## II. A MODEST PROPOSAL FOR THE IMMEDIATE FUTURE

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The dispute over whether *Alexander* v. *Gardner-Denver* [1] was right or wrong seems to have subsided; in any event, the highest court has ruled and we are all bound by its ruling. The larger question of the role of the arbitrator in the law-of-the-shop/law-of-the-land controversy continues unabated, and the question of how arbitrators should approach discrimination issues that involve both contractual and legal issues is an important component of that debate. Tomorrow morning's panel, which bears the rather ominous title of "The Coming End of Arbitration's Golden Age," will no doubt address the question of employment discrimination arbitration in the larger perspective of the future of arbitration in general. Our role today, as I understand it, is a more limited one: to discuss the future of arbitration of employment discrimination cases.

Various commentators have proposed major changes in the arbitration procedure for employment discrimination cases,[2] which may or may not be implemented in the indefinite future, to handle the discrimination issues that arbitrators must decide because they are required to do so under the contract.[3] In the meantime, I believe there are some practical and simple things that arbitrators can do when faced with sex, race, and national-origin discrimination cases to enhance the protection of individual grievants. What I propose to do is to offer a modest proposal for the immediate future.

*Gardner-Denver* holds that an employee's statutory right to a trial *de novo* in federal court under Title VII of the Civil Rights

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[1] 415 U.S. 36, 7 FEP Cases 81 (1974).

[2] *See, e.g.*, Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265 (1976); Askew, *Post Gardner-Denver Developments in Arbitration Law* in ARBITRATION—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 24; Newman, *Post Gardner-Denver Developments in Arbitration Law, id.*, at 36; 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. Dennis and Somers (Washington: BNA Books, 1973), 114.

[3] The hotly debated question whether or when arbitrators should rely on external law in interpreting the contract is not dealt with here. At least 70% of all contracts contain nondiscrimination clauses and therefore require by their terms that arbitrators deal in some fashion with discrimination issues. *See Basic Patterns in Union Contracts: Working Conditions and Safety*, 34 DLR B-1, B-4 (Feb. 19, 1975).

Act of 1964 is not foreclosed by prior submission of the employee's claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement.[4] In reaching its holding, the Supreme Court carefully considered the respective roles of the judiciary and the arbitrator in the vindication of the right of the individual to redress of employment discrimination. With respect to the arbitrator's role, the Court stated:

> "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties . . . . If an arbitral decision is based 'solely on the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced. Thus the arbitrator has authority to resolve only questions of contractual rights, and *this authority remains regardless whether certain contractual rights are similar to, or duplicative of the substantive rights secured by Title VII.*" [5] (Emphasis added.)

In connection with this general statement of the role of the arbitrator, the Court in a footnote made a critical observation concerning the individual grievant's posture in the arbitral process. The Court said:

> "A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. . . . Moreover, the harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . And a breach of the union's duty of fair representation may prove difficult to establish." [6]

While the arbitrator is part of a collective process, Title VII, said the Court, "stands on plainly different ground. It concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free

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[4] *Supra* note 1, at 59–60.

[5] *Id.*, at 53–54.

[6] *Id.*, at 58 n. 19. Similar considerations have led some courts to refuse permission to unions to act as plaintiff class representatives in Title VII actions, and to union attorneys to represent the individual plaintiffs in such actions. *See, e.g., Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636, 639–42, 6 FEP Cases 1197 (7th Cir. 1973), *cert. denied*, 416 U.S. 993, 7 FEP Cases 1160 (1974); *Lynch* v. *Sperry Rand Corp.*, 62 FRD 78, 84, 7 FEP Cases 1160 (S.D.N.Y. 1973).

from discriminatory practices." [7] Congress gave to the courts the jurisdiction and plenary power to secure Title VII compliance.

