CHAPTER 5

MAKE-WHOLE AND STATUTORY REMEDIES

I. INFORMING THE SILENT REMEDIAL GAP

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The theme of this paper is that, as a general rule, parties to a collective bargaining agreement expect the law of the land to be used to inform remedies fashioned by an arbitrator. This is more than a theoretical issue. It is a consequential topic because an arbitrator's view of remedies can frame the approach used to analyze a dispute and can affect values and norms believed to be relevant to the solution. More is at stake than merely cataloging diverse approaches to arbitral remedies. An arbitrator's view of make-whole remedies has significant implications for the role of arbitration.

A purpose of this paper is to help develop a coherent theory for fashioning labor arbitration remedies in the face of contractual silence. The first part of the paper asks whether a collective bargaining agreement is more like a contract or a code. The second part examines rules used to fill gaps in incomplete agreements and proposes their use in filling "remedy" gaps. The third part discusses the meaning of make-whole remedies. The fourth part explores that meaning by studying specific examples which, for the most part, have been excluded from a definition of make-whole remedies, namely attorney fees, punitive remedies, and front pay.

As Professor Charles M. Rehmus observed, "Some issues . . . like old soldiers, never die, nor do they fade away," and arbitral remedies is such an issue.[1] Because of their impact on the arbitration system itself, arbitral remedies deserve close scrutiny and

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[1]Rehmus, *The Code and Postaward Arbitral Discretion*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 127; *see* Hayford, *The Changing Character of Labor Arbitration*, in Arbitration 1992: Improving Arbitral and

should be evaluated by reference to legal-social-economic goals of collective bargaining. Highlighting the importance of the grievance-arbitration system, Professor Theodore St. Antoine observed:

> The major achievement of collective bargaining has probably not been economic at all. It has been the creation of the grievance and arbitration system, a formalized procedure whereby labor and management may resolve disputes arising during the term of a collective agreement, either by voluntary settlement between the parties themselves, or by reference to an impartial outsider, without resort to economic force or court litigation. The mere existence of a grievance and arbitration system helps to eradicate such former abuses as favoritism, arbitrary or ill-informed decision making, and outright discrimination in the workplace.[2]

Conventional wisdom teaches that arbitrators exist almost solely within the universe of the collective bargaining agreement and that, as a general rule, the law of the land is not a part of this universe. Arbitrators have expertise in the "law of the shop." As Professor David Feller, past president of the National Academy of Arbitrators, stated, "External law is irrelevant even where the collective bargaining agreement has terms that look very much like

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Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 69; Jaffe, *The Arbitration of Statutory Disputes: Procedural and Substantive Considerations, id.* at 110, 111 ("[F]or purposes of this paper, the propriety of arbitral application of statutory law is assumed"); McKee, *Federal Sector Arbitration*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 187; 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. Gruenberg (BNA Books 1991), 23; Nicolau, *The Arbitrator's Remedial Powers, id.* at 73; Ross, *Arbitration in the Federal Sector: A Panel Discussion*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 204; Christensen, *Recent Law and Arbitration: I.* W.R. Grace and Co.: *An Epilogue to the Trilogy?* in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1985), 21; Feller, *Remedies: New and Old Problems: I. Remedies in Arbitration: Old Problems Revisited*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1982), 109; Seitz, *Remedies in Arbitration: I. Problems of the Finality of Awards, or Functus Officio, and All That*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books 1964), 165; Stein, *Remedies in Labor Arbitration*, in Challenges to Arbitration, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1960), 39. *See also* Hill & Sinicropi, Remedies in Arbitration, 2nd ed. (BNA Books 1991); eds. Bornstein & Gosline, Labor and Employment Arbitration (Matthew Bender 1990); Feller, *Arbitration and the External Law Revisited*, 37 St. Louis U. L.J. 973 (1993); St. Antoine, *Judicial Review of Labor Arbitration Awards*, 75 Mich. L. Rev. 1137 (1977).

[2]St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 Chi.-Kent L. Rev. 631, 640 (1985).

a statute."[3] There is considerable agreement with the notion that arbitrators are primarily "contract readers" and that this conception of an arbitrator's role generally does not include an assessment of legal issues.[4]

Parties, however, generally leave a gaping void in their collective bargaining agreement on the topic of arbitral remedies. The agreement simply is incomplete. There might be a general admonition reminding arbitrators not to add to or change the existing agreement, but little else. As Professor William P. Murphy, past president of the National Academy of Arbitrators, noted, "Despite the importance of the remedial power of the arbitrator, most collective bargaining agreements have very little to say on the subject."[5] It is reasonable to believe the parties knowingly and deliberately created an incomplete agreement. Despite contractual silence on remedies, it is an arbitrator's duty to fashion an appropriate remedy. How arbitrators do so involves considerable discretion and merits close attention.

Any remedy granted by an arbitrator must find its essence in the parties' collective bargaining agreement. The purpose of such remedy is to give an injured party the benefit of the bargain. An arbitrator seeks to hold parties to promises made when they brought their agreement into existence, and those promises define the rights of the parties. There is a strong interdependence between rights and remedies. Such interdependence should manifest itself in a convergence between promises made at the bargaining table and arbitral remedies used to enforce them. An inadequate arbitral remedy places an arbitrator in the role of actually defining contractual rights.[6] If the parties have incorporated statutory rights into their agreement, it is an arbitrator's duty to "read the contract" so that it is consistent with statutory protections.

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[3]Feller, *Arbitration and the External Law Revisited, supra* note 1, at 975. Professor Feller has remained remarkably committed to his position. Almost 30 years earlier, he stated, "[I]t is no part of the function of an arbitrator to award damages." *See* Seitz, *supra* note 1, at 195.

[4]*See* Oldham, *supra* note 1, at 37 ("Most arbitrators continue to take the traditional view that the legal issue cannot be considered"). *See also* Mittenthal, *Why Arbitrators Do Not Apply External Law*, in Labor Arbitration: A Practical Guide for Advocates, eds. Zimny, Dolson & Barreca (BNA Books 1990), 287, 291 ("It is more than doubtful that there is any general understanding between employers and unions that law is part of the contract").

[5]Murphy, *The Role of the Collective Bargaining Agreement*, in Labor Arbitration: A Practical Guide for Advocates, eds. Zimny, Dolson & Barreca (BNA Books 1990), 215, 226.

[6]The only overt reference to remedies in Labor Arbitration Rules of the American Arbitration Association is found in Rule 9, which indicates merely that parties may submit a submission agreement to an arbitrator setting forth a stipulated remedy. Rules effective

How is an arbitrator to fill the large gap left by the parties' incomplete agreement when they choose not to address directly remedial aspects of an arbitrator's power? A potential answer lies in "gap-filling" rules.[7] There is a long history among decision-makers of using gap-filling rules or the process of implication as a method of giving meaning to incomplete agreements.[8]

A Contract or a Code

A threshold question to be examined is whether a collective bargaining agreement is more than a mere contract. In 1960 the U.S. Supreme Court, relying on Dean Harry Shulman, concluded in *Steelworkers v. Warrior & Gulf Navigation Co.*[9] that a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate."[10] The description of a collective bargaining agreement as a "code" did not originate with the U.S. Supreme Court. It was part of the lore of arbitration that developed before World War II.[11] The U.S. Supreme Court also taught in *Warrior & Gulf* that "arbitration is the substitute for industrial strife."[12] The concept has been used to support the proposition that grievance arbitration serves as a substitute for work stoppages, in contrast with arbitration in commercial transactions serving as a substitute for litigation.[13]

The idea that a collective bargaining agreement is a "constitution" or a "code" has coalesced with the notion that grievance

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as of September 1, 1993. *But see* AAA Commercial Arbitration Rule 43.

It is an ancient notion that arbitral remedies are constrained by equitable boundaries. Aristotle urged parties to "prefer arbitration to litigation—for an arbitrator goes by the equity of the case, a judge by the strict law, and arbitration was invented with the express purpose of procuring full power for equity." Aristotle, Rhetoric, Book 1, ch. 13, §1374b (Rhys 1954).

See Cooper & Nolan, Labor Arbitration: A Course Book (West 1994). This useful source contains an excellent discussion of the role of law in arbitration. *Id.* at 61–84. Remedial issues in discipline cases are also covered. *Id.* at 127–36.

[7]"Gap-fillers" is a term shamelessly borrowed from scholarship on the Uniform Commercial Code.

[8]*See, e.g., Bergum v. Weber*, 288 P.2d 623 (1955); *Baetjer v. New England Alcohol Co.*, 68 N.E.2d 798 (1946).

[9]363 U.S. 574, 46 LRRM 2416 (1960).

[10]*Id.* at 578, 46 LRRM at 2418.

[11]*See* Brandeis, The Curse of Business, ed. Fraenkel (1934); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955).

[12]363 U.S. at 578, 46 LRRM at 2418.

[13]Seitz, *supra* note 1, at 195.

arbitration serves as a substitute for strikes by organized workers, and these two ideas support a crucial third prong in explaining North American labor arbitration, namely, that arbitrators enjoy considerable discretion in fashioning remedies as long as the remedy finds its essence in the parties' agreement. The U.S. Supreme Court described the idea as follows:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsman may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[14]

The ostensible link between democracy in the workplace and collective bargaining has pervaded North American philosophies about the nature of collective bargaining. In 1959, Professor Archibald Cox espoused the idea of a collective bargaining agreement as a code. It was not surprising that the concept surfaced in the *Steelworkers Trilogy* in 1960. Justice Douglas, in *Warrior & Gulf*, asserted that "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government."[15] But is a collective bargaining agreement really an example of self-government in any meaningful sense?

A hallmark of democratic government is civil equality among all its members. This is expressed in the idea of "one people." Once such a government is formed, it lacks the dualism inherent in bargaining between separate, independent entities. Collective bargaining, at its core, is not about "one people." It is about negotiation between separate entities. Self-government requires a

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[14] *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423, 2425 (1960).

[15] 363 U.S. at 581, 46 LRRM at 2419. *But see* Shaw, Industrial Law (Holder & Stoughton 1977), at 80–81 ("Treaties are express agreements and are a form of substitute legislation undertaken by states. They bear a close resemblance to contracts in a superficial sense in that the parties create binding obligations for themselves, but they have a nature of their own which reflects the character of the international system").

commonality of identity. Parties to a collective bargaining agreement have no such commonality of identity and view themselves as separate entities with generally different goals. When separate entities happen to share a common interest, they form a contract. Separate entities sharing a common purpose do not form a government. Contracts reflecting an understanding between separate entities do not represent a "code" or a "constitution" in anything but the most metaphoric sense.[16]

There is a fundamental dissimilarity between a democratic government and life under a collective bargaining agreement. At the same time, they are similar in that each provides a common internal mechanism for policing agreements. These enforcement mechanisms are of vital importance. Agreements without specific enforcement mechanisms are of little use and are no stronger than the economic or military might of the party who wishes to enforce them. This is true whether in a political or a collective bargaining context.

