CHAPTER 4

WHAT PRICE EMPLOYMENT? ARBITRATION, THE CONSTITUTION, AND PERSONAL FREEDOM

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In reading over past proceedings of the Academy in order to prepare for this session, I was struck by the variety of roles suggested to arbitrators. They range from the common suggestion that arbitrators are employees chosen to perform a specific task of contract interpretation to the suggestion that arbitrators should consider themselves the "supreme court" of industrial relations.[1] Because the subject assigned to me involves the relationship among arbitration, the Constitution, and personal freedom, it is with the usefulness of the latter model that I am concerned. My conclusion is that the analogy, though far from perfect, has much to commend it as a description of how arbitrators have functioned in discipline cases. It also provides a guide for the solution of vexing problems involving conflict between individual rights and management prerogatives.

Since my subject concerns discipline, the focus of my discussion will be on the Supreme Court's role in criminal cases and in cases involving the disciplining or discharge of governmental employees. My discussion presupposes a typical "just cause" provision and does not question the duty of the arbitrator to follow whatever other standards the parties explicitly established by contract.

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[1] "[T]he fruitful image of the arbitrator's role is that of the interpreter of the constitution in the political community—the Supreme Court." John Perry Horlacher, *Employee Job Rights Versus Employer Job Control: The Arbitrator's Choice*, in 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), at 174. *Cf.*, Sanford H. Kadish, *The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations*, in LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), at 125.

Basic Procedural Rights

A major function of the U.S. Supreme Court in criminal cases has been to monitor the actions of government officials prior to arrest and immediately afterward in order to ensure that certain standards of conduct have been met. Arbitrators have similarly used their power to monitor the behavior of company officials prior to discharge and during the early stages of the grievance machinery. Thus they have insisted that employees be given adequate notice of what constitutes grounds for discharge and that the accused be given an opportunity to be heard before discipline is administered. They have, in general, held that an employee accused of a serious infraction has the right to representation. In addition, arbitrators have rejected improperly obtained evidence. When company officials or security personnel have tricked, coerced, or misled employees into harmful admissions, arbitrators have refused to admit or consider them.[2] Thus arbitrators have with considerable consistency incorporated basic concepts of due process into the definition of good cause.

Although this practice has been noted before, there has been surprisingly little challenge to it.[3] The early cases in which due process or equal protection concepts were first adopted apply them without discussion—almost as a matter of course. Later cases more openly enunciate the role of the arbitrator as monitor of the processes of discharge, but they treat the function as being so well settled as not to require justification. For example, arbitrator Carroll Daugherty, in a series of opinions, has attempted to define "good cause" as the concept has evolved in arbitration.[4] He has focused almost exclusively on the procedures used by management in establishing and administering discipline. I believe that Daugherty's definition is somewhat too formal and does not encompass enough of the role of the arbitrator as a trial court judge

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[2] *See* Frank Elkouri and Edna A. Elkouri, HOW ARBITRATION WORKS, rev. ed. (Washington: BNA Books, 1960), at 194; and Owen Fairweather, PRACTICE AND PROCEDURE IN ARBITRATION (Washington: BNA Books, 1973), at 241–76.

[3] The concept of due process with disciplinary cases was dealt with by W. Willard Wirtz in *Due Process of Arbitration*, in THE ARBITRATORS AND THE PARTIES, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), at 1. The application of specific constitutional doctrine to arbitration has been challenged. *See* Fairweather, *supra* note 2, at 247 *et seq.*

[4] *See Combustion Eng'r*, 42 LA 806 (1964); *Enterprise Wire Co.*, 46 LA 359 (1966).

to find facts and to pass on the adequacy of grounds offered in justification for company action. It is noteworthy, however, that an able, experienced arbitrator would focus the appellate aspect of the arbitrator's role as the distillation of arbitral experience in defining the concept of just cause.

If the role of arbitrator were as modest as speakers at these meetings sometimes pretend, a different approach could easily have been taken. Arbitrators might have stated that they were entrusted solely with the task of deciding whether a particular employee had done anything that justified his discharge. If it was proven that he had, that ended the matter—grievance denied. Arbitrators have seldom taken this position; they have rarely even seriously considered it, which reflects the importance of procedural fairness to anyone who determines the legitimacy of punishment. The existing practice also demonstrates how well accepted is the notion that the arbitrator's role is the culmination of a process of self-regulation, with the arbitrator, like the Supreme Court, having responsibility for the workings of the other parts of the process.

Basic Substantive Rights

The Supreme Court's role in criminal cases also involves articulating fundamental liberties—areas of behavior in which an individual's actions are presumptively immune from state interference or criminal penalties. Thus far, however, there is no comparable, recognized concept of fundamental rights in arbitration. Although a perceptible movement toward recognition of individual rights exists, arbitrators have not developed a consistent response to claims that constitutional rights should be recognized in arbitration. Some arbitrators have implicitly accepted this contention; [5] some have rejected it.[6] For the most part, however, arbitrators have been ambivalent and have shown a marked reluctance to deal with the question directly. Many opinions contain alternative analyses arguing both that constitutional rights are not applicable and that in any case they are not infringed. For example, in *Great Lakes Steel Co.*,[7] the arbitrator upheld a

[5] *See, e.g., California Processors, Inc.*, 56 LA 1275 (Adolph M. Koven, arbitrator, 1971).

[6] *See Reynolds Metals Co. and Auto Workers Local 277*, 56 LA 592 (Mark L. Kahn, arbitrator, 1967).

[7] 60 LA 860 (Richard Mittenthal, arbitrator, 1973).

company rule forbidding employees "to bring or distribute on Company property literature which is scurrilous, abusive or insulting." The grievant's First Amendment claim was initially rejected on the ground that "the rule in dispute . . . is not a Congressional act." The arbitrator also concluded that in any case the literature was beyond the protection of the Constitution, but the analysis was perfunctory. Had the arbitrator been willing to recognize its applicability, I think he would have recognized that the First Amendment applies even to "criticism . . . beyond all reasonable grounds."

In addition, cases that raise claims of the applicability of constitutional rights are frequently decided on other grounds. This hesitation to address directly the applicability of basic constitutional rights in arbitration, though understandable, is unfortunate. Arbitrators should recognize that certain interests, such as freedom of speech and religion, are so fundamental to individual liberty that they can be limited and made the basis for disciplinary action only when management can demonstrate an overriding economic need. In considering claims of fundamental rights, arbitrators should familiarize themselves with court decisions construing the Constitution. Such decisions are valuable because they articulate the significance of individual liberties, provide a sense of their reach, and state the policies that are advanced by their recognition. Court opinions also suggest techniques for the accommodation of important interests when they are in conflict or when they infringe upon some fundamental opposing interest.

I recognize that the validity of the constitutional analogy I propose as a starting point for evaluating individual rights and the practice of considering judicial opinions may be contested from a variety of perspectives. It might, for example, be claimed that such constitutional rights are less important in the industrial setting than they are in the political. Although there are factors that might be pointed to, such as the ability to change jobs, that differentiate the industrial process from the political process, they do not bulk large. We have come to recognize that the job environment is one of the most significant aspects of a person's life. Most people spend more of their waking time at work than they do anywhere else. My own recent field research,[8] which has in-

[8] *See* Getman, Goldberg, and Herman, UNION REPRESENTATION ELECTIONS: LAW AND RESULTS (New York: Russell Sage, 1976).

volved extensive interviews with hundreds of workers, has made me realize how deeply held feelings about work are and how closely related these feelings are to basic self-image.[9] Thus, just as we recognize that the possession of certain rights is crucial to political freedom, it should seem obvious that they or similar rights are also vital to industrial dignity and self-respect.

This is not to say that there must be a one-to-one correspondence between constitutional rights and fundamental rights recognized in arbitration. There are rights customarily observed in arbitration, such as the right to be judged solely by one's performance on the job, that are only metaphorically related to political rights. Similarly, fundamental political rights, such as the right to vote, are not easily translatable to job rights. Nevertheless, the fact that certain interests are constitutionally recognized should be a powerful argument to arbitrators that such rights should also be recognized in arbitration. Thus, for example, the constitutional commitment to robust and "open" debate of public issues should be recognized in the plant environment. Freedom of expression at work should be limited only when a strong showing can be made that the expression of ideas or the use of words is likely to cause serious disruption. Similarly, our commitment to free exercise of religion should make arbitrators most reluctant to uphold discharges based upon religious observance, and the existence of a constitutional right of privacy should make arbitrators suspicious of discipline based on sexual behavior that does not pose a threat to the functioning of the company. The fact that the exercise of such rights is unpopular with other employers should not be a basis for their limitation.