Recognizing the importance of both the national labor policy and the civil rights policy, the Court, like Solomon, arrived at a result that would enhance both policies and permitted an employee to pursue both his or her full remedy under the grievance-arbitration clause of the collective bargaining agreement and his or her cause of action under Title VII. The Court also mandated the federal district court to consider the arbitral decision and to give it such weight as the district court deems appropriate.[8]

In its last footnote, Footnote 21, the Court declined to adopt standards as to the weight to be accorded to the arbitral decision, but specified the following relevant facts that courts should take into account in the weighing process: (1) the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, (2) the degree of procedural fairness in the arbitral forum, (3) adequacy of the record with respect to the issue of discrimination, and (4) the special competence of the particular arbitrators.[9] The Court went on to say that where the arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight: "This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." [10]

That footnote, in my view, represents a sensitive and positive focal point for the healthy accommodation of the law of the shop and the law of the land. It gives to courts an affirmative and realistic way of incorporating (or, equally important, declining to incorporate) the work of the arbitrator into the judicial proceedings; it gives to the individual a sturdy protection against full effectuation of arbitration decisions that inadequately deal with his or her employment discrimination claims, and it gives to the arbitration profession the space and time to consider fully and develop an approach to discrimination claims that best comports with the purposes and limits of the arbitrator's role, free from the duress which would or should result had the Court held that the

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[7] *Supra* note 1, at 51.
[8] *Id.*, at 60.
[9] *Id.*, n. 21.
[10] *Ibid.*

arbitrator's decision forecloses a *de novo* consideration of employment discrimination claims in court.

Further, and equally important, the footnote explicitly recognizes the respect in which the arbitrator is already (and may always be) on his or her strongest ground; that is, where the discrimination issue before the arbitrator is a question of fact rather than law.[11]

The wisdom of the footnote cannot be fully appreciated without reference to the state of discrimination law, the nature of Title VII actions in the courts, and the arbitral role as it is presently defined, all viewed in the light of the employee's interest in vindication of his or her right to be free from employment discrimination.

By passing Title VII, the Congress made the eradication of employment discrimination a national priority of the highest order. At the time of passage, the country and the courts had had some experience with the formulation of principles in the area of race discrimination and virtually none in the area of sex discrimination. Beginning on the effective date of the Act, a critical national process of exploration, definition, and evolution in the understanding of the phenomenon of employment discrimination began. By the time Congress amended the Act in 1972, a new understanding of the phenomenon had emerged. A Senate committee report summarized this new perception as follows:

> "In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . Experience has shown this view to be false.
> "Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of systems and effects rather than simply intentional wrongs. . . .
> "In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance and that the system complained of is unlawful." [12]

As this perception developed, courts adopted standards, both substantive and procedural, that enhance the detection and eradi-

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[11] *But see Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50, 66–67, 9 FEP Cases 195 (1975) (arbitral process is not inherently limited to resolution of individual cases).

[12] REPORT, SENATE COMM. ON LABOR AND PUBLIC WELFARE, S. REP. No. 92–238, 92nd Cong., 2d Sess. 8 (1972).

cation of systems and patterns of discrimination. Thus, the already liberal provisions of the federal discovery rules are given full latitude in Title VII cases.[13] Courts repeatedly state that discrimination claims are by definition class claims, and they see in the claims of individual discriminatees larger considerations.[14] Accordingly, the class action device is a frequent tool of Title VII plaintiffs. Whether or not suit is on behalf of an individual or a class, statistics revealing the larger patterns of race or sex imbalance are key evidence in discrimination cases, the courts declaring that statistics tell much and the courts will listen.[15] Finally, courts have begun to develop broad and complex remedies for discrimination [16] with an eye to making the discriminatees whole and ensuring that the discrimination will not occur again.[17] Their orders are, of course, enforceable under the courts' contempt powers.

