

CHAPTER IV

ARBITRATORS AND THE YOUTH REVOLT

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Before turning to the substance of my remarks, I think I should try to explain as best I can why I happen to be standing before you at this particular moment. My presence here is dictated in large part by custom. Doubtless, most of you recall the familiar lines:

Midway 'twixt morning and evening,
After the third whiskey sour,
Comes a meaningless pause in the program
That is known as "Ex-Presidents' Hour."

The custom is not old; like so many others hallowed in the Academy, such as the one that any member with at least one year's tenure shall thereafter be referred to as a "distinguished" member, this one is characterized not so much by its age as by the fungus-like rapidity with which it has reached maturity.

Nor is it certain that the custom is especially popular even with those whom it purports to honor. As you may remember, our most distinguished relic, Ralph Seward, was chosen to inaugurate the Ex-Presidents' Hour at the final session of our Twentieth Annual Meeting in San Francisco, two years ago. Ralph thought so poorly of the idea that he resorted to what I consider to have been unnecessarily dramatic measures to avoid keeping the commitment.¹

Last year, the program committee had an easier time. I was not a party to its deliberations, but it is perfectly clear that having moved up the Ex-Presidents' Hour from evening to noon and

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¹ Ralph Seward, the first President of the Academy, and the only one to have served two terms, was prevented from attending the Twentieth Annual Meeting by a heart attack, from which, happily, he has fully recovered.

selected Dave Cole as the speaker, the committee assured his cooperation by having the invitation come from President Bert Lusk. In Dave's case, acceptance of presidential assignments has, after three decades, become a conditioned reflex.²

That brings us down to the present, and I must say it is difficult for me to explain why I have agreed to appear on the program as the greatest anticlimax in human experience since that banner with the strange device, "For God, for Country and for Yale," was first unfurled. As all who heard it will agree, Dave Cole's Ex-Presidents' Hour address last year was a classic of warmth, wit, and wisdom, impossible to emulate or equal. That fact must have been so immediately apparent to this year's program committee as to make it despair of finding a patsy who, in order to continue the instant tradition of Ex-Presidents' Hour, would subject himself to the humiliation of invidious comparison. Through a process about which I would rather not speculate, the committee finally decided on "sweet old Ben," as I am known far and wide (although, as Robert Benchley used to say, many of my acquaintances prefer to use just the initials).

Charles Killingsworth was assigned the nasty chore of passing me the Black Spot. He telephoned me long distance and at first tried to make me feel as if I were to be the guest of honor at somebody's party; but midway through the conversation, the nobler nature within him stirred and he apologized for the whole thing, saying it was the dirtiest day's business he had done in his entire tenure as President of the Academy. But such was the persuasive impact of Charles's quiet eloquence that, despite his confession, he convinced me that to accept this fatal assignment would be a far, far better thing than I have ever done for the Academy. He might have added, though he didn't, that having done my duty on this occasion, I would undoubtedly go to a far, far better rest—from public speaking, that is—than I have ever known. But anyway, here I am, and I hope we all survive. Although it will afford but a cold comfort, I promise to be guided by Macbeth's useful axiom:

² David Cole, a former President of the Academy, has served with distinction as a public member of ad hoc arbitration and fact-finding panels, emergency boards under the Railway Labor Act, and boards of inquiry under the Taft-Hartley Act appointed by Presidents Roosevelt, Truman, Eisenhower, Kennedy, and Johnson. He was also Director of the Federal Mediation and Conciliation Service in the Eisenhower administration.

If it were done when 'tis done, then 'twere well
It were done quickly.

This year's Academy program reflects the sense of crisis and of change that pervades our society. In keeping with that mood, I have chosen as the title of my address today, "Arbitrators and the Youth Revolt." I got the idea for my subject, incidentally, from a recent column by our West Coast waterfront philosopher, Eric Hoffer. "If you want to know whose age we are living in," he said, "find out who it is that wants to make history. But right now," he continued, "neither the masses nor the industrialists nor the politicians want to make history. They would be happy if history were something that happens to other people, preferably their enemies. Nowadays it is the young, particularly students, who itch to make history." I suspect that he is right.

