Steelworkers Trilogy and *Boys Markets*—show that it can be done well. One cannot say the same about the third and the fourth steps, nor express much optimism about the fifth being "the bargaining tool of the future." The challenge for the new generation in the new century is to do better and get it right by 2060—perhaps much earlier than 2060!

II. *STEELWORKERS TRILOGY*: COLLECTIVE BARGAINING AS THE FOUNDATION FOR INDUSTRIAL DEMOCRACY AND ARBITRATION AS AN INTEGRAL PART OF WORKPLACE SELF-GOVERNMENT

W. DANIEL BOONE*

You have devoted your working lives to understanding and carrying out the ideals grounded in Justice Douglas's *Steelworkers Trilogy* decisions. Most of my 36 years as a union lawyer have been spent serving workers and their unions as a practitioner in the labor arbitration forum. I understand intimately that grievance arbitration of collective bargaining disputes frequently falls short of what it is supposed to be, that we are all participants in a fractured and troubled labor movement, that the post–World War II labor management compact is substantially broken, and that today truly meaningful national labor law reform is more hope than expectation.

Nonetheless, I want to revisit and reflect upon "what is labor arbitration" as conceived by the *Steelworkers Trilogy,* and how to make it better.

Labor arbitration originated and is fundamentally grounded in collective worker action, and the collective rights of workers, through their union, to achieve the dignity and respect they deserve, together with good wages, decent pensions, and affordable health care.

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Grievance arbitration is the institutional mechanism for industrial self-government and more particularly for "industrial democracy." As an ideal, the union is the partner to the employer in that endeavor. As an ideal, labor arbitration provides a continuing opportunity to rebuild or reinforce a culture of mutual respect and engagement of frontline rank and file leadership and union representatives with managers and human resources representatives, resulting in a more productive and fulfilling place to work for unionized employees.

By way of introduction, this is really two papers in one. Parts I through IV are a review of the intellectual, legal, and historical context of the *Trilogy* decisions, followed by detailed summary of the cases and commentary about their meaning. The second paper (Parts V and VI) addresses the role union advocates can play in revitalizing the labor movement through labor arbitration, and (modestly) suggests how labor arbitrators can be true to *Trilogy* ideals in their day-to-day practice.

Part I grounds the *Trilogy* decisions in the writings of Dean Harry Shulman and Archibald Cox, briefly touches on the basic labor law and Supreme Court cases, and recalls the strength of the labor movement in the 1950s. The *Trilogy* decisions are then related to the Steelworkers' Union goal to establish the autonomy of labor arbitration as the most effective enforcement mechanism for worker shop-floor governance.

Part II reviews the Supreme Court *Trilogy* decisions, highlighting the collective bargaining agreement as a "generalized code of industrial self-governance"; with labor arbitration as "part and parcel of the collective bargaining process itself," requiring an arbitrator chosen by the parties because of their "confidence in his knowledge of the common law of the shop and their trust in his personal judgment."

Part III recites commentary and response from within the National Academy community, focusing particularly on the role of the labor arbitrator and the collective bargaining agreement as a "code."

Part IV addresses the "critical labor law" analysis of the collective bargaining agreement, which argues that post–World War II labor law serves to blunt workers' collective action, institutionalize managerial power and domination, and limit employee participation in workplace governance.

Part V is basically a challenge to union advocates to confront and attempt to overcome the practice of arbitration as legalistic,

alienating, and contrary to ideals of solidarity and worker participation. This section is premised on the understanding that an effective union exists only if its members accept and act upon principles of solidarity, which are achieved through knowledge, participation, and mutual respect. This section explores concrete techniques to address the power imbalance inherent in the "quid pro quo" tradeoff, describing the role of a union attorney in shaping, creating, and implementing arbitration.[1]

Finally, Part VI includes suggestions to the arbitrator community for the conduct of ad hoc arbitration hearings.

Lastly, I have included an Appendix of "Memorable Phrases," describing the *Trilogy* decisions and the role of labor arbitrators.

Collective Worker Action as the Foundation for *Steelworkers Trilogy* Decisions.

Oliver Wendell Holmes, Harry Schulman and Archibald Cox: Collective Bargaining to Achieve Industrial Democracy

In October 1894, a furniture manufacturer on North Street in Boston received a communication from two unions and their members enclosing a "Price-list for your earnest consideration…and we kindly request that after October 29, 1894, nine hours constitute a day's work."[2] When the employer rejected this most kindly and reasonable request, the workers left the employment and premises "in a body." Between 6:30 in the morning and dark, two striking workers "willfully and maliciously patrolled the streets in front of the premises," and engaged in a variety of other "persuasive activities." The employer obtained an injunction prohibiting the workers from interfering with the plaintiff's business by patrolling the sidewalk or street in front or in the vicinity of the premises, based on the proof that "the defendants have conspired to prevent the plaintiff from getting workmen and thereby to prevent him from carrying on his business, unless he adopted the schedule of prices." On appeal to the Supreme Judicial Court

[1] I understand that this section may be more appropriate for a union conference, but hope that the Academy audience finds it provocative.

[2] From a historical perspective, the union proposal was a "trade agreement" establishing basic wage rates and fundamental working conditions such as hours of employment. There was no enforcement mechanism. *See* David Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CAL. L. REV. 663, 724–36 (1975); Katherine Stone, *The Steelworkers Trilogy, The Evolution of Labor Arbitration*, in LABOR LAW STORIES, 149, 151–54 (Laura J. Cooper & Catherine L. Fisk, eds., Foundation Press, New York, 2005).

of Massachusetts[3] the Court upheld the injunction prohibiting the two-man picket on the grounds that such "moral intimidation" is illegal.

Oliver Wendell Holmes dissented, pointing out that "the true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes."[4] Holmes reflected upon the fact that

> it has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin someone already there, and succeeds in his intent.... The doctrine generally has been accepted that free competition is worth more to society than it costs and that on this ground the infliction of the damage is privileged.... [T]he policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade.[5]

Having established that competition and "combination" between businesses is readily accepted, Justice Holmes addressed the "competition" between a group of workers and their employer:

> One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.[6]

On February 9, 1955, Harry Shulman delivered the Oliver Wendell Holmes lecture at Harvard Law School.[7] The presentation opened with the language just quoted from Holmes's dissent in *Vegelahn v. Guntner.* With this foundation, Dean Shulman set out

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[3]Vegelahn v. Guntner, 167 Mass. 92, 104, 44 N.E. 1077, 1079 (1896)

[4]*Id.* at 106.

[5]*Id.*

[6]*Id.* at 108, 44 N.E. at 1081; Holmes dissent in Vegelahn v. Gunter has been the subject of extensive commentary, and quoted widely. *See, e.g.*, Ellen Kelman, *American Labor Law and Legal Formalism: How "Legal Logic Shaped and Vitiated the Rights of American Workers,"* 58 ST. JOHN'S L. REV. 1, 17–20 (1983); Cook, *Privileges of Labor Unions in the Struggle for Life,* 27 YALE L.J. 779, 783 (1918) (decisions to grant injunctions in labor cases result from policy considerations rather than deductive reasoning); K. Klare, *Labor Law as Ideology,* 4 INDUSTRIAL REL. L.J. 450, 453 (1981); Oliver Wendell Holmes addressed the political motivations underlying labor law in *Privilege, Malice, and Intent,* 8 HARV. L. REV. 1 (1894).

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

a vision of the collective bargaining agreement as the instrument memorializing the collective strength of workers (safeguarded by the right to organize) to achieve a fair economic share and respected role in return for their services.

> Collective bargaining is today . . . the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens.[8]

Focusing on the large industrial enterprise, Shulman grounded the analysis in the "thousands of occasions for friction between employee and supervisor" and the need for resolution of those disputes. Shulman recognized and accepted the important role of a union in the workplace setting:

> First, the employees, through the union, must participate in the determinations (of policy and efficient operations). Second, the acceptance of unions and collective bargaining has increased the employee's confidence and his sense of dignity and importance; where previously there may have been submission, albeit resentful, there is now self-assertion.[9]

The collective bargaining agreement's grievance procedure is, according to Shulman, the "machinery for the adjustment of complaints or disputes during its term. The autonomous rule of law thus established contemplates that the disputes will be adjusted by the application of reason guided by the light of the contract, rather than by force or power."[10]

However, the collective bargaining agreement cannot address all possible disputes. There will inevitably be disputes not explicitly addressed by a provision of the labor agreement. If the subject is not explicitly addressed, and the arbitrator does not act, in effect this is an abstention supporting the employer's action.[11] The arbitrator's role is therefore "creative more than interpretive."[12] "In the last analysis, what is sought is a wise judgment."[13] The arbitrator is "part of a system of self-government created by and confined to the parties."[14]

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[8] *Id.* at 1002.
[9] *Id.* at 1003.
[10] *Id.* at 1007.
[11] *Id.* at 1010.
[12] *Id.* at 1016.
[13] *Id.*
[14] *Id.*

Dean Shulman concluded the presentation with some eminently quotable language:

> [W]hen the system works fairly well, its value is great. To consider its feature of arbitration as a substitute for court litigation or as the consideration for a no-strike pledge is to take a foreshortened view of it. In a sense it is a substitute for both—but it is the sense in which a transport airplane is a substitute for a stagecoach. *The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees.* It is a means of making collective bargaining work and thus preserving private enterprise in a free government.[15]

Shulman's understanding of the labor agreement and the function of grievance arbitration was adopted by Justice Douglas in the *Steelworkers Trilogy*.[16]

In addition to Harry Shulman, the writings of Archibald Cox directly influenced the ideology and language of the *Trilogy* decisions.[17] One passage from an early Cox article provides a snapshot of his many writings:

> In annual conferences (negotiations), the employer and the union representing the employees, in addition to fixing wage rates, write a basic statute for the government of an industry or plant, under which they work out together through grievance procedures and arbitration the day-to-day problems of administration. By this "collective bargaining" the employee shares through his chosen representative in fixing the conditions under which he works, and a rule of the law is substituted for absolute authority. With these roots in the ideals of self-rule and government according to law, the institution seems certain to grow, at least as long as there survives the political democracy on whose achievement it has followed.[18]

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[15] *Id*. at 1024) (emphasis added)

[16] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (hereafter *American Mfg.*); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (hereafter *Warrior & Gulf*); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (hereafter *Enterprise Wheel).* Other Shulman writings promoting grievance and arbitration procedures include H. Shulman, *Collective Bargaining and Arbitration* (Institute of Industrial Relations, University of California, (1949); Shulman, *The Role of Arbitration in the Collective Bargaining Process*, in COLLECTIVE BARGAINING AND ARBITRATION 19 (1949)

[17] *American Mfg.*, 383 U.S. at 568 n.6; Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 274 (1947); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 247 (1958); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1408–09 (1958); Cox, *Reflections Upon Labor Arbitration in the Light of the* Lincoln Mills *Case*, in ARBITRATION AND THE LAW, PROCEEDINGS OF THE 12TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATIONS, ED. JEAN T. MCKELVEY (Washington, DC: BNA Books, 1959), 24, 33.

