

Michigan Law Review

Volume 76 | Issue 2

1977

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Recommended Citation

Roger I. Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231 (1977).

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THE INTEGRITY OF THE ARBITRAL PROCESS

Roger I. Abrams*

I. INTRODUCTION

Over twenty years ago Dean Shulman and Professor Cox debated through the pages of the *Harvard Law Review* the question of the role law should play in labor arbitration.¹ Shulman urged "that the law stay out,"² while Cox argued that courts would come to understand the special nature of the arbitration process and would accordingly limit the extent of judicial intervention.³ The impact of their discussion has, of course, been mooted by the numerous judicial decisions implanting private arbitration within the federal law of the collective agreement.⁴ From the Supreme Court has come a formidable legal superstructure for the labor arbitration process, and support for labor arbitration is now a paramount national policy.

It is not the object of this Article either to belabor the wisdom of these decisions or to suggest fundamental changes in the labor arbitration system. The question does remain, however, of how to ensure that labor arbitration continues to merit its preferred status. In offering an answer to that question, this Article suggests that the key to private arbitration's future contributions to the national labor law system lies in maintenance of the integrity of arbitral procedures. Thus the focus of the inquiry will be directed at the basic elements of arbitration procedure essential to the achievement of accurate results in an efficient manner acceptable to the parties. The legal developments of the past two decades demand a thorough reexamination of how labor arbitration is to be conducted.

The reasons proffered in support of designating labor arbitration as the appropriate forum for resolving industrial disputes are well

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1. See Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

2. Shulman, *supra* note 1, at 1024.

3. Cox, *supra* note 1, at 604-05.

4. See text at notes 5-28 *infra*. This historical development of labor arbitration as a private dispute-resolving mechanism is traced by R. FLEMING, *THE LABOR ARBITRATION PROCESS* 1-30 (1965), and more recently in B. LANDIS, *VALUE JUDGMENTS IN ARBITRATION: A CASE STUDY OF SAUL WALLEN* 2-14 (1977).

known. In supporting labor arbitration, the Supreme Court has relied upon evidence of congressional intent⁵ and upon the principle of allocating decisionmaking power to the more expert tribunal,⁶ as well as upon the assumption that labor peace can be best accomplished through enforced use of the pre-established private mechanism for dispute resolution.⁷ Arbitrators, knowledgeable in the common law of the shop, were said to be better equipped than judges to resolve controversies arising in the industrial setting.⁸ Thus, in fleshing out the new federal common law of the labor agreement, the Court concluded that the judiciary was obliged to send union and management to this preferred forum for resolution of disputes, unless it was clear that the matter lay beyond the scope of arbitration.⁹ Moreover, the Court stated that it was not the job of courts, upon completion of an arbitration, to reexamine the merits of the dispute.¹⁰ Essentially, the Court limited review to a determination of whether the arbitrator had the power under the collective agreement to make his award.¹¹

The foreseeable effect of these decisions was to keep the parties out of court. Except where the contract clearly and expressly excluded the disputed issue from arbitration, resistance to the process was rendered futile.¹² Even frivolous grievances were to be sent to arbitration so that its "therapeutic values" would be allowed to

5. "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Labor-Management Relations Act, § 203(d), 29 U.S.C. § 173(d) (1970).

6. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) [hereinafter cited collectively as *Steelworkers Trilogy*].

7. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

8. "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *Warrior & Gulf Navigation*, 363 U.S. at 582.

9. 363 U.S. at 582-83.

State courts have not uniformly followed the *Steelworkers Trilogy* formulation in public-sector arbitration. In a recent case under the Taylor Law—the New York public employee's fair employment act, N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973)—the New York Court of Appeals held that arbitration would only be directed if the matter expressly, directly, and unequivocally fell within the arbitration promise. *Acting Superintendent of Schools v. United Liverpool Faculty Assn.*, 42 N.Y.2d 509, 369 N.E.2d 746, 399 N.Y.S.2d 189 (1977).

10. *Enterprise Wheel*, 363 U.S. at 596. The First Circuit recently restated the appropriate judicial role as one of applying a "rule of non-reviewability." *Betten-court v. Boston Edison Co.*, 560 F.2d 1045, 1049 (1st Cir. 1977).

11. *Enterprise Wheel*, 363 U.S. at 597. See Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 439-62 (1969).

12. *Warrior & Gulf Navigation*, 363 U.S. at 584-85.

flourish.¹³ Labor peace was to be promoted by affording the union an opportunity to vindicate its contractual rights through peaceful private adjudication in lieu of strife—*i.e.*, the “carrot” approach to labor peace.

When unions ignored the judicial “carrot,” the Supreme Court in its 1970 decision in *Boys Markets*¹⁴ supplied management with the “stick” of the labor injunction.¹⁵ In that case, the Court found the arbitral process to be too important in the scheme of national labor policy to be sacrificed to union self-help. Notwithstanding the substantial obstacles of the Norris-LaGuardia Act¹⁶ and an eight-year-old decision directly on point,¹⁷ the Court, speaking through Justice Brennan, concluded that support of labor arbitration required not merely specific enforcement of the promise to arbitrate, but specific enforcement of the collateral promise not to strike.¹⁸

Further support for the arbitral process was supplied by Court decisions channeling employee grievances through contractual procedures¹⁹ and demarcating a union’s duty to represent unit employees fairly in those procedures.²⁰ Individual employees were required to utilize the contract’s grievance procedure to redress their grievances, even those based upon claims of racial discrimination;²¹ the use of self-help collective methods was not to be protected under section 7 of the National Labor Relations Act (NLRA).²² Moreover, once involved in the grievance and arbitration process, the employee was left with the weak reed of the union’s duty of fair repre-

13. *American Mfg.*, 363 U.S. at 568.

14. *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

15. See *Abrams, The Labor Injunction and the Refusal To Cross Another Union's Picket Line*, 26 CASE W. RES. L. REV. 178 (1975).

16. 29 U.S.C. §§ 101-115 (1970).

17. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962).

18. *Boys Markets*, 398 U.S. at 253. Four years later, the Court went a step further by implying a no-strike obligation from the presence of a contractual arbitration provision arguably covering the dispute in question. The Court then specifically enforced the implied obligation. *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974).

19. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975).

20. *Vaca v. Sipes*, 386 U.S. 171 (1967).

21. *Emporium Capwell*, 420 U.S. at 70. Likewise, an employee asserting a contractual claim must exhaust available contractual procedures. Compare *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), with *Smith v. Evening News Assn.*, 371 U.S. 195 (1962).

22. *Emporium Capwell*, 420 U.S. at 70. Section 7 of the NLRA guarantees, *inter alia*, the right of employees “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.” 29 U.S.C. § 157 (1970). Employer interference with the exercise of this right is made an unfair labor practice by § 8 (a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1970).

sentation in pursuing his claim.²³ A union could settle a grievance short of arbitration, so long as it acted without bad faith,²⁴ and retain control over the privately created dispute-resolution mechanism. The autonomy of the grievance and arbitration system was reaffirmed.²⁵

Labor arbitration has thus been moved "center stage" by two decades of judicial determinations.²⁶ Arbitrators have been given unique power to resolve disputes with the support, but not the interference, of external legal institutions.²⁷ Although the courts disclaim any expertise in the ways of labor arbitration, they have nevertheless readily lent their assistance to the process. When parties privately negotiate a collective bargaining agreement that includes an arbitration provision, they automatically obtain the "support" of the legal system. Their voluntary acceptance of a mechanism for dispute resolution assures ready enforcement of that contract provision at the behest of either party.²⁸

23. *Vaca v. Sipes*, 386 U.S. 171 (1967). See generally Note, *Fair Representation and Union Discipline*, 79 YALE L.J. 730, 734-35 (1970).

24. 386 U.S. at 191.

25. In *Vaca* the Court decided that the merits of the contract claim could be addressed in federal court if the employee had vaulted the barrier of proving a union breach of the duty of fair representation, although the judicial option of sending the matter to arbitration was preserved. 386 U.S. at 196. It might be suggested that the federal judiciary is competent to hear the merits of this type of grievance because a union found to have breached its duty of fair representation is unlikely to represent the aggrieved employee adequately in the court-ordered arbitration. In any case, this aspect of *Vaca* is discordant with the trend of judicial obeisance to the labor arbitration process.

The only other major exception to this trend of unlimited judicial support for the arbitral process arose when policy favoring arbitration directly conflicted with statutory antidiscrimination policy. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974), the court allowed a Title VII suit to be brought by the grievant, notwithstanding an unfavorable arbitration result on the grievant's discharge, because of the "distinctly separate nature of these contractual and statutory rights."

26. The National Labor Relations Board has also contributed its measure of support for the labor arbitration process. Its policy came into full bloom in the *Collyer* doctrine, developed in *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). Alleged violations of § 8(a)(5) and 8(b)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), (b)(3), that were arguably cognizable in arbitration would now be deferred to the parties' own private forum. After arbitration, the NLRB would disturb the arbitral resolution only if it were "repugnant to the purposes and policies of the Act." *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955).

27. "Arbitrators experience a unique position among the various decision makers who respond to the issues raised in labor disputes in America. Unlike federal and state judges and administrative agencies, the labor arbitrator is almost entirely unfettered by legal concepts; his judgment is insulated against displacing judicial review." Jones, *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 U.C.L.A. L. REV. 1241 (1966).

28. Under the *Collyer* doctrine, they have also contracted themselves out of direct NLRB supervision over a large spectrum of contractually based unfair labor prac-

Although recent years have seen a significant concentration of decisionmaking power on labor arbitration, little discussion has centered on how the participants in the process should react to its newfound prominence in the scheme of national labor policy. There is no indication that arbitral jurisprudence, the essential source of arbitrators' decisions, has significantly changed over the past twenty years.²⁹ Arbitration procedure remains, for the most part, a matter of the parties' choice. But the developments in the legal environment external to the arbitral process necessarily require some rethinking about how the process itself should be conducted. The freedom to operate without legal intrusion but with considerable legal support devolves upon the participants—union, management, and arbitrators—a responsibility to ensure that labor arbitration effectuates national policy.

A recent judicial signal indicates that a reexamination of the arbitral process is both necessary and appropriate. In *Hines v. Anchor Motor Freight, Inc.*,³⁰ the Supreme Court noted that a final and binding arbitration award was "reviewable and vulnerable if tainted by breach of duty on the part of the union, even though the employer had not conspired with the union."³¹ The Court concluded that inquiry must be directed to whether the arbitration process "has fundamentally malfunctioned by reason of the bad-faith performance of the union,"³² for if "contractual processes have been seriously flawed," the "integrity of the arbitral process" has been undermined.³³ "Congress," stated the Court, "has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that contractual machinery would operate within some minimum levels of integrity."³⁴ The preferred status of labor arbitration is thus not immutable. The

tices. The Board has, however, wisely retracted its earlier extension of deferral to alleged violations of § 8(a)(1) and § 8(a)(3). *General Am. Transp. Corp.*, 228 N.L.R.B. No. 102 (1977), reported in [1976-77] NLRB Dec. (CCH) ¶ 17,962.

