

CHAPTER II
COLLECTIVE BARGAINING AND THE ARBITRATOR
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I.

The purpose of this paper is to discuss two controversies which have surrounded labor arbitration almost from its inception. They touch on what may be called its permanent problems. Recently they have been brought into renewed prominence by certain judicial decisions and in particular by certain observations by Mr. Justice Douglas in the *Three Steelworker Cases*.¹

The first of these controversies relates to the proper role of the arbitrator—how he should conceive his function, how he should conduct the hearings, and what limits he should impose on himself. The second relates to the principles he should follow in interpreting the collective bargaining agreement and in applying its provisions to the controversy before him. As this statement of the second issue implies, my concern here is primarily with arbitration arising under an existing agreement, and not with arbitration conducted to set the terms of a new contract.

One conception of the role of the arbitrator is that he is essentially a judge. His job is to do justice according to the rules imposed by the parties' contract, leaving the chips to fall where they may. He decides the controversy entirely on the basis of arguments and proofs presented to him "in open court" with the parties confronting one another face to face. He does not attempt to mediate or conciliate, for to do so would be to compromise his role as an adjudicator. He will strictly forego any private communication with the parties after the hearing. The friends of this conception see it as casting the arbitrator in the role of a man of principle, a man who respects the institutional limits of

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¹ *United Steelworkers v. American Mfg. Co.*, 34 LA 559, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 34 LA 561, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 34 LA 569, 363 U.S. 593 (1960).

his task, who conscientiously refuses to exploit his powers for ulterior purposes, however benign. The critics of this conception have a less flattering view of it. To them it is unrealistic, prudish, purist, legalistic, an abandonment of common sense, a chasing after false models motivated perhaps by a secret hankering for the glamour and security of judicial office.

The opposing conception expects of the arbitrator that he should adapt his procedures to the case at hand. Indeed, in its more extreme form it rejects the notion that his powers for good should be restrained at all by procedural limitations. By this view the arbitrator has a roving commission to straighten things out, the immediate controversy marking the occasion for, but not the limits of, his intervention. If the formal submission leaves fringes of dispute unsettled, he will gladly undertake to tidy them up. If the arguments at the hearing leave him in doubt as to the actual causes of the dispute, or as to what the parties really expect of him, he will not scruple to hold private consultations for his further enlightenment. If he senses the possibility of a settlement, he will not hesitate to step down from his role as arbitrator to assume that of mediator. If despite his conciliatory skill negotiations become sticky, he will follow Harry Shulman's advice and—with an admonitory glance toward the chair just vacated—"exert the gentle pressure of a threat of decision" to induce agreement.²

The critics of this view are seldom charitable in describing it. They say that arbitrators who accept it think they can "play God," though the actual motive of their actions is usually a base instinct to meddle in other people's affairs. The conception that encourages this intermeddling rests essentially on hypocrisy, for it enables a man who pretends to be a judge to enjoy the powers of his office without accepting its restraints. It is a Messianic conception, a patent abuse of power, a substitution of one-man rule for the rule of law. So the castigations mount. There is need for a neutral term. As the nearest approach I suggest that we describe this view as one that sees the arbitrator, not as a judge, but as a labor-relations physician.

The other major controversy is, as I have said, that which re-

² Shulman, "Reason, Contract, and Law in Labor Relations," 68 *Harv. L. Rev.* 999, 1023 (1955). Reprinted in *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), p. 169.

lates to the interpretation of the collective bargaining agreement. By one view a labor contract is like any other legal document and ought to be subject to the same principles of interpretation. If, as it commonly does, it states that the arbitrator shall have no power to add to or to detract from its terms, he must accept this limitation. His object is not to do justice, but to apply the agreement. If the agreement imposes hardships, it is no business of the arbitrator to alleviate them. His powers and his duties lie wholly within the four corners of the written document.

The opposing view stresses the unique quality of the collective bargaining agreement. It is not quite like any other document ever conceived by the mind of man. It is at once a constitution and the written record of an economic trade. It is a charter of the parties' rights and a set of resolutions never really expected to be fully realized in practice. From the curiously mixed nature of the collective bargaining agreement there is derived (by a logic that is certainly not obvious) the conclusion that it must be construed freely. Unlike judges, arbitrators must eschew anything like a "literal" interpretation. Their task is not to bend the dispute to the agreement, but to bend the agreement to the unfolding needs of industrial life.

In presenting these two controversies I have purposely thrown the contending sides into a sharper opposition than commonly exists in practice. In reality the matter is never so black and white as I have just painted it. Even those arbitrators who purport to adhere to a fairly extreme position at one end or the other of the scale seldom practice entirely what they preach.

The two controversies I have outlined are to some extent two aspects of a single dispute. One can generally predict that the arbitrator with strong instincts toward mediation will also be likely to favor free principles of contract construction. This is not necessarily so, however. There is no compelling reason why the strict constructionist should not, on occasion at least, undertake the role of mediator. Indeed, he is in an especially favorable position to coax an agreement by "the gentle threat of a decision," for in his case this threat may be fortified by a reputation for stiff interpretations. But with this allowance it still remains true that where one will take his position on each of the two controversies is likely to be influenced by a single disposition.

This affinity of views comes to clear expression in Mr. Justice

Douglas's remarks in *United Steelworkers v. Warrior & Gulf Nav. Co.*:

"Arbitration is a means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way that will generally accord with the variant needs and desires of the parties. . . . The labor arbitrator performs functions which are not normal to the courts. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the . . . agreement permits, such factors as the effect on productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished."³

Here by a single stroke the arbitrator-physician is largely relieved both of the restraints of judicial office and of any undue concern to find justification for what he does in the words of the agreement.

It is time now to undertake an analysis of the merits of the controversies I have so far been merely describing. It will be convenient to start with that concerning interpretation.

II.

No one has seriously contended, I believe, that formal legal principles of interpretation ought to govern the construction of a labor contract. In a labor arbitration they would be a needless encumbrance and would probably make no difference in the result. As is often pointed out, these principles tend to come in offsetting pairs. One can find a maxim according to which when you say "trees" you must mean shrubs also, shrubs being so much like trees. By another maxim one can argue that when you say "trees" you must mean to exclude shrubs because if you had meant shrubs you would have said so; shrubs being so much like trees, and so naturally suggested by them, you couldn't have forgotten about them when you said "trees" and stopped. Latin expressions of these contradictory truths may lend a certain dignity to judicial opinions. They can hardly serve any purpose in an arbitration award.

There is one legal principle affecting interpretation that might be thought to have a proper bearing on the arbitrator's task of construing the collective bargaining agreement. I have heard

³ 34 LA at 564; 363 U.S. at 581-582.

arbitrators say that they wish they felt free to invoke the parole evidence rule to cut off certain kinds of testimony with which hearings are often burdened. What they have in mind generally is testimony along this line: One of the parties wants to testify to what *he* meant by a phrase in the agreement. He may add, "I wrote that part myself." He is generally puzzled that his explanations are not received with more enthusiasm. When he is asked whether he communicated his interpretation to the other party, he replies that of course he did not. When he is asked if he is prepared to testify to any fact that will tend to show that the other party ought reasonably to have put the same interpretation on the phrase that he did, he replies that he does not understand the question. At this point the arbitrator will probably be well advised to let the witness proceed on his own, meanwhile suspending the taking of notes until the testimony takes a more propitious turn. In actual fact, however, the testimony just described is not excluded by the parole evidence rule. It is excluded by the more fundamental rule of relevance, the common sense rule that the testimony received ought to have some bearing on the dispute.

The parole evidence rule comes into question only when the party seeks to testify to some *communicated* expression of intention, some expression that passed between the parties. If the intention so communicated finds no expression in the written contract, testimony concerning it may be offered for the purpose of altering the construction that would otherwise be put on it. Here the possible exclusionary effect of the parole evidence rule becomes relevant. Unfortunately the answer it yields is not simple. The rule's apparent exclusionary force is greatly reduced by two qualifications: (1) errors in the written document may be corrected by a resort to parole evidence;⁴ (2) matters deliberately left to "side agreement" generally do not come within the rule.⁵ With these qualifications the rule largely reduces itself to a rebuttable presumption that when some intention expressed during negotiations fails to get into the written document, it was omitted because it was not intended to stand as a part of the

⁴ *Restatement of Contracts*, § 238 (c).

⁵ *Id.*, § 240(1)(a) and (b). The *Restatement* is stricter on this point than Wigmore; 9 Wigmore, *Evidence* (3d ed., 1940), § 2430-2431. Corbin puts a broad interpretation on the *Restatement*; Arthur L. Corbin, 3 *Corbin on Contracts* (St. Paul, Minnesota: West Publishing Co., 1960), § 584.

total agreement of the parties. If this is a correct appraisal of the effect of the rule, then it is apparent that its use in labor arbitration would accomplish little that cannot be achieved by a common sense appraisal of the testimony received and the probabilities to which it points.

These remarks are, however, a digression from our subject. The real controversy hinges, not on specific rules of interpretation, but on the general spirit with which the task of assigning meaning to the contract is conducted. Here the field is cluttered with a good many clichés that have done great harm. The most common of these asserts that judges construe contracts strictly and literally, while arbitrators play fast and loose with them. I don't believe that there is anything in this at all, and that if any generalization were to be made, it ought to run in the opposite direction.

In the first place courts have been rather free in reading obligations into contracts that are not expressed in the writing, and that sometimes directly contradict the writing. A enters a contract with B to render a performance scheduled to begin July 1st. On May 15th, A repudiates his agreement and tells B he is not going to perform. B brings suit on May 16th. A alleges that the suit is premature; his promise was to begin performance on July 1st. Until that date arrives, he cannot be guilty of a breach of contract for he has promised nothing before then. For more than a century British and American courts have generally allowed B to recover. Why, they ask, should B have to wait around for July 1st to arrive when A has already told him he is not going to perform? If a promise is needed, we can say that in committing himself to begin performance on July 1st, A impliedly promised not to repudiate his obligation meanwhile. This result has often been criticized by legal scholars as an unprincipled rewriting of the words of the contract. It has become, however, accepted law.⁶

A father has two children, a son and a daughter. Before his death the father conveys most of his property to his son and exacts from the son a promise that he will provide for the daughter during her life. The father makes the son the executor of his will. After the father's death, the son refuses to carry out the agreement to provide for his sister. The sister brings suit against him. It is argued that she cannot sue on the contract since she was

⁶ *Restatement of Contracts*, § 318.

not a party to it. The promise ran to the father, not to her. Again, for at least a century, the courts have generally found some way to allow the daughter to recover on the contract. If we say that only a person to whom a promise is made can sue on it, the father has departed and his representative is now the son, who obviously has no interest in suing himself. There being no machinery of public enforcement available, the only solution is to allow a suit by the daughter herself. This result has also been criticized by scholars, who have seen in it a loose addiction by the courts to doing justice at the cost of legal principle. Again, however, the result stands as law.⁷

My third illustration is somewhat more extreme. In an individual contract of employment, an employer promises his employee a bonus if the employee will remain on the job for a certain period of time. The contract states: "the provision herein concerning a bonus is to be understood as a gratuity and shall impose on the employer no legal liability whatsoever." The employee complies with the stipulated conditions for securing the bonus. The employer refuses to pay it. The courts have held in cases like this that the stipulation against legal liability does not relieve the employer of an obligation to pay the bonus. The employer cannot have his cake and eat it, too. He cannot induce the employee to remain with him by holding a bonus before his eyes, obtain in this way the employee's loyalty and the benefit of his services, and then cut the ground from under him by invoking a clause against legal liability.⁸

The three cases I have just described—and I could expand the list many times over⁹—witness a willingness by courts to add to and subtract from the language of contracts that would seem strange indeed in a labor arbitrator. The reason for this difference is not far to seek. The labor arbitrator is himself a creature of the contract. It is the charter, not only of the parties' rights, but of his powers as well. The courts, on the other hand, have a commission broader than that of the enforcement of contracts. They have, accordingly, claimed the power to interpret

⁷ *Id.* at § 135 (a).