Substantively, the courts refused, at an early date, to limit the coverage of Title VII to intentional and invidiously motivated discrimination. By 1971 the Supreme Court had declared, in *Griggs* v. *Duke Power Co.*: "The Act proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." [18] A judicially created principle thus arose: A rule or practice, neutral or nondiscriminatory on its face, is illegal under Title VII if it has a disparate impact on a group protected by that Act and is not justified by business necessity.[19]

In the area of sex discrimination, viable principles emerged more slowly, and some of the most difficult issues are still unre-

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[13] *See, e.g., Burns* v. *Thiokol Chem. Corp.*, 483 F.2d 300, 6 FEP Cases 269 (5th Cir. 1973); *Dunlop* v. *J. C. Penney Co., Inc.*, 10 CCH Emp. Prac. Dec. ¶10,346 (M.D.N.C. 1975).

[14] *See e.g., Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719, 2 FEP Cases 223 (7th Cir. 1969). *See also Johnson* v. *Georgia Highway Express Co.*, 417 F.2d 1122, 1124, 2 FEP Cases 231 (5th Cir. 1969).

[15] *See, e.g., United States* v. *Ironworkers Local, 86*, 443 F.2d 544, 551, 3 FEP Cases 496 (9th Cir. 1971), *cert. denied*, 404 U.S. 984, 4 FEP Cases 37 (1971); *Parham* v. *S. W. Bell Tel. Co.*, 433 F.2d 421, 426, 2 FEP Cases 1017 (8th Cir. 1970); *see also McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805, 5 FEP Cases 965 (1973).

[16] *See, e.g., United States* v. *U.S. Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975), *petition for cert. filed*, April 13, 1976 (No. 75–1475); *United States* v. *Libbey-Owens-Ford Co., Inc.*, 3 FEP Cases 372 (N.D. Ohio 1971).

[17] *See, e.g., Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418–19, 10 FEP Cases 1181 (1975).

[18] 401 U.S. 424, 431–32, 3 FEP Cases 175 (1971).

[19] *See, e.g., Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971), *cert. dismissed on petition for withdrawal*, 404 U.S. 1006; 1007 (1971).

solved. One issue, not yet the subject of Supreme Court resolution, but nonetheless fully explicated in the circuit courts, is the effect of the bona fide occupational qualification exception to Title VII.[20] Two distinct standards, the outcome of which has proved to be basically the same, have emerged. Under the Fifth Circuit standard, the burden is on the employer to justify the exclusion of men or women from a particular job classification by showing that all or substantially all members of the excluded sex cannot perform the duties of the job.[21] The Ninth Circuit [22] and the Equal Employment Opportunity Commission [23] have opted for an even more stringent standard: Each individual must be judged on his or her own ability to do the job. Only when physical sexual characteristics are required for job performance will the BFOQ exception permit the employer to choose solely one sex or the other. Examples of when the BFOQ exemption will apply under this standard illustrates its extremely limited scope: Sperm-bank donors may be drawn exclusively from among men, wet nurses from among women.

Other sex discrimination issues are proving troublesome. Particularly difficult are the issues that involve a sex discrimination claim where, because of their physical makeup, only members of one sex can experience the effects of a rule or practice. Rules concerning beards and mustaches fall in this category,[24] but the most serious of such rules or practices in terms of their effects on working people are those concerning pregnancy of women workers. Arbitral decisions are all over the map on this issue,[25] and the courts have only in the last 15 or 20 months begun to reach a

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[20] Section 703(e), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e–2(e).

[21] *See, e.g., Weeks* v. *So. Bell Tel. & Tel. Co.,* 408 F.2d 228, 235, 1 FEP Cases 656 (5th Cir. 1969).

[22] *Rosenfeld* v. *So. Pacific Co.,* 444 F.2d 1219, 1224–1225, 3 FEP Cases 604 (9th Cir. 1971).

[23] Equal Employment Opportunity Commission (hereinafter cited as EEOC) Sex Discrimination Guidelines, 29 C.F.R. §1604.2(a) (1974).

[24] *See Rafford* v. *Randle Eastern Ambulance Serv., Inc.,* 348 F.Supp. 316, 317, 5 FEP Cases 335 (S.D. Fla. 1972) (employer rule regulating beards and mustaches not sex-based discrimination proscribed by Title VII).

