CHAPTER III

THE ROLE OF THE LAW IN ARBITRATION: A PANEL DISCUSSION

NATHAN P. FEINSINGER, *Panel Chairman**

In adopting Section 301 of the Taft-Hartley Act, Congress decided that a collective bargaining agreement was a "contract" to be enforced by the federal courts. This puts to rest one question, but leaves open the question of the difference, if any, between this kind of contract and any or all others, and whether and how the courts will apply the ordinary principles of contract law to take account of those differences.

Congress was primarily concerned with the enforcement of no-strike clauses. In *Lincoln Mills,* the Supreme Court reasoned that the agreement to arbitrate is the *quid pro quo* for the no-strike clause and concluded that if one should be judicially enforced, typically by an award of damages, so should the other, typically by a decree of specific performance, which is one type of injunction, despite the apparent bar of the Norris-La-Guardia Act.

This decision meant that the federal courts, to do their job properly, would have to concern themselves with the nature of the arbitration process. The question is whether the courts can accommodate themselves to that process as it has been developed by labor and management to serve their particular needs and desires and whether those parties can accommodate themselves to the doctrines to be developed by the decisions of the courts.

It may be argued that *Lincoln Mills* will affect only those few

employers and unions which do not "get along." Experience suggests, however, that people tend to conform their actions to judicial thinking, and collective bargaining is no exception. It was this thought which Mr. Justice Frankfurter probably had in mind when he stated, in his *Lincoln Mills* dissent, that a general rule derived from atypical cases "is more likely to discombobulate rather than compose." In his paper this morning, Mr. Aaron appeared to share that view. Mr. Cox was more optimistic, feeling that the courts may contribute to the enrichment of the arbitration process rather than its discombobulation.

There is a similar diversity of views, I believe, among the members of our panel, as to what the institution of arbitration has to lose, and what it has to gain, by increased judicial intervention. This may be explained by the fact that one member of the panel, Russell Smith, was trained as a lawyer, another, Arthur Ross, as an economist and the third, William Simkin, as an engineer. This in itself reflects the varied nature of the arbitration process, an attribute which all of us desire to preserve. The arbitration process can benefit from the orderly procedures of the law, but most of all it needs wisdom, and wisdom is not the exclusive product of any single discipline.

Discussion—

ARTHUR M. ROSS**

To what has already been said about *Lincoln Mills* itself, I can add little of significance and nothing of interest. It is quite evident, however, that we are entering a new era in the relation-

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ship between arbitration and the law. The possibilities are great, the dangers are serious, the open questions are numerous. I suggest that before we can answer these questions, we must look at arbitration in a larger historical perspective. We should ask, What is the special character of arbitration as a dispute-settlement procedure? To what extent have the particular aims of arbitration been accomplished? In what respects are we failing to realize them? Then we can ask what further contributions the law might make toward achieving the full potentialities of arbitration. But in addition, what contributions can the parties make, and what can the arbitrators do?

Let us not forget that arbitration has always had a pioneering quality. The essence of the process is experimental and inventive rather than traditional and routine. This was true of the early beginnings of commercial arbitration at the close of the middle ages, when merchants and traders found it necessary to break away from the feudal concepts, obscure technicalities and dilatory procedures of the common law courts. It was equally true of the early endeavors in labor arbitration in the United States, whether in the coal industry, the shoe industry, or the garment and hosiery industries. These were not cast in any established mold but fashioned on a trial-and-error basis. Some 25 years ago the auto industry of Michigan rendered great service in developing the permanent umpire system by striking out in its own direction rather than following along a well-traveled path.

Relatively little of this pioneering has been accomplished through legislation or litigation. In fact, the majority of the pioneers were not lawyers. Moreover, arbitration has succeeded best where the element of consent has been dominant and the element of coercion relatively weak. The law has played an important part, to be sure, but a secondary rather than primary part. It has moved in to consolidate the gains rather than developing new concepts in the first instance. It has experienced some difficulty in assimilating labor-management relations to the more familiar institutions of business life. Thus

the law has had to recognize that a collective bargaining agreement is not the same thing as a commercial contract, although the analogy is a strong one; that labor arbitration is not entirely an exercise in contract law, although there is much in common; that an arbitration hearing is not a courtroom trial, although due process must be afforded. While judicial hostility toward arbitration has declined considerably in recent years, and the support of the law has been helpful in many cases, it is important to ensure that the adaptive, inventive quality of arbitration not be smothered in the maternal embrace of section 301, and that arbitration not be frozen into the rigid, formalistic routines of personal-accident and divorce litigation.

