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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have given arbitrators an extraordinary freedom from judicial review. This freedom, he then finds, requires the introduction into the arbitral process of what I will call extraneous considerations of public policy because the arbitrator is now the final and binding, nonreviewable, decision-maker. But the very premise of this reasoning, the freedom of arbitration from judicial review, was built upon the notion that arbitrators were expounding the agreement and not the law.

I am not the author of the words that are so frequently quoted from the *Warrior & Gulf* case as to the special expertise of arbitrators. I think the words in my brief in that case were a little more modest, but a little more accurate. They were, however, to the same effect: The nature of the decision which the arbitrator makes is one which he is peculiarly competent to make and which the courts are not competent to make. That is the essential premise upon which the freedom from review which the courts have granted to arbitrators rests.

Ted's argument implicitly, and Charley's extrapolation of it explicitly, involves a different premise: that the arbitrator determines not only what the agreement means but what the law is. Alternatively phrased, the premise is that the arbitrator decides what the agreement means on the assumption that all applicable common and statutory laws are engrafted into it. The problem is that on that premise there is no reason at all to assume that the arbitrator is more competent than the judge. There is certainly no reason to assume that his judgment should be unreviewable, while the district judge who is deciding Title VII questions, and the Labor Board which is deciding NLRA questions, are subject to being reviewed by a whole hierarchy of courts.

I therefore think that the role which Charley and Ted project for the arbitrator is essentially a bootstrapping one. You simply cannot start from the premise that the arbitrator is working within a particular sphere in which he is uniquely competent and therefore should be free from judicial control and then conclude that, since he is free from judicial control, he is obliged to work outside that sphere.

Of course, there are some notions of what you may want to

call public policy which an arbitrator must take into account. There are considerations of fairness and justice that arbitrators obviously utilize, and must utilize. I can even agree that arbitrators utilize those concepts because they are part of "the common stock of legal ideas without which no civilized community can exist." But the civilized community to which reference is properly made is the industrial relations community, not the society at large.

Obviously, in interpreting and applying an agreement, an arbitrator must discover and explicate many things which are not expressly set forth—indeed, many things which are not dealt with at all. At the Santa Monica meeting of the Academy I urged that arbitrators had been given a charter by the Supreme Court to act like judges and urged that they go forth and act like judges. But that does not mean for a moment that they should act like judges in saying that the agreement, fairly read, means *X*, that Title VII fairly read requires *Y*, and that the result in the case to be decided should therefore be *Y* and not *X*. To the contrary. What I said there, and what I would like to repeat here, is that an arbitrator's function in interpreting and applying an agreement is very much like a judge's function in interpreting and applying a statute.

To paraphrase what Learned Hand once said, it is the surest mark of an immature jurisprudence to rely on the plain meaning of words to determine what a statute means. Indeed, Judge Hand, in a famous case, once interpreted the numbers 1916 to mean 1941, a rather astonishing result which he justified by saying that a court should not make a fortress out of a dictionary. The case is, concededly, an extreme one, but he was doing what the courts do all the time in interpreting statutes. He looked at what the purpose of the statute was in order to interpret its words. The term "purpose" is used in an entirely fictional sense. What the courts seek, and properly so, is the objective which the Congress was intending to accomplish by a statute. With a sympathetic understanding of that objective, they must make that determination of the particular dispute before them (to which Congress may not have adverted at all) which is most consistent with the entire scheme of the congressional enactment.

Now what an arbitrator should do—and all he should do—is to deal with a collective bargaining agreement in precisely the same way. Of course, in doing that he must make certain assumptions as to what the parties thought about concepts of fairness, justice, and equality. To the extent that it is consistent with the entire scheme of the agreement to do so, it is entirely proper for him to take such concepts into account. But his competence ends when he has finished that kind of interpretation of the agreement.

It seems to me that as soon as an arbitrator goes further and relies upon external sources of authority, he not only subjects his judgment to review by others equally or more competent to apply that external authority and destroys any claim of the uniqueness, but he also disappoints the expectations of the parties. Without glorifying the expectations of the parties, I think it may be fairly said that a system of justice under law is one which, by and large, produces results in controversies most in accordance with the expectations of the community within which that system of law operates. The community within which the arbitrators' system of law operates is the community to which the collective bargaining agreement applies—the industrial community. The result in a controversy as to the meaning of the law governing that community should accord with the expectations of the parties who establish that law, not the expectations or the scheme envisaged by those who enacted the external law except as it may fairly be said that the parties intended to incorporate that law into their agreement.

To use a simple example: The notion of "just cause" as expressed in a collective agreement is a reference to an undefined standard. Yet it is not a charter for arbitrary decision. There is some reference point. That reference is not to "just cause" as it is understood under some statute, or in some other situation, or in the halls of Congress, but "just cause" as it is understood in the industrial community to which the agreement applies. It is that standard, and no other, which the arbitrator is charged to apply.

My adjurations concerning the appropriate reference source for arbitrators apply equally in the other direction. Every time I read an NLRB decision in which the Board unfortunately

gets into the business of interpreting a collective bargaining agreement, I am shocked by the ineptness of the performance (although perhaps I am not as shocked by that as I am at the quality of the performance in the few instances I've seen where arbitrators have tried to interpret the National Labor Relations Act).

The Board is enforcing a statute. Insofar as it enforces that statute, it has some expertise. When a dispute arises as to the proper application of the Act to particular facts, the Board has to resolve that question. That's its job and, as well, the job of the courts in reviewing what the Board does. The fact that the dispute which the Board resolves as to the proper application of the statute arises between parties who have agreed to arbitrate disputes as to the proper application of their agreement has little or no relevance, except as disputes relating to the facts or to the meaning of the agreement may bear on the Board's resolution of the controversy as to whether there has been a violation of the National Labor Relations Act.

One of the classic blunders of the Labor Board in failing to recognize that principle was the much-discussed *International Harvester* case, in which the question was whether an employer could be required to discharge a man for failing to pay his dues. The dispute arose under a union-shop contract which had been executed in a right-to-work state before the passage of the right-to-work law. By the time the case came to arbitration, however, the right-to-work law had become effective and a new contract had been executed which did not contain the union-shop provision. The question was whether the employer had violated the agreement by not discharging the employee initially, and if he had, what remedy should now be applied in view of the existence of the right-to-work law and the new agreement.

David Cole, in deciding that case, confined himself pretty clearly to interpreting the agreements which the parties had made and applying the law which the parties had acknowledged, by their agreements, to be applicable. He said that the company should have fired the man before the old contract expired. Since it did not do so, and since he could not now be fired under the terms of the new agreement which had been exe-

cuted in the light of the right-to-work law, he concluded that the employee should be treated as having been fired but subsequently rehired as a new employee on the effective date of the new agreement.

