basic [contract] principles which command general acceptance" [55] is more likely to be achieved by Board movement toward arbitration concepts than the other way around.

F. Conclusion

My conclusion is that the role of law in arbitration must be carefully circumscribed. Too great a reliance on the law would encourage a kind of rigidity and uniformity which is foreign to our arbitration system. Statutory law may guide the arbitrator on occasion. But the arbitrator must follow the rule of law established by the contract. He is part of a private process for the adjudication of private rights and duties. He should not be asked to assume public responsibilities and to do the work of public agencies. He "has no general charter to administer justice for a community which transcends the parties." [56]

II. THE ROLE OF LAW IN ARBITRATION: REJOINDERS

BERNARD D. MELTZER *

I greatly appreciate the gracious invitation of Richard Mittenthal and Martin Wagner to comment on Mr. Mittenthal's paper despite my inability to attend the Academy's 1968 meeting.

Let me begin by attempting to pinpoint the principal difference between Mr. Mittenthal's position and mine. During last year's Academy meeting, I put forward the following suggestion: Where there appears to be an irrepressible conflict between a labor agreement and the law, an arbitrator whose authority is typically limited to applying or interpreting the agreement should follow the agreement and ignore the law.[1] The arbitrator would thus leave the application of superseding law to courts or to other

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[55] Cox, *supra*, note 19, at 83.

[56] Shulman, "Reason, Contract and Law in Labor Relations," 68 *Harv. L. Rev.* 999, 1016 (1955).

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[1] Meltzer, "Ruminations About Ideology, Law, and Labor Arbitration," *The Arbitrator, the NLRB, and the Courts,* Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), 1, 16, 19.

official agencies, such as the NLRB, which possess plenary power over the legal issues enmeshed in arbitration. Mr. Mittenthal, as I understand him, agrees—subject, however, to this qualification:

> . . . although the arbitrator's award may *permit* conduct forbidden by law but sanctioned by contract, it should not *require* conduct forbidden by law even though sanctioned by contract.[2]

The implications and desirability of that qualification may be clarified if we examine it in the context of two grievances. The first, suggested by Mr. Mittenthal,[3] was filed by a *nonveteran* who, when laid off, requested reemployment and back pay on the ground that his layoff violated an agreement that granted veterans *only* their plant seniority plus the seniority they would have accumulated had they not been drafted. The employer supported his layoff of the nonveteran, even though the latter had more seniority than the retained veteran on the following ground: The Selective Service Act of 1940 required the layoff of nonveterans rather than veterans during the first year after the veteran's discharge from military service, even though the veteran's seniority, including credit for his military service, was less than the nonveteran's.

Although Mr. Mittenthal's statement of his hypothetical case rests on what I believe to be a misreading of *Fishgold* v. *Sullivan Corp.*,[4] I will assume, for the purpose of this discussion, that his reading of *Fishgold* is correct. Mr. Mittenthal suggests that the

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[2] See Mittenthal, "The Role of Law in Arbitration" (hereinafter cited as "Mittenthal"), text immediately following n. 32, p. 50.

[3] See Mittenthal, text immediately preceding and following n. 20, p. 47.

[4] 328 U.S. 275, 18 LRRM 2075 (1946). The apparent conflict between the agreement and the statute resulted not from the Court's reading of the statute but from an administrative interpretation issued by the Director of Selective Service. That interpretation was, however, rejected by the Court. *Id.*, at 289–90. The Court, moreover, declared: "We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can fairly be implied." (*Id.*, at 286.) Plainly, the statutory step-up in the veteran's seniority, which the Court rejected, is the premise for the conflict between the contract and the statute that Mittenthal assumed to exist.

In the paper relied on by Mittenthal, Cox also referred to the conflict between the Act as "interpreted" and the typical collective bargaining agreement, and cited the Court's decision in *Fishgold*. But Cox did not specify whether the interpretation involved had been the Court's or the Director's. See Cox, "The Place of Law in Labor Arbitration," *The Profession of Labor Arbitration*, Selected Papers From the First Seven Annual Meetings of the National Academy of Arbitrators, 1948–1954 (Washington: BNA Books, 1957), 76, 77.

arbitrator should follow the statute and deny the grievance because an award calling for the nonveteran's reinstatement and the veteran's displacement would require the employer to engage in conduct forbidden by the law.

The second grievance involves the same basic situation, except for this variation: The employer laid off the *veteran,* who filed a grievance requesting reinstatement (and displacement of the nonveteran) and back pay. Mr. Mittenthal, if I follow his distinction, suggests that the arbitrator should deny the veteran's grievance even though the award would be contrary to the law, for "the arbitrator's award may permit conduct forbidden by law but sanctioned by contract." Our hypothetical arbitrator is not requiring legally proscribed conduct; he is merely permitting it or refusing to grant a remedy for it.