29. See generally F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* (3d ed. 1973).

30. 424 U.S. 554 (1976).

31. 424 U.S. at 568 (noting the ruling in *Humphrey v. Moore*, 375 U.S. 335 (1964)). The petitioners' central claim was that their union failed to investigate the asserted grounds for their discharge, thereby breaching its duty of fair representation. The Court granted certiorari only on the question of whether the final and binding arbitration award denying the grievance barred petitioners' claim, and thus it did not address the adequacy of the unfair representation contention.

32. 424 U.S. at 569.

33. 424 U.S. at 567, 570.

34. 424 U.S. at 571. Although *Hines* dealt with how the negligence of one party to the arbitration affected the integrity of the arbitration process, the message

Court has given clear notice that if arbitration is to continue its special role in national labor policy, attention must be given to the way in which it is conducted.

II. THE NATURE OF THE ARBITRAL PROCESS

A. *The Assumed Attributes of Arbitration*

Labor arbitrators decide the most important issues facing unionized working people today—those involving individual employee job rights. Discharge and discipline cases constitute the most common issues faced by arbitrators; job rights cases involving seniority, wage rates, and pay issues fill arbitration dockets.³⁵ With the courts and the streets now foreclosed, the contract rights of the working person must find protection in the forum of arbitration or be lost.³⁶

Labor arbitration has been traditionally lauded for its flexibility and informality. The arbitrator, as the chosen instrument of the parties, is assumed to be controlled by their agreement and no other forces. Privately employed by the parties,³⁷ the arbitrator is viewed as an itinerant problem solver, relied upon by both union and management for his informed practical solution of a dispute they could not resolve themselves.³⁸ Stare decisis is proclaimed inoperative

is clear that the process itself must be examined for flaws. Malfunction in the process will make the results of the process vulnerable to judicial attack.

35. In fiscal year 1976, of a total of 6855 issues reported in Federal Mediation and Conciliation Service closed arbitration cases, 2150 were discharge and discipline issues, 969 were seniority issues, and 912 were wage rate and pay issues. UNITED STATES FEDERAL MEDIATION AND CONCILIATION SERVICE: TWENTY-NINTH ANNUAL REPORT 55-56 (1976) [hereinafter cited as FMCS ANNUAL REPORT]. Professor Lon Fuller characterized employee job rights as "a species of property" earned by individual workers. Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. REV. 3, 10 (1963).

36. "Collective bargaining's most enduring monument may well be the rule of law which it has brought to the American industrial society. Without such a rule individuals would have infinitely less protection in their working lives than they now have. Yet we remain concerned that the very collective process which offers them protection may unduly subjugate individual rights." R. FLEMING, *supra* note 4, at 130.

37. Most labor arbitrators are members of one or both of the labor panels maintained by the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS). The AAA "is a private, non-profit organization founded in 1926 to foster the study of arbitration, to perfect the techniques of this method of dispute settlement under law and to administer arbitration in accordance with the agreement of the parties." AMERICAN ARBITRATION ASSN., LABOR ARBITRATION: PROCEDURES AND TECHNIQUES 23 (1975) (booklet). Congress created the FMCS in the Taft-Hartley Act of 1947 "to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation." 29 U.S.C. § 173 (1970).

38. The arbitrator is thus seen, to borrow Cardozo's colorful phrase, as a "knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." B.

and the rules of evidence are not binding. The process is praised as cheap, fast, and informal.

This, in brief, is the accepted portrait of the process to which the law has lent its considerable support.³⁹ It rests upon the behavioral assumption that the parties will, in fact, administer their private mechanism with the help of a talented adjudicator in a fair manner, providing correct results expeditiously. Experience, however, belies the assumption.⁴⁰ Economy is asserted as a central benefit, but arbitration is far from cost-free.⁴¹ Speed is a posited attribute, but one may seriously question whether a process that on the average takes over seven months can be characterized as "speedy."⁴² Moreover, the assumptions supporting the present formless arbitration model are challenged in arbitrations where the union and the grievant do not have coincident interests, where the arbitrator has an undisclosed—or even disclosed—personal interest in the case at hand, where either party is poorly represented before the arbitrator, where

CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921). Professor Fuller described this expansive conception as the labor arbitrator as "labor relations physician":

The . . . conception expects the arbitrator to adapt his procedures to the case at hand. Indeed, in its more extreme form it rejects the notion that his powers for good should be restrained at all by procedural limitations. By this view the arbitrator has a roving commission to straighten things out, the immediate controversy marking the occasion for, but not the limits of, his intervention. Fuller, *supra* note 35, at 4.

39. Arbitration practice is consistent, however, only in its inconsistency: "Arbitration hearings run the gamut from utmost informality to high formality. The means of presenting facts range from conversation across the table to examination of sworn witnesses in meticulous accord with the rules of evidence. Styles vary from one relationship to another." Dunau, *supra* note 11, at 437.

The AAA has created a set of "Voluntary Labor Arbitration Rules," which parties may follow by mutual agreement. "The rules . . . are not binding upon arbitrators but do set guidelines as to hearing procedures." *Harvey Aluminum, Inc. v. United Steelworkers*, 263 F. Supp. 488, 491 (C.D. Cal. 1967). It is, of course, impossible to ascertain whether there is compliance with these broad, permissive rules.

40. The traditional view of labor arbitration may be "one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience," we can no longer continue "to rely on it." *Office of Communications of United Church of Christ v. FCC*, 59 F.2d 994, 1003-04 (D.C. Cir. 1966) (Burger, J.).

41. The average total arbitrator charge in a sample of FMCS arbitrations in fiscal year 1976 was \$662.39 per case. FMCS ANNUAL REPORT, *supra* note 35, at 51. If the parties are represented by attorneys and a transcript is taken, the cost significantly increases.

The Bureau of National Affairs reported recently on a survey done for the AFL-CIO's *American Federationist* that estimated the total cost to a union for a one-day arbitration at \$2,220. FACTS FOR BARGAINING (BNA), June 27, 1977, at 1.

42. The average elapsed time from the grievance filing to arbitration award of a sample of FMCS cases in fiscal year 1976 was 233.5 days. FMCS ANNUAL REPORT, *supra* note 35, at 53.

issues beyond the competence and special expertise of the arbitrator are presented, or where the procedures followed do not afford adequate protection for legitimate and substantial public and private interests. Labor arbitration cannot be defended simply on the broad, unverified assumption that in many instances it works well.⁴³ Nor can the competence of the present corps of professional arbitrators be defended with the market theory that the parties continue to select them,⁴⁴ for, after all, they are the "only game in town." The private system of labor arbitration has been vested with enormous power, and, if its fiduciary role is to be conserved, its procedures must be open to continuing examination.

B. *Fundamental Values Underlying Institutional Design*

The Supreme Court has stated that labor arbitration must meet "some minimum levels of integrity."⁴⁵ Although the specific requirements imposed by that abecedarian standard were not made at all clear, this Article will propose the adoption of certain fundamental procedures designed both to satisfy the Court's prescription and, more broadly, to ensure that the performance of labor arbitration is commensurate with its national responsibilities. In developing the outlines of this proposal, which will for convenience be called the "basic labor arbitration model," we should not merely focus upon the possible dysfunctions of the present norm, but also weigh the costs and asserted benefits of establishing certain uniform procedures. Improvements in the system's accuracy may come at the expense of efficiency, and advancements in either of these respects may yet be unacceptable to the parties involved. Thus, if the basic labor arbitration model is to offer an acceptable game plan for the institution's future, it must be cognizant of the various interests that arbitration serves as well as of the demands to which it must answer. In sum, the basic model must be crafted to serve the national labor goals of industrial peace and equitable adjudication of private claims while also meeting the reasonable expectations of the parties.⁴⁶

43. A systematic empirical study of labor arbitration is certainly in order. See generally Roomkin & Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1440 (1977). Fleming has detailed an agenda of research issues. R. FLEMING, *supra* note 4, at 203-22.

44. See Wallen, *Dispelling the Hays' Haze*, Address to the 12th Annual Institute of Labor, The Southwestern Legal Foundation, Dallas, Texas (Oct. 29, 1965), reprinted in R. SMITH, L. MERRIFIELD & D. ROTHSCHILD, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 300-04 (1970).

45. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976).

46. A reasonable construction of any collective bargaining agreement is that

The procedural elements of the basic model for labor arbitration must maximize the probability that the arbitrator will reach a correct result.⁴⁷ Parties to a collective bargaining agreement certainly intend that their privately appointed neutral dispose of their disputes in a manner, and with a result, consistent with their mutual expectations.⁴⁸ Using the construct of a "range of reasonable outcome expectations" as a measure of accuracy, we might say that outcomes that fall within the spectra of decisions anticipated by the parties are "correct."⁴⁹

To illustrate, consider the discharge of an employee for conduct outside of the work place, a common arbitral scenario.⁵⁰ Industrial jurisprudence suggests⁵¹ that management must demonstrate to the arbitrator the impact of the grievant's external activity on the employer's legitimate business interest. Assuming no proof of such a nexus and a common "just cause" contractual provision for discharge, the overlapping spectra of the parties' reasonable expectations con-

the parties intend the arbitrators of their grievances to adjudicate within some procedural rubric. Although it was agreed that the arbitration decisions were to be final and binding upon the parties, implicit in such agreement was the concept of decisions reached by a fair means.

Central Packing Co. v. United Packinghouse Workers, 195 F. Supp. 188, 192 (D. Kan. 1961).

47. Dean Cramton suggests this value of accuracy, coupled with the values of efficiency and acceptability, as the measures of necessary administrative process. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 592-93 (1972). Barry Boyer employed Cramton's three criteria to evaluate agency procedural systems for solving polycentric problems. Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972).

48. "Given the absence of an objective external standard for accuracy . . . [t]he nearest approximation to an index of accuracy is consistency in adjudication In a closed hierarchical structure with no external referents consistency and accuracy tend to merge." Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 44 (1976). Thus, the correctness of arbitral outcomes might be tested by measuring consistency—similar cases should be decided alike. Altering the perspective slightly, one may say that the parties should legitimately be able to anticipate predictable results from similar cases. Results inconsistent with these expectations are incorrect. See S.C.M. Allied Paper, Inc., 68 LAB. ARB. REP. (BNA) 1125, 1126 (1977) (Herrick, Arb.) (obligation of arbitrator to follow "right answer principle").