The method of analysis that I am urging was employed by arbitrator Adolph Koven in *California Processors, Inc.*[10] The grievant in that case was indefinitely suspended for refusing to remove a poster of Emiliano Zapata that contained a slogan "Viva la Revolución." Koven, citing the Supreme Court's decision in *Tinker* v. *Des Moines School District*,[11] dealing with the right of students to distribute literature, rejected the company's ban. He stated, "Not even a scintilla of evidence was produced to show

[9] This point is well illustrated in Studs Terkel's popular book, WORKING (New York: Pantheon, 1974).

[10] *Supra* note 5.

[11] 393 U.S. 503 (1969). The arbitrator, however, applied the rule that the grievant should have obeyed the rule and filed a grievance. This conclusion is highly questionable in this setting.

that an absolute ban on the Zapata poster was called for pursuant to the requirements of *Tinker*." [12]

Such analysis might be attacked as inconsistent with a proper appreciation of the arbitrator's role. The concern has frequently been expressed at these meetings that arbitrators not overstep their institutional limitations and give way to that most seductive of perfidious impulses, the desire to do good. We are hired to interpret contracts, not to indulge our fantasies of being on the Supreme Court. However, the task of contract interpretation varies with the nature of the issue and breadth of the language used. The language of just cause is so general that it cannot be construed in terms of the precise intent of the parties. The most that can be said is that by the use of such language, the parties have manifested an intent to refer in discharge cases to the moral standards of the community modified for the industrial setting. The Constitution and the decisions that interpret it both reflect and shape contemporary standards of morality. As such, they are valuable sources of guidance to arbitrators in determining whether specific conduct is sufficiently reprehensible to justify discharge.

The reluctance of arbitrators to consider constitutional issues may also be justified by a claim of institutional incompetence. Many arbitrators are not lawyers, and among those of us who are, very few are particularly knowledgeable about constitutional law. The same or even greater lack of qualification exists among those who argue before us. Isn't it then a wise and understandable decision to avoid the complexities of constitutional doctrine? For example, it would be extraordinarily difficult to apply current constitutional standards concerning personal appearance. The law is confused and unclear, and any attempt to follow it would inevitably lead to confusion and contradiction. It might also serve to confuse and perhaps to enlarge standards of judicial review.

The problems are real, and they cannot be totally avoided. However, the great power that arbitrators possess, through law and custom, carries a concomitant responsibility to exercise it in a responsible and informed fashion. This would be impossible to do without some attention to the Constitution and the decisions interpreting it. It is important to recognize that in interpreting the Bill of Rights, courts are not involved in an esoteric legal ex-

[12] *Supra* note 5, at 1275.

ercise. They are seeking to develop a system whereby basic concepts of fairness and liberty are given their just due. Court precedents reflect a major effort over time to analyze the reach of these rights and to apply them in a consistent fashion. While the precedents do not always easily give their learning, they are no more conflicting or confusing than are the decisions and opinions of other arbitrators on similar questions, as a look at the grooming cases in arbitration will quickly reveal.[13]

As already noted, I do not suggest that arbitrators apply mechanically constitutional doctrine derived from decisions in the criminal law area, but only that we look to such decisions in fashioning our own standards. Although confusion and misapplications will inevitably arise because of the lack of familiarity with constitutional law, we are not likely to increase the already prevalent confusion and contradiction that now distinguish our treatment of cases in which claims of constitutional privilege are raised. Recognition of the importance of harmonizing the two areas of adjudication would begin a gradual process of assimilation and synthesis, so that eventually the standard sources of doctrine in arbitration would reflect substantive constitutional standards as they now reflect procedural constitutional standards. If we make clear that constitutional decisions are being looked to for guidance only, that should prevent confusion concerning the scope of review from arising. Moreover, as the Second Circuit decision in *Holodnak* v. *Avco* [14] suggests, questions concerning the appropriate relationship between arbitration and constitutional rights are likely to be raised in the courts whatever approach arbitrators take.

The analogy that provides the basis for my suggestion may also be criticized from the perspective of the employer. It might be argued that the presuppositions that justify individual rights in the political sector do not exist in the business environment. A sound political process requires recognition of fundamental liberties so that informed decisions and necessary changes in public policy can be made. A business enterprise, however, is not a political entity and does not require, for its proper functioning, that these rights be exercised. Indeed, they may very often be incon-

[13] *See* Smith, *Arbitration of Right of Employee to Self-Expression*, 162 CLEVELAND ST. L. REV. 162 (1972); McGuckin, *Employee Hair Styles: Recent Judicial and Arbitral Decisions*, 26 LAB. L.J. 174 (1975).

[14] 514 F.2d 285 (1975).

sistent with efficient operation. In the capitalist system it is the employer who is the best judge of what is harmful or what is beneficial to the company. When the employer makes a decision that certain types of conduct are improper, this decision should be permitted to stand unless it is totally arbitrary or completely unreasonable.

While there is undoubtedly some force to this argument, it is not totally persuasive. For one thing, many of our most highly cherished individual freedoms, such as free exercise of religion, cannot be justified in terms of their value to the political process. They are important because they permit individuals to express themselves and to live their lives as they choose, free of arbitrary interference—a rationale almost equally applicable to the employment situation. Moreover, the protection of fundamental rights does not require either that the Supreme Court ignore the interests of the Government as declared by public officials or that an arbitrator ignore the economic concerns of a business enterprise as declared by appropriate officers. Every constitutional right is subject to some limitation. Freedom of religion does not involve the right to subject people to the danger of poisonous snakes, or the right to withhold needed medical attention. Freedom of speech does not protect inducements to crime, nor does it permit an employer to threaten to discharge employees if they vote for a union. The right to privacy does not prevent the state from prohibiting abortions in the third trimester of pregnancy. Where fundamental rights are involved, however, a much closer scrutiny is called for into the claimed justification for a governmental rule and, if the analogy is accepted, for a managerial decision.

Thus, for example, managerial decisions involving safety or setting hours of work would normally be assumed valid and any violation thereof punishable in accordance with applicable policy. However, where a company seeks to limit the use of political buttons or interferes with the free exercise of religious beliefs or limits the ability of employees to make statements critical of the company, the arbitrator should require that the company demonstrate the need for such limitation. Moreover, if the legitimate interests offered by the company in justification could be satisfied in a manner more consistent with individual liberties, then the managerial decision should not be upheld.

The type of analysis that I suggest has been employed regularly by the courts in the public sector. Thus in *Pickering* v. *Board of*

Education,[15] the Supreme Court held that a school board could not constitutionally discharge a teacher because of a letter that irresponsibly attacked the board's allocation of funds between academic and athletic needs and that contained false statements of fact. Although the Court recognized that "the state has interests as an employer in regulating speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general," [16] it nevertheless required that the school board demonstrate an overriding need for such limitation. The Court, in holding that the state had not adequately justified its action, specifically noted the similarity between criminal sanctions and discharge in inhibiting the exercise of basic rights.[17] I see no reason why employees in the private sector should not be afforded similar protection. Why should the exercise of so significant a right as peacefully expressing one's views constitute "good cause" for discharge except in the most unusual of circumstances?

I am not urging automatic application of all decisions dealing with the constitutional rights of public employees. Certain decisions make sense only in their own context and should not be applied by arbitrators in the private sector. For example, the Supreme Court recently upheld the constitutionality of the Hatch Act, which limits the right of political participation by governmental employees.[18] The Court concluded that this statute was justified because of the legitimate congressional desire to ensure the fair operation of the election system and "the goal that employment and advancement in the government service not depend on political performance." Obviously, these concerns are nonexistent or so weak in the private sector that, except in unusual circumstances, a private-sector employer would not have good cause to discharge an employee who engaged in partisan political activity in violation of a company rule.