Whatever one's view of the larger issue as to the role of law in arbitration, I cannot see an acceptable basis for Mr. Mittenthal's formula. It is not supported by the authority conferred on the arbitrator by the parties;[5] or by the expertise imputed to arbitrators and courts; or by the twin desires for finality of arbitration awards and the limitation of judicial intervention. Under Mr. Mittenthal's approach, the role accorded to law would depend on how an employer resolved a controversy and not on its essential character or the functions properly delegated to different adjudicative agencies. In my opinion, such an approach transforms an accidental consideration into a decisive one. His formula, incidentally, also appears to run contrary to Cox's suggestion, on which he relies; for Cox admonished the arbitrator to "look to see whether sustaining the grievance would require conduct the law forbids *or* would enforce an illegal contract; if so, the arbitrator should not sustain the grievance."[6] In my opinion, if the arbitrator is viewed as "enforcing" contracts, he "enforces" an illegal contract equally whether he causes an employer to engage in an act prohibited by statute or, by denying a remedy, condones the prohibited act already executed by the employer.

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[5] Mr. Mittenthal, in his criticism of Mr. Howlett's position, refers to Mr. Justice Douglas' statement in *Enterprise Wheel* that an arbitrator's award based "solely upon the requirements of enacted legislation" would "exceed the scope of the submission" and would not be legitimate. See Mittenthal, text immediately following n. 42, p. 54. But Mittenthal fails to explain why his formula does not run afoul of the Justice's unqualified limitation on arbitral authority.

[6] See Mittenthal, text accompanying n. 31, p. 50.

It is, however, worth nothing that, in a strict sense, the arbitrator does not "enforce" the contract. Enforcement is left to the courts, and, regardless of whether the arbitrator purports to apply the law or to ignore it, the courts stand ready to enforce the condition that his award is not to be repugnant to the law.

Let me turn now from the consequences of Mr. Mittenthal's dichotomy to more general considerations. His principal argument is embodied in the following quotation from Cox:

> . . . The parties to collective bargaining cannot avoid negotiating and carrying out their agreement within the existing legal framework. It is either futile or grossly unjust to make an award directing an employer to take action which the law forbids—futile because if the employer challenges the award the union cannot enforce it; unjust because if the employer complies he subjects himself to punishment by civil authority.[7]

And Mr. Mittenthal adds: "Furthermore, such an award demeans the arbitration process by inviting noncompliance, appeals to the courts, and reversal of the award." [8]

Those considerations, which incidentally were not overlooked in my paper, have a superficial appeal, but they appear to beg, or at least to obscure, the critical issue. An award "directing" illegal conduct is "unjust" only if the arbitrator is assumed to have the authority to nullify contractual provisions as contrary to law. But to assume such authority is to beg the critical question: whether arbitral assumption of such jurisdiction is a desirable method of coordinating a private system of adjudication with a governmentally imposed legal and administrative framework. Plainly, if it is assumed that an arbitrator lacks authority to invalidate contractual provisions by invoking superseding law, there is nothing unjust in his disregarding the law since he is merely observing limitations appropriate to his function. And if he should "direct" illegal conduct, his direction, as I have already observed, would not be self-enforcing but would be subject to the condition that the competent tribunal would not find his direction incompatible with the law. Similarly, if he should invalidate a contractual provision in order to avoid directing what he considers to be an illegal act, he would be subject to judicial

[7] See Mittenthal, text accompanying n. 22, p. 47, quoted from Cox, *supra*, note 4, at 77–78.
[8] See Mittenthal, text immediately after n. 22, p. 47.

correction if he had misconceived the law.[9] Accordingly, it is clear that whenever a contractual issue is enmeshed with a fairly disputable legal issue, there is a risk of comprehensive judicial review and nullification.

It may improve our perspective if we remember that such risks are not peculiar to labor arbitration but are inherent in any adjudicative system that includes specialized tribunals or, indeed, any tribunals whose decisions are appealable. Thus, an administrative agency that issues an order based on a statute subsequently held to be unconstitutional has engaged in a futile act. Similarly, a lower court that directs specific enforcement of a contract held, on appeal, to violate the Civil Rights Act, or the NLRA, or the Sherman Act, has directed action that, it turns out, the law forbade. Like all provisional adjudications that are reversed, individual cases of "futile" or "unjust" adjudications are unfortunate. But, as already indicated, such cases are the necessary cost of an adjudicative system that provides for a hierarchy of adjudicative tribunals and seeks to have experts on tap but not on top. The possibility or even the frequency of such reversals does not, *per se,* tell us anything about the proper distribution of authority among different adjudicative agencies.