⁸ Fuller and Perdue, "The Reliance Interest in Contract Damages," 46 *Yale L.J.* 373, 415, notes 217 and 218 (1937).

⁹ One may mention in passing: the requirement of "mutuality" by which one-sided contracts are stricken down; ancient rules concerning dealings with the equity of redemption; the rule rendering "penalty clauses" void; the various ameliorations of contractual obligations introduced by the doctrines of waiver and estoppel.

contracts broadly in terms of their evident purpose and to disregard certain kinds of provisions deemed unduly harsh.

To emphasize this contrast, let me recall an arbitration award that has been widely regarded as a particularly bold piece of interpretation, reaching toward the limit of what is appropriate in labor arbitration. In this case, though there was no provision making discharges subject to the grievance procedure (including arbitration), the arbitrator held that such a provision was necessarily implied.¹⁰ He reasoned that this implication was essential to maintain the integrity of the rest of the contract, which contained the usual grievance and seniority procedures. He observed that giving a man a right to present and arbitrate grievances is of little value if, at the first stirrings of discontent, his boss is free to throw him out of the plant. When we compare this award with the judicial holdings just passed in review—and I want to emphasize that the list could be expanded many times over—it seems odd indeed that the award should be regarded as involving any unusual standard of interpretation. The principle that you read into a contract those obligations that are essential to achieve its principal objectives is almost a judicial commonplace.

When the question is not that of infusing a contract with unexpressed implications, but rather that of construing particular words, I believe it can again be asserted that courts by and large proceed more freely than arbitrators—and I would again say, properly so. Arbitrators are especially likely to put a fairly strict interpretation on provisions that confer on individuals what may be called earned or acquired rights, like seniority and vacation benefits. These are a species of property. Now it is obvious that the courts themselves approach the law of property in a somewhat different spirit than they do, say, the law of torts. There is in property law a certain conceptual rigor, a willingness to draw black and white distinctions, that would be out of place in most areas of law, including that of ordinary contracts. The only thing peculiar in this respect about the collective bargaining agreement is that it has the side effect of establishing a system of earned privileges or rights—essentially property rights—in individuals. This is a quality not shared by contracts generally. In administer-

¹⁰ *In the Matter of Coca Cola Bottling Co.*, 1949, reported in Cox, *Cases on Labor Law* (4th ed., 1958), p. 583.

ing this aspect of the collective bargaining agreement, arbitrators proceed much as judges do in administering the law of property generally. This works toward a stricter type of interpretation than would be appropriate for contracts generally.

At this point it may be objected that the comparisons I have been making are irrelevant. If a meaningful comparison of interpretation by courts and by arbitrators is to be made, it ought not to be as to contracts generally, but with respect to the same kind of contract. Is it not true that in those cases where courts have had occasion to interpret collective bargaining agreements—chiefly in passing on the issue of arbitrability—they have favored a more literal and strict interpretation than have arbitrators? And does not this judicial inclination toward a strict and word-bound interpretation underlie the now widely felt concern lest the institution of arbitration be impaired by an expanding judicial control over it?

These are questions that deserve careful consideration. In attempting to answer them, let us start by accepting the word “literal” in a sense frankly pejorative—for surely all would agree that an interpretation can be too “literal.” What produces such an interpretation? One thing that can bring it about is an animosity toward the purpose of the document being interpreted. A perversely literal interpretation is one of the surest ways of making a contract unworkable. The classic example is the judgment in *Shylock's Case*. There are those who discern something similar in the carefree literalness with which courts sometimes approach the construction of labor contracts. One cannot dismiss this suspicion as wholly without warrant. Perhaps indeed there are judges who would be flattered by the comparison with Portia, who in their private moments like to think of themselves as rescuing the Merchant from the knife. The tone of occasional judicial utterances suggests as much.

The most common cause of an inept literalness, however, lies not in bias but in a lack of understanding. The innocent who asked why a player was permitted to continue in a baseball game after the umpire had told him he was “out” was not actuated by bias. He simply did not understand the game.

Labor relations have today become a highly complicated and technical field. This field involves complex procedures that vary from industry to industry, from plant to plant, from department

to department. It has developed its own vocabulary. Though the terms of this vocabulary often seem simple and familiar, their true meaning can be understood only when they are seen as parts of a larger system of practice, just as the umpire's "You're out!" can only be fully understood by one who knows the objectives, the rules, and the practices of baseball. I might add that many questions of industrial relations are on a level at least equal to that of the infield fly rule. They are not suitable material for light dinner conversation.

In the nature of things few judges can have had any very extensive experience in the field of industrial relations. Arbitrators, on the other hand, are compelled to acquire a knowledge of industrial processes, modes of compensation, complex incentive plans, job classifications, shift arrangements, and procedures for layoff and recall.

Naturally not all arbitrators stand on a parity with respect to this knowledge. But there are open to the arbitrator, even the novice, quick methods of education not available to courts. An arbitrator will frequently interrupt the examination of witnesses with a request that the parties educate him to the point where he can understand the testimony being received. This education can proceed informally, with frequent interruptions by the arbitrator, and by informed persons on either side, when a point needs clarification. Sometimes there will be arguments across the table, occasionally even within each of the separate camps. The end result will usually be a clarification that will enable everyone to proceed more intelligently with the case. There is in this informal procedure no infringement whatever of arbitrational due process. On the contrary, the party's chance to have his case understood by the arbitrator is seriously impaired if his representative has to talk into a vacuum, if he addresses his words to uncomprehending ears.

The education that an arbitrator can thus get, say, in half an hour, might take days if it had to proceed by qualifying experts and subjecting them to direct and cross examination. The courts have themselves recognized the serious obstacle presented by traditional methods of proof in dealing with cases involving a complex technical background. In March of 1960 the Judicial Conference approved a *Handbook of Recommended Procedures*

for the *Trial of Protracted Cases*.¹¹ The text of this *Handbook* makes it clear that in speaking of "protracted cases" the Conference has in mind cases that are likely to be indefinitely protracted if difficult technical questions, say, of economics or engineering, are dealt with by conventional methods of proof. There is an analysis in the *Handbook* of the difficulties encountered by courts in antitrust and patent cases.¹² I believe that every item in this analysis has an equal application to complicated labor cases. I only regret that there is no explicit recognition of this fact in the *Handbook*. We would have gone a long way toward better understanding if we could think of the labor arbitrator performing a function much like that of the court-appointed referee or special master in cases involving patents, antitrust problems, water diversion issues, and the like.

There is a second—and to my mind even more important—reason why courts are at a distinct disadvantage in dealing with problems involving industrial relations. The question they chiefly have to decide, that of arbitrability, is the most difficult question of all, and is virtually unanswerable within the frame of its usual submission for judicial decision. Let me explain what I mean.

In the first place the questions of the merits and that of arbitrability are generally—to put it mildly—closely intertwined. There are, to be sure, cases of highly specific limitations on the arbitrator's power, such as an express stipulation that no question relating to pensions shall be arbitrated. Here there is no real penumbra of doubt and a straight-forward ruling on arbitrability is possible without trespassing on the merits. Unfortunately for the courts, questions like these don't go to litigation. Usually you can't answer the question either of arbitrability or of the merits without answering another question: "Is there any provision of the contract that could be or has been broken?" Unfortunately, this question does not readily break into two pieces, one part of which determines arbitrability, the other the decision on the merits.

Let us examine how the matter typically comes up when arbitrability is passed on by the arbitrator himself, at least in the first instance. At the very outset of the hearing the company in-

¹¹ This *Handbook* was prepared by a Study Group under the chairmanship of Alfred P. Murrah, Chief Judge, Court of Appeals, Tenth Circuit.

¹² See esp. pp. 63-64, 69.

terposes the objection that the question submitted by the union is not arbitrable. Arguments are then heard on that issue. If the arbitrator had then to decide the case, he might rule either for or against arbitrability. But he would feel insecure in any such ruling. The language and facts adduced before him seem to add up to a *prima facie* case for or against arbitrability, but he knows from experience that things which seem simple at the outset often turn out to be complicated. Language that seems to mean one thing may have acquired a different meaning in the practice of the plant. The arbitrator cannot in good conscience rule until he has a chance to probe more deeply. Accordingly, he suggests that the question of arbitrability be reserved and that the parties proceed to the merits. He then hears the same story told a second time, but this time in three dimensions, as it were. When he comes to make his award, he may rule against arbitrability, in which case there is no occasion to discuss the merits, or he may rule in favor of arbitrability and then proceed to decide the merits. But in deciding on arbitrability he has the advantage of the testimony he heard on the merits.

I can imagine these remarks causing a chill of horror to run down the spines of those who are convinced in advance that all arbitrators are unprincipled triflers insensitive to procedural due process. But let us recall the peculiar intertwining of the merits and the question of arbitrability under the usual labor contract. The arbitrator has jurisdiction to decide the case only if there is some provision in the contract that might reasonably be thought to have been broken. The grievant wins on the merits only if the contract has been broken.

The arbitrator's reservation of a decision on arbitrability as he goes into a hearing on the merits is not an empty form or an act of hypocrisy. Let me spell the thing out procedurally a little more precisely than is customary in practice. Suppose after hearing the arguments on arbitrability the arbitrator says, "I rule tentatively that the company is right in its contention that this dispute is not arbitrable; it involves no provision of the contract that could be broken." The union says it wants a chance to show the history of the contract, to go into the way in which it has been administered and how the parties have in practice construed its provisions. The conscientious arbitrator cannot refuse to hear such evidence. But such evidence is equally relevant on both the

merits and arbitrability and it would be a shameful waste of time, as well as a source of confusion, to go through it twice. But if this evidence does not suffice to overcome the tentative ruling against arbitrability, then the arbitrator will make that ruling absolute. He gives the union a chance to rebut the *prima facie* case against arbitrability. If it fails, the decision on arbitrability goes against it. Viewed in this light, proceeding to the merits, while a final decision on arbitrability is reserved, involves no prejudgment at all, but simply the adoption of an expeditious procedure in the interest of all concerned.

Contrast this procedure with that which is imposed on the parties and the court when arbitrability is judicially decided before the case goes to an arbitrator. A union, let us say, demands specific performance of an agreement to arbitrate contained in a collective bargaining agreement. The company defends on the ground that the grievance in question is not subject to arbitration. This frame of argument puts all concerned in a quandary. If the lawyer for either side attempts to go too deeply into such matters as the history of the contract, the practices that have arisen under it or the manner in which the particular grievance came up and how it was treated at earlier steps, he is likely to be reminded that he cannot argue the merits but must stick to arbitrability. The result is an abstractly presented case, a skeleton of the real facts. If the court decides on the basis of this presentation, it runs the risk of not really knowing what it is deciding. If the court itself seeks to go more deeply into the facts, it arouses the suspicion of being influenced by its views of the merits in making its decision on arbitrability.

Let me illustrate these points by reference to a much discussed case, that of *Local 149, Am. Fed'n of Technical Eng'rs v. General Electric Co.*¹³ This case is all the more significant because it was decided by a court which entered with evident reluctance upon a task it considered to be imposed on it by law.

In this case the union claimed that four men were improperly classified, that, in other words, they were performing duties falling within a classification higher than that actually assigned to them by the company. The suit was a petition for a decree of

¹³ 250 F.2d 922 (C.A.1, 1957). Some of the assertions in the discussion of this case are based on the Record.

specific performance directing the company to arbitrate. The company defended on the ground that the grievance was not subject to arbitration under the contract. The contract contained a schedule of the rates to be paid to the various classifications, and contained no clause suggesting that the propriety of the classification assigned to a worker was beyond arbitration.