49. The "reasonable outcome expectations" of the parties will ordinarily overlap. Although the parties undoubtedly enter arbitration seeking differing results, both sides generally recognize that the reasonable arbitrator may decide the cases by accepting the opponent's result.

50. See, e.g., Allied Supermarkets, Inc., 41 LAB. ARB. REP. (BNA) 713 (1963) (Mittenthal, Arb.); W. E. Caldwell Co., 28 LAB. ARB. REP. (BNA) 434, 436-37 (1957) (Kesselman, Arb.); Inland Container Corp., 28 LAB. ARB. REP. (BNA) 312, 314 (1957) (Ferguson, Arb.).

51. Unlike legal principles, arbitral principles "suggest" and do not "demand" certain modes of analysis.

cerning the possible outcome of the arbitration would range from ordered reinstatement with full back pay to, perhaps, reinstatement without back pay if the employee did not use reasonable efforts to seek other employment after his discharge.⁵² A blanket affirmance of the discharge without unique additional contract language or facts demonstrating impact on the employer's business would be a "wrong" result. Any model of labor arbitration must minimize the chances of such an outcome.⁵³

In addition to accuracy, the basic arbitration model must assure the acceptability of the process to all concerned persons. Parties to an arbitration, grievants directly affected by the adjudication, and other employees in the shop must be satisfied with both the result reached and the process that led to the result. Although universal satisfaction may not be achievable, the design of the arbitral system must maximize this value. Of course, if the process is inaccurate, it will to that extent also be unacceptable. A "wrong" decision in the hypothetical discharge case sketched above would undoubtedly produce dissatisfaction and lead the losing party to consider a court suit to vacate the award. Although under current law the result would undoubtedly stand, assuming the arbitrator's opinion interpreted the contract language of "just cause" to have been satisfied,⁵⁴ the matter would be "settled" in only the narrowest sense of the term.

It is also clear, however, that accuracy alone will not guarantee acceptability. Consider a situation where an arbitrator fails to allow a dischargee to confront his accuser in a discharge case based upon an assault of a supervisor. Even though a ruling against the grievant that upholds the discharge is clearly within the spectra of reasonable expectations,⁵⁵ the procedure through which the result was reached renders the process unacceptable.⁵⁶ The Supreme Court's dictum concerning the therapeutic value of arbitration⁵⁷ is clearly relevant

52. See, e.g., *Albertson's Inc.*, 65 LAB. ARB. REP. (BNA) 1042, 1047 (1975) (Christopher, Arb.).

53. Techniques for increasing accurate results include the selection of experts in labor relations as arbitrators and the allowance of the full development of facts and arguments to aid decisionmaking. See text at notes 67-112 *infra*.

54. *Enterprise Wheel*, 363 U.S. 593 (1960).

55. See, e.g., *Kewanee Oil Co.*, 56 LAB. ARB. REP. (BNA) 908 (1971) (Traynor, Arb.); *Pioneer Finishing Co.*, 52 LAB. ARB. REP. (BNA) 822 (1969) (Roberts Arb.).

56. "If employers and unions concerned are to engage in agreements providing for arbitration, they must have complete confidence in the proceeding." *Harvey Aluminum, Inc. v. United Steelworkers*, 263 F. Supp. 488, 495 (C.D. Calif. 1967).

57. *American Mfg.*, 363 U.S. at 568.

to the construction of the arbitration model. Labor arbitration must not only reach a fair result, it must give the appearance of having done so through fair means. The legitimacy of any decisionmaking procedure is easily lost and, once lost, most difficult to retrieve in a collective relationship.⁵⁸ Arbitration must offer a satisfactory procedure to those concerned if it is to preserve its legitimacy.

The third value to be achieved in the arbitral model is efficiency in operation. The process must work expeditiously if it is to serve as an attractive substitute for litigation or self-help. Procedures that do not assist the accuracy or acceptability of the process are not simply surplusage: they actively impair the value of efficiency. Certain procedures that arguably increase accuracy or acceptability may also detract from the efficiency of the process. Nevertheless, each trade-off must be evaluated on its own terms, for it is too simplistic to suggest that every increase in procedure results in inefficiency. The three values are interdependent. Increasing efficiency does increase acceptability, but only so long as the procedures used achieve correct results in a fair way. Similarly, the addition of procedures that increase the potential accuracy of the process may decrease the occasions on which it must be invoked, since parties will know that losing cases cannot be won before the arbitrator.⁵⁹ The less frequently it is employed, the more expeditious the arbitral process may become.⁶⁰

58. The posited basis for national law concerning enforcement of the arbitration promise is that labor peace will flow from the availability of an alternative mechanism for perfecting contractual rights. The premise breaks down if the process reaches either wrong results or correct results in an apparently unfair manner.

59. It is true, of course, that certain matters are brought to arbitration for intra-union "political" reasons unrelated to the merits of the case. R. FLEMING, *supra* note 4, at 207.

60. One potentially useful way to analyze the components of the basic arbitration model is by using concepts developed by the Supreme Court in the context of administrative procedures. See generally Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975). Although arbitration's connection with governmental power is too attenuated to make a convincing case for the direct, necessary application of the requirements of administrative due process, similarly important property rights are adjudicated in each procedure. Moreover, both due process in administrative law and basic process in arbitration law are intended simply as flexible indications of the standards necessary to ensure the integrity of the respective institutions. See R. FLEMING, *supra* note 4, at 165-66. Court decisions evaluating administrative adjudications are, of course, not directly applicable to labor arbitration. Moreover, Professors Ernest Gellhorn and Glen Robinson have pointed out that the procedures appropriate for one administrative agency are not necessarily transferable to another agency because of the difference in the respective substantive programs. Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771 (1975). Likewise, the procedures of labor arbitration must be made to fit both the substantive issues and the nature of the participants in the industrial relationship. It may be useful, nonetheless, to test arbitral sufficiency against the judicial benchmarks for administrative procedure.

Although undoubtedly elementary and unmistakably impressionistic, an analysis of the elements of labor arbitration based upon achievement of the goals of accuracy, efficiency, and acceptability appears justified. The emphasis of these values within the arbitral process, coupled with the maintenance of the essentially diverse nature of individual voluntary systems, will meet judicial expectations that private adjudication of labor disputes is consistent with national labor policy. Certainly a dispute-resolution system that is unable to achieve a balanced development of these three values will not long stand as the centerpiece of national labor policy.⁶¹

Under the Court's most recent formulation of the administrative due process equation, it is essential to consider "the risk of an erroneous deprivation of [the private interest] through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Clearly, then, accuracy is one of the values specifically identified as part of the due process inquiry. Similarly, the value of efficiency is invoked through mandatory consideration of the government's interest in minimizing administrative procedural burdens. 424 U.S. at 335. Lastly, acceptability is generally considered as part of "the private interest that will be affected by the official action." 424 U.S. at 335. Thus, considered broadly, the due process equation is based upon the same value trinity posited earlier as the measure of arbitral integrity.

Professor Jerry Mashaw, in his recent article criticizing the Court's approach in *Matthews v. Eldridge* as exclusively utilitarian, suggests a value-sensitive approach to due process analysis that would consider, in addition to accuracy, values such as individual dignity, equality of opportunity to be heard, and tradition. Mashaw, *supra* note 48. Although Professor Mashaw is undoubtedly correct that the Court emphasized utilitarian values in *Eldridge*, the Court did not expressly exclude future consideration of what Mashaw terms "individual dignity" considerations in appropriate situations. This value Mashaw refers to as procedural "acceptability." *Id.* at 51. If the Court's announced calculus is read as the definitive standard for due process review, this "acceptability" value must be identified when considering the private interest. See generally Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

Mashaw's suggested value of "equality" might be employed as an alternative measure of the adequacy of the labor arbitration process. As a general proposition, it is clear that the arbitrator must afford all concerned parties an equality of opportunity to be heard. Discriminatory action by an arbitrator affects both the acceptability and the accuracy of the process. Any disparate treatment that disadvantages one party to an arbitration certainly derogates from the integrity of the process. Thus, Mashaw's "equality" value will be built into the trinity of values suggested above to assess the arbitral process, through consideration of acceptability and accuracy.

61. David Feller has foreseen the end of the "Golden Age of Arbitration" in a recent, provocative article. Feller, *Arbitration: The Days of Its Glory Are Numbered*, 2 INDUS. REL. L.J. 97 (1977). He suggests that labor arbitration should recapture its special status by maintaining the traditional role as a purely private system of industrial governance, ignoring external law and protecting "the hegemony of the collective agreement." *Id.* at 101, 107. Even an occasional "injustice" at the hands of arbitrators must be allowed: "The system of industrial self government almost necessarily carries with it the possibility of injustice, not only to individual grievants, but also to many groups of employees and, as well, employers." *Id.* at 127. It is apparent that reasonable persons can differ as to the correct solution to the same problem. The recognition that injustice may be a product of labor arbitration should suggest that an attempt be made to design a system that minimizes its occurrence. The developments in the external environment discussed by Feller

Before proceeding to define the elements of the basic arbitration model, two important caveats are in order. No suggestion is being made to transform labor arbitration into a civil court. Full trial-type procedures are neither necessary nor useful in labor arbitration. The basic arbitration model is not a proposal for establishment of a labor court. Such a major reorganization of the national labor law system does have proponents, and arguments in favor of the establishment of a governmental tribunal need not be reiterated here.⁶² A structural reform of that magnitude would require the development of a broad political consensus among management, labor, and public forces based on intense dissatisfaction with labor arbitration as it presently exists. A more realistic approach lies in giving attention to reform of the components of private labor arbitration.

The second caveat addresses general analytical orientation. It should not be presumed that the suggestion that certain basic minimum procedures are essential need constrict what Ted Jones has called "intelligent innovation."⁶³ Only through a continual process of evaluation, commentary, and innovation will the components of the national labor law system evolve and mature. This continuing process seeks only a better system.⁶⁴ The perfect system will have to wait.

III. A BASIC ARBITRATION MODEL

The elements of the basic arbitration model include (1) an unbiased adjudicator (2) who conducts a hearing in an informal yet orderly manner, (3) protecting the rights of the grievant, (4) in a proceeding for which a record is made; and (5) the arbitrator must render a reasoned decision, so that (6) a court can meaningfully review the proceeding in order to ensure that the integrity of the arbitral process has been maintained.⁶⁵ The elements of the proposed

will not disappear. Labor arbitration must change to meet the challenge presented by these developments. An ostrich-like stance will not insulate the process from external impact.

