the operative agreement should be a considerable one before court or arbitrator. Public policies external to the agreement may very well influence, even dictate, a particular disposition on the merits. But the presumption of arbitrability should be, if anything, heightened in the public sector, far more than in the private. This is so precisely because the alternative right of public employees to strike will remain for some time quite limited, if not wholly outlawed.

Public administrators and arbitrators—not to mention courts —will do well to reflect long and hard on the significance of those angry, frustrated New York cops surging out the doors of their precincts in unplanned outrage.

Once again, that ancient truism comes to mind: "He who builds a pressure cooker had better vent the steam or blow the scene!"

**Comment—**

CHARLES J. MORRIS *

Ted Jones has taken a complex question—What is the role of arbitration in state and national labor policy?—and he has given a thoughtful and descriptive answer, synthesizing the diversity which characterizes arbitration and providing an overview of what arbitrators actually do. I find myself in agreement with much, but not all, of what he has said about private sector arbitration; and I whole-heartedly second his motion about public sector arbitration: that if grievance arbitration is to work in the public sector, it will have to echo the *Warrior & Gulf* [1] presumption of arbitrability, and further, that public sector arbitral awards, where brought before the courts in grievance cases, should receive circumspect judicial review that does not manipulate the merits of the dispute. I shall say no more on this occasion about public sector arbitration, for Ted has done an exceedingly good job in his treatment of this sensitive subject.

It is with regard to the role of arbitration in the private sector that I find myself in some disagreement with his position.

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[1] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

To the extent that he is describing what most arbitrators do, I have no quarrel with his characterization of the arbitrator's role. But to the extent that he is postulating what the role ought to be, I cannot agree. At the risk of applying another beating to what by now should be a dead horse, I must dissent from his dissent. Professor Jones purports to dissent from Professor Meltzer's thesis regarding the interrelation of the arbitration award with law applicable to the dispute but external to the collective bargaining agreement. Professor Meltzer's much-quoted advice, given from this platform four years ago and repeated three years ago in a rejoinder to Dick Mittenthal, was to the effect that "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." [2] Professor Jones says that he agrees with Professor Meltzer if by law he means what Mr. Justice Holmes defined as "the prophecies of what the courts will do in fact." The illustrations which Meltzer provided in his paper and also in his rejoinder would seem to indicate that he was referring to law in the Holmesian sense. But whether he was or not, Ted Jones has now submitted his own definition of the role of arbitration vis-à-vis the law. In so doing, Ted might also be accused of beating the same old horse, for this horse has been beaten previously by at least seven other distinguished members of the Academy. In addition to Bernie Meltzer, the list of horse beaters includes Bob Howlett, Dick Mittenthal, Harry Platt, Mike Sovern, Bill Gould, and Ted St. Antoine—to name only a partial list of the participants in this exercise. The fact that eight such eminent scholars and arbitrators have given at least six different answers to the same question is persuasive proof that the horse they have been beating is indeed very much alive. It is so much alive that the Supreme Court has just granted certiorari in a case which involves at least part of this same

[2] Meltzer, "Ruminations About Ideology, Law, and Labor Arbitration," in *The Arbitrator, the NLRB, and the Courts,* Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 16; Meltzer, "The Role of Law in Arbitration: A Rejoinder," in *Developments in American and Foreign Arbitration,* Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 58.

subject, *Dewey* v. *Reynolds Metals*,[3] which Ted noted in his paper. I shall later comment briefly about that case, but first I think it would be useful to line up the spectrum of the foregoing positions and then discuss in greater detail the new position which Ted has advanced.

At one end of the spectrum, not surprisingly, is Professor Meltzer's statement that the arbitrator "should respect the agreement and ignore the law." [4] Ted St. Antoine has expressed general agreement with that position.[5] At the other extreme is Bob Howlett's view that "arbitrators *should* render decisions on the issues before them *based on both* contract language and law. Indeed, [according to Howlett] a separation of contract interpretation and statutory and/or common law is impossible in many arbitrations." [6] He notes a single exception: where the employer and the union advise the arbitrator that they have chosen him to decide the contractual issue only and that actual or potential statutory questions are to be presented to the NLRB. In such a situation, Howlett recognizes that the arbitrator must comply or withdraw from the case; and he suggests withdrawal as the wiser course, allowing the parties to pursue their remedy before the Board and thus avoid two hearings and two decisions.