The District Judge held for the company. It appeared that the jobs in question were "newly created." There was a provision in the contract that the arbitrator should have no power to establish a new wage rate or a new job classification. Therefore, the Judge reasoned, if an arbitrator were to declare the classification assigned to the grievants improper, he would be creating a new classification. This holding was rather patently based on a misunderstanding of the meaning of a job classification system. What the union wanted was a chance to urge the arbitrator to put the men in a slot different from that into which the company had put them. The slot itself would not be created by the arbitrator, but was one already created by agreement between the union and the company.

The Court of Appeals indicated its disagreement with the reasoning of the District Judge. It upheld the refusal of specific performance, however, on a different ground. It relied on a general provision limiting the arbitrator to the function of interpreting and applying the agreement. There was in this case, so the Court considered, nothing to interpret and apply. It was true that the contract referred to a system of job classifications, but the table purporting to set forth the classifications consisted merely of figures—a vertical column of labor grades and a horizontal column of appropriate rates. Nowhere was there any verbal description of the duties appropriate to the different labor grades. There was, therefore, nothing to interpret or apply.

I venture the opinion that if the contract had set forth, not numerical labor grades, but job titles, the decision would have been different. If the quarrel had been not whether the men should be assigned Labor Grade No. 13 instead of No. 12, but should be classified as Methods Planners, Grade A, instead of Methods Planners, Grade B, the court would have perceived the possibility that these titles, though they were accompanied by no verbal description of the duties that went with them, might easily have gained content from the practice of the parties. It

is easy to see that words need interpretation. Faced with the numeral "12" there seems no occasion for interpretation at all. But it is, of course, perfectly possible for a number indicating a labor grade to take on a specific meaning in much the same way that a verbal title can, especially since the company had obligated itself to provide the employee on hiring or transfer with a card designating his job classification.

What I have said is not in criticism of the court in this case, which, as I have said, evidenced a reluctance to assume a task it considered imposed on it by statute. My criticism is directed to the whole frame within which issues of this sort are presented to the court.

As I have said, the court in a case presented as this one was faces the hardest task of all. An arbitrator with a very wide experience in cases involving draftsmen and the various methods of classifying their jobs might have decided the case with some assurance on the basis of the evidence before the court. But no one whose experience fell short of that standard could possibly do it.

A good many of the cases involving arbitrability contain suggestions of the argument that the apparent meaning of the contract's language has been modified by practice under it. In this connection I would recall that courts have (1) held that written contracts may be modified by subsequent oral agreements, (2) that such oral agreements may be effective even though the written contract expressly states that it can only be altered by an agreement written and signed,¹⁴ and (3) that conduct as well as words may evidence an intention to change the terms of a contract.¹⁵ I might add that to determine when a contractual provision has in fact been modified by practice is a subtle question requiring an intimate knowledge of the whole structure of the parties' relations. It is not a question that can be decided on the basis of a factual skeleton.

Another harmful cliché is that the courts mistakenly tend to treat collective bargaining agreements as if they were commercial contracts. In this case the cliché may contain an ironic element of unintended truth. Courts have in fact had difficulty with complicated commercial litigation. The problems here are not un-

¹⁴ 6 *Williston on Contracts*, 2d ed., § 1828, n. 8.

¹⁵ *Restatement of Contracts*, § 235, comment to (e).

like those encountered in dealing with labor agreements. There are really few outstanding commercial judges in the history of the common law. The greatest of these, Lord Mansfield, used to sit with special juries selected from among experienced merchants and traders. To further his education in commercial practice he used to arrange dinners with his jurors. In Greek mythology it is reported that Minos prepared himself for a posthumous career as judge of shades by first exposing himself to every possible experience of life. It is not only in labor relations that the impracticability of such a program manifests itself.

At this point one remedy may suggest itself for the difficulties confronted by courts when they undertake to interpret collective bargaining agreements. Why, it may be asked, should they not use the device of the special master as they do in other complicated litigations? The answer is that in labor relations there is usually a special master already—the arbitrator himself—who has been appointed by the parties or who is ready to be appointed through procedures established by agreement of the parties. To displace him from his appointed function is to destroy an essential element in the whole structure of industrial self-government.

There will be occasion later to return to the problem of interpretation for the purpose of relating it more closely with the problem of the role of arbitration generally in labor relations. Meanwhile it will be helpful to summarize the three relatively simple conclusions I have so far sought to support. *First*, there is nothing ineffably peculiar about the job of interpreting collective bargaining agreements. Such agreements are complicated and they contain provisions foreign to most contracts, such as those establishing a framework for industrial self-government. But we find similar provisions in long-term supply contracts, percentage leases, and other specialized legal documents. Such documents may also involve what may be called constitutional aspects, establishing a private system of adjudication and providing procedures for accommodating the contract to changing circumstances. *Second*, intelligent interpretation of collective bargaining agreements requires an understanding of a complex and changing body of industrial practice. This understanding is not as a practical matter accessible to courts through ordinary procedures of proof. *Third*, in most cases there is and can be no sharp distinc-

tion between testimony bearing on the merits of a dispute and testimony bearing on the arbitrator's jurisdiction to hear the dispute. For this reason to determine the question of arbitrability on the basis of a fraction of the facts relevant to the case as a whole is to take a shot in the dark, a proceeding all the more dangerous when the marksman mistakenly thinks, as he often does, that he sees the target clearly.

III.

Let me now turn to the other major controversy surrounding labor arbitration, that of the proper role of the arbitrator himself. Is his office essentially judicial, with all the restraints that term implies? Or shall we assign to him a freer role, something like that suggested by the term "labor-relations physician"?

Here we encounter the difficulty of defining the restraints of the judicial role in the case of one who does not hold public office in the ordinary sense of the word. Even the most ardent advocate of the view that the arbitrator's function is essentially judicial would hardly argue that his procedures should be patterned precisely after those applicable to courts of law. The problem then becomes that of defining in some more general sense what it means to act like a judge.

At this point one is tempted to discern the essence of the judicial function in a requirement that the decision reached be *informed* and *impartial*. This will not do, however. The expectation that judgments should be informed and impartial applies to many social roles: that of supervisors toward those under their direction, of teachers toward pupils, of parents toward children, etc. The essence of the judicial function lies not in the substance of the conclusion reached, but in the procedures by which that substance is guaranteed. One does not become a judge by acting intelligently and fairly, but by accepting procedural restraints designed to insure—so far as human nature permits—an impartial and informed outcome of the process of decision.

I believe there is open to us a relatively simple way of defining the procedural restraints to which the judicial role is subject. We can do this by looking at adjudication, not through the eyes of the judge, but through the eyes of the affected litigant. Adjudication we may define as a social process of decision which assures

to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favor.

Viewed in this light, adjudication is only one form of social decision in which the affected party is afforded an institutionally guaranteed participation. Elections grant to the affected party participation through voting; contracts grant to him participation through negotiation, either in person or through representatives. No procedure of decision guarantees any particular outcome and least of all an outcome favorable to any particular participant. But the essence of the rule of law lies in the fact that men affected by the decisions which emerge from social processes should have some formally guaranteed opportunity to affect those decisions.

Within this frame of thought we may say, then, that adjudication is a process of decision in which the affected party—"the litigant"—is afforded an institutionally guaranteed participation, which consists in the opportunity to present proofs and arguments for a decision in his favor. Whatever protects and enhances the effectiveness of that participation advances the integrity of adjudication itself. Whatever impairs that participation detracts from its integrity. When that participation becomes a matter of grace, rather than of right, the process of decision ceases to deserve the name of adjudication.

From the analysis just presented can be derived, I believe, all of the restraints usually associated with an adjudicative role. Thus, interest or bias on the part of the adjudicator constitutes an obvious impairment of the interested party's participation through presenting proofs and arguments. So does the holding of private conferences, for the party not included in such a conference cannot know toward what he should be directing the presentation of his case. Matters are not squared when both parties are separately consulted, for then both are dependent on the candor and intelligence of the adjudicator in learning what the other side is saying, not to mention the more usual objections, such as the lack of an opportunity to cross-examine.

The test here suggested by no means coincides with popular prejudice concerning the judicial role. In this country there is a strong inclination to identify judicial behavior with passiveness, the judge being viewed as an umpire over a game in which he takes no active part until called upon by one of the parties to do so. The test here proposed renders a quite different judgment. If

the arbiter of a dispute judges prematurely without hearing what both sides have to say, he obviously impairs the effectiveness of the parties' participation in the decision by proofs and arguments. On the other hand, that participation may be equally impaired if the parties are given no inkling at any time as to what is happening in the arbiter's mind. One cannot direct an effective argument into a vacuum. Accordingly it is the part of the wise arbitrator at some time, usually toward the end of the hearing, to convey to the parties some notion of the difficulties he finds in supporting or in answering certain of the arguments that have been addressed to him. He may find it useful also to summarize the arguments on each side, asking the parties to make corrections or additions so that he may be sure he fully grasps what each is contending for. Such discussions, initiated by the arbitrator himself, take him out of a purely passive role. It is plain, however, that they enhance meaningful participation by the parties in the decision and thus enhance the integrity of adjudication itself.

Perhaps the crassest infringement of adjudicative integrity consists in what has been called the "rigged award." In its most extreme form this means that although the affected parties think their case is being submitted to arbitrational decision, in fact their representatives have already agreed on the outcome to be incorporated in the award. It might seem that this procedure involves not so much an abuse of arbitration as a fraud by representatives on their constituents. But it should not be forgotten that the object of the whole manipulation is to secure the moral force of adjudication for what is in fact not adjudicated at all. The apparent participation of the affected party—through proofs and arguments presented on his behalf—is an empty sham.

This problem of the "rigged," or more politely, the "informed" award deserves some analysis. Such an analysis will reveal that, while in some cases to clothe an agreement with the trappings of an award will constitute a plain abuse of adjudicative power, in other instances the appraisal is less obvious.

Let me take two extreme cases, beginning with an instance where the practice is presented in its most innocent form. Six grievances are scheduled for hearing over a three-day period. These grievances are all closely related, involving, let us say, a series of work-load or machine-assignment problems. Late on

the third day the sixth case has still not been heard. If it is to be heard at all, a new hearing will have to be scheduled and this will be difficult. Though the arbitrator has not as yet rendered a formal award in any of the cases heard, the drift of his mind has become apparent during the hearing of the first five cases, and the disposition of the sixth is not hard to predict. The parties' representatives agree on a solution of it and ask the arbitrator to incorporate their settlement in an award. If the first five cases were reported to the membership as settled by arbitration while the sixth was reported as settled by agreement, quite unjustified suspicions and doubts would be aroused. Hence, the arbitrator is willing to put the agreed settlement "in series," as it were, with its five companions. It would take a purist indeed to discern any real wickedness in this action.¹⁶

At the other extreme is the case where an arbitrator is paid handsomely to hold extended hearings, where a parade of witnesses is heard, where lawyers plead with heart-stirring eloquence, when all the while the whole thing has been rigged and fixed from the beginning and the whole hearing is a farce from start to finish. I agree with Willard Wirtz that even if awards rendered in cases like this always produced a short-run advantage judged from the standpoint of public welfare, the long-run cost would be too high to pay,¹⁷ for such an arbitral practice is essentially parasitic. It takes advantage of the fact that most awards are honest, for if all awards were known to be fixed there would be no point in masquerading an agreement as the decision of an arbitrator. One recalls here the remark of Schopenhauer, that the prostitute owes her bargaining power to the restraint of virtuous women.

It should be observed that in cases like that just suggested, the "fixed" award may involve a by-passing of procedural guarantees surrounding the negotiation of the collective bargaining agreement itself. Those representing the union in an arbitration would seldom possess the power acting by themselves to negotiate a

¹⁶ To forestall a possible inference of self-justification at this point, I should like to say that I have never as an arbitrator had anything to do with a situation of the sort described in the text. On the other hand, I certainly would not like to pretend that I have never been influenced by intimations conveyed during argument as to the lines of an acceptable settlement.