62. See, e.g., Morris, *The National Labor Relations Board: Its Future*, 26 LAB. L.J. 334 (1975). The opposing view suggesting the need for providing private mechanisms for resolving disputes outside the courts is in current vogue. See, e.g., Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

63. Jones, *supra* note 27, at 1242.

64. A particularly noteworthy proposal for structural reform designed to deal with discrimination issues in arbitration has been suggested by Professor Harry Edwards. Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265 (1976).

65. The elements of the basic model are patterned in part after those set forth by the Supreme Court as relevant factors for a Title VII court to consider in appor-

basic model are not offered as a template to be laid over any existing arbitration procedure to guarantee its legal sufficiency. Rather, they are suggested as approaches to reform, approaches to minimize arbitral weaknesses. The absence of certain elements of the basic model—*e.g.*, an impartial arbitrator—would certainly vitiate any award resulting from the process. Other elements, such as the making of a record, are suggested in order to allow meaningful judicial review of arbitral integrity. Absence of a record, then, should not automatically render an award null and void.⁶⁶ Although some elements are not mandatory, implementation of these permissive elements of the model would benefit the achievement of the values of accuracy, acceptability, and efficiency, and thus would protect the integrity of the process.

A. *An Unbiased Adjudicator*

The most important component of the basic labor arbitration model is the presence of an unbiased neutral who is capable of fairly adjudicating a dispute that the parties to a collective agreement have

tioning weight to a prior arbitration finding: "Relevant factors include . . . the degree of procedural fairness in the arbitral forum, adequacy of the record . . . and the special competence of particular arbitrators." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974). Although the Court was not ready to impose these procedural requirements on the parties, its suggestive footnote has encouraged practitioners, at least in potential Title VII cases, to focus on matters of procedural regularity in order to maximize the probability that the arbitration result will be given great weight in any subsequent court suit.

66. The United States Arbitration Act provides for judicial vacation of arbitration awards

(a) Where the award was procured by corruption, fraud, or undue means. (b) Where there was evident partiality or corruption in the arbitrators, or either of them. (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced. (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10 (1970). Despite the express exclusion from coverage in § 1 of the Act for "contracts of employment of . . . any other class of workers engaged in . . . interstate commerce," the Act has been held applicable to labor arbitration by numerous federal courts. See the cases collected in Note, *Labor Arbitration: Appealing the Procedural Decisions of Arbitrators*, 59 MINN. L. REV. 109, 116 nn. 33-35 (1974).

The enumerated grounds for vacating awards, though certainly useful in evaluating arbitration procedures, do not comprehensively suggest the guideposts for constructing the basic arbitration model. Certainly an arbitration procedure that fails to pass muster under the Arbitration Act does not comply with the basic arbitration model. There are, however, additional elements to the model, such as the need for a record and a written opinion. The absence of such factors, though not mandating vacating the award under the Arbitration Act, nonetheless would detract from the integrity of the arbitral process.

not been able to settle themselves.⁶⁷ The essence of neutrality is being openminded, not empty-headed.⁶⁸ An arbitrator must be a person knowledgeable in the methods of conducting a hearing, fluent with the body of industrial jurisprudence, and receptive to the input of the parties on the common law of their shop.⁶⁹

An arbitrator must possess expertise in labor relations, organizational behavior, contract interpretation, and the fundamental elements of national labor law.⁷⁰ None of these qualities are reserved to lawyers, and those who would limit the corps of arbitrators to persons trained in the law do a disservice to the industrial community.⁷¹ The labor arbitrator must not only be informed, he also must be capable of dealing with complex and emotional issues in a manner reassuring to the parties. Arbitration deals powerfully with important individual interests, and compassion, including a proper sensitivity to the stakes and emotions involved, is a credential fully necessary to an arbitrator's vita.⁷²

67. See, e.g., Edwards, *Labor Arbitration at the Crossroads: The "Common Law of the Shop" v. External Law*, 32 *ARB. J.* 65 (1977).

68. "An amorphous dummy unspotted by human emotions [is not] a becoming receptacle for judicial power." *Berger v. United States*, 255 U.S. 22, 43 (1921) (McReynolds, J., dissenting).

69. Justice Douglas' characterization of labor arbitrators in the *Steelworkers Trilogy* as knowledgeable in the common law of the shop is correct insofar as he is referring to permanent umpires immersed in the ongoing problems of a major enterprise. The ad hoc arbitrator, however, though informed about the general operation of industrial principles, comes to a hearing without prior knowledge of the special factors that make up the common law of the parties who have chosen him to arbitrate their dispute. It is important to emphasize that, in order to fulfill his adjudicatory role, the ad hoc arbitrator must be receptive to learning as much as is possible and relevant about the way the parties have designed their industrial relationship.

70. THE CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES [hereinafter cited as *ARB. CODE*], reported in *ARBITRATION—1975, PROCEEDINGS OF THE 28TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 217 (B. Dennis & G. Somers eds. 1976), lists "honesty, integrity, impartiality and general competence in labor relations matters" as essential personal qualifications of an arbitrator. *ARB. CODE* § I(A)(1). The Code was promulgated on November 30, 1974, by the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service. The standards set forth in the Code "are designed to guide the impartial third party serving in . . . diverse labor-management relationships." *ARB. CODE*, Preamble-Background. See also 29 C.F.R. § 1404.2 (1976).

71. See Edwards, *supra* note 67, at 94-95 (arbitrators should not need "certification"); Jones, *supra* note 27, at 1251 n.36.

72. Unlike judges and juries, arbitrators are able to blend into their decisions a wide range of normative considerations, not excluding their sympathy for the individuals caught in the contractual matrix within which the grievance erupted . . . Their scale of justice is commodious and affords room to weigh the human needs of the workers against the institutional demands of the employer. Coulson, *Foreword* to B. LANDIS, *supra* note 4, at ix. For a vivid example of compassion and an understanding of the very human problems involved in arbitration,

Because the biased arbitrator immutably taints the integrity of the process,⁷³ disclosure of prior or current personal or business dealings with one of the parties must be the first order of business.⁷⁴ Such matters must be revealed prior to appointment. Disclosure of such information to the unknowing party must not be delayed until the opening of a hearing, when the pressures of the moment might motivate a decision to allow the arbitrator to continue.⁷⁵ Moreover, there may be situations where disclosure alone is insufficient to meet the arbitrator's responsibility to the process: if he⁷⁶ cannot free himself from a predisposition irrelevant to the facts of the particular dispute, or, because of prior known relationships, cannot appear to be disinterested,⁷⁷ the arbitrator must not accept appointment.⁷⁸ Pri-

see Arbitrator John C. Manson's recent opinion in *Basic Magnesia, Inc.*, 69 LAB. ARB. REP. (BNA) 737 (1977).

73. Impartiality of the adjudicator likewise lies at the core of administrative due process. See, e.g., *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912). See generally K. DAVIS, ADMINISTRATIVE LAW TEXT § 12.01-.06 (1972); Boyer, *supra* note 47.

74. An arbitrator must disclose "any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which he or she is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest." ARB. CODE § II(B)(1). An arbitrator must disclose if he or she "is serving concurrently as an advocate for or representative of other companies or unions in labor relations matters." ARB. CODE § II(B)(2). An arbitrator must disclose "any close personal relationship or other circumstance . . . which might reasonably raise a question as to the arbitrator's impartiality." ARB. CODE § II(b)(3). And "[n]o person shall serve as a neutral Arbitrator in any arbitration in which he has any financial or personal interest in the result of the arbitration, unless the parties, in writing, waive such disqualification." VOLUNTARY LABOR ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (1975) [hereinafter cited as AAA RULES], Rule 11, quoted and discussed in Sherman, *Labor Arbitrator's Duty of Disclosure*, 31 U. PITT. L. REV. 377, 379 (1970).

75. The Code and AAA Rules specify that this disclosure must be made prior to acceptance of an appointment. ARB. CODE § II(B)(3); AAA RULE 17.

76. The masculine pronoun is employed for convenience. However, it is a regrettable fact of arbitral life that very few arbitrators are women.

77. In *Public Util. Commn. v. Pollak*, 343 U.S. 451, 466-67 (1952), Justice Frankfurter recused himself and explained:

The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. Where there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

78. "If the arbitrator believes or perceives that there is a clear conflict of interest,

vate enforcement of this element of the arbitration model lies in the first instance with the individual arbitrator.⁷⁹ The ethical boundaries of the profession must be drawn by the people who make the system operate. Conscience is an uncertain policeman, but professional pride and individual integrity are resources not to be discounted.

The labor arbitrator must be an adjudicator, a decisionmaker. The itinerant problem solver who plays the shifting role of adjudicator-mediator harms the integrity of the process. The otherwise appropriate suggestion that the parties should try to settle their own dispute must not be taken as an excuse for the arbitrator to participate in the process of agreement. Once an arbitrator abandons his position as decisionmaker in order to act as an accommodator, he will be unable to reassume an adjudicatory role later in the case.

Consent awards—the polite term for “rigged awards”—are particularly troubling.⁸⁰ Even though expressly authorized by the Code of Professional Responsibility for Arbitrators in Labor-Management Disputes,⁸¹ consent awards misleadingly portray settlements as the product of adjudication. Although it may be true that the optimal solution to an industrial dispute is a voluntary agreement reached privately by the parties, the use of the arbitrator’s name and prestige to “sell” the result to rank-and-file members is a censurable misrepresentation.⁸² The legitimacy of the adjudicatory process is cor-

he or she should withdraw, irrespective of the expressed desires of the parties.” ARB. CODE § II(B)(5). The AAA Rules, however, allow for a blanket written waiver by the parties. AAA RULE 11, quoted in note 74 *supra*.

79. It may be cynical to suggest that a party may select an arbitrator because of a personal or business relationship, but it is generally recognized that the selection process involves an element of gamesmanship. Selecting an arbitrator on these grounds is, of course, short-sighted, as well as patently unethical, since the failure to disclose is a *per se* ground for vacation of the award. *Cf.* *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149 (1968) (undisclosed prior business dealing “which might create an impression of possible bias”). *But see* *Local 1296, Intl. Assn. of Firefighters v. City of Kennewick*, 86 Wash. 2d 156, 542 P.2d 1252 (1975) (award not set aside under public-sector statute despite appearance of impropriety.)

80. *See generally* Epstein, *The “Agreed” Case: A Problem in Ethics*, 20 ARB. J. 41 (1965); Fuller, *supra* note 35, at 20-22 (the rigged award is perhaps “the crassest infringement of adjudicative integrity”).

