A need for fair and objective investigation is mentioned in the comment following Section 6.12[26] of *The Common Law of the Workplace*. And Section 6.14 states that "[m]ost arbitrators require that an employer's decision to discipline or discharge an employee be based on a meaningful, more-than-perfunctory factual investigation."[27]

The advocates in the audience might like to have more precise and up-to-date data regarding arbitrators' attitudes about procedural errors by management. But my hunch is that what they really want to know is the inclination of individual arbitrators. That information can only be obtained by researching the decisions of individual arbitrators.

III. SUBSTANTIVE DUE PROCESS: THE STANDARDS FOR JUDGMENT MUST ALSO BE FAIR

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Although due process is an imprecise concept, it is commonly understood to place limits on those who exercise authority over the affairs of others. That includes labor arbitrators, who are given the authority to decide disputes between labor and management. Procedural due process—such as the right to forewarning of prohibited conduct; notice of charges; an investigation prior to discipline; and the right to present, confront, and cross examine witnesses—is essential for a fair hearing, which, in turn, is essential to the fairness of the labor arbitration system.

This paper addresses a less debated aspect of due process: substantive due process. There must be substantive as well as procedural due process if the grievance-arbitration system is to be fair and just. (The history of labor in the United States provides too many examples of technically correct procedures being used to enforce unjust laws, rules, and precedents.)

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[26]St. Antoine, ed., The Common Law of the Workplace (BNA Books 1998), at 187.
[27]*Id.* at 192.
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By substantive due process I mean the substantive rules or standards for judgment that arbitrators apply when they decide cases. These rules or standards pre-position a decisionmaker's approach to a particular case situation, thereby exerting a powerful influence on the outcome. Substantive rules are ways of looking at the workplace—in other words, whether we see the workplace through the eyes of employees on the shop floor, in offices or classrooms, or from the perspective of those who manage these enterprises.[1] This aspect of arbitral fairness is, in essence, a question of who benefits from and who is burdened by a particular rule or standard of judgment.

At a meeting of the Academy many years ago, Willard Wirtz pointed out that the procedural due process rules in labor arbitration had been devised primarily by arbitrators rather than employers and unions.[2] So, too, arbitrators have been the creators, choosers, appropriators, and implementers of these substantive rules. These substantive rules or doctrines go well beyond the rules the parties negotiate into their CBAs. My work and that of a few others[3] demonstrates that arbitral decision making involves making choices in policy, theory, and ideology. (Doubters could begin with former Academy President Sylvester Garrett's 1985 speech to the Academy, in which he described his reading of labor arbitration textbooks on the subjects of contract language interpretation and management rights.[4])

I am convinced that the major debates about labor arbitration, particularly at Academy meetings over the years, are at their core

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[1]Rabin, *Some Comments on Obscenities, Health and Safety, and Workplace Values*, 34 Buff. L. Rev. 645, 725 (1985).

[2]Wirtz, *Due Process of Arbitration*, in The Arbitrator and the Parties, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1958), 12.

[3]*See, e.g.*, Atleson, Values and Assumptions in American Labor Law (University of Massachusetts Press 1983); Gross & Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights Over Workers' Rights*, 34 Buff. L. Rev. 645 (1985); Gross, *Value Judgments in Arbiration: Their Impact on the Parties' Arguments and on the Arbitators' Decisions*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1997), 212; Atleson, *Arbitration: The Presence of Values in a Rational Decisionmaking System*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1997), 225; Mittenthal, *Comment*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1997), 231; Gross, *Value Judgments in the Decisions of Labor Arbitrators*, 21 Indus. & Lab. Rel. Rev. 55 (1967).

[4]Garrett, *The Interpretive Process: Myths and Reality*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1985), 121.

disagreements over the sources of rights (management, union, and worker rights), although the issues are rarely presented or discussed explicitly in that context. Some held that the collective bargaining contract was the only source of rights and, consequently, that an arbitrator had no license to look beyond that contract. Others, however, maintained that employees had rights in addition to those in the contract and that those rights should be recognized by arbitrators. Saul Wallen's implied limitations theory, for example, was set forth in his now famous *Coca-Cola Bottling Co.*[5] decision. In 1958, Willard Wirtz talked to this Academy about the arbitral obligation and authority to protect certain individual interests even when this meant, in his words, "piercing the institutional, representative veil."[6] My lovingly remembered colleague Jean McKelvey, in her breakthrough January 1971 presidential address, deplored arbitrators' ongoing refusal to apply in their decisions the principles set forth in external law and "public policy."[7] She called that attitude "negative," "alarming," "outmoded and irresponsible."[8] She warned that, "[i]f the institution of arbitration is to survive and to be 'relevant' to the emerging needs of a new social and economic order, it cannot afford simply to remain a part of the 'Establishment.'"[9] She accused arbitrators of using the contract as a shield against public policy.[10]