[25] *Cf., e.g., Chippewa Valley Bd. of Educ.,* 62 LA 409 (1974) (denial of sick-leave pay during teacher's hospitalization and home recuperation due to childbirth violates contract and federal and state law); *Clio Educ. Ass'n,* 61 LA 37 (1973) (mandatory pregnancy leave invalid under contract, EEOC guidelines, and state law) *with e.g., Merrill Area Joint School Dist. No. 1,* 63 LA 1106 (1974) (employees absent due to pregnancy and childbirth not entitled to sick-leave benefits under contract); *Samsonite Corp.,* 65 LA 640 (1975) (employer did not discriminate on basis of sex when it limited paid sick leave for pregnancy disability to six weeks while at the same time covering other disabilities for up to 20 weeks).

consensus.[26] The issue whether Title VII covers the practice of denying sick-leave or disability pay to women workers disabled by childbirth is now under submission before the U.S. Supreme Court, and an opinion should be forthcoming soon.[27] There are other issues on which the courts and the government agencies dealing with discrimination conflict: whether sexual harassment of female employees is sex discrimination;[28] whether exclusion of women from jobs that involve supervision of or interaction with members of the opposite sex in a state of undress falls within the BFOQ exception; [29] whether different health, life, and disability insurance rates for men and women can be justified on the basis of actuarial data; [30] and how to harmonize the provisions of Title VII and the Occupational Safety and Health Act in situations where women are excluded from jobs involving exposure to substances that can harm a fetus or, more broadly, cause genetic changes in the woman which could affect later-conceived fetuses.[31]

Some of these issues, as well as race discrimination issues in, for example, the employment-test area,[32] require for their resolution

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[26] *See, e.g., Berg* v. *Richmond Unified School Dist.*, 528 F.2d 1208 (9th Cir. 1975), *petition for cert. filed,* Jan. 28, 1976 (No. 75–1069); *Satty* v. *Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975), *petition for cert. filed,* Oct. 7, 1975 (No. 75–536); *Hutchison* v. *Lake Oswego School Dist.*, 519 F.2d 961 (9th Cir. 1975), *petition for cert. filed,* Oct. 10, 1975 (Nos. 75–568, 75–1049); *Gilbert* v. *General Elec. Co.*, 519 F.2d 661, 10 FEP Cases 1201 (4th Cir. 1975), *cert. granted,* 96 S.Ct. 36 (Oct. 6, 1975) (Nos. 74–1589, 74–1590); *Holthaus* v. *Compton & Sons, Inc.*, 514 F.2d 651, 10 FEP Cases 601, (8th Cir. 1975); *Wetzel* v. *Liberty Mutual Ins. Co.*, 511 F.2d 199, 9 FEP Cases 227 (3d Cir. 1975), *vacated on other grounds,* 96 S.Ct. 1202 (1976); *Communications Workers of America* v. *American Tel. & Tel. Co.*, 513 F.2d 1024, 10 FEP Cases 435 (2d Cir. 1975), *petition for cert. filed,* June 19, 1974 (No. 74–1601). *See also* EEOC Sex Discrimination Guidelines, 29 C.F.R. §1604.10 (1974).

[27] *General Elec. Co.* v. *Gilbert, supra* note 26.

[28] *Cf., Williams* v. *Saxbe,* _____ F.Supp. _____, 12 FEP Cases 1093 (D.D.C. 1976) (dismissal of female employee for rejecting sexual advances of male supervisor is sex discrimination under Title VII), *with Corne* v. *Bausch & Lomb, Inc.*, 390 F.Supp. 161, 10 FEP Cases 289 (D. Ariz. 1975) (sexual harassment of women not covered by Title VII).

[29] *See, e.g., Long* v. *State Personnel Bd.*, 41 Cal App 3d 1000, 116 Cal. Rptr. 562 (1974); *City of Philadelphia* v. *Pennsylvania Human Rels. Comm'n,* 7 Pa. Comm. 500, 300 A.2d 97, 5 FEP Cases 649 (Pa. Comm. 1973).

