from exercising its discretion to defer to an arbitral board.

DISCRETIONARY POWER TO DEFER TO AN ARBITRATION AWARD

Professor Gould, in focusing attention primarily upon the election-of-remedy issue, has dealt—but ever so lightly—with what I consider to be the basic question, namely, whether the court, in the exercise of its discretion, should refuse to permit plaintiff to have two—or indeed several—bites at the same apple and to accept the benefits of an arbitration award if he wins, but to

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[17] *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303, 310, 2 FEP Cases 725 (5th Cir. 1970).
[18] *Dewey* v. *Reynolds Metals Co., supra* note 3.
[19] *Spann* v. *Kaywood Div., Joanna Western Mills, Inc., supra* note 2.
[20] 455 F.2d 911, 4 FEP Cases 468 (6th Cir. 1972).
[21] 451 F.2d 743, 748-749, 3 FEP Cases 1137 (6th Cir. 1971).

reject it and bring a Title VII proceeding if he loses. When the decisions cited by Professor Gould are reexamined, it is clear that those cases hold that the court has such discretionary power.

For example, in *Bowe* v. *Colgate-Palmolive Co.*,[22] the Seventh Circuit, in holding it was error not to permit the plaintiff to prosecute his claim both in court and through arbitration, added that such proceedings would, however, be barred if duplicate relief "would result in an unjust enrichment or windfall to the plaintiffs." [23] There is no reason why the Seventh Circuit might not reach the same result as to a plaintiff who had a fair hearing in arbitration and had an adverse award rendered against him based on standards compatible with a Title VII claim.

Again, in *Hutchings* v. *United States Industries, Inc.*,[24] the circuit court, after rejecting the election-of-remedy theory, specifically reserved for future litigation the question whether "a procedure similar to that applied by the Labor Board in deferring to arbitration awards when certain standards are met might properly be adopted in Title VII cases." [25]

In the Sixth Circuit, to which I have already adverted, in view of *Dewey* and the cases following [26] applying the equitable-estoppel doctrine, I believe it is fair to conclude that that court would bar a Title VII judicial proceeding brought after an adverse arbitration award where *Spielberg* criteria have been complied with.

In connection with the Second Circuit decision in *Voutsis* v. *Union Carbide Corp.*,[27] it suffices to note that court's careful reference to "as a matter of law" in the following quotation: "We also agree with the conclusion of the Fifth, Sixth and Eighth Circuits that the doctrines of *res judicata* and *collateral estoppel* do not bar appellant *as a matter of law*" (emphasis on last words added). [28]

Finally, it is noteworthy that our prestigious Chief Judge Fuld of the New York Court of Appeals, in discussing the question as

[22] 416 F.2d 711, 2 FEP Cases 223 (7th Cir. 1969).
[23] *Id.* at 715.
[24] 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970).
[25] *Id.* at 314, n. 10.
[26] See, e.g., *Thomas* v. *Carey Mfg. Co.*, 455 F.2d 911, 4 FEP Cases 468 (6th Cir. 1972); *Newman* v. *Avco Corp.*, 451 F.2d 743, 3 FEP Cases 1137 (6th Cir. 1971); *Spann* v. *Kaywood Div., Joanna Western Mills Co., supra* note 2.
[27] 452 F.2d 889, 4 FEP Cases 74 (2d Cir. 1971).
[28] *Id.* at 894, 4 FEP Cases at 77.

to whether tenured school teachers who challenged disciplinary action taken against them could pursue both an arbitral remedy contained in the collective bargaining agreement and also a court remedy granted by the New York Education Law,[29] had this to say as to such possible duplicative remedies:

> "We would but add that there is no basis for the fear expressed that to permit the grievance to go to arbitration will enable the employee to appeal—pursuant to section 3020-a, subdivision 5, of the Education Law—to the arbitrator *after* he has lost before the commissioner or the court or, conversely, the Commissioner of Education or the Supreme Court *after* he has submitted to arbitration and lost before the arbitrator. Once the controversy is heard and a decision arrived at *either* by the arbitrator *or* by the commissioner *or* by the judge, that is the end of the matter."

(A footnote to the above quotation states: "We assume, of course, that the arbitration proceeding is fair and regular and free from any procedural infirmities that might invalidate the award. [Cf., e.g., *Spielberg Mfg. Co.*, 112 NLRB No. 1080].")

In short, the courts recognize that they possess the discretionary power to defer under appropriate circumstances to an arbitration award, and, to that extent, they have recognized that principles of equity require interference with their power to decide Title VII cases. I will now consider the circumstances under which the court should exercise its discretion.

CRITERIA FOR DEFERRING TO ARBITRATION AWARDS

Currently, 69 percent of the collective bargaining agreements in the nation contain explicit "no discrimination" clauses.[30] Further, over 94 percent of collective bargaining agreements have a mechanism for the arbitration of disputes through the selection of arbitrators by either the American Arbitration Association or federal or state mediation boards.[31] In addition, the EEOC has over 20,000 cases pending before it,[32] and its backlog is apparently ever increasing.

Arbitration provides a ready-made forum for the handling of these cases and has many advantages over court proceedings. It

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[29] *Bd. of Educ. of Union Free Schl. Dist. No. 3 of the Town of Huntington* v. *Assoc. Teachers of Huntington, Inc.*, 30 N.Y. 2d 122, 331 N.Y.S. 2d 17 (1972).

[30] *Basic Patterns in Union Contracts* (7th ed., Washington: BNA Books, 1971).

[31] U.S. Dept. of Labor, *Arbitration Procedures in Major Collective Bargaining Agreements* 5, Bull. 1425-1426 (1966).

[32] 5 EEOC *Ann. Rep.* (1971).

provides an expeditious method of relief; it prevents fragmentation of the union's representation by permitting the employee to be represented by his union in all of his dealings. In addition, since most discrimination cases deal with matters such as layoff, promotion, discharge, and inequities as to rates of pay, arbitrators who have traditionally handled these problems are possessed of a well-honed expertise to deal with them.

I submit that while Title VII is indeed a civil rights act, it should be accommodated to the established body of federal labor law, and its interpretation should, therefore, be tailored to satisfy both its intended effect and its realistic application. The court can give effect to announced congressional intent by adopting a system of administration which courts help define and which the Supreme Court has made a fundamental part of national labor policy.

I believe that the application of the *Spielberg* [33] analogue to Title VII cases will furnish an effective method of dealing with the multiple proceedings present in the situation under discussion. Under the *Spielberg* doctrine, the Title VII rights of an alleged discriminatee would be fully safeguarded since the courts would defer to the arbitration award only where the award satisfied the following criteria:

1. The factual issues before the arbitrator are identical with those before the court.

2. The hearing and evidence presented must deal adequately with all factual issues.

3. The arbitrator must have decided the factual issues before the court.

4. Nothing in the arbitrator's decision is repugnant to the policies of the Act.

5. The arbitration proceeding was fair and regular and free from any procedural infirmities.

6. The grievant, if he sought to be represented by counsel of his own choosing, had been granted that right.

By recommending an adoption of the principle of deferral, I am not drawing an analogy between the NLRB and the EEOC

[33] *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

which, admittedly, is inappropriate, but I am recommending that the federal courts adopt a practical system of vindicating Title VII rights analogous to the system utilized by the NLRB in vindicating rights under the National Labor Relations Act.