Clearly great progress has been made in the development of arbitration, particularly during the past fifteen years. Most collective bargaining agreements now contain arbitration clauses and most of the no-strike and no-lockout pledges are observed most of the time. The permanent arbitration system has spread widely, and now covers at least 40 percent of all unionized workers and at least 50 percent of those in manufacturing industries. While a few losing parties seek to circumvent distasteful awards, the vast majority comply in good faith. I am sure the parties swallow more bad decisions than the good and bad ones, put together, which they contest. Furtherermore, there is an increasing supply of competent and experienced arbitrators, with a better understanding of their judicial function. Labor and management have become more sophisticated in selecting and evaluating arbitrators; certainly the old-fashioned box-score method, the crude "expendability" concept, etc., have declined in popularity. Finally arbitration has made an important contribution to personnel practices as the reasoning of the arbitrators has been accepted into the thinking of management and union officials.

Thus, times have changed. Fifteen years ago the major problems of arbitration were those of becoming more widely used, getting better established, being more fully understood. To a

large extent these problems have been overcome. It is significant that *Lincoln Mills* is not among the 500 most important manufacturing companies listed in *Fortune* magazine. The need for the law's help in getting arbitration accepted certainly is not so great as it formerly was.

The fact is that the chief problems of arbitration seem to arise from its undisputed acceptance, popularity and respectability. Some of the traditional values of the process — the relatively speedy and economical procedure, the avoidance of dilatory maneuvers, the likelihood of substantial justice on the the merits — are increasingly being jeopardized. Arbitration is losing some of its creative, inventive character as it settles into a routine.

There is no doubt, for example, that some parties arbitrate too much. They arbitrate chronically and promiscuously. Arbitration becomes a mill rather than a court of last resort, a substitute for the grievance procedure rather than a means of strengthening it. Issues multiply through a process of continuous division and subdivision, so that trivial disputes which should have been buried at Step I of the grievance procedure are solemnly and painstakingly dissected in a full-dress hearing. I wonder if the "unnecessary hearing" in arbitration should not be regarded in the same light as the unnecessary operation in medicine.

A related problem is that many company and union officials are reluctant to settle disputes on a sensible, equitable basis in the grievance procedure. Sometimes they are too much in awe of the arbitrators, digest writers, commentators, etc., and are fearful of making decisions out of line with the thinking of these authorities. More often they have a practical fear of creating a binding precedent which will rise to haunt them in some future arbitration case. While reports, digests and summaries of decisions have been useful in many ways, they have cultivated an attitude of passivity and dependence in some quarters. And I must say that arbitrators have unwittingly

fostered the same attitude by their propensity to elevate an isolated or occasional grievance settlement to the status and dignity of an "established past practice." How can parties be expected to compromise when the risks of compromise become so great?

Another disturbing tendency is the unnecessarily dilatory and expensive character of many arbitration cases. I am not delivering a diatribe against lawyers, transcripts and briefs at this point. Important cases ought to be carefully presented; and parties are entitled to the most effective spokesmen they can obtain. But many sources of delay and expense have nothing to do with careful presentation or skillful representation. I refer to the many months which pass before some cases are referred to arbitration; long delays in selecting *ad hoc* arbitrators; overloaded dockets in some of the umpire systems; excessively elaborate exchanges of briefs; poorly prepared representatives who convert the hearing into an exploratory operation; and excessive postponements of hearings and briefs. So far as I am aware, no hearing has yet been postponed because one of the representatives needed a haircut, but I wouldn't be surprised to see it. The combined result of these delays is that the average length of time between the filing of a grievance and the rendering of the arbitration award increased 50 percent between 1946 and 1956. The average is 200 days, but we have all seen cases which have passed their first and second birthdays.