The legal philosopher H.L.A. Hart taught that law exists to protect voluntary cooperation among citizens and not to force compliance with imposed rules.[17] Terms of a collective bargaining agreement serve this purpose. But protection of voluntary cooperation requires enforcement. No one will agree to be bound to an agreement that another may violate with impunity. It is the similarity of using internal enforcement mechanisms to protect voluntary commitments that drives continued references by arbitrators to "industrial self-government" or to "industrial democracy" more than it is any real similarity between democratic government itself and collective bargaining relationships. Today, theories about the nature of grievance arbitration that are premised on equating collective bargaining with a "code" and with "industrial self-government" should be approached with healthy skepticism.[18] Even if the

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[16] *See* Mittenthal, *Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 35, 46 ("Arbitration, as practiced today, bears a far closer relationship to litigation than to collective bargaining"). *See also id.* at 49 ("The parties see the agreement largely as a contract rather than a code").

[17] Hart, The Concept of Law (Oxford Univ. Press 1961), at 93.

[18] Eva Robins, past president of the NAA, suggested that treatment of the collective bargaining agreement as a simple contract and not as a code was not necessarily a result of a conscious choice. ("Do we really want what some of the new presenters of cases are supplying—a litigation-type process—or have we simply fallen into it because a new element has been added to the process without such scrutiny?") Robins, *The Presidential Address: Threats to Arbitration*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1982), 1, 10.

collective bargaining agreement is theoretically conceptualized as a code, the practical reality is that most labor arbitrators today analyze it as a contract. They rely on contract theory and interpretive rules for their analysis. Such theory and rules are important in formulating arbitral remedies.

"Gap-Filling" Rules in Contract Theory

Rules of contract theory are dynamic and have evolved in ways that let them respond effectively to incomplete agreements. Try as they might to avoid doing so, negotiators of contracts generally, and collective bargaining agreements in particular, produce incomplete agreements. There are a number of reasons for such incompleteness. Foremost is the cost of contracting. The cost of detailing a complete statement in a collective bargaining agreement of an arbitrator's remedial powers would be greater than benefits gained from such an undertaking. Parties simply have performed a cost-benefit analysis and decided to leave a gap in their agreement.[19] After 50 years of bargaining experience and considerable literature on arbitral remedies, most parties have chosen to leave the topic in any detail out of their agreements.

There are other sources of incompleteness in collective bargaining agreements in addition to the cost of contracting. Judge Frank Easterbrook of the Seventh Circuit maintained that parties deliberately leave contractual gaps in order to be able to respond effectively at a later time to changed circumstances.[20] Negotiators knowingly leave a remedial gap with an expectation that it will be filled reasonably by an arbitrator. It is clear that there is an enforceable bargain and that the parties expect the remedial gap to be filled by an arbitrator resorting to the legal-social-economic context in which the agreement came into existence.

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[19] *See generally* Miller & Yandle, eds., Benefit-Cost Analyses of Social Regulation: Case Studies From the Council on Wage and Price Stability (1979).

[20] Easterbrook, *Arbitration, Contract, and Public Policy*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 65.

> Parties deliberately leave terms open-ended, knowing that others will fill them in. Supervisors and managers take the lead in completing the contract and usually have the last word; the arbitration clause gives the union an option to call on a different decider, one who, because of disinterest in the outcome, may be more faithful to the original plan. Changing the person with the final say does not diminish the parties' joint authority to specify an outcome.

Id. at 71 (footnote omitted).

Judge Easterbrook suggested, as another source of contractual incompleteness, the realization of the parties that they have limited knowledge about an appropriate remedy, and they recognize this fact. What negotiators seek is not necessarily the best drafted collective bargaining agreement but, more importantly, an agreement that is acceptable to both sides. For over a half century, it has been acceptable to the parties to leave a large gap in their labor contract with regard to an arbitrator's remedial powers. Beyond routinely stating that an arbitrator should not modify or add to the agreement, negotiators of collective bargaining agreements have relied on arbitrators using reasonable gap-filling norms to fashion an appropriate remedy. These "gap-fillers" are norms and standards embedded in arbitral jurisprudence, stated in thousands of arbitral decisions, and set forth in the expectations, customs, and practices of particular industries.[21]

A fundamental purpose of contract theory is to protect reasonable expectations of parties when they make promises to each other. In the course of promise-making, parties develop legitimate expectations. It is the role of an arbitrator to enforce those commitments. One such expectation is that arbitrators will draw on a developed arbitral jurisprudence to fill gaps in the parties' agreement, including the remedial gap. There is, however, confusion within arbitral jurisprudence regarding the use of the law of the land to provide guidance as a gap-filler for fashioning an appropriate remedy.[22]

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[21] *See* Abrams, *The Nature of the Arbitral Process*, 14 U.C. Davis L. Rev. 551, 566 (1981) ("By negotiating a collective bargaining agreement, the parties adopt this 'common law' gloss [arbitral jurisprudence] for the later interpretation of their agreement by an arbitrator"); International Harvester Co., 9 LA 894 (1947). Arbitrator Willard Wirtz stated:

> The conclusion that no money arbitration award is proper regarding contract provisions which do not specifically provide for it would have two effects. The first would be the substitution of some other method of settlement in the place of arbitration. The second would be the cluttering up of the contract with a lot of "liquidated damage" provisions which would invite more trouble than they could ever be expected to prevent. It will be unfortunate if the collective bargaining agreements develop along the lines of the revenue laws, with provision necessarily being made for every little hairline question which may arise between adverse parties pressing conflicting interests. They will lose their effectiveness when they become so involved that laymen cannot follow or understand them. It would contribute dangerously to that tendency if it were required that every contract clause had to include a damages provision.

Id. at 896.

[22] *See* Zack & Bloch, Labor Agreement in Negotiation and Arbitration, 2nd ed. (BNA Books 1996), at 97–98 ("If it is not clear that the parties intended that external law resolve the matter, the arbitrator should assume they did not so intend"); Zack, A Handbook for Grievance Arbitration (Lexington Books 1982), at 170 ("Although the parties' collective bargaining agreement may be subject to the laws of the community in which it was negotiated, it has been generally accepted that the arbitrator's decision making responsibility is limited to the interpretation and application of the contract terms without

A theme of this paper is that the law of the land should provide a baseline source of guidance for fashioning appropriate arbitral remedies, absent contractual instructions to the contrary. A labor arbitrator's role is to fill the remedial gap in the agreement by awarding a remedy the parties themselves would have contracted for if they had negotiated regarding the precise problem before the arbitrator.[23] Logic dictates that, had the parties faced a problem in bargaining, a fundamental source of guidance would have been standards of the law. Accordingly, an arbitrator ought to assess remedial needs of the parties against the backdrop of the legal context in which the agreement came into existence and should pour content into the remedial gap with regard to appropriate relief by fashioning a contractual remedy using legal norms as a source of instruction.

Fashioning remedies within the context of legal, social, and economic norms is more faithful to reasonable expectations of the parties than ignoring contextualization. The parties gave birth to their agreement within the context of multifaceted legal standards, and using the law as a baseline source of guidance in fashioning an appropriate remedy helps an arbitrator better understand the parties' contractual intent. By taking into account the legal context in which the parties created their agreement, an arbitrator comes closer to understanding expectations of the parties with regard to fashioning an appropriate remedy. The agreement emerged from the parties' legal-economic relationship, and arbitral remedies should be fashioned within that same context. The law is part of the social context that gave rise to the parties' agreement and, unless

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regard for the external law"); Feller, *Arbitration and the External Law Revisited*, 37 St. Louis U. L.J. 973, 980 (1993) ("Labor arbitrators should, in their own interest, stay away from external law questions"); *But see* Mittenthal & Bloch, *Arbitral Implications: Hearing the Sounds of Silence*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 65, 77 ("The prevailing view, particularly in the private sector, is that laws are not part of the contract . . ."); Hill & Sinicropi, Remedies in Arbitration, 2nd ed. (BNA Books 1991), at 91 ("When the contract is silent on incorporation of external law in formulating awards and remedies, most arbitrators, while not announcing that their decision is based upon legal doctrine, will not ignore the mandate of law, but rather will issue an award consistent with the law").

[23]Murphy, *supra* note 5, at 223–24 ("[T]he question 'What was the intention of the parties?' can more accurately be restated 'If the parties had foreseen this specific problem, what would their intention have been?'"). *See also* Mittenthal & Bloch, *supra* note 22, at 78 ("The remedy power is implied to preserve the parties' bargain, to make the arbitration process meaningful. All of this is well-accepted today").

contractually excluded, should be used as an interpretive tool to help inject content into an appropriate remedy.[24]

Arbitrator as "Contract Reader"

Using the law to inform an arbitrator about an appropriate remedy is an idea that must be examined within the context of the "contract reader" debate among arbitrators of the last two decades. In 1977, Professor Theodore J. St. Antoine asserted that labor arbitrators are "the parties' official 'reader' of the contract."[25] Professor St. Antoine reasoned that, as the parties' bargained-for, official reader, an arbitrator's award should enjoy judicial deference because the parties agreed to accept the award as final. Professor St. Antoine rejected Professor Feller's assertion that the deference extended to arbitration awards by courts "derives from a not always explicitly stated recognition that arbitration is not a substitute for judicial adjudication, but part of a system of industrial self-government."[26] According to Professor St. Antoine:

> The real explanation for the courts' deference to arbitral awards is not to be found in some unique element of the collective bargaining process. The real explanation is simpler, more profound, and more conventional. Courts will ordinarily treat an arbitral award as "final and binding" because the parties have *agreed* on such treatment. This is their *contract.* Like other contracts, that is the measure of their legal expectations. With certain well-recognized limitations, courts are in the business of enforcing contracts.[27]

Although clear about the fact that judicial enforcement of arbitration awards is a straightforward application of contract law, Professor St. Antoine also described an arbitrator as the parties' "joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omis-

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[24]Shulman, *supra* note 11, at 1001 ("Does it not naturally follow, then, that the law which provides remedies for breaches of contract generally should also provide remedies for breaches of labor agreements?").

[25]*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. Dennis & Somers (BNA Books 1978), 29, 34. *See also* Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration: 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), 97.

[26]St. Antoine, at 32 (quoting Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), 97).

[27]*Id.* at 32–33.

sions of the initial agreement."[28] At this crucial juncture, Professor St. Antoine's description heralded more than a simple application of contract law. He described a collective bargaining agreement as something that is in the process of "becoming," rather than something already completely in existence. He proclaimed arbitrators as bargain-makers in addition to being bargain-finders. It begs the question regarding what an arbitrator is reading as the "contract reader" if an arbitrator is "striking supplemental bargains" for the parties, rather than merely interpreting an already completely negotiated bargain.