Harry Platt has taken a position between the two extremes, at least with regard to cases involving civil rights and the Title VII area.[7] His position seems to be located in both the Meltzer and the Howlett camps. First, he questions whether the Meltzer approach will suffice in the civil rights area, noting that:

> "Many earnestly believe that if arbitration is not to become a contradiction of public policy and a forum in which racial tensions are exacerbated, third party impartials should think twice about legitimatizing discriminatory provisions which thwart the proper advance of Negro workers. To do otherwise, it is urged, would be to demean the arbitral process and to engender minority group allegations of conspiracies between the arbitrator and the parties."

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[3] *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, *rehearing denied*, 429 F.2d 324, 2 FEP Cases 687 (CA 6, 1970), *aff'd* by equally divided Court, 402 U.S. 689, 3 FEP Cases 508 (1971).

[4] Meltzer, "Ruminations . . . ," *supra* note 2, at 16.

[5] St. Antoine, in *Developments in American and Foreign Arbitration*, *supra* note 2, at 75.

[6] Howlett, in *The Arbitrator, the NLRB, and the Courts*, *supra* note 2, 67 at 83.

[7] Platt, "The Relations Between Arbitration and Title VII of the Civil Rights Act of 1964," 3 *Ga. L. Rev.* 398 (1969).

Notwithstanding that admonition, Platt cites *Hotel Employers Ass'n* [8] to demonstrate "the potential mischief in the arbitral fashioning of legal opinions about civil rights law," [9] and he concludes on a cautionary note which brings him perhaps closer to the Meltzer position than he may have intended. He states:

> "Whatever might be said in favor of harmonizing law and the contract, when possible, arbitrators should move cautiously and should be loathe to make statutory and legal interpretations, certainly in the absence of clear legal precedent. Where there are substantial doubts about the contract's legal viability—and I am talking particularly about racial discrimination grievances—deferral to the courts and the EEOC would appear to be the wisest course. Where the parties' intent can move in concert with statutory objectives, affirmative relief can issue. But, arbitral meddling in the law as well as 'contingent awards' which are based upon illegalities seem to be unavailing. Otherwise, the utility of arbitration in discrimination disputes may be seriously impaired." [10]

Dick Mittenthal and Mike Sovern also occupy the middle ground—but not the same ground. Mittenthal suggests that:

> "The arbitrator should '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.' This principle, however, should be carefully limited. It does not suggest that 'an arbitrator should pass upon all the parties' legal rights and obligations.' . . . Thus, 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." [11]

Sovern buys some of Mittenthal and some of Meltzer, but injects different reasons and additional conclusions. According to the Sovern formula, an arbitrator may follow federal law rather than the contract when the following conditions are met:

> "1. The arbitrator is qualified.
> "2. The question of law is implicated in a dispute over the application or interpretation of a contract that is also before him.
> "3. The question of law is raised by a contention that, if the conduct complained of does violate the contract, the law nevertheless immunizes or even requires it.

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[8] 47 LA 873 (1966), Robert E. Burns et al.

[9] Platt, *supra* note 7, at 409.

[10] *Id.* at 409-410.

[11] Mittenthal, "The Role of Law in Arbitration," in *Developments in American and Foreign Arbitration, supra* note 2, 42 at 50.

"4. The courts lack primary jurisdiction to adjudicate the question of law." [12]

Dean Sovern illustrates his fourth condition by noting that the courts are entrusted with primary jurisdiction to decide Title VII questions, contrasted with the absence of such court jurisdiction for NLRB questions; therefore, when Title VII questions arise the arbitrator should decide the issue on the basis of the contract only, making it absolutely clear that he is not deciding the Title VII issue. Sovern suggests that in the ensuing action to enforce or set aside the award the court can apply Title VII to the award and, if appropriate, invalidate it.

Bill Gould, writing close to the Howlett end of the spectrum, rejects the view that there is a sharp demarcation between public and private law in the arbitral process.[13] With particular emphasis on Title VII questions he argues that:

"New approaches to the use of arbitration in grievances involving racial discrimination are needed. For if racial discrimination cases cannot be heard by arbitrators, the uniformity to which *Vaca* [14] has given honor and consideration will be undermined by a dual system composed of public and private routes—the first for racial cases and the second for nonracial." [15]

Citing Mr. Justice Douglas's flattering dictum in *Warrior* [16] (flattering, that is, to arbitrators), Gould says that "arbitrators are infinitely more capable than government officials and judges in interpreting labor contracts and fashioning remedies," [17] and "[i]f arbitration can be adapted to cope with racial discrimination, a relatively expeditious forum for the redress of grievances would then be available." [18]

So much for the pre-Jones spectrum. Time does not permit direct discussion of these various positions on the Meltzer-Howlett scale; but I should try to answer the question of where

[12] Sovern, "When Should Arbitrators Follow Federal Law?" in *Arbitration and the Expanding Role of Neutrals,* Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 29, 38.