¹⁷ Wirtz, "Due Process of Arbitration," from *The Arbitrator and the Parties* (Washington: BNA, Incorporated, 1958) pp. 1, 27.

contract binding on the union. Thus, in the typical case where the arbitration involves the wages to be paid under a new contract, the arbitrator becomes an accomplice in circumventing limitations on the agency of the union's representatives.

At the extremes, passing judgment on the "agreed" award is relatively easy. In the middle area of gray, arriving at a valid appraisal requires a greater exercise of individual responsibility.¹⁸ One thing seems to be clear, however. In deciding what he should do, the arbitrator is not entitled to take the easy way out by saying, "After all, the purpose of arbitration is to promote good labor relations. If I can head off an unjustified and futile strike by issuing as an arbitrator's decision what is really an agreed settlement, then my conscience is clear." Before taking this escape, the arbitrator should reflect that he is trustee for the integrity of the processes of decision entrusted to his care. He should ask himself whether the argument for bending his powers for good is not like that of the man who, in order to give to a worthy charity, embezzles funds entrusted to his care for an undeserving nephew. In practice the temptation to take short cuts in order to do good is a much greater threat to the integrity of arbitration than the temptation to use its forms for evil purposes.

Before leaving this question of the "informed" award—so that none of its nuances may be left unnoticed—it should be remarked that the problem can arise within the framework of an arbitration wholly conducted within the strictest judicial restraints. Effective advocacy sometimes suggests that the advocate give some intimation in his argument of the most acceptable form of an adverse decision in the event such a decision should be rendered. It hardly needs to be said that such intimations, though conveyed "in open court" and in the presence of all affected, are not always perceived by an inattentive audience. This tincturing of the argument with intimations of settlement, instead of employing more direct and reliable channels of communication, may seem to some the essence of hypocrisy. To others it will represent that

¹⁸ "Code of Ethics and Procedural Standards for Labor-Management Arbitration," 15 LA 961, offers a sparse guidance. § 4(c): "It is discretionary with the arbitrator, upon the request of all parties [who are *all* parties?], to give the terms of their voluntary settlement the status of an award." § 10: "If the parties reach a settlement of their dispute but desire nevertheless to have an award made, they should give the arbitrator a full explanation of the reasons therefor in order that he may judge whether he desires to make or join in such an award."

deference for symbolism without which social living is impossible.

There remains the difficult problem of mediation by the arbitrator, where instead of issuing an award, he undertakes to persuade the parties to reach a settlement, perhaps reinforcing his persuasiveness with "the gentle threat" of a decision. Again, there is waiting a too-easy answer: "Judges do it." Of course, judges sometimes mediate or at least bring pressure on the parties for a voluntary settlement. Sometimes this is done usefully and sometimes in ways that involve an abuse of office. In any event the judiciary has evolved no uniform code with respect to this problem that the arbitrator can take over ready-made. Judicial practice varies over a wide range. If the arbitrator were to pattern his conduct after the worst practices of the bench, arbitration would be in a sad way.

Analysis of the problem as it confronts the arbitrator should begin with a recognition that mediation or conciliation—the terms being largely interchangeable—has an important role to play in the settlement of labor disputes. There is much to justify a system whereby it is a prerequisite to arbitration that an attempt first be made by a skilled mediator to bring about a voluntary settlement. This requirement has at times been imposed in a variety of contexts. Under such systems the mediator is, I believe, invariably someone other than the arbitrator. This is as it should be.

Mediation and arbitration have distinct purposes and hence distinct moralities. The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more.¹⁹ The morality

¹⁹ In exchange "... the rule must be that you give, so far as possible, what is less valuable to you but more valuable to the receiver; and you receive what is more valuable to you and less valuable to the giver. This is common sense, good business sense, good social sense, good technology, and is the enduring basis of amicable and constructive relations of any kind. This does *not* mean that you give as little as you can from the *receiver's* point of view. ... What conceals this simple fact of experience so often is that subsequent evaluations may change, though this is then beside the point. I may pay a man \$10 today with pleasure, and find tomorrow that I need \$10 very badly, but cannot use the service I paid for. I am then perhaps disposed to think I made a bad exchange. I read the past into the present. This leads to the false view that what exchange *should* be is as little as possible of what the *receiver* wants, regardless of its value to me. This philosophy of giving as little as possible and getting as much as possible in the *other man's values* is the root of bad customer relations, bad labor relations, bad credit relations, bad supply relations, bad technology. The possible margins of cooperative success are too limited to survive the destruction of incentives

of arbitration lies in a decision according to the law of the contract. The procedures appropriate for mediation are those most likely to uncover that pattern of adjustment which will most nearly meet the interests of both parties. The procedures appropriate for arbitration are those which most securely guarantee each of the parties a meaningful chance to present arguments and proofs for a decision in his favor. Thus, private consultations with the parties, generally wholly improper on the part of an arbitrator, are an indispensable tool of mediation.

Not only are the appropriate procedures different in the two cases, but the facts sought by those procedures are different. There is no way to define "the essential facts" of a situation except by reference to some objective. Since the objective of reaching an optimum settlement is different from that of rendering an award according to the contract, the facts relevant in the two cases are different, or, when they seem the same, are viewed in different aspects. If a person who has mediated unsuccessfully attempts to assume the role of arbitrator, he must endeavor to view the facts of the case in a completely new light, as if he had previously known nothing about them. This is a difficult thing to do. It will be hard for him to listen to proofs and arguments with an open mind. If he fails in this attempt, the integrity of adjudication is impaired.

These are the considerations that seem to me to apply where the arbitrator attempts to mediate before hearing the case at all. This practice is quite uncommon, and would largely be confined to situations where a huge backlog of grievances seemed to demand drastic measures toward an Augean clean-up. I want now to pass to consideration of the case where the arbitrator postpones his mediative efforts until after the proofs are in and the arguments have been heard. In doing so I pass over the situation

which this philosophy implies." Barnard, *The Functions of the Executive* (1942), pp. 254-255.

Barnard may simplify the matter somewhat in this passage. If in making a deal today I look forward to possible future deals with the same party tomorrow, then it may sometimes be wise to hold back something he wants badly, even if it would cost me little to give it. By doing so I improve my bargaining position tomorrow. But without doubt this consideration is in practice grossly over-emphasized. Barnard is certainly right in pointing up the social destructiveness of the conception that you have won an important victory just because you have deprived the other party of something he wanted badly. One of the most important tasks of the mediator is to keep the discussions within the frame recommended by Barnard, so that this conception will have no chance to work its havoc.

where the arbitrator interrupts the hearing midway in order to seek a voluntary settlement. The standards properly applicable to this intermediate situation may be derived from those governing the two cases that lie on either side of it.

One might ask of mediation first undertaken after the hearing is over, what is the point of it? If the parties do not like the award, they are at liberty to change it. If there is some settlement that will effect a more apt adjustment of their interests, their power to contract for that settlement is the same after, as it is before, the award is rendered. One answer would be to say that if the arbitrator undertakes mediation after the hearing but before the award, he can use "the gentle threat" of a decision to induce settlement, keeping it uncertain as to just what the decision will be. Indeed, if he has a sufficiently Machiavellian instinct, he may darkly hint that the decision will contain unpleasant surprises for both parties. Conduct of this sort would, however, be most unusual. Unless the role thus assumed were played with consummate skill, the procedure would be likely to explode in the arbitrator's face.²⁰

There is, however, a more convincing argument for mediative efforts after the hearing and before the award. This lies in the peculiar fact—itsself a striking tribute to the moral force of the whole institution of adjudication—that an award tends to resist change by agreement. Once rendered it seems to have a kind of moral inertia that puts a heavy onus on the party who proposes any modification by mutual consent.²¹ Hence if there exists the possibility of a voluntary settlement that will suit both parties better than the award, the last chance to obtain it may occur

²⁰ The labor arbitrator must forever be on his guard against being too clever. In one wage case tried before a tripartite board, the impartial chairman hit upon this interesting device. He wrote on a piece of paper his own idea of what would be a fair award. He then asked each of the partisan arbitrators to write down a figure. The amount of the award would then be set by the figure closest to his own. The difficulty with the procedure was that proposing it led to the resignation of the two partisan arbitrators.

²¹ "Even within the confines of disposition of a single issue, our responsibilities [as arbitrators] 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

after the hearing and before the award is rendered. This may in fact be an especially propitious moment for a settlement. Before the hearing it is quite usual for each of the parties to underestimate grossly the strength of his adversary's case. The hearing not uncommonly "softens up" both parties for settlement.

What, then, are the objections to an arbitrator's undertaking mediative efforts after the hearing and before rendering the award, this being often so advantageous a time for settlement? Again, the objection lies essentially in the confusion of role that results. In seeking a settlement the arbitrator turned mediator quite properly learns things that should have no bearing on his decision as an arbitrator. For example, suppose a discharge case in which the arbitrator is virtually certain that he will decide for reinstatement, though he is striving to keep his mind open until he has a chance to reflect on the case in the quiet of his study. In the course of exploring the possibilities of a settlement he learns that, contrary to the position taken by the union at the hearing, respectable elements in the union would like to see the discharge upheld. Though they concede that the employee was probably innocent of the charges made by the company, they regard him as an ambitious troublemaker the union would be well rid of. If the arbitrator fails to mediate a settlement, can he block this information out when he comes to render his award?

part of the collective bloodstream for years to come." William E. Simkin, in a discussion of "The Role of the Law in Arbitration," in *Arbitration and the Law* (Washington: BNA Incorporated, 1959), p. 77.

I suggest that the phenomenon to which Simkin draws attention arises from a deep human faith (or is it hope?) that there are ways of resolving disputes that are intrinsically right and that rise above a mere accommodation of interests. The procedure most adapted to arriving at such a resolution lies in submission to an impartial third person—a procedure in which the parties play the role only of advocates for a point of view. The arbitrator is thus put in this peculiarly difficult position: the moral inertia of his award, once rendered, makes it vitally important that it be right; to be certain it is right, the arbitrator may feel himself strongly pulled to abandon those restraints upon which rests the conviction of the parties that his award will have about it some sort of intrinsic rightness.

In 1947 Jesse Freiden called attention to a phenomenon closely akin to that remarked by Simkin. When wages are set in a particular labor-management dispute by adjudication, there is a tendency for the award to have an inappropriate carry-over to quite different situations. A result reached by negotiation or strike can be localized; one reached through adjudicative processes, determining what is "right," reveals a centrifugal tendency to expand throughout the whole area that at all resembles that in which the award was rendered. This tendency is increased when the adjudicative tribunal is regarded as a branch of government. "The Public Interest in Labor Dispute Settlement," 12 *Law & Contemporary Problems* (1947), pp. 367, 372-373.

It is important that an arbitrator not only respect the limits of his office in fact, but that he also *appear* to respect them. The parties to an arbitration expect of the arbitrator that he will decide the dispute, not according to what pleases the parties, but by what accords with the contract. Yet as a mediator he must explore the parties' interests and seek to find out what would please them. He cannot be a good mediator unless he does. But if he has then to surrender his role as mediator to resume that of adjudicator, can his award ever be fully free from the suspicion that it was influenced by a desire to please one or both of the parties?

Finally, in practice the settlement mediated after the hearing will seldom be free from some taint of being "rigged." Indeed, when an agreement is reached under the express or implied threat of an award, the distinction between agreement and award is lost; the "rigged award" blends into the coerced settlement, and it may at a given time be uncertain which will emerge from the discussions. During these discussions it is most unusual for all affected to know at all times just what is going on.

These, then, are the arguments against the arbitrator's undertaking the task of mediation. They can all be summed up in the phrase, "confusion of role." Why, then, should any arbitrator be tempted to depart from his proper role as adjudicator? In what follows I shall try to analyze the considerations that sometimes press him toward a departure from a purely judicial role. I shall also offer suggestions as to how these considerations can be met without that departure—by methods that keep the arbitrator within the proper limits of his role.