Perhaps because Professor St. Antoine's description of an arbitrator as a contract reader turned out to be much more than an interpreter and enforcer of an existing contract, Professor Feller later was able not only to agree with Professor St. Antoine but also was able to use the notion of an arbitrator as contract reader to argue that remedial powers of an arbitrator are severely restricted. According to Professor Feller, the description of an arbitrator as contract reader supports the idea that an arbitrator has authority only to say "what the agreement means."[29] He argued that "an arbitrator's sole function in deciding what remedy should be given . . . is to determine what the agreement says about remedies."[30] Professor Feller maintained that, in fashioning a remedy, an arbitrator "is performing a quite different function than a court is performing when it determines that remedies for breach of contract should be awarded."[31]

There should be little dispute about the fact that an arbitral remedy must be rooted in the collective bargaining agreement, rather than solely in some external standard of law. It is an accepted tenet that an enforceable arbitration award must draw its essence from the collective bargaining agreement. But most first-year law students now recognize that collective bargaining agreements state virtually nothing about remedies, apart from instructing an arbitrator not to change or add to the parties' agreement. The "essence test" provides lots of room for arbitral discretion, and the parties have realized that fact for over half a century. As Professor Feller

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[28] *Id.* at 30.

[29] Feller, *Remedies: New and Old Problems: I. Remedies in Arbitration: Old Problems Revisited*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1982), 109, 110.

[30] *Id.* at 110–11.

[31] *Id.* at 111.

recognized, a general arbitral authority to right wrongs and to do justice implied from the collective bargaining agreement itself made "contract reading" an insubstantial limitation on arbitral authority. As a consequence, a second proposition was necessary if an arbitrator's remedial power were to be meaningfully distinguished from a civil court resolving an ordinary breach of contract.

Professor Feller's second proposition was that, "unless the contrary is stated in the agreement . . . the primary authority implicitly granted to the arbitrator is the authority to award specific performance of the provisions of the agreement."[32] Professor Feller found the basis for this remedial limitation in the asserted distinction between commercial contracts and collective bargaining agreements. It is a standard principle of contract theory that an ordinary contract can be violated with impunity if a breacher is willing to pay damages. Such a result, however, is uniquely not the expectation of parties to a collective bargaining agreement, according to Professor Feller. "The parties intend that the employer have an obligation to perform in accordance with the contract, not the option of performing or paying damages."[33] As a contract reader, an arbitrator is expected to determine the parties' intent and to require that the agreement be performed, that is, not order a payment of damages but specifically to implement promises of the parties. Hence, he concluded that arbitrators do little else but order the remedy of specific performance.

The impossibility of ordering a party not to violate the agreement after the fact was not lost on Professor Feller. In fact, that potential liability became an asset under Professor Feller's theory of arbitral remedies because it explained the fact that arbitrators traditionally have granted awards looking suspiciously like damages for breach of contract, more than like specific performance of a contractual provision. But as Professor Feller saw it, those money awards by arbitrators have not constituted "damages" for breach of contract. Such money awards have a different function. They fill a time gap. Instead of being damages for breach of contract, Professor Feller concluded, money awards of arbitrators merely compensated a person for the impossibility of instantaneous relief. As he described it:

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[32] *Id.* at 116.
[33] *Id.* at 117.

> There must always be a time gap between the uncorrected event upon which the grievance is based and the arbitrator's determination that the event constituted a failure of the employer to comply with the rules. The usual function of a money award [by an arbitrator] is precisely to fill that time gap.[34]

According to Professor Feller, the time gap is filled when an arbitrator grants only what the collective bargaining agreement itself would have granted had instantaneous relief been available. Accordingly, when an arbitrator reinstates a wrongfully discharged grievant and grants back pay, a grievant receives what he or she should have been paid if it had been known at the time of the discharge that the employer was acting wrongly.

Professor Feller's model is an elegant, wonderfully imaginative construction. It, however, is doubtful that parties to the most mundane commercial contract do not intend that the other party perform the agreement rather than breach it. The fact that the law normally will not insist on specific performance where money damages will suffice to protect expectations of an injured party does not mean the parties do not intend that the contract be performed rather than breached. Intentions of parties to a collective bargaining agreement are not much different from intentions of parties to most contracts when it comes to an expectation of performance. Parties to contracts expressly bargain for performance. It is this promise that forms the consideration for the contract. The "perform or breach" dichotomy is a consequence of enforcement by a third party, not a separate part of a special kind of contract.

Parties to a collective bargaining agreement generally choose to resolve disputes about contractual compliance by submitting complaints to an arbitrator. An arbitrator has a legal duty to draw the essence of any award from the parties' collective bargaining agreement. Enforcement by courts, representing the collective power of society, is a necessary component of any voluntary agreement. Courts protect voluntary relationships by assuring that a bargained-for exchange cannot be ignored with impunity, whether that relationship be between individual citizens or an employer and a union. Without such assurance of judicial enforcement, all contractual relationships would depend on a willingness to use force in order to accomplish enforcement. Collective bargaining

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[34] *Id.* at 117–18.

agreements and strikes are directly related but no more so than promises and fistfights.

It is the bargain and the certainty of its enforcement that serve as the substitute for the strike. When a collective bargaining agreement contains an arbitration clause, it serves to avoid the process of litigation to enforce the bargain much more than it serves as a substitute for the strike. When a grievance is submitted to an arbitrator, it invariably takes the form of a two-part question, namely: (1) Was the agreement violated? and (2) If so, what is the appropriate remedy? Particular circumstances of an agreement inform any inquiry into the first question, as they do in any contractual dispute. It is the context and implications of the conflict that are important. "Implications arise from existing but unstated realities of the world in which the contracting parties live and the circumstances that surround the making of their bargain."[35] While enormous study is necessary to understand the unique context of collective bargaining, the interpretation of such agreements within their legal-social-economic context is not at all revolutionary. In finding a violation of a collective bargaining agreement, an arbitrator's primary task is little different from that of a civil judge who finds a violation of a commercial contract. It is the purpose and context of the two agreements that vary so greatly.

Accepting the contractual nature of a collective bargaining agreement, however, does not dispose of questions about an arbitrator's power to fashion an appropriate remedy. It is clear that an arbitrator has no authority not granted by the parties themselves. It is equally certain that an arbitrator has authority to fashion a remedy consistent with any contractual restrictions. But there generally is silence in the parties' agreement regarding specific remedies to be adopted by an arbitrator. Silence or not, the collective bargaining agreement itself provides the basis for an arbitrator's remedy. Recognition of such contractual silence led to Professor Feller's "third proposition regarding arbitral remedies:

> The power to order specific performance, retroactively, if necessary, which the parties may be assumed to have vested in the arbitrator is ordinarily limited to the payment of sums calculated in terms of the collective bargaining agreement, not by measures external to it.[36]

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[35]Mittenthal & Bloch, *supra* note 22, at 66 (footnote omitted).
[36]Feller, *supra* note 29, at 119.

Professor Feller's proposition flowed directly from his premise that arbitrators do not award "damages" for breach of contract. To the extent his "codal" assumptions about the nature of collective bargaining agreements are not accepted, the validity of his third proposition is diminished. Even assuming that only internal measurements are to be used, there is, in the third proposition, little advancement toward an understanding of the appropriate remedy in any particular case.

Ultimately, Professor Feller acknowledged that an arbitrator's remedial power generally must be implied from the context in which an agreement was formed and not merely from express terms in the agreement. Limits on an arbitrator's remedial power are no different from limits on interpretive authority. The limitation is found in a proper construction of the parties' agreement. In other words, Professor Feller taught that an award must draw its essence from the collective bargaining agreement.

This, however, is a circular discussion. That is, labor arbitrators draw their authority from the parties' agreement. If an agreement states explicitly that arbitrators shall have the power to make grievants whole for any breach of the agreement, there can be no argument other than about what is required for a make-whole remedy. Almost universally, however, agreements say little about arbitral remedies. Accordingly, an arbitrator either must forgo a remedy or infer one from the agreement. Arbitrators almost never forgo remedies. It, therefore, is the legitimacy of an arbitrator's inferences that are at issue. Whether one is a "contract reader" or a "philosopher king or queen," it is the "sounds of silence" in an agreement that provide the interesting universe of exploration. In listening to the "sounds of silence," Mittenthal and Bloch argued that implications must be drawn from the agreement in order to preserve the bargain of the parties and to protect their reasonable expectations.[37] It is the law of the land that provides the backdrop for such inferences and implications.

Role of the Law as a "Gap-Filler"

What is the role of the law of the land in fashioning an appropriate remedy? Any discussion of make-whole remedies must attempt

[37]Mittenthal & Bloch, *supra* note 22, at 67.

to come to terms with the role of law in arbitration. Opinions about the use of the law of the land to inform arbitration awards vary widely, depending on whether there is a belief in grievance arbitration as an integral part of "industrial democracy" and a belief in arbitration as a substitute for the strike or whether one views grievance arbitration as a private, freely chosen way of enforcing a contractual relationship. Those who hold the "self-government" or "substitute for a strike" view of the process tend to reject using the law of the land for any substantial purpose in grievance arbitration, unless the parties expressly mandate that a decision be rendered on a legal basis. Those who view grievance arbitration as an example of private ordering and as a voluntarily chosen method of contract enforcement seem more drawn to using the law of the land whenever it provides a useful source of interpretive guidance or when, by a process of contractual implication, it has become a part of the collective bargaining agreement itself.[38]

Robert Howlett proposed the following categories for an arbitrator's use of the law of the land:

1. When, in the private sector, parties submit a legal issue to an arbitrator;
2. When the *Spielberg/Collyer* doctrine is used;[39]
3. When, in the nonfederal public sector, there is a risk of vacatur if applicable law is ignored;
4. When, in the federal sector, there is an obligation to consider applicable law;
5. When ignoring the law will produce an award contrary to law;
6. When the law is "necessary" to interpreting a contractual provision; and
7. Finally, "[t]here is disagreement on the part of those who have addressed the subject as to whether an arbitrator should apply the law if it cannot be 'tied' in some way to the contract language."[40]

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[38]*See* Winston, ed., Principles of Social Order: Collected Essays of Lon Fuller (Duke Univ. Press 1981); Feller, *supra* note 22.

[39]The *Spielberg/Collyer* doctrine refers to the degree of deference to be given an arbitrator's award by the National Labor Relations Board (NLRB) when a grievance involves conduct claimed to be an unfair labor practice within the jurisdiction of the NLRB. *Collyer Insulated Wire,* 192 NLRB 837, 77 LRRM 193 (1971); *Spielberg Mfg. Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955).

[40]Howlett, *Why Arbitrators Apply External Law,* in Labor Arbitration: A Practical Guide for Advocates, eds. Zimney, Dolson & Barreca (BNA Books 1990), 257, 286.

The first four categories proposed by Howlett should present no difficulty because the law was made applicable in a dispute by operation of the law itself or by the will of the parties. The fifth category is not a major concern because few collective bargaining agreements are so clearly written as to require an interpretation contrary to law. Even if they were, it is highly unlikely that the parties would insist on enforcing a contractual provision and, in the process, risk breaking the law. It is the last two categories that generate most disagreements, and they are not unrelated issues.

