CHAPTER 4

WHITHER ARBITRATION?

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The old timer's complaint is familiar to our ears: "Things aren't what they used to be." Change is everywhere. Compare the 1940s with the 1980s. Authority once obeyed is now challenged. Work once mechanized is now automated. One breadwinner per family is now two. Attention spans have waned. Mobility has increased. What was local has become regional; what was regional has become national; what was national has become international. "A dollar ain't a dollar anymore." Our culture has been in ferment. Hence, it is hardly surprising that arbitration itself has undergone profound changes.

This paper is an attempt to create a conceptual framework with which to examine the evolution of arbitration over the past half-century. Some explanation of how and why labor arbitration has changed is long overdue.

There were two distinct concepts of arbitration in the 1940s. One was associated with George Taylor; the other with J. Noble Braden. Neither man created a true theory of arbitration, but each had a compelling vision of the basic nature of the process and the role the arbitrator should play in that process. Their visions have competed in the marketplace for many years.

This competition was not played out at the bargaining table with labor or management urging that their arbitration system follow the Taylor or Braden path. The parties rarely spend their energies on such a philosophical question, particularly one that has no apparent monetary consequences. Change nevertheless occurred. Slowly, almost imperceptibly, arbitration in most relationships became more formal, more wedded to case precedent, more legalistic. Those characteristics were to some extent always present. But the degree to which they came to dominate the process is, in my opinion, quite remarkable. If one could focus

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only on how arbitration is conducted today as compared to the 1940s, completely ignoring the intervening years, I suspect it would be easier to see what has happened.

There are many forces responsible for this development, the most significant of which is the parties themselves—their greater sophistication, their clearer view of their institutional needs, their more detailed collective agreements, and their willingness to embrace statutory law. Other forces at work include the attitudes of the parties' representatives at the arbitration hearing, the influence of the labor arbitration reporting services, the reliance on such hornbooks as *Elkouri & Elkouri*,[1] the emergence of a so-called common law of arbitration, the role of the law, and the arbitrators themselves. All of these factors, I suggest, have moved the process in the same direction, toward Braden and away from Taylor.

The Taylor Model

George Taylor, a truly seminal figure in the history of labor relations, saw arbitration as a substitute for the strike, that is, a substitute for strikes over unresolved grievances. This meant, he argued, that arbitration should be regarded as an extension of the collective bargaining process.[2]

These concepts had a real impact on how arbitrators behaved, at least those who subscribed to the Taylor model. For if arbitration was an extension of the bargaining process, the arbitrator would look to collective bargaining reality as much as the language of the agreement in deciding cases. The consequences were predictable. Such arbitrators viewed the agreement less as a contract and more as a code or constitution for which the ordinary rules of contract interpretation may not always suffice. These arbitrators were more likely to ask themselves such questions as: What will best effectuate the purposes of the parties or what will best suit the parties' needs? These arbitrators were more likely to find implied obligations in the silence of the agreement, more likely to resist formality at the arbitration hearing, more likely to ignore the rules of evidence, more likely

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[1]Elkouri & Elkouri, How Arbitration Works, 4th ed. (Washington: BNA Books, 1985).

[2]*See, e.g.*, the following Taylor articles: *The Arbitration of Labor Disputes*, 1 ARB. J. (n.s.) 409 (1946); *Further Remarks on Grievance Arbitration*, 4 ARB. J. (n.s.) 92 (1949); *Arbitration and Arbitration Provisions*, 2 Proc. N.Y.U. Ann. Nat'l Conf. on Labor 355 (1949); and *Effectuating the Labor Contract Through Arbitration*, in The Profession of Labor Arbitration, Selections from the Proceedings of the first seven Annual Meetings, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 20.

to mediate, more likely to accept consent awards, and so on. Such arbitrators, to the extent practicable, drew their inspiration from the bargaining process.

Before turning to the competing model, consider for a moment the environment out of which the Taylor model grew. Many union-management relationships had been formed in the 1940s. The parties had only recently negotiated their initial agreements. Those agreements were extremely brief, often no more than a few pages. And those pages were full of gaps and generalizations. The people responsible for administering these agreements were, for the most part, new to the task. They needed guidance, guidance that often could not be found in the language of the agreement. The art of labor relations was in its infancy.

Arbitrators often found the language to be inadequate or irrelevant to the issue at hand. They sought, given these deficiencies, a sound and workable solution to a problem. They saw themselves not only as judges engaged in analyzing a written text but also as problem solvers who were using their knowledge of the workplace and the parties' needs to transform a code (or constitutional) provision into the kind of practical result the parties could accept. They were the alchemists of a new labor-management order. It must be remembered too that this was a time when there were still strikes called by unions over unresolved grievances. And almost everyone agreed, apart from the few committed to the notion of class warfare, that arbitration was preferable to economic force in settling grievance disputes.

Given this scenario for the 1940s and 1950s, it is understandable why arbitrators then had a significant effect on labor-management agreements. Because the decisions could have far-reaching consequences and there were no real precedents, it was not unusual for high-ranking officials within the labor or management hierarchy to appear at the hearing. These officers realized that something important was happening and that a decision could, in view of the incompleteness of the agreement and the discretion of the arbitrator, cause much harm or embarrassment. Their presence was a way of advising the arbitrator of the seriousness of the situation, the important institutional interests at stake.

The Braden Model

J. Noble Braden, an important figure in the history of the American Arbitration Association, saw labor arbitration as sim-

ply a minor variant from such long-established forums as civil and commercial arbitration. He believed labor arbitration was a substitute for litigation, a quasi-judicial process. He therefore looked to the courts, not collective bargaining, for inspiration.[3]

The Braden model produced a different mindset. Those arbitrators who embraced this model viewed the agreement, first and foremost, as a contract for which the traditional rules of contract interpretation would ordinarily suffice. They did not think of the agreement as a code or constitution. They looked to the language of the contract and looked further to the parties' purposes or matters of equity only if the language itself was truly ambiguous. Their collective bargaining insight was a secondary tool. They were more likely to resist implications, more likely to rely on arbitration case precedent, more likely to accept formality at the hearing, more likely to employ the rules of evidence, more likely to reject mediation, and so on. They acted, consistent with Braden's philosophy, more like a court than an extension of the collective bargaining process.

Competition between the Models

Over the past 45 years, there has been a silent and largely unconscious competition between the Taylor and Braden models. I do not mean to suggest that arbitrators embrace a certain theory and then live by it. We are pragmatists, more concerned with facts than theories. My comments on this point are therefore impressionistic. Nevertheless, I am convinced that most arbitrators in the immediate postwar years found the Taylor model attractive. For the Taylor model promised us a degree of discretion and influence in the affairs of labor and management that was difficult to resist. It seemed to me in 1954, when I began my career as an arbitrator, that Taylor's view was dominant and appeared likely to prevail.