[18] Cox, *Some Aspects of the Labor Management Relations Act*, 1947, *supra* note 17.

Wagner Act, War Labor Board, Taft-Hartley, Lincoln Mills, *and* Steelworkers' *Legal Strategy*

By way of brief review, grievance arbitration was introduced in American labor relations in the early part of the 20th century, but did not spread widely.[19] Arbitration was problematic because common-law courts refused to enforce executory agreements to arbitrate.[20] There was also a long history of unions' well-founded reluctance to empower judges to decide the meaning of collective bargaining agreements.[21]

The 1935 Wagner Act gave private-sector employees the right to organize, to engage in concerted activities for mutual aid and protection, and established a duty on employers to bargain with the majority representative.[22] In upholding the constitutionality of the Wagner Act, the Supreme Court recognized collective worker action as a necessity:

> Long ago we stated the reasons for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. [23]

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[19]Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 UNIV. FLA. L. REV. 373 (1983); Katherine Stone, *The Postwar Paradigm in American Labor Law,* 90 YALE L.J. 1509–14 and n.24 (1981); *See generally* I. Bernstein, THE LEAN YEARS (Boston: Houghton-Mifflin, 1960), 391–415) (regarding the unfulfilled hope/expectation that labor and management would voluntarily achieve collective bargaining agreements; *see generally Fifty Years in the World of Work*, THE NATIONAL ACADEMY OF ARBITRATORS, at 1–15, ed. by Gruenberg, Najita and Nolan, 1997.

[20]*See, e.g.*, Kulukundas Shipping v. Amtorg Trading Corp., 126 F. 2d 978 (2d Cir. 1942).

[21]Steven Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor* (New York: Free Press, 1991); fewer than 10 percent of the agreements in effect in the early 1930s provided for arbitration; David Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CAL. L. REV. 663, 745–46 (1975).

[22]The Wagner Act, 49 Stat. 499 (1935), 29 U.S.C. §§ 151-68 (1952); I. Bernstein, *Turbulent Years: A History of the American Worker, 1933–1941,* at 635–81 (1970) (describing New Deal "revolution" in labor law). To be accurate, modern labor law began with the Norris LaGuardia Act of 1932. 29 U.S.C. § 101 *et seq.* This paper does not focus on railroad and airline employees, covered by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, federal workers, where strikes are unlawful, 5 U.S.C. §§ 7101-35, or state and local public employees, where strikes may be prohibited (*e.g.*, Ch. 95, Article 12, § 98.1d General Statutes of North Carolina) or circumscribed (*e.g.*, *County Sanitation District No. 2 v. Los Angeles County Employees Ass'n*, 38 Cal. 3d 564 (1985) (permitting strikes other than those of workers whose services are essential to the public health and safety)).

[23]NLRB v. Jones & Laughlin, 301 U.S. 1, 33 (Hughes) (1937).

The statute was silent on the subject of enforcement of collective bargaining agreements.

The War Labor Board (WLB), created during World War II, sought to maintain labor peace and ensure stable wartime production. It had the important effect of changing labor arbitration in this country, greatly expanding use of labor arbitration clauses in collective bargaining agreements.[24] Those who worked for the WLB became professional labor arbitrators and promoted labor arbitration to resolve collective bargaining disputes.[25]

Section 301 of the 1947 Taft-Hartley Amendments to the Wagner Act established Federal Court jurisdiction to enforce collective bargaining agreements.

> Suits for violation of contracts between an employer and a labor organization . . . may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[26]

In *Textile Workers v. Lincoln Mills*, the union brought a Section 301 action in federal court to force an employer to comply with a promise to arbitrate grievances over work assignments. In the decision, Justice Douglas (on behalf of a majority of five) held that Section 301 was constitutional and that it gave unions the right to injunctive relief to enforce contractual promises to arbitrate grievances over work loads and job assignments.[27] The opinion pointed to the congressional intent to promote no-strike clauses in collective bargaining agreements.[28] Justice Douglas then articulated a trade-off that would establish final and binding arbitration as central to national labor policy.

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce *these agreements* on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.[29]

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[24]Freidin & Ulman, *Arbitration and the National War Labor Board*, 58 HARVARD L. REV. 309, 344 (1945); Frey, *Arbitration and the War Labor Board*, 29 IOWA L. REV. 328, 345–46 (1944); *National War Labor Board Termination Report* 113 (1948); David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 747 (1975); by 1952, 89 percent of all collective bargaining agreements provided for arbitration.

[25]Dennis R. Nolan and Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 564–69 (1983); R. Fleming, *The Labor Arbitration Process* 19 (1965).

[26]29 U.S.C. § 185(a).

[27]353 U.S. 448 (1957).

[28]*Id.* at 453–54.

[29]*Id.* at 455 (emphasis added)

Lincoln Mills distressed many members of the National Academy of Arbitrators, which devoted a full day of its 1959 Annual Meeting to discuss the decision. A number of prominent arbitrators predicted that *Lincoln Mills* would prove to be a "disaster for the labor arbitration process."[30] David Feller was present at the meeting, and responded to the criticisms of the *Lincoln Mills* decision. He stated that he and Arthur Goldberg had already embarked on a litigation strategy that would support use of Section 301 as a tool for enforcing collective bargaining agreements, and at the same time make arbitration, not the courts, the primary forum for hearing and deciding disputes arising out of collective bargaining agreements.[31]

Of course, the embrace of labor arbitration cannot be understood apart from the post-war historical/political context. One of my favorite questions to union stewards and representatives is to ask in what year during the 20th century were there the most strikes. As most of you know, that was 1946.[32] However, many of us do not fully appreciate the distinctive nature of labor relations in the 1950s. Not only was a third of the total workforce unionized during this decade, but 70 percent of workers in mass-production industries were union members. Most noteworthy, there was an average of 352 major strikes per year, a record decade for the entire century. Despite the failure of labor's major organizing drive in the South (Operation Dixie), the passage of the anti-union Taft-Hartley Act, and the divisions caused by anticommunism, with the merger of the AFL with the CIO in 1955, the power of the labor movement during the 1950s was unique in American history.[33]

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[30] *See, e.g.,* Benjamin Aaron *On First Looking in the* Lincoln Mills *Decision*, PROCEEDINGS OF THE 12TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, at 1 (1959): "Now sublimity, at least in the Kantian sense, combines the elements of both beauty and terror, and to a number of observers the prospect before us in more terrifying than beautiful"; Archibald Cox, *Reflections Upon Labor Arbitration in the Light of the* Lincoln Mills *Case,* PROCEEDINGS OF THE 12TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, at 24, 63; *see generally* Bickel & Wellington, *Legislative Purpose and the Judicial Process, The* Lincoln Mills *Case,* 71 HARV. L. REV. 1 (1957) (arguing why private arbitration was a better vehicle than the courts for resolution of labor disputes).

[31] *Remarks of David Feller,* PROCEEDINGS OF THE 12TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, at 14, 21–22 (1959).

[32] U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970, Series D 970–1021,* at 179–80 (1975).

[33] Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton, NJ: Princeton University Press, 2002); David Brody, *Workers in Industrial America: Essays on Twentieth-Century Struggle* (New York: Oxford University Press, 1993).

Taft-Hartley outlawed "secondary boycotts," strikes over jurisdictional disputes, and national emergency strikes. 29 U.S.C. § 158(b)(4), 29 U.S.C. § 158(b)(4)(D) and 29 U.S.C. § 176–82. Two recent articles summarizing the literature of 1950s labor history are found in the summer 2010 volume (Vol. 7, No. 2) of *Labor Studies in Working-Class*

What the Steelworkers Union Was Trying to Accomplish

The goal of attorneys Arthur Goldberg, David Feller, and Elliot Bredhoff on behalf of the Steelworkers and the labor movement was to establish the central status of labor arbitration as the primary institution for enforcement of collective bargaining agreements. A grievance mechanism close to the shop floor was especially important for the Steelworkers Union, because issues of work rules and shop floor governance were critical to union power and union member support. This focus on work rules and the union's commitment to limit management's discretion over shop floor decisions made arbitration essential because it was the only practical method the union had to enforce its negotiated power over shop floor governance. To retain its power, there had to be an effective enforcement mechanism and, therefore, the autonomy of labor arbitration was critical.[34]

Goldberg, Feller, and Bredhoff wrote a single brief to support the arguments in all three cases.[35] David Feller led the oral argument together with Elliot Bredhoff, because Arthur Goldberg's health had broken down from the overwhelming work demands during the 1959 nationwide steel strike.[36] There were three hours of argument for each side.[37]

History of the Americas, published by Labor and Working-Class History Association: Kim Phillips-Fein, *Business Conservatism on the Shop Floor: Anti-Union Campaigns in the 1950's* (pp. 9–26); Jennifer Broods, *Unexpected Foes: World War II Veterans and Labor in the Postwar South* (pp. 27–52) (racism and threats by local officials to cut off G.I. benefits were significant explanations for failure of Operation Dixie.)

For a provocative paper arguing that, because of individualism, racism, the power of religious faith, and the fragmentation of a collective class identity, New Deal breakthroughs were a historical aberration; *see* Cowie and Salvatore, *The Long Exception: Rethinking the Place of the New Deal in American History,* INTERNATIONAL LABOR AND WORKING CLASS HISTORY, No. 74, Fall 2008, at 3–32, Cambridge University Press.

[34] *See Cooper and Fisk's, Labor Law Stories: An In-Depth Look at Leading Labor Law Cases,* Chapter 4 (Laura J. Cooper and Catherine Fisk, eds., Foundation Press, 2005); Katherine Stone, *The* Steelworkers Trilogy, *The Evolution of Labor Arbitration* (New York: Foundation Press, 2005), at 159–62; David E. Feller, *How the* Trilogy *Was Made,* PROCEEDINGS OF THE 47TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 329 (1995).

[35] Brief for the Petitioner at 35, *United Steelworkers of America v. American Manufacturing Company, et al* Nos: 360, 443, and 536 (October Term, 1959); *Id.* at 343: "We tried to develop an entire theory about the nature of the arbitration process and its place in the scheme of industrial relations."

[36] The Steelworkers' attorneys appealed the injunction against the strike from federal district court to the United States Court of Appeals for the Third Circuit and to the Supreme Court for decision on the merits in 19 days, with stays in effect for the entire time, one of which lasted one hour while the attorneys found an appellate judge in Pittsburgh and filed appeal pleadings in Philadelphia. This strike, one of the largest collective actions in the country's history, was significantly about work rules. Jack Metagar, *Striking Steel: Solidarity Remembered* (Philadelphia, 2000).