Even where a public-sector decision involves the same basic interests that are involved in the private sector, its applicability might be questionable. Suppose, for an example, an arbitrator is called upon to decide a case involving discharge for violation of a hair-length code. In its recent decision in *Kelley* v. *Johnson*,[19]

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[15] 391 U.S. 563 (1968).
[16] *Id.*, at 568.
[17] *Id.*, at 574.
[18] *CSC* v. *Letter Carriers*, 413 U.S. 548 (1972).
[19] 44 L.W. 4469 (1976).

the Supreme Court held that a county regulation limiting the length of a policeman's hair did not violate the Fourteenth Amendment. In significant part, the Court's decision rested on the majority's conclusion that the choice of one's hair style is not an interest worthy of significant constitutional protection. To what extent should arbitrators in the private sector feel compelled to give the interest in personal appearance a similarly short shrift? Might they justifiably adopt the position adovcated by the dissenters who argued that "the right in one's personal appearance is inextricably bound up with the historically recognized right of every individual to the possession and control of his own person"? The dissenters would have required persuasive demonstration of the need for such regulation before permitting it. In my view, it would be permissible for arbitrators to reject the Court's reasoning in this regard and to adopt instead the approach suggested by the dissent.

There are several reasons why a more expansive approach might be legitimate in arbitration.[20] Since we are determining contractual rights rather than constitutional interest, any decision reached in arbitration is changeable by amendment of the collective bargaining agreement. It is obviously far less drastic to conclude that certain rights exist in the absence of contractual language than it is to hold that they are constitutionally mandated and thus may never be infringed upon by public employers. Moreover, the possibilities of refinement and change on the basis of unforeseen factors or recent industrial developments is much greater through arbitral decision-making, which involves hundreds of coequal decision-makers and thousands of decisions, than it is through the process of constitutional litigation, which involves only occasional decisions in this area by the Supreme Court. Finally, arbitrators are inevitably more familiar with common industrial practice than is the Supreme Court and are therefore more likely than the Court to know if a rule is totally inconsistent with common employee practice or expectation. Arbitrators, thus being more aware of industrial realities and part of a process in which change is easier, might well feel that a somewhat more generous view of the basic concept of personal

[20] There are also differences between the public and private seectors, such as the greater difficulty of finding alternative employment for certain jobs in the public sector, which would militate in favor of a less generous recognition of individual rights in the private sector.

liberty would be permissible since it does not involve the same risk which too firm enunciation of personal rights would have in constitutional litigation. Such a conclusion should not be reached casually, but only where it is supported by a more general concept of fundamental rights recognized both constitutionally and in arbitration. In any case, it seems to me necessary that arbitrators must consider and pass upon the applicability of Supreme Court decisions dealing with such matters.

In part, this topic was selected by the program committee in recognition of our country's Bicentennial celebration. It would be a fitting contribution to that celebration for arbitrators to recognize that fundamental concepts of freedom and individual rights are and should be an integral part of the concept of just cause.

Comment—

JOHN E. DUNSFORD*

From all appearances this portion of the program is the Academy's own "Bicentennial Minute." The subject for discussion was obviously inspired by the heralded approach of the 200th anniversary of our country. One is tempted to open these remarks with a lead-in which apes the popular television commercials: "Two hundred years ago today . . . ." I cannot vouch for what occurred that long ago, but Peter Seitz assures me that was the date when the Baseball Players Association and the club owners had their first negotiating sessions on the reserve clause. However, Peter is no longer an unbiased authority on this subject. As far as he is concerned, football is now the national pastime.

The patriotic motivation of the program planners can hardly be faulted, although I suppose we should note that the birthday of the country does not coincide with the adoption of the Constitution or of those protections of the Bill of Rights that receive the major attention in Professor Getman's theme. Those developments came years after the birthday. Furthermore, one may properly challenge any suggestion that the federal Constitution (in which for present purposes I will include the Bill of Rights) has

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a direct and controlling application to the issues of employee freedom that arise in the arbitration process of the private sector. That document, after all, is a blueprint for political governance, and its first 10 amendments are restrictions on the exercise of the power of the state. The possibility exists, of course, that in certain circumstances the activities of companies or unions may take on the character of "state action" and thus bring the provisions of the Constitution into play. However, these situations have been the exception rather than the rule. Generally speaking, the area of grievance arbitration in the private sector has remained free of constitutional restraints in any formal sense.

As I read Professor Getman's paper, he is not maintaining in any way that the provisions of the Constitution are legally binding on the parties in arbitration. That much is clear. Precisely what he is contending is a little more difficult to identify. He *sometimes* speaks descriptively, as if telling us what arbitrators have actually done. At other times he is obviously projecting norms for arbitrators to follow.

He states that of the various role-models that arbitrators might consider, that of Supreme Court Justice is commendable. If this suggestion were entertained just for the sake of fantasizing, little harm would be done. In the mind's eye, many arbitrators at one time or another will have pictured themselves in the trappings of the judicial robes. Such mental posturing, if not taken too seriously, can be invigorating and refreshing, especially on rainy Mondays. Except that our sister arbitrators will not at this moment find a model of the right gender from which to draw on the Supreme Court, the choice of that bench is at least a healthy sign of our continuing capacity not to underestimate ourselves. Obviously, however, our main speaker is proposing something far more significant than psychological role-playing.

The prescription that the functions performed by Supreme Court Justices should be taken as helpful guides by arbitrators can be understood in another way. It may constitute nothing more nor less than a repetition of the conventional wisdom that the labor contract is not to be narrowly construed as if, for example, it were merely a contract of sale. In his paper at the 1962 meeting, John Perry Horlacher urged that the arbitrator look on the collective bargaining agreement as "the equivalent, for the plant industrial community, of the constitution for the political

community . . . ." [1] In this regard he found a strong resemblance between the role played by the arbitrator and that of the Supreme Court. Relying on an article by Archibald Cox and the teaching of the *Warrior and Gulf* case, Horlacher expounded a view of the agreement as "defining a system of industrial self-government." He maintained that the arbitrator, in probing the generality and flexibility of the contract, should exercise the kind of "judicial statesmanship" which would be expected of the Supreme Court in interpreting the Constitution. But Professor Horlacher, who was dealing specifically with the subject of job rights and employer controls, was concerned primarily with the outlook and manner with which arbitrators perform their job of contract interpretation. His comparison between arbitrators and the Supreme Court stressed the similarity of the range of discretion available in each forum, out of which grows a responsibility to develop rulings that suit the demands of the respective communities in which they operate. While the Horlacher approach, then, does find a resemblance between the types of interpretive functions performed by the two systems of decision-making, it does not assert that the issues faced by Supreme Court Justices and the judgments made by them are substantively interchangeable with those of arbitrators. You may be interested in the way Horlacher finally sums up his role-model of the arbitrator: "In reality, he is a peculiar combination of the police magistrate who handles the Saturday night drunks and the Supreme Court justice who accommodates powers and rights under a constitution." [2]

Professor Getman appears to be recommending something remarkably different from the simple notion that the arbitral approach, like that of the Supreme Court, must recognize the institutional setting in which the terms of a basic compact operate. He is saying that although the mandates of the Bill of Rights are not legally operative in the private employment relationship, arbitrators ought consciously to work toward incorporating them into collective bargaining relationships wherever feasible. The underlying premises for this theme must be (1) that the questions of procedural fairness and personal liberties that surface in

[1] John Perry Horlacher, *Employee Job Rights Versus Job Control: The Arbitrator's Choice*, in 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), at 173–76.

[2] *Id.*, at 196.

the arbitration process are often (though not always) indistinguishable from those with which the Supreme Court must deal; and (2), accordingly, that arbitrators should deliberately (though with care and sophistication) look to Supreme Court decisions for guidance in the resolution of these matters. While I have the highest respect for the scholarship of our speaker and find him a stimulating and creative thinker, I am compelled to disagree with his Bicentennial message.

It is possible, of course, to see some similarities in the subject matter of cases in arbitration and those that come before the Supreme Court. Both may pose a question of speech, for example; both may call for consideration of the fairness of the procedures leading to the sanction. In addition, the underlying standards that arbitrator and judge apply to the issues may have the same resonances: due process, equal protection, just cause. Instructive comparisons can certainly be made between the reasoning and results produced in the two forums. And arbitrators will no doubt find profitable, in a general way, the analysis and exposition of the Supreme Court on such matters as the elements of due process.

But the decisive question is not whether there are similarities or analogies which can be discerned in the two systems; the question is what, if any, significance such attempted correlations may have for the sound development of the arbitration process. It is one thing to trace out the outline of a picture in the stars, but quite another to attribute a reality to the image that is projected. I can see the outline of a Big Dipper in the sky, but I find that it does not really hold water. That is my difficulty with the thesis Professor Getman is proposing.

As an academic, I am obviously in favor of comparative studies of the roles of arbitrator and Supreme Court Justice; as a lawyer and an arbitrator, I endorse the proposition that an understanding of Supreme Court jurisprudence can be a helpful aid in thinking about many of these matters. Nevertheless, I do find unconvincing the further contention that the substance of the Supreme Court rulings under the Bill of Rights is in most cases readily transferable to the resolution of issues of personal freedom under the labor contract.