While specific enforcement of arbitration agreements has been helpful, the other side of the coin is the tendency of courts to judge the merits of a case in deciding whether the parties have agreed to arbitrate it. Finally there is the dangerous drift toward reliance on technicalities, described as "creeping legalism." When cases are decided according to whether an assistant foreman on the lobster shift invoked the right shop rule in making out his disciplinary report, or whether a shop committeeman cited the proper section of the contract in filing the origi-

nal grievance, we are not too far away from the system of strict common-law pleadings which was supposed to have been abandoned more than a century ago.

The greatest need today, therefore, is not one of urging more people to adopt arbitration clauses, or persuading them to use these clauses, or convincing them to accept unwelcome decisions. The need is rather to restore and protect some of the traditional values of arbitration which have been thrown into jeopardy. Can we continue to offer a relatively quick and inexpensive method of resolving disputes with assurance of substantial justice? Are we really willing to work ourselves out of a job as we like to claim? Can we pull arbitration out of the bottomless pit of trivial and bloodless disputes which lies at the end of some grievance procedures? Can we regain a bit of the inventive quality which Billy Leiserson, Harry Shulman, George Taylor and others gave to arbitration a few years back?

If this is really where we stand today, I expect the law can make relatively little contribution toward the next stage of development. The law can hold employers and unions to their arbitration agreements. It can strive to avoid judging the merits of cases when questions of arbitrability are raised, although we may be a little foolish in expecting the best of both worlds. The law can encourage the use of arbitration to settle controversies which might alternatively be brought before administrative agencies or into court.

But the law cannot pull arbitration out of a rut, nor reinvest it with creative energy. As Benjamin Aaron observed this morning, the challenge is for the parties and the arbitrators: "to demonstrate, by our actions and by our teaching, that the benefits of industrial self-government far outweigh its imperfections." It can be done. We have seen the successful use of arbitration for resolving jurisdictional and organizational disputes, protecting the rights of individuals and minorities inside unions, and for other novel purposes. Arbitrators can help the parties regain the habit of self-reliance by settling dis-

putes between themselves at any stage — before the hearing, after the hearing. The repetitive submission of routine grievances which never solve any real issue can successfully be discouraged. Employers and unions can be persuaded to lift up their eyes from the cases and look at the problems. The arbitrators can take more responsibility for an orderly and sensible hearing; and the parties can eliminate wasteful and time-consuming practices which are the result of thoughtlessness or lack of preparation. All of this can be done without "adding to, subtracting from or otherwise modifying the contract;" without undermining the hard-won rights of labor or diluting the prerogatives of management; without denying due process; and without mediating specific cases.

It can be done, if the parties and the arbitrators think of arbitration not as a mechanical routine, but as a creative instrument in the development of better industrial relations under a system of economic freedom.

Discussion—

WILLIAM E. SIMKIN*

The original title of this session was "A Legal and Practical Philosophy of Arbitration." I have not had a single law course. This is a deficiency for which, with all due deference to my lawyer friends, I have no major cause for regret. I do regret the fact that I have had no courses in Philosophy. Thus, when asked to be a member of this panel, I found myself unlearned both in Law and in Philosophy. Incidentally, I also found myself among that unlettered 3.4 percent minority of Academy members, as reported by our Research Committee, who can add no handle behind their name more imposing than a Bachelor's degree. However, I took some small comfort from the word "Practical" in the title in view of almost 20 years

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of full-time arbitration work. Imagine my embarrassment when I found only a few days ago that I had been "mouse-trapped" by deletion of the word "Practical" and even of the word "Philosophy."

In any event, having agreed to "accept the case," I will assume the arbitrator's prerogative of looking at the history of negotiations, as well as the final language, and will "make believe" that "Practical Philosophy" is not out of place. These are nice, big, all-inclusive words that make me feel like one of two mosquitoes who said to the other, upon flying into a nudist camp, "I hardly know where to begin."