[37] David E. Feller, *supra* note 2.

Summary of the *Trilogy* Decisions, Focusing on the Role of the Collective Bargaining Agreement and Final and Binding Arbitration

I have taken guidance for this review of the *Steelworker Trilogy* cases from Charles Morris' paper "*Twenty Years of* Trilogy*: A Celebration.*"[38] Having stated that he did not expect to find anything from rereading the decisions in preparation of his paper, Professor Morris wrote,

> I saw these decisions more vividly as an integrated whole with interrelated parts. I saw them not just as three important cases among a series of Section 301 cases, and not just as rules defining the respective roles of courts and arbitrators in relation to disputes arising under collective bargaining agreements. I saw them—as if for the first time, as a single document *defining the nature of the collective agreement and the role of the arbitrator in relation to the collective bargaining process.*[39]

American Manufacturing

In November 1955 James Sparks began working in the plating department of the American Manufacturing Company's metal stamping and wire manufacturing plant in Chattanooga, Tennessee. His job involved hoisting heavy metal frames from waist level to overhead racks, pushing loaded trucks up and over ramps, and bending at the waist to empty bins into vats of hot acidic chemicals. Sparks suffered several work injuries, ultimately requiring surgery. In 1957 he settled his Workers' Compensation case with a permanent partial disability of 25 percent, receiving a monetary award. A week after the settlement, Sparks returned to work with a letter from his physician stating he was capable of performing all his job duties.[40] The employer refused reinstatement, and refused to arbitrate the grievance protesting violation of the seniority clause, on grounds that the grievance was frivolous and barred by estoppel.

The *American Manufacturing* decision addresses the question of judicial involvement in the merits of a dispute prior to arbitration. Justice Douglas took the occasion to lay a foundation to describe the nature of the collective bargaining agreement, and how it dif-

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[38] Morris, *Twenty Years of* Trilogy*: A Celebration, in Decisional Thinking of Arbitrators and Judges,* PROCEEDINGS OF THE 33RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, eds. James L. Stern and Barbara D. Dennis (Washington, DC: BNA Books, 1981), at 331.

[39] *Id.* at 341 (emphasis added).

[40] *See,* Cooper and Fisk, *Labor Law Stories*, Chapter 4, *supra* note 2; Katherine Stone, *The* Steelworkers Trilogy*, The Evolution of Labor Arbitration* (New York: Foundation Press, 2005).

fered from ordinary commercial contracts. Douglas wrote that "special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."[41]

> The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious. There is no exception in the "no strike" clause and none therefore should be read into the grievance clause, since one is the quid pro quo for the other. The question is not whether in the mind of the court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement.[42]

The Opinion emphasizes the arbitrator's role as integrated into the collective bargaining process. In the context of the collective bargaining agreement as a system of industrial self-governance, and the arbitrator as the neutral authorized to resolve disputes, the *American Manufacturing* rule was stated as follows:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment when it was his judgment and all that it connotes that was bargained for.
>
> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.[43]

Therefore, the Court held, courts should enforce agreements to arbitrate irrespective of the merits of the grievance.

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[41] *American Mfg. Co.*, 363 U.S. at 566–67.
[42] *Id.* at 567.
[43] *Id.* at 567–68, n.6; Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 247, at 261 (1958) ("cathartic value of arbitrating even frivolous grievances….").

Warrior & Gulf

The union filed a grievance protesting the contracting-out of maintenance work while bargaining unit members were laid off, alleging that it was a "partial lock-out" of employees who would otherwise be working. There was a provision in the collective bargaining agreement that issues which "are strictly a function of management shall not be subject to arbitration."[44] The Supreme Court ordered the employer to arbitrate the dispute, despite the argument that subcontracting was a "function of management" excluded from arbitration and the fact that the union had unsuccessfully attempted to negotiate limitations on the company's longstanding practice of subcontracting.[45]

The *Warrior & Gulf* decision constitutes the Court's central statement on the nature of the collective bargaining agreement "to promote industrial stabilization," with the arbitration clause being "a major factor in achieving industrial peace" as the "*quid pro quo*" for the agreement not to strike.[46]

> In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. . . . [A]rbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement. . . . [A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.
>
> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1004-1005. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. As one observer has put it:
>
> > . . . {I}t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. . . . Within the sphere of collective bargaining,

[44] *Id.* at 575–76.

[45] *Id.* at 587–88 (Whittaker dissent, describing the Douglas opinion as "entirely new and strange doctrine").

[46] 363 U.S. at 578, relying explicitly on *Lincoln Mills*.

> the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. [47]
>
> . . .
>
> A collective bargaining agreement is an effort to erect a system of industrial self-government.[48]
>
> . . .
>
> Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." Shulman, supra, at 1005. Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement.[49]

In order to promote arbitration as the preferred means for resolving workplace disputes, there is a strong presumption favoring arbitrability, stated in familiar language:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.
>
> . . .
>
> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. [50]

The Court relied upon the broad definition of a grievance as "differences . . . between the Company and the Union [and] any local trouble of any kind" to support its order compelling arbitration of the subcontracting grievance.[51]

The Supreme Court mandate of minimal judicial involvement, both before and after the arbitration award, is grounded upon

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[47] Citing Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498–99 (1959).
[48] 363 U.S. at 578–80.
[49] 363 U.S. at 580.
[50] *Id.* at 582–83, 584–85.
[51] *Id.* at 576.

the Court's acceptance of Shulman's view of the collective bargaining agreement as "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate,"[52] that the collective bargaining agreement is "a system of industrial self-government."[53] The arbitrator's role must be creative as well as interpretive because:

> The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective agreement.
>
> . . . The grievance procedure is . . . a part of the continuous collective bargaining process. It rather than a strike, is the terminal point of a disagreement.
>
> The labor arbitrator's source of law is not confined to the express provisions of the contract as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement, although not expressed in it.[54]

Referring to Harry Shulman's 1955 paper, Justice Douglas articulated a wide-ranging role for the arbitrator:

> The parties expect that his judgment of a particular grievance will reflect not only what the contract says, but insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement. . . .[55]

Because the arbitrator is called upon to serve the "specialized needs" of the collective bargaining process, "the labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment."[56]

In his reflections 20 years later, Professor Charles Morris wrote that Justice Douglas's

> extravagant praise for arbitrators was a source of some consternation in the judicial community and a source of embarrassment or amusement in the arbitration community. Although I have shared

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[52] *Id.* at 578.
[53] *Id.* at 580.
[54] 363 U.S. at 581–82.
[55] 363 U.S. at 582.
[56] *Id.*

> the feeling of amusement, I'm not sure that any of these reactions was proper. . . . He (Douglas) was . . . elaborating on the unique nature of the decisional expectations which collective bargaining parties place on the arbitrator whom they have personally chosen as their proctor.[57]

Enterprise Wheel

Eleven employees at the Enterprise Wheel factory in West Virginia walked off their jobs to protest the discharge of a fellow employee for unauthorized absences. On advice from their union representative they attempted to return within a half hour. They were nonetheless terminated on the grounds that they had quit their jobs by engaging in a wildcat strike.[58] A successful action to compel the employer to arbitrate the discharges was necessary to get a hearing. The arbitrator ruled that, although the walk-out was not justified, the employer had violated its contractual obligation to suspend prior to discharge. Therefore, termination was not for good cause. The employees were reinstated with back pay minus 10-day suspensions. The Company refused to comply because the backpay period extended beyond expiration of the Agreement, and the arbitrator had thereby exceeded his authority.

In its most straightforward formulation, the Supreme Court confirmed the award, relying upon *Warrior & Gulf*, for the conclusion that

> Arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.[59]

The Award must be grounded in the Agreement, as stated in familiar phrases:

> [T]he 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 agreement. When the arbitrator's words

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[57]Morris, *Twenty Years of Trilogy: A Celebration, supra* note 38, at 349.

[58]Feller, *How the Trilogy Was Made,* PROCEEDINGS OF THE 47TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 329 (1995), at 339.

[59]363 U.S. at 596.

> manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award.[60]

The meaning of the word "essence" must be understood in relation to the Court's recognition that the arbitrator was "to bring his *informed judgment* to bear in order to reach a *fair* solution of a problem."[61] Thus, a decision intended to achieve fairness does not manifest infidelity to the essence of the collective bargaining agreement. This is "especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."[62]

Justice Douglas rejected a scope of review which would require the arbitrator to apply the "correct principle of law to the interpretation of the collective bargaining agreement" because,

> . . . acceptance of this view would require courts . . . to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.[63]

Following the Supreme Court decisions, the union's grievance on behalf of Mr. Sparks was arbitrated, and Sparks was reinstated at American Manufacturing. The Warrior & Gulf workers returned to their jobs. At Enterprise Wheel, there was no collective bargaining agreement in effect at the time of the Supreme Court decision. The union workers went on strike, the company hired replacements, the union was decertified, and most of the union workers were never rehired.[64]

Together the *Steelworkers Trilogy* established the law of unionized labor relations: Final and binding arbitration is the primary institution for resolution of disputes between management and labor, as an integral and essential instrument of the parties' self-government.[65] A Bureau of Statistics survey of all contracts covering more

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[60] *Id.* at 597.
[61] *Id.* (emphasis added).
[62] *Id.*
[63] 363 U.S. 598–99.
[64] David E. Feller, *How the* Trilogy *Was Made*, PROCEEDINGS OF THE 47TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 344 (1995).
[65] Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970) (Courts enforce the requirement to arbitrate disputes arising during the term of and covered by the agreement, by enjoining strikes pending arbitration).

than 1,000 employees in effect during 1961 to 1962 reported that 94 percent of the agreements covering 96 percent of the workers provided for arbitration.[66]

Commentary From Within the Academy Community

In January 1961, Sam Kagel argued that the *Steelworkers Trilogy* decisions went "beyond the necessities of the case and it could be argued assumed to regulate their (the parties') affairs in excess of their consent" (quoting Dean Shulman).[67]

Sam Kagel was not comfortable with the description that "the collective bargaining is a code, that it brings into being a new common law, that it is an effort to erect a system of industrial self-government."[68] Accepting that the agreement is intended "to supply stability and quietude for the term of the agreement," Kagel argued that the Court's characterization of the agreement had exactly the opposite effect:

> The Court has a continuously pulsating if not quivering (collective bargaining agreement) by describing it as more than an agreement—a code; by appending to it a common law—known and unknown; by assigning to it the duty of erecting an industrial self-government with the arbitrator given the task of molding a system of private law for that government.
>
> Assigning such characteristics or duties to the collective bargaining agreement does not coincide with reality. The parties, once they make their bargain, want it to remain unchanged for its term unless they themselves desire to change it.
>
> It is correct to say that the agreement may contain omissions and gaps, both known and unknown; ambiguities, even purposeful ones; and inept and sometimes deliberately misleading draftsmanship. . . .
>
> However, the agreement emerges as the product of the parties' efforts operating within the collective bargaining process. Neither the Courts nor arbitrators have license to change it, remold it, or add to or subtract from its substantive terms, unless the parties specifically seek such a service.[69]

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[66]Feller, *A General Theory of the Collective Bargaining Agreement*, *supra* note 2, at 747 (1973).
[67]S. Kagel, *Recent Supreme Court Decisions and the Arbitration Process* (with *Discussions* by Jesse Freidin and David Feller), in PROCEEDINGS OF THE 14TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Spencer D. Pollard (Washington, DC: BNA Books, 1961), 1–2.
[68]*Id.* at 5.
[69]*Id.* at 6–7.