Since my appearance before the National Academy, at which time the above recommendations for the application of the *Spielberg* analogue to Title VII cases were made, the Fifth Circuit, in *Ramon J. Rios* v. *Reynolds Metals Co.,* on September 20, 1972, held that a district court, in the exercise of its power under Title VII, may follow a procedure of deferral similar to *Spielberg* under the following limitations:

> "First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant."

There will, of course, be occasions when the arbitrator will be unable effectively to deal with a discriminatory practice as, for example, where there has been a studied pattern of discrimination, so that the application of a straight and racially neutral seniority provision of the collective bargaining agreement might perpetuate the discrimination.[34] In such a case, since the arbitrator cannot rewrite the seniority provisions without violation of his duty that his award must draw its essence from the contract,[35] the arbitrator either would have to refrain from rendering an award or would have to state in his opinion that the limits of his authority have prevented him from eradicating the discriminatory practice in the manner called for by the authorities. In the latter case, the award would not be a bar to the Title VII

[34] See, e.g., *Quarles* v. *Philip Morris, Inc.,* 279 F.Supp. 505, 1 FEP Cases 260 (E.D. Va. 1968); see also *Dobbins* v. *Local 212, Int'l. Bro. of Elec. Wkrs.,* 292 F.Supp. 413, 1 FEP Cases 387 (SD. Ohio 1968).

[35] *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 46 LRRM 2423 (1960).

judicial proceeding since it would be repugnant to the policies of the Act.

Professor Gould, as noted, also suggests a modified *Spielberg* procedure. His criteria, however, differ from those proposed by me in the one major respect to which I previously adverted: He would require the arbitrator to be selected from a source which specifically promotes use of arbitration for problems involving race, creed, or sex. Since few arbitration provisions in collective bargaining agreements specify the selection of arbitrators through such a tribunal, Professor Gould's proposal would, as a practical matter, prevent the resolution of discrimination cases through the arbitral process. Thus, Professor Gould's proposal, if followed, either would destroy the utility of the arbitral process as a means of resolving such discrimination cases, or would mean that employers would be the butt of a new form of discriminatory practice, namely, one in which the employer, if he loses in arbitration, would be bound by the award, but the employee, if he loses, would be free to relitigate the same issue. It is ironic that a statute enacted to eliminate discriminatory practices against one or more groups should be interpreted in such a manner as to create discriminatory practices against other groups.

Professor Gould's insistence on the utilization of his method for the selection of an arbitrator stems from his lack of confidence in the integrity of arbitrators. Since I do not share his fears on that score and, in any case, since the vast majority of arbitration provisions would have to be rewritten in order to comply with his proposal, I would continue to leave the selection of arbitrators to traditional tribunals.

SEPARATE TRIAL OF DEFERRAL DEFENSE

In any case which is ripe for the application of the deferral defense, I would suggest that Rule 42 (b) of the Federal Rules of Civil Procedure [36] be invoked by the employer, and that he seek a separate trial with respect to that defense. I believe that the court, in the proper exercise of its discretion, would order a

[36] "(b) *Separate Trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

separate trial of that issue since such a trial, in the words of the Rule, "will be conducive to expedition and economy," and, if the defense is sustained, will obviate the necessity for retrying all of the discrimination issues.[37]

Comment—

MR. STEPHEN REINHARDT: I find myself in almost total disagreement with all of the previous speakers. First, I think we all owe a debt of gratitude to Professor Gould for raising somewhat dramatically what is probably the most important issue which confronts this Academy and attorneys practicing in this field. And I might say that not only do I disagree with the previous speakers, but I probably disagree with many of our clients. The views I will express today should not be taken as the views of labor lawyers in general or labor unions in general. These are my personal views on what I consider to be an extremely critical and crucial issue for all of us.

I think the question of whether arbitration and arbitrators will survive as a significant part of solving the problems which truly confront employers and unions will depend on how we handle the issues raised by Professor Gould. If you have read some of the recent decisions in the field of equal employment opportunity, I think you will see that the changes that must be brought about in industrial practices are far broader and far wider than most of us conceived when the Act and even the amendments were passed.

The recent decision this March in *Rowe* v. *General Motors* from the Fifth Circuit held that the practice of promoting individuals on the recommendation of foremen was in itself discriminatory, regardless of the intent or efforts of the company, where by merely looking at the results it is established that an insufficient number of minority group members are being promoted. Tying that decision eliminating the right to promote based on personal recommendations with the previous *Griggs* decision eliminating the use of the classic tests for such promotions, you will find that the courts are making, or ultimately will be making, the

[37] There is ample precedent for the separate trial of threshold issues in the federal courts. See, e.g., *Seaboard Terminals Corp.* v. *Standard Oil of N. J.*, 30 F.Supp 671 (S.D. N.Y. 1939) (statute of limitations; complex antitrust matter); *Metal Film Co.* v. *Melton Corp.*, 272 F.Supp. 64 (S.D. N.Y. 1967) (patent validity; infringement action); *Bowie* v. *Sorrell*, 209 F.2d 49 (4th Cir. 1953) (validity of release); *Sogmose Realties, Inc.* v. *Twentieth Century Fox Film Corp.*, 15 F.R.D. 496 (S.D. N.Y. 1954) (validity of release; complex antitrust matter).

test of discrimination, whether or not a sufficient number of minority members find their way into employment and into the promotion line. I suspect the courts will ultimately require that the percentage of minority group employees be basically in line with the percentage of those persons in the population. The court decisions are going to cause a basic change in promotion practices, employment practices, and in the way companies, unions, and arbitrators view these problems.

I think the entire subject not only of race discrimination but also of sex discrimination is the key issue which confronts society, and it is the key issue which confronts employers and unions. I don't think that we are even beginning to solve that problem through the standard, traditional methods, and certainly we are not beginning—no matter how well motivated arbitrators may be—to solve that problem through the arbitration process. It is my belief that it is in the interests of employers, unions, and arbitrators to see that that problem is solved by making the initial effort to solve it through the private process, and that only when that process does not solve the problem should it go to the courts.

This does not mean, however, that I would eliminate the party's right to protect his basic constitutional and civil rights in the most effective manner by eliminating his right to judicial review. It does mean that I believe the initial effort must be made in the private sector and by arbitrators, and that arbitrators must be given the initial authority to resolve these issues properly.

I think we have to look at the problem in perspective—in the perspective in which the sex/race issue now arises in our society and what it will mean in housing, busing, education, and employment. And I think we also have to look at it by comparing the rights of the worker under a union contract with the rights of the worker who does not have a union contract. I think we have to approach this entire problem of discrimination in employment in a manner totally different from the way we approach the problem of the other ordinary rights of a worker, which do not reach the level of constitutional and civil rights. Only in that perspective can we develop the needed approach for handling discrimination cases and for making the arbitration process survive.