The employee then filed a charge with the Board that this action violated the National Labor Relations Act on the theory that it violated the state right-to-work law and any violation of a state right-to-work statute also violated the NLRA. The Board decided that it did not have to decide whether the action violated the Act because the dispute had been resolved by an arbitrator!

Of course, David Cole didn't purport to decide whether the relief which he found was called for under the agreement would violate the Act. The result is that there was never a decision by anybody on that particular question. The case came out right anyway, but just by good luck, not because the adjudication of the proper application of the National Labor Relations Act fell between tribunals.

So I would conclude these brief remarks by affirming that, yes, arbitrators must be sympathetic and understanding of the public policy issues which are involved in the disputes which they hear. But they should be sympathetic and understanding only insofar as it may be fairly said—not arbitrarily and by virtue of a legal presumption—that the parties themselves are conscious of those considerations and, it can be assumed, would have dealt with the particular question before the arbitrator in the indicated way because of those considerations.

Beyond that, I think that the arbitrator, if he moves, moves not only at his peril but also at the peril of the relative immunity of all arbitrators from judicial review which has developed primarily because they have not taken the broader view here urged.

CHAPTER IV

DISCRETION IN ARBITRATION

GABRIEL N. ALEXANDER*

I.

I recall, somewhat ruefully, the conversation between Dick Mittenthal and myself during which he asked if I would work up for delivery at this meeting a discourse about arbitrators and the exercise of discretion. We were seated in the lobby at the Chateau Champlain near the end of last year's annual meeting in April. I demurred a bit, as I remember it, and pointed out to Dick that, unlike himself and others, I have no bent for scholarly research. He continued to press me, of course, as any good Program Chairman should. I think he tried to be reassuring and made some reference to my tendency to philosophize about the arbitrator's function, which I foolishly took as a compliment, and I began to respond to his invitation with increasing enthusiasm. After 15 minutes or so of what at the time seemed like a lively exchange of ideas, I took the hook. But I asked Dick to do two things for me: first, to write me a letter sketching out what he had in mind, and second, to keep after me by phone about once a month. He promised to do so, and did. In his letter he said in part: "You asked me to write in more detail as to what I had in mind. That's not easy to express. For this is an elusive subject, one which concerns the many unstated assumptions and judgments which enter into our awards. . . ."

Over the months intervening since last April 1, I have from time to time grappled with the subject. It is indeed an elusive one. Eel-like, no matter at which point I sought to take hold of it, it slipped from my grasp and slithered on the desk before me. Eventually I managed to creel my prey, and with your

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indulgence for the next half hour or so I shall display it. Whether my catch is a delicacy to be savored or trash to be thrown on the garbage pile rests in the palate of you, my audience.

Insofar as any ultimate conclusions are concerned, I am probably no further ahead nor much behind where I was in 1962 when I addressed the Academy under the title "Reflections on Decision-Making." At that time I ventured into a brief analysis of what goes on in the mind of an arbitrator between the time the evidence and arguments are fully submitted to him and the time he affixes his signature to an opinion and award and sends it out for the parties, and perhaps others, to see.

My thesis then was that decision-making by arbitrators is a dynamic mental and emotional process which includes nonrational, as well as rational, elements, and that awareness of such dynamics is essential to a proper understanding of it. But the area of interest encompassed by this paper is intended to be narrower than that with which I previously dealt. Today I propose to explore those aspects of decision-making by arbitrators which may be encompassed by the word "discretion."

Roughly divided, what I have to say comprises three parts: an inquiry into the meaning and usage of the word "discretion"; a look at some of the pros and cons as to the exercise of discretionary authority by arbitrators; and an argument that arbitrators are affected by normative forces which constrain them toward objectivity and accepted notions of justice and fairness, when, occasionally, they exercise "discretion."

Much of the elusiveness which characterizes today's subject emanates from the variety and generality of the meanings suggested by the word "discretion." Webster's *New International Dictionary* lists about six definitions, some of which are clearly foreign to present interest. The definition from which I proceed toward closer analysis reads as follows: "Power of free decision; individual judgment; undirected choice."

In the administration of justice, "discretion" as thus defined is generally regarded as evil. For persons in authority to exercise "free decision; individual judgment; [or] undirected choice" smacks of tyranny and an authoritarianism which is incompatible with fundamental conceptions of liberty and justice.

As I shall attempt to make more clear hereinafter, however, it is impossible to avoid all indulgence in "discretion" in the administration of justice, and there have grown up two modified concepts which (with some misgivings) are generally regarded as beneficial. I have in mind the terms "judicial discretion" and "administrative discretion." The following observation by Professor Frank Cooper in his book *Living the Law* illuminates the point:

> "Exercise of discretionary powers (in the classical meaning of the term defined as 'unrestrained exercise of will') is alien to judicial tradition. True, judges are free to exercise a degree of discretion in ancillary matters (such as determining trial dates, or the order of proofs or whether to grant extraordinary equitable remedies). But even here, it is said that the Courts exercise a 'judicial discretion' meaning that the trial judge's freedom of choice will be limited by established norms and standards." [1]

Accordingly, in the literature of the law we find definitions of, and discourses upon, "judicial discretion," a term that implies something narrower than wholly unrestrained exercise of will, but something broader than close adherence to rules of law. Attempts to define the more benign meaning of discretion connoted by "judicial discretion" are fraught with semantic uncertainties. The following definition of "judicial discretion" taken from a respected dictionary of legal terms may draw some wry amusement from those of you who, as I try to do, look closely at words to discern exactly what they mean. "Judicial discretion" is there defined as:

> "A liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable and wholesome, as determined upon the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law." [2]

What to me is a more realistic definition is to be found in the following extract from a monograph by B. X. Meyer appearing in the *New York State Bar Journal* for April 1966. "Judicial discretion" was there defined as describing

> ". . . the area in which an appellate court will accord deference, but not finality to the determination of the lower court judge

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[1] Cooper, *Living the Law* (Indianapolis: Bobbs-Merrill, 1958), 99.
[2] *Black's Law Dictionary*, 375 (2d ed. 1910).

> . . . [resulting] from the difficulty of establishing hard and fast rules . . . typically . . . reversal will be accompanied by the statement that the lower court 'abused' or 'improvidently exercised' its discretion." [3]

This definition affords greater recognition to the interrelationship between a lower court and a reviewing court. It takes into account the dynamics of such relation and points up the inescapable fact that a discretionary ruling by a lower court will be reversed when the reviewing court disagrees with the ruling so strongly that it will use the words "abuse" or "improvident" to describe that ruling.