Contrary to my expectations, however, it is Braden who has prevailed. I do not mean that arbitrators never approach cases from Taylor's perspective. Of course they do. But if my reading of thousands of awards is correct, it seems clear that arbitrators today, by and large, see themselves as akin to administrative law judges in an adversarial system in which they are called upon to

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[3]*See, e.g.*, the following Braden articles: *Problems in Labor Arbitration*, 13 MO. L. REV. 143 (1948); and *Current Problems in Labor-Management Arbitration*, 6 ARB. J. (n.s.) 91 (1951).

interpret and apply contract language. Collective bargaining insight, a focus on the larger purposes at work in the negotiation and administration of the agreement, has little to do with how most of us function. The Braden description of our behavior is a far more accurate picture of today's arbitration world than the Taylor description.

There are, I believe, perfectly sensible reasons for what has happened. Those reasons concern all the players in the arbitration process—the parties themselves, their representatives in the hearings, the publishing houses, the arbitrators, and the law itself.

The Parties

From the standpoint of human nature, the Taylor model was bound to falter. Institutions, no less than individuals, crave certainty. Labor and management, to the extent possible, want their agreements to provide a high degree of predictability. They want to control their own destinies. They do not want an arbitrator intruding in their relationship, exercising overly broad discretion, and producing unwelcome surprises. Taylor arbitrators are likely to be more creative and hence more unpredictable. For they are more disposed to see the agreement as a code or constitution rather than a contract and to read the agreement through the filter of their own collective bargaining insight. That is a formula for surprise. Braden arbitrators possess neither of these predilections. They are likely to take a far more conservative view of their function and hence less often produce the dreaded surprise. To the extent to which the parties have expressed a preference by choosing Braden types over Taylor types, arbitrators receive this subliminal message and alter their behavior to improve their acceptability.

The parties have not been standing still since the 1940s. They have developed high levels of sophistication in collective bargaining. They have surrounded themselves with a battery of specialists—economists, lawyers, statisticians, consultants, and so on. Their quest for greater certainty has been pursued at the bargaining table. The results are obvious. The ten-page agreement in 1940 is now 50 pages; the 50-page agreement in 1940 is now 150 pages. A one-time statement of principle (e.g., equal distribution of overtime or layoff by seniority) is now elaborated upon in great detail. The gaps have been filled; the generaliza-

tions have been made specific. Things are no longer left to chance. The parties realize they can generally do for themselves what they once expected arbitrators to do for them.[4] They have made their agreements look more like contracts, less like a code or constitution.

Given these changes, it is hardly surprising that Braden arbitration would be more attractive to the parties. Indeed that impulse has been consciously acted out in some places. For example, in the Ford-United Auto Workers relationship, Harry Shulman served as the umpire from 1943 to 1955. He filled a power vacuum when first appointed, and he arbitrated in the Taylor tradition, providing the guidance and education the parties needed in the ways of contract administration. He even chose not to issue decisions in many cases he heard, believing that awards in those situations were unnecessary or would do more harm than good. When he died, he was replaced by Harry Platt. The parties were, by then, prepared to handle their own problems. There was no longer a power vacuum. Platt was told, although not in these words, that Taylor-type arbitration was not what the parties had in mind. They did not want Platt to use his insight and imagination to solve problems they had failed to solve. They wanted no more and no less than what the arbitrator could reasonably divine from the words of the agreement. They had placed predictability high on their agenda.[5]

The Parties' Representatives

The competition between the two models has been influenced by other forces as well. Lawyers play a large role in labor relations. They help draft contract language; they sometimes negotiate the contract; they appear at the arbitration hearing as representatives for unions and employers. They often bring to the hearing the trappings of the courtroom. That means more formality, objections, transcripts, briefs, case citations, and so

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[4]This has been facilitated by a decline in industrywide bargaining and pattern bargaining. The industry bargain prompted general contract language to satisfy many diverse employer interests. The pattern bargain prompted contract language that the parties used without fully understanding what they had agreed to. Both situations increased the parties' reliance on arbitration.

[5]Taylor's theory views arbitration as a substitute for the strike. Strikes seem to be slowly disappearing from American life, due, at least in part, to the availability of arbitration to resolve grievances in the vast majority of agreements. It is doubtful that unions, even if they had the right to strike over unresolved grievances, would ordinarily do so today. If that is true, one wonders what impact that reality might have on the Taylor theory.

on.[6] This can be helpful or harmful, depending on the nature of the dispute and the manner in which the task is performed. The point is, however, that more lawyers have meant more legalism which, in turn, has made arbitration appear more and more like litigation.[7] And that is precisely what Braden was urging—arbitration as a substitute for litigation.

Arbitrators are in some ways like chameleons. They generally blend into the environment in which they find themselves; they adapt to whatever procedures, whatever spirit, the parties seem to desire. If labor and management choose to be legalistic, arbitrators will respond in kind. Objections to evidence are dealt with on their merits. Arbitrators do not state that such objections are inappropriate in an arbitration hearing. A request to file a post-hearing brief is seldom, if ever, denied. Case citations by the parties lead to analysis of such precedent in the arbitrator's opinion. We play by the parties' rules. We have not resisted—and cannot effectively resist—the trend toward legalism. The more the hearing resembles a courtroom, the more likely the arbitrator will assume that formality, objections, transcripts, briefs, and so on, are a perfectly sensible way of proceeding. All of this, it seems to me, has further undermined Taylor's view of arbitration as an extension of the bargaining process.

The Publishing Houses

The publishing houses—BNA, CCH, LRP Publications, and others—have relentlessly printed arbitration awards by the thousands. A huge body of precedent has been made available to the labor-management community and arbitrators on the assumption that there is a common law of arbitration. Nothing could be further from the truth.[8] But that has not discouraged the parties from arguing by analogy through awards in other bargaining relationships. The case citations are employed in much the same way as they would be used in a courtroom.

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[6]A survey of arbitrators' views by William Dolson, Labor Arbitration—A Practical Guide for Advocates (Washington: BNA Books, 1990), at 371, states: "Of the 125 arbitrators who responded, a significant majority agreed that hearings have become more legalistic (30% strongly agreed while 51% tended to agree)."

[7]Lay people who present cases often use the same formal and technical devices as lawyers do. Whether this is a true choice or a mere reflex action, prompted by having to compete against lawyers, is difficult to determine.

[8]There is a "common law" within a given bargaining relationship. The arbitrator will almost always attempt to honor prior awards between the same parties where the principles in those awards are relevant to the case at hand.

Arbitrators, regrettably in my view, go along with this arrangement and rely on citations to support whatever contractual principles they may embrace. Such a large use of precedent makes it appear that principles arise not so much from the fabric of a particular bargaining relationship as from a national consensus among arbitrators.