It is very simple, I think, to see the difference when we start

from the premise that the ordinary worker who is discharged or punished in some manner for a non-civil-rights reason may, if he has a collective bargaining agreement, go to arbitration and have the issue of just cause determined by an arbitrator. His remedy arises because of that collective bargaining agreement which protects him against unfair treatment. The ordinary worker who does not have a collective bargaining agreement may be discharged for any reason; there need not be just cause. So the contract remedy, or the contract right, is the essential right of the worker in the ordinary non-civil-rights case.

In the discrimination case, the worker who does not have a collective bargaining agreement has a statutory right to have the courts decide whether his civil or constitutional rights have been taken away from him because of his race, sex, color, or creed. So, too, does the worker under a union contract. He does not have greater rights than the unorganized worker; he has the same rights. I don't think that the union worker's rights can be diminished by telling him that he does not have the right to go to court to enforce his constitutional rights merely because he has a collective bargaining agreement. I think what he has is a basic right to have his civil rights vindicated in the courts of this land.

Some very serious and difficult questions are posed as to what an arbitrator may do, and we may have to divest ourselves of some hoary notions, such as two bites of the apple, sanctity of contract, and some of the classic, old legal arguments that are really not applicable to the revolution that is taking place in our society. Either the arbitrators are going to be part of that revolution, or else arbitration will recede and become insignificant as workers' rights are determined in the courts instead of by the parties in the private sector. I think there is indeed a place for arbitration in that revolution, and I think that management and union lawyers as well as arbitrators are going to have to find what that role will be, even if it means ridding ourselves of these outmoded, traditional legal concepts.

The first issue that arises is the question of whether an arbitrator may or should take into account a federal statute in deciding what a worker's rights are—whether a man has been discriminated against in violation of the Civil Rights Act or in violation of the Constitution. Regardless of the language of the collective bargaining agreement, I think we must find a rationale for saying

that the arbitrator must take the law into account. There are a number of reasons for reaching this conclusion. The first is the general reason I gave earlier—that it is the only accommodation that will make arbitration meaningful, will give it a role, and will preserve its utility.

The second reason is that I think it is demeaning and degrading to the arbitration process to ask an arbitrator to issue an award that is in violation of the Constitution or in violation of a man's basic rights under the law and which must be invalidated by the courts. I think that just as the courts refuse to enforce restrictive covenants, they will not enforce awards which violate an individual's fundamental rights—and an arbitrator should not be asked to uphold a discharge that is based on a violation of a man's constitutional rights, whether or not the collective bargaining agreement contains a nondiscrimination clause.

The easy rationale, and there could be others, but if you need a rationale, it is that every contract contains by implication a provision that the laws of the land shall not be violated by that contract. A contract is written in light of the laws of the land. In looking to the laws of the land, the arbitrator may therefore be said to be merely interpreting the contract, and if it makes lawyers or arbitrators happy to look for that kind of rationale to justify a necessary act, then it is satisfactory to look to that rationale. To me, the rationale is not that important. I think the result is inevitable if arbitration is to be meaningful.

Mr. Gottesman's argument that the reason for finality in arbitration awards is that the parties have entered into a contract, they have agreed upon a final decision by an arbitrator, and they should be bound by it, is very appealing and may well be correct in the normal case. The parties have agreed to a final determination by an arbitrator and they should be bound by it. That cannot be the case, however, where the principal party in interest is a person whose fundamental statutory or constitutional rights are at stake, where those rights do not arise under the contract but arise under the law. Again, that shows us a reason for treating the result differently.

There are a number of elements which have been mentioned so far which the courts have considered in the very muddy, muddled, and unsatisfactory decisions that have been discussed today. When should an arbitration decision be a bar to a civil

rights action? When should it be given weight? How much weight? Most of the elements the courts are considering are totally irrational and meaningless.

The element of whether there is a nondiscrimination clause in the contract is one. Another is the question of the timing of the filing of the charge. Some courts have said if you file the charge at the same time you go through the grievance procedure, then you have the right to go to court. If you file the charge at some later date, you don't have the right to go to court. The allegation of lack of fair representation has been used as a reason to give a court jurisdiction. There are others also.

The worst application of irrelevant elements, I think, is found in the *Spann* decision's application of the estoppel principle. The reasoning in that case is totally irrational. The court said that because (1) a man was discriminated against, (2) the arbitrator found that he had been discriminated against and was entitled to his job back, and (3) the individual returned to his job, even though the arbitrator denied him back pay, that he was barred from his right—his legal right—to receive the back pay which he lost as the result of unlawful discrimination.

Now, ordinary contract law requires that a man who is discharged mitigate his damages, and that he obtain employment, and it provides that if he fails to take a job he is acting improperly and his damages will be reduced. Here the man took a job, the very job he was entitled to, as soon as he could be reinstated following the arbitration award. He did so even though the arbitrator failed to award the back pay to which he was entitled. What the *Spann* case seems to say is that you should take a job anywhere you can find one, even at a lesser rate of pay, but don't take the job you're entitled to and don't really mitigate your damages by going back to that job unless you're willing to waive your economic rights and suffer the consequences of the estoppel doctrine.

This is the kind of reasoning that runs through many of the decisions involving the relationship between Title VII and arbitration. This is because the courts are fiddling around with outmoded rationales and are unwilling to recognize that we are facing different problems under Title VII than we do in the normal grievance case. We must examine this problem anew and establish sound and rational principles. We have to come to grips

with the basic problem of what will be the role of arbitrators and what will be the role of courts in accommodating the arbitration process to the resolution of disputes involving fundamental or constitutional rights, and we must find intelligent solutions.

The two management representatives who spoke here today spoke persuasively about the weight to be given arbitrators' awards and, in fact, spoke more favorably about the weight to be given arbitrators' awards than is customary among management attorneys. Neither one, however, discussed the question I just raised—the question of whether the arbitrator should look beyond the contract and should consider federal law if there is no nondiscrimination clause. Is that weight to be given to the arbitrator's award if he has merely interpreted the contract and has not applied the law? Obviously, that could not be the case. A man's right under federal law cannot be taken away by an arbitrator who merely interprets the contract.

We really can't discuss these issues in isolation. As to the question of the weight to be given the award, some courts have said, "We'll look at the arbitrator's decision and see if he has considered all these factors." But we can't discuss these questions without examining the entire arbitral, statutory, and judicial relationship. For if an award is to be given any weight at all in a Title VII case, it cannot be based solely on an interpretation of a contract but must also consider the effect and meaning of the law.

My own view—and unfortunately in 15 minutes I really cannot even expound the position adequately—is that for the reasons I have given previously, an arbitrator must, if he is to act in good conscience, if he is to act with any professional dignity, take the law into account, and he may not issue decisions which make him a part of the process denying a human being his civil rights and his constitutional rights. Just as the courts said in restrictive covenant cases, "We cannot be a part of the process of violating a man's constitutional rights," so an arbitrator cannot be a part of that process, even if he is privately employed by the parties.