For the past several years my research and teaching have centered on a reevaluation of U.S. labor law and policy using internationally accepted human rights principles as standards for judgment. My current focus is on the application of these human rights standards to labor arbitration in the United States. Part of my research will address why labor arbitrators have embraced the generally conservative principles of common law but have resisted applying the principles of external law, have rarely employed constitutional principles, and have ignored human rights concepts. In the human rights context, an individual is considered, in Willard Wirtz's words, "as the owner of rights and interests—job

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[5] *Coca Cola Bottling Co.* (Wallen 1949), *reprinted in* Cox, Labor Law: Cases and Materials (Foundation Press, 4th ed. 1958), 583.
[6] Wirtz, *supra* note 2, at 35.
[7] McKelvey, *Sex and the Single Arbitrator*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1971), 1.
[8] *Id.* at 28.
[9] *Id.*
[10] *Id.* at 29.

rights, personal rights, human rights—at least as much entitled to protection as a piece of real estate or machinery."[11] He added that the individual is "somebody the system is designed for instead of the other way around."[12]

My research into the body of common law principles and rules applied by labor arbitrators demonstrated an arbitral commitment to extracontractual doctrines of private property rights; employer hierarchical authority and control; management freedom to operate the enterprise most efficiently; and the need to discipline employees whose actions were considered challenges to management's order. These are extracontractual doctrines that have as their aim the maintenance of managerial control over all aspects of an enterprise. They embody value judgments that, as Robert Rabin has put it, "reflect the interests of the dominant power in the work relationship."[13]

Take as an example, the hallowed and long-standing "obey now, grieve later" rule. First, it is extracontractual, originated not by employers and unions but by the War Labor Board and a most influential arbitrator, Harry Shulman. Second, that rule is value-laden. It favors management control and the need for efficiency, maintenance of discipline and order at the workplace, and private property ownership prerogatives over union and worker protests about working conditions. The rule permits employees to complain about their treatment, but only in a way (and at a later time) that does not interfere with any of management's functions. In other words, the rule establishes and protects a zone of management prerogatives by giving priority to managerial control and uninterrupted production.

The notion that "management acts and the union reacts" gives employers the right of initiation as well as broad discretion in deciding how to assert its own interpretation of the contract. Employees (and a union), however, may not use self-help when they seek to assert their interpretation of the contract.[14] In addition, the employee who may not exercise self-help at the workplace

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[11]Wirtz, *Arbitration is a Verb*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1971), 40.

[12]*Id.*

[13]Rabin, *supra* note 1, at 727.

[14]Atleson, Labor and the Wartime State: Labor Relations and Law During World War II (University of Illinois Press 1998), 72.

has recourse only to the grievance-arbitration process, where the same doctrines that underlie the "obey first, grieve later" rule will guide the arbitrator—if the dispute gets that far.

Some are favored by this rule, and some are disfavored. The rule favors management authority and objectives, but often confronts employees with an unfair dilemma—in safety and health cases, for example, to work and risk their health and safety or to refuse to work and risk their jobs. In those workplace situations involving worker safety and health, moreover, self-help is essential. Giving workers the right to refuse hazardous work without retaliation would empower them to take control over and protect their own lives when confronted with threats to their safety and health—without facing the unfair dilemma. As things stand now, however, this extracontractual rule results in the contractual rights of unions being treated differently from the assertion of such rights by employers. You may agree with the values the rule embodies, but it is important, at least, to understand the implications of the rule for labor, management, and workers, and to engage in debate about the underlying values of the rule.

There should be no unchallenged orthodoxy. It would benefit us all and the fairness of the labor arbitration process if every hard and fast rule were treated as suspect until the value judgments underlying it are identified and it is determined who benefits and who is burdened by the rule. The basic fairness of the system depends on such continual reevaluation, rather than simply intoning unexamined doctrines out of tired habit or mindless adherence to the tyranny of rusty precedents. This is particularly important as arbitrators contemplate deciding disputes in nonunion settings where up to now the only concern seems to be with procedural due process.

Reevaluating those rules from a values approach, as I have said before, would not be an attack on labor arbitration, but rather a long overdue attempt to understand all the dimensions of the decisionmaking process in which we are all engaged, to promote debate, and to make changes where changes should be made.[15] It is really an ongoing attempt to answer Archibald Cox's call at the 1959 meeting of this Academy for a coherent explanation of the philosophy of contract arbitration.[16]

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[15]Gross, Arbitration 1997, *supra* note 3, at 213.

[16]Cox, *Reflections upon Labor Arbitration in the Light of the* Lincoln Mills *Case*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1959), 26, 30, 46.