IV.

The most obvious case where an arbitrator is tempted to mediate is where the decision dictated by the terms of the contract is plainly less advantageous to the parties than one that lies within their powers of agreement. Suppose, for example, the following situation. Certain employees called out in an emergency, occurring outside their regular shifts and on a holiday, claim triple pay for the work done. Though the arbitrator has no personal fondness for pyramided overtime, it seems clear to him that under the relevant provisions of the contract the

grievants are entitled to triple pay. The company advances as one of its arguments that if triple pay is allowed, the employees may connive to make available in emergencies only those whose shift schedules are such as to qualify them for triple pay. The union offers during the hearing to work out an agreement by which any such practice would be forestalled.

In such a case the arbitrator will be strongly tempted to propose private consultations, during which he could explain to the company that if the case goes to an award, he will have to grant triple pay and that he will have no way of qualifying his award so as to avoid the abuse about which the company is concerned. I think, however, that there is no need for the arbitrator thus to step down from the bench. He may, for example, explain toward the end of the hearing that he finds it useful to request each party to state how he would write an opinion in his own favor. He then asks the company representative to give in outline form an opinion that would justify a refusal of triple pay. He may thus bring home to the company the plight he has in writing his award. He may further at this point ask the union to clarify its proposal for avoiding abuses. Thus without abandoning his role as judge of the dispute he may open the way for a voluntary settlement. At least in one case like that just related the arbitrator received a letter two days after the hearing that the case had been settled by agreement. It may be objected that this procedure is an hypocrisy and constitutes mediation from the bench. In a sense this is true. But the procedure suggested avoids what is always undesirable and suspicion-arousing: private consultations with the parties. The procedure in no way impairs the integrity of adjudication, for each party has his full chance to present his proofs and arguments in open court and each knows every consideration that the other is advancing for a decision in his favor.

A second situation where an arbitrator may be moved to undertake mediation is presented by a case where there is really no intelligible standard of decision—where decision by a roll of the dice would be about as rational as one reached by an artificial and unconvincing manipulation of contractual phrases. In international law the concept of justiciability is largely associated with the presence or absence of available standards of decision. A judge is one who applies some principle to the decision of the case; if there are no principles, then the decider cannot be a judge

—the case is not justiciable. In terms of the analysis proposed in this paper, the participation of the litigant by presenting proofs and arguments becomes meaningless if there is no rational standard that can control the decision. One cannot join issue in an intellectual void. Unless there is some standard by which the relevance of proofs can be judged and the cogency of arguments measured, the litigant's participation in the process of decision becomes an empty form.

In actual practice I don't think the arbitrator tempted to mediate can find much justification in considerations like those just outlined. Justiciability in the sense in which the term is commonly used in international law is not a serious problem in labor arbitration. In arbitrations arising under a contract, the source of the standards that should govern the decision is clear: it lies in the contract itself. In comparison with contracts generally, labor agreements are tolerably well drafted. The fact that crucial provisions are sometimes drafted at 4 a.m. by tired and angry men does not make them as different from other contracts as labor negotiators are likely to suppose. The difficult problems of interpretation are those common to contracts generally: overlooked situations, apparent or real inconsistencies, carelessness of thought and language, passages drafted by one party in his own terms and never closely examined by the other, provisions knowingly left vague or ambiguous either for later resolution through arbitration or simply through an inability to find an apt verbal solution for the problem addressed. These problems are not, I would say, as difficult as they are in many other branches of contract law. The factual foundation of reciprocal dependence on which a labor agreement rests supplies guide lines for interpretation that may be lacking when business contractors part permanently in a bitter litigational feud. In labor contracts a high specificity of standards often impedes justiciability instead of advancing it. I think most arbitrators would rather decide discharge cases under a simple provision requiring "just cause" than under an elaborate table of detailed offenses. Such a table, because of the limitations of human foresight, usually does more harm than good. (An explicit rule against storing liquor in your locker seems simple enough until the offending employee testifies it was on doctor's orders that he bought a bottle for his ailing

grandmother at lunch time so that he could rush it home after work.)

The procedural limitations that surround the adjudicative function are designed to insure as rational a decision as possible. The essential open-endedness of all human arrangements makes it impossible to guarantee that every dispute that arises will find waiting for it a rule conclusively dictating its decision. Every system of rules yields occasional cases that could be decided either way with equal persuasiveness. This is as true of labor arbitrations as it is of other adjudicative processes, but no more so. The important thing is that in arbitrations arising under a collective bargaining agreement both parties know where to go to get the standard of decision. It lies in the contract itself. This is the standard by which they must judge, as best they can, what proofs to offer and what arguments to advance.

The problem of finding appropriate standards of decision may seem somewhat more difficult in the case of arbitration to set the terms of a new contract—almost invariably, of course, wage terms. Here the problem is not so much a lack of standards as a multiplicity of standards—all, curiously, of a conservative nature, being directed toward the restoration of a disturbed balance of some sort.²² George W. Taylor has suggested a procedure by which the arbitrator may in such cases secure a firmer basis for decision. This consists in requesting the parties to include in their agreement of submission a stipulation of the criteria by which judgment should be rendered.²³ Even in the absence of such an agreement, however, the arbitrator will generally find himself compelled to do the best he can. Arbitration being usually a last resort in such cases, the chances of agreement have usually been sufficiently explored to make mediation pointless. If there is any

²² "No one can be impartial in a vacuum. . . . Where, therefore, as in wage determinations, there are no rules and no code, the only possible interpretation of impartiality is conservatism. Since people have accepted the *status quo*, they probably will continue to do so: impartiality then consists in restoring this *status quo* in any cases in which it happens to have been disturbed." Barbara Wootton, *Freedom under Planning* (1945), p. 112.

The same conservative tendency tends strongly to limit economic adjustments within the bargaining unit itself. The majority principle, unsupplemented by the "deal," is incapable of effecting such adjustments. (See p. 52, *infra*.) It is possible that accelerating technological changes may in the future throw internal wage structures so badly out of balance that some new institutional procedure of adjustment will have to be devised.

²³ Conference on Training of Law Students in Labor Relations, *Transcript of Proceedings* (Univ. of Michigan, 1947), p. 37.

hope that mediation could result in a settlement, it ought to be conducted by someone other than the arbitrator.

I come now to a third kind of situation of much more fundamental importance than those I have so far discussed. An understanding of this situation is, I believe, essential not only for an understanding of labor arbitration, but of adjudication generally. The point I wish now to develop is this: There are certain kinds of problems that by their nature are unsuited to solution by the adjudicative process.

Let me return to the starting point. I have defined adjudication as a process of decision characterized by a particular form of participation accorded to the affected party, that of presenting proofs and arguments for a decision in his favor. The question then becomes, in what kinds of cases can this participation be meaningful? At this point I am no longer concerned with the availability of standards of decision. I am raising the more basic question of the kinds of problems that are amenable to solution by the adjudicative process. The question I have in mind is the counterpart of that which can be raised about elections. An election, too, is a method of decision in which the interested party is accorded a particular form of participation, in this case, that of voting. A good many questions can be decided by voting: who shall be president, whether a bond issue shall be authorized, etc. But there are other questions that do not lend themselves to such a decision: how troops shall be deployed to meet an enemy attack, what is the cheapest way to build a bridge, etc. There are, in other words, intrinsic limits to the kinds of questions that can be resolved by elections.²⁴ I want now to discuss whether the method of decision known as adjudication is subject to similar limits.

Let me begin with typical cases that fall neatly within the competence of the adjudicative process. One such case is that which calls for a yes-or-no decision between parties with opposed interests, no other interests being directly affected by the outcome. The claim is made that a particular employee is entitled to a week's vacation. The company argues that under a proper

²⁴ Arrow, *Social Choice and Individual Values* (1951); Black, *The Theory of Committees and Elections* (1958); a comprehensive bibliography will be found in Riker, "Voting and the Summation of Preferences," 55 *American Political Science Review* 900 (1961).

construction of the contract the employee is entitled to no vacation at all. The decision of such a case can be reached entirely within the limits of normal adjudicative propriety, each party advancing his proofs and arguments in the presence of the other. To be sure, an inexperienced company representative might wish to convey privately to the arbitrator his concern that a decision for the grievant might have an expensive carry-over to somewhat similar situations. He might explain that he does not want to make this statement in front of the union for fear it might be taken later as an admission on his part that the carry-over effect was justified; if decision goes against him, he wants an unimpeded opportunity to oppose the carry-over as if it were a new problem. Clearly this wish to have one's cake and eat it too cannot be gratified. All formal procedures of decision inevitably involve inconveniences and side costs. If every guarantee surrounding adjudication were relaxed the minute it rubbed either party, adjudication would lose its integrity as a distinct form of social decision.

A second kind of case that normally puts no strain on the forms of adjudication may be called the more-or-less case. In a law suit a party asks for \$10,000 damages. The possible decisions run from zero to \$10,000. The plaintiff of course argues for \$10,000, the defendant for zero, the actual judgment may lie somewhere in between. The important thing is that all of the possible decisions may be represented within a single dimension, as points along a straight line.

In practice, more-or-less questions are normally compounded with yes-or-no questions: does the defendant owe anything, and if so, how much? Thus, in a discharge case the arbitrator may be asked to decide, yes or no, whether the employee shall be reinstated. If he is reinstated, the arbitrator may then have to decide how much back pay, more or less, he is entitled to. Though this makes the issues more complex, there is nothing in the nature of the case as a whole that unsuits it for decision within the adjudicative frame.

Now let me present a case in which the question is not simply yes or no, more or less, or a combination of the two. To emphasize that the problem is a general one, I shall begin with a case falling completely outside the field of labor relations.

In 1959 a wealthy lady by the name of Timken died in New

York City. She left a collection of paintings valued at millions of dollars. The pictures were drawn from different periods, different nations, different schools of art. Her will devised the collection to the Metropolitan Museum and the National Gallery of Art "in equal shares." The will prescribed no apportionment and set up no procedure for accomplishing any apportionment.

Here obviously the problem of effecting a division "in equal shares" does not permit a yes-or-no answer. Similarly, the available solutions do not lie along a straight line of more-or-less, but are scattered in an irregular pattern across a checkerboard of possibilities. One can imagine an optimum solution, yielding the greatest utility to both donees, that might lie only a few moves away from the worst possible solution. If one were to seek the best solution by a series of approximations, the movement of a single picture across the line might call for a host of compensatory adjustments in the allotment of other pictures. For it should be remembered that the problem here is not merely that of giving to the two museums collections that might produce an equal dollar return if offered for sale—a conjectural standard in any event—but also that of giving to each those pictures that will most effectively supplement the extensive collection it already has.

The division under Mrs. Timken's will was in fact effected by an agreement of the two museums. The solution was reached through a somewhat complex procedure designed not merely to achieve "fairness" in monetary terms, but to produce a maximum satisfaction of the needs of both museums.²⁵

What difficulty would have been encountered in attempting to effect an equal division of the paintings within the usual adjudicative frame? The difficulty lies in the fact that meaningful participation by the litigants through proofs and arguments would become virtually impossible. There is no single solution, or simple set of solutions, toward which the parties meeting in open court could address themselves. If an optimum solution had to be reached through adjudicative procedures, the court would have had to set forth an almost endless series of possible divisions and direct the parties to deal with each in turn.

Similar problems can plague adjudication in all fields. In international law the classic problem is that of apportioning the rights

²⁵ *New York Times*, May 15, 1960, p. 77.

in an international river system, including the interrelated rights of diversion, pollution, power uses, navigation, and fishing. In constitutional law we have the problem presented by a demand that the courts reapportion election districts to make them more representative of the distribution of population. In administrative law those agencies most likely to fall short of judicial proprieties are almost invariably those entrusted with tasks of apportionment, such as that of allotting air routes or radio and TV channels. In controlled economies (including those of this country in time of war), the adjudicative function is likely to be badly confused with managerial direction because many of the problems that require solution do not yield themselves to solution within the adjudicative frame.