In support of his thesis, Professor Getman first reviews some of the procedural requirements that arbitrators through the years have developed in discipline cases. He finds that they are in many

respects comparable, if not identical, to standards constitutionally imposed by the Supreme Court in criminal matters. From the similarity between the two systems, he finds support for his theme and concludes that arbitrators have "with considerable consistency incorporated basic concepts of due process into the definition of good cause." This statement rather strongly implies that there has been a conscious adoption by arbitrators of the criminal procedural standards of the Constitution. If that is not actually intended, there is in any event the intimation that what is procedurally necessary in criminal cases must therefore be desirable in arbitration. Two things are wrong with this reasoning. The first is that it neglects to inquire why these similarities have appeared and instead tends to assume that the arbitral process inherited its notions of procedural fairness directly from the criminal courts. The second is that it fails to consider the numerous ways in which the procedural requirements in discipline cases are, in fact, different from—even contrary to—the criminal law.

Professor Getman notes that, even in the earliest reported decisions, arbitrators seldom bother to discuss the meaning of "just cause." As he accurately reports, the concept is applied almost as a matter of course. But the conclusion to be drawn from this primeval reticence to expound on the meaning of "just cause" is not that the arbitrators had a ready-made source of decisional guides in criminal law, but rather that the contract phrase touches root concepts of justice and equity that demand application in specific contexts before they can be articulated in judgments and rules. On the rare occasion when an arbitrator does drop a remark about the "just cause" standard in these early years, the one thing that is clear is that his thinking is oriented to the universe of the private parties before him, not to the fate of an accused in the criminal dock of the state. For example, in an award of January 4, 1947, Arbitrator Robert Brecht offered this definition: "Just cause was established by reference to such considerations as fairness, appropriateness of punishment to offense, absence of arbitrariness and capriciousness, consistency of treatment, and absence of haste and emotionalism." [3] A few months later (still almost 30 years ago) another young arbitrator named Harry Platt made this effort to explain the process of balancing the needs of the company against the interests of the discharged employee:

[3] *Glenn L. Martin Co.*, 6 LA 501, 504 (1947).

> "To be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what reasonable men, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just." [4]

This approach, it will be noticed, is a far cry from what one would expect if the arbitrator were thinking in terms of the criteria for prosecuting crimes.

It is not surprising that arbitrators, testing the limits of this embracing standard of "just" or "proper cause," began to conclude that it encompassed procedural elements of adequate notice, opportunity to present evidence, cross-examination, and similar things. This occurred because claims for procedural fairness are constantly struggling for recognition in any system where binding factual determinations are made on a record of evidence. Of course these arbitrators in the earlier years were not unaffected by their exposure to a legal system in which the courts interpreted and applied such terms as "due process" or "equal protection" in the area of crimes. But neither were they necessarily positing any formal correspondence between constitutional requirements of fair criminal procedure and the proper handling of discipline within an industrial setting. Working within the spacious boundaries of the "just cause" language, arbitrators were independently confronting questions about the ultimate fairness of plant discipline which suffered the infirmities of inadequate procedures. And they resolved some of these problems by embodying requirements of procedural fairness into their decisions. But these requirements were embraced not because they were constitutional, but because they were *due*. And they were *due* not in consideration of what might be needed to protect those accused of crimes against the overreaching power of the state, but instead what was deemed appropriate and fitting in the special relationships of the industrial community.

While admittedly there are similarities to be observed between the essential procedural protections that have emerged in both the arbitration forum and the criminal law, there are also noteworthy differences that are generally thought to be entirely justi-

[4] *Riley Stoker Corp.*, 7 LA 764, 767 (1947).

fiable. That is a second weakness in the proposition that a deliberate effort at correlation between the two systems is either necessary or desirable. In a paper delivered at the 17th Annual Meeting in 1964, Professor Sanford H. Kadish conducted a painstaking review of the sanctioning systems of the criminal law and industrial discipline.[5] Though not restricting himself to the subject of procedural mechanisms, Professor Kadish did, for example, point out the substantial differences between the two systems in regard to the provision of notice for conduct that is forbidden. The highest degree of specificity is required in the notice requirements that precede the imposition of criminal penalties. There must be no vagueness or ambiguity in the drafting of the statute which sets forth the crime. By way of contrast, the type of notice that is deemed necessary in industrial discipline depends on a variety of factors, the foremost of which is the nature of the conduct under review. Nobody in the plant has to be advised in written rules that he will jeopardize his job if he punches the foreman in the nose. But an absence of precisely such a formal prohibition of assault would invalidate efforts of the state to fine or imprison him.

Further examination of the two systems offers other striking examples of procedural variances. The privilege against self-incrimination is one of the central protections of the Fifth Amendment, and it is interpreted to forbid the drawing of any adverse inference from a failure of the defendant to testify. Yet it is commonplace for arbitrators both to expect the grievant to testify at the hearing and to draw appropriate inferences from his unwillingness to respond to the evidence adduced against him. The underlying purposes behind the constitutional privilege are not relevant to the industrial setting. They stem from concerns about abuse of governmental power going back to Star Chamber proceedings and the thumbscrew and the rack, elements that do not loom large in the modern American factory. The privilege is also understandable in the light of the severe penalties to which the defendant is potentially exposed, and the heavily adversary character of the criminal trial in which the individual citizen must face the formidable resources of the state. In the industrial rela-

[5] Sanford H. Kadish, *The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations,* in LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), at 125.

tions environment, however, a different set of considerations is at work. Between the parties there is usually an expectation of mutual cooperation and respect for the other side's interests, which survives even the bitterest of disputes. Men and women who work next to each other, both in supervision and in the bargaining unit, expect each other to be open and responsive when disciplinary charges are made. The relationship of labor and management is not an isolated, impersonal affair comparable to that of a prosecutor and defendant, but an ongoing collaborative enterprise with its own unique texture.

There are other differences between the procedural requirements of criminal law and arbitration which might be mentioned. Some relate to the degrees of formality required in the handling and processing of charges. In the criminal area, the manner in which evidence is obtained, the requirement of a grand jury indictment or a prosecutor's information, the precision called for in the written specification of charges, the arraignment of the defendant—all of these are vital to the success of the prosecution in establishing an adequate basis for criminal sanction. The same format is not necessarily desirable in arbitration. The weight that comparable factors receive in arbitration usually depends upon the facts of a particular case as they bear upon the fairness of the result. For example, disregard of procedural steps in the labor contract may or may not be deemed to invalidate the ultimate discipline, the result turning in large part on the degree of prejudice the grievant has suffered by this oversight.

Now I understand that our speaker is not insisting that every procedural protection found in a criminal trial must necessarily be accorded in arbitration. Yet it should be apparent that the dissimilarities between the two systems are so numerous and important as to cast substantial doubt on the validity of his underlying theme.

When he leaves the subject of procedural arrangements, Professor Getman urges that labor arbitrators decide substantive issues of employee freedom by reference to those decisions of the Supreme Court which stake out areas that are immune from state interference. At the heart of this recommended approach is the assumption that a personal action that is free of control by the state ought also to be free of disciplinary consequences in the area of collective bargaining. In effect, the constitutional measurements of the rights of citizenship are suggested as the standards by which to determine the propriety of private relationships.

That there are fundamental employee interests that fall outside the employment relationship, and which for that reason ought to be immune from discipline in the industrial context, is not in dispute. Indeed, for years arbitrators have been busily occupied in defining the allowable limits of an employer's concern for the life-style and conduct of the worker, seeking to strike a balance between that which is fairly subject to regulation in the plant community and that which is outside any justifiable claim of managerial control. Questions of this type are properly cognizable under the auspices of the "just cause" standard that governs the propriety of discipline. But the idea that concrete answers to these questions should be sought in a systematic examination of judicial decisions setting forth the relationship between the citizen and the state is, to my mind, quixotic. To put my conclusion directly, the imperatives that lead to the leashing of the powers of the state may or may not operate with the same force or relevance when the claim for individual freedom is raised in other than the governmental setting. The provisions of the Bill of Rights surely were not thought of as offering a paradigm for the wide range of private relationships: familial, social, religious, employment, fraternal. One of the reasons that the Bill of Rights was written into the Constitution was to preserve an enclave of private initiative free of federal interference. It is thus rather paradoxical to suggest that those in the private sector should be bound by exactly the same limitations that were designed to protect them against the possibility of oppressive government.