There should not be much debate about whether the law needs to be "tied" to the parties' collective bargaining agreement in order to use the law as a source of guidance. It is the means by which it is "tied" to the agreement that generates strong debate. Arbitrators generally agree that drawing the essence of an arbitration award from a collective bargaining agreement precludes simply finding that a party's action was contrary to law, without some link to the parties' agreement. What this means is that the pivotal area of disagreement centers on when is it "necessary" to apply the law in order to interpret the parties' agreement.

The most common way the law becomes "necessary" to the interpretation of a collective bargaining agreement occurs when it is determined that the parties' agreement "incorporates" a particular statute or legal standard. Professor James Oldham recently examined the question of how the law may be "incorporated" into collective bargaining agreements. He proposed six ways, namely (1) surprise, (2) global, (3) particular, (4) deleter, (5) conformer, and (6) status quo.[41]

Of Professor Oldham's categories, the most controversial is the one he described as "surprise" incorporation. The other categories, more or less, express an indication by the parties that the law has been considered in formulating their agreement. For example, consider the "global" and "particular" provisions in an agreement that declare that parties will conform to all applicable laws or to a particular statute or legal standard. This approach would incorporate law either by global or particular incorporation. Similarly, consider the "deleter" category. A provision that expressly

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[41]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. Gruenberg (BNA Books 1991), 23, 32.

rendered unenforceable any contractual provision conflicting with the law would constitute a "deleter." A clause requiring that the parties comply with the law would incorporate the law as a "conformer" contractual provision. A "status quo" incorporation would involve a promise by the parties that they not only would obey existing law but also would not try to change it. These categories generally would not present much of a problem to most arbitrators. Even a strict contract reader probably would find it necessary to interpret law referenced by such categories in the parties' agreement.

The category labeled "surprise" incorporation is more problematic. By surprise, Professor Oldham meant cases in which an arbitrator applied the law, even though there was no express reference to such a law in the parties' agreement. In other words, surprise incorporation occurs when an arbitrator discovers a statute or legal principle in a general provision of the parties' agreement that itself makes no mention whatever of the law. Declaring himself a "traditionalist," Professor Oldham rejected this type of "wholesale incorporation through openended language, such as just cause."[42]

The problem of incorporating the law into an agreement is especially important in cases involving employment discrimination and merits special attention to the parties' expectations. Employment discrimination cases demonstrate the wide range of interests and rights that can be implicated in grievance arbitration. If parties choose to incorporate all or some of employment discrimination law, how is an arbitrator to fashion an appropriate remedy? If arbitral remedies are to be only those expressed or directly implied in the collective bargaining agreement, remedies available to an individual may be truncated. It would seem incongruous to find that parties incorporated the language of a statute but not the remedies called for by that statute. Those who reject arbitral make-whole remedies like those called for in most employment discrimination statutes rely to a great extent on the fact that such remedies traditionally have not been available in grievance arbitration. That tradition, however, developed largely before the enactment of most modern employment discrimination statutes. The tradition also took root prior to the trend of including nondiscrimination

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[42] *Id.*

provisions in collective bargaining agreements. Are new traditions emerging?

Whatever else they may be, collective bargaining agreements are employment contracts. The agreement memorializes promises of the parties to each other. When an employer promises that it will not discharge except for just cause, management has limited its right to terminate at will. When an employer subsequently breaches the promise, an employee has been deprived of the benefit of the bargain. Whether by arbitration or otherwise, such an individual should be able to enforce promises made. Under the Anglo-American system of jurisprudence, an individual is entitled to be made whole for harm resulting from a contract violation that was foreseeable at the time of contracting.

Those arguing that labor arbitrators are not vested with authority to award statutory make-whole remedies point, for example, to the failure of arbitrators traditionally to grant interest on back-pay awards and to the absence of consequential damages in arbitration awards. Remedies during the past four to five decades, it is argued, made clear that such full make-whole remedies are not within the contemplation of the parties. Such a view, however, fails to take into account substantial changes that have occurred in collective bargaining with respect to employment discrimination. Using a history of limited awards when employees enjoyed limited rights fails to address the propriety of emerging remedies in an era when employment rights are expanding both in collective bargaining and in society at large.[43]

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[43] *See* Bornstein, *Arbitration of Sexual Harassment*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 109, 111–12 (emphasis added), where he eloquently called for using the law of the land (for example, "For three reasons it is appropriate (and, I believe, necessary) to incorporate the federal law's definition and concept of sexual harassment into the interpretation of collective bargaining agreements. I emphasize that arbitrators should incorporate only Title VII's definition and concept of sexual harassment, *not Title VII remedies*"). *See also* Anita Christine Knowlton's comments at the 1994 midyear meeting in Boston, Mass., of the National Academy of Arbitrators ("There are serious questions about an arbitrator's authority to order many of these alternative remedies," that involve rehabilitation in sexual harassment cases); Stallworth & Malin, *Conflicts Arising Out of Work Force Diversity*, in Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 104, 123 ("In resolving grievances raising statutory-related issues, arbitrators should broaden their focus to encompass external law"); Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17, 56 (1994) ("A national labor policy so narrowly conceived that it cannot embrace the interests of sexually harassed women is not worthy of the role historically played by labor in the struggle for justice").

Those arbitrators who craft awards with an ear for the "sounds of silence" long since have heard sounds of increased employee expectations when it comes to protection from discrimination in the workplace. Many collective bargaining agreements now contain "global" employment discrimination clauses. They incorporate particular statutes, such as Title VII, by repeating precise language from statutes in the collective bargaining agreement itself. In more and more submissions, advocates are expressly arguing statutory law before arbitrators because they are aware of an employee's right to redress the wrong directly under the statutory process as well as through grievance arbitration. In such circumstances, can it really be said that the kinds of harm employment discrimination statutes strive to prevent are no longer within the contemplation of the parties at the time of negotiating a collective bargaining agreement?

In view of an employee's right to bring an action in a court of law or administrative agency, are not the most foreseeable remedies those allowed by a statute itself? For instance, Title VII, as amended by the Civil Rights Act of 1991, allows recovery of past and future pecuniary losses as well as consequential and punitive damages. When an employer bargains for a provision in a collective bargaining agreement that incorporates the same rights as those protected under Title VII and does not expressly provide for a remedy if the contractual provision is violated, is it not more logical to assume that an employer intended to bear the full risk of compliance with the statute? When an arbitrator subsequently finds a contractual violation and considers an appropriate remedy, should the decision give effect to the parties' implicit intent by awarding remedies that are within the scope of the statute as proven at the arbitration hearing?

This is not meant to imply that, for example, Title VII and all its remedial provisions are a part of all collective bargaining agreements. Context is supreme. The context in which collective bargaining agreements exist now includes a wide range of employment discrimination laws. Many agreements acknowledge an employer's responsibility to obey laws of the land. From that fact, is it reasonable to fill the "remedy" gap in the parties' agreement by surmising that the risk of liability under relevant statutes was within the contemplation of the parties at the time of contracting? In the absence of a provision that shifts some risk to employees by expressly limiting their ability to recover actual damages, is it reasonable to conclude that the full range of consequences stated

in a statute was within the contemplation of the parties and that acceptance of such a liability becomes part of the bargained-for exchange between the parties?

If there were a violation of a provision that paralleled statutory rights, should not an arbitrator fill the remedial gap in the agreement by reference to the law? An arbitrator's award, informed by remedies available under a violated statute, would, therefore, not only draw its essence from the collective bargaining agreement but also would preserve and protect the parties' bargain by enforcing the implicit intent of the parties. Many employment discrimination statutes are intended to make whole victims of discrimination for harm caused by discriminatory acts. When an employer's discriminatory conduct violates a contractual provision in the parties' agreement, should not statutory make-whole provisions become an important norm in determining what should be an appropriate remedy? When a contested act is the kind that would subject an employer to liability under statutory law and there is no contractual provision enabling an employer to avoid statutory liability under the parties' collective bargaining agreement, is it reasonable to conclude that the parties intended for an arbitrator routinely to consult statutory remedies as one source of guidance in determining an appropriate remedy?[44] If it is a make-whole remedy, what does that mean?

The Meaning of a Make-Whole Remedy

The Matter of Undercompensation

Make-whole remedies in labor arbitration awards implicate legal principles, and the gap-filler concept shows how the law of the land enters the contractual universe of an arbitrator's award. If the law is to be used as a way of helping to inject content into an arbitrator's

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[44] *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974), where the Supreme Court held:

> If an arbitral decision is based "solely [on] the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced. . . . Thus, the arbitrator has authority to resolve only questions of contractual right, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

Id. at 53–54, 7 FEP Cases at 87 (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423, 2425 (1960)).

power to fashion an appropriate remedy, what should it mean when an arbitrator concludes that a person must be made whole as a result of contractual violations? There is considerable ambiguity in the term make whole, but it is clear that it almost never means actually making a person whole as a result of harm suffered from a contractual violation. Make whole rarely, if ever, means make whole. As a general rule, contracts in the United States are underenforced.[45] The theme of undercompensation runs deep in American law.

There are numerous limitations on contractual recovery that virtually insure undercompensation. First, any harm must be reasonably foreseeable at the time the parties made their agreement, and a party must have been given notice of any special injuries that might result from violating the agreement. Second, harm must be proven with reasonable certainty. Third, as a general rule, relief for a contractual violation should not include payment for emotional injury. Fourth, any relief should exclude damages that could have been avoided with reasonable effort by the injured party. Finally, recovery generally does not include some significant costs, such as attorney fees.

The first extensive American treatise on remedies taught as a general rule that, "in ordinary cases of contract, the remuneration must be less" than the "injury sustained."[46] Despite talk of protecting the expectations of the parties, "American contract remedies are limited and reflect a fear of awarding too much."[47] As a general rule, American remedial objectives are implemented by erring on the side of undercompensation, and especially so in contract actions.

Another aspect of the concept of make-whole remedies is the notion that relief is based on any actual loss to the injured party. The focus generally is not on gains made by the party who violated the agreement. Nor should relief to the injured party exceed any loss. The objective, in theory, is full recovery for an individual's loss, but nothing more. "Windfall" recovery is disfavored.

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[45] *See* Less, *Injury, Ignorance and Spite—The Dynamics of Collective Coercion*, 80 Yale L.J. 1, 5 (1970).

[46] Sedwick, *A Treatise on the Measure of Damages*, 1st ed. (1847), 38, 44.

[47] Macauley, *An Empirical View of Contract*, 1985 Wis. L. Rev. 465, 469.

Make Whole in Tort Theory

Different topical areas of the law treat make-whole remedies differently. Remedies in tort, contract, and labor law do not necessarily use the term make whole in the same way, although distinctions are almost never made in decisions by arbitrators or courts. To determine how a decision maker might be using the term, it may be helpful to focus on goals and objectives of providing a remedy in different types of cases. In this way, it may be possible to detect the source of an arbitrator's make-whole concept.