[13] Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," 118 *Pa. L. Rev.* 40 (1969).

[14] *Vaca* v. *Sipes,* 386 U.S. 171, 64 LRRM 2369 (1967).

[15] Gould, *supra* note 13, at 50.

[16] *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582, 46 LRRM 2416 (1960).

[17] Gould, *supra* note 13, at 51.

[18] *Id.*

the Jones position fits into the spectrum. I am not at all sure—but this may be because I am not sure that I fully understand Ted's position.

Ted rejects the view that an arbitrator should apply law in the Holmesian sense; and I assume that to mean, for example, that an arbitrator should not apply the law of Title VII as it might relate to the construction of a seniority provision in a collective bargaining agreement. However, Ted makes a distinction between "law" in the narrow sense and " 'public policy' in the broader sense of [a] 'common stock of legal ideas' that we all share." He proposes "that all labor arbitrators should feel . . . conscience bound to be concerned about how their decisional conduct accords with 'the common stock of legal ideas' without which no civilized community can exist." He says: "To the hindmost with the courts! The critical query is whether . . . we as arbitrators are leaving this country with a higher or a lower quality of justice." These are indeed lofty ideals. But I am uncertain as to whether Ted would include statutory law, such as the Age Discrimination in Employment Act of 1967,[19] or Title VII of the 1964 Civil Rights Act,[20] or Section 8(e) of the Taft-Hartley Act [21] among the "common stock of legal ideas" upon which an arbitrator might draw. Apparently he would not, at least not in a direct way. Nevertheless, in some vague way he would rely on the conscience of the arbitrator to guarantee that arbitrators would not issue awards in significant numbers that are contrary to the "spirit of our common stock of legal ideas."

His approach is reminiscent of the Supreme Court debates over the "absorption" doctrine whereby so-called "fundamental rights" in the Bill of Rights were deemed applicable to the states through the concept of Fourteenth Amendment due process.[22] The question was frequently asked: What are those fundamental rights? And how does one distinguish them from the subjective views of the individual Justices? Emphasizing the

[19] 29 U.S.C. § 621.
[20] 42 U.S.C. § 1971.
[21] 29 U.S.C. § 158(e).
[22] *E.g., Palco* v. *Connecticut,* 302 U.S. 319 (1937); *Adamson* v. *California,* 332 U.S. 46 (1947); *Rochin* v. *California,* 342 U.S. 165 (1952); *Pointer* v. *Texas,* 380 U.S. 400 (1965).

subjective element in the doctrine, Mr. Justice Douglas dubbed the concept, especially as it was articulated by Justices Frankfurter and Harlan, as a recurrence of a theory of natural law. Is Professor Jones suggesting a like theory of natural law which should guide labor arbitrators? I would agree that an arbitrator must often look to his conscience to aid him in reaching a decision, but his mandate is to interpret the contract. We have been reminded that a labor arbitrator "does not sit to dispense his own brand of industrial justice." [23] I would be suspicious of a system which says to the arbitrator: Let your conscience be your guide. I am quite certain that Professor Jones is not suggesting that one's conscience or one's subjective view of common legal ideas should ever be more than an aid to construction, not a substitute for construction. And he is on sound footing when he insists that public policy in arbitration be fact-oriented, and that for the arbitrator facts will involve contractual differences. However, I am unsure of his meaning when he declines to include specific labor statutes and basic constitutional guarantees among the common stock of legal ideas on which an arbitrator should rely.

I fail to see why one would reject statutory law as a direct source of fundamental rights and at the same time allow the arbitrator to apply a subjective standard based on public policy in a broad sense. Surely statutory laws specifically enacted to cover the employment relationship (I am not referring to nonspecific laws, such as general criminal laws) embody the most reliable standard to tell us what public policy is. But Ted Jones emphasizes that "[i]t is a contract we are expounding." And by that he means *only* a contract, one that is independent of the law around it, for he says that:

> "Arbitrators do indeed interpret the collective agreement. They do not, and I do not suggest that they should . . . undertake to expand upon the Constitution, the Civil Rights Act, the National Labor Relations Act, the Railway Labor Act, the Norris-LaGuardia Act, the Sherman Anti-Trust Act, or any other resource of national policy."