[30] *See, e.g., Manhart* v. *City of Los Angeles,* 387 F.Supp. 980, 10 FEP Cases 101 (C.D. Cal. 1975); *Rosen* v. *Public Serv. Elec. & Gas Co.*, 477 F.2d 90, 5 FEP Cases 709 (3d Cir. 1973).

[31] *See* H.E.W., *Report and Recommendations: Occupational Health Problems of Pregnant Women* (1975); Burnham, *Rise in Birth Defects Laid to Job Hazards,* N.Y. Times, Mar. 14, 1976, at 1, col. 4; EEOC Dec. No. 75–072, 10 FEP Cases 287 (1974); EEOC Dec. No. 75–055, 10 FEP Cases 814 (1974).

[32] *See, e.g., Albemarle Paper Co.* v. *Moody, supra* note 17, at 425–26; *NAACP, Inc.* v. *Beecher,* 504 F.2d 1017, 8 FEP Cases 855 (1st Cir. 1974), *cert. denied,* 421 F.2d 910 (1975); *Vulcan Soc.* v. *Civil Service Comm'n,* 490 F.2d 387, 6 FEP Cases 1045 (2d Cir. 1973). *See also* EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §1607 *et seq.* (1974).

the testimony of expert witnesses at trial and massive submission of medical, psychological, and sociological data. All require an evolutionary period in which the issues are clarified, all the related aspects are explored, and from which all the questions of fact, policy, and effect emerge over time along with judicial and attorney experience. Some involve a difficult search for the proper remedy after the phenomenon has been labeled discrimination. Most notable among these, perhaps, is the remedy for discriminatory seniority systems.[33]

In this national effort to eradicate employment discrimination are many players, with many different interests, mandates, and positions. There are now civil rights or human rights agencies on the national, state, or even local levels. On the national level, there are a number of agencies whose mandate includes the eradication of employment and other discrimination. And there are the courts—state and federal. Finally, of course, there are the arbitrators and the NLRB.

Each of the players has a role to play, and each has serious and well-known drawbacks. The EEOC, the largest and best known of the antidiscrimination agencies, is hopelessly backlogged. Many of the state agencies have a more limited mandate than the EEOC and cannot deal with discrimination problems in as thoroughgoing a fashion as it can. The courts are painfully slow (although this is sometimes the result of the size and complexity of some Title VII cases rather than an institutional flaw), and court cases are enormously expensive. In this total picture, arbitration has some appealing aspects as well as some very serious flaws and limitations.

The appealing aspects are obvious: Arbitration is speedy, inexpensive for the individual grievant, familiar, and simple.[34] No other procedure that I know of offers all these advantages at the present time.

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[33] *See, e.g., Franks* v. *Bowman Transp. Co,,* 96 S.Ct. 1251 (1976); *Watkins* v. *Steelworkers Local 2369,* 516 F.2d 41, 10 FEP Cases 1297 (5th Cir. 1975); *Jersey Central Power & Light Co.* v. *Electrical Workers Local 327,* 508 F.2d 687, 9 FEP Cases 117 (3d Cir. 1975), *vacated and remanded,* 96 S.Ct. 2196 (1976); *Waters* v. *Wisconsin Steel Works,* 502 F.2d 1309, 8 FEP Cases 577 (7th Cir. 1975), *cert. denied,* 96 S.Ct. 2214 (1976).

[34] An additional benefit for grievants who prevail on discrimination claims in arbitration proceedings was suggested by Ann Trebilcock, Assistant General Counsel for the United Auto Workers. Ms. Trebilcock points out that successful grievants, when they return to the shop, are far less likely to experience disapprobation or retaliation than successful plaintiffs in court actions because arbitration grievants have sought and obtained "in house" relief rather than resorting to an "outside" forum.

