While the role of intuition (operating hypothesis) is widely recognized and accepted in the physical and social sciences, it is still regarded skeptically by many, if not a majority of, arbitrators and judges. However, this is not the only area where a disparity exists between what actually occurs and how it is often perceived.

III. Decision-Making

Two principal aspects of the decision-making process in a given case involve: (1) fact-finding—an evaluation of the factual record of the case; and (2) rule determination—establishing the applicable rules or contract criteria:

Fact-Finding

Probably no task is more significant in determining the decision in a case than the trier's fact-finding role. The fact-determinations made at this stage direct the path of decision in one direction or another. Appellate courts place great reliance upon the findings of fact made by trial courts, particularly as regards credibility. For example, Rule 52(a) of the Federal Rules of Civil Procedure prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." An arbitrator's findings of fact, for most practical purposes, are conclusive. Therefore, to comprehend fully the nature of the decision-making process, it is necessary to understand the fact-finding role and, even more importantly, to be aware of its limitations.

The term "fact-finding" does not convey an accurate impression of the raw unevaluated record of the case at the close of the trial or hearing. The facts in a given case are seldom "found" —they must be "extracted," refined as it were, from the often conflicting accounts of fallible witnesses. The trier, with no infallible antenna for determining which version is closer to the truth, must make a choice between these contradictory accounts. The agony of decision in choosing the facts to be credited has been discussed previously in "Evaluating Testimony."

Despite what we perceive to be the crucial importance of fact-finding, most legal scholars in their analysis of decision-making have largely concentrated their attention on the func-

tion of appellate courts, either minimizing or largely ignoring the trial judge's fact-finding function. Notable exceptions in this respect are the works of Judge Frank, which focus upon the decisions of trial court judges and juries.

Judge Frank was particularly sensitive to the problem of flawed memory or observation, unconscious prejudices, and other aspects of human fallibility that are invariably present in reconstructing or interpreting past occurrences. In short, the likelihood of human fallibility renders the fact-finding process one of probability rather than certainty. In *Courts on Trial,* Judge Frank offers this candid analysis of fact-finding:

> "The facts as they actually happened are therefore twice refracted —first by the witnesses and second by those who must 'find' the facts. The reactions of trial judges and juries to the testimony are shot through with subjectivity. Thus, we have subjectivity piled on subjectivity. It is surely proper, then, to say that the facts as 'found' by a trial court are subjective.
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> . . .
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> "Considering how a trial court reaches its determination as to the facts, it is most misleading to talk as we lawyers do, of a trial court 'finding' the facts. The trial court's facts are not 'data', not something that is 'given'; they are not waiting somewhere ready-made, for the court to discover, to 'find'. More accurately, they are processed by the trial court—are, so to speak, 'made' by it, on the basis of its subjective reactions to the witnesses' stories. Most legal scholars fail to consider that subjectivity, because, when they think of courts, they think almost exclusively of upper courts and of their written opinions. For, in these opinions, the facts are largely 'given' to the upper courts—given to those courts by the trial courts."[13]

The trial judge and the arbitrator face the same dilemma in their fact-finding task. However, their relationship to the upper courts is substantially different. The grounds for judicial review of arbitral awards are exceedingly (and deliberately) narrow since the parties accept arbitration as the terminal point of the grievance procedure to attain a final and binding decision. The number of arbitration cases appealed to the courts is minimal—probably less than one-tenth of one percent. Thus, in practical effect, arbitration combines the functions of first-stage triers of fact and courts of last resort. Of course, an intolerable situation to either party not remedied in arbitration can often be reme-

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[13]Frank, Courts on Trial: Myth and Reality in American Justice (Princeton, N.J.: Princeton University Press, 1949), at 22–24.

died by a determined position when the agreement is opened for amendments.

Finally, it should be noted that the quest for certainty in the outcome of a contested case will inevitably be thwarted by the unpredictable aspects of the record produced in a fact-finding proceeding and by the interpretation of that record. Therefore, decision-making at the trial or arbitral-hearing stage would be even more likely a venture into the realm of probability than it would be in the upper courts who necessarily rely, to a great extent, upon the trial courts' findings of fact.

Rule Determination

Do trial judges and arbitrators merely interpret and apply an existing body of rules? Or does the nature of their function also include a broader responsibility? This matter has been debated by legal scholars and practitioners for centuries.

The traditional concept of judicial decision-making, as depicted by such common-law pioneers as Coke and Blackstone, holds that the judge does not really interpret the law, but merely finds it. Blackstone referred to the judiciary as "the living oracles of the law" and reaffirmed the concept that its task was solely one of discovery, namely, a search for the applicable rule, which, when applied mechanically, as it were, to the facts resulted in the inevitable conclusion. As for statutory law, legal traditionalists rigidly distinguish between the judiciary, which interprets the law, and a legislative body which, in their view, enacts legal absolutes. Similarly, the traditionalists view the arbitrator as performing a corresponding mechanical task of searching out the applicable contract provision and then measuring it against the facts of the case.

Granted the traditionalist's view that stability in the legal system and in the bargaining relationship are fundamental objectives of our society. And granted also that stability requires the enforcement of established principles and rules—for example, case law, statutes, or terms in a collective agreement—whenever they are applicable. But only the most inflexible advocate of mechanical jurisprudence would deny that the law must *reflect* changes in an evolving society. The word "reflect" is used advisedly because decision-makers primarily reflect—they do not normally initiate—societal changes.