Consider now the concept of "administrative discretion," so important in modern law that it is doubtful if our complex society could be regulated without resort to it. As Professor Cooper put it, "Administrative agencies, on the other hand, thrive on the grant of broad discretionary powers. It has been said that discretion is the very life blood of the administrative process." [4] Nevertheless, experience reveals an appellate court will, when sufficiently aroused, also reverse a discretionary choice made by an administrative agency. The following words by Mr. Justice Douglas, dissenting in *New York* v. *United States,* verbalize the traditional concern of courts for the "unrestrained exercise of will" by administrative authority:

> "Unless we make the requirements for administrative action strict and demanding expertise, the strength of modern government can become a monster which rules with no practical limits on its discretion. *Absolute discretion like corruption marks the beginning of the end of liberty.*" [5] (Emphasis added.)

The point I would stress to you before leaving my analysis of the meaning of "discretion" is that exercises of both "judicial discretion" and "administrative discretion" are subject to review by appellate courts. Such review, of course, is only on the question, as commonly put, whether such discretion was "abused," but even as thus limited it places direct restraints on the freedom of choice which may be exercised by any court or tribunal vested with "discretionary" powers. It is to the appellate courts that one must look for practical application of

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[3] Meyer, "Judicial Discretion in Matrimonial Actions," 38 *N.Y.S. Bar J.* 119 (1966).

[4] Cooper, *supra* note 1, at 99.

[5] Dissenting opinion in *New York* v. *United States,* 342 U.S. 882, 884; 72 Sup. Ct. 152 (1951).

the restraints upon "discretion" which modifies the concept from its classical definition, "unrestrained exercise of will," to its accepted meaning in the administration of justice.

The question then may be asked, how, if at all, may the notion of "arbitral discretion" be defined and utilized? Assuming for discussion that an arbitrator is empowered specifically or by reasonable implication to exercise his "discretion," what if anything in theory or practice narrows such discretion to the limits to which exercises of "judicial discretion" or "administrative discretion" are subjected? There are, of course, limits beyond which an arbitrator may not exercise his will without being subject to reversal by a reviewing court, but I am unaware of any legal principle which asserts that an award will be upset on the ground that a *discretionary power* clearly vested in an arbitrator was exercised improvidently. Does it follow that as to matters lying within an arbitrator's discretion, there are, or should be, no limits on his exercise of will? In other words, is or should the concept of "arbitral discretion" be equated with "discretion" in its classical sense? I do not relish such a consequence.

So much for the difficulties that emanate from the meaning and connotations of the word "discretion." I turn now to passing comment on three matters relevant to the necessity or advisability of authorizing or permitting an arbitrator to exercise "discretion" as to any matter.

II.

First: There exists a perceivable parallel between the complexities of society at large and the complexities of the industrial relations society in which arbitrators function as decision-makers. While a major thrust by organized labor and a major concession by the managers of enterprises have been in the direction of objectifying the rules and standards governing life in industrial establishments (to create a society "governed by laws, not men"), experience demonstrates the impossibility of putting into words specific rules and standards to cover all circumstances. Our late respected colleague, Harry Shulman, described the problem in his 1955 Holmes lecture. After expressing the view that it is wholly impractical for unions and em-

ployers to deal with labor relations problems on a purely case-by-case basis, he said:

> "So the parties seek to negotiate an *agreement to provide the standards* to govern their future action.
>
> "In this endeavor they face problems not unlike those encountered wherever attempt is made to legislate for the future in highly complex affairs. The parties seek to foresee the multitude of variant situations that might arise, the possible types of action that might then be available, the practicalities of each and their anticipated advantages and disadvantages . . . ." [6] (Emphasis added.)

And as to an agreement resulting from negotiations, Dean Shulman said that it

> ". . . becomes a compilation of diverse provisions: Some provide objective criteria almost *automatically applicable;* some provide more or less specific standards which require *reason and judgment* in their application; and some do little more than *leave problems to future consideration* with an expression of hope and good faith." [7] (Emphasis added.)

Second: Although, as Dean Shulman observed, parties engaged in collective bargaining face problems similar to those encountered in legislating complex affairs, experience reveals that by and large they did not resort to a device similar to the administrative agency: that is, they did not create offices, sole or *en banc,* with power to make and enforce *general rules* within *broadly defined policies.* Rather, employers and unions reserved to *themselves* the right and duty of applying their collective bargaining agreement directly to the incidents of day-to-day life in the factory and provided for third-party intervention only on the limited scale encompassed by the system of grievance arbitration as it generally exists. I assume that all would agree that, on the whole, with certain exceptions aside to which I will advert hereinafter, arbitrators are *not expressly* empowered to exercise "discretion" as to any matter.

From my own experience I had thought this was so. In my early deliberations on this discourse I could recall seeing only three collective agreements in which there are provisions expressly authorizing an arbitrator or umpire to exercise "discretion," as such, with respect to any matter. Being chary of

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[6] "Reason, Contract and Law in Labor Relations," 55 *Harv. L. Rev.* 999, 1003 (1955).

[7] *Id.* at 1005.

generalizations based on one man's experience, however, I inquired by mail of 20 members of the Academy whether they could cite to me out of their experience any labor agreement usages of the word "discretion" to describe either by way of expansion or limitation the authority of an arbitrator. The replies received by me confirm my impression based on my own experience. I now regard it as a safe generalization to say that, ordinarily, express affirmative grants of authority to arbitrators to exercise "discretion" are found only in provisions relating to the modification of disciplinary action imposed on employees by management. Otherwise, in the grievance arbitration system as we know it, the authority of an arbitrator to exercise "discretion" emanates from the inherent nature of his role, or by implication from other contract provisions which do not contain the word.

Third: An explanation for the absence, by and large, of express delegation of "discretion" to grievance arbitrators probably lies in two factors. One is the voluntarism by which, particularly in the years prior to 1960, our grievance arbitration institution has been characterized. While government (at the level of the War Labor Board, the President's Labor Management Conference of 1945, and the Congress in the Labor Management Relations Act, 1947) has lent *impetus* to the acceptance of grievance arbitration, all important expressions of that impetus emphasize the notion that employers and unions would create and shape their own proceedings. For example, Section 206 (d) of the Act states only that

> "Final adjustment by a *method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." (Emphasis added.)

The other factor was *apprehension*, most marked in management circles but not unknown in labor circles, lest arbitrators issue awards which seriously diminished the rights or freedoms of the parties, or created impracticable results.

The most common manifestation of this apprehension is seen in the provision, found in almost all arbitration clauses, to the effect that the arbitrator shall have no power to add to, detract from, or modify any of the provisions of the agreement. More

forceful expressions in the same vein appear in some labor agreements, one example of which reads in part as follows:

> "He [the arbitrator] shall have no power to substitute his discretion for the Company's discretion in cases where the Company is given discretion by this Agreement or by any supplementary agreement,
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> . . .
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> ". . . In rendering decisions, an arbitrator shall have due regard to the responsibility of Management and shall so construe the Agreement that there will be no interference with such responsibilities except as they may be specifically conditioned by this Agreement."