I suggest that if such advice is taken literally, labor arbitration will stand to lose much of its relevance. It is too late to turn

[23] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

the clock back to the collective agreement of an earlier day, though we might long for that day, and some of us might wish that we could return to it. It is an inescapable fact that the agreement is no longer the exclusive province of the immediate parties. The Supreme Court, in numerous familiar decisions,[24] and Congress, in a series of statutes, have dictated the allowable contours of both the collective agreement and, to a large extent, the role which arbitration plays in the implementation of national labor policy. Collective bargaining agreements can and do embody the Constitution, the Civil Rights Act, the National Labor Relations Act, the Norris-LaGuardia Act, and even the Sherman Anti-Trust Act.[25] The contract and the arbitration process are thus the product of more than an agreement between the union and the employer. To illustrate: Congress, through the National Labor Relations Act, has sharply circumscribed the types of collective bargaining provisions on which the parties may agree. Shall an arbitrator ignore the law relating to subcontractor clauses, picket line clauses, union standards clauses, union security clauses, and numerous other areas where the NLRA establishes patterns of lawful bargaining and standards of lawful conduct affecting employee rights? Shall an arbitrator, in construing seniority provisions, ignore still other congressional mandates regarding discrimination based on race, sex, religion, national origin, and age?

It is undoubtedly true that many arbitrators will choose to ignore these laws; but to the extent that arbitration awards conflict with these laws, or perhaps even to the extent that such awards ignore the legal issues which federal—and sometimes state—laws impose upon the interpretation of the collective bargaining agreement, arbitration will surely lose its relevance. And minority groups in particular will have reason to object to a labor relations system where arbitrators conceive of their roles so narrowly. Any grievance system which fails to resolve a sig-

[24] *E.g., United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 49 LRRM 2717 (1962); *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 64 LRRM 2801 (1967).

[25] See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 59 LRRM 2369 (1965); *Amalgamated Meat Cutters Local 189* v. *Jewel Tea Co.*, 381 U.S. 676, 59 LRRM 2376 (1965).

nificant number of important employee disputes, or resolves them contrary to public law, invites alienation from the system.

Let us, as arbitrators, not make the mistake of refusing to change where the need for change is dictated by inherent changes that have already occurred, and are still occurring, in the institution to which we devote our services.

Time limitations will not permit a detailed discussion of the familiar legal doctrine whereby applicable law is deemed incorporated automatically into contracts. The U.S. Supreme Court over 100 years ago provided the classical statement of that rule:

> "It is . . . settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement." [26]

Whether that rule may be literally applied in all situations is irrelevant to the present discussion.[27] What is important is that in the field of collective bargaining, federal labor laws have generally provided the framework and the limits within which contracts are construed and enforced. Stating the proposition in its broadest form, Bob Howlett reminded us that:

> "Arbitrators, as well as judges, are subject to and bound by law, whether it be the Fourteenth Amendment to the Constitution of the United States or a city ordinance. All contracts are subject to a statute and common law; and each contract includes all applicable law. The law is part of the 'essence [of the] collective bargaining agreement' to which Mr. Justice Douglas has referred." [28]

The extent to which the collective bargaining agreement incorporates external law depends ultimately on the question and answer which Mr. Justice Douglas posed in his *Lincoln Mills* [29] opinion. His question was: "What is the substantive law to be applied in suits under §301 (a)?" His now familiar answer was: "[F]ederal law, which the courts must fashion from the policy of our national labor laws." The debate thus boils down to a point of policy: whether arbitrators can and should

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[26] *Von Hoffman* v. *City of Quincy*, 4 Wall (U.S.) 535, 550, 18 L.Ed. 403 (1967).
[27] *Williston on Contracts*, 3rd ed., 615 (W. Jaeger, ed., 1961).
[28] Howlett, *supra* note 6, at 83.
[29] *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).