In any event, my words are intended to be prophetic; for an examination of the Academy membership roster or a glance around this room will be sufficient to demonstrate that the time for the youth revolt in arbitration has not arrived quite yet. That its moment will come—ineluctably and soon—is, however, a proposition to which I firmly adhere; so firmly, indeed, that I intend to describe its advent in the past tense, to speak of it, in other words, as if it were a historical event viewed retrospectively and therefore with perhaps more objectivity than is possible when one is venturing a prediction. Accordingly, I bespeak your cooperation and ask you, as you listen to what follows, to project yourselves in time about 20 years.

Selecting the date when the youth revolt in arbitration may be said to have begun is, of course, a purely arbitrary exercise, for the events causally connected with that upheaval extend infinitely backward in time. There can be no doubt, however, that the first large-scale public manifestation occurred in the 1970s. The initial rumblings of rebellion were heard, appropriately enough, on a university campus. Early in 1971 an editorial, entitled "Arbitration and the Establishment," appeared in *The Docket*, a student publication at the UCLA School of Law. It read in part:

Today, collective agreements covering millions of workers throughout the country are administered under grievance and arbitration procedures. At the very apex of these complicated structures sit a

group of men known as arbitrators or umpires who exercise powers of economic life or death over the workers from which there is literally no effective appeal. Who are the members of the secular priesthood?

To begin with, most of them are very old and virtually senile; the average age of the membership of the prestigious American Academy of Arbitrators [like many editorials, this one contained a number of inaccuracies] is close to 50. Furthermore, many have worked at one time or another for the government and are closely tied in with the industrial-military complex that runs this country. In short, they are simon-pure, card carrying members of the Establishment.

Is it any wonder, then, that young men who care and who wish to make arbitration more relevant are systematically excluded from the ranks of professional arbitrators and virtually blacklisted by reactionary employers and unions? The present course offerings in the law school totally ignore this problem because those who give them are quite content with things as they are. What is needed, besides new blood on the faculty [it is not known whether this phrase was used in its customary metaphorical sense or was actually a rather sanguinary double-entendre], is a course on how to take arbitration out of the clutches of the Establishment and give it back to the people.

For some reason, this generally moderate and altogether unremarkable statement attracted considerable attention. The *Santa Monica Evening Outlook*, better known to local residents as the "Outrage," printed a front-page editorial denouncing *The Docket* and calling for an investigation of the UCLA School of Law; *Ramparts* reprinted the *Docket* editorial in connection with an exposé of fees charged by arbitrators in the San Francisco Bay area; and an SDS chapter at Cornell cited the editorial in its statement rejecting an offer by the administration to submit a dispute over its building program to arbitration by the current President of the Academy, Professor Jean McKelvey.

At this point the underlying controversy began to escalate rather rapidly. At San Francisco State College, the students and junior faculty struck in order to dramatize their solidarity with three graduate students at Columbia University who had unsuccessfully sought admission to the National Academy of Arbitrators. (The applicants had argued that their admitted lack of training or experience as arbitrators was irrelevant, and that Academy membership ought to be available to anyone who wished to experiment

with new methods of dispute settlement and do his own thing.) This strike is now generally regarded by historians of the Youth Movement as the spark which touched off the whole train of subsequent events leading to the geographical transfer of San Francisco State College to Death Valley, the bulldozing of the old campus, and the construction on the site of a large new National Guard armory and parade ground.

At about the same time, a young man named Whitman formed a militant new organization, Young Arbitrators Who Protest, which published a widely read newspaper, the *Barbaric YAWP*.³ One of the stated objectives of YAWP was to take over the National Academy of Arbitrators or, alternatively, to discredit it as an authoritative spokesman for arbitrators and arbitration.