Despite this strong language, Kagel acknowledged that past practice was a proper aid in resolving ambiguities in the written agreement, but not to add new or contradictory terms to the agreement.[70] Kagel returned repeatedly to the theme that "grievance arbitration is limited to interpreting and applying the written collective bargaining agreement" and the "glittering generalities would have well been omitted."[71]

Responding to the Kagel criticisms, David Feller defended the "rather broad and generous language with which the court described the arbitration process" and the "somewhat extravagant description of the competence of arbitrators" by pointing out that the Supreme Court takes relatively few cases. Therefore,

> The Court cannot, in the very nature of things, limit itself to the bare decision. . . . If it did, the system would collapse. The purpose of the Court's opinions is not only to set forth the reason why the particular case is decided as it is, but to provide guidance to the lower courts so that they can decide a multitude of cases without the requirement of review by the Supreme Court. . . . [T]he opinions of the court must therefore be read in the light of the function which they must perform.
>
> What was the function in these three cases? . . . The problem was the demonstrated fact that the lower courts, following what I think is the natural bent in any judicial system, had assumed and probably would continue to assume that they as judges were better able to decide which grievances are foolish and which subjects are covered by the collective bargaining agreement than arbitrators. They had, frankly, to be hit over the head.
>
> The notion that arbitrators are better judges in this area than courts was not an easy one for the court to accept, and so the Supreme Court, of necessity, had to spell out perhaps in somewhat extravagant terms, exactly why arbitrators are better able to make decisions in this area than the courts. That I think was essential to the opinions. . . .[72]

David Feller also defended the decisions as correct as a matter of law, but, "equally important, as pragmatically desirable for the preservation of the institution" of collective bargaining.

More significant for this discussion, David Feller explained why the more expansive role of the arbitrator is essential—otherwise there is betrayal of the promises made in return for the

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[70] *Id.* at 7.

[71] *Id.* at 8; for criticism of Justice Douglas and effusive praise of labor arbitrators, *see* Paul R. Hays, *Labor Arbitration: A Dissenting View* (New Haven, CT: Yale University Press, 1966).

[72] *Id.* at 23.

no-strike clause. If the arbitrator keeps "hands off" because there is no explicit language, then the company action goes unchallenged, and the company is empowered to take unilateral action. The union is essentially powerless because of the no-strike clause. During the term of the agreement employees lose the legal right to exert economic force to compel changes, and cannot take concerted action to protest management's administration of the contract. Such an imbalance of power was addressed by Feller's description of the collective bargaining agreement in this broader context:

> Every question relating to wages, hours, or working conditions is covered by such an agreement. Obviously the agreement governs if there is an explicit provision in the agreement limiting management's action. The converse, however, is not true. A conclusion that management's action is not limited by the agreement does not mean that the subject matter is not governed by the agreement. The agreement does govern because, by virtue of the no-strike clause, management is given a right which it did not have, the right to take action without being faced with a possibility of a strike or other concerted activity in support of the union's view as to what should be done.
>
> Except as restricted by the agreement, management is free to act. This freedom is not simply the absence of contract restriction: when coupled with the no-strike clause it is an affirmative grant to management of a protection it would not have had in the absence of a contract.
>
> That is the reason, of course, the fundamental reason, why the critical question so often is whether there are implicit, although not expressed, restrictions on management's conduct. If it is concluded that there is no restriction in a given area, the union cannot do what it could have done if there were no contract at all—shut the plan down and contest the issue in economic terms. It has, by the contract, forfeited that right.
>
> That is why the Supreme Court said, in the language to which Sam Kagel objects, that the collective bargaining agreement is not merely a statute but a code. Of course it is! It is a code because it covers the universe of discussion. On all matters on which the Union has the statutory right to bargain and strike, it either limits management's action or, if it does not, confers upon management the right to be free of activity which would otherwise be protected by the National Labor Relations Act.[73]
>
> . . .

[73]David E. Feller, *Arbitration and Public Policy,* PROCEEDINGS OF THE 14TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS (1961), at 27–28.

> For the reasons which the Court set forth, I think the arbitrator is better qualified than the judge to make the decision. But it is equally important to recognize that, if no one decides, then the very absence of decision constitutes a decision in favor of the employer. If the contract contains a no-strike clause, and if the issue raised by a grievance is not arbitrable, then the employer wins on the merits because there is no decision. There is no middle ground.[74]

One of the most powerful and persuasive commentaries on the *Steelworker Trilogy* is that of Sylvester Garrett in his 1985 Academy paper.[75] In that article, Garrett rejected the viability of the "pristine (i.e., primitive) reserved rights myth" of the collective bargaining agreement. Quoting from the Second Edition of Fairweather, *Practice and Procedure in Labor Arbitration*, the "residual rights" (i.e., management rights) theory is,

> [T]hat management had all rights necessary to manage the plant and direct the working forces before the union became the employees' representative and negotiated a contract *and that unless management limited its managerial rights by a specific term of the agreement* those rights did not evaporate and hence are still retained by management after the labor agreement is signed.[76]

In the context of typical language that the arbitrator does not have the authority to "add to, subtract from or modify the agreement," if combined with the notion that management's freedom of action is limited only by specific language of the agreement, Garrett pointed out that this inhibited meaningful substantive interpretation, that it foreclosed reference to and reliance upon past practice, and it precluded fashioning appropriate remedies. *Id.* at 129.

> Finally, of course, the pristine management rights doctrine cannot be reconciled with the controlling opinion of the Supreme Court in the

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[74] *Id.* at 28–29. This analysis is repeated, in Feller's *General Theory*:

> . . . the no-strike provisions of most collective agreements constitute a *quo* considerably in excess of the *quid* of the agreement to arbitrate.
>
> It is this fact more than any other which has created the tendency, already noted, for arbitrators to find implied restrictions on management conduct within the agreement and which underlies the dispute over the extent to which past practices or rules not explicitly in the agreement should be deemed, sub silentio, to be embodied in it.

David E. Feller, *A General Theory of the Collective Bargaining Agreement*, *supra* note 2, at 760. For this proposition, Feller cites and relies upon Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1960).

[75] S. Garrett, *Contract Interpretation: The Interpretive Process: Myths and Reality, Arbitration 1985: Law and Practice*, PROCEEDINGS OF THE 38TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS (1985), at 121.

[76] *Id.* at 128.

> *Steelworkers Trilogy* which the full Court continues to support with a clear sense of commitment.

Garrett then recites the "generalized code," "common law," and "special judgment" passages from *Warrior & Gulf*, identifying the many contractual standards not explicitly stated which are generally accepted by labor arbitrators.[77] As the prime example, the concept of and meaning of "past practice" is typically not reflected in an explicit provision of a collective bargaining agreement; yet it is universally understood as part of the interpretive process.[78]

In this same 1985 paper, Sylvester Garrett was not shy about embracing the "unique nature" of the collective bargaining agreement, asserting that without "full awareness" of the specific bargaining relationship, interpretation "is nothing short of naive."

> The inescapable truth is that the ultimate responsibility of an arbitrator in the interpretive process is to rely on his or her total background of experience and expertise in the collective bargaining process, with due regard to the relationship of the given parties and their presentations so as to provide as practical and realistic an interpretation as is possible under the given agreement. The ultimate personal responsibility of the arbitrator to decide patently requires independence of mind.[79]

Sylvester Garrett's embrace of the "creative and intuitive nature" of the arbitrator's decisional process was consistent with his longstanding views.[80] The central role of "grievance arbitration procedures as expression and vindication of worker aspirations for respect, dignity and justice in the workplace have been echoed by many Academy members."

> What representation promises, what collective bargaining promises, and what arbitration promises the worker who feels aggrieved is "the opportunity to be heard, the freedom to stand upright, unafraid, with

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[77] *See* R. Seward, *Grievance Arbitration—The Old Frontier, in Arbitration and the Expanding Role of Neutrals,* PROCEEDINGS OF THE 23RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, eds. Gerald G. Somers and Barbara D. Dennis (Washington, DC: BNA Books, 1970), 153, 158–59.

[78] Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements, in Arbitration and Public Policy,* PROCEEDINGS OF THE 14TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Spencer D. Pollard (Washington, DC: BNA Books, 1961), 30–58.

[79] S. Garrett, *Contract Interpretation: The Interpretive Process: Myths and Realities,* PROCEEDINGS OF THE 38TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS (1985), at 143–44.

[80] Garrett, *The Role of Lawyers in Arbitration, in Arbitration and Public Policy,* PROCEEDINGS OF THE 14TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Spencer D. Pollard (Washington, DC: BNA Books, 1961), 102.

full human dignity, and to say to his employer. 'I feel that I have been wronged and I want the wrong remedied.'"[81]

There are many influential papers published by Academy arbitrators or in Proceedings meriting special attention, but which cannot be summarized.[82]

Critical Labor Law Challenges the *Trilogy*'s Progressive Understanding of the Collective Bargaining Agreement and Labor Arbitration

Although not included in Academy Proceedings, there is a "left" critique of modern labor law. The literature of "critical labor law" argues that the system of collective bargaining legitimizes domination by corporate employers and stifles worker militancy and union democracy.[83] I will attempt to fairly summarize a few of the leading papers.

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[81]G. Nicolau, *Presidential Address: The Challenge and the Prize*, in Arbitration 1997: The Next Fifty Year, PROCEEDINGS OF THE 50TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATIONS, ed. Najita (1997) at 5, quoting Byron Abernathy's 1983 Presidential Address; *see also* Calvin Sharp, *Employee Empowerment—Collective Bargaining's Future Role,* beginning at 57 of the same volume: ". . . employees join unions because unions provide the backing necessary for employees to speak up and to be heard, they provide a grievance procedure for employees to air complaints, they provide employees with a sense of security, and they ensure that the employees are treated with a respect and dignity. . . ."

