bility of the entire process. The systems that exist today for selection of arbitrators lend themselves to abuse; the existence of arbitrary, sleazy private rating services that purport to evaluate arbitrators would not otherwise be possible. Labor, management, and the many outstanding professional arbitrators deserve a better, more objective system of selection to eliminate partisan control over selection. Thus, I disagree with the position expressed by the majority of my panel that the 'expendability' or the 'acceptability' of the arbitrator acts as an effective restraint on arbitrators. I believe that 'expendability' tends to stunt the exercise of independent judgment and imagination."

IV. Reaching a Decision

At the heart of the decisional process is the question—why and how does a judge or an arbitrator reach a particular result?

This question does not often arise in cases controlled by facts. The fact-finding process is relatively clean-cut and not difficult, except for issues of credibility which can be exceptionally challenging. We found that judges and arbitrators applied the same criteria in determining the credibility of witnesses. Nor is there any difficulty in understanding the decision process when judge or arbitrator is applying clear and unambiguous terms of the agreement. Here, however, the area of discretion may vary as between judge and arbitrator. The judge has both legal and equitable jurisdiction. If the decision which would result from literal application of the agreement is unjust, there is an array of doctrinal approaches that may be used to temper the result. The arbitrator, in contrast, is limited to interpretation and application of the agreement. The end result is that his award may be harsh, but there is not much he can do about it. The example which follows is based on an award of one of the arbitrators.

The case involved a utility located outside of Chicago. The grievant had been employed for 23 years, all of his working career, in various positions, principally in operating and maintaining the electrical relay systems of the company. He grieved the refusal of the company to process his promotion to Senior Test Relay Engineer because he had no degree in electrical engineering. The grievant was acknowledged to be highly competent. He had satisfactorily performed most of the duties of Senior Test Relay Engineer—and had trained and assisted other employees who held degrees in electrical engineering.

The contract provided that the company "has sole responsibility for developing and applying all selection criteria. . . ." The requirement of a degree in electrical engineering had been in effect for 20 years. The only issue of fact was whether that requirement was reasonable. On the basis of the record reflecting the many technological changes which have occurred in the utility industry resulting in a highly complicated system, and the key character of the job in question in the company, the arbitrator was convinced he had no choice except to conclude that the requirement was reasonable and to deny the grievance, overlooking the ironic fact that Thomas Edison, after whom many electrical utility companies are named, was not a college graduate.

If the foregoing case had been presented to a court, the result may have been different. In addition to inherent authority to determine whether the contract has been reasonably interpreted, the court has broad equitable powers. The judge enjoys the important advantage in that his decisions are subject to appellate review. In a case where an unjust result is compelled because of stare decisis consideration, he can write an opinion deploring the compelled unjust result which may have an impact in securing a reversal of a line of precedents.

There are two classes of cases where an arbitrator has substantial range of discretion: (a) discharge and discipline cases, particularly in the review of penalties, and (b) resolution of interpretive issues involving ambiguous provisions of an agreement—or where the agreement is silent.

A considerable body of "industrial jurisprudence" or "common law of the shop" has evolved over the years, helping to guide the arbitrator as he interprets and applies that elegant but vague phrase "just cause" in a specific discipline case.

In resolving interpretive issues when the language is ambiguous, the arbitrator, in addition to considering the collective agreement and the rules of contract construction, may look to and give weight to past practice in the plant—or custom in the industry. He may also consider collective bargaining history. But in the end he must make a choice between alternative interpretations.

What governs that choice in close contract-interpretation cases? There may be rational and to some extent objective guidelines, such as the workability of the award. The arbitrator should not impose on the parties an impractical or absurd rule.

But what about factors such as general principles of equity, personal notions of social justice, or personal value preferences? To what extent do they enter into decision-making?

The classic statement almost always cited in discussions of decision-making is that of Justice Cardozo, taken from his lectures "The Nature of the Judicial Process": "Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make the man, whether he be litigant or judge."[19]

The late Judge Jerome Frank in his book *Law and the Modern Mind* expounded the same thesis but in more blunt terms: "The judge really decides by feeling and not by judgment, by hunching and not by ratiocination appearing only in the opinion. The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case."[20]

Both of these views were expressed years ago. They were considered bold statements at the time they were uttered. Today it is taken for granted as a result of the widely publicized research of psychologists and psychiatrists that the outlook of a man, and his general approach to problems, is the product of many factors. These include the impact of his family, his environment, his formal and informal education, and, indeed, his entire experience.[21]

Jerome Frank's words, the "intuitive sense of what is right or wrong," translates into the common term "gut reaction." Lawyers with extensive litigation experience are especially sensitive to this factor. They will give it substantial weight, particularly in deciding whether to litigate or settle.