At first the officers of the Academy were inclined to dismiss YAWP as an insignificant upstart organization, but they soon discovered, to their astonishment and chagrin, that the Academy numbered among its own members a small but fanatic group of YAWP supporters. In 1975, for the first time in the Academy's history, the slate of officers presented by the nominating committee was opposed by a rival slate, sponsored by YAWP. The annual business meeting shattered all previous records for attendance, and was the most turbulent in the Academy's history. Ralph Seward, Father of the Academy, looking more than ever like George Washington, gave the principal speech in support of the official slate. The full text of his remarks is contained in the *Treasury of Arbitral Rhetoric: Windy Speeches for Stormy Occasions*, edited by Hill, Ross, and Seitz, and need not be repeated here. Partisans of the YAWP slate sought, unsuccessfully, to offset Seward's eloquence and prestige with sheer volume and invective, and their statements have long since been discarded in the dustbin of history. Fortunately, I have secured a partial transcript of the proceedings which includes a fragment of a speech made by one of the YAWP supporters. The speaker employed a rather strange dialect and vocabulary which members of the older generation may dimly recall from their youth, although it is doubtful if they ever really understood it. Nevertheless, I shall make no effort to trans-

³ It is not known whether Whitman was a descendant of the poet, Walt Whitman, who had written in *Song of Myself*: "I sound my barbaric yawp over the roofs of the world."

late or interpret, but shall simply quote from the following original text:

Man, like we need to tear down this power structure, right now. These old pigs been jiving us too long. What they call Academy programs is so much [the text here appears to be garbled]. The programs we dig are like, you know, more relevant. The Establishment is through; the pigs has got to go to the slaughterhouse. Like some old cat said, you want an omelette, you gotta crack some heads open around here, or somethin' like that.⁴ So we say to the Establishment: Up against the wall, mother. . . . [Unfortunately, the fragment ended here and I am unable to explain this curious locution.]

After many hours, a vote was finally taken, and although the Academy slate was elected by a comfortable margin, the number of votes cast for the rival candidates came as a shock to many, and the YAWP faction hailed the result as a moral victory.

In the years immediately following this landmark election, YAWP elected a few of its members to positions on the Board of Governors and secured appointments of others as regional chairmen. Before anyone quite realized what had happened, the two factions had become so nearly equal in strength that neither was able to carry forward any kind of consistent program. Annual meetings were now as disorderly as campus rallies, and plainclothesmen routinely mingled with members and guests. Indeed, passions aroused by the internal struggle reached such a fever peak that, for a brief time, even regional meetings were regularly held and well attended. YAWP published its own directory of Academy members, characterizing each of them in one of three ways: all supporters of YAWP were denominated "Swingers"; all of the older and well-known Academy members were labeled "Pigs"; and the appellation "C.O." (standing for "Cop Out") was reserved for those members who tried to avoid taking sides.

The three basic principles of YAWP's philosophy were definitively, if somewhat cryptically, explicated in the book, *Sayings of Chairman Whitman*. The first appears to express what we would call the idea of participatory democracy. As Whitman put it, "Anybody digs arbitration, then that's his bag, and no pig's got a right to interfere. It's like love or grass, man, it's got to be free."

⁴The reference appears to be a corruption of the saying popular in the early days of the Communist revolution in Russia that one cannot make an omelette without breaking a few eggs.

The second set forth the official YAWP position on the arbitrator's role. Again in the words of Chairman Whitman, "Forget the contract, man; that's for the Establishment. What the arbitrator has got to do is figure out who is jiving who in the shop and what that cat who filed the grievance is so uptight about. Once the arbitrator digs the problem, he can fix it so people will relax and really put out for their bread." Here let me interpolate a rather interesting historical note. A contemporary of Whitman's who was a distinguished legal scholar once told him that YAWP philosophy on this point could be traced back to some famous decisions of the U.S. Supreme Court in the sixties.⁵ Whitman is supposed to have laughed and replied, "Man, you've just got to be putting me on."

The third principle of the YAWP philosophy held that the generation gap was unbridgeable. Whitman's message to the older arbitrators was painfully explicit: "Face it, old men, you're not with it any more, no way. You've lived it up and had a high old time, but that's over. Old men don't dig young cats or their hang-ups. You get to be 30, man, you've had it."