I will begin with an observation, all too apparent to those who can read and discern, that our western form of democracy is in great peril from two directions. The many millions of peoples in Eastern Europe, Asia, the Near East, Africa and even South America are turning away from our so-called "way of life" at an alarming rate in their groping for higher standards of living and in their search for political and economic principles and procedures that are to accompany their emergence from older forms of economic endeavor. Moreover, within our own country, we are losing or forgetting some of the more precious essentials of democracy, either because we are being scared by outside competition or have become insensitive to the sources of greatness in the democratic method.

Within our more immediate field of work, collective bargaining is the best and only presently known method of expression of essential democratic principles in the industrial area. It, too, is "on trial" in many ways, most of which cannot even be noted within the brief compass of this paper. I venture here only the observation that if collective bargaining fails as a device for industrial self-government, perhaps the largest single democratic bulwark will have crumbled.

These comments are inserted here because many of us find it essential to work at a job that is something more than a way

to earn a living. We want to be at least a tiny cog in a process that contributes to man's struggle to achieve a better world. Those of us who work in the collective bargaining area (company and union representatives and arbitrators) can properly pursue that aim. Today's troubled and rapidly changing times gives a special sense of urgency to our endeavor.

As arbitrators, we are concerned directly only with one aspect of the collective bargaining process, the making of a decision in each case that comes to us. That is a limited role, a function that should not be "blown up" beyond its importance, but also a task that necessarily has implications beyond the confines of a "case" whether we like it or not and whether the parties like it or not.

Even within the confines of disposition of a single issue, our responsibilities are increased by a peculiar development of which I have no statistical evidence but which I believe to be true. It would be logical to assume that companies and unions would find it easier to negotiate changes of principles and procedures established by arbitration awards than to change their own agreements. However, the indications are in the opposite direction. Arbitration decisions tend to have long lives and they are seldom changed in contract negotiations despite the obvious opportunity to do so. I'm not a psychiatrist and cannot explain this phenomenon. The only point here is that each case and disposition needs to be viewed by the arbitrator, not as an isolated event, but as a potential part of the collective bargaining bloodstream for years to come.

For these and other reasons that cannot be developed here because of time limitations, it is my considered opinion that we are only "pill dispensers" (bad pills, at that, in all too many instances) unless we work within a basic philosophy that embraces numerous factors, some of which are contradictory. With a great deal of hesitation, I venture to suggest the following outline for a "Practical Philosophy of Arbitration," which is not presumed to be all-inclusive.

1. A primary function of arbitration is to avoid actual arbitration cases. When an arbitration clause is written into a labor agreement, the parties have added a "How will our position look to an impartial person?" ingredient at earlier steps of the grievance procedure. Ideally, the arbitration clause is only a fire insurance policy. In practice, it may also be a fire extinguisher and a part of a fire prevention program.

2. An agreement reached by the parties is always better than a decision issued by an arbitrator, even though the arbitrator may think he has a better answer. An arbitrator has no "vested rights" in a case, and he should welcome settlement by the parties all the way up to the minute the decision is issued. He has an obligation to "narrow the issues" as much as possible on cases that must be decided.

3. The essence of every arbitration clause is that it is an agreement of the parties that the risks and hazards of arbitration are less than the costs and dangers inherent in the use of economic force. That agreement by the parties is not irrevocable. Every time an arbitrator issues a decision, he is adding one link in a chain of evidence by which either a company or union, or both, may decide that arbitration no longer continues to be more desirable than possible use of the strike or lockout method.

4. A major strength of American industry and of its collective bargaining procedures is the fact of diversity. Development of a body of "common law" within the confines of a single labor agreement by grievance settlements and arbitration decisions is inevitable and undoubtedly desirable. However, the parties to any particular labor agreement have every right to insist on preservation of their differences and any concept of *stare decisis* or its equivalent beyond the boundaries intended by the parties should be discouraged.

5. Selection of the arbitrator by mutual agreement of the parties is critical to the arbitration process. Any arbitrator is expendable. The right of either a company or union to reject

or eliminate an individual arbitrator, with or without good reason, must be preserved.