81. The Code expressly authorizes consent awards provided the arbitrator is satisfied, based upon the evidence submitted, that the settled-upon position is proper, fair, sound, and lawful. ARB. CODE § II(I). However, the Code also imposes a “responsibility” to seek to discover and “refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose.” ARB. CODE § II(A)(2).

82. Consent awards should be distinguished from stipulations of fact submitted by the parties. Stipulations streamline the arbitration process by adding to the efficiency value, and thus they should be encouraged by the arbitrator.

roded to the extent that a consent award masquerades as an adjudication on the merits.

When measured by the values of accuracy, efficiency, and acceptability, the need for an unbiased adjudicator is manifest. The results reached by an actually biased arbitrator are hardly accurate, and those produced by an apparently biased arbitrator are unacceptable even if correct.⁸³ Although it may be efficient to employ an arbitrator in the shifting role of adjudicator-mediator, that mixture is detrimental to the acceptability of a subsequent award and to the process of arbitration itself. A mediator becomes privy to facts and positions beyond the scope of those revealed to an arbitrator. The end result of mediation is an accommodation of conflicting interests; the end result of arbitration is a decision on the merits. Thus, joining the processes destroys the independent posture of the arbitrator and does harm to the integrity of the process.⁸⁴

The labor arbitrator must recognize that he serves two masters, one internal and one external to the arbitral process. The traditional role of the arbitrator as servant to the parties to the collective agreement acknowledges only the internal master. The basic model also requires the arbitrator to recognize his responsibility to the external environment of public policy. National law has bestowed upon him enormous power to adjudicate in a final and binding manner disputes that involve the interests of employees, unions, and management, and that, in turn, affect society at large. His determination is, for all practical purposes, a final disposition.⁸⁵ His award, if made public with the permission of the parties, becomes a guidepost for other arbitrators in the development of industrial jurisprudence. He must reconcile contractual rights with national law in those instances where they conflict.⁸⁶ In his conduct of the

83. Canon 2 of the ABA Code of Judicial Conduct and the accompanying commentary require a judge to "conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . . A judge must avoid all impropriety and appearance of impropriety." ABA CODE OF JUDICIAL CONDUCT 8 (1972). An arbitrator should be guided by the same considerations.

84. See Fuller, *supra* note 35, at 23-42.

85. *Enterprise Wheel*, 363 U.S. at 596.

86. Dean Theodore St. Antoine recently developed the concept of arbitrator as "contract reader" in a short Article in this journal. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977). According to St. Antoine, the arbitrator is the "joint 'alter ego'" of the parties "for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement." *Id.* at 1140. When there is a conflict between the parties' agreement and external public law, "[w]ith a right good conscience, he should follow the contract." *Id.* at 1142. Only if the parties have expressly or impliedly called upon

hearing, he must afford the parties the fullest protections of arbitral procedure in order to ensure the integrity of the system as a whole.⁸⁷ If he remains passive in a situation where matters and interests external to the particular arbitration would counsel an active role, he may have preserved his short-run acceptability, but he will have damaged the long-term health of the system in which he has been privileged to perform the pivotal role.

Mention must be made of what may well be a fundamental flaw in the labor arbitration system. In stark contrast to the judicial system, an arbitrator is paid by the parties for whom he arbitrates, and thus full-time arbitrators depend for their very livelihood upon the preservation of their acceptability to those parties.⁸⁸ Were a judge placed in a similar position, any decision rendered would undoubtedly be invalid on its face.⁸⁹ Concern over the dysfunctional aspect of this payment arrangement has been minimized by the assumption that the overwhelming percentage of arbitrators remain unmoved by the financial implications of their awards. To suggest, however, that all arbitrators are oblivious to "how many he's decided for the union (management)" would be naive. The problem arises not with re-

the arbitrator to draw upon statutory or decisional sources should the adjudicator do more than merely "read" the contract in the light of "industrial practices and psychology." *Id.* at 1143, 1147-48. Professors Edwards and Feller agree that this is the proper limited role for the arbitrator. Edwards, *supra* note 67, at 90; Feller, *supra* note 61.

Yet St. Antoine acknowledges that where "substantial rights of third parties, such as individual employees, intervene," St. Antoine, *supra* at 1161, the normal deference owing to the arbitrator's reading of the contract is inappropriate and a court on review must judge an award in light of external public policy. But if that is so, it should certainly be unacceptable to require an arbitrator to uphold consciously an illegal act—*e.g.*, discharge of an employee on the basis of race—even if such employer conduct was allowed by the contract. Although it is useful to see the arbitrator as, in part, a "contract reader," the developments in the law of the collective agreement over the past two decades have made him something more than a "creature of the parties." The arbitrator has become an instrument of national labor policy. His decisions on the merits of a dispute are final and binding. Although in theory an award upholding an illegal act would be set aside in court, the practical barriers to court review of cost and delay are substantial. Where the external law clearly censures certain conduct, the arbitrator would be derelict in his duty to the parties were he to approve such illegal conduct and invite the parties to expend their own and judicial resources in post-arbitration litigation that would certainly lead to vacation of the award. There is no reason to countenance such inefficiency.

87. The Arbitrators' Code notes that the "arbitrator must uphold the dignity and integrity of the office" while endeavoring "to provide effective service to the parties." ARB. CODE § I(C)(1).

88. See Comment, *Employee Challenges to Arbitral Awards: A Model for Protecting Individual Rights Under the Collective Bargaining Agreement*, 125 U. PA. L. REV. 1310, 1334 (1977) (fundamental fact that arbitrator "is dependent for his livelihood on his acceptability to the parties who hire him").

89. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) ("[p]ossible temptation to an average man"); *Tumey v. Ohio*, 273 U.S. 510 (1927).

gard to the case presenting a "clear winner" for either side, but rather with the close case where a decision either way is correct. Would an arbitrator decide for the large corporation or the major international union in the hope that further appointments would flow from the favorable award? No answer is presently possible. However, a system based on self-appointed, self-paid judges contains this potential for abuse.⁹⁰

Although reform appears to be needed in the method of compensating arbitrators, it is not at all clear what that reform should be. At one time arbitrators on the Federal Mediation and Conciliation Service roster were on the governmental payroll,⁹¹ and they remain so today when serving on a Hospital Amendments' Board of Inquiry.⁹² Yet, even if arbitrators were paid by governmental entities, the problem would remain so long as the private parties were permitted to choose their own arbitrator and arbitrators were paid by the case. Furthermore, completely removing the selection process from the parties would transform the private process into a labor court. Placing arbitrators on a full-time payroll would eliminate from the profession the many skilled part-time arbitrators. In any event, however, strong evidence that this inherent risk of bias has become reality would suggest the need for a fundamental alteration in the labor arbitration system.

A final problem regarding the arbitrator is the disproportionate allocation of cases to a small group of arbitrators, a problem that arises because of the parties' self-selection of their arbitrator. Statistics indicate that ninety per cent of all cases are decided by ten per cent of the arbitrators on the roster of the two appointing agencies,⁹³ the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS), even though it is the position of both agencies that all arbitrators on their rosters are capable of deciding most arbitral matters. The result of this grossly uneven distribution of arbitral resources is that arbitrations are delayed

90. The fact that the arbitrator is an appointee of the parties subjects him to the political pressures of those who control his appointment. He is thereby confronted with a situation akin to a judge having to fear the power reaction against him from the party against whom he is inclined to make his decision. Some arbitrators inure themselves against such pressures. Others, especially those whose sole income is derived from arbitration, become quite sensitive to what the union or management can do to their position in consequence of their acts.

Raffaele, *Needed: A Fourth Party in Industrial Relations*, 13 LAB. L.J. 230, 238 (1962).

91. R. FLEMING, *supra* note 4, at 51.

92. 29 U.S.C. § 183(a), (d) (Supp. V 1975).

93. Stessin, *Expedited Arbitration: Less Grief over Grievances*, HARV. BUS.

until the services of a member of the preferred corps can be obtained. It is apparent that such delay is detrimental to both the efficiency and the acceptability of the process.

The appointing agencies should continue to urge labor and management to select lesser-used arbitrators in order to shorten the delay in obtaining a date for an arbitration hearing.⁹⁴ Arbitrators who cannot perform the important role of industrial adjudicators should be removed from the rosters and not offered to the parties for their selection. In addition, the appointing agencies must recognize that the continued expansion of the use of labor arbitration requires the development of an organized plan to train new arbitrators. While society trains lawyers and businessmen in an organized institutional fashion, similar preparation is not available to arbitrators. Serious consideration must be given to the establishment of an Institute of Arbitration with a faculty of senior experienced arbitrators to train prospective replacements. Graduates of such a program would have the added advantage of a credential attesting to their proficiency in the field, which might be a substantial aid in their gaining the acceptance of labor and management.

B. *A Hearing Conducted in an Informal Yet Orderly Manner*

The basic arbitration model requires that the hearing be conducted in a manner that allows the participants to present their case fully to the arbitrator.⁹⁵ It is far better that the arbitrator hear too

REV. 128 (Jan.-Feb. 1977). The two appointing agencies are the American Arbitration Association and the Federal Mediation and Conciliation Service. Michael F. Hoellering, Vice-President of the American Arbitration Association, recently reported that, of the 2600 arbitrators on the AAA roster, about 600 are chosen for 90% of the cases. 96 LAB. REL. REP. (BNA) 253, 254 (1977).

94. The appointing agencies' efforts to encourage selection of new arbitrators has thus far been largely unsuccessful. See Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1136 (1964).

95. A great aid in making efficient use of the hearing time would be the development of pre-hearing procedures. Fleming has suggested the use of pre-hearing conferences that narrow the issues to be adjudicated and catalyze settlements. R. FLEMING, *supra* note 4, at 64-65. Judicial pretrial discovery tools are, for the most part, inapposite to labor arbitration. Relevant documents should be exchanged as part of the grievance procedure. Failure to supply such relevant information may violate the statutory bargaining duty. See, e.g., *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967).

A simple adjunct to the traditional practice of arbitration that offers the greatest potential for increasing the efficiency of the arbitral hearing would be to notify the arbitrator prior to the hearing about the parameters of the dispute he is to decide. This can be done through submission of pre-hearing statements, such as Fleming suggests, R. FLEMING, *supra* note 4, at 65-66, or simply by sending the arbitrator copies of the grievance, the management responses, the collective bargaining agree-

much rather than too little,⁹⁶ and thus the arbitrator should encourage the parties to present their own case in a comprehensive fashion. All concerned should be satisfied that the issue or issues have been fully aired.