Our perspective is also distorted when the risks of judicial correction and arbitral "futility" are weighed in the context of hypothetical cases involving an obvious inconsistency between an agreement applied by the arbitrator and a law which he ignores. I do not mean to interfere with the cherished right of law professors and lawyers to construct hypothetical cases. But I do suggest that cases that postulate a clear repugnancy between the agreement and the law do not provide a good yardstick for the risks of arbitral futility and judicial reversal. In such cases, once the arbitrator has done the job of interpreting the agreement, responsible parties will presumably obey the clear mandate of the law without recourse to the courts. Parties bent on harassment may, of course, insist on judicial confirmation of the obvious, but such litigiousness is beyond the control of the arbitrator regardless of his view of the role of law.

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[9] Mittenthal (note 30, p. 50) recognizes that even where an arbitrator purports to apply the law so as to avoid illegal directions required by the agreement, there is a risk to the finality of awards. But cf. his statement quoted in text accompanying note 8, *supra.*

The genuine difficulties surrounding the role of law arise in situations where the law implicated in a grievance is complex, uncertain, and in flux. Consider, for example, the difficulties that may arise with respect to contractual clauses attacked as illegal hot-cargo arrangements, as illegal union security arrangements, as violations of Title VII of the Civil Rights Act of 1964, or as contrary to the Sherman Act. Even if distinguished lawyer-arbitrators were selected[10] to resolve grievances enmeshed with such matters and chose to speak about them, it is doubtful that they would have the last word in genuinely difficult cases. Reversal of their determinations, despite their asserted competence to make them, would, I believe, be more demeaning to arbitration than the invalidation of awards on the basis of legal considerations that arbitrators considered to be beyond their proper sphere. Furthermore, with respect to such legal issues, judicial review would exceed the limitations appropriate for review of arbitral determinations on the scope of the agreement. Once habituated to comprehensive review of such legal determinations, the courts might be less inclined to self-limitation in the contractual sphere. Arbitral autonomy in the contractual sphere may thus be promoted by arbitral restraint in the sphere of law.

I do not, however, attach primary importance to the possibility that the absence of such arbitral restraint will encourage judicial overexuberance in the contractual sphere. But it is important to observe that the extent to which judicial review disrupts the arbitration system depends more on the basis for judicial invalidation of awards than on the fact of such invalidation. Specifically, judicial correction grounded in a statute does not challenge the expertise imputed to arbitrators and is, accordingly, less threatening to the values of the arbitration system than correction based on contract interpretation.

I am reassured by Mr. Mittenthal's substantial agreement with the conclusion to which I have been led by the considerations that I have urged here and in my first paper. Although I recognize that the diversities of industrial relations caution against absolute positions, I regret that I cannot accept even his modest qualifi-

[10] It is true, as Mittenthal suggests, that it is not unusual for the parties to fit the arbitrator to the dispute. See his text following n. 23, p. 48. But it is also not unusual for the parties to have failed to formulate clearly the contract issue prior to the arbitration hearing. In such cases, among others, the parties may select an arbitrator without realizing that there is a conflict between the agreement and the law.

cation on a position that he describes as "extreme" but that I prefer to call "consistent."

A REPRISE

ROBERT G. HOWLETT *

In "The Role of Law in Arbitration," the scholarly and competent Dick Mittenthal serves as mediator between the "orthodox" arbitrators and the minority of "new thinkers." [1]

Meltzer: "An arbitrator is, in general, the proctor of the agreement and not of the statutes." [2]

Howlett: "Arbitrators, as well as judges, are subject to and bound by the law, whether it be the Fourteenth Amendment to the Constitution of the United States, or a city ordinance." [3]

I concur more with Mittenthal than with Meltzer, for Mittenthal's differences with Howlett seem more in emphasis than as disagreement.[4]

Mittenthal recognizes that arbitrators do, and should, apply the law:

> . . . Confronted by the woman's grievance, an arbitrator may properly rely on state law to establish that the woman lacked either the "ability" or "physical fitness" to perform the man's job. . . .
>
> Law may even be used to resolve ambiguity in contract language. . . .
>
> An arbitrator should likewise refuse to enforce a particular contract provision if enforcement would require action forbidden by the law. . . .

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[1] *Labor Trends*, No. 1128, June 3, 1967.

[2] Bernard D. Meltzer, "Ruminations about Ideology, Law, and Labor Arbitration," in *The Arbitrator, the NLRB, and the Courts,* Proceedings of the Twentieth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1967), 1, 19.

[3] Robert G. Howlett, "The Arbitrator, the NLRB, and the Courts," in *The Arbitrator, the NLRB, and the Courts,* Proceedings of the Twentieth Annual Meeting of the National Academy of Arbitrators, (Washington: BNA Books, 1967), 67, 83.

[4] For another viewpoint, see Hanley, "The NLRB and the Arbitration Process: Conflict or Accommodation?," *Proceedings of Fourteenth Annual Institute on Labor Law of The Southwestern Legal Foundation, 1967* (New York: Matthew Bender, 1968).