6. In the difficult area of questions about arbitrability, the arbitrator is often torn between the nether millstones of responsibility to decide an issue under the "no-strike," no-lockout" implications of his position in the contract, and his responsibility not to "crowd over" into areas reserved solely for mutual agreement or unilateral action. These millstones are sharper because of arbitration clauses that are frequently ambiguous, or that do not represent a "meeting of minds."[1] The two "*Lincoln Mills*" papers heard this morning emphasize the necessity for an arbitrator to answer these arbitrability questions strictly in the light of his best appraisal of the parties' concept of their agreement language and meaning, if court intervention is to be avoided.[2]

7. Unless the parties clearly want a formalistic type of hear-

[1] In this connection, an historical comment may not be inappropriate. Many of you will recall that top representatives of labor and management were able to agree on only one point at the president's Labor-Management Conference held immediately after World War II. It was a significant milestone in the development of grievance arbitration that it there received its first nation-wide blessing as a terminal point to the grievance procedure. However, the agreed-upon "standard clause" was the ". . . interpret and apply . . . but may not add to or subtract from . . ." clause that exists today, in substance, in most contracts, that has caused "headaches" for conscientious arbitrators ever since and that underlies part of the *Lincoln Mills* problem. There is an element of irony in the fact that that sole point of agreement was a factor in a Supreme Court decision some twelve years later and is one of the most serious "trouble spots" in grievance arbitration today. As that same so-called "standard clause" has been interpreted by the parties in the intervening years, I have found all sorts of variations. There are some parties who say to the arbitrator, "Dr. Anthony, we have a problem," and who seek only a sensible answer without even lip service to the "add or subtract" element. There are some parties who construe those limitations very rigidly and by agreement. There are numerous instances where the union and the company have totally different but reasonably consistent concepts. There are probably more instances where concepts differ widely but only as applied to a specific case with a complete reversal on both sides of the table on the next specific case, sometimes heard on the same day.

[2] It is quite possible that I have a "head in the sand" attitude in terms of Archie Cox's brilliant analysis, heard this morning. However, I'm somewhat more optimistic about the probable extent of reference of such matters to the courts. When telling several top labor-management representatives of a large corporation that *Lincoln Mills* was the principal subject matter of this year's

(Footnote continued on following page.)

ing, the arbitrator has a responsibility to encourage informal hearing procedures, designed to permit both parties to present the problem in their own way in a minimum of time and at minimum expense, subject to recognition of the therapeutic value of "off the chest" discussions not necessarily directly relevant to the issue. The extent to which the arbitrator can influence such matters is limited. If the parties insist on "beating a case to death," there are extremes beyond which an arbitrator should not exhibit his annoyance. However, the true end of every hearing is the point at which the arbitrator understands the case on its essential points and he can properly devise methods of avoiding unnecessary details or repetition.[3]

8. The arbitrator has a responsibility to obtain and feel sympathetic understanding of the reasons behind both company and union positions, even in cases where the decision in the case cannot recognize validity in some of those positions. Of equal importance, it is necessary to transmit somehow to the parties the existence of that understanding.

9. In deciding grievance cases, compromise has no valid use in the sense that an "in between" answer may be a palliative to both parties or an avoidance of a difficult or unpopular decision. However, a compromise answer dictated by the facts, may be entirely legitimate and proper, especially since the bulk of the legitimate cases are neither black nor white but are some shade of grey. Most of us need to reexamine our actual practices in making distinctions between these two types of compromise, especially in such matters as reinstatement with-

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Academy meeting, the rejoinder was "What's that?" I have a firm belief that the great majority of company and union representatives in the collective bargaining process will continue to say either "What's that?" or "So what," irrespective of the outcome of *Lincoln Mills*. However, I will agree that my optimism will be ill-founded if, as arbitrators, we treat the arbitrability problem lightly.

[3] It should go without saying that the difference between formalistic and simpler procedures is not synonymous with lawyer participation or the absence of lawyers in a proceeding. The worst type of "legalist" is the "sea lawyer." Conversely, the lawyer with collective bargaining "know how" can do much to promote orderly and simple hearing procedures.

out back pay and the like. Moreover, we need to be wary of a too frequent inclination to recognize extremely small gradations of shading. If "off-white" is usually considered by the parties to be white, or charcoal grey to be black, who are we to suggest that they are color-blind.