The present arbitral practice of not binding the hearing procedure to the judicial rules of evidence is soundly based in practical realities.⁹⁷ Parties to the arbitration might not be represented by persons versed in the intricacies of evidentiary rules. To prohibit the introduction of evidence on technical grounds designed to keep unreliable testimony or documents from the ears of the untutored juror would demean the informed perception of the arbitrator and would add an irritant to the system while yielding little gain in accuracy.⁹⁸ Surely a skilled arbitrator can competently weigh evidence according to its probative value.⁹⁹

The hearsay objection, commonly asserted in arbitration, should not be allowed to frustrate the presentation of evidence. Natural turnover in employment may mean that certain witnesses are unavailable to testify. If the statements of a person absent from the hearing may significantly influence the arbitrator's final decision, the arbitrator should certainly inquire about the whereabouts of the witness and seek to have him testify.¹⁰⁰ However, if the final choice is between listening to hearsay or not listening at all, the arbitrator should listen.

A relaxed standard for receipt of evidence is, of course, a prime prescription for the therapeutic effect of labor arbitration, since inhibiting free and open testimony reduces the acceptability of the

ment, and, if possible, a statement of the issue. Much hearing time is now inefficiently consumed in introducing the arbitrator to the issue at hand. "In the phraseology of the courts, it is the 'pleadings' which are weak in arbitration." *Id.* at 62.

96. Shulman, *supra* note 1, at 1017.

97. The AAA Rules state that "conformity to legal rules of evidence shall not be necessary." AAA Rule 28. For superb treatments of evidentiary matters in labor arbitration, see R. FLEMING, *supra* note 4; Jones, *supra* note 27.

98. R. FLEMING, *supra* note 4, at 165.

99. Likewise, the evidentiary requirements for the admission of documentary evidence are normally surplusage. The relevant documents have undoubtedly been examined as part of the grievance procedure. Newly discovered documentary evidence is, at the very least, suspect. If the documents were discoverable earlier, an arbitrator will not likely allow such evidence to be introduced for the first time at the arbitral stage, not because of a lack of foundation or questionable authenticity, but rather because the parties have not had an opportunity to consider the evidence at earlier stages of the procedure.

100. A common arbitral scenario involves a defense claim that the dischargee was provoked into striking the first blow by the words of a co-employee. An arbitrator must attempt to ascertain what was said, even if the testimony is hearsay.

process. Participants must feel that they "have had their say." The counterweight to this open-ended standard for the admission of evidence is its possibly adverse impact on efficiency. To minimize this potential, the arbitrator should restrict repetitive testimony and, with regard to basically uncontroverted matters, seek stipulations from the parties so that the hearing does not bog down in unnecessary testimony. Again, each trade-off between admissibility of evidence and efficiency of the proceeding must be evaluated on its own terms, but in order to avoid the risks to accuracy and acceptability of not hearing enough, the arbitrator generally should err in favor of admission of testimony.

Labor arbitration is an adversary process. The arbitrator must run the hearing with full awareness that each party must present his case and test his opponent's evidence. Cross-examination, then, is as crucial in the arbitral hearing as it is in the courtroom.¹⁰¹ Thus, those arbitrators who inappropriately displace the advocates in both direct and cross-examination¹⁰² detract from the value of acceptability. Only after the testimony of any witness is completed should the arbitrator intervene for his own purposes with clarifying questions for the witness.

Of course, the arbitrator is placed in a most difficult position when the parties have not presented a complete case. Knowledgeable of arbitral jurisprudence, the arbitrator may recognize that an additional line of questioning is required to explicate fully a party's position. Should he ask the questions necessary to bring the case to completion? The answer may depend on the precise nature of the inquiry. If the arbitrator senses that an otherwise skillful advocate is purposefully avoiding a line of inquiry,¹⁰³ he should stand mute. On the other hand, the arbitrator has a clear responsibility to educate and assist the parties in those instances where failure to inquire into a particular matter may obstruct industrial justice. Needless to say, a difficult question of balance is presented. Although the basic arbitral model allows the arbitrator great leeway

101. The right to confront and cross-examine witnesses has been considered essential to administrative due process, *see, e.g., Willner v. Commission on Character & Fitness*, 373 U.S. 96 (1963), especially where decisions are based on questions of fact, *see Goldberg v. Kelly*, 397 U.S. 254 (1970).

102. The Code cautions that the "arbitrator should not intrude into a party's presentation so as to prevent that party from putting forth its case fairly and adequately." ARB. CODE § V(A)(1)(c).

103. The analogous situation is presented by the absence of the dischargee from the arbitration hearing. Most arbitrators realize that if the dischargee is not there, he is undoubtedly confined elsewhere. Questioning his whereabouts can be mutually embarrassing.

to question witnesses, his exercise of the prerogative may be counterproductive to the extent that it impedes a party's presentation of his own case or annoys the party whose opponent is aided by the inquiry. In sum, circumspection is clearly required, but the arbitrator's primary responsibility is to produce a correct result, and his authority must ultimately be exercised in light of that duty.

The basic arbitration model does not require the arbitrator to run the hearing in a judicial fashion. The trappings of the courtroom—a robed magistrate, strict rules of decorum and dress, bailiff and law clerks—are, of course, inapposite to the informal atmosphere of the labor arbitration hearing room. Parties should feel comfortable in arbitration. Nevertheless, arbitration is a serious enterprise and the hearing should proceed with a maximum of ordered informality. Mutual respect between the arbitrator and the parties is essential. Procedures can be tailored to meet the inclinations of the parties so long as they remain consistent with the basic rights of those concerned. A grievant must be allowed to hear and confront his accusers and to be present throughout the hearing.¹⁰⁴ Continuances must be granted by the arbitrator unless they are purposefully obstructive.¹⁰⁵ If witnesses are not sworn, they should be advised by the arbitrator that they are expected to tell the truth. Finally, at the conclusion of the hearing, all parties should be given the opportunity to make any further statement they desire.¹⁰⁶

C. *Rights of the Grievant*

The procedures of the arbitration hearing must be designed to assure the parties that their dispute has been given a complete and fair examination. This assurance is particularly crucial for the grievant, who is likely to be the party with the most at stake, given that his job rights are in dispute. Unfortunately, the traditional arbi-

104. Douglas Aircraft Co., 28 LAB. ARB. REP. (BNA) 198 (1957) (Jones, Arb.). Fleming notes that "very sensitive personal rights and fundamental considerations of fairness" require confrontation and cross-examination. R. FLEMING, *supra* note 4, at 175. The AAA Rules expressly entitle persons "having a direct interest in the arbitration . . . to attend hearings." AAA RULE 22.

105. The NLRB has considered the failure to grant a reasonable request for a continuance as one ground for refusing to defer to a prior arbitration award. Gateway Transp. Co., 137 N.L.R.B. 1763, 1764 (1962).

106. The court concludes that both parties have the right to assume that any arbitration hearing in which they may become involved, pursuant to their agreement, will afford them the opportunity of presenting *all* of their material evidence and that the Arbitrator, before closing the hearing, will inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Harvey Aluminum, Inc. v. United Steelworkers, 263 F. Supp. 488, 492 (C.D. Calif. 1967) (emphasis original).

tration model has not focused upon the need to satisfy the grievant that he is getting a full and fair hearing. Indeed, one might well project that erosion of labor arbitration's present preferred status in national labor policy is most likely to come in those cases involving the job rights of individual grievants. Clearly, one of the arbitrator's paramount responsibilities is to see that the procedures followed at the hearing assure the grievant that his claim has been decided on the merits.

A more difficult question involves the arbitrator's appropriate stance when a grievant claims a right to separate representation. What should the arbitrator do when the grievant appears at the hearing with his own attorney and the union or the company objects to the presence of his counsel? Does the grievant have a right to his own counsel?

Many arbitrators will respond by saying that they are the servants of the parties to the contract¹⁰⁷ and that the grievant thus has no right to separate representation.¹⁰⁸ As a practical matter, however, both union and management would be shortsighted if they ignored the fact that a grievant who is sufficiently disenchanted with his union to have obtained separate counsel will undoubtedly pursue other remedies—*i.e.*, a duty of fair representation suit¹⁰⁹ or, in an appropriate case, a Title VII suit¹¹⁰—if he does not win in arbitration.

The arbitrator should seek to alleviate the problem of separate grievant representation by seeking an accommodation, perhaps by allowing grievant's counsel to cross-examine witnesses and remain in attendance at the hearing. If voluntary accommodation cannot be reached, the basic arbitration model requires the arbitrator to allow at least limited participation by grievant's counsel. Given the grievant's stake in the hearing, the arbitrator cannot, consistent with his responsibility to the national labor law system, allow the hearing to proceed in the enforced absence of the grievant's own representative. The practical effect of recognizing this limited right to counsel is to encourage the parties to the collective agreement to attempt

107. To use Arbitrator J.A. Raffaele's more colorful phraseology, "the direct offspring of the parties in industrial relations, born out of wedlock." Raffaele, *supra* note 56, at 236.

108. The AAA Rules provide that "[a]ny party may be represented at the hearing by counsel or by other authorized representative." AAA RULE 20. A "party," which is undefined in the rules, apparently does not include the grievant. See *Blake v. USM Corp.*, 94 L.R.R.M. 2509 (D.N.H. 1977).

109. See *Vaca v. Sipes*, 386 U.S. 171 (1967).

110. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

to satisfy the individual grievant that the established system adequately protects his interests. The grievant must be convinced that he will receive a "fair shake" through arbitration, and parties unable to inspire that degree of individual satisfaction must "suffer" the presence of an outsider.

Although the above conclusion should not be read as discounting the union's countervailing interest in acting as the sole representative of complaining employees, it necessarily acknowledges that the union's interest has limitations. Although arbitration hearings where the union objects to an outsider's presence and participation should be avoided,¹¹¹ in the overwhelming number of instances the problem of separate representation will either not arise or will be soluble through informed accommodation. In the very small number of cases where accommodation is impossible, the arbitrator must recognize the grievant's limited right to separate representation.¹¹²

D. *A Record of the Proceeding and a Decision with Reasons
Based on Evidence Presented*

The basic labor arbitration model requires that a record be made of the proceedings and that the arbitrator write a decision based on the evidence presented at that hearing.¹¹³ If labor arbitration were

111. Concerning distribution of control of procedures, see generally J. THIBOUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

112. The due process cases on right to counsel in an administrative hearing are of minimal help. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court found counsel to be essential in a welfare termination hearing. The untutored welfare recipient needed counsel to "help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." 397 U.S. at 270. The individual grievant in arbitration is not equally disadvantaged; he does have union representation. But when that representation is primarily directed at protecting associational interests, or at least when the disenchanted grievant so believes, a limited right to separate counsel is in order. As the Court in *Goldberg* noted: "We do not anticipate that this assistance [in a welfare termination proceeding] will unduly prolong or otherwise encumber the hearing." 397 U.S. at 271. With that caveat, limited separate representation should be allowed in arbitration. See also Administrative Procedure Act § 6(a), 5 U.S.C. § 555(b) (1976).