Precedent can, of course, be helpful. All of us have profited from seeing how a particular conceptual problem has been handled by other arbitrators. But a large role for precedent encourages mere comparative analysis. Which past awards bear the closest similarity to the case at hand? Which awards are distinguishable? Which are not? This is arbitration as litigation. It tends to shift one's attention away from the truly critical matters—the specific facts, the specific contract language, the specific bargaining relationship. It is these specifics that ought to be the engine that drives the arbitrator to a decision. When principles are derived from precedent, the inspiration comes not from collective bargaining but rather from the law.

It may be that the mere existence of written opinions, even unpublished, would inevitably push arbitration into the litigation mold; for the purpose of written opinions, other than convincing the losing party that it ought to have lost, is to provide guidance for the future. Once having accepted the notion that prior decisions are a template against which to measure later disputes, it was unavoidable that precedent would play an ever larger role in the arbitration process. All of this is typical of any litigation system.

Some people foresaw this development as early as 1946. Alex Elson tells me that a meeting was held that year at the U.S. Department of Labor to discuss, among other subjects, whether arbitration awards should be accompanied by written opinions. Alex, emphasizing the views of Harry Millis, the first NLRB chairman and the first GM-UAW umpire, argued that because arbitration should be closely related to collective bargaining, there should be no written opinions. His was a minority view. Most of those present favored opinions. This was a clear omen of things to come. With written opinions, with commercial publication of opinions, with widespread reliance on opinions, arbitration was bound to evolve into a process more like litigation and less like collective bargaining. That is exactly what has happened.

The Arbitrators

Arbitrators have not played a large part in this evolution. We are not ideologues. We accept the role the parties wish us to perform. If labor and management see the agreement as a contract rather than a code or constitution, if labor and management see the process more as litigation than collective bargaining, we seem ready to oblige. That is hardly surprising given the way in which we tend to describe our own function as "the servants of the parties."

These are not conscious choices by the parties. They have not reached an understanding that the agreement is a contract rather than a code or constitution or that arbitration should be more like litigation than collective bargaining. Their choices have been suggested in other ways. Their choices have been sufficiently clear so that arbitrators, for the most part, act as if they are judges in contract litigation. If I were to ask the arbitrators in this audience to indicate through a show of hands whether they view the agreement as a contract or as a code or constitution, I am convinced the vast majority would say it is a contract. The idea of the agreement as a code or constitution is rarely a part of our thought processes.

It should be noted that most arbitrators today arrive at this profession from the law, the government, or the university. They tend to be lawyers with little or no real collective bargaining background. One could hardly expect such an arbitrator to embrace the Taylor model, to attempt to construe the agreement from the standpoint of collective bargaining reality.

Consider, for instance, how we deal with a contracting-out dispute where the agreement is silent on the use of contractors. More often than not, the arbitrator will review the literature, particularly Elkouri & Elkouri or Hill & Sinicropi,[9] and will then cite a group of awards which stand for the proposition that there are certain implied limitations on management's right to contract out. Or, if the arbitrator tends to be literal and conservative, the citations may stand for the proposition that there are no such implied limitations. In either event, the opinion is likely to be an exercise in *stare decisis*. Little attempt will be made to analyze the terms of the agreement in question. Little or no attempt will be

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[9]Hill & Sinicropi, Management Rights (Washington: BNA Books, 1986).

made to consider collective bargaining reality—the setting in which the agreement was negotiated, the nature of the parties' bargain, and the need to preserve that bargain. The issue of whether there are implied limitations will be decided by importing generally accepted arbitral concepts from outside the parties' relationship.

The reason we behave in this way is a matter of conjecture. I think it is more difficult and more dangerous to interpret agreements from the standpoint of collective bargaining reality. We do not know enough about the parties in a particular relationship; we cannot tell whether our bargaining insights are shared by the parties; we do not believe an implication born of our individual view of the meaning of silence in the agreement will have sufficient persuasive force. Hence, instead of looking inward to the fabric of a bargaining relationship, we look outward to past volumes of labor arbitration awards. How can the parties blame us for a decision that we can prove is consistent with what fifty other arbitrators have said in recent years? It is difficult to resist the ease of ready accessibility to long established concepts and the comfort of peer support.

This is the Braden model, arbitration as a substitute for litigation. We have accepted this model mainly because that appears to be the parties' wish but also because it helps to make the arbitrator's job more secure and manageable, and therefore less risky and mysterious.

The Law

Another large influence has been what Jim Oldham has recently referred to as "relentless legalization in the workplace."[10] Oldham's paper stressed the extent to which the parties themselves have, expressly or impliedly, incorporated more and more statutory law into their agreements. The most common examples of this phenomenon are Title VII of the Civil Rights Act of 1964, the Employee Retirement Income Security Act, the Occupational Safety and Health Act, and the Fair Labor Standards Act. Even the Labor Management Relations Act of 1947 (LMRA) is occasionally made a part of the agreement. Thus

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[10]Oldham, *Arbitration and Relentless Legalization in the Workplace*, in Arbitration 1990: New Perspectives on Old Issues, Proceedings of the 43rd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1991), at 23.

arbitrators can be forced to decide public law questions when the union's grievance (or the employer's defense) relies on a statute incorporated in the agreement. The arbitrator in this situation must construe the statute. That task may also require a review of relevant court cases and perhaps even legislative history. We are often dealing with the very question that a federal court or administrative agency would otherwise have initially been called upon to resolve.

The consequences of more public law being placed in more agreements have been suggested by Dave Feller:

> . . . to the extent that the arbitrator decides disputed questions of external law, he necessarily relinquishes his right to claim immunity from review by the bodies that external law has established as the ultimate deciders of what that law means and how it is to be applied in particular situations. By applying the external law, the arbitrator ceases to be part of an autonomous adjudicatory system and transposes himself into another kind of adjudicatory system. If you will allow me to push my previous analogy a bit further—his judgments are no longer entitled to "full faith and credit" because, rather than being an adjudicator in a foreign jurisdiction, the arbitrator becomes more like a lower court whose decisions are subject to review by higher courts. Further, it seems probable that once undertaken, review can scarcely be limited to decisions on the issues of external law.[11]

Thus arbitration becomes a substitute for litigation of public law rights or, more likely, the first step in such litigation. This can serve only to buttress the many forces that have already transformed arbitration into what is largely a litigation forum. Collective bargaining considerations have little, if any, relevancy in deciding public law questions. Again the Braden view seems ascendant.

The law intrudes in other ways as well. Courts are asked, pursuant to section 301(a) of the LMRA, to enforce the promise to arbitrate found in most agreements or later to enforce the arbitrator's award. Courts are requested to invalidate a provision of the agreement that is alleged to be contrary to federal law. The National Labor Relations Board refuses to decide whether a management action is a violation of section 8(a) of the NLRA until an arbitrator has first determined whether that action is a violation of the agreement. Indeed, arbitrators must consider

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[11]Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976) 97, at 111.

the legal concepts that prompt the placement of various provisions in the agreement. The best examples are the recognition clause and the waiver (or zipper) clause. There seems to be an ever larger interplay between the agreement and the law. The more this happens, the more certain the agreement will be viewed strictly as a contract and the more likely its collective bargaining context will be ignored.