10. If an opinion is desired, the arbitrator has a responsibility to write clearly and as briefly as possible, to make certain that the parties will know that he understands the problem, to avoid excursions beyond the confines of the case, and to state the reasons for the decision. In the absence of any mutually recognized procedures, formal or informal, for discussion of a case with representatives of the parties after a hearing, the opinion is the only opportunity to "sell" a decision and enhance its acceptability.

11. Increasing costs of arbitration, including arbitrator's fees, costs of transcripts, legal fees, and "time off" expenses of representatives of the parties present a substantial threat to labor arbitration. The opposite possibility, that arbitration may be so cheap and accessible as to enervate collective bargaining, still exists, but in diminishing degree.

12. As Ben Aaron noted this morning, the trend toward delayed decisions is a dangerous one. Nor can arbitrators absolve themselves from responsibility by pointing to what appear to be comparable trends of delays in the grievance procedures, long intervals between referral to arbitration and selection of the arbitrator and delays in arbitration imposed by formalistic procedures, post-hearing briefs and the like. A reasonably quick answer in industrial relations problems is still desirable. Long delays increase the pressures to bypass the contract by wildcat strikes and other devices.

13. As arbitrators, we have a responsibility to arrange our personal lives, by alternative sources of income or by other deeper moral resources, so that our vision is not obscured by the "need for business" or by fear of the consequences to us of any particular decision or group of decisions. In the best use of

the word, we are servants of the parties but we cannot be subservient to them. As participants in a common endeavor, development of personal friendships and a sense of fraternity with union and company representatives is inevitable and proper, but with constant realization that intellectual integrity must not be sacrificed thereby.

14. Finally, the arbitrator has a responsibility to obtain what can only be described as a "feel" for the essential characteristics of each collective bargaining climate in which he works, including some of the points already mentioned and not neglecting appreciation of the human strengths and weaknesses of the principal representatives of both parties. We face the difficult problem of needing chameleon-like qualities without losing our integrity and purpose. It has been said that this can be done in umpire or impartial chairman relationships but not in *ad hoc* cases. There are obvious differences, but these differences do not relieve us of the responsibility, even in *ad hoc* cases, of adapting arbitration to the needs of the principals.

To summarize, what I could characterize as a "practical philosophy" of arbitration embraces a return to relatively simple, informal, quick, and relatively inexpensive "down-to-earth" procedures readily understood by the employees in the shop and by all other participants. Greatly increased use of arbitration is no necessary measure of quality and is not proof that growth will continue. Those of us who have "been around" for 20 years or longer in this work will recall that most of the early arbitration was of the variety that I have attempted to describe in this paper. I am sure that I'm not simply being nostalgic, old-fashioned or senile in concluding that some trends of the last 10 years have indicated retrogression rather than progress. Moreover, these simpler procedures prevail today in many collective bargaining relationships and it is my conviction that they are more effective than the formalistic variety.

Discussion—

RUSSELL A. SMITH*

It is not altogether clear to me whether our panel has a roving commission to discuss "the role of the law in arbitration," or simply the duty to comment on the remarks of Ben Aaron and Archie Cox. In other words, there is a question of "interpretation" of the "submission" to us, and we can be of the "activist" school, and range broadly and purposively, or "follow the quieter role" of a Learned Hand. I shall use the less aggressive interpretation of our assignment. Nevertheless, I can't resist the opportunity to try to assess the relevance of today's discussion to the persistent question of what, if anything, the Academy should do with respect to the subject of labor dispute arbitration legislation. First, however, it is in order to compare the ably stated views of Aaron and Cox.

The crux of Aaron is that the results of *Lincoln Mills* will be bad for industrial relations "unless measures are taken to cushion its impact," and the only really effective way of dealing with the problem is to persuade labor and management to stay away from the courts like the plague. Thus, Aaron holds that neither the attempt to enact wise regulatory legislation nor the attempt to articulate a rational philosophy of grievance arbitration, nor, I gather, the two taken together, offer much hope for success in meeting what he calls the "threat" and "challenge" of *Lincoln Mills,* for the essence of the problem is the very involvement of the courts at all. To the extent the courts are asked to intervene, the parties give up "their precious opportunity to govern themselves," and the real virtue of arbitration under the system (or lack of system) that we know is the Shulmanian concept that it is a procedure fashioned by the parties, responsive to their needs, and not imposed

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or regulated from without. To the extent that the parties lay down their private arms of collective bargaining, and call upon the arsenal of government, they repudiate the only solid basis for private grievance arbitration. The threat, therefore, goes to the very existence of voluntary grievance arbitration, and the parties should understand this. So understanding, they will, collectively, and with the arbitrators, take the steps they deem necessary to make the process function according to their mutual desires. Evidently our distinguished president, Harry Platt, shares this view.