Adopting a term introduced by Michael Polanyi,²⁶ I have called problems like that presented by Mrs. Timken's will "polycentric," that is, "many-centered." One may illustrate the essential idea by a spider web. Pull a strand here, and a complex pattern of adjustments runs through the whole web. Pull another strand from a different angle, and another complex pattern results. As I have said, the essential point does not lie in the presence or absence of rational grounds for action. Constructing a bridge, for example, is a rational procedure, but there is no rational ground on which one can determine, in abstraction from the structure of the bridge as a whole, that *Girder A* should intersect *Girder B* at a particular angle, say, eighteen degrees. Needless to say, placing all the elements of the bridge in proper relationship with one another is not a problem solvable within the adjudicative frame.

Before returning to labor arbitration, I want to forestall one further possible misunderstanding. I am not here asserting that an agency called a "court" should never under any circumstances undertake to solve a "polycentric" problem. Confronted by a dire emergency, or by a clear constitutional direction, a court may feel itself compelled to do the best it can with this sort of problem. All I am urging is that this sort of problem cannot be solved within the procedural restraints normally surrounding judicial office. Courts do in fact discharge functions that are not adjudicative in the usual sense of the word, as in super-

²⁶ *The Logic of Liberty* (1951), pp. 170-184.

vising equity receiverships or in setting up procedures for admission to the bar. What I ask is clear thinking about the limits of the adjudicative process and about the value of those limits in the perspective of government as a whole. Thus, what I have said is relevant to the question whether courts should undertake to rewrite the boundaries of election districts to make them more representative of the distribution of population. It does not, however, pre-emptively decide that question.

Returning finally to labor arbitration, probably the nearest counterpart to Mrs. Timken's will is the following case: Union and management agree that the internal wage structure of the plant is out of balance—some jobs are paid too little in comparison with others, some too much. A kind of wage fund (say, equal to a general increase of five cents an hour) is set up. Out of this fund are to be allotted, in varying amounts, increases for the various jobs that will bring them into better balance. In case the parties cannot agree, the matter shall go to arbitration. Precisely because the task is polycentric, it is extremely unlikely that the parties will be able to agree on most of the jobs, leaving for arbitration only a few on which agreement proved impossible. Since in the allotment every job is pitted against every other, any tentative agreements reached as to particular jobs will have to lapse if the parties fail in the end to reach an agreement on the reorganization of the wage structure as a whole. In short, the arbitrator will usually have to start from scratch and do the whole job himself.

Confronted with such a task the arbitrator intent on preserving judicial proprieties faces a quandary much like that of a judge forced to carry out Mrs. Timken's "equal" division through adjudicative procedures. Indeed, his quandary is even more serious. If a judge should go wrong in making the allotment contemplated by Mrs. Timken's will, the parties could by subsequent negotiations correct at least his grosser mistakes. But because of the peculiar moral inertia of an arbitral award, it is unlikely that any wage structure established by award would be changed later by agreement.²⁷ The arbitrator confronts the

²⁷ See note 21, *supra*. What I have called the "moral inertia" of an award is of course greatly increased where any attempt to modify it by agreement would stir up latent oppositions of interest within the union itself. I do not think, however, that this principle of letting sleeping dogs lie is the whole reason for the peculiar resistance of the award to later contractual modification.

heavy responsibility of imposing a more or less permanent design on the plant's internal wage scale.

What modifications of his role will enable the arbitrator to discharge this task satisfactorily? The obvious expedient is a resort to mediation. After securing a general education in the problems involved in reordering the wage scale, the arbitrator might propose to each side in turn a tentative solution, inviting comments and criticisms. Through successive modifications a reasonably acceptable reordering of rates might be achieved, which would then be incorporated in an award. Here the dangers involved in the mediative role are probably at a minimum, precisely because the need for that role seems so obvious. Those dangers are not, however, absent. There is always the possibility that mediative efforts may meet shipwreck. Prolonged involvement in an attempt to work out a settlement agreeable to both parties obscures the arbitrator's function as a judge and makes it difficult to reassume that role. Furthermore, a considerable taint of the "rigged" award will in any event almost always attach to the final solution. The very fact that this solution must involve a compromise of interests within the union itself makes this virtually certain.

There is one device that may sometimes meet the demands of a problem like this while keeping the arbitrator's role within the strictest limits of judicial propriety. This lies in the tentative award. After hearing the arguments and proofs, the arbitrator issues a tentative award with an order to both parties to show cause why it shall not become final. If the arguments on the show-cause order reveal mistakes, they can then be corrected.

The difficulties with this solution are: (1) It will often be too simple. In a complicated case a whole series of tentative awards with repeated corrections might be needed. (2) The release of a tentative award may arouse expectations that will resist later adjustment, however essential that adjustment may be from the standpoint of the total solution. (3) Because of the consideration just mentioned there may again appear some taint of the "fixed" award. The argument at the hearing on the tentative award may become indistinguishable from proposals of settlement, and the case may thus in effect be negotiated before a very restricted audience.

The use of a tripartite board of arbitration is a third way of

adjusting arbitration to such problems as the reordering of a wage scale. By the tripartite form I mean, of course, the arrangement by which a neutral chairman is flanked by two "arbitrators" appointed by the interested parties. (Naturally, the essential nature of the arrangement is not changed if there is, say, a six-man board, with two neutral arbitrators, two appointed by management, and a final pair appointed by the union.)

The pros and cons of tripartite arbitration are fairly familiar. Those who may be called the partisan arbitrators are cast in a difficult and subtle role that is seldom performed adequately. They cannot be wholly advocates, running back and forth to inform their constituents of every turn in the discussion among the arbitrators.²⁸ They cannot be wholly judges, for their function is to represent a point of view, a posture of interests. If a majority decision is required, a proceeding that has the façade of arbitration is converted into a continuation of negotiation in an inept and distorted form, as the impartial umpire turns from side to side in an effort to induce one of the flanking arbitrators to join with him.

Here one variant form deserves mention, that is, where, by the terms of the collective bargaining agreement or by a kind of tacit agreement expressed in practice, the decision is to be rendered by the impartial umpire with his co-arbitrators serving merely as advisers and warners. This variant form relieves the impartial chairman from the necessity for bargaining and eliminates the confusion implicit in a merging of rôles. But now the objection is that the two advisers are given a deceptive title. If they are not in fact arbitrators, they ought not to be given a title that calls to mind, or should call to mind, a distinctive social rôle which in fact they do not perform.

This suggests a rather simple solution for the kind of problem we have been considering. Why not try the case before a single arbitrator with a clear written understanding that before making his award final he must submit it, in a three-man conference, to two persons named in advance, each to represent the interests of one side? It should be clearly understood that the two are merely

²⁸ Section 2 of "Code of Ethics and Procedural Standards for Labor-Management Arbitration," prescribes that the partial arbitrators may not, unless the parties consent, convey to the parties "the discussions which take place in executive session." 15 LA 961, 962.

advisers, and that the arbitrator is free to disregard their advice. This solution would combine the advantages of the three procedures I have passed in review. It would formalize the post-hearing conference and reduce the temptation to pretense. In comparison with the tentative award, by making it clear who should be privileged to advise the arbitrator, it would reduce the embarrassment (and with it, again, the temptation to dissimulation) in deciding who should attend the argument on the tentative award. Finally, it would eliminate the ambiguities of rôle implicit in tripartite arbitration. The difficulties of the solution lie in the judgment, discretion, and courage demanded of the two partisan advisers. But these are difficulties that should in any event be openly faced. If they are not present in the other solutions, it is largely because they are dodged or are concealed by various subtle and unsubtle forms of hypocrisy.

These, then, are the methods by which arbitration may be adjusted to the solution of polycentric problems. Among such problems are any which involve the setting of several wage rates in their proper relation, including not only the case just discussed at length, but situations where the arbitrator is authorized to set rates for newly created jobs. Another example might be found in some multiple-discharge cases, where in the judgment of the arbitrator the company has improperly inflicted a uniform penalty on men whose complicity in the offense varies greatly. Perhaps another example might be found in some contracting-out cases; for example, where contracting out justified by legitimate business considerations was in the opinion of the arbitrator expanded beyond its proper scope for the purpose of undermining certain provisions of the contract. Here, if a partial cut-back would have a complex effect upon different jobs, the problem takes on aspects that make it hard to resolve within the normal frame of adjudication. Job jurisdiction cases, where falling within the arbitrator's authority, may also present polycentric problems. It is in fact significant that it was in discussing such a case (and "cases of this character") that Harry Shulman recommended mediation reinforced by the threat of decision.²⁹

A candid analysis of the problems of arbitration cannot, I believe, neglect cases of the kind I have just described. They are

²⁹ Shulman, *op. cit.*

significant and important. Nevertheless, they constitute only a small portion of the cases going to arbitration. I want to urge that we analyze carefully the nature of the cases where ordinary adjudicative forms are demonstrably inadequate; that for these cases we adopt, in an open way, those modifications that seem to meet their special needs and to entail a minimum sacrifice of procedural due process; and that, finally, for all other cases (which constitute the great bulk of those going to arbitration) the usual restraints of the adjudicative office be preserved.

In particular I would like to warn against the indiscriminate use of the tripartite form. In practice this form seems generally to be accepted or rejected purely on the basis of tradition or prejudice, without any real analysis either of its merits or its dangers. I would urge its general abandonment in favor of the device here suggested of designated advisers to the arbitrator, this device in turn to be used only when the nature of the case demonstrably makes it essential for a properly informed award.

In what has preceded I have tried to identify those situations in which some modification of the strict judicial role is essential if an intelligent decision is to be reached. I have not, I hope it is clear, been describing what happens in fact. The line that in actual practice divides arbitrational purism from its opposite follows a more haphazard pattern. Many human motives, worthy and unworthy, combine to set it.

There is one general consideration that may incline the arbitrator to resolve any doubts presented by particular cases in favor of assuming a mediative role. This lies in a conviction—to be sure, not expressed in the terms I am about to employ—that all labor arbitrations involve to some extent polycentric elements. The relations within a plant form a seamless web; pluck it here, and a complex pattern of adjustments may run through the whole structure. A case involving a single individual, say a reclassification case, may set a precedent with implications unknown to the arbitrator, who cannot see how his decision may cut into a whole body of practice that is unknown to him. The arbitrator can never be sure what aspects of the case post-hearing consultations may bring to his attention that he would otherwise have missed.

That there is much truth in this observation would be foolish to deny. The integrity of the adjudicative process can never be

maintained without some loss, without running some calculated risk. Any adjudicator—whether he be called judge, hearing officer, arbitrator, or umpire—who depends upon proofs and arguments adduced before him in open court, with each party confronting the other, is certain to make occasional mistakes he would not make if he could abandon the restraints of his rôle. The question is, how vital is that rôle for the maintenance of the government—in this case a system of industrial self-government—of which he is a part?

In facing that question as it arises in his practice, the arbitrator ought to divest himself, insofar as human nature permits, of any motive that might be called personal. It has been said that surgeons who have perfected some highly specialized operation tend strongly to favor a diagnosis of the patient's condition that will enable them to display their special skills. Can the arbitrator be sure he is immune from a similar desire to demonstrate virtuosity in his calling? It is well known in arbitrational circles that combining the rôles of arbitrator and mediator is a tricky business. The amateur who tries it is almost certain to get in trouble. The veteran, on the other hand, takes an understandable pride in his ability to play this difficult dual rôle. He would be less than human if he did not seek out occasions for a display of his special talents, even to the point of discerning a need for them in situations demanding nothing more than a patient, conscientious judge, able to put a sensible meaning on the words of the contract.