But passing from the question of the necessity of the arbitrator's considering not merely the contract but also the law to the question of the weight to be given to the arbitrator's decision, it is my view that the courts should give less than, rather than more than, the *Spielberg* weight to an arbitrator's award in a case

involving a person's civil or constitutional rights. I think in such a case arbitration plays a healthy role in the process. I think arbitration may resolve and should resolve a large majority of the cases. But when that process does not resolve a case, when an individual is still deprived of his constitutional rights or his civil rights by final action of the parties in the private sector, whether that final action is a good-faith or a bad-faith decision of the company and the union, and whether it results from the arbitration process or not, when those rights are still violated in the private sector, then that individual must, under the law, have a right to vindicate his constitutional and civil rights in federal court.

I think I have as much respect for arbitrators as my fellow panelists and as most attorneys, and that's a great deal of respect. However, I do not believe that in a case involving constitutional or civil rights arbitrators are so godlike that their decisions must be above review. It may well be that in the ordinary contract interpretation cases, as Mr. Gottesman suggests, the contract may be finally interpreted by one man. In the ordinary case, the parties may say to each other, "Even if the arbitrator makes a mistake, let's make a deal that his mistake will be ours because we agreed to buy his final judgment." I don't think the parties are free to do that in a case involving an individual's civil or constitutional rights. Under our legal system, this is one place where it is too important to give one man the unreviewable power to make a final decision. That may be satisfactory for resolving commercial differences, or differences in the plant, but it is not satisfactory for deciding constitutional issues or issues of civil rights. In those cases, an arbitrator's decision cannot be finally binding on the party whose civil or constitutional rights are involved.

The only quarrel I believe a reasonable person could have with the position that the individual is entitled to review of a decision affecting his basic civil and constitutional rights is that he has, as the employers' attorneys have said, two bites at the apple while employers have just one. That may be an unfortunate consequence. It is not unique, however. There are cases, under our legal system, in which only one party has the right to appeal. In this case what the individual has at stake is a constitutional right, a civil right, a right affecting his basic human quality. The employer does not have a constitutional or a civil right at stake; he is

not deprived of a statutory right by the arbitrator's decision if it is adverse to him. What you have is the normal mistake or wrong interpretation of law or fact that an arbitrator makes. You do not have a deprivation of a basic and fundamental right, and therefore the employer is by no means in the same situation as the individual grievant.

Second, what you have in the case of an employer who loses an arbitration case in the civil rights field is a final decision by the parties through the normal process. You have reached the end of the normal private sector procedure. That decision has been adverse to the employer and his normal private right may have been decided incorrectly, as it may be in other cases. From the employer's standpoint, the grievance is no different from any other contract grievance. But it is not comparable to telling a man who has been given a federal right either under the statute or under the Constitution that he has been denied that right finally and irrevocably. The parties are in totally different positions; their rights are totally different and the effect upon them is totally different.

There may well be a certain apparent or surface inequity in allowing judicial review to persons deprived of their civil rights; but even if there is a surface or apparent inequity, when you weigh the interests involved, I would not concede that there is any real inequity. I think the conclusion is clear that the individual must have the right to judicial review of an arbitration award which purports to deny him his civil rights.

I said I would give less than the *Spielberg* weight. Without going into the weight I would give and without going into the reasons, in view of the fact that I am merely commenting and not making a major speech, I would suggest that the court be allowed to receive in evidence the arbitrator's award and give such consideration to that award as the court desires. But in no event should it be bound by that award or give undue weight to it.

My final remark will probably be more unpopular than anything I have said up to now. The problem arises with the suggestion I made that the arbitrator give consideration not just to interpreting the agreement, but that he, in fact, apply the law. That raises the question of the competence of arbitrators to perform that function. One of the speakers this morning made a suggestion that possibly the panel to be appointed should be

approved by the EEOC or by the Dispute Center. My suggestion—and I offer it to this body with great reluctance—is that there be a requirement that the arbitrator be an attorney.

In these civil rights cases, I think the interpretation and application of the law will be an essential and integral part of the arbitrator's function. Now I know arbitrators who are better lawyers than many attorneys I know. I know many attorneys who are not really as well qualified to apply the law as members of this Academy who are not attorneys. Nevertheless, those attorneys may some day be judges, and those arbitrators, if they are not attorneys, are not qualified professionally to be judges. This, again, may be unfortunate and may be an inequity, but there must be some professional requirements for one who wishes to serve as a judge or to interpret the law. With all due deference, I respectfully suggest that the minimum acceptable professional standard is the qualification to practice law.

I happen to believe in the standard that judges must be attorneys—and we don't have that standard in some lower courts in some states, and I think that's unfortunate. As a matter of fact, President Nixon came rather close to appointing someone who had never practiced law to the Supreme Court, and I think that nomination would have been even more disastrous than Haynsworth or Carswell. I think that judges, to be qualified, should be knowledgeable in the law, and the only objective test for knowledge in the law is legal training. It may not make you qualified, but it is the only objective standard we have.

As I say, I offer this reluctantly and with regret, but I think we must in many ways treat this area of employment discrimination as sui generis, and I think one of the ways in which we must treat this area sui generis is that arbitrators should be attorneys.

My only other regret is that I do not have an opportunity to comment on the subjects discussed this morning by the first two speakers. I thought both made excellent presentations, and they raised questions that I would like to consider with you. But in the limited time I had available, I felt that the real issue, the most important issue which we are facing together, is the one I should devote my time to. So I hope the other speakers from this morning's program will excuse my inattention to their subject matter.

Discussion—

CHAIRMAN BAILER: As I said at the opening of this session, before I call for or provide an opportunity for questions or comments from the audience, I am going to give each of the morning speakers an opportunity to make a brief reply if they wish.

PROFESSOR THOMAS G. S. CHRISTENSEN: My assignment was to speak on the disguised review of the merits of the award. The attention of this body is, I think, properly on another area. Like any good arbitrator, which assuredly I am, I have rendered my opinion on awards strictly within my submission.

MR. BENJAMIN C. ROBERTS: I guess that I ought to take a good example from Tom Christensen, and while he says it's not within his jurisdiction, I refuse to accede my authority, so I will defer to Bill Gould.

PROFESSOR WILLIAM B. GOULD: I want to comment very briefly on the remarks of two speakers, Mr. Gottesman and Mr. Dannett. First Mr. Dannett:

Fortunately, I happened to bring a copy of the *Union Carbide* opinion with me here today. I don't usually bring most of the opinions that I refer to in a paper with me to proceedings like this, but I just happened to think about this this morning and thought I might bring a copy of the paper along with me. And I'm very glad I did because Mr. Dannett's remarks about my paper are inaccurate.