The point I am trying to make here was emphasized by Professor Kadish in his earlier presentation on these two systems of sanctions. After explaining that in the field of arbitration there is a wider ambit of prohibited conduct than may be found in the criminal courts, he made this telling observation:

> "The contrast is understandable. The general community, to the extent it is libertarian, places a high value on personal freedom. It is committed to a wide margin for non-conformity and to the maintenance of fluid social conditions to allow individuals themselves to find their own levels of preferred conduct and values. The ultimate sanction of criminal punishment, because of its severity, its moral stigma, and its overall compulsiveness, is therefore thought inappropriate except to support the minimum social conditions of order necessary to allow men to pursue their own alternatives to fulfillment. In an industrial community, on the other hand, the social values are imposed by the nature of the enterprise—an efficient and profitable operation, although, of course, within the limits set by

> the human and contractual claims of the workers and the union. It is not and cannot be a wholly libertarian community; it is a special purpose community with a job to do. Hence, the very effectiveness of industrial punishment in coercing compliance is not viewed as a limitation on its use so long as the behavior regulated has justifiable relevance to the needs of the enterprise." [6]

In a response to the Kadish paper at the same meeting, Arthur Ross made a somewhat similar point:

> "[T]he relationship between the state and its citizens is not the same as the relationship between an employer and his employees. The thrust of criminal law is primarily negative or prohibitive. . . . But the employee is involved in a commercial transaction with his employer, an exchange of services for wages. . . . The employers' obligations are enforced through the collective agreement and the grievance procedure. The employee's obligations are enforced through a system of inducements and sanctions including those we call industrial discipline. The thrust of industrial discipline is prohibitive to some extent . . . . But the affirmative commands are more prominent and more significant. They include dependability, diligence, collaboration, conformity, and all the other requirements for efficient production in a complex organization." [7]

Professor Getman fully recognizes that his invitation to arbitrators to assimilate into the collective bargaining agreement the liberties that the Constitution affords the citizen may be seen by some as an overstepping of institutional bounds. While he is sensitive to the point, I do not think he sufficiently acknowledges the validity of this concern. The arbitrator is called as an outsider and a neutral to a relationship, the particulars of which he is asked to clarify by reference to the terms of an agreement that the parties have themselves created. As previously noted, the agreement may reasonably be viewed as a compact or governing document for an industrial community. But the import of the Getman thesis seems to be that the arbitrator should not hesitate to treat it as an instrument for maximizing the civil liberties of those who are employed in this plant, by holding the management—and presumably, where possible, also the union—to the same strict standards of infringement that would operate against actions of the state or federal legislature. Surely this tends to distort the nature of the compact that the arbitrator is elucidating. I

[6] *Id.*, at 132.
[7] *Id.*, at 146.

am not sure by virtue of what authority the arbitrator could undertake to do that.

More to the point, perhaps, I am not at all sure that it would be desirable for the arbitrator to possess that kind of authority. The employment relationship has not been created for, nor is it particularly conducive to, the staging of the "robust and open" debate on public issues that the First Amendment is calculated to insulate from governmental interference. A citizen must have reasonable access to a public park to give a speech; that does not mean he or she should be able to demand the use of the plant cafeteria for the same purpose. To interpret the "just cause" provision to prohibit the employer from regulating speech even in those ways reasonably related to ordinary business considerations may satisfy some inner need of arbitrators to promote participatory democracy or strongly held ideological objectives. I venture to guess that in the long run it would not enhance the acceptability of the process in the eyes of labor, management, or the individual worker.

Professor Getman mentions the way in which work and the employment status have an important shaping effect on self-image. Certainly he is right in his sentiment that arbitrators should be protective of the worker's claim to be treated with human dignity and respect. At the same time, the American worker hardly believes that he is entitled to pour on a supervisor the kind of oral abuse which, for example, a public servant must sometimes accept in the interest of the First Amendment. Most employees would not have any respect for a supervisor who would accept such invective. To protect our political freedoms, it is necessary to forbid criminal or even civil sanctions except, in Professor Kadish's words, "to support the minimum social conditions of order." But although this may mean a citizen can with impunity call a police officer a "pig," it does not follow that within the differently textured relationship of employment a worker should be similarly free to deride a supervisor and enjoy the protections of the First Amendment. The differences in the two cases are patent. In private relationships the objective is not merely to maintain minimum social conditions of order, but to build a community in which rights and duties will be fairly fashioned to achieve the success of the enterprise. Under those circumstances the measure of what is acceptable in speech between human beings is

not evaluated solely by reference to those words that will cause serious disruption, as Professor Getman suggests. The social and personal relationships that evolve in a plant over a period of time are much more complex than that. They are not adequately reflected in the stark standards of criminal law designed to sanitize the powers of government.

Professor Getman cites as another illustration of a constitutional right that ought to be transplanted into the employment setting the exercise of religious freedom. In this connection he argues that an individual's refusal to work on his Sabbath ought not to be considered a sufficient ground for discharge. The prospect of protecting a person's right to follow a religious commitment is one that is quite appealing to me personally. Nevertheless I am troubled, as many arbitrators have been, at the thought of imposing a contractural duty to tolerate the grievant's demand for special treatment in the teeth of the language of the seniority provision. It is possible that those who will pay for the arbitrator's indulgence of this claim based on religion are others in the work force who will pull more than their share of unpopular assignments. I would be delighted, of course, if the parties themselves should negotiate an arrangement in which the grievant might be accommodated in some way. Whether as an arbitrator I should force that arrangement on the parties is highly dubious.

Furthermore, it is entirely arguable that the example under review will not support the thesis our speaker is proposing. The Civil Rights Act of 1964, as amended in 1972, calls for precisely the kind of employer accommodation of individual religious freedom that Professor Getman is urging. It remains to be seen whether the Supreme Court will find that such a governmental mandate to employers is consistent with the Establishment Clause of the First Amendment. Assume, for reasons that I probably would not find very convincing, a majority of the Supreme Court should conclude that the statute passed by Congress is an illicit entanglement of church and state: Would that mean that arbitrators ought not to enforce consensual arrangements of this sort between the parties? I would hope not, since in private relationships there is nothing equivalent to the set of historical concerns that culminated in the inclusion of the Establishment Clause in our Constitution. Yet, taken at face value, the theme developed by Professor Getman might seem to dictate that result.

To each of these points I have raised, our speaker may well respond that he does not intend that his thesis extend so far. To my mind, however, this is just another sign of its weakness, for we are offered very little to help us determine when a Supreme Court ruling might appropriately be applied in arbitration and when it should be ignored.

My resistance to the thrust of the main paper is certainly not inspired by any disagreement with its premise that the issues of procedure and personal freedom with which it deals are of great and abiding importance in arbitration. Contrary to what Professor Getman says, however, the relevant inquiry is not whether these rights are less important in the industrial setting than in the political. The question, rather, is whether they are identifiably the same interests regardless of the context in which they arise. His approach makes moral absolutes out of what are specifically political rights. He suggests that the only alternative to his approach is a system in which the unilateral judgments of employers will always prevail except when they are totally arbitrary or completely unreasonable. That has not been in fact what has happened, as I think a careful study of arbitration awards on these matters would show.

But obviously others may disagree with that judgment and to the contrary assert that labor arbitrators as a class have been much too conservative in their decisions affecting the personal freedoms of employees. The way to evaluate such assertions, however, is to focus attention on particular rulings and to debate the competing rationales that might be advanced for different conclusions. My point is simply that it does not help to pretend that such a difference of opinion is of constitutional dimension.

Finally, a few comments should be directed to the subject of government employees. With the growth of unionization in the public sector, the Supreme Court itself has increasingly been forced to consider the application of constitutional principles to the resolution of the problems of employee discipline. Such cases have arisen because the public employer, unlike the private, is formally bound by the mandates of the Constitution. In the closing section of his paper, Professor Getman seeks to persuade us that this judicial development lends support to his central theme. A close analysis will show that just the opposite is true. In evaluating the claims of public employees in these cases, the Supreme

Court has not imported wholesale the full measure of individual liberties otherwise found in its opinions interpreting the Bill of Rights. Yet that is essentially what has been proposed as a guide for labor arbitrators. Professor Getman has himself given us the sentence from *Pickering* v. *Board of Education* [8] that undermines the position he has been espousing for the private sector: "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." In short, the employment relationship cannot readily or realistically be equated with the relationship between the government and its citizens. If this is so in the public sector where concededly the Constitution is binding, the same conclusion surely follows with even more force in the private sector for all the reasons previously mentioned.