No legal system that attempted to reduce the judicial function

to the bare bones of an inflexible code of absolute legal principles has long survived.[14] As stated by Roscoe Pound:

> "Application of law must involve not logic merely but a measure of discretion as well. All attempts to eradicate the latter element and to make the law purely mechanical in its operation have ended in failure. Justice demands that instead of fitting the cause to the rule, we fit the rule to the cause. 'Whoever deals with juristic questions,' says Zitelman, 'must always at the same time be a bit of a legislator' [footnote omitted]; that is, to a certain extent he must *make* law for the case before him." [Emphasis in original.][15]

Justice Oliver Wendell Holmes articulated the earliest and perhaps the most quoted criticism of mechanical jurisprudence:

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. . . ."[16]

Let us consider a few examples of the foregoing concepts as applied by judges and arbitrators.

In practice, legislators often delegate to the courts what amounts to legislative responsibilities by what is omitted from a statute either deliberately or inadvertently or by resort to deliberate ambiguity in an effort to satisfy special interest groups. Frequently, the legislature enacts laws with very general wording, the precise meaning of which remains to be declared by the courts on a case-by-case basis. Otherwise, legislatures would get so bogged down in details that they could never complete their work. Consider, for example, the role of litigation in the implementation of the Civil Rights Act of 1964. Trial courts across the nation have made sweeping decisions on school integration and employment discrimination issues (to name but a few) that involve basic questions of public policy—decisions for which the Civil Rights Act provides only a very broad mandate. Of course, the courts' rulings on these vital questions interpret the Civil Rights Act, but they also involve an

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[14]Science of Legal Method: Selected Essays by Various Authors, Modern Legal Philosophy Series Vol. IX (Boston: Boston Book Co., 1917), Ch. VII by Roscoe Pound.
[15]*Id.*, at 208.
[16]Holmes, The Common Law (1881), at 1.

important expansion of the law as well. Countless other examples could be cited of judges being required to add to legislative enactment by judicial interpretation. Legislation is often an inescapable part of the judicial process.

As we know, arbitrators also are called upon to bridge the gap of omitted or ambiguous terms as part of their interpretative function. Negotiators of bargaining contracts simply cannot anticipate all the issues that might arise during the term of a one- to three-year agreement that covers the working relationships of hundreds, sometimes thousands, of employees. Most of us are familiar with the following observations of the late Harry Shulman, which bears repeating in this context:

> "No matter how much time is allowed for the negotiation, there is never time enough to think every issue through in all its possible applications, and never ingenuity enough to anticipate all that does later show up. Since the parties earnestly strive to complete an agreement, there is almost irresistible pressure to find a verbal formula which is acceptable, even though its meaning to the two sides may in fact differ. The urge to make sure of real consensus or to clarify a felt ambiguity in the language tentatively accepted is at times repressed, lest the effort result in disagreement or in subsequent enforced consent to a clearer provision which is, however, less favorable to the party with the urge. With agreement reached as to known recurring situations, questions as to application to more difficult cases may be tiredly brushed aside on the theory that those cases will never—or hardly ever—arise."[17]

It is a commonplace that virtually every collective agreement contains a grievance and arbitration provision to deal with both the problems of interpretation that inevitably arise and those situations that the parties may not have anticipated. Arbitrators not only interpret the parties' agreement, they also perform a vital gap-filling role. Indeed, the U.S. Supreme Court, in a landmark case,[18] underscored this arbitral function as ". . . a vehicle by which meaning and content is given to the collective bargaining agreement."

Changes affecting the employment relationship also may require the arbitrator to introduce a legislative element in the decisional process—for example, changes in technology, in prod-

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[17]Shulman, *Management Rights and the Arbitration Process: Reason, Contract, and Law in Labor Relations,* in Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1956), at 175.

[18]*Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 580, 46 LRRM 2416 (1960).

ucts produced, and even in the acceptable length of facial hair and beards. A pertinent example of the pressure on the decision-maker to respond to change arises from discipline meted out for chronic alcoholism. Until recent years, alcoholism was viewed as a human failing attributed to a lack of character and deserving of little patience in meting out stern disciplinary action often including discharge. At present, there is virtual unanimity among medical authorities that alcoholism is an illness that should be treated as such—a view gradually gaining recognition in the industrial community, but by no means universally accepted. Today, when an arbitrator is presented with such medical evidence in a discharge case for alcoholism under the typical "just cause" contract provision, the evidence may compel him to deal with the issue as an illness (and often an absentee problem) rather than a disciplinary problem, as in the past.

In summary, decision-making does not simply involve a mechanical application of the facts to a set of fixed rules. As former Michigan University Law School Dean St. Antoine so aptly phrased it: "The arbitrator cannot be effective as the parties' surrogate for giving shape to their necessarily amorphous contract unless he is allowed to fill the inevitable lacunae."[19]

We have focused our attention to this point upon decision-making in its broadest aspects. Now to a consideration of more specific matters, namely, decisional thinking involving questions of procedure, fair-representation issues, and the interaction of NLRB, judicial, and arbitration proceedings.

IV. Decisional Thinking as Applied to Procedural Matters

Arbitral Discovery

The basic objective of arbitral discovery is to achieve full disclosure while avoiding the legal complexities of discovery as practiced daily by "litigators" in law and motion courtrooms. The authority of labor arbitrators to fashion and administer discovery procedures, it should be noted, is now firmly established.[20]

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[19]St. Antoine, *Judicial Review of Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L.Rev. 1137, 1153 (1977).

[20]For an excellent discussion of arbitral discovery, including a proposal for interaction among the three tribunals of labor dispute resolution—the courts, the NLRB, and