III.

To recapitulate to this point, I have sought to explain that "discretion" in its classical sense is abhorrent to our fundamental conceptions of justice, but that as the complexities of life prohibit the formulation of specific rules to cover every contingency there have arisen a concept of "judicial discretion" within which the courts of first impression may act, and a concept of "administrative discretion" within which regulatory boards and commissions may act. Application of those limited concepts of discretion involve recourse to appellate courts, and the concepts are better understood by those who recognize the dynamics inherent in the process of judicial review. By contrast, labor arbitration agreements seldom specifically authorize arbitrators to exercise "discretion" although, as Harry Shulman and others have pointed out, companies and unions face problems not unlike those encountered in complex legislative matters.

Nevertheless, I submit, closer examination of the subject reveals that, as to a variety of matters, arbitrators are expected to, do, and indeed must act in a manner which, although not styled "discretionary," is identical with, or closely similar to, the exercise of discretionary power.

Let us put aside for the moment the word "discretion" and substitute for it its classical definition, "unrestrained exercise of will." Let us then look to the sources, if any, of restraint upon the exercise of will by arbitrators. The primary source, it is clear, is the text of the labor agreement or submission from which the arbitrator derives his authority. The arbitrator, faith-

ful to his trust, like the judge, applies the rule which is clearly prescribed by his source of law or principle. Judge Cardozo put it in these words: "The rule that fits the case may be supplied by the constitution or by statute. If that is so the judge looks no farther. *The correspondence ascertained, his duty is to obey.*" [8] (Emphasis added.)

But in the grist of the business coming before labor arbitrators, the terms of an agreement are seldom clear enough to supply the rule, and *pro tanto* the arbitrator is less than explicitly restrained in the exercise of his will. A contract may be devoid of any affirmative invitation to the arbitrator to exercise "discretion," as such, but it may be replete with words which are so general in their meaning as to compel him to exercise his will with little or no specific contractual restraint. I cite the following clauses as illustrative:

1. "An employee seniority shall be broken and all employment rights terminated if an employee is absent for three working days, unless he has a *satisfactory reason* for such absence."
2. "The arbitrator shall decide the question of *equitable incentive compensation.*"
3. "The Company shall not exercise its right to discipline . . . any employee except for *good and just cause.*"

None of these clauses, which are representative of many clauses which arbitrators are regularly called upon to interpret and apply, affirmatively grants arbitrators authority to exercise "discretion," but none of them provides much guidance or restraint upon the arbitrators' exercise of will with respect to the outcome of a dispute over the application of the clause to a situation.

In terms of the underlying consideration, "restraint upon the exercise of will," how much, if any, real difference can be found between a clause which grants an arbitrator authority to exercise "discretion" with respect to how much incentive employees should earn and a contract clause which empowers the arbitrator to decide whether incentive compensation available under a plan is "equitable"?

Illustrative of how arbitrators actually behave in this uncertain area are two lines of holdings, one by the United States

[8] Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 14.

Steel-Steelworkers Board of Arbitration and the other by the General Motors-United Automobile Workers umpires. In the former, the Board of Arbitration has made it clear that it will decide whether a plan provides "equitable incentive compensation" by reference to what is fair, just, and reasonable on a case-by-case basis, and will not establish any intermediate principle or precedent for such a determination.[9] In one opinion in this series, the Board said:

> "Since it [the Board] proceeds on a case by case basis . . . in applying the 'fair just and reasonable' test, it seems essential that the Board *refrain from theorizing or rationalizing the decision here announced.*" [10] (Emphasis added.)

In effect, as I see it, the Board has asserted that it will exercise its will to reach decision in these cases unrestrained by principles or concepts which are more specific than the terms, "fair, just, and reasonable." I find it hard to distinguish between such an assertion and one which says that these kinds of cases will be decided by exercise of "arbitral discretion." Indeed, in a recent incentive case heard by me involving another steel company, counsel for the Steelworkers used the word "discretion" to describe to me the latitude of consideration which permeates decisions on the question of equitable incentive compensation made by the Board of Arbitration.

The line of decisions to be found in the General Motors-United Automobile Workers umpire rulings arises under one of the few agreement clauses which does affirmatively grant "discretion" to an arbitrator. Since 1941 the GM-UAW national agreement has contained a clause which states in part, "The Corporation delegates to the Umpire full discretion in cases of violation of shop rules. . . ."

However, and for present purposes by way of contrast with the refusal of the United States Steel Board to lay down more specific guideposts, the umpires have said that they would generally adhere to the unifying concept of corrective discipline in exercising that delegated "discretion." In one opinion, it was put in these words:

"*Full discretion* is an extremely broad term and connotes a

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[9] *U.S. Steel,* 5 Basic Steel Arbitrations [hereinafter cited as BSA] 3177 (1955); *U.S. Steel,* 6 BSA 3939 (1957); U.S. Steel, 6 BSA 4317 (1958).

[10] 4 BSA 2343 (1954).

> freedom of choice not hampered by formal rules or precedents. Nevertheless, in order that the parties might have some guide to indicate the probable outcome of disputes over the reasonableness of penalties, the Umpire has announced that, with certain exceptions not now material, he will exercise his contractual full discretion within the doctrine of 'corrective discipline'. . . ." [11]

The contrast between these two lines of decision is best understood as a manifestation of the importance which the respective arbitrators attached to considerations beyond those affecting the particular disputes ruled upon. In the line of decisions dealing with disciplinary penalties, the GM-UAW umpires were apparently most concerned lest lack of guideposts for the probable outcome of appeals would obstruct the settlement of discipline cases at the lower steps of the grievance procedure. In the line of decisions pertaining to equitable incentive wages, the Board of Arbitration was apparently most concerned lest the broad standard ("equitable incentive compensation") set forth in the contract become subservient to specific industrial engineering principles or incentive wage theories.

The results achieved by both arbitration tribunals are viable, having withstood tests of subsequent experience, and in my opinion were wise. The holdings illustrate not only that "discretion," or something closely akin to it, is a factor which affects decisions upon diverse matters, but also indicate that the extent to which "discretion" will be exercised by arbitrators is itself a question which at times may and properly should lie in the arbitrator's discretion. Nothing in either the General Motors agreement or the United States Steel agreement, as far as I can find, instructs the arbitrator as to the importance which he must attach to conflicting relevant considerations which are brought to bear on a dispute. In most arbitration cases where the outcome turns upon value judgments, the arbitrator has no alternative to making his choices on the broad basis of experience and wisdom.

Does it follow that as to any matter upon which the labor agreement does not specifically supply the rule to be applied, the arbitrator's will is wholly unrestrained? Not in the overall grievance arbitration system in which we practice. One important constraint which influences most arbitrators is the quasi-

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[11] Decision G-15 (1951).

professional status of our calling, a status for which the National Academy has diligently exerted its efforts for almost 25 years. Rare indeed on today's labor arbitration scene is the well-meaning but uninformed prominent citizen called upon to act the role of Solomon. Grievance arbitrators are selected for qualities of expertise as well as their personal dedication to justice.