Remedial relief in tort theory is negligence-based. Tort remedies, as a general rule, carry with them a strong interest in deterrence.[48] In tort remedies, there is an effort to find the proximate cause of an injury and to restore an individual to his or her previous condition. Part of the relief, however, is intended to express social values with regard to the fact that a tortfeasor violated some cultural norm, and others are to be deterred from doing so by restoring the injured party to his or her former condition. There is a punitive aspect to the concept of make whole in tort theory.

Make Whole in Labor Law

The concept of make-whole remedies in labor law appears to draw its meaning more from contract principles than from tort theory. It is in the middle between contract and tort theories of make whole. In *Republic Steel Corp.*,[49] the U.S. Supreme Court reviewed the propriety of a remedy from the National Labor Relations Board (NLRB) which required the employer to reinstate a group of employees with back pay. The Court stated:

> The [National Labor Relations] Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community issues as distinguished from the protection and compensation of employees.[50]

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[48] *See* Posner, Economic Analysis of Law, 2nd ed. (1977), where:
The association of negligence with purely compensatory damages has prompted the erroneous impression that liability from negligence is intended solely as a device for compensation. Its economic function is different; it is to deter uneconomical accidents. As it happens, the right amount of deterrent is produced by compelling negligent injurers to make good the victim's losses.
Id. at 142–43.

[49] *Republic Steel Corp. v. NLRB*, 311 U.S. 77, 7 LRRM 287 (1940). *See also Carpenters Local 60 v. NLRB (Mechanical Handling Sys.)*, 365 U.S. 651, 47 LRRM 2900 (1961).

[50] 311 U.S. at 79, 7 LRRM at 289.

The District of Columbia Circuit Court supported this idea and suggested that making an employee whole by providing reinstatement and back pay is a statutory creation with a public focus that came with the enactment of the National Labor Relations Act, and the U.S. Supreme Court has concurred, stating:

> The legitimacy of back pay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute and the purpose of the remedy is clear. 'A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employee whole for losses suffered on account of an unfair labor practice.'[51]

There is a remedial, not punitive, objective that should be reflected in remedies to enforce labor legislation, and arbitral awards premised on labor laws should not be immune from such values.

Remedial measures of the NLRB must effectuate policies of the NLRA. For example, the court might require an employer to discontinue an unfair labor practice or to recognize an employee organization or to cease and desist from a particular conduct. The Board has been clear about the fact that the Board has authority to make whole employees who have been harmed in violation of relevant legislation. The focus of such make-whole orders is on restoring the status quo ante. The Board tries to restore the situation to that which would have existed had there been no statutory violation. This is close to a protection of the expectation interest under contract theory.

While courts have given the NLRB flexibility in fashioning remedies based on administrative experience, any make-whole remedy with a hint of oppressiveness is generally stricken as one not calculated to effectuate policies of labor legislation. The tension between remedial and punitive remedies from the Board often surfaces when there is a need to calculate deductions from back pay. The Board inevitably wants to be certain that an individual is made whole but not made more than whole. The concept of make-whole remedies used by the Board is premised on restoration of the status quo and is restricted to actual losses in order to avoid

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[51] *See NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307 (1972); *NLRB v. J.H. Rutter-Rex Manufacturing Co., Inc.*, 396 U.S. 258, 263 (1969). There is also a "make-whole" purpose in Title VII which is modeled on the "make-whole" concept inherent in the National Labor Relations Act. *See, e.g., Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975).

becoming punitive. The objective of such remedies is to restrain statutory violation and to avoid consequences of violations where misconduct is of the sort to thwart purposes of labor legislation. There are special purposes in the concept of make-whole remedies drawn from labor law that are not inherent in the contractual role of an arbitrator.

Make Whole in Contract Theory

Contract remedies seek to place an injured party in the position an individual would have been in if the contract had been performed. There is an effort to give a person the benefit of the bargain. The remedial goal of contract theory is to compensate an injured party on the basis of what Professor Lon Fuller first described as the "expectation" interest. If that cannot be done, an effort will be made to provide relief on the basis of expenses incurred in seeking to perform the contract or to protect the "reliance" interest. Should there be restitutionary relief, it would not focus on injury to the party suffering harm but, rather, on requiring the wrongdoing party to disgorge any benefits received from violating the contract.

Theoretically, deterring nonperformance of a contract is not a goal of contract remedies. The broad "proximate cause" rule of tort remedies is considerably narrowed by the scope of damages for violation of a contract. An underlying policy of contract remedies is to encourage promise-making, and this is done by reducing the liability of the risk-taker in an agreement. Implicit in contract remedies is the goal of reducing damages slightly below the level an injured party actually suffered.[52] There is a compensatory, not a punitive, theme in contract remedies.

Make Whole in Arbitration

The concept of make-whole remedies in labor arbitration is rooted more in contract theory than in other uses of the term. There is an arbitral interest in giving an injured party the benefit of the bargain or at least in remedying any loss caused by reasonable reliance on an agreement. The primary objective is to place an

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[52] *See* Restatement (Second) of Contracts, §347 (1981); Dobbs, Handbook on the Law of Remedies, §3.8 (1973), at 194; Macauley, *supra* note 47, at 469–70.

individual in the position that would have been held if the agreement had been performed or, alternatively, returning to the original position of the wronged party. The goal is to compensate the injured grievant for disappointed expectations or detrimental reliance. The objective is not to impose punishment on a wrongdoer or to deter others from similar wrongdoing.[53] This is theoretically different from specific performance.

What a remedy of specific performance does is to require literal performance of a promise. A remedy is "specific" when it gives a party the precise performance promised in an agreement. A remedy is "substitutional" when it gives a performance in substitution for that which was promised. Remedies in arbitration often accomplish both goals, but they routinely go beyond specific performance.

For example, in *Ingalls Shipbuilding Corp.*,[54] an arbitrator reinstated an employee and ordered the employer to provide back pay. That might appear to be nothing more than specific performance, but the arbitrator also ordered the employer to reimburse the employee for reasonable expenses "involved in locating and working at" jobs held since the wrongful discharge. Likewise, consider *O'Keeffe's Aluminum Products*,[55] where an arbitrator ordered, as part of an individual's make-whole remedy, reimbursement for expenses incurred in securing alternative insurance coverage. Specific performance would have given the individual only the precise coverage provided by the employer, but the arbitrator protected the individual's reliance interest. Finally, consider *Stone Container Corp.*,[56] where an arbitrator ordered a company to reimburse an employee for the cost of a drug test he decided to undergo after management suspended him based on an erroneous report from its own testing laboratory. In no sense could this be described merely as specific performance. The arbitrator protected the grievant's reliance interest.[57] Arbitrators routinely move beyond specific performance in their remedies.

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[53] *See generally* 5 Corbin 1019, ch. 10.

[54] 37 LA 953 (Murphy 1961).

[55] 92 LA 215 (Koven 1989).

[56] *Stone Container Corp.*, 91 LA 1186 (Ross 1988).

[57] For those enjoying an inordinate interest in history, the first published arbitration decision to use the term make whole was decided by Whitley F. McCoy in *Memphis Publishing Co.*, 2 LA 529 (1943). The second case was another Whitley McCoy decision, *Reynolds Alloys Co.*, 2 LA 515 (1945). The first U.S. court case to use the term make whole surfaced in 1831. *Edward King*, 1831 WL 56 (Ohio). The first U.S. Supreme Court case to mention the make-whole concept came in 1860. *Louisville Mfg. Co.*, 51 U.S. 861 (1850).

Some Specific Examples Giving Definition to Make-Whole Remedies

Attorney Fees

Despite a ubiquitous use of the term make whole in arbitration remedies, considerable debate continues regarding boundaries of make-whole relief.[58] Since a collective bargaining agreement is more a contract than a code, the guiding light should be the test of foreseeability. For almost a century and a half, a theme in Anglo-American contract remedies has been that a party that violates an agreement is not held responsible for damages that were not reasonably foreseeable at the time the parties negotiated their agreement.[59] It is the "foreseeability" principle as much as anything that explains the decision of arbitrators generally not to award attorney fees, punitive damages, and front pay. Such recovery has not been thought to flow naturally from violating a collective bargaining agreement nor to be the anticipated result of a violation. Such relief has not been in the mutual contemplation of the parties at the time they negotiated their agreement. These are not norms embedded in their expectations.

The failure of labor arbitrators to fill the remedial gap in agreements by awarding attorney fees as a part of a make-whole remedy is not at all surprising. Attorney fees along with other transaction costs, such as taking off the day from a new job to be present at an arbitration hearing, are not customary gap-fillers in arbitral jurisprudence. Awarding such transactional costs does not represent a normative value among the parties after over 60 years of labor arbitration history. Such a norm has not become a part of their expectations and, generally, would not provide a gap-filler for injecting content into a silent remedial provision.

Awarding attorney fees has had lots of time to evolve into a normative value for the parties and labor arbitrators. The "American rule" of expecting each party to pay his or her own attorney fees has been established in the United States for over 200 years.[60]

The first employment case using make whole was decided in 1884. *Cutler v. Kouns*, 110 U.S. 720 (1884). The first judicial reference to make whole in an NLRB case came in 1940, *NLRB v. West Ky. Coal Co.*, 116 F.2d 816, 7 LRRM 452 (6th Cir. 1940), and the first case to go to the Supreme Court from the NLRB using the make-whole term was in 1941, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 8 LRRM 439 (1941). Unfortunately, little or no attention was given to the meaning of the term.

[58] *See* Hill & Sinicropi, Remedies in Arbitration, 2nd ed. (BNA Books 1991), at 180–244, detailing how to compute back-pay awards.

[59] The "foreseeability principle" is forever linked to the English case of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

[60] *See Arcambel v. Wiseman*, 3 U.S. (1 Dall.) 306, 1 L.Ed. 613 (1796).

Absent a contractual, statutory, or common law exception, the expectation in the collective bargaining community is that rich and poor parties alike will pay only their own attorney fees.[61]

Strong arguments exist for and against the traditional approach in North America with regard to payment of attorney fees.[62] In arbitration, however, any arguments about the pros and cons of shifting attorney fees as well as about the power of an arbitrator to award such fees are often wide of the mark. Unless a collective bargaining provision or well-established legal exception applies, a party that is guilty of violating a collective bargaining agreement would not foresee being ordered to pay attorney fees for anyone other than one's own attorney.[63] A well-known exception to the general rule is the "bad faith" exception, which would provide a basis for shifting fees when the other party acted in bad faith. Even fee-shifting on the basis of bad faith, however, is a highly unusual arbitral remedy, and any bad faith conduct should be required to meet a high standard of proof. Conduct with some rational basis for it ordinarily would not rise to the level of bad faith.[64] It might even be argued that it is not an arbitrator's role to impose attorney fees on a losing party based on bad faith conduct because to do so is punitive, and it arguably is not appropriate for an arbitrator in a contractual context to punish a party for its bad faith behavior.[65] That generally is the function of another forum.[66]

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[61] *See* Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651. Some collective bargaining agreements state generally that each party will assume responsibility for its own case presentation. Few, however, specify whether expenses include attorney fees, and the American Rule supports denying such a request. *See* Delta Airlines, 72 LA 458 (Platt 1979).