I just want to quote from the *Union Carbide* one here. There was, contrary to what Mr. Dannett has just told you, a settlement entered into between the employee and the party that the employee filed the charge with. The court put the references to settlement in quotation marks because the court did not regard the settlement as complete inasmuch as it did not cover all aspects of the matter in dispute. The employee had agreed to settle and there was a settlement, but the settlement, said the Second Circuit, did not cover all aspects of what she was concerned with.

The court said, and I quote, ". . . Nor do we find that appellant elected to pursue state remedies exclusively by entering into a 'settlement' of August 12, 1969." There was a settlement on August 12, 1969, contrary to what Mr. Dannett has told you.

Appellant ". . . agreed to offer to the claimant within thirty days after the date of this stipulation the opportunity to accept employment in a non-exempt, non-routine administrative position with higher pay points and higher salary level." And the court went on to criticize this settlement as being inadequate—this "vague settlement," said the Second Circuit. So there was a settlement: point number one.

Point number two is that I never said in my paper that the courts would be deferring in all circumstances to arbitrators. Quite to the contrary. As a matter of fact, as I pointed out during my talk, the decision came down only two weeks ago, and the settlement remained intact. I never suggested that the courts would defer to arbitration awards under all circumstances.

Similarly, the Second Circuit had impliedly said that it would not permit an employee under all circumstances, in any case, to sign a settlement agreement and then come into court and challenge that settlement agreement. Impliedly, the court is saying that, because this settlement agreement is inadequate, you can come into federal district court; presumably there are some agreements which are so perfect and so adequate that they will preclude judicial inquiry at a later date.

Now the *Union Carbide* decision similarly said that there are factors—and I referred to them in my paper—which would argue for different results than the result arrived at. I really don't want to take too much time on Mr. Dannett because his points are not points of substance but just allegations that various portions of the material I gave you were inaccurate. He is hostile to my position, but he is really unable to grasp or come to grips with my view.

Mr. Dannett said that I say the only circumstances under which the selection of the arbitrator is appropriate is when the Disputes Settlement Center of the American Arbitration Association is utilized. I did not say that. I proposed that the AAA Center for Disputes Settlement be considered as one of many possibilities to cure what I regard as a basic defect in the arbitration process insofar as employment discrimination cases are concerned. I said that their selection process might be one alternative; the EEOC may want to maintain lists; the state agency may want to maintain lists. So that when Mr. Dannett sought to characterize my position as being one of relying upon the Center for Disputes

Settlement as a prerequisite—as valuable an institution as I see the Center as being—he was once again misreading my paper.

There were so many mischaracterizations here, both of case law and of my paper, that I really may want to recall the reference to *Spann* at a later point. Suffice it to say that the last speaker has just mentioned that *Spann* is a case involving an egregious injustice to the grievant in that case. *Spann* is a case where the union officials found out that a male black worker was sending notes to a white female co-worker; the white worker tore up the notes and threw them in the wastepaper basket. The union officials reached into the wastepaper basket, pieced the notes back together, gave them to the company officials, and said, "You ought to discharge this guy." The company discharged him, and the union said, "We represent you." And they go to arbitration.

The fellow said, "Listen, they didn't really press my claim very hard." And the arbitrator awarded reinstatement and said no back pay; he said that these notes that the black co-worker was sending caused certain discontent in the plant. Although apparently he does not specifically refer to this, he had the *Steelworkers* trilogy in mind which said that arbitrators are experts about the plant community because they take into account plant morale and productivity considerations in issuing their awards; and he said, "I'm going to take that into account here. These workers are pretty upset about these notes. No back pay."

The Sixth Circuit said, as I pointed out earlier, "Well, he was estopped from coming in and asking for more than reinstatement, which he has already accepted as a result of the arbitration."

Now on Mike Gottesman's opinions, which I think are very thoughtful ones, I want to touch on a few things which I was not able to deal with sufficiently in my remarks and some of which are not covered explicitly in the paper itself.

The basic problem, it seems to me, involved in employment discrimination arbitration is: Is it really worthwhile to spend time trying to reform the arbitration process so that it can effectively cope with employment discrimination cases? This seems to me the fundamental question here. Mike, I take it in most instances, is saying that the quest for some kind of arbitral reform in employment discrimination cases is essentially a futile one

except in a narrow set of circumstances, and that arbitration ought to proceed pretty much the way it has insofar as it involves essentially private machinery.

I believe it is important to have these cases channeled into the arbitration process for a number of reasons. I believe that the dockets are overcrowded; the grievance-arbitration machinery presents a relatively inexpensive, a less complicated, and still on balance, a relatively expeditious way to have the complaint resolved.

Second, it seems to me that the process, if it fails to respond to employment discrimination cases, has the effect of having the parties turn their backs on a class of complaints. Mike said that we had to look to see whether or not they were union-employer complaints or other kinds of complaints.

The fact is that both in and outside the racial context, the indication is that it is very difficult to determine whether it is a union-and-employer dispute or whether they are in league with one another—that is to say, whether there is a "make-believe" dispute. I think it is important to keep racial grievances in the mainstream of disputes. I think it is important not to set up a special kind of machinery to siphon off such disputes. Most disputes are resolved in the arbitration process.

I think the argument that the arbitration process is essentially private and that the only recourse for employees is the federal court is turning away in the same way that today people say that integration of the schools is an anachronism, and we should simply put more money into the ghetto schools and let them deal with their own problems. Let's let blacks and women go to the courts if they have a problem; let's forget about the arbitration process.

I think we must make the arbitration process responsive. I don't think that individuals who have complaints involving discrimination can sue and litigate every time they have a complaint. I don't think we can rely exclusively and entirely upon the litigation route. Therefore, it seems to me to become relevant and important to stress reform of the arbitral process and, once you stress reform of the arbitral process, it seems to me the burden is upon you to propose circumstances under which the arbitrator's award should be deferred to. I've tried to do that here today.

I don't mean to say that the criteria that I have cited should be the only criteria. For instance, suppose an arbitrator, dealing with a testing case or one of the past discrimination cases, did not anticipate the way in which federal law should be fashioned. It seems to me that on the question of law, at least, the courts are going to have to make some kind of inquiry and become involved to some extent although, as I say, if all the factors that I have advocated here today were incorporated into the arbitration process, I think those cases will then be very few indeed. So I think it is worth the candle.

I'm sanguine about the fact that we were talking about really fundamental reforms in the arbitration process. This noon I was discussing a case that I had where a black grievant came before me and alleged that he was improperly discharged and alleged racial discrimination as well. The case was completed; I said to the parties, "What about the allegations of racial discrimination?" "Well, we don't have anything on that." I said, "You made a very serious allegation here, against the company. I want to hear some evidence on it or I want it withdrawn."

There is reluctance, I think, on the part of arbitrators, generally speaking, to probe too deeply, to push the parties around too much, to tell them what to do, to ask them to produce witnesses, to break in and cross-examine. This is very much against the rules of the game.