[82]Mittenthal, *The Role of Law in Arbitration*, in Arbitration 1968: Developments in American and Foreign Arbitration, PROCEEDINGS OF THE 21ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Rehmus (BNA Books, 1968) (addressing issues of external law and its relationship to the collective bargaining agreement); 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; Feller, *A General Theory of the Collective Bargaining Agreement*, *supra* note 2; C. Snow, *Make-Whole and Statutory Remedies, Informing the Silent Remedial Gap,* Arbitration, 1995: New Challenges and Expanding Responsibilities, PROCEEDINGS OF THE 48TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Najita (1995), at 150; B. Bogue, *Melding External Law With the Collective Bargaining Agreement,* Arbitration 1997: The Next Fifty Years, PROCEEDINGS OF THE 50TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Najita (1997), at 82; Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1960); St. Antoine, *The State of External Laws Effect on the Arbitration Process*, in Arbitration 2004: New Issues and Innovations in Workplace Dispute Resolution, PROCEEDINGS OF THE FIFTY SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Coleman (2004), at 185; St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137 (1997); *see also* PROCEEDINGS OF THE 39TH ANNUAL MEETING.

[83]*See, e.g.*, K. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law,* 4 INDUS. REL. L.J. 450 (1981); S. Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483 (1981); Katherine Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO ST. L.J. 750 (1973); Atleson, *Values and Assumptions in American Labor Law* (University of Massachusetts Press, 1983); Kennedy, *Critical Labor Law Theory*: *A Comment*, 4 INDUS. REL. L.J. 503 (1981).

In his1978 *Minnesota Law Review* article, Northeastern University Law Professor Karl Klare analyzes U.S. Supreme Court decisions as a "political enterprise…shaping the ideological and institutional architecture of the modern capitalist workplace."[84] In its broadest formulation, the U.S. Supreme Court decisions interpreting and applying the Wagner Act "integrated" the working class into the institutional structure of collective bargaining, which had the effect of diminishing labor's combativeness and "controlling and disciplining the labor force and rationalizing the labor market."[85] Klare's article

> attempt(s) to demonstrate that, in shaping the Nation's labor law, the court embraced those aims of the (Wagner) Act most consistent with the assumptions of liberal capitalism and foreclosed those potential paths of development most threatening to the established order. Thus, the Wagner Act's goals of industrial peace, collective bargaining as therapy, a safely cabined worker free choice, and some rearrangement of relative bargaining power survived judicial construction of the Act, whereas the goals of redistribution, equality of bargaining power, and industrial democracy—although abiding in rhetoric, were jettisoned as serious components of National labor policy.[86]

Klare grounds his analysis of the judicial review of the Wagner Act with a statement of its six statutory goals, those being: (1) to promote industrial peace by subduing "strikes and other forms of industrial strive or unrest" (29 U.S.C. § 151); (2) enhance collective bargaining for its own sake as a "mediating" impact on industrial conflict; (3) promote "actual liberty of contract" by redressing

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These citations are a small fraction of a large body of scholarly work, the task of which is to explain the fundamental moral assumptions, political judgments, and social functions underlying labor law, with the ambitious purpose of transforming the law to promote worker self determination and overcome management domination. *See* Klare, K., *Critical Theory and Labor Relations Law,'* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (3rd ed.), ed. D. Kairys (New York: Basic Books, 1998); Klare, K., *The Horizons of Transformative Labour & Employment Law,* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES & POSSIBILITIES, ed. Joanne Conaghan, Richard Michael Fischl, & Karl Klare (Oxford: Oxford University Press, 2002), at 3–29; James Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB,* 59 BUFFALO L. REV. 653 (2009) (powerful argument that the rights of "self organization" and "concerted activity for…mutual aid or protection" enshrined at the core of the NLRA must be returned to the center of labor law, that the culture of labor solidarity must replace "the employer promoted culture of self-interested competition for employer approval").

[84] Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941,* 62 MINN. L. REV. 265 (1978).

[85] *Id.* at 267–68; relying for criticism of collective bargaining, S. Aronowitz, *False Promises* (1973); Brecher, Jeremy, *Strike!* (Boston: South End Press, 1997).

[86] *Id.* at 292–93. This article is extraordinarily complex and sophisticated as legal theory ("conceptualism" vs. "realism") and cannot be satisfactorily summarized in this paper (*cf.* pp. 276–80). I address certain limited portions of the analysis to focus on labor arbitration.

the unequal balance of bargaining power between employers and employees ("by restoring equality of bargaining power between employers and employees") (29 U.S.C. § 151); (4) protect the free choice of workers to organize and select a representative of their own choosing for collective bargaining; (5) promote economic recovery and prevent future depressions by increasing the earnings and purchasing power of workers;[87] and (6) promote industrial democracy.[88] In this context, the 1935 Wagner Act was one of the most progressive, even radical pieces of legislation ever enacted by Congress:

> . . . . the Act by its terms apparently accorded a governmental blessing to powerful workers' organizations that were to acquire equal bargaining power with corporations, accomplish a redistribution of income, and subject the workplace to a regime of participatory democracy. The Act's plain language was susceptible to an overtly anti-capitalist interpretation.[89]

Klare traces the imbalance between workers and their union versus the employer through Supreme Court decisions after 1935, many of which are recited in later pages of this paper. As articulated by Klare, the Supreme Court decisions undermine the possibility:

> that workers' organizations ought to affirm and advance the proposition that those whose collective efforts make social production possible should have a decisive say in the decisions that affect the process, that they pose themselves morally and institutionally as the authors of their own destinies in the workplace.
>
> Second, since it was imagined that there was an overall societal interest in maintaining the prevailing industrial system, the Courts fiduciary theme encouraged responsible unions to accept the social order as given and to seek to defend and better the lot of their members only within its ground rules.[90]

The central role played by the Supreme Court in the period after World War II is characterized as being contrary to workers' interests.

> [T]he primary role of the Court was to fashion and articulate a legitimating ideology for the emerging institutional system governing the

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[87] Klare points out that section 1 of the Act explicitly finds that the unequal bargaining power of employees "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners." 29 U.S.C. § 151.

[88] *Id.* at 281–84. On the subject of "industrial democracy," Klare recites the Shulman passage found at footnote 7, *supra,* of this paper.

[89] *Id.* at 285.

[90] *Id.* at 321.

> workplace. . . . The Court played an enormous role in elaborating the institutional structure of mature collective bargaining. To a degree unprecedented in the capitalist world, the judiciary directly and creatively intervened in the workplace and was crucially involved in designing the architecture of the modern, administered, and regulated system of class relations. . . . More and more, unions were treated as guarantors of productivity and enforcers of work-discipline, and the chasm separating union leadership from the rank and file was widened.[91]

Professor Klare broadened the analysis in his 1981 paper entitled "Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law."[92] The article continues the "critical labor law" analysis, challenging "the adequacy of established social institutions to protect the needs and interests of working people, particularly with respect to the openness of those institutions toward worker participation in the decisions affecting their industrial lives."[93] The basic point, elaborately developed, is that the policy of legally sanctioning collective worker power to organize, and choose a representative with whom the employer must bargain and enter into a collective bargaining agreement that memorializes the aspirations of workers, is a false promise.

> Two common themes run throughout critical labor jurisprudence. First, we argue that collective bargaining law articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace. The second theme is that collective bargaining law has evolved an institutional architecture, a set of managerial and legal arrangements, that reinforces this hierarchy and domination. Viewed as a component of public policy, the two central goals of the collective bargaining laws are to integrate the labor movement into the mainstream contours of pressure-group politics and to institutionalize, regulate and thereby dampen industrial conflict.[94]

Professor Klare is clear about his political premises, including,

> a belief in the feasibility of democratic self-management of the workplace by workers; a belief in the justice and desirability of giving a dominant voice respecting the organization and purposes of work and the disposition of the products of labor to those who perform work; a belief that work can and should provide dignity and meaning to life, that it can and should be a mode of expression, development and realization of the human self; and the belief that the highest aspiration of a democratic culture should be to generate, nurture and encourage

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[91] *Id.* at 336.
[92] 4 IND. RELATIONS L.J. 450 (1981).
[93] *Id.* at 451.
[94] *Id.*, at 452.

> in all people the capacity for self-governance and the fulfillment of human potential.[95]

In developing this critique, as with the 1978 paper, Professor Klare is not unequivocally critical, recognizing that collective bargaining has engendered "democratic participation" for workers.

> [F]rom its outset modern collective bargaining law has endorsed and to some extent has actually engendered the democratic participation of employees in workplace governance. Quite apart from their manifest achievements in improving the working and living conditions and economic security of organized workers, labor unions protect employees from unilateral and arbitrary dictates of management. Unions provide an institutional context within which workers can formulate and express their aspirations, aggregate their voices and experience the dignity that comes with having some power to affect the decisions governing one's life.[96]

The "critical historiography" highlights the ruling's prohibiting collective action; *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 303 (1938) (established the critical strategic right of struck employers to offer permanent positions to workers hired to replace economic strikers, despite section 13 which states that the Act shall not be construed "so as to interfere with or impede or diminish in any way the right to strike" (29 U.S.C. §163)); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939) (wildcat strikes unprotected); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (sit-down strikes unprotected);[97] *Local 174, Teamsters v. Lucas Flower Co.*, 369 U.S. 95 (1962) (employer's agreement to arbitrate gives rise to implied contractual no-strike duty upon union); *Boys Market, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 251 (1970) (Brennan, J.) (strike over arbitrable grievance enjoinable despite Norris-LaGuardia Act); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 70 (1975) (Marshall, J.) (NLRA does not protect concerted

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[95] *Id.*, at 451.

[96] *Id.* at 453 and n.11, contrasting an earlier "epoch in which the very legitimacy of labor conflict was not juridically acknowledged," reciting Brandeis' and Holmes' dissents, including Holmes' famous dissent in *Vegelahn v. Guntner*, relied upon by Dean Shulman.

[97] In *Fansteel*, the employer engaged in massive and undisputed unfair labor practices. Workers engaged in a sit-down strike in the factory; they were evicted by the police and many were fined or jailed under state law. The Board ordered the company to bargain with the bona fide union (rather than the company union), and ordered reinstatement of the strikers. This last order was reversed by the Supreme Court. Although the company's conduct was "reprehensible," it did not deprive it of "its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. . . . To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundation of society." 306 U.S. at 253.

protest against alleged employer race discrimination by dissenting unit members); *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974) (*"Boys Markets"* injunction lies against coal mine safety strikes).

The analysis also centers on the contradiction that collective bargaining law both authorizes and limits employee participation in workplace governance. In its starkest statement, the labor laws and the collective bargaining system serve to induce "organized workers to consent to and participate in their own domination in the workplace."[98] The critique challenges the underlying assumption that "the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement." *Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

> This trade-off—one of the most profoundly important developments in modern labor law—virtually compels workers to surrender their greatest source of power, the power concertedly to interrupt work. The arbitration system removes grievances from their context as experienced on the shop floor to the rarified atmosphere of the hearing room.[99]

In a footnote, Professor Klare clarifies his position about labor arbitration.