[62] *See* Dobbs, Law of Remedies, Vol. 1 (West 1993), §3.10. *See also* Steiner, *Attorneys' Fees and Costs Awards to Prevailing Parties in Employment Litigation*, 13th Annual Multi-State Labor and Employment Law Seminar, Southern Methodist Univ. School of Law (May 17, 1995).

[63] *See* Yarowsky, *Report of the Committee on Law and Legislation*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), 163; *Sammi Line Co. v. Altamar Navegacion S.A.*, 605 F. Supp. 72, 74 (S.D.N.Y. 1985) ("Respondent cannot validly assert the existence of a custom so universal that the parties may be deemed to have agreed to arbitration with an understanding that attorneys' fees might be awarded. Indeed, the general understanding is to the contrary").

[64] *See F.B. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974); *Hall v. Cole*, 412 U.S. 1, 83 LRRM 2177 (1973); Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 Hastings L.J. 319 (1977).

[65] *See Aetna Portland Cement Co.*, 41 LA 219, 223 (Dworkin 1963) ("The concept of a punitive award is inconsistent with the underlying philosophy of the arbitration process").

[66] *See* Note, *NLRB Attorneys' Fees Award: An Inadequate Remedy for Refusal to Bargain*, 63 Georgetown L.J. 955 (1975); Note, *NLRB Power to Award Damages in Unfair Labor Practice Cases*, 84 Harv. L. Rev. 1670 (1971). *See also Tiidee Prods.*, 174 NLRB 705, 70 LRRM 1346 (1969); *Heck's, Inc.*, 172 NLRB 2231 (1968).

Suppose, however, an arbitrator has informed a silent remedial gap in the parties' agreement by using guidelines in a statutory provision. Should an arbitrator, then, order fee-shifting as part of interpreting a contractual provision based on a statutory provision, which statute provides attorney fees for the prevailing party? For example, the Civil Rights Attorney's Fees Award Act of 1976 provides for shifting attorney fees to the nonprevailing party in a variety of cases.[67] If an arbitrator were interpreting contractual language paralleling statutory language, interpretive questions might also arise about allocating fees for expert witnesses. The Civil Rights Act of 1991, for example, permits a recovery of fees for expert witnesses in actions brought under Title VII, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990.[68]

Should one expect to see arbitrators routinely awarding attorney fees and fees of expert witnesses to the prevailing party? Probably not. First, the agreement would need to be silent or ambiguous. Second, it would be necessary for a party to overcome the "foreseeability" test. Payment of such fees probably would not have been embedded in the expectations of the nonprevailing party when negotiators entered into their collective bargaining agreement. Third, assuming the matter had not been addressed in the parties' labor contract nor was foreseeable and assuming the rarely proven "bad faith" exception was not applicable, there is, yet, another hurdle before a labor arbitrator should assign attorney fees to the prevailing party. That is, an arbitrator should be informed by goals of applicable legislation authorizing fee-shifting to the nonprevailing party. If the law is to help arbitrators fill silent remedial gaps in labor contracts, this must include policies of the law.

If a statute guided an arbitrator into considering a remedy that would shift the customary assignment of attorney fees and other transaction costs to the nonprevailing party, the arbitrator should do so cautiously only after understanding the goals of such legislation. To the extent that legislative goals are different from arbitral goals, it would be inappropriate to interpret a collective bargaining agreement as permitting fee-shifting. For example, much legisla-

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[67] *See* 42 U.S.C. §1988. *See also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 130 LRRM 2921 (1989); *Johnson v. Georgia Highway Express*, 488 F.2d 714, 7 FEP Cases 1 (5th Cir. 1974).

[68] *See West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 55 FEP Cases 353 (1991); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 43 FEP Cases 1775 (1987).

tion awards attorney fees as a punitive remedy, and an arbitrator is not in the business of punishing either party. Even though other substantive aspects of a law might inform an arbitrator about the meaning of a silent remedial gap in an agreement, there generally is no basis for concluding that parties expect an arbitrator, a contractual creation, to impose punishment as a remedy.

There is also a public interest in fee-shifting legislation that rarely is a part of arbitral remedies. Fee-shifting, as a method of advancing needs of society, is implicated in much legislation. Arbitration is a purely private forum, and no public interest ordinarily would be advanced by shifting attorney fees to a nonprevailing party. For example, a public interest in keeping an administrative docket free of frivolous claims is not advanced by awarding attorney fees in arbitration. If the legislative purpose of permitting fee-shifting is to effectuate special policies of a law, such public policies usually are not advanced in arbitration by an award of attorney fees. Even the "bad faith" exception should be evaluated by an arbitrator in terms of legislative goals to be accomplished by using the exception. If the purpose of the law being considered as a basis of informing an award is to discourage bad faith conduct, such misconduct is not necessarily discouraged by an award of attorney fees in arbitration.[69]

Punitive Awards

Should arbitrators issue punitive awards? Punitive awards by labor arbitrators have generated considerable discussion.[70] Much

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[69] *See Wellman Indus.*, 248 NLRB 325, 103 LRRM 1483 (1980); *Leavenworth Times Div.*, 234 NLRB 649, 97 LRRM 1346 (1978). For an interesting example of an arbitration case that shifted attorney fees to the nonprevailing party, see *Sunshine Convalescent Hosp.*, 62 LA 276, 279 (Lennard 1974) ("This employer cannot be permitted to play fast and loose with either the judicial or the arbitral process").

[70] *See* Hill & Sinicropi, *supra* note 58, at 436–39; Hayford, *The Changing Character of Labor Arbitration*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 69; 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. Gruenberg (BNA Books 1991), 23; Korn, *Collective Rights and Individual Remedies*, 41 Hastings L.J. 1149 (1990); *Arbitration Without Neutrals: Joint Committees and Boards*, in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1985), 106; Shaller, *The Availability of Punitive Damages in Breach of Contract Actions Under Section 301 of the LMRA*, 50 Geo. Wash. L. Rev. 219 (1982); Seitz, *Remedies in Arbitration: I. Problems of the Finality of Awards, or Functus Officio, and All That*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books 1964), 165.

that was stated earlier in this paper about gap-filling by labor arbitrators when they are asked to award attorney fees is also applicable to punitive awards, although an exposition of punitive awards is convoluted. Assuming a collective bargaining agreement is silent on punitive awards, how an arbitrator pours content into a remedial gap may depend on the source used for formulating a make-whole remedy. Results may differ depending on whether the interpretation of the parties' agreement is informed by tort principles, contract theory, or a conception of make-whole remedies drawn from labor law.

Labor arbitrators who use tort principles as a source to inform their understanding of the parties' remedial intent will be guided by the tort notion that a contractual violation is reprehensible and an occasion for punishment. Tort theory is designed to discourage undesirable behavior, and remedies premised on tort principles not only compensate a grievant but also attempt to deter contractual violations. Tort theory is used to advance the will of society. It is clear that some arbitrators use tort principles to fashion contractual relief.[71]

Formulating a make-whole remedy premised on contract theory has quite a different focus. Contract remedies strive to advance the will of the parties, not the will of society. The focus of contract remedies shifts from deterrence and punishment to placing an individual in the position that would have been held if there had been no contractual violation. Under contract theory, there is greater interest in limiting the contract violator's liability than there is in limiting a wrongdoer's liability under tort principles.[72]

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[71] *See* Shuman, *The Psychology of Deterrence in Tort Law*, 42 Kans. L. Rev. 115 (1993) ("Deterrence delineates tort law. Tort law seeks to reduce injury by deterring unsafe behavior, and that goal informs tort standards for behavior"). *See also Freeman Decorating Co.*, 102 LA 149, 154 (Baroni 1994) ("For such a 'causal connection' to have been established, management must have shown that 'a direct proximate cause' existed between the loss and the refusals"); *Sterling Gravure*, 79-2 ARB ¶8325 (Kaplan 1979) ("Once the threshold question of *direct and proximate cause* is answered in the affirmative, the amount claimed in damages demands a less rigid test").

[72] *See* Prosser, Handbook of the Law of Torts, 4th Ed. (1971), where:

> The fundamental difference between tort and contract lies in the nature of the interest protected. Tort actions are created to protect interests and freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.

Id. at 613.

In making a person whole under contract theory, a primary focus is on whether or not a contract violator had reason to know that a particular type of harm would be forthcoming from violating an agreement. While contract theory offers a "foresight" test in fashioning a remedy, tort theory, to the contrary, uses a "hindsight" test.[73]

As explained earlier, the focus of make-whole remedies from a labor law perspective is remedial and not punitive. The U.S. Supreme Court stated over half a century ago that the authority of the NLRB to formulate remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose . . . ."[74] A make-whole order from the NLRB should be designed as "a restoration of the situation, as nearly as possible, to that which would have been obtained but for the illegal discrimination" or unfair labor practice.[75] To the extent that a remedy of the NLRB is not calculated to effectuate a policy of labor legislation, it probably will be described as oppressive and punitive. The focus of NLRB remedies is on actual losses and avoiding overcompensation, and these goals are closer to contract theory than to tort principles.[76]

If a labor arbitrator is asked to grant a punitive remedy, it is reasonable to assume that the source for understanding "make-whole" remedies will affect the arbitral response. A remedy is punitive in nature if it is "an extraordinary remedy and is designed to punish and deter particularly egregious conduct."[77] An arbitration award designed to respond to arbitrary misconduct or to a specific pattern of bad faith misconduct would be characterized as an award with a punitive cast to it. A labor arbitrator should not be

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[73] *See* Restatement (Second) of Torts, §435(a) (1955) ("If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable").

[74] *Consolidated Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 235–36, 3 LRRM 645, 655 (1938).

[75] *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 345, 31 LRRM 2237, 2237 (1953) (quoting *F.W. Woolworth Co.*, 90 NLRB 289, 292–93, 26 LRRM 1185, 1185 (1950), quoting *Phelps Dodge Corp. v. NLRB, supra* note 57, at 195, 8 LRRM at 446).

[76] *Phelps Dodge Corp. v. NLRB, supra* note 57, at 197–98, 8 LRRM at 448, where:

> Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker [during the period of the back pay award] but also for losses which he willfully incurred.

[77] *See Stephens v. South Atl. Canners*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988).

misdirected by commercial arbitration or tort theory into punishing parties.

There is a rich literature describing the use of punitive remedies in a commercial arbitration, and numerous courts have permitted punitive awards in a commercial arbitration setting.[78] At least one court has drawn a sharp distinction between the use of punitive remedies in a commercial and labor arbitration context. While allowing a punitive remedy in a commercial arbitration context, the court stated:

> Punitive actions [in labor arbitration] are disfavored; the award of punitive damages in the midst of a steady stream of arbitration between a company and its union might well undercut both sides' confidence in the arbitration process and decrease their commitment in this essential aspect of "industrial self-government."[79]

Yet, labor arbitrators continue to assert their authority to award punitive remedies.[80] Collective bargaining agreements almost never address the topic, and any such authority must result from reasonable implications in the parties' agreement.