I recognize that what I'm proposing in effect requires a reevaluation not merely of the matters that I have discussed today, but of many basic assumptions and attitudes in terms of how arbitrators conduct themselves—how they see themselves vis-à-vis the parties. I suppose, in essence, I am saying that a framework must be established whereby arbitrators—insofar as employment discrimination cases are concerned—see themselves as basically responsible to someone other than the parties.

I want to deal briefly with a couple of other things Mike said. He said that both blacks and whites have gained a lot through the arbitration process, and I certainly don't mean to suggest otherwise. I don't mean to suggest that the advent of the machinery of arbitration on the scene has not meant improvement in many areas for blacks. The scope of this paper is issues relating to discrimination claims, and I recognize that they often arise under

different rubrics. Both blacks and whites have benefited, and I don't think that that in any way detracts from the basic analysis.

The other point is that despite the fact that the steel industry, which I mentioned in my paper, has negotiated very important and beneficial collective bargaining agreement terms relating to testing, I have noticed in recent years a decline in the willingness of many unions to challenge through arbitration management-promulgated testing—and in some instances imposed by employers—whereas, if you look in the arbitration reports back a few years, the unions at one time litigated this (and I use the word loosely here in the arbitration context) to a very considerable extent. There is less of this now where testing is used widely in utilities, which is a prime example. Now the answer to that, I suppose, is that the unions lost many of those testing cases a few years back, and they feel as though there is precedent in many companies against them.

I would suggest to trade unions that they ought to run with the ball that they once ran with before blacks began to come into industry and before testing began to present problems of employment discrimination. Run with the same ball that they ran with 10 years ago when the work forces, as they were in utilities, were primarily white. Do the same sort of thing now that blacks are involved.

There are, indeed, new issues involved in employment discrimination, even though in many industries there is a good deal of arbitration precedent against the grievance involved.

MR. DANNETT: I want to reply briefly to Professor Gould's reading of *Union Carbide*. His paper says that the Second Circuit recently held that an employee cannot be deemed to have elected to pursue state remedies exclusively where she entered into a settlement with an employer in a state proceeding.

And then he observed that there was a settlement in the *Union Carbide* case. Let me read from the court of appeals opinion, which I also happen, by chance, to have with me. The court said, "Suffice it to say that no settlement has been effectuated with or without EEOC consent." I do agree with Professor Gould that if there is an incomplete settlement, it would not bar the Title VII proceeding; but if there was, then, in my opinion, it will bar the Title VII proceeding.

Again, I believe he has modified his position with respect to the question as to the panels from which the arbitrators are to be selected. His paper says that both the court and the EEOC must be extremely careful in applying any kind of *Spielberg* rule, and that the arbitrator should be selected from a panel which specifically promotes the use of arbitration in problems involving minority groups, women, and ghetto residents.

As I understand his present position, he is saying that is not necessarily absolute criteria; it may or may not be resorted to. If that is his position, I have no problem with it.

MR. LANDIS: I have only a couple of comments. One of them is that, as my colleagues from Philadelphia know, I'm a card-carrying civil libertarian, so that the fact that I defend the finality of arbitrators' awards in employment discrimination cases should in no way suggest to any of you that I don't view these issues as very important. The basic assumptions that I think have to be made in deciding cases of this kind, when you're going to give effect to an arbitrator's award, are that the issue was fully and fairly raised in the arbitration proceedings, fully and fairly litigated, and fully and fairly decided. In a case like that, I think that the courts should give effect to the arbitral award.

MR. GOTTESMAN: I got very excited when Bill Gould said my remarks were thoughtful—I think he said "very thoughtful"—and I was disappointed when he proceeded to characterize them and I discovered that they were not my remarks at all.

Bill characterized my position as being that the pursuit of discrimination claims through arbitration was futile. On the contrary, what I was trying to say was that we want most eagerly to encourage the processing of discrimination grievances through arbitration. It is precisely for that reason that we don't want any kind of election-of-remedies doctrine, such as *Dewey*, which would discourage minority employees from going to the grievance procedure out of fear that by doing so they would lose their right later to go through the federal procedure.

My disagreement with Bill is not on our mutual desire that such grievances go through the grievance procedure, but on our respective views as to how well arbitrators presently are doing in handling them. What I tried to say was that I think arbitrators on most questions, without the need for any great reformation of the process, are resolving those kinds of problems very well.

I isolated the one area where I think arbitrators are totally incompetent, under the institutional structure, to do anything, and that is where the contract itself contains provisions that are discriminatory. Unless we make arbitrators into an EEOC, we cannot expect them to declare the contract unlawful and rewrite it.

It is only in the limited area that I have suggested where we are going to have to use the federal agencies exclusively, and I think it would be undesirable to restructure the entire arbitration process to have arbitrators do that.

MR. REINHARDT: I, too, am a card-carrier, which does not affect my views of these legal issues. I am a card-carrying male chauvinist pig.

I have no personal sympathy with the extremes to which legislation which started as a bad joke by some southern members of Congress, in an effort to destroy the Equal Employment Opportunities Act, resulted in the inclusion of the sex amendment. Nevertheless, that is the law, and those changes are going to be made in our society, whether I like them or you like them or whoever likes them, and we all have to face up to the basic changes that are occurring in this society. If you go to General Motors, you will see those basic changes are going to have to occur throughout this society and throughout every plant in this country.

Either arbitrators are going to be a part of that—the process of arbitration is going to bring that about—or not, and we are going to fight all of this out in the courts. I would like to see it done through arbitration.

I believe Mr. Dannett stated earlier that 65 percent of the contracts contain nondiscrimination clauses—64 percent. Obviously, arbitrators, under those contracts, can decide whether a person is discriminated against. He will, therefore, apply federal law, whether he recognizes it or not; in order to decide whether you are discriminated against, you have to know what the federal law provides.

I do not see a different process required in cases where the contract fails to contain that express nondiscrimination provision. There is a nondiscrimination provision, either expressly or impliedly, and every employer and every union is bound by that nondiscrimination provision.

My disagreement with Mr. Gottesman is his marriage to the sanctity of contract concept which requires that we treat differently all contracts which omit a nondiscrimination provision. I think the number of contracts which contain such provisions will increase. Arbitrators are going to have to be applying federal law in order to interpret contract language.

I think sooner or later the real question is going to be whether arbitrators become gods whose decisions must be accepted by federal courts, or whether the rights here involved are such that a person whose constitutional rights are at stake should have the right to a federal trial. I think we must have a constructive, pragmatic attitude toward this. I agree wholly with Professor Gould that employers, unions, and arbitrators would be missing what is happening in this world if we abdicated this responsibility to the courts and failed to deal realistically with these problems. The only way we can deal with them is to eliminate these artificial distinctions, based on the wording of a contract, the time of the filing of the charge—all of the other theories that are being tentatively expressed in these courts of appeals decisions.

I hope the Supreme Court will deal with this issue and decide that a man's constitutional and civil rights mean what the law says they do, that the courts must enforce those rights when the parties or an arbitrator fails to, and I hope at the same time we will begin to do our job of developing a system which will recognize the problems and deal with them practically so that we can perform a valuable function of resolving the vast majority of these cases through the arbitration process.