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[19]Lecture IV, 167.

[20]Frank, Law and the Modern Mind, at 104.

[21]A more extreme position was expressed by the late Professor Harold D. Lasswell, a noted political scientist, whose major scholarly interest was in applying principles of Freudian depth psychology to political leadership and political events. He would certainly dissent from any idyllic view of the analytic approach to decision-making. Commenting on judicial decision-making, Lasswell dismissed the analytic approach as simply a "rationalization" or substituting "for the record" an explanation of "motivation acceptable to the ego" for the purpose of "hiding from one's self" the actual libidinal reasons for one's acts. Robert A. Leflar, *Honest Judicial Opinions,* Northwestern U. L. Rev. 722 (1979). The Lasswell thesis, however, distorts the Freudian approach. It fails to give sufficient recognition to the strong narcissistic drive to act in ways "acceptable to the ego." Although we may at times behave in ways we do not fully consciously comprehend, we do struggle with the evidence in the record to arrive at what we consider a proper decision because any other course could not be reconciled with one's perception of oneself as a professional. *See also* J. Woodford Howard, Jr., *Role Perceptions and Behaviour in Three U.S. Courts of Appeals,* 79 J. Politics 916 (1977).

If the issue is one where there is a range of arbitral or judicial discretion and if the result sought is manifestly unjust, by whatever standard one applies, a strong technical case will not assure a successful outcome. The advocate should not become so involved in the adversary process that he becomes blind to the equities.

The following case involves an award in which the equities played an important role.

The grievant was dismissed under a provision of a collective agreement listing the circumstances under which an employee's seniority could be terminated. One of these circumstances was absence from work for two days without notifying the employer. He was dismissed on the day following the expiration of the two-day period. He was notified of his dismissal upon his return after a week's absence.

The grievant was 56 years of age. He had worked at the plant for 25 years. In the first year of his employment, he was involved in an industrial accident as a result of which he lost several fingers on one hand. At the time he was promised a job for life if he could do the work. His record was satisfactory, and he had no prior history of absenteeism. He claimed he was ill and had called in to the plant on the second day of his absence. On the basis of the entire record, the fact issue was resolved against him. Nonetheless, the arbitrator reinstated him to his job and imposed a suspension for his failure to call in.

The contract provision was subject to several interpretations. Although there was no language expressly mandating dismissal, the provision was susceptible to such an interpretation, or to the interpretation that there was a range of discretion in management. The record disclosed another case of an employee with far less seniority than the grievant, similarly absent for two days, but in his case management made a successful effort to contact him and permitted him to return to work.

The company explained its action on the basis of the essential character of his job. Its action, however, clearly established that it did not interpret the contract as mandating dismissal. In choosing to rely on the evidence of inconsistent application for the decision, it is obvious that the arbitrator was strongly influenced by the equities. The chance that a 56-year-old man with a physical handicap could find a job in today's labor market was minimal. Moreover, in industry generally, an unexcused absense of a long-term employee for two days is a basis for discipline but not for dismissal.

Most cases, of course, can be disposed of without substantial difficulty. The facts and applicable law or contract provisions point to only one sound resolution. In those cases where the decision is clear but the result harsh, the temptation to resort to dicta is very strong. Arbitrators must exercise the greatest restraint. The dictum in a particular case may play havoc in ongoing disputes unknown to the arbitrator. Indeed, the continuing relationship between the parties is a constant dominant factor. A strong case could be made for awards without supporting opinions. Such awards would insure that there would be no impact beyond the case at hand. But it is too late to reverse the established tradition of supporting opinions in this country, and of course there are compelling reasons for that tradition.

The cases that present the most difficulty, of course, are those where the arbitrator or judge can find a rational basis for deciding the case either way. It is futile to try to generalize about how decisions in such cases are reached. One would like to assume that there will be careful review of the record and the applicable agreement, a scrupulous review of the facts, a weighing of alternate theories, and a sorting out of all extraneous factors that may bias the result. It would appear that it is common experience of judges and arbitrators to reach a tentative conclusion and to test this conclusion by a written opinion. If the opinion does not stand up, the process is repeated. In the end, a decision is made and we go on to the next case.