It did not take long, however, for a major doctrinal dispute to erupt within the ranks of YAWP. A small but articulate group of psychologists specializing in group dynamics and practicing a little arbitration on the side organized under the leadership of the celebrated philosopher and mystic, Elton Mao.⁶ In his most popular book, *Recollections of Childhood, or How I Guru*, Mao had devoted an entire chapter to the social value of temper tantrums. In later years he developed the theory that confrontations and violence in the shop were the only means of achieving true catharsis, which in turn was a necessary precondition for genuine and spontaneous collaboration between managers and workers. He and his

⁵ The cases referred to were undoubtedly the *Steelworkers Trilogy* and, more particularly, *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), in which the Court said in part: ". . . The labor arbitrator's source of law is not confined to the express provisions of the contract [He] is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished."

⁶ Any similarity between Elton Mao and Elton Mayo, a pioneer industrial sociologist who championed the idea of spontaneous collaboration in labor-management relations, is unintended and purely coincidental.

followers in the YAWP camp, who came to be known as the Cathartics, argued, contrary to orthodox YAWP doctrine, that the arbitrator's most important role was to create such tension by his decisions that all existing labor-management relationships would be violently shaken if not actually destroyed.

Perhaps the clearest statement of Mao's theories appeared in one of his later works, *The True Creator*. In the doggerel-aphoristic style which he called antiheroic couplets, Mao proclaimed:

Things just ain't right
If they're not uptight.
Blood must be spilled
Before you can build.
Remember this: the True Creator
Destroys first, saves later.

These views were savagely attacked by Whitman in a pamphlet entitled "Seers and Suckers." Mao replied in kind, and the internecine struggle within YAWP grew even more intense.

We come now to the events immediately preceding the turning of the tide against YAWP. Adopting the slogan, "You need more than bread to feel groovy," YAWP advocated reducing the current per diem rate for arbitrators by 50 percent. The great majority of its members were still being subsidized in whole or in part by their parents and weren't very interested in money anyway. The older members of the Academy of course regarded this move as a subversive attack, threatening the very life of the organization. An emergency meeting was called by the loyalist caucus, which formed an ad hoc Committee on Un-Academy Activities and demanded that all Academy members either pledge allegiance to the present fee structure and sign a non-YAWP affidavit or be summarily expelled from the Academy. YAWP strength among the Academy membership was strong enough to defeat these proposals, however, and the desperate loyalists sought other means to save the situation.

Doubtless it was their ingrained pragmatism and flexibility that eventually led them to seek an alliance with the Cathartics in the YAWP camp. The instinct was a sound one and proved once again that money is stronger than ideology. On the question of fees, the

Cathartics were at one with the psychoanalysts; Mao himself had written:

Catharsis don't come easy, as you will see;
Peace will cost you plenty of do-re-mi.
Peacefulest dudes that ever I seen
Were all big spenders. You got to think Green.

Consequently, they strongly opposed the fee-cutting policies of the YAWP leadership and responded affirmatively when they were first approached by Academy loyalists.

Of course, the usual problems were encountered in bringing the two sides together. The table arrangements at the joint conferences proved to be an extremely difficult hurdle to overcome, as did the insistence by the Cathartics that negotiation sessions be limited to 50 minutes and that the participants be forbidden to ease their tensions by smoking.

After about six weeks of hard bargaining, however, a compromise was reached and peace talks commenced. The result of the negotiation, when announced, electrified the arbitration world. The Cathartics resigned from YAWP in a body and joined the Academy, where their added support proved sufficient to enable the loyalists to regain complete control. As has been demonstrated so many times before and since, a common policy on how much to charge other people proved to be the solvent in which all differences on other, less important matters were neutralized. After a few more years, the YAWP supporters in the Academy were purged.

YAWP itself, meanwhile, was rapidly running downhill. Its founders and leaders were now well over 30 and distrusted by the dwindling numbers of the rank and file; their allowances were being cut off; and a vigorously reactionary new youth group, the YAF (Young Fogies for Arbitration), was challenging the YAWP constituency among the most promising nonstudents.

Gradually, the once Barbaric YAWP was reduced to a domesticated bark without much bite. The YAF took over and was in turn absorbed painlessly and without tears by the now all-powerful International Academy of Arbitrators.

Thus, in less than 20 years, the Youth Revolt in arbitration reached flood tide and then ebbed away; it had never made the transition from revolt to revolution, and it left only a few traces on the sands of time. Surely there is a lesson to be learned from all this, but for the life of me I can't think what it is.