Conclusions

My theme is quite simple. Arbitration, as practiced today, bears a far closer relationship to litigation than to collective bargaining. It is Braden's view, not Taylor's, that has prevailed. Given the benefit of hindsight, this result seems to have been inevitable. All the forces I have mentioned—the parties' needs, their increasing sophistication, their more detailed agreements, the influence of lawyers, the use of precedent, the publishing of awards, the intrusion of the law, and so on—have combined to make labor arbitration appear more and more like any other quasi-judicial proceeding.

The plaintive cry is heard that arbitration is now "too legalistic." That complaint comes largely from the unions and from those arbitrators who once subscribed to the Taylor model. But that model has been rejected. The evolution of arbitration may not be over, but it is moving in a direction further and further from the Taylor view. I see no likelihood of a U-turn in the road which might bring us back to the collective bargaining model. I recognize that there are a few arbitration systems that still bear a close resemblance to collective bargaining but they are the rare exceptions. In view of the forces that have been at work, I do not see how this competition between Braden and Taylor could have been resolved differently.

Most extraordinary of all is the fact that this competition was not resolved through any conscious decision of the parties. Employers and unions chose ad hoc arbitration or a panel of arbitrators or a permanent arbitrator; they determined how the arbitrator would be selected; they placed limitations on the arbitrator's authority. But they generally went no further. They did not seriously deal with the question of what kind of arbitration they wanted. They did not agree to "strict" or "liberal" construction, whatever those words might mean. They did not agree that their agreement was a contract rather than a code or

constitution. They did not agree that arbitration was to be essentially a quasi-judicial forum. But these matters, although not directly addressed, seem to have been decided. The parties appear to have unconsciously embraced the Braden model, perhaps because it promised them greater control over arbitration or perhaps because it meant less uncertainty and a lesser role for outsiders in their relationship. Whatever the explanation, it only serves to demonstrate that unconscious forces play as large a role in institutional life as they do in individual life. Freud lives.

There are other ironies as well. Consider the remarkable events of recent years—the creation of a true world market, the rigors of international competition, the new combinations of capital and production, and the resultant pressures to transform the way American business functions. These pressures have led to significant structural changes in labor-management relations. At the top, the parties are often forced into a continuing dialogue, in effect a continuing negotiation, to alter the workplace in ways that will serve to protect plants and jobs. At the bottom, the parties have negotiated new means of enlisting the energy and imagination of employees in the quest for improved productivity and quality. Worker-participation programs, broader job duties, larger responsibility, and less supervision are only a few of the recent innovations.

All of this has infused bargaining with new challenges and new purposes. As a consequence, we see more flexibility, more informality, and more emphasis on joint concerns than ever before. Yet, while all of this Taylor-type activity has been taking place, it certainly has not been reflected in the arbitration forum. There, the parties seem to be moving in the opposite direction. Inflexibility, formality, narrowness, and legality have become the vogue in arbitration.

How can one explain these conflicting trends? I do not have the answer. I nevertheless suggest the following possibilities:

First, there is a wish in most of us for a metaphorical "scoreboard," a means of measuring our skills and understanding against others. The attraction of the contest, a game with winners and losers and a playing field with clear rules, is part of our culture. The arbitrator in such a contest is the referee, not a player, and the rules are written to make sure this distinction is faithfully observed. The Taylor-type arbitrator comes too close to being a player.

Second, when the parties are negotiating, they exercise control over their own destiny. There are no limits. It is their process and they can be as free-wheeling as they like. But when the parties cede control to an outsider, an arbitrator for instance, they understandably want to place limits on such authority so as to minimize the possibility of unwelcome surprises. Those limits are more easily expressed and understood, and more likely to be honored, in an arbitration system that embraces formalism and legalism.

On the other hand, we cannot ignore the development of grievance mediation. This process is on the rise and is being used in more and more relationships as a device for resolving grievances, short of arbitration. The willingness to mediate may be a product, at least in part, of the structural changes in labor relations.[12]

Consider finally what the Braden triumph means in practical terms to the parties, the arbitrators, and the courts.

From the parties' standpoint, arbitration has been made more manageable. Arbitrators, at least those who follow the Braden model, are more likely to be predictable. That predictability has been reinforced both by the parties' greater sophistication and by their action in spelling out the "rules of the game" in far more detail in their agreements. All of this improves the parties' ability to resolve grievances short of arbitration, particularly those crucial grievances that have the potential for damaging the essential interests of one or both parties. The result is a less important role for arbitration in the labor-management world. This can be seen in the fact that the parties' high officials now rarely appear at arbitration hearings. Because the process is under control, the arbitration function is delegated to lower levels of authority within the management and union hierarchies. This is particularly true in the large multiplant manufacturing corporations.

From the arbitrators' standpoint, this lesser role translates into more fact questions and fewer contract questions. Even the contract questions are more a matter of application of agreement language to a new set of facts than a pure question of interpretation. There are fewer gaps, fewer generalizations in agreements, and hence far less room for large exercises of arbitral discretion. Collective bargaining insight plays a much

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[12]The willingness to mediate is primarily, I suspect, a reaction to high arbitration costs and excessive legalism.

smaller part in what we do. The process is not as creative as it once was. But that is, I suspect, merely another way of saying that the Taylor view has been largely replaced by the Braden view. It follows that Braden-type arbitrators are, over the years, likely to be more acceptable to the parties.

From the courts' standpoint, the most thorough description of arbitration was attempted in the U.S. Supreme Court's decision in *Warrior & Gulf.*[13] In that case, Justice Douglas relied heavily on the writings of Harry Shulman and Archibald Cox and described labor arbitration in these words:

> In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. *For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.*
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> The collective bargaining agreement states the rights and duties of the parties. *It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . .* The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.
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> *The labor arbitrator's source of law is not confined to the express provisions of the contract,* as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. (emphasis added)

No doubt this description of arbitration must have been welcomed by Taylor. Notwithstanding Douglas's words, labor arbitration has evolved in a quite different direction. Neither the parties nor the arbitrators seem to have paid much attention to this portion of the Supreme Court's message. To repeat what I have already said, the parties see the agreement largely as a contract rather than a code. Their focus is on arbitration as a form of litigation, not as part of the collective bargaining pro-

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

cess. Arbitrators generally echo these views.[14] In this respect at least, *Warrior & Gulf* does not reflect the reality of arbitration in 1991. For the Supreme Court's lead to have been so totally ignored on this matter suggests the strength of the current that is drawing arbitration away from the expansive Taylor model and toward the narrow and technical Braden model. I suspect this reality will, in time, come to play a significant role in the way in which labor arbitration is treated by the courts.