Indeed, if one wanted to be mischievous, he might be so bold as to stand the Getman theme on its head and contend that in the area of personal liberties of employees, the Supreme Court might profitably take into account the hundreds of decisions by labor arbitrators on the disciplinary subjects under review, rather than vice versa. Fortunately, I am spared the temptation of engaging in such mischief since I notice that our speaker has done the job for me. At least that appears to be the import of his treatment of the recent Supreme Court decision in *Kelley* v. *Johnson,*[9] in which a hair-grooming code imposed on the Suffolk County police was upheld as constitutional under the Fourteenth Amendment. It is interesting to examine precisely why Professor Getman abandons his main theme in opting to have arbitrators follow the dissent in that case rather than the majority. He tells us that arbitrators are more familiar than the Supreme Court with common industrial realities and "more likely to know if a rule is totally inconsistent with common employee practice or expectation." I suspect that he has so convincingly proved this exception as utterly to destroy the rule. Whatever one may think of the merits of the Supreme Court decision in this case, the reasons Professor Getman advances why arbitrators should not feel bound to follow *Kelley* v. *Johnson* are good and sufficient reasons for rejecting his overall theme.

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[8] 391 U.S. 563 (1968).
[9] _____ U.S. _____, 96 S.Ct. 1440 (1976).

Some years ago Judge Learned Hand wrote a little book called *The Bill of Rights.* In it he discussed the restraints which he deemed ought to operate on judges, and specifically the Supreme Court, in reviewing legislation passed by the popular assembly. Words which he directed to that issue may have relevance for the proposal presently before us on the role of arbitrators. Judge Hand said: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs." [10] I am concerned that, in its furthest extension, the proposal of our speaker will encourage too many arbitrators to assume the role of those Platonic Guardians. In my judgment, both unions and management, like Judge Hand, have every right to prefer the stimulus of trying to create their own private worlds.

Comment—

JAMES E. JONES, JR.*

My fundamental problem with Professor Getman's proposal for the modification of arbitrators' perceptions of their role in industrial jurisprudence lies less with its desirability than with its acceptability to those elements of the industrial community that could make it a reality.

In a society in which individual liberties and personal and constitutional freedoms are ideals of the highest order, I find it difficult seriously to quarrel with suggestions to secure and ensure their implementation. However, the translation of arbitrators into instruments of general justice in industrial governance comparable to the Supreme Court requires action by those elements of the industrial community who possess the *real* power and authority. Either the parties to the industrial codes, the collective bargaining agreements, from which arbitrators get their warrant must act, or the legislatures must alter the fundamental laws that give arbitration its legal status. The courts, of course, arguably

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[10] Learned Hand, THE BILL OF RIGHTS (Cambridge, Mass.: Harvard University Press, 1958), at 73.

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could require the incorporation of those fundamental freedoms in arbitration procedures, under pain, upon review, of holding deficient arbitration agreements to be legally inadequate. As I shall indicate below, I believe existing judicial doctrine sufficient to support such an approach by the courts, or by the administrative agencies like the National Labor Relations Board, but the prospects of the courts' and the Board's venturing into this area in the near future seem less than bright. To the extent that there is a judicial notion abroad in the land today that tends in the direction of greater protection for the individual in the arbitration process, it seems to be emerging in the oblique interstices of the expansion of the union's duty of fair representation.

It is my understanding that the arbitration community for years has been split on the issue of the applicability of general laws in the labor field to collective bargaining agreements with which they may be in conflict.[1] Until the recent Supreme Court decision in *Alexander* v. *Gardner-Denver*,[2] I was impatient, as a casual observer of the arbitration community, with those who adopted the role model of "employees chosen to perform a specific task of contract interpretation." [3] Prior to the Getman suggestion, I had not considered the model of a "supreme court of industrial relations" as a viable alternative. To the extent that this model suggests the ultimate function of interpreting the bargaining agreement to include procedural, and perhaps substantive, due process protections, such a model would entail engrafting upon an agreement not only substantive labor law, but constitutional concepts of criminal law and other areas of civil liberties.[4] Implementation of the concept would require more precision than emerges from the general recitation of the desirability of protecting certain freedoms.[5]

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[1] *See* Louis A. Crane, *The Use and Abuse of Arbitral Power*, and Chapter IV *generally*, in LABOR ARBITRATION AT THE QUARTER CENTURY MARK, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1972), at 66 *et seq.*

[2] 415 U.S. 36, 7 FEP Cases 81 (1974).

[3] Getman, *supra*, at 61.

[4] *Id.*, at 63.

[5] For example, *see NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 71 LRRM 2481 (1969), at 618 where the Court discusses free speech under Section 8(c) of the National Labor Relations Act and urges comparison with *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); additionally, both the specific provisions of the law and evolving case law treat religious discrimination differently under Title VII of the Civil Rights Act (as amended in 1972) than other forms of discrimination. *See Cummins* v. *Parker Seal Co.*, 516 F.2d 544, 10 FEP Cases 974 (6th Cir. 1975), *cert.*

To ask arbitrators, even in the Bicentennial year, increasingly to incorporate fundamental freedoms and individual rights into an expanding concept of "just cause" is to ask them to make a quantum leap—to swallow a constitutional camel when they have been unable to agree upon ingesting the statutory gnat. Given that the arbitral community has been unable, in 25 years, to accept as an obligation interpreting collective bargaining agreements as if they were negotiated subject to existing and future labor laws, it seems unlikely that general agreement on incorporating constitutional freedoms would be forthcoming.[6] In fairness to Professor Getman's thesis, as I understand it, he is not suggesting a wholesale grab by arbitrators for the entire panoply of individual freedoms, but rather selective and incremental addition of such freedoms as they interpret "just cause for discharge." I believe the parties to collective bargaining agreements increasingly seek specific definitions of "just cause" precisely because of the tendency of arbitrators to be somewhat generous in their handling of the concept. While egregious examples of unfairness in the procedures are unlikely to arouse the ire of the parties, my subjective judgment would be that to expand just cause to include what may be regarded as more peripheral individual freedoms would not be well received.

It would not require great imagination for parties to collective bargaining agreements to devise contract language that would accomplish the Getman objectives. Such an approach could range from the writing of specific personal guarantees into the bargain

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granted, _____U.S._____ (March 1, 1976) and *Dewey* v. *Reynolds Metals*, 402 U.S. 689, 3 FEP Cases 508 (1971), a case in which an arbitration decision on a matter of religious discrimination was affirmed by a divided Supreme Court. *Compare Reid* v. *Memphis Publishing Co.*, 521 F.2d 512, 11 FEP Cases 129 (6th Cir. 1975).

See also dress-code and hair-grooming cases that have received different treatment, such as *Kelley* v. *Johnson*, _____U.S._____, 11 E.P.D. ¶10,788 (1976). This subject is discussed extensively in *Changing Life Styles and Problems of Authority in the Plant*, in LABOR ARBITRATION AT THE QUARTER CENTURY MARK, *supra* note 1, at 235.

[6] *See The Role of the Law in Arbitration: A Panel Discussion*, in ARBITRATION AND THE LAW, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), 68 *et seq.*; Richard Mittenthal, *The Role of Law in Arbitration*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. C. M. Rehmus (Washington: BNA Books, 1968), 42 *et seq.*; W. Willard Wirtz, *Arbitration Is a Verb*, in ARBITRATION AND THE PUBLIC INTEREST, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), *30 et seq.*; and William B. Gould and James P. Kurtz, *Arbitration and Federal Rights under Collective Agreements in 1971*, in LABOR ARBITRATION AT THE QUARTER CENTURY MARK, *supra* note 1, at 287 *et seq.*

to the inclusion of a more general statement that the contract is to be interpreted in a manner consistent with the U.S. Constitution and the laws of the land. This latter, more general approach would free arbitrators to select appropriate concepts, but, without more specificity, would leave them saddled (1) with conflicting laws and (2) with variations in the scope of the constitutional protection depending upon the substance under review and court accommodation of conflicting legitimate interest. After all, the "four corners doctrine" [7] is a matter of law, and, perhaps, it is the presiding legal principle of arbitration.[8]

Alexander v. *Gardner-Denver Co.* was a civil rights action based upon alleged racial discrimination. After discharge from employment, the petitioner, a black, filed a grievance under the collective bargaining agreement. The agreement contained a broad arbitration clause, pursuant to which the petitioner ultimately claimed his discharge resulted from racial discrimination. Petitioner filed a complaint with the Colorado Civil Rights Commission which was, in due course, referred to the U.S. Equal Employment Opportunity Commission. Petitioner's claim also proceeded to arbitration and the arbitrator ruled that the discharge was for cause. The EEOC subsequently dismissed the petitioner's claim, finding there was not reasonable cause to believe that a violation of Title VII had occurred. The petitioner then brought his action in the federal district court. The district court granted summary judgment to the defendant, holding that the petitioner was bound by the prior arbitration decision and had no right to sue under Title VII. The court of appeals affirmed. The Supreme Court of the United States reversed, holding that the employee had a statutory right to a trial *de novo* under Title VII and that such right was not foreclosed by prior submission of his claim to arbitration under the nondiscrimination clause of the bargaining agreement.