make legal determinations which embrace the effect that various labor statutes might exert on the interpretation and application of collective agreements. Put simply, is the national labor policy better served by arbitrators assuming this additional role? Or is it preferable for them to decide their cases within the comfortable symmetry of the collective agreement, as if shielded by blinders shutting out all other legal principles, even principles which might ultimately be dispositive of the issue? There are some who would argue that an arbitrator, having been chosen by and being paid by the union and the employer, is thereby unqualified to apply laws designed to regulate union and employer conduct. Such critics may ultimately be right; but if so, arbitration in a great variety of cases will have ceased to be a reasonably fair and reasonably successful dispute-settling institution. I am not prepared to admit such premature failure of the arbitration process to adjust to the expanded role which new laws and changing conditions have thrust upon it. I prefer to believe that arbitration is sufficiently resilient to adapt satisfactorily to most of these new demands affecting employee disputes.

I am also impatient with the view that arbitrators are not qualified to apply law considered external to the collective bargaining agreement. In the first place, the law with which we are concerned will never be—or should never be—entirely *external* to the agreement. It is only in cases involving the interpretation of an agreement, or conduct pursuant to or in violation of an agreement, or conduct which is contrary to an agreement because it is alleged that the law prohibits literal compliance with the agreement, that the arbitrator will be called upon to interpret and apply the law. But in so interpreting and applying the law, he is first and foremost interpreting and applying the contract, which after all is his ordinary and traditional obligation. There will of course be situations in which the statutory issue is unclear; in such cases the arbitrator might be well advised to heed Harry Platt's admonition to avoid making statutory interpretations in the absence of clear legal precedent. But in cases where the statutory issue is squarely presented and the ultimate disposition of the dispute is likely to hinge on the application of the statute, the arbitrator should give full consideration to the legal effect which the statute has upon the grievance.

As to the matter of the arbitrator's legal competence, it is not likely that an arbitrator who is incompetent to handle a complex legal issue will necessarily accept such a case, just as arbitrators who are incompetent to handle highly technical wage-incentive cases generally do not accept them. However, I am confident that most professional arbitrators will rise to the occasion if necessary, particularly when they have the assistance of legal briefs which they have the right to expect the parties to furnish whenever a case contains difficult statutory issues.

As to the arbitrator's objectivity, we must rely primarily upon the maintenance of the highest professional and ethical standards to guarantee that arbitrators will have the moral courage to decide cases solely on their merits. If arbitrators cannot do this with reliability, then they should not accept the responsibility of deciding unpopular cases—indeed, they should not be arbitrating at all. But if high professional standards do not suffice, the corrective response will likely come from the courts in the form of expanded judicial review of the arbitrator's award. Properly limited, such review should not be unwelcome.

Admittedly, many hard problems will be encountered when and if arbitrators generally apply the law as well as the contract in deciding grievance cases. In particular, one can foresee problems relating to the reception which other tribunals will accord the award. It is in this regard that I would not be surprised if the Supreme Court, pursuant to its own *Lincoln Mills* [30] mandate, ultimately clarifies the *Enterprise* [31] rule to provide for limited judicial review of the arbitrator's application of statutory law, at least in those areas, such as Title VII cases, where the courts have primary jurisdiction. Indeed, it seems consistent with the broad rule of *Enterprise* to reason—assuming that the contract does incorporate the law—that if an arbitrator ignores the law and limits his award solely to construing the bare bones of the contract, then the words of the arbitrator, in the language of *Enterprise,* will "manifest an infidelity to the agreement." [32] If the *Enterprise* rule is thus

[30] *Id.*
[31] *Supra* note 23.
[32] *Id.* at 597.

expanded, arbitrators should not fear such limited judicial review—provided of course that this review is confined to the arbitrator's application and interpretation of the relevant statute but otherwise goes no further than the present review. (I daresay that most of us would not want to return to the days of *Cutler-Hammer*.[33]) The prospect of judicial review of an arbitrator's construction of a statute that directly concerns the employment relationship could prove beneficial to the arbitral process. Such review, or the availability of such review, would serve the dual purpose of providing both a strong incentive for the arbitrator to arrive at a correct legal decision and also a judicial check against his arriving at a wrong decision.