The essence of the Cox view is that *Lincoln Mills* means that the courts will move increasingly into the area of contract administration and grievance adjustment, whether we like it or not, and that the only real hope for saving our arbitration system from serious, perhaps fatal, damage is to expound and sell to the courts a valid, viable, coherent concept of the nature of the collective labor agreement and of the process of interpreting and applying the agreement. Courts must be permitted to pass on the question whether a party, refusing to arbitrate, has broken his promise to arbitrate, but somehow they must be made to understand the difference between deciding this question and deciding questions of contract interpretation and application. They must be made to see that the collective labor agreement, like other agreements, may properly be read in context. They must come to appreciate the peculiar institutional and "governmental" nature of the agreement and the elements, including the "common law of the shop," out of which the agreement emerges and against which it is to be measured. The courts must be convinced that the parties have chosen to use private arbitration to resolve their differences because, on the whole, they think arbitrators can perform this task with greater awareness and understanding than others, including the courts. Thus far, as Cox's references to judicial decisions show, the judges, with certain notable exceptions, have exhibited a singular lack of understanding of these matters, and this in part may be because, as Aaron

says, most of them "are poorly informed about industrial relations at the plant level." At any rate, the job of informing the courts of the nature of the collective labor agreement, and of the conceptual basis and function of grievance arbitration, remains to be done. Archie's paper, given adequate distribution, provides, in itself a very fine contribution to this end.

I want to add to the grist for this occasion some of the thinking of another of our distinguished colleagues, Charlie Gregory. Speaking at a Michigan Law School conference last summer on "The Law of Collective Agreement," Charlie made some remarks which are germane to our present subject, and worth serious consideration. Charlie (surprisingly enough!) likes the arbitration process, and, like Aaron and Cox (and I suppose the rest of us) thinks it should be encouraged, not discouraged. He thinks the Court in *Lincoln Mills* indicated that it wants no part of a federal arbitration act, since it deliberately (when it might have done otherwise) assigned to the courts the task of developing, from any and all available and relevant sources, a federal substantive law with respect to collective labor agreements. Gregory regards this as a wise choice, since he thinks we'll be better off with a developing federal "common law," including arbitration, than if we had legislation on this subject. He concluded with these remarks:

> "This whole thing is a unique legal situation. We are dealing with a novel subject-matter—the collective agreement—which is supposed to be what the parties themselves make it. At the same time we are trying to foster a new kind of social structure—self-government in an industrial society. On top of this we recognize the need of some neutral procedure to enforce collective agreements and settle differences arising under them. But we do not want to restrict the parties at all in their experimentation. What better or more unique answer to this need could be imagined than the roving commission the Supreme Court has assumed for itself and the lower federal courts? In a fluid quasi-legislative fashion they may conduct experiments in this field and can produce something eventually

> that is bound to be revolutionary—and no doubt a triumph—in law-making."

Gregory likes the resiliency and flexibility inherent in judicial lawmaking, and no doubt finds in this quality the capacity for absorbing, eventually, the rational philosophy of grievance arbitration which Archie Cox expounds and says we need.