> It is very important to be clear that I am *not* arguing that professional arbitrators lack the qualities of fairness and impartiality. The claim is of quite a different nature, namely, that arbitration as a system contains a pronounced, value-laden "tilt" toward management. The system may well be administered neutrally and judiciously, but it nonetheless in the long run promotes management interests because of the substantive content of arbitral law and the institutional function of arbitration in suppressing collective worker self-activity. Notwithstanding my criticisms of the *systemic* significance of arbitration, I still regard it as the most important source of such due process as Americans have on the job.[100]

Professor Katherine Van Wezel Stone analyzes and critiques the "ideology" of *Steelworkers Trilogy* collective bargaining and labor arbitration in the *Post-War Paradigm in American Labor Law.*[101] Professor Stone challenges the suggestion that management and labor are anything close to equal parties who jointly determine

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[98] *Id.* at 456, 461, referencing H. Braverman, *Labor and Monopoly Capital* (1974).
[99] *Id.*, at 466
[100] *Id.*, at 468.
[101] 90 YALE L.J. 1509 (1981); In this paper, "industrial pluralism" is the descriptive phrase for the writings of Harry Shulman, Archibald Cox, and "the human relations school of industrial sociology."

the terms and conditions of employment, or that there is true self-government. Rather, she argues that the "ideology" is "fundamentally incoherent," and that "it serves as a vehicle for the manipulation of employee discontent and for the legitimation of existing inequalities of power in the workplace."[102]

> This model of collective bargaining is the lens through which all issues that involve class relations have come to be viewed. As with any pair of lenses habitually worn, the distortions it causes have been long forgotten. The thesis of this article is that the industrial pluralist view of labor relations is based upon a false assumption: the assumption that management and labor have equal power in the workplace. Thus the model is a false description. . . .[103]

Having rejected the premise of equal power or even potentially equal power between management and labor, Professor Stone argues that the process of collective bargaining does not produce industrial democracy.

> If there is no equality of power between management and labor, and if the legal framework that the theory mandates cannot establish true industrial democracy, then the entire privatized approach to collective bargaining must be questioned. If there is a structural inequality of power between management and labor based upon the incidents of private property as the law has defined it, then no procedural solutions will create true industrial democracy. In that case, the law must intervene actively to alter the definitions of property rights in order to create true equality. If such equality is desirable, either to improve wages, hours, and working conditions, or to affirm workers' dignity, then there must be a new theoretical and doctrinal approach to the law of labor relations.[104]

Stone advocates, rather than submitting resolution of these issues to the privatized forum of labor arbitration, they should be subject "to the political process."

> This approach would enable workers to struggle in the arena in which their strength is greatest—the national political arena. At the level of national economic and political institutions, they could utilize their collective strength and define their problems in such a way that genuine solutions would be possible.[105]

What should be made of this? Is it true that fundamentally, intrinsically, labor arbitration functions to suppress collective worker activity rather than to support and legitimize it? Is it true

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[102] *Id.*, at 1516–17.
[103] *Id.*, at 1511.
[104] *Id.* at 1579–80.
[105] *Id.* at 1580.

that the promise of collective bargaining as the institutional structure of legally sanctioned industrial democracy is false, a myth serving only to stifle or manipulate employee discontent?[106]

The next section of this paper will attempt to answer these questions in practical, concrete terms. Stated more positively, I believe workers at a given location, or bargaining unit, can affect the conduct of the employer, can achieve substantial compliance with the collective bargaining agreement, and bring about workplace fairness, dignity, and respect from the employer.[107]

Union Perspective: Confronting and Overcoming the Potential Shortcomings of Labor Arbitration

This paper has examined the basic bargain and the role of grievance arbitration as a means of establishing industrial democracy (Shulman),[108] or a system of domination stifling worker militancy and union democracy (Klare).[109] Which is more accurate? Can both be true, depending on the conduct of the parties?

The theme of this section is, taking seriously the "left" critique, to propose some ways of thinking and concrete techniques to make real the ideals described in the *Trilogy* decisions in day to day practice. Local union leadership can't change the law. Whatever my understanding I must deal with the realities (intrinsic limitations) as they exist.

My basic argument is that there is a possibility of recapturing labor arbitration only if its foundational premises are accepted and acted upon. Those basic propositions explaining the theory and practice of labor arbitration are straightforward:

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[106]This paper will not attempt a review of the extensive literature evaluating and challenging the Karl Klare, Staughton, Lynd thesis that federal labor law immobilized trade unionism as a militant force and deradicalized the labor movement. *See, e.g.*, Melvyn Dubofsky, *Legal Theory and Workers' Rights: A Historian's Critique*, 4 INDUS. REL. L.J. 503 (1981); Duncan Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503 (1981). However characterized, the hostility of the courts to broader challenges to the employer's "right to manage its own business'' is longstanding and unremitting. Forbath, *The Shaping of the American Labor Movement,* 102 HARV. L. REV. 111 (1989); Dubofsky, *The State and Labor in Modern America* (Chapel Hill: University of North Carolina Press, 1994).

[107]Employees do not join unions to overthrow capitalism or "take over the business." However, they do join and participate to assume a greater degree of control over their working lives. For an early and provocative read, *see* Frank Tannenbaum, *The Labor Movement: Its Conservative Functions and Social Effects* (1921); Merrill, *Even Conservative Unions Have Revolutionary Effects: Frank Tannenbaum on the Labor Movement,* INTERNATIONAL LABOR AND WORKING CLASS HISTORY, 77, Spring 2010, Cambridge University Press.

[108]*See supra* note 7.

[109]*See supra* note 92.

1. Individual workers are relatively powerless to affect their workplace lives, to be other than subordinate individual employees.

2. Only through collective action can workers achieve meaningful power in the workplace.

3. Under our system of laws (beginning with the Wagner Act) the labor union is the recognized institution for the exercise of collective aspirations of workers, who have rights to organize, select their representative, and bargain collectively with their employer.

4. Collective bargaining is the legally required methodology engaged between union (on behalf of the collective whole, according to its own democratic processes) and the employer, to contest wages, benefits, terms of employment, and control of the workplace. Concerted action including strikes, picketing, and leafleting are legally protected to achieve the most favorable result.

5. The collectively bargained agreement is the product of and "part and parcel" of that struggle. "It is more than a contract; it is a generalized code . . ." covering "the whole employment relationship, calling into being "the common law of a particular industry or of a particular plant."[110] "A collective bargaining agreement is an effort to erect a system of industrial self-government."[111]

6. There is one, primary trade-off central to every labor agreement. In return for the promise not to strike during the term of the collective bargaining agreement, the employer agrees to an informal, inexpensive, and prompt dispute resolution system leading to final and binding decisions by an arbitrator jointly selected by the parties. All grievances are subject to arbitration, whether or not meritorious.

7. The rights and benefits of the labor agreement are enforced beginning on the shop floor, and ultimately by final and binding award of the arbitrator, subject only to the most deferential judicial interference, especially when it comes to remedies.

8. Quoting W*arrior*:

> The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . . . The grievance procedure is . . . A part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement."[112]

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[110] 363 U.S. at 578–79.
[111] *Id.* at 581.
[112] *Id.* at 581–82.

9. As such, labor arbitration is the essential mechanism for "achieving industrial peace" and carrying out workplace democracy. "Arbitrators under collective bargaining agreements are indispensable agencies in a continuous collective bargaining process."[113]

What follows from these understandings? Arbitration belongs to the union. And to the degree there are failures to deliver on the promises made in return for the assurance not to strike or disrupt production during the life of the agreement, the fundamental bargain has been betrayed.

However, as we all know, informal "workplace democracy" is too frequently an ideal bearing little relationship to reality. The body of commentary addressing the overly "legalized" and burdensome practice of labor arbitration dates back decades.[114]

I share with you a paper we have used in our office to train new associates to represent unions in labor arbitration. This piece is intended to make real the idea of workplace democracy, and how we as union advocates must work with our clients to fulfill those promises. [115] I wrote this paper in 1995. Although it begins with a superficial summary of critical labor law, that's the starting point for the challenge, not the end of the discussion.

Empowering Workers: Moving From a Service to an Organizing Model of Unionism

The fundamental agreement between employers and unions achieves "labor peace," by which the employer obtains a prohibition against strikes during the life of the contract, a regularizing of day to day labor relations at the work place, and predictable industrial discipline. On the union side, those represented by the union achieve a measure of job security through "just cause" and seniority protections. These protections, as well as a fixed pay and benefit package, are combined with the grievance/arbitration procedure, which is understood as the basic counter balance to the no strike clause. A grievance procedure ending in binding arbitration by a neutral jointly selected by the union and the

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[113] *See supra* note 63, at 596.

[114] For a summary of readings, *see* Boone, *How to Have an Arbitration Hearing in One Day or Less, Arbitration 2007: Workplace Justice for a Changing Environment,* PROCEEDINGS OF THE 60TH ANNUAL MEETING, ed. Befort and Halter, at 85–99. It should be noted that Kerianne Steele was a significant participant in writing this article.

[115] The New Voice Slate leadership of the AFL-CIO of John Sweeney, Richard Trumka, and Linda Chavez-Thompson was elected in October 1995.

employer vindicates the rights and protections under the Collective Bargaining Agreement through a cheaper, faster dispute resolution mechanism in which the union is an equal participant.

This is a classic liberal solution. On the one hand, it is a progressive mechanism to afford fair problem solving by a knowledgeable tribunal, especially when compared to courts and the judicial process, or unrestrained employer power.

However, this "solution" promotes the fundamental capitalist interest of precluding disruption or interruption of production, and it frequently results in bureaucratized and rule bound labor relations. As such, the grievance/arbitration procedure is fundamentally inconsistent with worker militancy and spontaneity. All disputes must be processed through the grievance procedure, which requires letter writing and delay, at the very least.

This process can lead to a service model of unionism. The union is like an insurance company, to which premiums (dues) are paid, and through which claims are processed. The union representative becomes and is regarded as a claims processor and bureaucrat for the individual worker. In this model, the union lawyer becomes the ultimate claims adjuster, functioning to legitimize and smooth the efficiency of the entire system.

Under this model, members are little more than individuals with varying rights depending on their status under the contract. Under this model, members are passive recipients of the services and benefits negotiated by "the union" as an institution separate from each member. Under this model, the union ("business representatives") is separate from and in control of important decisions affecting the individual members. And, if it chooses to be aggressive, dilatory or nasty, the employer dominates and overpowers the union. The employer need only repeatedly violate the contract, challenge the union to file as many grievances as it wishes, delay and obstruct processing those grievances and demonstrate that the union is inadequate or powerless to fulfill its service promise to employees. Members become increasingly apathetic, alienated, discouraged and pessimistic, as well as passive. They don't come to meetings; they complain "that the union doesn't do any thing for me except take my money." The union representative responds that the workers don't understand the struggle and sacrifice required to achieve the rights and protec-

tions in the Collective Bargaining Agreement. The members are "not what they used to be."