The moral of my story is that institutions follow the imperative of their needs and ignore theories, however compelling, which contradict those needs. Thus, because the parties' needs were better served by the Braden model, they have embraced it.[15] They have long since discarded the Taylor model, the memory of which still burns bright in the heart of many an arbitrator. Legalism is here to stay. We can no more contain its force than King Canute could command the ocean tides. In any event, whether arbitrators approve of the way in which the process has evolved is of little moment. The real question is whether the Braden model, presently in command, effectuates the purposes of arbitration. The parties seem to believe it does.

Comment—

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Dick Mittenthal's analysis of the evolution of arbitration represents a very helpful way of thinking about the institution in which we are all active participants. By using the views of Taylor and Braden, he has given us two benchmarks for assessing where we are today and by extension where we will be in the future, given current trends.

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[14]Rarely do members in our society choose not to exercise the full authority granted to them. Yet that is exactly what the vast majority of arbitrators have done.

[15]One can argue that only management's needs were better served by the Braden model. From the outset employers were concerned with arbitrators adhering strictly to the language of the agreement. It was management that initially sought limits on the arbitrator's authority, and a prohibition against "adding to or modifying" the terms of the agreement. But unions, as they negotiated more detailed restrictions on management's rights, developed the same interest in making certain that arbitrators did not "add to or modify" the agreement. They too embraced the Braden model, although not always the legalism that accompanied it.

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I agree with the conclusion reached by Mittenthal that we have moved steadily in the direction of Braden and more importantly, the parties want it this way. So at this point, we could just sit down and say: "End of discussion."

However, I believe that if we allow the Braden model to continue unchallenged we will all be worse off. Our own level of activity will decline and more and more of our income will be in the form of cancellation fees. More importantly, the potential role for crucial influence will not be exercised.

To properly determine "Whither Arbitration," we first need to assess: Whither industrial relations? Let me comment on several trends. First, we can see in many industries an expanding nonunion sector. Arbitrators may have a role to play where companies institute nonunion grievance procedures, but I will not delve into this subject—it has been analyzed in recent National Academy of Arbitrators' publications. What is clear is that the nonunion sector is growing steadily. Some of this is due to the confrontational tactics initiated by employers who follow the well-traveled sequence of an insistent demand for concessions, impasse, implementation of new conditions, and employment of replacement workers with the eventual decertification of the union. Arbitrators generally are not called upon to play a role in these circumstances.

A second major trend (and one at the opposite end of the spectrum) is the increased emphasis on collaboration and jointness in union-management relations. Recently publications of the U.S. Department of Labor, Work in America, The Collective Bargaining Forum, and The Economic Policy Council, clearly show the increasing emergence of a new brand of industrial relations characterized by shorter agreements, joint committees, involvement of the union at the strategic level on a wide range of agenda items, and new decision-making structures such as teams and task forces. As today's version of labor-management cooperation sweeps the country, the need for arbitration drops accordingly. Consider the avant-garde arrangement between Saturn and the UAW. This enterprise, employing over 3,000 workers, has been underway for almost four years and only three grievances have been filed, all protesting discharge, and none of these cases has gone to arbitration. As I talked to practitioners in getting ready for this session, I hoped I would be able to identify examples of special arbitration agreements in the

new agenda areas such as training, health, and classification systems. But this has not been the case.

The question then is whether in the face of these realities we can play a constructive role in the new industrial relations. Perhaps, but it is not a straightforward engagement. Let me mention several possibilities. For example, recently I approached a company and a union that I knew through arbitration and asked if they wanted to participate in a Department of Labor training program on win-win concepts and skills in negotiations.

More generally, we could go back to the parties to do a post-mortem review to inquire how a particular decision impacted other issues and the labor-management relationship. The concept of the learning organization is very much in vogue today and I think it would be interesting for all of us to revisit some of our cases. It might affect our reasoning when we encounter similar issues in the future.

I do not want to underestimate the difficulties that are inherent in an expansion of our role into Tayloristic (mediation, facilitation, training, and coaching) activities. The role that I think is more readily available for us to play today is that of the "pilot" who is hired to perform a specific function but uses some imagination and creativity as unforeseen circumstances are encountered. Let me return to George Taylor for this mandate: "To have continuing usefulness, the arbitration procedure must be so developed as to be preferable to strikes and lockouts. The kind of arbitration that will meet this criteria is itself a bargainable subject."[1]

Another model is that of the process consultant. The distinguishing feature of labor arbitration (compared to other quasi-legal procedures) is that the parties own the process. The outsider brought into the relationship would be remiss not to point out opportunities for the parties to improve their process.

Another term that is popular today is "empowerment." Too often arbitration is conducted in a way that limits the degrees of freedom rather than empowering labor and management—the chief stakeholders who, after all, created the relationship. The parties need to be helped to make adjustments "on-line" for their mutual benefit. Let me describe a number of junctures that have arisen in my own arbitration work and the opportunities

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[1]Taylor, Critical Issues in Labor Arbitration (Washington: BNA Books 1957), 152–153.

regularly afforded to arbitrators to help the parties shape a more effective arbitration procedure and labor-management relationship.

1. It becomes clear to the arbitrator that the employer has not proven the case for discharge and the grievant should be returned to work. However, it is also clear that reinstatement to the original position will create considerable turmoil. Does the arbitrator suggest to the parties that they negotiate the specific job assignment for reinstatement?
2. The arbitrator concludes, without waiting for post-hearing briefs, that his mind is made up—an "open and shut case." Does the arbitrator ask the parties whether they would be willing to receive a summary judgment?
3. As the arbitration hearing unfolds and direct testimony begins, it becomes clear that one or both sides are using the arbitration hearing to "get even" with the other side. Does the arbitrator give full sway to this ventilation process (because it is therapeutic) or negotiate limits (because the testimony will create even more antagonism)?
4. The arbitrator quickly realizes that one or both of the advocates are new to the case, and/or the issue has been ineptly formulated. In this situation, does the arbitrator allow time for the parties to get up to speed or suggest a better formulation of the real issue at hand?

I have found myself increasingly attentive to these process dimensions. Some of us play this mixed role (between Braden and Taylor) by saying to the advocates: "Why don't you go out in the hall and see if you can work out the stipulation for this case?" Others of us would join the advocates in the hall. Still others would go into a conference mode, with the grievant and other parties in attendance, so that no one is kept in the dark and so the education process, particularly for the grievant and others who previously have not participated in arbitration, is facilitated.

Given an increasingly diverse work force, with many members who are not familiar with English-American traditions of due process and case law, the arbitrator does have an important instructional function: to help those who are participating know what is going on and why it is taking place.

If we continue on the Braden path and if the environmental trends continue (which I believe will be the case), the future is not bright for our profession. One can think of the history of arbitration as having been comprised of several major periods.

The first, starting in the 1940s and carrying on for a decade or two, was a period when the leading practitioners of our art were mediators first and arbitrators second. They embodied the activism of George Taylor.