It ordinarily would not be appropriate for an arbitrator in a collective bargaining context to rely on tort theories of punishment and deterrence as a basis for fashioning a punitive remedy. Such awards go beyond the contractual principle of compensation in order to punish and deter. Nor should an arbitrator use the concept of make-whole remedies drawn from labor law as a basis for punitive remedies, since relevant legislative principles are remedial in nature. Make-whole remedies from labor law reflect a congressional concern with making the labor-management relationship work. An arbitrator's primary focus in not necessarily on what is best for the parties' relationship but, rather, more on what was their contractual intent.

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[78] *See Mastrobuono v. Shearson Lehman Hutton Inc.*, 115 S.Ct. 1212 (1995); *Raytheon Co. v. Automated Business Sys.*, 882 F.2d 6 (1st Cir. 1989); *Ex parte Costa & Head (Atrium) v. Duncan, Inc.*, 486 So.2d 1272, 1276 (Ala. 1986) ("[T]here is authority that supports the submission of both fraud and punitive damages claims to [commercial] arbitration if the arbitration agreement is broad enough to allow it"); Dobbs, *supra* note 62, at 452–549; Ware, *Chance of Damages in Arbitration*, 63 Fordham L. Rev. 529 (1994); Farnsworth, *Punitive Damages in Arbitration*, 20 Stetson L. Rev. 895 (1991).

[79] *Raytheon Co. v. Automated Business Sys.*, supra note 78, at 10.

[80] *See John Morrell & Co.*, 69 LA 264 (Conway 1977); *Yale & Towne*, 46 LA 4 (Duff 1965); *Bethlehem Steel*, 37 LA 821 (Valtin 1961). Courts sometimes agree. *See, e.g., Goss Golden W. Sheet Metal v. Sheet Metal Workers Local 104*, 933 F.2d 759, 765, 137 LRRM 2344, 2348 (6th Cir. 1991) ("To the extent that the awards were punitive, we find them permissible"). But not always. *See Howard P. Foley Co. v. Electrical Workers (IBEW) Local 639*, 789 F.2d 1421, 1424, 122 LRRM 2471, 2473 (9th Cir. 1986) ("In the absence of any provision for punitive awards and any substantiating proof of willful or wanton conduct, an arbitrator may not make an award of punitive damages for breach of a collective bargaining agreement").

Likewise, contract theory would not justify a punitive remedy, unless it were established that the contractual violation also constituted a tort.[81] If an arbitrator is using contract theory to help give meaning to a make-whole remedy, even the "tort exception" probably should not be applied. When a court remedies a tort that arose from a contractual violation, it is advancing a public interest. Considerable proof should be required to establish that a party to a collective bargaining agreement ever expected an arbitrator to use tort theory or punitive principles to fashion a remedy. Merely because punitive remedies might be within the contemplation of parties in a commercial arbitration context, they should not necessarily be used in labor arbitration because policies in the two arenas differ substantially. Gap-filling remedial authority of a labor arbitrator should be used "to preserve the parties' bargain, not to expand it."[82] Parties to a collective bargaining agreement would not expect a contractual violation to expose them to a risk of a punitive remedy. Arbitral awards that try to remedy civil wrongdoing exceed norms parties expect in labor arbitration. Consequently, such an arbitral award probably would not withstand the test of foreseeability.[83]

Even if an arbitrator is using a statute that permits punitive remedies as a gap-filling mechanism to help define an appropriate remedy, it may but does not necessarily follow that a punitive award

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[81] *See* Restatement (Second) of Contracts, §355 (1981), at 154 ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach was also a tort for which positive damages are recoverable").

[82] Mittenthal & Bloch, *Arbitral Implications: Hearing the Sounds of Silence,* in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 65, 79.

The EEOC considers a variety of factors in deciding whether to impose a punitive remedy, and they go well beyond an arbitrator's contractual role. They include: (1) How bad is the misconduct? (2) How extensive is the harm? (3) How long did the misconduct continue? (4) Was there a history of such misconduct? (5) Did the employer try to conceal the misconduct? (6) Did the employer take action after being told of the misconduct? and (7) Did the employer retaliate? *See Compensatory and Punitive Damages Available Under §102 of the CRA of 1991,* EEOC Policy Document N-915,002 (July 14, 1992).

[83] *See Splitt v. Dentona Corp.*, 662 F.2d 1142 (9th Cir. 1981), suggesting that even a flagrant contractual violation does not support a remedy of punitive damages; *Berryhill v. Hatt,* 428 N.W.2d 647, 666 (Iowa 1988), where a "belligerent" contractual violation failed to justify a punitive remedy; *Manges v. Guerra,* 673 S.W.2d 180 (Tex. 1984), where a "malicious" contractual violation failed to support a punitive remedy; *see generally* Biggar, *A Model of Punitive Damages in Tort,* 15 Int'l Rev. of L. Econ. 1 (1995); Owen, *A Punitive Damages Overview,* 39 Vill. L. Rev. 363 (1994); Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale,* 40 Ala. L. Rev. 741 (1989).

is appropriate. Punitive remedies have their roots in criminal law and should be directed at the most egregious misconduct. Punitive remedies are intended to remedy wrongs owed to the public in general. By providing punitive remedies, problems are resolved that, otherwise, might require the attention of the criminal justice system. Arbitral remedies, on the other hand, have evolved primarily from contract theory. The focus of contract theory is on giving relief based on a contract principle that teaches that, by requiring an individual to provide the benefit of the bargain, it is sufficient to deter contractual violations. Violating a collective bargaining agreement generally does not contravene a public norm, and the underlying justification for a punitive remedy is generally not found in the contract setting.

Assume a party urged an arbitrator to use the Civil Rights Act (CRA) of 1991 to inform a remedial gap in the parties' collective bargaining agreement.[84] Section 101 of the CRA of 1991 changed remedies of Title VII, Americans with Disabilities Act, and the Rehabilitation Act of 1973 by authorizing compensatory and punitive damages. This is viewed as a make-whole remedy and provides recovery for nonwage injuries, such as psychological harm, reputational damages, and medical expenses in addition to punitive damages.[85] If such compensatory and punitive damages are sought, there is a right to a jury trial. Such compensatory and punitive damages are available in addition to other relief authorized by section 706(g) of the CRA of 1964. Punitive damages are available if an individual is able to prove that an employer engaged in unlawful discrimination "with malice or with reckless indifference to the federally protected right of an aggrieved individual."[86] The statute makes clear that a court should not tell a jury about caps on damages set forth in the law.

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[84] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). *See also* Gueron, *An Idea Whose Time Has Come*, 104 Yale L.J. 1201 (1995); Nager, *Affirmative Action After the Civil Rights Act of 1991*, 68 Notre Dame L. Rev. 1057 (1993); *Symposium on the Civil Rights Act of 1991*, 45 Rutgers L. Rev. No. 4 (1993).

[85] There are caps on the level of recovery based on the number of personnel employed by a company. The statute provides the following pattern:

No. of Employees	*Cap*
15–100	$50,000
101–200	$100,000
201–500	$200,000
500+	$300,000

[86] Civil Rights Act of 1991, §102(b)(1).

Should a labor arbitrator ordinarily fill a silent gap in a remedial provision by awarding damages provided by the CRA of 1991? It is unclear. First, there would need to be an opportunity for a party to request a jury trial or to have waived that right in the parties' labor contract. Alternatively, a strong argument can be made that there is an implied waiver by virtue of an antidiscrimination clause in a collective bargaining agreement. If the reason an employer agreed to send a problem to arbitration was to avoid a jury trial and the possibility of punitive damages, it allows the statute to be sidestepped entirely by an arbitral interpretation that requires an explicit waiver of the right to a jury trial. Second, there is a need to establish that the unlawful discrimination was intentional and not merely disparate impact discrimination.[87] Third, it would be necessary to satisfy the foreseeability requirement.

Even if it could be shown that there was a contractual waiver to a jury trial and that there had been intentional discrimination with "malice or reckless indifference" to a grievant's rights, it might but would not necessarily follow that an arbitrator should inform an arbitration award by reliance on the CRA of 1991.[88] If one relied on contract theory as the basis for informing an arbitration award, it probably would be inappropriate to use the CRA of 1991 unless it could be established that the intentional discrimination rose to the level of a tort. The compensatory and punitive damages provisions of the CRA of 1991 have the sort of deterrent policy that is served by a tort action. Even if the contract violation constituted a tort, some might argue that it is not the role of an arbitrator to impose punishment for violating a collective bargaining agreement. Is it reasonable to conclude that public interests inherent in the punitive damages provisions of the CRA of 1991 would be advanced by

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[87]The boundary is not always clear. *See, e.g., Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832, 834, 5 FEP Cases 897, 898 (W.D. Tex. 1973), where:

> Evidence of mental distress was received. That distress is not unknown when discrimination has occurred. . . . But as the trial progressed, it became more apparent that the psychic harm which might accompany an act of discrimination might be greater than would first appear. For the loss of a job because of discrimination means more than the loss of just a wage. It means the loss of a sense of achievement and the loss of a chance to learn. Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That, and not the loss of pay, is perhaps the injury which is felt the most and the one which is the greatest.

[88]Civil Rights Act of 1991, §102(b)(1). Even President Bush, who signed into law the Civil Rights Act of 1991, believed that remedial aspects of the law had their roots in tort theory ("The adoption of these limits on jury awards sets an important precedent, and I hope to see this model followed as part of an initiative to reform the nation's tort system"). Bush, *Statement on Signing the Civil Rights Act of 1991*, 1993 Daily Lab. Rep. (BNA) (Nov. 21), No. 226: D-1.

granting such relief in an arbitral forum? Should an arbitrator's assumption be that the parties intended enforcement of a statutory tort to be available in a labor arbitration proceeding? If a unionized worker's statutory rights mirrored in a collective bargaining agreement are not protected in arbitration, isn't it a practical reality that there will be no other protection? Even with the prospect of recovering attorney fees, most workers are unable to pursue individual vindication in a court of law.

Front Pay

Front pay is a relatively new judicial remedy that has emerged in the past decade primarily in connection with the Age Discrimination in Employment Act (ADEA). In 1967, Congress enacted the ADEA "to promote employment of older persons based on their ability rather than age; [and] to prohibit arbitrary age discrimination in employment."[89] Front pay, although not expressly authorized by the ADEA, has been judicially created as an appropriate make-whole remedy. The term front pay refers to a monetary award representing the present value of lost future earnings and benefits. Virtually all courts now recognize front pay as an available remedy under the ADEA or Title VII of the CRA of 1964 or the Rehabilitation Act of 1973.

Front pay is a make-whole remedy. The objective is to place an individual in the position that would have been held but for some statutory violation. Front pay attempts to restore an individual to the economic position that would have been enjoyed had an employer not engaged in illegal conduct. Courts have used front pay as an appropriate remedy (1) if an unduly hostile relationship between an employee and employer makes reinstatement unproductive; (2) if an individual's former position already has been filled, and displacement would perpetuate injustice; and (3) if the portion of the business where the terminated employee formerly worked has been discontinued. Front pay is an alternative remedy in lieu of reinstatement.[90]

As a general rule, front pay should not constitute a gap-filler at this point in history as an arbitral remedy because it would not meet

[89]29 U.S.C. §§621–634 (1988).