The union is essentially powerless, and we as attorneys do little else than facilitate the subordinate relationship of the union and the subjugation of the workers.

Although most of these thoughts can be expanded and better stated, in summary this is the post World War II labor management "paradigm," as described by "critical labor law theory." This is the description of failure in the period of declining unionism in America.

Union members must believe that their union makes a difference at the workplace, that it can protect and improve working conditions, that it can protect job security, that it can timely and effectively enforce the contract, with respect from the employer.

Fortunately, we are now living in a time when unions are revitalized. We are part of a movement consciously and systematically seeking to regain power to affect events. We and the union movement understand that workers cannot equal the employer's capital or monetary resources. Power can only be generated by collective, mass action. This requires understanding, commitment, creativity and courage by individual workers and masses of workers. Confidence and growth comes when new groups discover through participation that collectively they can achieve dignity, respect and power. These are the keys to unions playing an important role in preserving and strengthening democracy.

Although it is overly simplistic, commitment derives only from knowledge, involvement and participation. Participation occurs only if workers take and assume responsibility. Power is generated from workers' recognizing the leadership of the union and participating in that leadership. Greater worker power cannot be willed from above: it results from community and shared beliefs that everyone is a learner and a leader and that everyone deserves to be treated with respect and dignity. This occurs only through old fashioned organizing of existing members and potential members.

However, employee participation and mass action is at odds with a legalistic, atomized and alienating arbitration system. How can we as worker advocates bring to arbitration practice the ideals that draw us to serve the labor movement? How do we achieve the goals of workplace democracy, of respect for those

who do the work, a recognition of the dignity and importance that should be accorded a union that is standing up for its members and the collective bargaining agreement? Here are some thoughts for discussion.

If the only concern is winning a case, the union has failed. If one of us wins a case and nobody knows about it, what difference does it make? If one of us wins a case, and everyone from the union side is a passive and uninformed observer, no one is empowered. No one will speak for or work harder for the union. A likely result will be that members grow ever more passive and alienated, and at best hope that the union lawyer can save the day sometime in the future.

Labor arbitration is not simply a "legal proceeding." Labor arbitration is an arena where the very nature and character of the union/management relationship is played out. We, as attorneys for the union, have a critical role in shaping, creating and implementing arbitration to serve and empower the union. Arbitration must function to equalize the power imbalance. Arbitration must be carried out to support and promote unions in struggle.

The "arbitration practice" in this office is designed consciously and explicitly to maximize power, and to maximize the chances that when each of us walks in to any particular case we will be both successful and enhance the goals described in this paper.

As union attorneys, we must recognize and carry out many responsibilities, most of which are obvious.

We must "out lawyer" whoever the employer advocate is. We must understand the case better, be able to articulate our theories of the case more clearly and persuasively, and be able to cross examine more effectively. Our witnesses must be better prepared, and we must be able to protect our witnesses from all manner of insult, racism and sexism. We must demonstrate in the arbitration hearing that the union is an equal party in the relationship. We must win more than our fair share of the cases. Finally, we must do this in about one quarter of the time that it takes the other side.

However, in my view, that is only a part of our responsibility. To be a quality union advocate, we must also, during the preparation and arbitration of the grievance, build the union by bringing about a deeper understanding of and commitment to the union. Whether the case is won or lost, in short, we as lawyers must function as organizers.

How to put these lofty notions into practice?[116] During the course of the arbitration preparation and hearing, we must think of the process in terms of powerlessness versus dignity, respect and equality. After all, this is one place where employees can see first hand who and what the union is.

A few simple ideas:

1. Integrate organizational and "political" analysis with legal issues at hand.
2. De-mystify the process by explaining what will happen, the expectations of the arbitrator, the "theories of the case," everyone's roles and responsibilities, and how to be an effective and credible witness.
3. Listen to and understand what workers and their union leaders have to say. Engage with all in a fully participatory process of formulating and presenting the strongest case.
4. With union participants, figure out and understand the employer's positions, arguments and legitimate interests. Make the effort to assure that the union side realistically assesses, "the other side." This often can result in settlement of the case at hand, and may enable the parties to resolve future grievances without resort to arbitration. As a basic proposition, workplace disputes are settled when the parties accept the legitimate concerns of each other, enabling them to craft a settlement that reconciles (if not entirely satisfies) those interests.
5. Ask for suggestions and criticisms regularly, *e.g.* "any more questions you think I should ask that witness."
6. Provide analysis and make recommendations if asked; don't tell people what to do. It's their lives, and their union.

[116]We offer, we promote training of representatives, rank and file leadership, and stewards, covered by the retainer. The subjects of grievance handling, duty of fair representation, and arbitration preparation are explored as something more than bureaucratic paper pushing. We train and advise grievance review committees. We explain why and how it is far better to settle the disputes at the first, immediate level; how to distinguish between a good and bad beef; why the union is not the public defender; and how to think about and act on the continuing relationships of collective bargaining.

7. Do not be afraid to argue strenuously that the hearing be focused and time not wasted.[117] Do not allow the employer attorney to insult or demean anyone from the union side.
8. Submit the grievance to the arbitrator with oral argument rather than written brief. Invite all union participants to be present during oral closing. If the employer insists on writing a brief, argue that the arbitrator hear the union closing outside management's presence, with the union closing arguments bound separately. If not allowed, either let the company stay or argue to the court reporter with members and representatives present.
9. Throughout, stress to the union side and to the arbitrator that we are arbitrating to vindicate the collective rights and benefits negotiated into the agreement.

Arbitrators: Suggestions for Consideration

These last pages offered some ideas about how "the union side" thinks about labor arbitration and should conduct itself. This last section proposes specific, concrete suggestions for arbitrators to consider. Some directly undermine my lawyerly advocacy interests, but nonetheless are beneficial to the process. I hope these stimulate your thinking, and even challenge your practices. By including these "suggestions," I well understand that there is the age-old debate about how active or passive the arbitrator should be. I am conscious of not being overly simplistic, and reluctant to overstep the bounds of an outsider.

However, I think it's accurate to say that only a small portion of today's participants in the labor arbitration hearing on any given day understand what's supposed to be happening and why. Therefore, you as "custodians" of the process have a responsibility to be

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[117]John Kagel's description of the role of an arbitrator in a hearing is well stated, and John and Sam Kagel are and were practitioners of their own advice:

> It is up to the labor arbitrator to guide the parties where necessary, to be active, and to cut in if required, keeping the case moving and on course. Obviously, the arbitrator must use discretion, but the days of just sitting and listening Buddha-like to anything that goes on should be over. The arbitrator should be quite active, not to favor one party or to catch a plane, but to make sure only relevant, noncumulative evidence is being presented. In this way the practices smuggled in from employment arbitration and litigation can at least be muted.

J. Kagel, *Presidential Address Seeking a Vaccine: Avoiding the Sad Practices of Commercial Arbitration, Arbitration 2001, Arbitrability in an Evolving Legal Environment,* PROCEEDINGS OF THE 54TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, Grenig and Briggs ed. (2001) 1, 10.

proactive. Most of these suggestions require much more detailed explanation and supporting argument. They are included to stimulate discussion, recognizing legitimate opposing positions.

1. Do not exclude witnesses from the hearing room. Allow all of the participants, together with a limited number of observers, to be present and to learn. I question the degree to which sequestration of witnesses is all that helpful for determining credibility. The admonition not to discuss the testimony of other witnesses is often not followed. I think there is a very good argument to be made that, with workers or managers in the room, a witness is less likely to lie because witnessed by others who all return to the workplace.

Further, as an exercise in dispute resolution, the hearing can set an example of productive labor relations. Being present informs the first line people on both sides concretely how to investigate and evaluate a case. Finally, workers must see a demonstration that the union is an equal partner to the contract, that the union can and will "take on the boss," and that intimidation, bigotry, or paternalism will not be condoned.

2. Honor the member/union privilege;[118] protect confidentiality, assist investigation and resolution.

3. Give meaning to "industrial due process" by requiring a thorough investigation before making a decision to terminate, including confronting the grievant with the accusations. This is necessary in order that the union can best fulfill its duty of fair representation, distinguish and pursue only the more likely meritorious cases. Without due process, the burden effectively shifts.[119]

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[118] *See* D. Adelstein, *The Union-Grievant Privilege: A Well-Recognized Method for Protecting Confidential Communications and Fostering the Efficient Resolution of Grievances, Arbitration 2004: New Issues and Innovations in Workplace Dispute Resolution,* PROCEEDINGS OF THE 57TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Coleman (2004), at 277 *ff.*

[119] In Koven, Smith, and May, *Just Cause: The Seven Tests*, 3rd ed. (BNA Books 2006), at 183–214, the authors articulate the many reasons supporting this element of just cause. These rationale are repeated by well regarded arbitrators:

> The procedural aspect of just cause is not dogmatic ritual. Its object is to postpone a penalty until thorough consideration takes place — to prevent supervisors from making bottom-line decisions before they know the knowable facts and have a chance to reflect. Who is to say that Grievants would not have been treated to greater moderation if the Superintendent had investigated and considered before reacting? *Meyer Products*, 91 L.A. 690, 693 (Dworkin, 1988).

In addition to the simple proposition that employees should be treated fairly, the inadequacy of a disciplinary investigation has the potential to alter the burden of proof. As stated by Arbitrator Clyde Summers:

> There is inherent unfairness in discharging employees first, and then determining whether they deserve it. The action, once taken, loads the scales with a desire to justify, and short of arbitration the burden is put on the employee and the union to persuade the company the employee is entitled to his job back. *Aerosol Techniques, Inc.*, 48 L.A. 127880 (Summers, 1987).

4. Strongly encourage oral argument, or substantially limit and focus the areas of briefing. If one side insists on a written brief, allow oral argument in your presence, excluding the other side.

5. Check your class biases at the door; don't assume that only the grievant lies.

6. Do not draw an "adverse inference" because the discharged grievant does not testify. If the employer has not carried its burden of proof, or just cause has not otherwise been established, there is no need for grievant to "take the stand."

7. Reject the "business justification" for a contract violation, such as a layoff.

8. Consistent with the S*teelworkers Trilogy* and the 1985 paper by Sylvester Garrett, reject the "retained rights" formulation of the collective bargaining agreement.

9. Issue meaningful remedies, effective and forceful as a deterrent to future violations

10. Understand that arbitrators work by themselves and do not have to follow somebody else's rules. Recognize that rules are regularly broken.