The significance of *Gardner-Denver* for our discussion today is not the direct holding of the case, but rather Justice Powell's ringing dicta as a clear warning to the more adventurous arbitrators that straying from the role of proctor of the bargain, whose task is to effectuate the intent of the parties, invites reversal of

[7] Shulman, *Reason, Contract, and Law in Labor Relations,* 68 HARV. L. REV. 999 (1955).

[8] *Steelworkers* v. *Enterprise Wheel & Car Co.,* 363 U.S. 593, 46 LRRM 2423 (1960), at 597.

the arbitrator's decision by the Court. The Court bluntly declares that the arbitrator has no general authority to invoke public laws that conflict with the bargain between parties. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[9]

While sounding a warning to impatient arbitrators, the Court, in the same case, implicitly invites the parties more adequately to protect the individual rights. Although federal courts in Title VII cases should consider an employee's claim *de novo,* the arbitral decision should be admitted as evidence and accorded such weight as the court deems appropriate. Relevant factors to be used in determining the weight to be given include, *inter alia,* the existence of collective bargaining provisions that conform substantially with Title VII and the degree of procedural fairness in the arbitral forum.[10]

It is too early to tell whether this indirect inducement will be at all effective. It is certainly easier for parties to strip agreements of any reference to equal employment matters than to write provisions that will conform with Title VII and accord due process to the grievant. Obviously, deferral to arbitration where standards are met would be a stronger inducement, but the Court held, and I believe rightly, that deferral was contrary to the congressional mandate of Title VII of the Civil Rights Act of 1964. It bears repeating: To the extent that an inducement to fairness in the arbitration procedure emerges from the decision, it is directed to the parties in designing an arbitration process in the first instance, and secondly, to federal district courts in deciding the weight to be accorded the fruits of such process. It is not addressed to the creative imagination of the arbitrator.

The courts seem to be exerting some pressure toward due process in arbitration through the expansion of the judicially developed doctrine of the union's duty of fair representation.[11] However, I do not believe that duty-of-fair-representation cases have, as yet, devoted enough attention to the sufficiency of collec-

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[9] *Supra* note 2, at 53.

[10] *Id.,* at 60 n.21.

[11] *See,* for example, Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?,* 24 MD. L. REV. 113 (1964), and Bernard 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), 1 *et seq.*

tive bargaining agreements in protecting constitutional and personal freedoms.[12]

The focus of the current Court seems to be upon the *quality* of the union's performance in the arbitration process. For example, in *Vaca* v. *Sipes*,[13] the Court repeats the proposition that it has accepted that a union cannot ignore a member's meritorious grievance or *process it in a perfunctory fashion*. Given another 20 years, this thrust might get us to the Getman plateau, particularly if court attention is also focused on the union in its bargaining role as well as on its administration of the agreement in the arbitration process.[14]

If the Court is of a mind to apply it vigorously, the theory upon which the duty of fair representation rests could support Getman's requirements. In *Steele* v. *Louisville and Nashville Railroad*,[15] Justice Murphy's thesis, in concurrence, was that the Fifth Amendment required the duty of fair representation to be imposed upon the union. If we couple this theory with the expansive formulation by the majority of the Court in that case that the union's duty was akin to that of the legislature, it seems not too farfetched to argue (1) that unions must negotiate contracts that include the Getman protections; or (2) that, without such negotiated clauses, the protections must be read into the collective bargaining agreements. Failure of the union to insist upon the constitutional freedoms, etc., during arbitration, with or without relevant contract language, would subject it to successful attack for failure in its duty of fair representation. To the extent that *Vaca* v. *Sipes* permits a suit against the employer for wrongful discharge, provided that the complainant can establish the union's failure in its duty of fair representation, acceptance of this proposition would pressure employers and unions alike to

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[12] The plaintiffs in *Humphrey* v. *Moore*, 375 U.S. 355, 55 LRRM 2031 (1964), attempted to attack the bipartite arbitration committee as unfair in view of the absence of a third-party neutral as well as on other grounds, but made no headway with that argument. *See also Hines* v. *Anchor Motor Freight, Inc.*, ____ U.S. ____, 91 LRRM 2481 (1976), involving the same kind of arbitration. It is noteworthy that in *Hines*, 91 LRRM 2485, the Court asserts: '[T]he decision of the committee, reached after proceedings *adequate under the agreement*, is final and binding upon the parties, just as the contract says it is." (Citing *Humphrey*, *supra*, at 351, emphasis supplied.)

[13] 386 U.S. 171 (1967), at 191.

[14] *See Conley* v. *Gibson*, 355 U.S. 41 (1957), and *Local Union No. 12, United Rubberworkers* v. *NLRB*, 368 F.2d 12, 63 LRRM 2395 (5th Cir. 1966).

[15] 323 U.S. 192, 15 LRRM 708 (1944).

modify bargaining agreements to include the entire panoply of personal rights and freedoms.

It would be inefficiently oblique for the courts to refuse to endorse the reading of the protections into the contract by an arbitrator applying a "just cause" provision, and yet to incorporate the protections into the judicially developed concept of the union's duty of fair representation. It might appear almost whimsical for success to depend upon whether the litigation attacks the arbitrator's inclusion or exclusion of noncontract personal rights or liberties, or whether the discharge or discipline is attacked because the union did not insist, either in negotiations or in arbitration, that such rights and liberties be protected. There is, however, a substantial difference in philosophy between restraining the tendency of an outsider (the arbitrator) to overreach and requiring the principal responsible institution (the union) to use its unique status to ensure that constitutional principles are honored.

Having theorized overly much on the issue, the salient point I am trying to make is that the duty-of-fair-representation cases seem more likely prospects for judicial incorporation of increased individual protections than does judicial approval of wide-ranging arbitral interpretation. It seems, further, that the duty-of-fair-representation theory is sufficient to support either imposition of the obligation upon the union or permitting arbitrators to engraft such concepts upon any agreement in cases involving just cause. However, given the decision in *Gardner-Denver* I do not believe that this Supreme Court is likely to give much support to the freewheeling arbitrators without word from Congress.

The National Labor Relations Board may be motivated to be more demanding in its *Spielberg* standards for deferral to arbitration.[16] Parties might induce the NLRB to include Get-

[16] *See Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955), in which the Board states that it would defer to arbitration if the arbitration hearing was "fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the [National Labor Relations] Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award." *Compare Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971), in which the Board dismissed a complaint subject to possible presentation of evidence that the *Spielberg* guidelines for deferral had not been met.

See, in addition, Emanuel Dannett's "Comment" on *Judicial Review: As the*

man's ideals in its arbitration standards. Or, enterprising lawyers may seek to challenge deferrals that do not include such protections, just as revocation of NLRB certifications have been attempted, and other methods to block certification utilized, in situations involving invidious discrimination.[17]

I do not intend to extend these comments by adding unnecessarily to the proliferation of discussion of the wisdom of *Spielberg/Collyer* nor of the differences in approaches represented by those cases compared with the Court's determination of the arbitration of Title VII matters under *Alexander* v. *Gardner-Denver*. I will leave that extended discussion for another time and for other parties. In any event, as Getman recognizes, these innovations invite, indeed would demand, increased judicial oversight of the arbitration process, with the corresponding diminution in finality.