Our role as commentators doubtless invests us with some jurisdiction to review for error the "cases" made by our principal speakers, although I, for one, accept the necessity that our review must be limited, and I lay aside as patently frivolous the possibility of claiming, in the formula of the Uniform Act, as to Aaron or Cox, that "there was evident partiality by an arbitrator appointed as a neutral." I agree with Aaron that the principal virtue of private grievance arbitration lies in its susceptibility to control by the parties and in its sensitivity to the collective bargaining milieu, which are likely to be impaired with increasing resort to the courts. This gospel, self-serving though it may seem to be, should be preached with increased vigor by the members of this Academy and by labor and management. I also agree, however, with Cox that the prospect in the wake of *Lincoln Mills* is for increasing judicial intervention, whatever the friends of arbitration may do. It seems fairly clear, too, that federal rules developed under or apart from Section 301 will occupy the field, and that this fact makes the Uniform Act promulgated by the Commissioners on Uniform State Laws, and state laws in general, relatively less important than they have been.

The Aaron and Cox views may, I think, be synthesized. Following Aaron (and, I suppose, also Cox) the friends of arbitration should stand up and be counted as viewing with alarm the trend toward litigation. On this issue the Academy and its members should speak and speak vigorously, although the primary responsibility, as Harry Platt would urge, rests with the parties, labor and management. At the same time, however, that this basic issue is joined, we can and should, as

Cox urges, try to articulate a rational philosophy of the collective labor agreement and its interpretation, and seek its acceptance by the judiciary and by legislators. The reason for doing so is quite clear. Judges are going to be asked increasingly to pass on questions framed as raising issues of "arbitrability." To the extent that they can be persuaded by statutory mandates or otherwise to analyze these issues in the manner suggested by Cox, the inherent threat to arbitration posed by judicial intervention will be diminished, for the result in most cases will then be to leave the determination of these questions to the parties and to the arbitrator, where they belong.

I want to try to relate this matter, if I may, to the interest of the Academy in the subject of arbitration legislation. As I conceive the matter, the Academy's principal objective in this area is fully consistent with the positions taken by our speakers. We seek, through evaluation and even promulgation of arbitration legislation, to promote understanding and acceptance of the kind of analysis of the arbitration function stated by Cox. Working on a statute is one way of doing this.

Yet the views expressed by Aaron and Cox, as well as by Gregory and others, suggest that we review again the threshhold question of whether we should concern ourselves, as an Academy, with arbitration legislation. It is agreed by all that the basic decision whether to invite further judicial intervention rests with labor and management, and this may mean that efforts of the Academy and of other friends of arbitration should be directed toward the parties rather than toward the legislators or the courts. Further, Cox's view that an arbitration statute must leave the basic issue of arbitrability to the courts to be passed upon, if desired, prior to arbitration is disturbing, for if this view prevails, any statute will include prearbitral judicial jurisdiction which, despite any restrictive language used, will invite judicial intervention and the kinds of decisions which he criticizes. Moreover, Aaron makes the valid point that the launching of a model act on a Congressional

voyage is fraught with the very real danger that the vessel, if it accomplished the passage at all, would come to port with a 30 degree list, bottoms leaking, and unwanted contraband aboard. Finally, Gregory would eschew any statute in favor of the development of a federal "common law" as an adjunct to Section 301. He thinks there is a good chance that this law, with proper stimulation and the application of inventive genius, can emerge in unique form structured to the needs of collective bargaining.

I find myself almost persuaded by these views to the position that the Academy should release its Committee on Law and Legislation from any further responsibility in the matter of arbitration legislation, or at least from the duty of attempting to come up with a form of statute which we might be willing to support.* (I might add that this would be a matter of considerable relief to the members of the Committee.) Yet, despite the obvious merits of the case for this proposition, my own tentative conclusions are these:

1. We should continue to work on a "model" statute, on the premise that this process in itself, if properly handled, will have an educational value in the right direction even if the product is never officially promulgated on behalf of the Academy and even if it is never pushed in the halls of Congress. The problems associated with the drafting process can become focal points for discussion among ourselves and with labor and management and other groups, perhaps even judges. This should help toward understanding.

2. We should concurrently, however, continue, as we have done in these meetings, to seek other opportunities for developing an articulated philosophy of collective labor agreement interpretation and grievance arbitration, and we should use all practicable methods of reinstilling in labor and management a faith in their own institutions, which we hope that, upon

* Editor's Note: See Appendix C of this volume.

reflection, they will reaffirm. Labor and management should, somehow, then take the primary responsibility, but with our help, for getting this philosophy "across" to judges and to legislators.