11. Visit the worksite.

12. Invite mediation during the arbitration hearing.

13. Don't allow additional justifications for the termination over and above those set forth in the discharge notice.

14. Lastly, continue your efforts to educate the judiciary, lawmakers, and your own members that the collective bargaining agreement must be understood as quite different from an employment, commercial, or other form of business contract, and that labor arbitration awards must be reviewed, and with very few exceptions, confirmed by application of S*teelworker Trilogy* framework of analysis.

As a matter of common sense and known realities of the workplace, once discharge has occurred, the employee is normally trying to persuade the employer that there is no cause for his or her discharge. In effect, the burden of proof has been shifted by the employer.

> The attitudes of the parties after an actual discharge notice has been given and a grievance filed and processed ordinarily cannot possess the same elements of elasticity as before the discharge. The company is more likely to feel compelled to support a supervisory decision already made than a mere suggestion of discharge not yet effectuated. *Décor Corp.*, 44 L.A. 389, 391 (Kates 1965).

Once a decision to discharge has been made, the employer has less incentive to listen to the grievant's side of the story objectively, and short of arbitration, the type of fair hearing essential to due process may be almost impossible to achieve.

Appendix: Memorable Phrases and Descriptions Grounded in *Steelworker Trilogy* Language

What follows are some quotations from NAA members over the years that impressed me, and that I would like to share with you.

A. STEELWORKER TRILOGY DECISIONS THEMSELVES

Justice Douglas' description of labor arbitrators was "extravagant."[120]

Justice Douglas fostered "a laudatory mythology about arbitrators" in *Warrior & Gulf*.[121]

It would be far more comforting if the Court had omitted its glittering generalities concerning arbitration and arbitrators and had retained only those of its statements which seem to make it clear that grievance/arbitration is limited to interpreting and applying the written collective bargaining agreement. . . .[122]

Indeed, the *Trilogy* quite often has been characterized as excessively effusive in its description of the authority and role of the arbitrator.[123]

The *Steelworkers Trilogy*. . . went so far in entrenching the jurisdiction of the arbitrator that the arbitrator . . . was the first to want to run for the nearest exit.[124]

It is rather widely acknowledged by now that in discussing the nature of arbitration in the *Warrior* case, Justice Douglas went to some rather fanciful extremes.[125]

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[120]Feller, *The Coming End of Arbitration's Golden Age, in Arbitration—1976,* PROCEEDINGS OF THE 29TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, eds. Barbara D. Dennis and Gerald G. Somers (BNA Books, 1976), at 111; Feller, *supra* note 4, at 111; Christensen, *Judicial Review: As Arbitrators See It, in Labor Arbitration at the Quarter-Century Mark,* PROCEEDINGS OF THE 25TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, eds. Barbara D. Dennis and Gerald G. Somers (Washington, DC: BNA Books, 1972), at 100.

[121]363 U.S. at 581–82; W. Gould, *Judicial Review of Labor Arbitration Awards—Thirty Years of the* Steelworkers Trilogy*: The Aftermath of* AT&T *and* Misco, 64 NOTRE DAME L. REV. 464, at 471 (1989).

[122]S. Kagel, *Recent Supreme Court Decisions and the Arbitration Process* (with *Discussions* by Jesse Freidin and David Feller), PROCEEDINGS OF THE 14TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Spencer D. Pollard (Washington, DC: BNA Books, 1961), 1–2.

[123]S. Garrett, *Contract Interpretation: The Interpretive Process: Myths and Realities,* PROCEEDINGS OF THE 38TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS (1985), 121; *id*. at 135.

[124]Marshall, *Section 301—Problems and Prospects, in Labor Arbitration and Industrial Change,* PROCEEDINGS OF THE 16TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Mark L. Kahn (Washington, DC: BNA Books, 1963), 146, 150–51.

[125]O'Connell, Jr., *The Labor Arbitrator: Judge or Legislator,* PROCEEDINGS OF THE 18TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, ed. Dallas L. Jones (Washington, DC: BNA Books, 1965), 102, 113.

In the first National Academy meeting after the *Steelworkers Trilogy* decisions, David Feller acknowledged the "somewhat extravagant description of the competence of arbitrators. . . ."[126]

B. THE LABOR ARBITRATOR

"... [O]ur special obligation to preserve and improve the institution of arbitration requires us to subject ourselves to more or less continuous and critical self-examination."[127]

"My experience since 1946, including handling well over 10,000 cases has not yet revealed to me that degree of excessive romanticism which ... others have seen in the *Trilogy*. Is it really absurd for example, to be concerned, where relevant, with the effect of a given decision upon (1) 'productivity,' (2) 'morale,' or (3) 'tensions in the shop'? Clearly not."[128]

"Thus, if I have any quarrel at all with the *Trilogy* Opinions, it is with the assertion that an arbitrator does not sit to 'dispense his own brand of industrial justice.' This pleasing euphemism, originally coined by Harry Shulman, does not seem entirely accurate. As any experienced practitioner full well knows, an arbitrator (like a judge) brings to each case a set of qualifications and preconceptions based on education, experience, associations, personal qualities, and perhaps instinct, which often may influence the outcome of a case."[129]

"...we are a protected species and carry with it the ultimate responsibility to maintain the integrity of the arbitration process.... There is an ongoing threat to us as a protected species from *within* namely ourselves." [130]

"The labor arbitrator under a collective bargaining agreement is the "proctor" of the bargain, and "part of a system of industrial self-government created by and confined to the parties."[131]

"The role of the labor arbitrator is as yet unsettled due to the essentially schizoid nature of American labor law."[132]

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[126]David Feller, *Arbitration and Public Policy,* PROCEEDINGS OF THE 14TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS (1961), 23.

[127]B. Aaron, *On First Looking Into the* Lincoln Mills *Decision, Arbitration and the Law,* PROCEEDINGS OF THE 12TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. McKelvey (1959), at7.

[128]S. Garrett, *supra* note 123, at 138.

[129]*Id.* at 148.

[130]Kagel, *Legalism in Arbitration, Legalism—and Some Comments on Illegalisms—in Arbitration, 1985,* ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, at 180, 181.

[131]Justice Powell's Opinion in Alexander v. Gardner Denver Co., 415 U.S. 36, 53, n.16 (1974).

[132]W. Gould, *Judicial Review of Labor Arbitration Awards—Thirty Years of the* Steelworker Trilogy*: The Aftermath of* AT&T *and* Misco, 64 NOTRE DAME L. REV. at 467 (1989).

"In addition to honesty and impartiality, and broad knowledge of industrial relations, enduring success as an arbitrator 'requires a disposition not easily ruffled and a keen appreciation of the rights and feelings of others. It calls for an understanding of human nature and a realization that the matters to be dealt with are basically human relations problems. Beyond that, it requires what might be termed an 'uncanny' ability to grasp the real situation. . . . Arbitration is an art rather than a body of knowledge.'"[133]

"In a loose sense, almost all arbitrators at times must act as judges do. Most parties appear to want them to; what they don't want, perhaps, is an arbitrator who begins to think he *is* a judge."[134]

"I do not share Justice Douglas' mystical reverence for the arbitration profession."[135]

". . . . I emphasize the fact that as a result of the direction of the United States Supreme Court, it is the arbitrator who is the guardian of the arbitration process. . . ."[136]

"Arbitrators like the Kings of Yesteryear, can do no wrong."[137]

"Speaking of the responsibility of making a decision, Arbitrator Ralph T. Seward described the responsibility of writing an arbitration award as: 'Indeed, a training school in humility.'[138] Ralph Seward also described arbitration as 'the search for the 'deeper truth.'"[139]

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[133]E. Witte, *The Future of Labor Arbitration—A Challenge, The Profession of Labor Arbitration,* SELECTED PAPERS FROM THE FIRST ELEVEN ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS, 1948–1954.

[134]Garrett, *The Role of Lawyers in Arbitration, Arbitration*, in *Arbitration and Public Policy,* PROCEEDINGS OF THE 14TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Spencer D. Pollard (Washington, DC: BNA Books, 1961), at114.

[135]Lewis, *The Arbitrator and the NLRB: Workshop Sessions: Workshop A,* in *The Arbitrator, the NLRB, and the Courts,* PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Dallas L. Jones (Washington, DC: BNA Books, 1967), 111, 122–23.

[136]Kagel, *supra* note 130, at 186.

[137]G. Cohen, *The Changing Face of Just Cause, One Standard or Many, The Union Response, Arbitration 2000: Workplace Justice and Efficiency,* in *the Twenty-First Century,* PROCEEDINGS OF THE 53RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ed. Briggs and Grenig (2000), at 42.

[138]Seward, *Arbitration in the World Today, The Profession of Labor Arbitration*, SELECTED PAPERS FROM THE FIRST ELEVEN ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS, 1948–1954; Nicolau in 1997, recalled by George Nicolau, *Presidential Address: The Challenge and the Prize, Arbitration 1997: The Next Fifty Years,* PROCEEDINGS OF THE 50TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, ed. Najita (1997), at 21.

[139]*Id.*, at 73.

III. FIFTY YEARS AFTER THE *STEELWORKERS TRILOGY*: SOME NEW QUESTIONS AND OLD ANSWERS

ANDREW M. KRAMER*

I appreciate the opportunity to comment both on Bill Gould's thoughtful remarks and to address some of the issues presented since the *Steelworkers Trilogy*[1] was decided a half century ago. It is also nice to be back addressing this group; my last visit was some twenty-five years ago.[2]

My comments today will be directed to the following points. First, how I see the practical impact of the Supreme Court's opinion in *Pyett*.[3] Second, how the *Trilogy*'s reliance on Section 301 of the Labor Management Relations Act,[4] rather than the Federal Arbitration Act (FAA)[5] led to the development of a significant line of cases whose place in labor jurisprudence remains intact. Third, how I see the legal impact of *Pyett* and, in particular, the interplay between Section 301 and the FAA, on the scope of judicial review. I close with a few personal comments based on my forty years of practice as to the state of labor arbitration from a management lawyer's perspective.

Pyett

Bill raises many interesting and important questions about *Pyett*. I, too, think *Pyett* raises a number of issues that will need addressing in the years to come, but I'm uncertain as to its immediate practical impact on employers, unions, employees, and arbitrators. For one, the Court recognized that "federal antidiscrimination rights may not be prospectively waived."[6] This suggests an important limit on the reach of the holding. Indeed, the Court made clear it was not deciding whether a union's control over the labor arbitration process operated as a substantive waiver of

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[1] *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

[2] Andrew Kramer, PROCEEDINGS OF THE 38TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, Walter J. Gershenfeld ed. (Washington, DC: BNA Books 1986), at 149.

[3] *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456 (2009).

[4] 29 U.S.C. § 185.

[5] 9 U.S.C. § 1 *et seq.*

[6] 129 S. Ct. at 1469.