CHAIRMAN BAILER: We are now open for questions and comments.

MR. SAMUEL S. KATES: My question is to Mr. Roberts. I want to know to what, if any, extent the state or federal courts have exclusive jurisdiction (a) to determine enforcement procedures in connection with interim orders of an arbitrator, such as subpoenas and discovery orders, and (b) with respect to the enforcement of the arbitrator's final award.

MR. ROBERTS: As I recall it, the only reference in the studied cases to the question of exclusive or concurrent jurisdiction in connection with the enforcement of arbitration procedures and awards was in the *United Aircraft* case dealing with the enforce-

ment of the subpoena duces tecum signed by the arbitrator. Federal district court judge Clarie's decision criticized the use of the state court form since the proceeding was under the federal statutes, but did not find it a bar to his enforcement of the subpoena.

MR. DAVID ZISKIND: The subject for today being judicial review, it is quite appropriate that we have some technical discussion of the law pertaining to the review of findings of fact and conclusions of law. Arbitration has been, and I think should be, influenced by such legal doctrines.

I would like to direct attention to a legal doctrine that has not been alluded to so far. It is a sound, technical, legalistic principle established by the U. S. Supreme Court; namely, that in cases involving the basic constitutional right of free speech, findings of fact can and will be reviewed by appellate courts. Even the U. S. Supreme Court will review the sufficiency of evidence to support findings of fact in cases involving the protection of free speech.

I concur with what Mr. Reinhardt has said to the effect that arbitration cases involving civil rights rest upon basic constitutional principles and that we need to apply new legalistic approaches to them. In arbitration proceedings in which constitutional civil rights are an issue, the findings of fact made by arbitrators should be reviewable by judicial tribunals. There is eminent Supreme Court reasoning and sound public policy for such a review.

MR. MARK L. KAHN: Just a couple of short comments.

Comment 1: I don't think it makes any difference, really, whether collective bargaining agreements contain a nondiscrimination clause. It seems to me that basically if we're in an area where the principle of just cause operates, either expressly in the contract or impliedly, I don't see how any arbitrator could accept discriminatory treatment under a just-cause concept.

Comment 2: But there is a big difference between that and saying that the arbitrator is obligated—lawyer or not—to interpret and apply the Civil Rights Act or other such legislation. While I often hear mentioned the question of whether or not the arbitrator is qualified, at least by virtue of being a lawyer, to render such judgment, I think we must also remember that there is a

question of the competence of the parties to argue that issue before the arbitrator in that particular forum at that time, and the obligation of the arbitrator to act on the basis of the record before him.

I happened to be the arbitrator, as Bill Gould mentioned this morning, in a little case in Grand Rapids where a man named Dewey was the grievant. Neither party mentioned the Constitution; no one mentioned the Civil Rights Act; and if the question had come up, they wouldn't have been competent—at least at that time—to discuss it in that forum.

I think it would have been abusing or overreaching my role to tell the parties that this case involved legal aspects of discrimination and I therefore demand that we recess the hearing and you come back before me later, and the union get itself a lawyer (which it did not have) and present all these things to me.

Dewey was fully entitled to take his case, under the Civil Rights Act, to court; I handled his grievance as a contract matter. The point I want to conclude on is this: There is a consequence that might result from the widespread adoption of Mr. Reinhardt's proposal, which is that it would reach into the conduct of arbitration itself: that the day will disappear completely when, as still sometimes occurs, we walk into the arbitration room and there is a director of labor relations here and a union representative there, and it's very informal and there are no transcripts, and even no lawyers; and we would obligate even the parties who don't want to do so, to formalize their structure, to make the process a much more burdensome and expensive one, and thus cause arbitration itself to become much less acceptable.

MR. REINHARDT: I'm glad you mentioned the just-cause problem because I failed to mention it, but you are quite correct, even without the nondiscrimination clause. You do reach those issues under a just-cause test in disciplinary cases.

I think I may be able to demonstrate the reason that you have to be a lawyer, or at least be sufficiently familiar with civil rights cases, by mentioning a decision which was handed down in Los Angeles by a federal court judge within the past month. It is one I happen not to be in agreement with but, again, that is irrelevant.

It was a hair case; a male grievant was discharged for having

long hair. Arbitrators have dealt with those problems for years on a contract basis. The federal judge in Los Angeles, however, based his decision on sex discrimination. He said if women can wear long hair, men can wear long hair. I have refused to make that argument in arbitration cases because I thought it was absurd.

Nevertheless, unless the decision is reversed, that happens to be the law—at least in Los Angeles. Therefore, a discharge for long hair cannot be a discharge for just cause because a man has a right under the law to wear long hair—and a discharge for that conduct violates Title VII. That is so whether or not there is a nondiscrimination clause in the contract. I cannot conceive of a rationale for saying that an employer has just cause under a contract to commit an act he is prohibited by law from committing. Nor can I conceive of an arbitrator construing the term just cause as justifying the discharge of a worker for exercising a right which the law protects and which the employer is expressly forbidden from infringing. That is how—as you point out—these issues really run together, the Civil Rights Act and just cause.

It would be best if such issues could be resolved in an arbitration. The question of the competence of the party's counsel is a legitimate question, also. If the procedures are not to be changed, it seems to me the answer is not to say that not only will the parties' counsel be incompetent, but also the arbitrator. The answer is that there is even more reason to have an attorney as an arbitrator.

My real answer to that would be that again I would treat these cases, for the reasons Dave Ziskind said, as cases involving fundamental rights, as cases which are in a different category, and the parties damned well ought to make the effort to spend a little more money, if necessary, to deal with cases involving people's fundamental rights.

Again, the final comment on your remark is that despite all of that, we may well not perfect the system, and for that reason as well, I would not give the same kind of *Spielberg* weight to an arbitrator's decision in a case involving a fundamental right.

I think whether we merely accept the decision into evidence for whatever purpose the judge wants, or whether we exclude it is not terribly important—even if we deprive the judge of the benefit of the arbitrator's wisdom. The arguments you make

support the view that as little weight as possible be given—rather than the weight given to the normal grievance case or the normal Board case where the *Spielberg* rule is involved.

I just think we should not try to apply concepts from nonfundamental rights cases and extend them to cases in this category. So my answer to you would be, "Yes, you are going to get into the law when you decide a just-cause case; you're going to have to be familiar with court decisions to know whether or not there is just cause, or you can't decide a just-cause case." You ought to be a lawyer; the parties should be represented by lawyers, and when you are all through, I think the man with the fundamental right is entitled to have his right determined under the law with a full review in federal court without giving undue weight to the views of the arbitrator.

MR. CLYDE SUMMERS: I do not want in any way to distract attention from what I think is the critical point made by Mark Kahn, for it is fundamental in any discussion of the role and competence to determine legal rights other than those growing out of the collective agreement.

However, I want to go back a few steps, for I am still stumbling at the threshold; I can't get past some rather elementary questions which grow out of the gospel of arbitration.