Gradually, successive generations of arbitrators increasingly limited themselves to interpreting the contract and deciding specific grievances. This legalistic approach made sense for the decades when everything was stable. However, with the dramatic changes in the environment that have characterized the 1980s and continue to characterize the 1990s, a more relevant conception is needed for our role as arbitrators and for the purpose of this organization.

To underscore the juncture at which we find ourselves, consider the powerful effect that the concept of "duty of fair representation" has exerted for the past several decades on the demand for arbitration. In some ways it has represented the "Full Employment Act" for arbitrators, as long as employers continued to hand out disciplinary actions. However, increasingly, companies are solving performance problems before they become aggravated. Human relations and an emphasis on good personnel practices have caught on precisely because competitive pressures require employers to engage in policies and programs that are more "clinical."

The situation that I researched when I first started teaching in this field, namely, International Harvester and the United Auto Workers, with thousands of grievances backlogged, would never occur today. David Cole, who was umpire under that agreement, helped the parties fashion an imaginative solution, specifically, the oral handling of grievances. In fact, he enjoyed a handsome yearly stipend and because of his intervention, had very little to do for a number of years.

The new role cannot be captured succinctly in the mediation of Taylor or the strict interpretation of the contract as expounded by Braden. The term "facilitator" may describe the essence of the role I have in mind. In the first instance, the arbitrator facilitates a resolution of the grievance. But the term captures other possibilities, such as asking the parties whether they want a streamlined hearing, negotiation of the remedies, and a caucus to reformulate the problem. These interventions may be quite consequential for the quality of the labor-management relationship.

We do not have to accept the narrow role of the Bradenistic style of arbitration, conducting only a quasi-legal proceeding. Given the fact that arbitration is an event in an ongoing relationship, we can be attentive to the interplay of the hearing and this larger process. I am not advocating freewheeling intervention that might have been appropriate in the early days of collective bargaining, but an approach that enables the parties to make intelligent choices about the conduct of arbitration. I am advocating a process that leaves the parties, not the contract, in charge and to paraphase Taylor: "To have continuing usefulness, the procedures of arbitration must themselves be a subject for bargaining and agreement by the parties."

I am certain that all of us engage in this second level activity. But I would urge us to do more process management—which means presenting options. In a relationship someone has to take the initiative, and I am urging us to take the lead more frequently, if only to stop the clock for a process check. Of course, more often than not the advocates will respond: "Let's stick to the book." But I cannot think of any disadvantages in using new options with the parties.

My final suggestion is that the Academy foster research, discussion, and education on how all of us can participate in the more effective management of the arbitration process.

Comment—

THEODORE J. ST. ANTOINE*

Exactly 30 years ago this month the Michigan Law Review published an article that evoked in me an emotion I must confess is the surest sign that I am in the presence of excellence—*envy*! The piece was entitled, "Past Practice and the Administration of Collective Bargaining Agreements."[1] It was authored by the esteemed principal speaker at this session, and it came as close as anything I have ever read to deserving that much-overworked appellation, "definitive." It is always hazardous to try to predict

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[1]Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1961).

the ultimate rating of a brand new vintage, but my first tasting of Dick Mittenthal's latest product suggests that his hand has not lost its touch. The graceful paper presented today belongs with his classic of a generation ago.

The major contribution of Dick's new work is his illuminating juxtaposition of George Taylor's bargaining model of arbitration and Noble Braden's adjudicative model of the process, and Dick's convincing explanation of why the Braden model has prevailed despite the support provided its rival by such formidable figures as Harry Shulman, Archibald Cox, and William O. Douglas. Here I agree with almost everything Dick has said, and my own remarks about the contents of his essay will do little more than embellish his thesis.

My principal demurrer to Dick's piece comes down to a semantic quibble about his title. Now, I hesitate to take issue even mildly about definitions with such a master wordsmith as Dick Mittenthal. But, as his title indicates, our commission was to ponder "Whither Arbitration?" which, according to my *Webster's Collegiate*, asks, "to what place *will* [it] go?" As Dick himself states, his paper aims instead "to create a conceptual framework with which to examine the evolution of arbitration over the *past* half-century."[2] Dick's accomplishment is so impressive on its own terms that I readily forgive him for any departure from the decreed agenda. After a few of my own observations on his chosen topic, however, I am going to proceed to speculate a bit myself on "Whither Arbitration?" that is, what is arbitration's future?

Before continuing, I should mention that anyone intrigued by the Taylor-Braden debate and its consequences will find further enlightening details in the admirable history of American labor arbitration being written by our colleagues, Dennis Nolan and Roger Abrams.[3]

For me, the most important conclusion Dick reaches is that the Braden adjudicative model triumphed in large part because it better served the parties' needs and desires for certainty, predictability, and results they themselves could control, not because unions and management consciously chose Braden over Taylor. It was all a natural outcome of the collective bargaining

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[2]Mittenthal, *Whither Arbitration? supra* (emphasis supplied).

[3]Nolan and Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 611–13 (1983).

process, and the parties' increasing sophistication and capacity to deal effectively with their problems on their own. The arbitrators naturally followed suit.

In the mid-1980s I conducted an intensive study of collective bargaining and arbitration between General Motors and the United Auto Workers. About 300,000 grievances were filed annually in the late 70s and early 80s. But by 1981 and 1982, the permanent umpire's decisional output at the last step of the process was down to a mere five and six cases, respectively.[4] The parties attributed this remarkable record of voluntary settlement to their mutual knowledge, acquired over many years of dealing with arbitral precedent, of how the umpire would likely rule in a dispute over contract interpretation. While the GM-UAW experience may be an extreme example, I think it underscores Dick's point about the high value the parties place on predictability.

In addition to the preferences of management and organized labor, Dick identifies the increasing incorporation of statutory law into collective agreements as another spur to promoting the Braden model of arbitration as a substitute for litigation. I agree with this, and I also agree with Dick (and Dave Feller,[5] whom Dick cites for support), that as arbitrators become statute interpreters as well as contract interpreters, certain arbitral awards will inevitably be subjected to closer scrutiny during judicial review.[6] But the universality of this trend can easily be exaggerated. Furthermore, the relegation of the arbitrator to the position of trial judge, susceptible to overruling for any error of law by an appellate tribunal, should be vigorously resisted.

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[4]St. Antoine, *Dispute Resolution between the General Motors Corporation and the United Automobile Workers, 1970–1982,* in Industrial Conflict Resolution in Market Economies, eds. Tadashi Hanami and Roger Blanpain (Deventer, The Netherlands, and Boston: Kluwer, 2d ed., 1989), 305, 316–17.

[5]Feller, *The Coming End of Arbitration's Golden Age,* in Arbitration 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 97, 116.

[6]This is not a retreat, as some Academy colleagues have suggested, from my position that an arbitrator is the parties' designated "contract reader," and that the arbitrator should follow the contract and not external law if there is an irreconcilable conflict between the two. *See* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny,* in Arbitration 1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1978) [hereinafter "Arbitration 1977"], 29. If the parties themselves make a statute part of their contract, expressly or impliedly, then the statute becomes an element of that contract, which the arbitrator must examine like any other element.