113. Justice Douglas plainly stated in dictum in *Enterprise Wheel*, 363 U.S. at 598, that "[a]rbitrators have no obligation to the court to give their reasons for an award." However, that blanket dispensation is proffered merely in support of his conclusion that an ambiguous award may be enforced lest arbitrators "play it safe by writing no supporting opinions." 363 U.S. at 598. That result would be "undesirable," said Justice Douglas, "for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." 363 U.S. at 598. Thus the Supreme Court has suggested those very reasons why "a well-reasoned opinion" is essential to maintain the acceptability of the process. *But see* R. FLEMING, *supra* note 4, at 53-55 (record and opinion characterized as costly "frills").

a self-contained process with no review available, perhaps no record would need to be made and no opinion would need to be written. In fact, however, under the *Steelworkers Trilogy*,¹¹⁴ some small measure of merit review is available,¹¹⁵ for the court, when considering a petition to vacate or enforce an award, must determine if the arbitrator has drawn his "essence" from the collective agreement.¹¹⁶ In the absence of some form of record and recitation by the arbitrator on the basis for his decision, it is impossible for a court to make even that limited determination.

The record requirement also makes possible judicial monitoring of arbitral procedures. If the losing party attacks an award on the ground, for example, that the arbitrator was biased or that he refused to allow cross-examination of a witness, the record will support or refute the claim. A record is far more reliable than oral testimony as evidence of what occurred at a hearing many months, or even years, before. Moreover, the record requirement can be met easily by the use of an inexpensive tape recording.¹¹⁷ A stenographic record, although a pleasure to an arbitrator, is both a financial burden to the parties, and, more important, a source of great delay in the final resolution of disputes.¹¹⁸ The tape recording would be transcribed only in the event of judicial review, thus minimizing delay and yet equipping the court to resolve claims that the integrity of the process was not maintained.¹¹⁹

114. See note 6 *supra*.

115. The Second Circuit, in the much-cited *Torrington* decision, indicated that a court must give "meaningful review." *Torrington Co. v. Metal Workers Local 1645*, 362 F.2d 677, 680 (1966).

116. 363 U.S. at 597.

117. It is difficult to estimate how common the use of a tape recorder is in arbitration. This idea was suggested to this author by Dean Theodore St. Antoine, who uses a tape recorder to supplement his note taking during an arbitration. In addition, see *Mobil Co.*, 46 LAB. ARB. REP. (BNA) 140 (1966) (Hebert, Arb.). In a proceeding where a stenographic record is not being made, an arbitrator will usually take copious notes. When crucial testimony is about to be given in the hearing, an arbitrator will attempt to take verbatim notes. He may find it necessary to advise the witness to "slow down" or repeat, thus allowing him to record the important evidence accurately. This signal is not lost on the witness, who then carefully selects his words. As a practical matter, the use of a continuous tape recording avoids this effect on testimony.

118. The AAA Rules make a stenographic record optional with the parties. AAA RULE 21. The Arbitrator's Code likewise places the decision regarding use of a transcript in the hands of the parties, although an arbitrator may seek to persuade the parties "to use a transcript if the nature of the case appears to require one." ARB. CODE § V(B)(1) (b).

119. The need for a record is exemplified by *Holodnak v. Avco Corp.*, 381 F. Supp. 191 (D. Conn. 1974), *affd. in part and revd. in part*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). The grievant was discharged for violating a plant rule prohibiting the making of "false, vicious or malicious statements concerning any

The requirement of a reasoned arbitral decision serves both an internal and an external function in the arbitration model. A concise, reasoned decision makes the arbitral process more acceptable to the parties affected by it.¹²⁰ The loser can discover and, one hopes, come to accept why he lost on the merits. Employees in the shop directly affected by the decision can read the arbitrator's decision and can at least understand that he did not decide against them on whim or prejudice. For the arbitrator, the process of explaining a decision in a reasoned fashion may improve his confidence that the decision is proper or help him transform a wrong decision into a correct one.¹²¹ For the court on review, a reasoned written decision is the evidence upon which to make the "essence review" mandated by the *Steelworkers Trilogy*.¹²² It is the ultimate indication

employee or which affect the employee's relationship to his job, his supervisors, or the Company's products, property, reputation, or good will in the community." 381 F. Supp. at 194-95. Holodak was a dissident who wrote an article denouncing his company, his union, and their permanent umpire. His discharge was upheld in a one-sentence award, stating that the proof "establishes the just cause for the discharge . . . with conclusive finality." 381 F. Supp. at 197. Indeed, the arbitral award probably would have had "conclusive finality" were it not for the fact that a full record was made of the proceedings. The transcript vividly demonstrated the "evident partiality" of the arbitrator, who was himself one of the objects of Holodnak's allegedly censurable article. During the hearing the arbitrator repeatedly, and in an offensive manner, questioned the grievant about his motives in writing the article, inquired into his political and social views, openly badgered the grievant, and sought to make Holodnak confess to the errors of his ways. 381 F. Supp. at 196, 198. The court concluded that "the transcript of the arbitration here discloses substantial evidence of partiality on the part of the arbitrator, if not open hostility toward" the grievant, which required that the award be vacated. 381 F. Supp. at 198-99.

Although it is true that a grievant could assert such arbitral misconduct by testimonial proof subject to a resolution of credibility, the availability of a record assures that the reviewing court can effectively carry on its function to defend the integrity of the arbitral process against such procedures. "It is said that the palest ink is more accurate than the most retentive memory." F. ELKOURI & E. ELKOURI, *supra* note 29, at 218.

120. The opinion should not be a logorrheic treatment of every corner of the dispute. Nor should it necessarily look like a judicial opinion. "Latin expressions . . . may lend a certain dignity to judicial opinions. They can hardly serve any purpose in an arbitration award." Fuller, *supra* note 35, at 6. It is important that the arbitrator address the main arguments made by the parties so that they appreciate that attention was paid to their contentions. On the other hand, padding an opinion with the equivalent of dictum is, at the very least, "arbitral feather-bedding," R. FLEMING, *supra* note 4, at 135, and may address issues that the parties would prefer to have left unresolved.

121. "When an adjudicator knows that he must record his judgments and give reasons for them, there are fruitful psychological effects. In Felix Frankfurter's words, we all feel much more responsible 'if we have to sit down and write out why we think what we think.'" W. GELLHORN, *SECURITY, LOYALTY, AND SCIENCE*, 212-13 (1950) (quoting Frankfurter's remarks in *Functions and Procedure of Administrative Tribunals* (a report on The Cincinnati Conference), 12 U. CIN. L. REV. 117, 276 (1938)).

122. *Enterprise Wheel*, 363 U.S. at 597.

of whether the arbitrator met his responsibilities to the parties and to the process.¹²³

The basic arbitration model requires that the arbitrator's opinion and award be rendered expeditiously. While a thirty-day standard might seem naively optimistic, especially in light of the present norm of approximately forty-five days, it is of paramount importance to efficiency and acceptability that the decisional process be compressed.¹²⁴ Arbitrators will acknowledge that most cases are not difficult, and some may even admit that study time, except for actual drafting, is brief. For the truly complex case, an extended time period may be necessary.¹²⁵

It is a basic tenet of labor arbitration that there is no binding precedent controlling the labor arbitrator. This "truism" misrepresents reality. Arbitrators have developed a body of arbitral jurisprudence.¹²⁶ Although many arbitrators decide cases without citing the opinions of their colleagues, they are cognizant of the substantive principles that have guided like determinations. A written opinion fleshes out those principles in a form useful to the parties affected and acts as a guidepost for future private resolution of industrial disputes.

E. Meaningful Judicial Review

The *Steelworkers Trilogy* teaches that the scope of judicial review is limited to an inquiry into whether the arbitrator's award

123. Judge Frank Coffin, dissenting in *Walsh v. Picard*, 446 F.2d 1209, 1214 (1st Cir. 1971), *cert. denied*, 407 U.S. 921 (1972), suggested that a statement of reasons panel of judges—is necessary for the development of consistent principles for decision-making and is "essential to enable further review to take place." If further review is circumscribed, as it is in labor arbitration, "due process requires the minimum internal check of an expressed rationale." 446 F.2d at 1214. Thus, without an explanation of the decision there is no way of knowing whether the adjudicator—for our purposes, the arbitrator—performed his "primary function of rationally evaluating the facts and arguments put before" him. 446 F.2d at 1214.

124. The AAA Rules requires the rendering of the award within 30 days, unless that period is extended by the parties. AAA RULE 37. FMCS "encourages" arbitrators to render an award in 60 days. 29 C.F.R. § 1404.15 (1976). The Arbitrators' Code neither recommends nor suggests any time limit for submission of decisions.

125. It would seem that bench awards or expedited arbitration without opinion would be inconsistent with the basic model. Some accommodation might be made for such innovative techniques in situations where only contract rights are in question or, when discharge or discipline is involved, where the grievant knowingly waives the opportunity to have a reasoned written award. Of course, streamlined arbitration should never be an excuse for incorrect decisions.

126. See F. ELKOURI, & E. ELKOURI, *supra* note 29.

"draws its essence" from the collective bargaining agreement.¹²⁷ This enigmatic standard understates the role the federal courts should play in ensuring the integrity of the arbitral process. The federal court, after all, must not only articulate the federal law of the labor agreement,¹²⁸ but must also ensure that federal labor policy is effected through private labor arbitration.

The Supreme Court's reluctance to have federal judges second-guess labor arbitrators on the merits of arbitration cases is grounded largely upon its perception that arbitrators, and not judges, are the experts in industrial relations. A limited review standard on merit questions is appropriate, however, for a more telling reason. In order to facilitate national labor goals, the arbitration result must be final and binding.¹²⁹ Disputes should be conclusively resolved privately. Protracted litigation acts as an irritant in the industrial relationship and runs counter to the parties' own voluntary commitment to have an arbitrator, and not a court, decide the substance of the dispute. Plenary review of merit determinations would destroy finality. As long as the award is the product of a fair arbitration process, it must stand in the absence of manifest error on the part of the arbitrator.¹³⁰ The current situation of few review petitions and even

127. The Third Circuit elaborated on the "essence test" in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (1969): An arbitration award "does 'draw its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award."

128. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

129. "[T]he essence of the arbitration process is that the arbitrator's decision shall put the dispute to rest." Dunau, *supra* note 11, at 427. Dunau insisted that the "imperative of finality" was not based "on the invidious judgment that the arbitrator's competence is superior to the judge's [I]t is not necessary or desirable to rapturize arbitrators as a class or to denigrate judges as a class to conclude that the power of decision must stay where the parties have put it." *Id.* at 427, 428 n.3.

130. For example, were the arbitrator to uphold a management action that was both expressly and definitively prohibited by a clear contractual statement and supported by bargaining history and an unwavering union insistence on its enforcement, a federal court might conclude that clear error had been shown. Such an award "draws its essence" only from the mind of the misguided arbitrator. *See, e.g., Electronics Corp. v. Electrical Workers Local 272*, 492 F.2d 1255, 1257 (1st Cir. 1974) ("sole articulated basis for [arbitrator's] award was concededly . . . a non-fact"); *Brotherhood of R.R. Trainmen v. Central Ga. Ry.*, 415 F.2d 403, 415, (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970) (arbitrator's decision "unfounded in reason and fact"); *Safeway Stores v. Bakery Workers Local 111*, 390 F.2d 79, 82 (5th Cir. 1968) (arbitrator's reasoning "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling"). Although Dean St. Antoine criticizes the approach of these courts, he is "reluctantly prepared to accept an . . . exception to the finality doctrine" for a decision that is "actually and indisputably without foundation in reason or fact." St. Antoine, *supra* note 86, at 1149.

fewer successful contests should not be disturbed.¹³¹

On the other hand, the federal courts must remain open to challenges to arbitral awards based on alleged impairment of the process' integrity,¹³² especially when the job rights of individual employees are at stake.¹³³ Of course, that emphasis upon judicial review of arbitral "process" poses a risk to finality, but it is a risk the Court has seen fit to run in the past, and with good reason.¹³⁴ Arbitral awards which are the product of prejudicial procedural defects are not merely null and void; they do grievous injury to the parties' acceptance of the process as the appropriate forum for private resolution of industrial disputes. Were the courts to enforce such defective awards, the full power of the federal government would be placed behind an arbitral malignancy, raising serious constitutional due process questions.¹³⁵ To limit the risks such review presents

131. "Arbitration decisions are rarely brought to court on appeal. In the overwhelming majority of that miniscule portion which are appealed, only an infinitesimal few have ever been vacated." Jones, *supra* note 27, at 1296.

132. A reviewing court must recognize that an arbitration hearing, like a judicial hearing, need not achieve procedural perfection. "In an arbitration case a court cannot act as a legal screen to comb the record for technical errors in the receipt of evidence by arbitrators . . . [A]n award will not be vacated because of an erroneous ruling by arbitrators, which does not affect the fairness of the proceeding as a whole." *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599, 600 (3d Cir. 1968). *Cf.* *Transport Workers Union v. Philadelphia Transp. Co.*, 283 F. Supp. 597, 600 (E.D. Pa. 1968) (attack on credibility of witnesses not suitable basis for court displacement of arbitrator's judgment.) A variant of the "harmless error" doctrine would appropriately apply so long as the essential integrity of the process is maintained. *See Dunau, supra* note 11, at 436.

133. *See, Dunau, supra* note 11, at 437-39. Individual employees do not have the right to challenge a completed arbitration on substantive or procedural grounds without first proving that their union breached its duty of fair representation in presenting their claim. *Vaca v. Sipes*, 386 U.S. 171 (1967). Worthy of some attention is a recent proposal of an alternative model allowing for employee standing to attack an arbitrator's award without being required to make this threshold showing of union misconduct. *See Comment, supra* note 88.

134. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

135. *See Shelley v. Kraemer*, 334 U.S. 1 (1948).

An argument can be made that the action of labor arbitrators is governmental action and thus subject to constitutional structures. When a state delegates public functions to private parties, the private parties must act in a manner consistent with constitutional principles. *See generally Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944). In the absence of an arbitration system, contractual rights would be perfectable in court. *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). Where there is such a system, the federal common law of labor arbitration delegates the otherwise public function of contract adjudication to the arbitrator, whose award is then readily enforced by the court. Arbitrators are "invested, *pro hac vice*, with judicial functions," *Strong v. Strong*, 63 Mass. (9 Cush.) 560, 570 (1852), and are to be judged by even stricter ethical standards than judges because their awards are subject to only limited review. *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149 (1968). The union party to an arbitration is likewise "clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power

to finality, the Court should set forth with particularity the fundamental prerequisites of a fair arbitration. Spurious suits to vacate awards should be deterred by a clear articulation of the criteria for review. Courts can also make effective use of summary procedures to test the facial adequacy of petitioners' claims of procedural deficiency. Of course, these steps can only reduce—not eliminate—the costs to finality of judicial review of the arbitral process, but, in the final analysis, these costs are a worthwhile price to pay for increasing the acceptability of the process as a whole.¹³⁶

F. *Achieving Reform*

There are several strategies available for implementing the above suggestions. The simplest and most likely approach to reform is through voluntary adoption by the parties to a collective agreement. Union and management have the primary interest in the integrity of the process that interprets and applies their agreement. Whether the parties will so act, of course, depends first on whether they agree that the suggested procedural baseline will maximize the values of accuracy, efficiency, and acceptability.¹³⁷ But, regardless of their endorsement of the particular reforms here suggested, the private parties must recognize, purely as a matter of self-interest, that national labor policy demands responsible action to ensure the integrity of their private means for adjusting disputes.

A second, though less direct mechanism for achieving procedural reform, is through the appointing agencies, the AAA and FMCS. Private reevaluation of labor arbitration can be promoted through

to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights." *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198 (1944). See Jones, *supra* note 27, at 1250.

136. Ted Jones has warned that arbitrators must not "function (or talk) like judges or Labor Board members," lest arbitral insulation from judicial review give way to "reversing review." Jones, *supra* note 27, at 1252. Arbitrators must "continue to act like arbitrators," and the basic model should not be read as transforming their substantive role.

The primary goal of the suggested model is to ensure that labor arbitration does not lose its special status in the scheme of national labor policy. The price of building a minimum procedural floor of adequate fair process is a loss of the totally unstructured flexibility as a private dispute-resolving mechanism that now characterizes labor arbitration. But parties should continue to be able to tailor arbitration procedure to fit their own desires so long as a minimum level of procedural integrity is maintained. A formless ad hoc process that is susceptible to abuse by the parties to the detriment of others affected by the institution both inside and outside of the shop will not long remain a cornerstone of national labor policy.

137. One would think that all parties would agree that accuracy, efficiency, and acceptability are appropriate goals to be achieved by the arbitral process.

their power to establish new guidelines for the process. The influence of such promulgations on the private parties must not be discounted, just as the agencies themselves must recognize their important roles as advisors to union and management.

If the participants default in their obligation to reevaluate arbitral procedures, the impetus for reform must fall on the courts. It is the federal courts, after all, who elevated labor arbitration to its present prominence, and it is they who under section 301¹³⁸ have assumed the responsibility for elaborating basic arbitration principles and procedures. Moreover, the common-law components of the law of the labor agreement are continuously open for revision suggested by changing realities.¹³⁹ As Holmes stated almost a century ago, the common law "is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will be entirely consistent only when it ceases to grow."¹⁴⁰ Through the developing common law of the labor agreement, the courts have both the opportunity and the responsibility to see that the integrity of the arbitral process is maintained.¹⁴¹

The final strategy to achieve arbitral reform lies in congressional action. It was, of course, the legislative branch that thirty years ago first authorized suits concerning collective bargaining agreements.¹⁴² Though surely the least feasible of the potential instruments for reform, Congress remains available as a final resource to mandate the

138. Labor-Management Relations Act § 301, 29 U.S.C. § 185 (1970).

139. Robben Fleming projected over a decade ago that courts might apply strict due process requirements to certain aspects of labor arbitration. R. FLEMING, *supra* note 4, at 174, 198. Procedural regularity should be ensured, in any case, as a matter of policy "from the standpoint of the arbitrator and the parties in the sense that the arbitration process will have dignity, integrity and fairness in every respect, and policy from the standpoint of the company and the union in that the methods which are used in processing and trying grievances will contribute to the harmonious and productive relationship of the parties." *Id.* at 198. These policy considerations should motivate judicial implementation of the basic arbitration model.

140. O.W. HOLMES, *THE COMMON LAW* 36 (1881).

141. The National Labor Relations Board has the opportunity to play a role in the reform of arbitration through the premises of review developed in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). Under the *Spielberg* standards the Labor Board will defer to arbitration awards if the arbitral proceedings were fair and regular. These conditions were explicated in *Denver-Chicago Trucking Co.*, 132 N.L.R.B. 1416, 1421 (1961), to require that "the procedures adopted meet normal standards as to sufficiency, fairness and regularity . . . [with no] evidence of irregularity, collusion or inadequate provisions for the taking of testimony." Although the number of arbitration awards brought to the Labor Board for review are comparatively small, the influence of Labor Board insistence upon such regularization of labor arbitration process will ripple beyond those cases actually considered.

142. Labor-Management Relations Act § 301(a), 29 U.S.C. § 185 (1970).

basic procedure required to ensure minimum integrity in the labor arbitration process.

IV. CONCLUSION

Even though private labor arbitration is undoubtedly an ingenious industrial invention, "one of democracy's most successful experiments in private self-government,"¹⁴³ it deserves a considered reappraisal. One may conclude that the basic labor arbitration model suggested here is "much ado about nothing," or see in it the spectre of "galloping legalism." One thing is certain: only through continued reevaluation will the arbitration process fulfill its promise.¹⁴⁴ If the actual practice of labor arbitration is examined by those affected by the process and the checkup indicates a fine state of health, then the objective of this proposal has been achieved. If the diagnosis indicates some treatment is in order, the proposed model may be useful as a prescription for fitness. Only a healthy private labor arbitration system will promote the national goals of equity and peace in the work place, and only a sound labor arbitration system deserves a preferred status in the scheme of national labor policy.

143. R. FLEMING, *supra* note 4, at 223.

144. Harry Edward's recent caution should be noted: "One should ask whether uniformity and codification in the arbitration business is really progress or whether it merely reflects the building of an even more ornate and top-heavy superstructure on a simple and sound foundation, but a foundation never intended to bear such weight." Edwards, *supra* note 67, at 94. Labor arbitration may never have been intended to play a central role in the administration of national labor policy, but, intended or not, it has been elevated to that position. It now must be made to serve its new purpose.