Another influential constraint upon the exercise of will by grievance arbitrators comes from the practice of explaining awards in written opinions. The necessity of recording a reasoned conclusion includes the necessity of calling forth reason to explain the decision. A reasoned exercise of will is not an unrestrained exercise of will. And Judge Paul Hays to the contrary notwithstanding, what to me are the legitimate and beneficial aspirations of arbitrators to maintain the respect of their fellows and of their clientele constitute a third source of constraint against the "unrestrained exercise of will," or arbitrary or tyrannical behavior.

IV.

What I have thus far discussed concerns the exercise of discretion, or something like it, by arbitrators as to the *substantive outcome* of a dispute. There are other aspects of arbitration as to which arbitrators are called upon to make rulings (exercise their will) entirely and frankly as a matter of "discretion." I have reference to the multitude of matters that arise with respect to the conduct of a hearing. Usually one does not find in a collective bargaining agreement a complete set of rules for the fixing of time and place of hearing, or the manner and sequence of the presentation of evidence and argument, or the winding-up of the case. Within the limits of "due process and fair hearing" to which the parties are entitled as of right, there are many details the resolution of which reposes in the "discretion" of the arbitrator by force of necessity from his role as president of the tribunal, and by force of customary expectations of the disputants. In this area the arbitrator exercises discretion identical with that exercised by a trial judge.

In another area, both substantive and procedural, arbitrators may be called upon to exercise discretionary authority. I refer to the formulation of a specific remedy for a proved violation of the agreement. This is a complex area, and time limita-

tions preclude me from delving deeply into it. I call your attention to the following:

1. On occasion parties will stipulate the issues to be decided in substantially the following terms: "Did the Company violate the Agreement when it did not promote Grievant to Electrician Leader? If so what shall the remedy be?" [12]

2. In *United Steelworkers* v. *Enterprise Wheel & Car Corp.* Mr. Justice Douglas said: "When an arbitrator is commissioned to interpret and apply the . . . agreement he is to bring his informed judgment to bear. . . . This is especially true when it comes to formulating remedies. There the need is for flexibility. . . ." [13]

3. The J&L Steel-Steelworkers Agreement states: "The decision of the Board will be restricted as to whether a violation of the Agreement as alleged in the written grievance . . . exists and if a violation is found, to specify the remedy provided in this Agreement."

So much for the arbitrator's discretion as to remedies. Let me call attention to another aspect of the grievance arbitration system as it exists today—the writing of opinions explaining decisions.

I think most experienced arbitrators would agree that the writing of opinions is an arduous task which does not become easier with the passage of years. The arbitrator is never more on his own with little or no restraint or guidance than when he is putting words to paper. Entirely within his "discretion" are the questions of what to say and how to say it. To whom is he addressing himself? His clients alone, or a wider audience? Shall he write broadly for the purpose not only of recording disposition of the subject case but also of giving guidance to the parties for the future? Or shall he write narrowly so as to avoid the pitfalls of affecting matters not known to him? Shall he call a spade a spade and characterize one or the other of the parties in strong or blunt terms? Or shall he let his words fall gently, either completely masking his feelings or only hinting at them? Or shall he say something nice about one or the other or both sides? It is almost entirely a matter within his discretion, or "style," or personality. Yet the arbitrator's writings are what most people rely on to form judgments about his skill and ability, and decision-writing forms a most important element of the system.

[12] See *Allied Chemical*, 47 LA 554 (1966), Carroll R. Daugherty; *General Slicing Machine Co.*, 49 LA 823 (1967), Louis Yagoda.

[13] 363 U.S. 593, 46 LRRM 2423 (1960).

And, finally, I call your attention to the one area, closely interwoven with both procedure and substance, as to which restraint or guidance to the exercise of the arbitrator's will is not only lacking, but is also unavailable from any reliable or authoritative source. I have reference to the jury function—the acceptance, qualification, or rejection of belief in conflicting versions of fact as related by witnesses. The real and underlying truth of this matter, as experienced practitioners recognize, is that the outcome of a case which turns upon which of conflicting versions is believed is a matter which lies wholly within the "discretion" of the arbitrator. It is at this point that the whole of the arbitrator's personality, experience, outlook on life, sympathies known to him or buried in his subconscious, etc., all come into play.

I have heard some men say they could always know who was telling the truth and who was lying. I have seen arbitrator's opinions which assert as a principle that a grievant is less credible than a contradicting foreman because the grievant has an interest in the outcome of the case but a supervisor does not. I would be more at ease with myself and the world if I shared those views, and in a way I envy others who do. But experience has not led me to do so, and I have searched in vain for authoritative principles of law, psychology, or any science or art upon which I could confidently rely for guidance or restraint upon my exercise of will as to matters of belief. I need not remind this audience that the "facts" upon which an arbitrator bases his conclusion are not the "facts" as they occurred at the time the dispute arose, but are rather the "facts" as understood by the arbitrator from the presentation made to him by the parties during the course of the hearing. No one who understands the psychological processes of observation, recall, and narration by witnesses can fail to perceive that difference and the dynamics that affect the understanding and decision-making by arbitrators, by administrative tribunals, by judges, and by juries.

As I said at the outset, I find myself not much ahead or behind the position I took in my 1962 discourse. We profess belief in a society governed by laws, not by men. We reject tyranny and absolutism. We find truth in the saying, "Power tends to corrupt; absolute power corrupts absolutely," and we share the

feelings of Mr. Justice Douglas when he said, "Absolute discretion, like corruption, marks the beginning of the end of liberty." But in 1971, as in 1962, I see no way of escaping the realities which affect our institutions for the administration of justice. One cannot ignore the necessity of resolving disputes on the basis of judgment, or the elements of personality that affect human judgment. Although seldom invested with specific authority to exercise "discretion," arbitrators could not reach or express their judgments without exercising their will. Justice demands that such exercise should not be wholly unrestrained, but it is simply not possible to restrain it to a degree that eliminates "discretion" in a sense comparable to "judicial discretion" or "administrative discretion."

Comment—

PHILIP G. MARSHALL *

Perhaps the soundest approach I could make in commenting on Gabe's dissertation would be to say "Amen" and be seated. But the program calls for something more than that, so for the next 10 minutes or so I shall try my analytical best to explore further the subject of "Discretion in Arbitration."