The key is that the parties have agreed the arbitrator's award shall be "final and binding." As between the parties themselves, I see no impediment to their agreeing to a final and binding declaration of their statutory rights and duties as well as their contractual rights and duties. Although the decisions are somewhat divided, there is clear judicial authority that arbitrators may be the final judges of law as well as of fact, and that awards issued under a misconception of the law will be upheld.[7] Technically, as I would analyze it, the arbitrators in such instances are still rendering a contractual ruling rather than a statutory one; they are applying, not the statute directly, but the parties' agreement to be bound by the arbitrator's determination.

Certain distinctions, however, must be recognized. As the Supreme Court has held, some statutory rights, such as those under Title VII of the Civil Rights Act or the Fair Labor Standards Act, "devolve on employees as individual workers, not as members of a collective organization," and are "not waivable"[8] by a union. In those situations the courts will not defer to the arbitrator's erroneous denial of employee rights. Similarly, if an arbitrator's interpretation of an Occupational Safety and Health Act requirement does not adequately protect the employees or violates some other basic public policy,[9] a court would not be bound by it. But, if an arbitrator imposes more stringent requirements than the statute, I would say the award should be enforced. The parties agreed to abide by that result, and their agreement should be accorded the same finality as any other arbitration contract. A middle position may be taken when employees' *collective* statutory rights are at stake, like the rights of employees under the National Labor Relations Act not to be discriminated against because of union activity. There the Labor Board and the courts will honor the arbitrator's award so long as

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[7]*See* Dransfield, *Right of Arbitrator to Consider or to Base His Decision upon Matters Other than Those Involved in the Legal Principles Applicable to the Questions at Issue between the Parties*, 112 A.L.R. 873 (1938), and cases cited; George Day Constr. Co. v. Carpenters Local 354, 722 F.2d 1471, 1477 (9th Cir. 1984).

[8]Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 745; 24 WH Cases 1284 (1981) (FLSA). *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 7 FEP Cases 81 (1974) (Title VII).

[9]A court will, of course, refuse to enforce either a contract or an arbitration award that violates positive law or public policy. But the public policy must be "well defined and dominant, . . . to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766, 113 LRRM 2641 (1983). *See also* Paperworkers v. Misco, Inc., 484 U.S. 29, 43, 126 LRRM 3113 (1987).

it is not "palpably wrong" and "clearly repugnant" to the Act.[10] That allows considerable latitude for the award. Finally, as the Supreme Court held recently in *Gilmer v. Interstate/Johnson Lane Corp.*,[11] an employee may be bound by an individual agreement to arbitrate rather than sue on statutory claims, even claims involving sensitive antidiscrimination rights.

Speculation about the future of arbitration and of the National Academy has been a frequent exercise at our Annual Meetings. An especially provocative and memorable three-person presentation took place in Toronto in 1977. Dean Harry Arthurs of Osgoode Hall Law School opined that arbitration could be treated as a process, a means of resolving labor-management disputes; or as a profession, a matter of rules and doctrine, and standards of arbitrator performance.[12] Arthurs lamented that the tide was running too strongly in the direction of professionalism. I find an interesting echo of his talk in Dick Mittenthal's account of the victory of Braden over Taylor. But what Harry Arthurs viewed with a considerable sense of anguish, I join with Dick in seeing as an inevitable development. I regard increasing professionalism as a means of better serving the process of dispute resolution, and of serving it more in keeping with the desires of the parties. There was undoubtedly an aura of high romance in the Taylor-Shulman arbitration world, which we have lost today. But there was also more than a little benevolent despotism, from whose clutches the parties escaped as soon as they could. Few, if any of us, are as heroic figures as those early pioneers, and yet I believe we generally meet the peculiar demands of our times as well as they met theirs.

Our then-Secretary, Richard Bloch, spotlighted the "increasing interplay between public statutory law and the private law of the collective agreement" as the "'hot issue' of the seventies."[13] It looks now as if Bloch could have called that the hot issue of the quarter century. Being, as early as 1977, the ever-practical fellow

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[10]*Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082, 36 LRRM 1152 (1955); *Olin Corp.*, 268 N.L.R.B. 573, 115 LRRM 1056 (1984); Bakery Workers Local 25 v. NLRB, 730 F.2d 812 (1984).

[11]59 USLW 4407 (U.S. May 13, 1991) (claim under Age Discrimination in Employment Act). *See also* Dean Witter Reynolds, Inc. v. Alford, 59 USLW 3781 (U.S. May 20, 1991), *vacating* 905 F.2d 104 (5th Cir. 1990) (Title VII claims).

[12]Arthurs, *Arbitration: Process or Profession*, in Arbitration 1977, *supra* note 6, at 222.

[13]Bloch, *Some Far-Sighted Views of Myopia*, in Arbitration 1977, *supra* note 6, at 233.

he has remained, Bloch stated that the Academy must institute a "program of continuing arbitral education"[14] to prepare its members to confront the growing complexities, particularly the legal complexities, of the new world of industrial relations. Rich's prescription for "[s]eminars, lectures, and workshops . . . presented on a regional basis"[15] has largely come to pass. The annual educational conference has been another major innovation.

Bloch was discreet enough, however, to avoid another issue that I feel the Academy must face up to. What is our responsibility for improving the performance of nonmembers or even, to use the dreaded phrase, "training new arbitrators"? With the current dramatic decline in the numbers of organized labor in the private sector and the accompanying decline (or perceived decline) in the available arbitration caseload, it is quite understandable that some Academy members wish that such questions would simply go away. I realize that it is easy for me to sermonize from the safe haven of a full-time academic post. Nonetheless, I believe that we cannot credibly claim professional status for ourselves and the Academy unless, through education and guidance, we take measures to ensure the entry and development of newcomers to our craft. An altruistic propagation of the group is one of the hallmarks of a true profession. The Michigan region, for example, has adopted a worthwhile compromise position. It holds so-called enhancement sessions with nonmembers who have already established themselves, or are in the process of establishing themselves, as accepted figures in the arbitration community. It does not include persons who just wish to become arbitrators. Philadelphia has had a similar program for a number of years. I am sure there are others.