In practice, departures from the strict judicial rôle are most common in the case of the so-called permanent umpire, who may preside over disputes between the same parties for many years. In such a situation success in combining the rôle of arbitrator with that of mediator attests not only to the arbitrator's professional skill, but to the depth of trust imposed on him by the parties. The rôle of arbitrator-mediator thus becomes doubly satisfying and the temptation to assume it correspondingly greater. Furthermore, with the permanent umpire, departures from the judicial rôle tend to become cumulative. As the parties discover his willingness to resolve all controversies—including those unsuited to decision within the restraints of a judicial rôle—they are likely to become more and more dependent upon him. He becomes in effect a kind of super-manager. In the short run

this rôle can relieve both union and management of many inconvenient responsibilities. The cost in the long run is that the moral force of the judicial rôle has been forfeited. It is no longer available as a reserve for meeting an eventual crisis. Meanwhile, the parties' capacity for unaided self-government may have suffered a serious decline through disuse.

The picture just drawn may lean a little toward the dismal. At the same time it is vitally important, I believe, that the apparent successes of mediative arbitration by permanent umpires be appraised with a full understanding of the situations in which they have occurred. Was the industry in question, for example, economically sick? Sick industries may need, not judges, but physicians; though, as with individuals, a sign of returning health would be a restored capacity to dispense with medical care. Again, did the apparent successes of mediative arbitration entail hidden costs not revealed in reports that confine themselves to the disposition of disputes? In this respect it is most unfortunate that readers of Harry Shulman's famous Holmes Lecture³⁰ do not have available to them a careful appraisal of the effects of the philosophy therein expounded upon the total labor relations of the Ford Motor Company. Without that appraisal any judgment is bound to be one-sided.

Sometimes judgment on the issues here under discussion is influenced by a kind of slogan to the effect that an agreed settlement is always better than an imposed one. As applied to disputes before they have gone to arbitration, this slogan has some merit. When the case is in the hands of the arbitrator, however, I can see little merit in it, except in the special cases I have tried previously to analyze. After all, successful industrial self-government requires not only the capacity to reach and abide by agreements, but also the willingness to accept and conform to disliked awards. It is well that neither propensity be lost through disuse. Furthermore, there is something slightly morbid about the thought that an agreement coerced by the threat of decision is somehow more wholesome than an outright decision. It suggests a little the father who wants his children to obey him, but who, in order to still doubts that he may be too domineering, not only demands that they obey but insists that they do so with a

³⁰ *Ibid.*

smile. After having had his day in court, a man may with dignity bend his will to a judgment of which he disapproves. That dignity is lost if he is compelled to pretend that he agreed to it.³¹

The *ad hoc* arbitrator, called in to decide a single case, will usually be most strongly moved to undertake mediation when it becomes apparent to him that what the parties really need is not someone to judge their dispute, but a labor relations adviser. For example, a company, inexperienced in collective bargaining and perhaps generally inept in labor relations, may be insisting on its pound of flesh—which, to be sure, it is entitled to under the contract—without being aware of the price it will pay for its victory in worsened labor relations. There is no easy way out of such a predicament for the arbitrator. In most cases he will do well to proceed with his assigned rôle, consoling himself with the thought that there is no better teacher than experience. He should think long and hard before employing the written opinion as an outlet for his pedagogical inclinations. Perhaps later on, after the award has been rendered, some discussion might be in order if his relationship with the party concerned seems to suggest it might be useful.

Throughout this paper I have asserted that adjudication is a *social* process of decision. This is true not only in the sense that it is a process of decision in which the affected party is afforded an institutionally guaranteed form of participation. It is also true in the sense that the success of adjudication, and the maintenance of its integrity, depend not only on the arbitrator, but on everyone connected with the process as a whole. It has been said that it is impossible for a judge to rise above the level of the bar practicing before him. So it may become virtually impossible for the arbitrator to perform his proper rôle if the parties—through ignorance, ineptness, or selfish interest—are constantly pushing him out of that rôle. Unions not uncommonly come to view arbitration as a kind of general-purpose facility, ready to solve their internal problems or to lend a friendly hand in winning over doubtful workers. Management, in turn, has its special techniques for bending arbitration to its own ends. A company that has never really accepted collective bargaining may,

³¹ I don't wish to be taken as pushing this point too far, but is it not true that one of the most prominent characteristics of what we call "totalitarianism" is that it compels, on a large scale, the doing of acts which have meaning only when done voluntarily, such as voting, putting out flags, and the like?

by refusing to settle anything, overload arbitration to the point of breakdown. Naturally in such a situation it will demand of the arbitrator the strictest judicial proprieties, a circumstance that has much embarrassed the struggle to preserve the integrity of the arbitrator's rôle.

A viable system of law requires that parties be willing to settle the great bulk of disputes out of court. It requires not only a willingness to settle cases that are reasonably certain to be decided against the conceding party, but also to settle at least some cases he could be quite certain of winning if they were taken to litigation. The decision of a dispute by law is not always the same thing as a wise disposition of it. People who are always demanding their "rights" can be a menace to any society.³² One of the responsibilities of the parties to a collective bargaining agreement is to ease the strains on arbitration by not litigating cases where there is an obvious tension between the result demanded by the terms of the contract and that which accords with practical wisdom in labor relations.

I have just been asserting that a large part of the responsibility for maintaining the integrity of arbitration rests with the parties. I do not wish to be understood as suggesting, however, that the arbitrator is entitled to thrust on the parties the whole responsibility for his rôle. I emphatically reject the contention made by Harry Shulman that in appraising such practices as "meeting with the parties separately" the "dangers envisaged with respect to judges and other governmental personnel are not equally applicable" to the arbitrator, for "the parties' control of the process and their individual power to continue or terminate the services of the arbitrator are adequate safeguards against these dangers."³³

The democratic principle does not require us, I submit, to indulge in the fiction that whatever institutions develop in a par-

³² It may not be irrelevant here to recall the turn taken by arguments in the British Parliament concerning a continuation of the tax on tea exported to the American colonies. These arguments took place, of course, under the mounting threat of revolution. The defenders of the tax rested their case on two grounds: (1) England had a right to impose it; (2) if it were rescinded, the Americans would want all taxes repealed. It was a great conservative, Edmund Burke, who contended that the first argument was, under the circumstances, irrelevant; that the second was contradicted by experience. One sometimes wishes that those concerned with labor relations might take Burke as their patron saint.

³³ Shulman, *op cit.*

ticular situation must be viewed as approved by those affected by them. There is generally no real sense, for example, in which it can be said that the workers in a particular factory have approved either a loose or a strict interpretation of the arbitrator's rôle. In such a matter only a few key figures, chiefly the arbitrator himself, have that sense of alternatives which is required for intelligent choice.

It may be answered that in speaking of the consent of the "parties" Shulman meant, not the workers or the whole management staff, but simply those few officials on either side directly concerned with arbitration. That this is hardly an adequate justification on which to rest the arbitrator's practices becomes apparent when one reflects on the implications of the "rigged" award in all its diverse manifestations.

V.

Industrial self-government in this country may be said to rest on four distinct procedures: (1) those by which the bargaining unit is defined, (2) those by which bargaining representatives are chosen and their authority delimited, (3) those of negotiation by which the terms of the collective agreement are set, and (4) those of arbitration. These four procedures stand in a relation of interdependence. A failure of function in one of them will inevitably affect the others.

Successful arbitration obviously depends upon successful collective bargaining. It is from the collective bargaining agreement that arbitration derives its standards. If those standards are clearly and properly set, they will shape the award toward the needs of industrial self-government as seen by those most directly in contact with its problems. Reasonably clear standards contractually established are also essential for the integrity of arbitration. Without them the bond of participation that characterizes adjudication may be lost. Carelessly drawn agreements invite, may indeed demand, a departure by the arbitrator from his proper rôle. In this case the damage done becomes cumulative, since arbitration is almost certain to become overloaded if there are no standards to govern the settlement of grievances short of arbitration.

Conversely, the institution of collective bargaining can be

undermined if the arbitrator casts off all restraints, assumes a variety of discordant rôles, and presides generally over a process of decision from which may emerge, almost indifferently, a half-coerced agreement or a half-agreed award. In any such procedural chaos the guideline of the agreement is inevitably forfeited. When the agreement ceases to play a significant rôle in arbitration, the incentive to draft it carefully and fairly is lost.

The institution of voluntary arbitration soundly administered is an essential of industrial self-government. The danger of an extension of judicial control over arbitration lies, not only in the delays, costs, and formalities it would entail, but in the kinds of interpretation it would produce. The whole purpose of a collective bargaining agreement can be frustrated by unresponsive interpretations. A collective bargaining agreement may be viewed as a series of answers to a series of problems. The answers cannot be understood without understanding the problems. If an adjudicator (whether he be judge or arbitrator) attempts to read answers out of the agreement without understanding the problems to which those answers are addressed, all the processes of industrial self-government are upset and thrown out of balance.

The mediating form-free arbitrator and his opposite number, the stiffly literal judge, are equally threats to effective collective bargaining. The first may dissipate the benefits of careful negotiation and draftsmanship by disregarding the contract in the resolution of disputes. The second may dissipate those benefits by projecting into the agreement incongruent meanings, foreign to the thinking of those who created it.

Successful collective bargaining is also dependent on the application of proper principles of representation on both sides of the table. The most common curse on the side of the employer lies in absentee management. Head office policy often requires certain stands by the negotiators of an agreement that violate the needs of the immediate situation. Reaching agreement on a decent framework for the parties' future relations becomes difficult under these conditions. The result is often a contract full of incongruities, with the head of a giraffe and the body of an elephant. Needless to say, such contracts impose serious strains on the process of arbitration.

Being essentially political organizations, unions are less sub-

ject to the evils of absentee management, though certainly not immune from them. More commonly in the case of unions, the inner tensions that are reflected in the processes of bargaining and arbitrating are those that arise from the deficiencies of the majority principle as a means of resolving conflicting interests within the bargaining unit. I have already observed that unions often resort to arbitration as a method of resolving these internal difficulties. The same difficulties often produce imperfect and ambiguous contracts.

It is important to recall that both the majority principle and adjudication represent processes of decision that are subject to inherent limitations in the kinds of problems they can resolve. One problem that majority vote cannot easily solve is that of effecting an optimum rearrangement of relations within the voting group itself. In practice such reorderings usually come about through some process of internal bargaining. This is not necessarily an unwholesome thing. If fifty-one percent of an electorate slightly prefer one situation, while forty-nine percent very strongly prefer another, a "deal" may make everyone better off. Whether such a deal is innocent depends in part on the nature of the issue settled.

Where the issue relates to satisfactions that are essentially separable from the welfare of the group as a functioning whole, then the internal deal may have much to recommend it. It is indeed regrettable that its utility is not more clearly recognized and delimited. As things stand now, accommodations of interest within the union generally follow no standard procedure. Yet the effects of these accommodations project themselves into the formally established procedures for defining the bargaining unit, for selecting bargaining representations, for negotiating, and finally for arbitrating.

The purpose of these rather scattered observations is to drive home the point that the procedures of industrial self-government, whether they be formal or informal, stand in a relation of interdependence. They are all parts, one of another. The right functioning of the system as a whole depends upon the right functioning of each of its components.

Taking the system as a whole and viewing it across considerable periods of time, I should say that it works remarkably well. Indeed I believe that our system of industrial self-government

is one of the finest expressions of the American genius for political arrangements.

Writing more than a century ago John Stuart Mill declared:

"What the French are in military affairs, the Americans are in every kind of civil business; let them be left without a government, every body of Americans is able to improvise one, and to carry on that or any other public business with a sufficient amount of intelligence, order and decision. This is what every free people ought to be."³⁴

If the first branch of Mill's comparison has become somewhat dated, I hope this is not equally true of the second, and that Americans do still in fact retain some of the capacity in the design of social architecture they displayed so prominently during an earlier and more creative period. The success of our system of industrial self-government encourages me to think they do.