[90]*See Wilson v. S & L Acquisition Co.*, 940 F.2d 1429, 1438, 56 FEP Cases 1233 (11th Cir. 1991) ("Prospective damages are awarded in lieu of reinstatement if reinstatement is unreasonable").

the requirement of foreseeability. Assuming a silent agreement and a decision by a labor arbitrator to use the concept of front pay as a source of remedial guidance, it ordinarily would be inconsistent with make-whole remedies drawn from contract theory. Front pay is not an embedded remedial expectation when parties negotiate collective bargaining agreements. Moreover, there also is a substantial problem of certainty.

Contract theory teaches that relief for a contractual violation is not available if there is uncertainty and speculation about the amount of recovery. While mathematical precision is not required with regard to any recovery, speculative remedies have been discouraged by contract principles.[91] A front-pay award may extend to an individual's date of expected retirement, and it may be necessary to include probable wage increases as well as a person's anticipated pension benefit. Likewise, there might be a need to deduct for an individual's pension contributions or earnings resulting from efforts to mitigate the injury. Other uncertainties include whether or not an individual probably would be reemployed and the impact of any Social Security payments. Uncertainty in the appropriate amount of front pay might be increased by a person's hedonic dream of an early retirement or by a lack of certainty about when an award would take effect because of appellate review.

Assuming a silent agreement, labor arbitrators should be cautious about using front pay as a make-whole remedy, first, because it is not a norm embedded in the expectations of the parties and, second, because it is a speculative remedy.[92] Third, the judicial purpose of front pay would not necessarily be advanced by using it as a make-whole remedy in arbitration. A fundamental objective of such remedies is to deter future discrimination.[93] It ordinarily is not an arbitrator's role to advance such a public purpose with a private arbitration award, and an arbitrator ought to be clear about

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[91] *See Tobin v. Union News Co.*, 239 N.Y.S.2d 22, 26 (1964) ("Mathematical certitude is unnecessary. A reasonable basis for the computation of an approximate result is the only requirement").

[92] *See Lussier v. Runyon*, 63 USLW 2615, 2615 (Mar. 29, 1995) ("The dispensation of front pay—if only because of its relatively speculative nature—is necessarily less mechanical than back pay, and the amount of front pay—if only because of its predictive aspect—is necessarily less certain than back pay").

[93] *See, e.g., EEOC v. Wyoming*, 460 U.S. 226, 31 FEP Cases 74 (1983); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 10 FEP Cases 1181 (1975); *Koyen v. Consolidated Edison Co. of N.Y.*, 560 F. Supp. 1161, 31 FEP Cases 488 (S.D.N.Y. 1983).

how a private award will advance legislative goals if it seems appropriate to award a remedy of front pay.[94]

Interest Adjustment

Another make-whole remedy sometimes used by arbitrators is the use of interest, most often for a back-pay award. "Interest is the sum paid or payable for the use or detention of money."[95] Interest on an award is a remedy made not so much to protect the expectation of or reliance on interest as much as it is awarded on a restitutionary theory of recovery. Such a remedy is designed to prevent unjust enrichment by a contract violator at the expense of an injured party. The objective is to require a contract violator to disgorge a gain realized because of the contract violation. There also may be other darker objectives in labor arbitration.[96]

When a collective bargaining agreement is silent, it is unclear whether or not there should be an award of interest. Ambiguity is caused by the fact that arbitrators are mixed in their decisions on awarding interest. Evidence of egregious misconduct might produce an award of interest. Other arbitrators almost never award interest.[97] In other words, when an agreement is silent on the topic of interest, there currently is ambiguity about the standard embedded in the expectation of the parties at the time they negotiated their agreement. In view of the fact that some arbitrators as well as

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[94]Not all arbitrators agree that such an analysis is necessary. *See Piney Point Transp. Co.*, 103 LA 1117 (Crable 1994), where an arbitrator denied back pay and ordered front pay of $19,943.50 because of the small size of the company. *See also MacKay Envelope Corp.*, 98 LA 863 (Bognanno 1992), where an arbitrator denied a request for front pay without comment while reinstating the grievant with back pay.

[95]Dobbs, Law of Remedies, Vol. 1 (West 1993), at 333.

[96]Not all arbitrators view an award of interest as restitutionary. For many it has a punitive cast to it and is used as a form of punishment. *See* Greenbaum, *Remedies*, in Labor and Employment Arbitration, eds. Bornstein & Gosline (Matthew Bender 1995), §42.03, 22–24 ("To add interest would be to cause compensatory damages to become punitive damages, and it was thought unfair to penalize the employer further by adding interest to the award"). *See also* Hill & Sinicropi, Remedies in Arbitration, 2nd ed. (BNA Books 1991), at 452 ("Over the years, some arbitrators have awarded interest on back pay awards only where special circumstances—such as the company acting in an arbitrary and capricious manner—warranted such relief").

[97]*See* Zack & Bloch, Labor Agreement in Negotiation and Arbitration, 2nd ed. (BNA Books 1996), at 266 ("It is unusual for an arbitrator to award interest on back pay"); Hill & Sinicropi, Remedies in Arbitration, *supra* note 96, at 450 ("Arbitrators traditionally have been reluctant to grant an award of interest on back pay or other moneys owed for a breach of a collective bargaining contract..."). *See also Kaiser Eng'g*, 102 LA 1189 (Minni 1994) (where an arbitrator awarded $3,419 in interest); *Glover Bottled Gas Corp./Synergy Gas Corp.*, 91 LA 77 (Simons 1987) (where an arbitrator awarded interest using a rate of 16%).

the NLRB and state employment boards now grant interest on awards, have expectations of the parties shifted? Is a new normative value emerging? There is also uncertainty about whether arbitrators view interest as a sum to be paid because money has been wrongfully detained.[98] Perhaps a community standard in the collective bargaining context is evolving. It is not currently possible to state definitively whether a payment of interest is a remedial gap-filler when an agreement between the parties is silent.[99]

Conclusion

The purpose of this paper has been to help develop a theory for crafting labor arbitration remedies in the face of contractual silence. A major development in employment law in the past quarter century has been the enactment of numerous statutes that provide a potential source of guidance for arbitral remedies, and it is virtually impossible for arbitrators to stay isolated from these developments.[100] Certainly, human resource managers have been unable to do so.[101] While arbitrators need to be open to using the law as a gap-filler when confronted with remedial silence, resistance remains evident.[102] Justice William J. Brennan, on the other hand, urged that "arbitrators must simply do their utmost to resolve complicated questions of external law in a way that is

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[98] *See Markle Mfg. Co.*, 73 LA 1292 (Williams 1980) (where an arbitrator added 10% on the grievant's base earnings to reflect approximate gratuities not received as a taxi driver); *see also Sunshine Convalescent Hosp.*, 62 LA 276 (Lennard 1974) (where an arbitrator added 7% to vacation pay).

[99] Marcia L. Greenbaum suggested a reason beyond mere tradition for an absence of interest on awards. She argued that a failure to award interest on back-pay decisions is attributable to the de minimis value of such interest, in view of low interest rates and short periods of dispute resolution typical of the postwar era in which grievance arbitration developed. *See* Greenbaum, *supra* note 94, 96, §42.03.

[100] *See* St. Antoine, *supra* note 2, *Federal Regulation of the Workplace in the Next Half Century*, 61 Chi.-Kent L. Rev. 631, 655 (1985) ("The major development affecting the whole labor field during the past two or three decades has been the increasing resort to direct governmental regulation of the substantive terms of the employment relationship").

[101] A survey in 1995 showed that 55% of human resource executives described themselves as more reliant on legal counsel than in 1989. *See* 148 LRR 207 (1995).

[102] *See Altoona Hosp.*, 102 LA 650, 652 (Jones 1993), where a collective bargaining agreement stated that the parties agreed "to comply with all State or Federal laws which prohibit discrimination of [sic] the basis of race, color, creed, national origin, political affiliation, sex, age, *handicap*, membership or non-membership in the Union." On being asked to apply the Americans with Disabilities Act of 1990, the arbitrator concluded that "the interpretation of that Act is a function of the appropriate agency or commission and, ultimately, the courts, not the arbitrator" (emphasis added).

faithful to the statutes and that, one hopes, will satisfy the parties."[103]

It is recognized that the approach to arbitral remedies discussed in this paper is framed in ambiguity, but it is believed that an approach that uses the law as a gap-filler draws an arbitrator closer to the contractual intent of the parties and increases the likelihood of achieving underlying policies of collective bargaining. Greater justice is accomplished when the full bargain of the parties is enforced. Arbitral remedies should be fashioned in a way that responds to substantive contractual rights of the parties, and this is best accomplished by enforcing norms embedded in the parties' bargain. Using the law as a gap-filler in the face of contractual silence about arbitral remedies is a norm inherent in the expectation of the parties and is consistent with contract theory. Whether or not a particular norm was implicitly contemplated by the parties depends on evidence about the legal-social-economic context in which the parties bargained. As long as an arbitrator is interpreting the remedial provisions in a collective bargaining agreement, it is appropriate to use the law as a source of guidance.[104]

If arbitrators do not use the law of the land to inform a silent remedial gap in a labor contract, what are they to use? Seldom in arbitration are there testimony and evidence about remedial patterns in an organization. If not the law, are arbitrators, then, to draw on a brooding omniscience in themselves? Are they to rely on personal values that tell them unerringly what is right or wrong? What is sought is a more predictable, rational source of instruction to help inform an arbitrator about the parties' intent in the face of their knowing silence, and the law of the land is an important source of guidance.[105]

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[103]Brennan, *Distinguished Speaker*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 2, 6.

[104]*See United Transp. Union Local 1589 v. Suburban Transit Corp.*, 1995 WL 109, 611 (3rd Cir., Mar. 16, 1995), 1, 3 ("An arbitration award draws its essence from the bargaining agreement if 'the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention"); *see also* Heinsz, *Judicial Review of Labor Arbitration Awards*, 52 Mo. L. Rev. 243, 275 (1987) ("When the interpretation of a labor agreement implicitly or even explicitly involves consideration of external law, it should be done by the arbitrator").

[105]A topic not intended to be explored here but meriting considerable attention is the development and evolution of remedial norms that parties reasonably should expect a labor arbitrator to consider. *See, e.g.*, Jones, *A Theory of Social Norms*, 1994 Ill. L. Rev. 545 (1994); Ellickson, *Remedial Norms: Of Carrots and Sticks*, in Order Without Law (Harv. Univ. Press 1991), at 207; Snow, *Deciding an Arbitration Case*, 2 J. Pub. L. 491 (1983); and Leff, *Unspeakable Ethics, Unnatural Law*, 1979 Duke L.J. 1229 (1979).