Gabe has said that he has "no bent for scholarly research," and indeed the very title of his paper gives evidence of that. The simple and descriptive title, "Discretion in Arbitration," has no scholarly clout. Anyone who pretends to be a scholar would have picked a title that has some real sock. Evidently Gabe doesn't know that at least 90 percent of all doctoral dissertations, papers, monographs, or just plain everyday academic speeches bear such titles as "The Impact of Something on Something Else" or "The Influence of Something Upon a Whole Flock of Other Things." Even though Gabe's original paper bore that simple title, "Discretion in Arbitration," the academicians on the Program Committee could not sit still for so simple and forthright a title. Hence, in the printed program, it was changed to "The Role of Discretion in Arbitral Decision-Making." Thus, we see that the key words to demonstrating erudition are "impact," "influence," and "role."

Quite properly, Gabe begins with a number of definitions of

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"discretion," each of which quarrels with the others. Recognizing this, he proceeds to differentiate between certain categories of discretion, that is, judicial discretion, administrative discretion, arbitral discretion, and also what he refers to as discretion in its "classical" sense. It was Cardozo who observed that there is an ancient maxim of the law which runs, "Peril lurks in definitions," [1] as, indeed, it does. If one consults *Words and Phrases*,[2] that legal reference work which preserves for posterity almost every judicial definition of every word or phrase which has been reduced to print in the entire West Publishing Company Reporter Series, you will find a curious but quite understandable variation in definitions, particularly by appellate judges, depending on whether they affirm or overrule a lower court or administrative body. A typical opinion overruling the exercise of discretion by an inferior judge reads as follows:

> "The discretion of a judge is said to be the law of tyrants. It is always unknown; it is different in different men; it is casual, and dependent upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable."—Judgment reversed.

On the other hand, when appellate judges affirm the exercise of discretion by an inferior court, the opinion most frequently cryptically states: "Discretion is the freedom to act according to one's judgment."—Judgment affirmed. Thus, it appears that "discretion" can be defined or categorized in many different ways, depending on whether there is approval or disapproval of the manner in which it has been exercised and the resultant judgment.

I find it difficult to determine any real difference between the proper exercise of judicial discretion, administrative discretion, or arbitral discretion. All must be judicial and all must be based on sound reasoning. It is likewise true that in every case there should be no abuse of discretion, nor should discretion be improvidently exercised.

In the early 1940s there was a great hue and cry about the unbridled, improvident, and uncontrolled exercise of discretion by federal administrative bodies and the executive branch of the Federal Government. To correct these alleged abuses, Senator

[1] Cardozo, Address before the New York State Bar Association Meeting, Jan. 22, 1932, *New York State Bar Association Report* (1932), 274.
[2] *Words and Phrases* (St. Paul: West Publishing Co.), Vol. 12A, 327 *et. seq.*

Pat McCarran in 1944 introduced a bill into the Congress which subsequently was enacted as the Administrative Procedure Act. Section 10 of that Act provided for judicial review of any administrative action "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." [3] When Senator McCarran was asked whether this provision would preclude judicial review of "an abuse of discretion," he denied that such would be the case and explained: "It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning." [4] Thus, we see that Senator McCarran was equating "administrative discretion" with "judicial discretion."

Of course, it is true that administrative bodies are generally ceded the right to exercise discretion in many areas where a judge in an ordinary suit at law is bound by the rigor of statutes or the common law, as fortified by the doctrine of *stare decisis*. However, though the area of discretion is admittedly broad in the field of administrative law, the manner in which it is exercised should nevertheless be subject to the same limitations that apply in courts of law or in arbitration proceedings.

Arbitrators, as well as judges or administrative bodies, are bound by the written word of the statute, regulation, or contract under which the dispute is being resolved; each is bound in equal measure. The area within which each is empowered to exercise his discretion, however, may vary markedly. In many cases the arbitrator's area of discretion is the broadest of all. Very often the parties in effect say to the arbitrator, "We got a problem. Here it is. Give us your solution." Very often neither side even alludes to the contract, and frequently the contract consists of a recognition clause, a termination clause, and little or nothing in between that bears any relationship to the issue presented. It isn't even a question of resolving an ambiguity; it is purely a question of judgment unconfined. A colleague of ours, Mike Ryder, in a paper delivered at our 21st Annual Meeting, put it another way: "After all, an arbi-

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[3] Administrative Procedure Act, Public Law 404, 79th Cong., 2d Sess., Sec. 10.

[4] Administrative Procedure Act, Legislative History, 1944-46, 79th Cong., 2d Sess., Senate Document No. 248, 310 ff.

trator is engaged in a legislative function when he is asked to interpret and decide a negotiated ambiguity." [5]

Perhaps the closest approach to the exercise of this kind of unbridled discretion is to be found in the old English Court of Requests, which first appeared in 1493: "Under Henry VII it was, in effect, a committee of the Council for the hearing of poor men's causes and matters relating to the King's servants." [6] The sole curb on its discretion was that its decisions were required to square with the King's conscience, which was notoriously flexible. And let the institution of labor arbitration beware, as Professor Plucknett in his *History of the Common Law* observed, "Toward the end of its career it lost its reputation owing to the growing complexity, slowness and expense of its proceedings." [7]

Gabe quotes our Program Chairman as being principally concerned with "the many unstated assumptions and judgments which enter into our awards." I suspect that if the full truth be known, hunch or intuition is frequently the principal ingredient. Cardozo, to whom I must credit this observation, in an address before the New York State Bar Association in 1932 stated:

> "In the business of choosing between . . . competitive offerings in the legal mart, we hear a great deal now-a-days of the intuitive judgment, more picturesquely styled the hunch, as the real arbiter of values (Hutcheson, The Judgment Intuitive; The Function of the Hunch in Judicial Decisions, 14 Cornell L.I. 274)." [8]

Cardozo points out, however, that pure hunch or intuition, or what might more properly be called the "intuitive flash or inspiration," seldom comes to those who are untutored and inexperienced in the field which gives rise to the intuitive flash. As he explains:

> "Accidental discoveries of which popular histories of science make mention never happen except to those who have previously devoted a great deal of thought to the matter. Observations

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[5] Meyer S. Ryder, "The Impact of Acceptability on the Arbitrator," 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), 107.

[6] Theodore F. T. Plucknett, *A Concise History of the Common Law* (Rochester, N.Y.: Lawyers Co-operative Publishing Co., 1929), 142.

[7] *Id.* at 142.

[8] Cardozo, *supra* note 1, at 285.

> unillumined by theoretic reason is sterile. . . . Wisdom does not come to those who gape at nature with an empty head." [9]

In other words, pure and unadulterated hunch without the "value of conceptions, rules and principles" is tantamount to being a denial of "the value of all logic" and to proclaim that "Whirl is King." [10]

As arbitrators we have been frequently accused of being inconsistent, as indeed we are—and so indeed are all who serve as judges. As Oliver Wendell Holmes observed:

> "The truth is, that law hitherto has been, and it would seem by the necessity of its being is always approaching and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." [11]

I think that there are really only two characteristics which distinguish arbitral discretion from judicial discretion. The first is that the judgment of an arbitrator, once given, is rarely subject to review. Every trial judge faces the prospect of having his judgment scrutinized by an appellate court, while an arbitrator can walk away from his mistakes with only the curse of the immediate parties in his wake.