When an arbitrator consciously determines a contract dispute with reference to applicable statutory law, for example, Title VII, it does not follow that in an independent Title VII action the U.S. district court would or should be deprived of jurisdiction. In *Hutchings* v. *U.S. Industries, Inc.*,[34] where the matter in dispute was subject to the concurrent jurisdiction of an arbitrator under the collective bargaining agreement and a federal court under Title VII, the Fifth Circuit stressed that

> "[t]he trial judge in a Title VII case bears a special responsibility in the public interest to resolve the employment dispute, for once the judicial machinery has been set in train, the proceeding takes on a public character in which the remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee." [35]

Supremacy of court jurisdiction over arbitral jurisdiction in such cases is not sufficient reason, however, for an arbitrator to ignore the statute. Should he ignore the statute and thereby render the wrong decision, he would accordingly weaken collective bargaining and contribute to the irrelevancy of its grievance procedure. But should he conscientiously apply the statute, his award might settle the dispute. Even where it does not, however, the arbitrator will have added the weight of his fact-finding and his reasoning to the ultimate judicial disposition of

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[33] *Int'l Ass'n of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S. 2d 317, 19 LRRM 2232, *aff'd.* 297 N.Y. 519, 74 N.E.2d 464, 20 LRRM 2445 (1947).

[34] *Hutchings* v. *U.S. Industries, Inc.*, 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970).

[35] *Id.* at 311.

the case. The effect to be given his award in a subsequent judicial proceeding—whether in an independent action or in an action to enforce or review an arbitration award under Section 301 [36]—should depend on a variety of factors: for example, the importance of the statutory question to the contractual issue, the extent to which the parties have litigated the statutory issue in the arbitration proceeding, the adequacy of the grievant's representation, and the degree of his participation in the selection of the arbitrator. The presence or absence of such factors may prove to be significant in the future development of a modified doctrine of judicial review and in the ultimate demarcation of lines defining the concurrent jurisdiction of arbitrators and courts.

My allotted time does not permit further speculation or theorizing about the problems which might be posed by such areas of concurrent jurisdiction. It may be noted, however, with reference to an issue in *Dewey* v. *Reynolds Metals*,[37] pending in the Supreme Court, that the doctrine of election of remedies, to which Professor Jones referred in his description of that case, makes common and legal sense only where the first tribunal—in that instance an arbitration board—either has decided the external legal issue, or could have decided it, and the grievant was aware or should have been aware that he was electing a remedy and thereby waiving his right to file a court action. It is my understanding that those conditions did not prevail in *Reynolds Metals*. *Reynolds* will be an interesting decision to watch, for the Court might use that case to provide some guidelines relating to the arbitrator's role when the grievant's statutory rights are enmeshed with rights under the collective bargaining agreement.[38]

Let me close on this note. Ted Jones has given us a thoughtful and provocative paper. I suspect that the real differences in our views are miniscule, and that the various positions on the Meltzer-Howlett spectrum are but evidence of our collective groping for a conceptual theory to define the role of labor arbitration in a rapidly changing collective bargaining structure. I

[36] 29 U.S.C. § 185.
[37] *Supra* note 3.
[38] *Id.*

also suspect that we shall be beating the same live horse for a long time to come.

**Comment—**

DAVID E. FELLER *

Earlier today I heard about garbage collectors, and now, at this session, I am described as the clean-up man coming after a live horse. My role has, I suppose, been adequately described.

I want to say, first of all, that I am like Charley, only more so, in my state of unpreparedness. I had done some preliminary thinking about "The Role of Arbitration in State and National Labor Policy," but I had done no thinking about the role of state and national labor policy in arbitration until I read Ted's very provocative piece at about 10 o'clock this morning. And, of course, I never had the slightest idea as to what Charley Morris was going to say. So, rather than clean up after him, I guess I had better just get on the horse and place myself in the spectrum he has described.

Let me say flatly: I am with Meltzer. I am not sure that I quite understand Ted's view that arbitrators must be concerned that their decisional conduct accords with "the common stock of legal ideas without which no civilized community can exist." If he means that arbitrators must adjudicate the disputes which come before them in the light of the "public policy rights" applicable to the dispute, then I quite agree with Charley Morris that the arbitrator must take into account not only vague notions of social policy but also the statutory law which, today, most often reflects social policy.

Ted recoils from that ultimate conclusion to his view because it necessarily implies, as he says, that the arbitrator must then undertake to expound the Constitution, the Civil Rights Act, the National Labor Relations Act, and the other sources of national policy. And he explicitly rejects any suggestion that they should do so. The reason is that this would make clear the essential contradiction in his position.

He begins by reviewing the course of decision of the past several years in the Supreme Court. He sees that the courts

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