Ronald Haughton, the third member of the 1977 panel, focused on the views of Academy members themselves.[16] He based his report on 115 responses to a questionnaire sent to the 400 persons then on the membership mailing list. Two-thirds thought the Academy "should concern itself directly with programs for the training of arbitrators,"[17] although it was not clear whether this covered new, aspiring arbitrators. Almost 70 per-

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[14]*Id.* at 241.
[15]*Id.*
[16]Haughton, *Future Directions for Labor Arbitration and for the National Academy of Arbitrators*, in Arbitration 1977, *supra* note 6, at 243.
[17]*Id.* at 253.

cent were prepared to have the Academy take positions on pending legislation under certain conditions, but most of those would limit such action to the area of arbitration. By comparison, about 90 percent approved the Academy's involvement with a "Code of Ethics." Perhaps surprisingly in light of the subsequent success of our Research Foundation, a full 40 percent thought the Academy should "not be active at all in the formal sponsorship or encouragement of specific research in arbitration."[18] Most significantly for our purposes, when asked where the Academy should be ten years later, that is, in 1987, the largest single group, 39 percent, answered "essentially where it is now."[19] The next largest group, 23 percent, did not answer or did not know. The other responses were widely scattered. Ron Haughton summed up by suggesting that the very success of the Academy and its members "militates against a desire for change."[20]

Speaking on the future of labor arbitration at the 1984 Annual Meeting, Bob Fleming, a past president of the Academy, observed that dissatisfaction with the costs, delays, and inaccessibility of the formal legal system had led to the spread of arbitration into many new fields:

> It has found favor in environmental disputes, in the field of domestic relations, in product-warranty cases, in courts for small-claims cases (incidentally, some of the "small claims" today are considered to be suits under $20,000), and in nonunion plants. Public employers have now accepted grievance arbitration, though with some limitations; unions are using an internal disputes machinery to decide such questions as the appropriate fee payment in agency shop cases; schools now utilize the process both under their union contracts and in some kinds of student disputes; major league sports are heavily into arbitration under their player contracts; and an increasing number of states have passed or are considering legislation which provides arbitration of dismissal cases where no labor contract exists.[21]

The expansion of arbitration has continued. Spectacular growth has occurred in the handling of medical malpractice claims.

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[18]*Id.* at 250.
[19]*Id.* at 254.
[20]*Id.* at 255.
[21]Fleming, *Reflections on Labor Arbitration*, in Arbitration 1984, Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1985), 11, 16.

Arbitration has even become part of a binational dispute settlement procedure under the Canada-United States Free Trade Agreement, which went into effect on January 1, 1989.[22] There will be more of these novel uses.

Potentially the greatest extension of arbitration, at least in the employment context, could occur in the nonunionized work force. This August, as Howard Block will discuss in his presidential address, the Uniform Law Commissioners will vote on a proposed Uniform Employment Termination Act, which would require "good cause" for the discharge of most American employees.[23] If adopted by the commissioners, the bill would be introduced in the various state legislatures. It would apply to all employees in businesses having five or more employees, except part-timers (less than 20 hours a week) and probationers (less than one year). Even unionized workers would be covered to the extent permitted by federal preemption doctrine.[24] The coverage of public employees would be left to local option. The preferred means of enforcement would be through individual arbitrators, although the system would presumably be administered through a new or existing state agency. If the currently unionized portion of the work force accounts for approximately one-fifth of the total, the possibility exists for an approximate fourfold increase in labor arbitrations.

Beyond the employment field two powerful but quite different forces fuel the drive for an accelerated resort to arbitration. One is the beleaguered, overburdened legal system itself. The other is the growing consensus among many private parties that somehow they must avoid becoming bogged down in that quagmire of a legal system. In several states, like Michigan and Pennsylvania, the courts may require litigants in almost any civil action for damages to undergo "mandatory mediation" or "advisory arbitration" before trial. Illustratively, a panel of three lawyers of disparate persuasions spends a half hour or so listening to an informal presentation of the case. They then come up

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[22]*See, e.g.*, Lowenfeld, *Binational Dispute Settlement Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement—An Interim Appraisal*, in Trade Policy in the 1990s, 6th Annual Conference on Canada and International Trade (Ottawa: Univ. Ottawa and Carleton Univ., 1991), §4.

[23]*See* 9A LAB. REL. REP. IERM 540:21 (BNA 1991).

[24]There is a strong likelihood that a state good-cause requirement would not be preempted. *See, e.g.*, Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988). *Cf.* Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 372 U.S. 714, 1 FEP Cases 25 (1963); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

with a recommended settlement figure. No one is bound by the result. But if one party accepts and the other does not, the holdout must better the recommendation by more than 10 percent at trial or else be liable for all the other party's attorneys' fees after the date of the "arbitration." On the private unofficial side, all sorts of small groups are springing up around the country, with California in the lead, offering "intermediation" or "quasi-arbitration" services to allegedly abusive and victimized spouses, embattled communities and supposed industrial polluters, warring neighbors with straying dogs and cats, and the like. What can or should the Academy, or we as individuals, proffer these burgeoning systems of dispute resolution in light of our experience and expertise? I think we ignore them at our peril—quite possibly at the risk of material loss but certainly at a risk to "the better angels of our nature."[25]

Let me close with two personal and somewhat divergent reactions to involvement outside the area of employment. At least for the foreseeable future I think the Academy, as an institution, should confine its activities, educational and otherwise, to employment matters, probably enlarged to cover the rapidly emerging new world of individual employee relations. A look at the programs for any of our recent Annual Meetings will demonstrate that this still leaves us with plenty of territory to explore—territory that is of almost universal interest to our members. Membership demand will tell us if and when any large-scale change is in order.

On the other hand, my hope is that individually many of us will be far more adventuresome. We possess expertise in techniques and procedures that are transferable well beyond union-employer-employee relationships. We have the capacity to teach about, and to help create, imaginative new institutions of alternative dispute resolution (ADR)—in short, to leave our mark on the future of ADR just as the Shulmans and Taylors left their mark on the future of labor arbitration.

Arbitration, especially full-time arbitration, is a lonely profession. I have heard a number of arbitrators declare that, for all its satisfactions, the practice of arbitration by itself cannot sustain one for a lifetime. More than a few persons find there is simply not enough of a constant intellectual challenge, or not enough

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[25]Lincoln, *First Inaugural Address*, in Abraham Lincoln: Speeches and Writings—1859–1865, ed. Don E. Fehrenbacher (New York: Library of America, 1989), 215, 224.

sense of contributing to the ongoing development of other people. For all of you who share or who come to share those sentiments, I commend to you a noble and fulfilling mission—to assist, through various types of instructional and mentoring programs, in spreading the gospel of our kind of peacemaking. As for the rewards awaiting such participants, the 19th century essayist, Charles Dudley Warner, put it well: "One of the beautiful compensations of this life is that you cannot sincerely try to help another without helping yourself."[26]

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[26]Warner, *Backlog Studies,* in Charles Dudley Warner, The Complete Writings (Hartford: American Publishing Co., 1904), I, 218–19. The quotation, which I have edited slightly, is sometimes attributed to Ralph Waldo Emerson. Emerson often expressed similar sentiments, not so much in his famous essay, *Compensation,* as in various passages throughout his journals. *See, e.g.,* The Journals of Ralph Waldo Emerson, eds. William H. Gilman, Alfred R. Ferguson, and Merrell R. Davis (Cambridge: Harvard Univ. Press, 1961), II, 344–46.