The most fundamental problem with arbitration, for the individual grievant, is an institutional one. The arbitrator is selected by the parties—that is to say, management and the union. The grievant does not play a part in the selection of the arbitrator and rarely has his or her own attorney at the arbitration proceedings. As Professor Meltzer has noted, "There is some basis for the fear that economic self-interest and the desire to be loved, which are linked to future acceptability, may distort adjudication even where there is complete harmony between the individual's interests and those of his representatives." [35] Whether or not this is true, there can be no doubt that the institutional bias favors and supports the collective activity of union and employer; the individual's rights are not the sole, and perhaps at times not even the primary, focus of the arbitration system.

This is not meant as a criticism of the arbitration process; on the contrary, the system does an excellent job of promoting the ends it was created to promote. But as early as the incorporation of the Bill of Rights in our Constitution, there was recognition that individual and collective interests are sometimes different, and that in the interest of certain fundamental principles and values, the individual must be allowed to assert individual rights against the collective or majoritarian norm. Civil rights statutes, such as Title VII, are intended to serve such a principle, and that principle cannot be fully realized within the collective bargaining context where majoritarian principles should and do play the major role.

There are other significant ways in which arbitration is no substitute for judicial determination of employment discrimination issues arising under federal law. Many arbitrators are not lawyers.[36] In almost half the arbitration cases, the union's position is not represented by an attorney.[37] Compulsory process is unavailable, and discovery in the judicial sense does not exist.[38] Transcripts are made in less than half the discrimination cases; [39]

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[35] Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 44 (1971).

[36] *See* Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in ARBITRATION—1975, *supra* note 2, at 59, 85.

[37] *Id.*, at 87.

[38] *See Alexander* v. *Gardner-Denver Co.*, *supra* note 1, at 57–58. The Court observed that "rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."

[39] Edwards, *supra* note 36, at 88.

briefs are submitted in only a little over half the cases.[40] The evidentiary record is complete, in the view of arbitrators, in only 55 percent of the cases.[41] In comparison to the kind of record made in federal court in discrimination cases, that percentage would be even lower. The arbitrator's mandate varies from contract to contract, depending on the type of clause relied upon by the grievant as well as the specific language of the clause.[42] Title VII principles are urged by the union in less than one quarter of the cases[43] and relied upon by arbitrators in their opinions half again as often.[44] And there is no appeal from the arbitrator's decision, as there is in court.[45] Finally, arbitrators lack the monitoring and enforcement mechanism of the federal courts.[46] For all these reasons, the arbitral process is not and can never be a major forum for resolution, on the broad scale described above, of discrimination issues. Its role is necessarily more modest.

The question then is how, if at all, arbitration procedures can or should be altered or improved to respond to the increasing number of discrimination cases arbitrators are called upon to consider and decide under collective bargaining contract provisions. A number of commentators have come up with proposals which they believe would more adequately meet the needs of the individual discrimination grievant. All of these, in one way or another, move arbitration procedures toward more formality—more, if you will, "federal courtism." [47]

These proposals, which include involving the grievant in the selection of the arbitrator, giving more power to the arbitrator to

[40] *Ibid.*

[41] *Ibid.*

[42] *See* Coulson, *Title Seven Arbitration in Action,* 27 LAB. L.J. 141, 144–45 (1976). An additional factor in arbitration which can weigh against the rights of individual grievants with discrimination claims is the traditional reliance of the arbitrator on past practices of the parties in interpreting the contract. *Cf., e.g., Merrill Area Joint School Dist. No. 1, supra* note 25 (arbitrator, relying on past practices of parties, concluded that childbirth disabilities were not contemplated to be within definition of "sick" for purposes of sick-leave provisions of contract) *with Walled Lake Consolidated Schools,* 64 LA 239 (1974) (arbitrator followed state and federal law despite fact that past practice suggested contrary interpretation of contract). Discriminatory practices are frequently "traditional." To rely on "past practices" in interpreting the contract is necessarily, in some instances, to uphold discriminatory practices under the contract simply because that discrimination has long been tolerated by the parties.

[43] Edwards, *supra* note 36, at 87.

[44] *Ibid.*

[45] ABA Section of Labor Relations Law, "Report, Committee on Labor Arbitration and the Law of Collective Bargaining Agreements," Committee Reports 153, 164 (1975).