The second characteristic of arbitral discretion which is different from the manner in which judicial discretion is normally exercised is the absence of a jury to decide the issues of fact.

These two characteristics—the absence of review and the absence of a jury—place upon the arbitrator a responsibility which is grave indeed, and transcends that of the average trial judge.

The area which Gabe and Abe and I are attempting to explore today has been better and more thoroughly done by Cardozo in his *The Nature of the Judicial Process,* by Karl Llewellen in his *Bramble Bush,* and by Morris Cohen and Jerome Frank in their numerous books and articles. As the three great jurisprudential scholars have observed, anyone who hears con-

[9] *Id.* at 286.
[10] *Id.* at 287.
[11] *Justice Oliver Wendell Holmes, His Book Notices and Uncollected Letters and Papers* (Brooklyn, N.Y.: Central Book Co., 1936), 12.

flicting sides of an issue, exercises discretion, and renders a judgment, is more influenced by subconscious forces than conscious ones. Indeed, if we could rule out the subconscious decision-making forces, we wouldn't need judges, commissioners, or arbitrators at all; we could resort to a computer.

As Cardozo observed, ". . . it is through these subconscious forces that judges are kept consistent with themselves and inconsistent with one another." [12]

Comment—

ABRAM H. STOCKMAN *

Gabe Alexander has told us, in essence: first, that under our system of grievance arbitration, arbitrators in their role as decision-makers do exercise discretion; second, that notwithstanding they are seldom granted such authority, they inescapably must do so in resolving disputes; and finally, that the professional nature of the arbitrator's calling, the need to substantiate decisions by written opinion, and the desire to maintain respect among colleagues and clients all serve as restraints upon the possibility of an unrestrained exercise of discretion.

There is little to quarrel with what Gabe has said. The fact of the matter is that, somewhat uncharacteristic of Gabe—at least insofar as Academy meetings are concerned—he has not adopted a polemical position. On the contrary, as I construe his paper, he has merely sought to explore and explain certain aspects of the decision-making process as seen through the eyes of a professional arbitrator. And need I add that, as a professional arbitrator, Gabe is among the most experienced as well as among the most esteemed in the profession.

There have been other occasions at these meetings which have been devoted to discussions of the decision-making process. Who can forget that tour de force in 1962 by none other than Peter Seitz on the subject, "How Arbitrators Decide Cases: A Study in Black Magic"? [1] You may recall that it was Peter's conclusion

[12] Benjamin Nathan Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 12.

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[1] *Collective Bargaining and the Arbitrator's Role,* Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1962), 159.

that arbitrators decide cases much in the manner in which his grandmother—and he made it quite clear that it was his maternal grandmother who was involved—chose and bought a melon at the fruit store. Digging deep into the bottom of the pile, she would pick one out for color, heft it for weight and volume, pressure the ends for ripeness and maturity, sniff it for fragrance, and then, turning her back on the evidence of her senses, choose another, relying upon "the ineffable and completely subjective criteria for judgment that are acquired only with having and coping with a problem for a long time. . . ." In that same year Gabe delivered his Presidential Address entitled "Reflections on Decision Making," [2] and it was his thesis that decision-making by arbitrators is a dynamic process which includes not only rational elements but nonrational elements as well. One cannot but be struck by the extraordinary coincidence of a meeting of the minds between Alexander and Seitz. We know of no other instance where that has occurred, and we strongly doubt that it will ever occur again. And so, if only because of that coincidence, if not for more cogent reasons, I am prepared to accept, and indeed endorse, the proposition that every decision represents a combination of both rational and nonrational elements.

In his talk today, Gabe concentrates on what he conceives to be a narrower aspect of the decision-making process—namely, an exploration into the discretionary aspect of the arbitrator's function. And he concludes, "Although seldom invested with specific authority to exercise 'discretion,' arbitrators could not reach or express their judgments without exercising their will."

I have no difficulty in accepting that conclusion, but I confess to some perplexity because I am never quite certain in what sense he is using the word "discretion" in the various ways he deals with this subject throughout the paper. Thus, I can never be sure whether he is speaking of discretion as "undirected choice" or "unrestrained exercise of will," or in some narrower sense, as "freedom of choice . . . limited by established norms and standards." And furthermore, in whatever sense he is using the term, I find myself equally uncertain in determining whether he is addressing himself to a specific grant of authority to exercise discretion, or to a reasonable implication to do so from the language, or to the inherent necessity to interpret and apply

[2] *Id.* at 1.

language as such. But I cannot and would not fault him for these uncertainties or my perplexities because I realize that we are here dealing with a subject that is at best quite elusive. In its broader context, it inescapably concerns the very nature of the decision-making process itself—a subject that has challenged the thinking of philosophers and jurists over the ages and, in our own time, of figures no less eminent than a Holmes or a Cardozo. Since none of us speaking this afternoon purports to be a professor of jurisprudence, I think we are entitled to a degree of fuzziness which may or may not be characteristic of jurisprudence professors.

Let us return, for a moment, to the statement, "Although seldom invested with specific authority to exercise 'discretion,' arbitrators could not reach or express their judgments without exercising their will." Of course, this is true. And it is a truism which extends throughout the arbitration proceeding from the moment the arbitrator accepts an appointment until he has discharged his responsibilities and issued his decision and award. Why is this so? Because in the very nature of the grant of authority to a third party to decide a dispute, the contesting parties have necessarily conferred upon the third party the power to exercise his discretion in freely choosing as between the facts and arguments presented by each and the decision which each seeks to have him render. Whatever his reasons, whether or not they conceal his motivations, and to whatever extent they may be dictated by nonrational elements, his decision in that case imposes on the parties his judgment, indeed his will, and represents to that extent an act of fiat. In short, by virtue of the authority invested in him by the parties, he decrees that the act be done.

Lon L. Fuller, professor of jurisprudence at the Harvard Law School, in his perceptive analysis of Cardozo's legal philosophy entitled *Reason and Fiat in Case Law*,[3] has pointed out that Cardozo was singularly aware that every decision in case law embraces the antinomies of reason and fiat. In epitomizing Cardozo's philosophical approach to that inherent contradiction, Fuller said: "For him law was by its limitations fiat, by its

[3] *Reason and Fiat in Case Law* (New York: American Book-Stratford Press, 1943).

aspirations reason, and the whole view of it involved a recognition of both its limitations and aspirations." [4]

In like manner must we recognize the limitations and aspirations of the decision process in arbitration. Its aspirations are to persuade by reason that justice has been accomplished, but its limitations as an institutional device no less abound in the exercise of discretion that represents a measure of personal fiat. And in the context of the arbitration of industrial disputes, concerned as it generally is with the interpretation and application of a written agreement, neither the absence of express authority to exercise discretion nor the presence of a restraining clause proscribing additions, detractions, or modification of the terms of the agreement can divest the arbitrator of the need to exercise his personal judgment. Hence, on that proposition, Gabe and I are in complete agreement. If there is any sense of difference between us, it is only as to a matter of emphasis in his attempt to treat the discretionary aspects of decision-making as something distinguishable from the decision-making process itself.