According to the gospel, arbitration is fundamentally a voluntary process, based upon the consent of the parties. It draws its life and force from the consent of the parties to submit their disputed rights to an arbitrator, and the arbitrator draws his competence and authority from the parties' selection of him to decide their dispute.

If I am not mistaken, Title VII of the Civil Rights Act creates rights in individual employees. The complainants are individuals who claim they have suffered from discrimination at the hands of the employer or the union or both. I find it difficult to understand how an arbitrator, being true to his faith of drawing his power only from the consent of the parties, can presume to determine an individual's rights under the Civil Rights Act without that individual's consent.

Although the union may carry its grievance to arbitration and have its rights adjudicated by the arbitrator, the individual has separable statutory rights. The first prerequisite for an arbitrator

to adjudicate the individual's rights is to obtain the individual's consent. If the individual genuinely and knowingly consents to have the arbitrator adjudicate his rights under the Civil Rights Act—that is, consent is given by all of the parties involved, employer, union, and individual employee—it seems to me that there is no obstacle to the arbitrator's deciding and disposing of the case. If they all are willing to rely upon his competence or incompetence to determine statutory rights, then he can decide and bind them.

The difficult question for me is: Where do we find the individual's consent to be bound by the arbitration proceeding—an arbitration proceeding in which he is not an advocate, over which he has no control, and before an arbitrator whom he did not choose? Where is the individual's consent which is the prerequisite for the arbitrator's authority?

There seems to be smuggled into the argument a proposition that the individual, by filing a grievance through the union, impliedly consents to the arbitration. By asking the union to enforce his contract rights, he consents to its enforcement of his statutory rights. Indeed, if the argument is followed, to obtain enforcement of his contract rights, he must surrender his right to have his statutory right adjudicated by the tribunal which Congress determined should be primary.

It is difficult for me to accept that because an individual seeks to have his contract rights adjudicated by the proper tribunal, he must be deemed to have consented to have his federal rights adjudicated by an arbitrator whom he did not choose and over whom he has no control. This seems to me to contradict the fundamental principle that arbitration is a voluntary process.

Much has been made of the argument that to allow the individual whose grievance has been denied in arbitration to sue in court is to give him two bites at the apple. This argument ignores the fact that there are two apples—the contract apple and the statutory apple—and the individual in suing is only claiming the apple which Congress has given him. Beyond this, it strikes me as whimsical, if not insensitive, in these civil rights cases for us to be worrying about some people having two bites at the apple when, for 200 years, they have never had anything but the cores discarded by other people.

MR. CHARLES R. VOLK: I want to address a question or a comment to my fellow male chauvinist pig, which is about all I could agree with in his presentation.

I wish to ask him to justify to me, as an attorney, his super-sanctification of a dispute involving a "civil rights matter," which is to say a discrimination case. First of all, he mentioned it in the light of a constitutional guarantee. Now unless they have changed the Constitution since I last viewed it, discrimination on some invidious purpose such as sex or race between private parties is to my knowledge not constitutionally prescribed, which is precisely why we had to have the Civil Rights Act of 1964.

I question severely how it is that we get such super-sanctification of rights arising under the Civil Rights Act of 1964, as opposed to rights arising under any other federal statute, such as the National Labor Relations Act. Of course, the Labor Board has substantially deferred to arbitration under *Collyer*. We have federal rights arising now under the Occupational Safety and Health Act, which an arbitrator may be called upon to rule on in the factual context of the shop.

I severely question this super-sanctification concept of anything that smacks of civil rights, and I ask, I guess whimsically at this late hour, how it is that an employee who is discharged because the foreman does not like his brother-in-law, is somehow less aggrieved than an employee who is discharged because somehow the foreman does not like the color of his skin?

MR. REINHARDT: I would like to answer your question seriously and without appearing disrespectful in any way. I think Professor Summers answered it in part in his closing remark. Seriously, there are orders of rights in our society. The Supreme Court, many years ago, in footnote 4 of the *Carolene Products* case, gave some order of the rights which were fundamental and essential and basic in our society.

I would hope you would be sympathetic to the difference between a man who loses his job because he's black, considering the rest of the things that that man has experienced in our society—the difference between that case and a man who has a fight with his foreman for some other reason.

There are different wrongs in our society; people suffer in different ways. I would hope you would yourself think through

the problem of what it means to be black in America, and that you would satisfy yourself concerning the evil of discrimination, whether it's by a President of the United States who tries to eliminate all we've done since the Supreme Court decision in the 1950s, or whether it's by a school board or by George Wallace, or whether it's by a foreman. That is a different order of wrong than the normal problem in an industrial plant.

I hope upon reflection you would reach that conclusion yourself.

MR. GOULD: On the question of the need for the Civil Rights Act and the fact that private parties in their private action do not violate the equal protection clause of the Fourteenth Amendment and other provisions of the Constitution, I think the idea behind incorporating constitutional principles in arbitration awards flows from two legal theories, one involved in *Black* v. *Cutter Laboratories*, a case decided by the California Supreme Court in the 1950s.

I won't go into the details of that case except to say that what is involved is the question of whether or not state court enforcement of a private arbitration award which, were it public, would violate the Constitution—and there was a question as to whether or not on the merits of what was done privately would have violated the Constitution—whether or not the state enforcement of that award amounts to state action within the meaning of the Constitution.

So that argument, I would assume, that is behind the principle supporting the incorporation of constitutional principles in arbitration awards would flow in part from that kind of state action theory. Also, of course, in *Lincoln Mills* the Court held that federal law is applicable to the interpretation of collective bargaining agreements in federal courts. If that be so, can there be, consistent with uniformity and harmony between the courts and the arbitrators, an arbitral fashioning of awards contrary to what the federal courts are commissioned to do as a matter of federal law under 301?

I think the argument behind incorporating the constitutional and federal law principle into arbitration awards can more than arguably flow from one of those two theories.

MR. HERMAN LAZURUS: I was somewhat concerned about the

position taken by the previous questioner, which reflects a rather narrow perspective of enforcements of collective bargaining agreements and perhaps does not recognize that variety of problems which might arise in the area of equal employment opportunities.

Just let me give you a brief statement of the facts in the case: An employer laid off a number of white employees, admittedly in violation of the seniority provisions of the contract, and retained his only minority employee. He was in compliance with the Philadelphia Plan, and if he had deviated from the course of action which he followed, if he had laid off the black employee, he would have been threatened with the impairment of his ability to get government contracts.

The union struck and refused to file a grievance; the employer filed a grievance. The Department of Justice, while recognizing the merits of the case, was so burdened with a volume of cases that it could not proceed with this case, although the papers were drawn.

It seems to me that under those circumstances, particularly in light of the Third Circuit decision in the *General Building Contractors* case involving the validity of the Philadelphia Plan, which held that where the provisions of the Philadelphia Plan cannot coexist with the provisions of the contract, the contract provisions must give way—under those circumstances, how can an arbitrator overlook the decision of the court and the element of equal employment opportunity?