The conduct of this government represents a "civil business" of paramount importance to the nation. Participation in it demands the very highest qualities of imagination and judgment. I also believe that this participation—if I may be forgiven an old-fashioned expression—can be ennobling. Holmes wrote of the legal profession, "The practice of it, in spite of popular jests, tends to make good citizens and good men."³⁵ I believe that the practice of industrial self-government tends also to make good citizens and good men.

Because I so strongly believe this, it is regrettable that this paper has had to dwell so much on practices of dubious propriety, including the various manifestations of the "informed" award. But in another sense it is precisely because such practices are always possible that labor relations can be a school of moral education. It is an area where choosing the right course always presents a real problem. In many callings men scarcely confront serious problems of moral choice. Grooves cut by usage guide them safely past both temptation and the chance for creative innovation. In labor relations it is otherwise. Here the grooves are being cut and recut all the time. For his share in charting their path, every participant has ultimately to answer to his own conscience. Before that forum he will be comfortable only if he can be sure, not only that his intentions are

³⁴ *Essay on Liberty*.

³⁵ "The Path of the Law," 10 *Harv. L. Rev.* 457, 459 (1897).

pure, but that they have also been clearly thought out and their full implications perceived. It is because it demands the best qualities of both the heart and the brain that the work of industrial self-government can serve to make good citizens and good men.

Discussion——

NATHAN P. FEINSINGER *

Professor Fuller's paper is very useful and very provocative. I think it is overly pessimistic in some respects, especially in relation to the so-called trend of excessive judicial intervention. But perhaps, before going to his paper, I will do as Alice did: start at the end by giving you my reflections on reading Fuller in a general way, and then come back to particular points in his paper.

I read the paper from the vantage point or "disadvantage point" of my combined experience as an arbitrator, as a mediator, as a fact-finder, as a government official, and as a teacher of labor law, and more recently, space law, there being a distinct similarity between the two fields. As a permanent arbitrator, my experience has ranged from the Minneapolis-Honeywell system, which is purely and simply mediation, to the General Motors—UAW system, which may be regarded as quasi-judicial decision making. The guiding principle of an arbitrator in the latter kind of situation is to decide, and then to regret your mistake in privacy.

Now, arbitration, mediation, and fact-finding have, of course, a common purpose—to bring an end to a particular dispute. In that respect, it is true that arbitration has the advantage of being final and binding. In theory, at least, it forecloses further overt action by either party if the arbitration clause is accompanied by a no-strike clause. But the arbitration award, though final and binding, does not necessarily end the dispute. General Motors, for example, may win a local seniority or local wage case, but the local union may use the subterfuge of a production standards dispute, which is excluded from the arbitration and no-strike clauses, to attempt to obtain a change in the award.

Mediation and fact-finding, though lacking the final and binding element, may have a greater likelihood of finally settling the

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dispute because the result is acceptable to both of the disputants.

We arbitrators frequently say that the poor public is ignorant and confused over the meaning of arbitration versus mediation. I sometimes wonder whether it is they or we who are confused.

I happened to read in this morning's paper on the sports page—to which I invariably turn first because I know something about that field—a suggestion by Tug Wilson, President of the United States Olympics Committee, for the way to end the dispute between the A.A.U. and N.C.A.A. over which should run the Olympics. He said:

"The differences between the two groups are not great. Both sides have men of understanding and vision. I am very optimistic about settling all the issues and getting down to business with that single purpose. The average sportsman doesn't care who is in control. He is only interested in proper facilities and the proper handling of his athletes. I think each side will have to give a little.

"The A.A.U. may have to broaden its committees and the N.C.A.A. may have to soften its demands. This is like a labor-management dispute. We will have to sit down and arbitrate and reach some sort of compromise."

Now, I submit that labor and management have adopted arbitration as a means of settling grievances because it costs both sides too much to permit grievances to fester. But let us not forget that arbitration is not the only way to preserve industrial peace in the day-to-day relations between the parties. It is not necessarily the best way and, in any event, it is certainly not a perfect instrument. Its virtue is its flexibility, in terms of meeting the desires of particular parties. There is a risk in recognizing it solely as a judicial process, and expanding judicial intervention may force labor and management, in some instances, to take a second look at arbitration as their particular kind of safety valve.

In my own experience, particularly with General Motors and the UAW, while I often hear the corporation or the union say to me in clear terms, "You cannot do thus and so under our contract," I haven't heard anything about Lincoln Mills or the Steelworkers' trilogy, nor do I expect to, though I dare say I have exposed myself on occasion to a charge of having exceeded my jurisdiction under the contract.

With those general observations, I would like to talk about some specific parts of Mr. Fuller's excellent paper. He treats

the threat of judicial intervention as a kind of external threat with which we arbitrators should be concerned. He says that the recent action of the Supreme Court has created such a crisis; that we must preserve the integrity of the institution of arbitration against that threat by recapturing our sense of direction. In that connection, I go back to my opening remarks: whether we ought not to try to reach agreement as to our sense of direction. I am not at all sure that Tug Wilson is not right in his view of the direction that arbitrators should take rather than the route we are taking today.

Mr. Fuller finds one danger implicit in the decisions of the Supreme Court in recent cases, particularly in the dictum of Mr. Justice Douglas in the *Warrior and Gulf* case, that the only limitation on the arbitrator in interpreting the contract is to avoid direct collision with the language of the document. Mr. Fuller objects, and in this I certainly join him, to either the formless type of arbitration, in which the arbitrator adheres to no ascertainable standard, or to the stiff type of arbitration to which he thinks the Supreme Court may be driving us as arbitrators.

He conceives of an arbitrator's role as essentially adjudicative and he is convinced that this function cannot be discharged successfully under what he describes as the constant threat of judicial intervention and supervision—a threat the magnitude of which I have not as yet been able to perceive.

It is his position, as I follow his paper, that arbitration loses its integrity if there is no opportunity for proofs and argument. This is a thesis with which I am sure we would all agree. In that connection, he refers to private, *ex parte* conferences after hearing, the rigged, fixed, or informed award, and so forth. I think that what he is really talking about is the concept of acceptability—that no arbitration award is worth anything unless it is acceptable to both parties. I join him in his criticism of under-the-table methods of accomplishing that result, but I do not think that acceptability of an arbitration award requires under-the-table dealings or any sort of skulduggery.

Now, in the area of interpretation, Professor Fuller puts the question in this way: whether arbitrators do or should interpret collective bargaining agreements by principles that are common to the interpretation of agreements generally—whether, in other words, the nature of a collective bargaining agreement is such

that it requires a special kind of interpretation foreign to contracts generally.

I agree with him entirely in his objection to certain clichés, such as that arbitrators have much less opportunity to arrive at the basic intent of the parties than do the courts. His reference to what everybody recognizes as the Saul Wallen award in a discipline case is particularly apt.

On the question of adding and subtracting, he is perfectly right in saying that, since the court does not derive its mandate from the parties, it does not have to pay too much attention to the parties' instructions. Even if they were to tell the court that it should not add or subtract, the court would do whatever it thought proper under that particular contract, bearing in mind the public interest when involved.

There is only one way to tell whether the court is adding to or subtracting from the contract in reaching a decision. No winning party ever feels that the court has done so. The party that loses always feels that it has.

Mr. Fuller comments that arbitrators, like courts, are free to roam around and get at the basic intent of the parties. He asks, why worry if that is the case? He goes on to make the point that there is a danger of letting the courts into this business because industrial relations is a highly specialized, highly technical field; that we arbitrators have our own vocabulary; and he concludes for some reason that this puts the judge at a disadvantage. He points out that the arbitrator can be educated at a hearing if he runs into a snag in trying to understand what the parties are talking about.

Assuming that a court does not have the time to be educated in that sense, there are many other ways to educate the court so that it can render an informed decision in an arbitration matter.

For example, the Supreme Court has been greatly influenced in its handling of arbitration issues by the writings of some of our colleagues and will continue to be: Shulman, Cox, Taylor, and from today on, at least, Fuller. Secondly, the people who practice in this field are peculiarly fitted to educate the courts. Third, it is not inconceivable that the court would use the suggested device of a labor relations expert serving as a Special Master or Referee in a complicated case.

I wish that the court had used such a device in the case men-

tioned by Fuller arising in the First Circuit. I am sure that the court would have reached the opposite decision. Finally, as Fuller pointed out, there is ample precedent for education of judges in specialized fields through "socialization." I would suggest as a possible project to the Board of Governors the holding of seminars in the various judicial districts in this country, a kind of dinnerfest where, perhaps, the arbitrators could educate the judges in some of the broad problems that they might or might not understand fully when limited to the help which advocates can supply.

Professor Fuller devotes a good deal more space in his paper to the question of arbitrability. It is an excellent discussion of the problem. As you all know, the Supreme Court has said that the question of arbitrability is for the court, in the first instance, and that in deciding on the question of arbitrability the court will not consider the merits. I join in Professor Fuller's objection to that approach. I agree with him that, as a practical matter, one cannot separate the question of arbitrability from the question of the merits, and it is in this area, in particular, that I think the advocates should have an opportunity to introduce proof. The dilemma of the lawyer arguing the question of arbitrability before a court is apparent. If he considers the merits, he is stopped on the ground that the court has no concern with the merits; if he does not get into the merits, he cannot explain his position fairly and fully on the question of arbitrability.

Now—this is not a novel suggestion—I think that further effort should be made to persuade the courts to permit the arbitrator to proceed in the case where either party claims there is an arbitrable matter—subject, of course, to judicial review of the award—instead of permitting a challenge to arbitrability before the arbitrator has acted.

Employers would argue this is too great a risk. I don't believe so. In the first place, the court will not refuse to enforce the agreement to arbitrate unless the subject matter is clearly excluded from the arbitration clause. If the arbitrator should hold that it is clearly excluded, the union would not be likely to take the case to court. If there is a risk of harassment in that respect, the risk is outweighed by the risk of an uninformed decision by the court, a risk which could be avoided if the court had the whole record of the arbitration proceeding and the arbitrator's

opinion, after hearing the merits, as to why he thought the question was or was not arbitrable.

It may be a waste of time to attempt to get the Supreme Court to change its mind on that point, but, while we are in the process of enacting legislation in the various states, maybe some state legislature could be persuaded to take that view. Then we would have a laboratory experiment as to which system works better.

Professor Fuller makes the point that since the parties have agreed they could not resolve a problem and have brought in the arbitrator, he should assume full responsibility for the award without consulting the parties. That is the philosophy of the General Motors-UAW system. The advocates make a noise like lawyers, present a brief, make a closing argument, say goodbye to the umpire, and hope for the best. As a philosophical proposition, I do not agree that the responsibility of the parties in the case stops at a point where they have presented the case to the arbitrator. I do not believe that they should be permitted to lift the load off their shoulders and transfer it solely to the shoulders of the arbitrator. If I were drafting an arbitration procedure, I would certainly attempt to persuade the parties to agree to some form of participation in the process of evaluating the case—on the table, not under the table—to insure an informed if not acceptable award.

Finally, if I were to draw up a description for an arbitrator exercising an adjudicatory function, my prescription would be:

First, I would ask for ability on the part of the arbitrator to grasp the issue in a particular controversy; second, to relate that issue to the particular clause or clauses relied upon by the parties; third, to relate those clauses to the basic purpose of the entire contract, as Wallen did in the discharge case; and, finally, to relate the contract as a whole to the purposes of the collective bargaining process.

I would ask for an arbitrator to act fairly and honestly, courageously and, if possible, intelligently.

I would ask him to have the ability to make up his mind and the ability to use sound judgment, particularly in the polycentric cases where the mediatory function is particularly important. If he can meet those tests, he need have no fear of harassment by the Federal District Judges who, if they err, are sure to be reversed anyway by the Court of Appeals or the Supreme Court.