[46] Coulson, *supra* note 42, at 150–151.

[47] *Supra* note 1.

decide discrimination cases and fashion remedies, allowing the grievant to be represented by his or her own attorney, and creating a special panel of expert arbitrators, are worthy of serious consideration. At the same time, it must be recognized that such proposals would change the role of arbitrators with respect to the collective bargaining process in significant ways, and therefore necessarily raise the question whether such measures are appropriate or desirable. Most crucially, the acceptance of such proposals is a matter that will ultimately be determined in the collective bargaining process. If the present is any basis for prognosis as to the future, the acceptance of proposed measures will vary from bargaining unit to bargaining unit, and it is unlikely that any nationwide uniformity will emerge in contract provisions.

So where does that leave us? Major proposals will be made and may be accepted, in whole or in part, in coming years. In the meantime, I have a modest proposal. The inspiration comes from the footnote to *Gardner-Denver* that I mentioned earlier. That footnote does *not* require, in fact or by implication, that all or any arbitration meet the standards set forth in the footnote. On the contrary, the factors enumerated there are meant only as a way for courts to determine how much weight should be given to any particular arbitration decision. It may not be, and some argue persuasively that it is not, the best result for any arbitrator to attempt to meet those standards or for any arbitration decision to be given great evidentiary weight. My proposal takes the arbitrator where he or she is, whether or not the standards are met.

The proposal is a simple one and is already being carried out, to a greater or lesser extent, by arbitrators deciding discrimination cases. It is not meant as a reform of the arbitration process, although its side effects for the process would be healthy ones. Rather, its goal is to protect the individual grievant when and if he or she gets to court. In essence, the proposal does not recommend that arbitrators do differently anything that they are doing now, but simply that they state with clarity and in detail what they have done in reaching their decisions.

Arbitrators should, in their opinions, address with specificity each of the factors in the footnote. Thus, the arbitrator would always state in the opinion what his or her mandate is under the collective bargaining agreement. This statement would include the specific provisions of the contract under which the grievant claims, as well as a statement of self-imposed or agreed-upon lim-

its of the arbitrator's mandate.[48] Moreover, the arbitrator should comment on the procedural aspects of the arbitration, including whether the grievant was represented by his or her own counsel, what documentary evidence was submitted, what witnesses testified and to what effect, etc. If it emerges that certain testimony or documents were considered important by the grievant or the union, but were unavailable at the hearing, it would be important so to note. More formal findings of fact and conclusions of law than are normally contained in arbitral decisions would clarify the basis for and limits of the arbitrator's decision. Particularly is this important when complex or unsettled questions of law are involved. Some arbitrators, in their opinions, have stated that if they had been sitting as federal judges, rather than as arbitrators, their decisions might have been different, thus clearly flagging the existence of possible actionable Title VII issues for the benefit of the grievant.[49] This is an important step in a decision in which an arbitrator considers himself or herself limited by the contract or by expertise in fully carrying out the requirements of Title VII. Finally, arbitrators might confess to lack of expertise where that is appropriate.

By thus clearly setting forth in the decisions what was done and not done, considered and not considered, in the arbitral process, the arbitrator sets the stage for a court proceeding where the weight to be given to his or her opinion can be properly assessed. Such a procedure best fulfills the intent of the Supreme Court in *Gardner-Denver,* protects the interests of the individual grievant, and serves to enhance and protect the important values of the arbitral process, while the efforts to arrive at ultimate solutions are worked out in meetings such as this and over the nation's collective bargaining tables.

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[48] *See* Coulson, *supra* note 42, at 144–146.

[49] In *St. Regis Paper Co.,* 65 LA 802 (1975), for example, arbitrator George H. Young held against the grievant, but noted that he might have taken a different position had the contract contained a clause stating that provisions in conflict with state or federal law were superseded by those laws. He concluded his opinion by stating, ". . . this opinion should in no way be construed to adversely affect the grievant in pursuing her claim in another forum." *Id.,* at 8.