Conclusions

Recently I had the pleasure of an extended dinner conversation with two of the Academy's most prestigious members, Dr. Jean T. McKelvey and Professor Benjamin Aaron. In the course of the evening, we discussed many things, including the age-old problem of the dilemma of the arbitrator faced with contracts in conflict with presiding law, the impact of *Gardner-Denver* in the discrimination field upon the arbitration process, and the composition of the arbitration community. I had remarked upon the minimal participation of women and minorities and the inevitable suspect credibility of that community in dealing with race problems. This sparked discussion of efforts to increase the numbers of arbitrators, and particularly the numbers of minorities and

Parties See It, in LABOR ARBITRATION AT THE QUARTER CENTURY MARK, *supra* note 1, at 201, and *Rios* v. *Reynolds Metals Co.*, 467 F.2d 54, 5 FEP Cases 1 (5th Cir. 1972), wherein are discussed situations in which standards have been imposed or suggested by the Board and Court as conditions that must be met in order for those bodies to defer to arbitration. Note "The Revised Guidelines by the General Counsel for the Use of Regional Offices in Cases Involving Deferral to Arbitration," reprinted at 83 LRRM 41 (May 14, 1973). Both the Board and the courts require that the arbitration proceedings be fair and regular and free from procedural infirmities. These standards might reach some of the suggestions included in the Getman ideal, but by no means all of them. Note again Chapter VIII, LABOR ARBITRATION AT THE QUARTER CENTURY MARK, *supra* note 5.

[17] *See*, for example, *Hughes Tool Co.*, 147 NLRB 1573, 56 LRRM 1289 (1964), and its progeny, and *NLRB* v. *Mansion House*, 466 F.2d 1283, 81 LRRM 2197 (8th Cir. 1972), supplemented at 473 F.2d 471, 82 LRRM 2608 (8th Cir. 1973).

women. The difficulty of so doing is not unrelated to the difficulty in translating the Getman ideals into arbitration practice. I was impressed by my mentors of the evening that the creation of new arbitrators is totally frustrated if they cannot obtain *acceptability.* I would hazard the guess that avant garde arbitrators who sought to implement the Getman ideals by dint of their interpretive skills would run the high risk of losing such acceptability as they currently enjoy. This, then, motivates my conclusion that to obtain these high ideals, most of the thrust must come from outside the arbitration profession. Prudence and past history suggest, for the most part, that arbitrators will limit their roles to advocacy and education.

Discussion—

CHAIRMAN ALEX ELSON: In these few minutes we have for discussion, I think Jack Getman should be given the privilege of responding briefly to what has been said.

MR. GETMAN: I should start by saying that I have little criticism of what Jim Jones said, and, indeed, I am astounded at the ingenuity of his theories as to how such a right might be developed through the legal process.

In listening to Jack Dunsford, I was struck by a recognition of how the process rather forces us to certain positions. While initially preparing my talk, I felt a bit forced—to be sure I had a proposal that would merit your attention. I was also struck by the fact that Jack, in order to do what he was called upon to do, had to pretend that I had said something somewhat different from what I had actually said—that he had to take my proposal as a suggestion that the Bill of Rights and the protections in criminal cases be adopted bodily into the arbitration practice. Once having taken that position, he could make a vigorous and telling response, but it wasn't to my proposal.

I did note here almost all of the points he used to differentiate arbitration from those other processes. However, putting aside where we were pushed by the process, I in one direction and he in another, there obviously is a difference.

It seems to me that part of what leads me to where I am is reading over arbitration decisions in which the claims of constitutional rights are raised. My feeling is that the profession has not done an adequate job. With all of the limitations, with all of the

recognition that the requirements and desiderata of an industrial environment are different from that sought by the criminal law, it is nevertheless true, in my opinion, that arbitrators have not paid adequate attention to these basic notions. Therefore, it seems to me important that we take a somewhat different starting point. It is not that arbitrators don't recognize the difference. Implicit in what Jim Jones and I have said is the awareness of the fact that arbitrators will have no trouble in perceiving the difference between the industrial setting and the claims for political liberty. What I hope is that arbitrators are as capable of recognizing the similarities.

MR. ELSON: Are there any questions or comments from the floor?

JAY W. MURPHY: You know, Jack, I don't find too much difference between you and Julius. I do agree with Julius that you took one part and maybe overemphasized it. But both you and he would agree with the proposition that you are dealing with the problem of the sources of law. The Supreme Court has sources—the Constitution and statutes—and when it runs out of those and other judicial decisions, where does it go? It goes to the institutions of religion, moral standards of the community, custom and practices, the history and traditions of the culture, and, in order to get its sources of what is right, just due process.

In the arbitration process, I feel that arbitrators have got to do the same kind of thing when they run out of specific authority. It seems to me that when the parties write "just cause" in a contract, they leave this area open as to what is proper and what is just; you don't find proper and just automatically. From one standpoint, I think the arbitrator may have a greater freedom than the courts have to find what is proper cause, because the courts are limited by the Constitution and we are not.

One of the things Julius is saying is that law itself becomes a source of values when we, as arbitrators, run out of values or want to draw upon the law for this purpose.

MR. DUNSFORD: I would like to make one comment. For purposes of saving time, I did not read several pages of my paper, and one of them had anticipated Jack Getman's complaint, which I am sure from his viewpoint is legitimate, that I am pushing him into a position he did not take. My paper says that to each of the points I raise, no doubt he can respond, "My theme doesn't go that far." To my mind, that is further evidence of its weak-

ness, because we are given no indication of how far it goes and how far it does not go. So I think he is right in the sense that in taking the positions we have, we tend to gravitate to one side of the spectrum or the other and polarize our differences.

I think he said essentially what probably motivates his message: an anxiety on his part, which is an important one for us to appreciate and consider, that the interests of personal freedoms are not given sufficient, proper protection by arbitrators.

My point is simply this: If he is right, it ought to be determined by analyzing specific cases and specific themes in arbitration on their own merits, on their own bottom in the industrial community. Then, if the analysis proves him to be right, fine; arbitrators will be led to reform. But I do not think that it helps the entire process of purifying ourselves—if that is needed, which is debatable—to pretend that it has a constitutional dimension.

MR. ELSON: This meeting has been unusual in that you have arbitrators willing to put their positions forward on a very controversial issue. I wonder if anyone representing the parties wants to respond.

TRACY FERGUSON: I am a guest, but I have been commissioned by one of the hosts, David Feller, to put a question to Dr. Getman. Suppose a collective bargaining agreement provides for no discharge except for just cause, and a second provision specifies that no employee shall, on pain of discharge, issue any public statement disparaging the company's product.

The employee prepares such a statement which presumably, if constitutional protection of freedom of speech were applicable, would be protected. Before sending it to the local newspaper, he shows it to the plant manager, who tells him that if he sends it, he will be fired. He does send it, and he is fired. What processes would you go through to decide the case?

MR. GETMAN: My problem is that it would partly depend on what he says about the product.

MR. FERGUSON: I can make it easier for you: It doesn't reach the state of libel; he just says, "My company is producing a lousy product." What we are trying to do, obviously, is test it in terms of constitutional protection.

MR. GETMAN: I understand that you are raising the disloyalty question, which has been held by the Labor Board to be a limitation on the notion of protected activity. Would this also be a limitation on the idea of free speech?

I can easily say "yes," and it is perfectly clear to me that it is a limitation. What is not clear to me is how much of a limit it should be. I would recognize that some concept of disloyalty would serve as a check on the exercise of the right of free speech; however, there may be cases, such as claims that the product is unsafe, which should be permitted.

GERI RANDALL: I would like to hear the speaker's views on a situation that has troubled me since I first got into the labor field. It struck me as strange when I learned that many arbitrators were applying a proof beyond a reasonable doubt to the criminal standard of proof in the discipline and discharge area. The issue first came up in a case I was handling that involved negligent medical care. What concerned me was that in order to sustain discharge, the employer would be required, in the view of some arbitrators, to prove the conduct beyond a reasonable doubt; yet the employer could be sued by an injured patient and lose on a negligence theory with proof by mere preponderance.

That struck me as a little unfair, and also it seems to fly in the face of some of the comments regarding incorporation of the Bill of Rights in criminal-type standards into those proceedings.

MR. GETMAN: This is a perennial question with respect to what the standard ought to be to uphold the discharge, particularly when it involves charges of serious moral turpitude on the part of the employee. I would just give this reaction to that problem. I think in large part there has been a lot of semantic fighting over things that are not very well conveyed by the language used. What the notion of proof beyond a reasonable doubt does is to convey to the jury that they had better be very careful about what they decide because there are some serious interests at stake.

The arbitrator presumably is exercising that care to begin with and is taking into account the variety of facts and circumstances with which he is confronted in a discharge case. I don't think it really matters what standard he says he is using. Some arbitrators may be getting their understanding of "beyond a reasonable doubt" from the Kojak show!