Believing, as I do, that the exercise of discretion permeates every aspect of the arbitrator's role, I am led to these conclusions. First, I do not think that one can meaningfully discuss the part that discretion plays in decision-making on any overall basis without reference to the particular substantive problem involved. Let me explain. In Dick Mittenthal's letter to Gabe detailing what he had in mind in suggesting the subject—the nature and exercise of arbitral discretion—he speaks of the many unstated assumptions and judgments which enter into our awards, and he cites, among others, the example of the selection of the rationale or theory on which a case is decided. Thus, he says: "Frequently we have a wide choice. Sometimes we choose the most forceful theory (i.e. the one which is most persuasive); other times we choose the safest theory (i.e. the one which is most likely to be acceptable); still other times we choose the most reasonable theory (i.e. the one which produces the 'correct' result notwithstanding contract-fact complexities); and so on." And he concludes: "Do we tend to exercise this kind of discretion in the parties' interests or in our own interests?"

Leaving aside, for the moment, the latter question about

[4] *Id.* at 3.

which I will have some comment later, any discussion concerning the choice of the most forceful, safest, or reasonable theory upon which to rest a decision can only be meaningful in the context of a consideration of the particular substantive problem involved. Is it to be doubted that the choice may be influenced by whether we are discussing wages and compensation, or vacations and holidays, or promotions, layoffs, premium pay, discipline, or any one of the great variety of provisions customarily included in the collective bargaining agreement? For example, Gabe has addressed himself to two substantive areas: one dealing with the question of equitable incentive compensation; the other dealing with just cause in disciplinary matters. In the situation dealing with the matter of equitable incentive compensation, he points out that the Board of Arbitration, in the cases he cited,[5] determined that it would proceed on a case-by-case basis in applying a "fair, just and reasonable" [6] test and would refrain from theorizing or rationalizing the decision, apparently because of a concern that the broad contractual standard might become subservient to specific industrial engineering principles or theories. In the situation dealing with discipline, the umpire, in the exercise of the "full discretion" [7] delegated to him by the contract, determined that he would exercise that discretion on the basis of the doctrine of "corrective discipline," [8] having in mind the need to provide guideposts so as to encourage the settlement of discipline cases at the lower steps of the procedure. Gabe concludes that in any arbitration case where the outcome turns upon value judgments, the arbitrator is compelled to make his choice broadly as a matter of "discretion." But where does that leave us? Informative as the cited examples may be about the considerations which entered into the exercise of discretion in choosing the particular theory upon which to rest the decision, in the final analysis we are really not much further advanced about this matter of discretion except as it relates to the specific substantive matter involved. In short, I suggest that the nature and exercise of discretion cannot all be wrapped up in one ball of wax, and my own personal opinion

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[5] *U.S. Steel,* 5 BSA 3177 (1955); *U.S. Steel,* 6 BSA 3939 (1957); *U.S. Steel,* 6 BSA 4317 (1958).

[6] 4 BSA 2343 (1954).

[7] Decision G-15 (1951).

[8] *Id.*

is that any attempt to do so would not represent much of a contribution to the jurisprudence of industrial relations.

The second conclusion that I derive from my view that the entirety of the arbitration process encompasses the exercise of discretion concerns the matter of constraint. Gabe has indicated that, in contrast to the restraints imposed by appellate review in the exercise of judicial and administrative discretion, the likelihood of a reversal of an arbitrator's award for the improvident exercise of an *express* grant of discretionary power is, in the main, rather remote. This may well be true, and I am content to rely upon his research for that conclusion. But from my point of view, I find it significant that our own Academy Committee on Law and Legislation has found in its analysis of reported judicial decisions that, consistently over the years, the majority of arbitration awards, challenged for *whatever reason* in judicial proceedings, were enforced or confirmed by the courts.[9]

Hence, I think it fair to conclude that, in general, the only restraint upon the arbitrator not to abuse his power of discretion is not judicial restraint but self-discipline. Self-discipline, according to Gabe, will necessarily result from the impact of such factors as the professional nature of the arbitrator's calling, the need to substantiate the decision by a written opinion, and the desire to maintain respect among colleagues and clients.

As I earlier indicated, there can be no quarrel with those conclusions. But since I do not regard the arbitrator's power to exercise discretion as something tangential to the process, but regard it rather as something inherent and inescapable by virtue of the very nature of the process, I would urge that the only safeguard which the parties have against the possibility of an improvident exercise of that discretion is the professionalism and integrity of the person they select as arbitrator.

When I speak of professionalism, I have in mind one who, by training and experience in the adjudication of industrial re-

[9] Edgar A. Jones, Jr., and David G. Finkle, "Arbitration and Federal Rights Under Collective Agreements in 1968," in *Arbitration and Social Change*, Proceedings of the 22nd Annual Meeting, National Academy of Arbitrators, ed. Gerald G. Somers (Washington: BNA Books, 1969), 200; Jones and Kathleen Peratis, "Arbitration and Federal Rights Under Collective Agreements in 1969", in *Arbitration and the Expanding Role of Neutrals*, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, ed. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 229.

lations disputes, has demonstrated the attributes of competency in its various facets, ranging from a thorough and intimate knowledge of labor relations to an ability to write a clear and persuasive opinion of the reasons which form the bases for his decision.[10] And when I speak of integrity, I have in mind a demonstrated awareness of the proprieties so necessary to the proper functioning of the office of arbitrator and so vital to preserving the integrity of the process of arbitration. In the final analysis, professionalism and integrity are most apt to provide the parties with the assurance that the arbitrator they have chosen to decide their dispute will exercise his discretion in a manner least calculated to result in unwarranted damage to them and, I might add, in a manner that would serve their interests and not his own. The concept of a government of laws, so characteristic of our society, is not without its antinomy in being dependent for the implementation and interpretation of those laws upon man. Hence, we are constantly faced with the challenge of seeking to insure that only persons of competence and integrity are selected or elected as judges. That challenge is, I submit, not without its relevance to the quasi-judicial process with which we have been concerned here this afternoon.

[10] For a fuller discussion of professional competence, see Stockman, "Now, Who Shall Arbitrate?" 19 *Stanford L. Rev.* 707 (1967).