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ARTICLE: INCORPORATING HUMAN RIGHTS PRINCIPLES INTO U.S. LABOR
ARBITRATION: A PROPOSAL FOR FUNDAMENTAL CHANGE

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SUMMARY:

... The focus of this article is on the application of human rights standards to labor arbitration in the United States. ... Wirtz's ideas were radical in that they struck at the fundamentals of the traditional arbitral view of the sources of worker rights, the role of the labor arbitrator and the preeminence of collective rights and interests. ... Arbitrator Garrett's 1985 review of texts on labor arbitration demonstrated what he called a "doctrinaire approach" that advanced the reserve management rights value judgment with "a substantial degree of uncritical acceptance. ... The two projects most relevant to this study addressed subcontracting (now euphemistically called "outsourcing"), because those cases raise issues of management rights and worker job security, and workplace health and safety disputes, because the fundamental clash between management's rights to operate the enterprise and workers' rights to a safe and healthful workplace was most likely to evoke arbitral value judgments. ... In a recent case involving a refusal to work for reasons of health and safety, for example, an arbitrator reinstated a worker with full back pay and benefits because the employer's "vital interest" in uninterrupted production was outweighed by "a specific employee right" arising under the Basic Agreement stating that "No employee shall be required to lift more weight than he or she is physically capable of lifting. ...

TEXT:

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I. Introduction

The concept of human rights, particularly workers' rights as human rights, has never been an important influence in the making of U.S. labor law or labor policy. Even the international human rights movement and organizations, human rights scholars, and labor organizations and advocates have given little attention to workers' rights as human rights. In recent years, however, the concept has emerged as a subject of great interest, particularly as part of a larger reexamination of U.S. domestic labor policy using internationally accepted human rights principles as standards for judgment.

Until now, the focus of this reexamination has been on the exercise of the right of freedom of association and, more specifically, on the violation of the rights of child laborers, immigrant workers, agricultural workers, [*2] domestic workers, and contingent workers. ¹ The focus of this article is on the application of human rights standards to labor arbitration in the United States. That subject has yet to be addressed.

Over the years, the common law of employment in the United States has been rooted in various systems and doctrines including indentured servitude, slavery, the obligations of master and servant, property rights, and free market contract principles. To this day in the U.S., employers, in the name of freedom of contract, are free to dismiss employees at will for any or no reason. Consequently, employees in this country are vulnerable to even arbitrary and malicious discharge unless they are covered by a collective bargaining contract and/or one or more statutes that prohibit certain forms of discriminatory treatment.

In a fundamental way, what distinguishes unionized employees from at-will employees is that unions have negotiated contractual protection against unjust discipline through "just cause" limitations on employers' authority to discharge workers. Labor arbitrators in the U.S. have adopted and developed standards for what constitutes just cause for discipline and through their decisions have created an arbitral common law of unjust dismissal.

In their decisions, however, labor arbitrators create and apply rules that, among other things, embody presumptions about the nature of the power and rights relationship of employer-employee as well as the sources of employee and employer rights. In doing so, they, as do judges, choose among applicable sets of principles. Although the basic foundation of law (whether made by legislators or judges or negotiators of contracts) is moral choice, little attention has been given to the values and conceptions of rights and justice underlying these laws and contractual provisions. These value choices not only condition the thinking of decision-makers but also provide them with ultimate standards for judgment. These value judgments also pre-position a decision-maker's approach to particular case situations, thereby exerting a powerful influence on the outcome of these cases. ²

[*3] The unique approach of this article consists in the use of international human rights principles as standards to judge arbitral determinations of the sources of worker and employer rights. It addresses another neglected subject by identifying the values underlying those determinations and assessing the influences of those values on arbitral decision-making, including the influence of values underlying various external laws, the U.S. Constitution, and human rights standards. In addition, this article identifies and discusses the consequences of applying human rights standards to safety and health cases, rather than the current "balancing tests" used by U.S. labor arbitrators. The discussion and analysis set forth in this article will also provide a doctrinal basis for change as well as gauges for determining

where change is needed.

The article begins with a discussion of arbitral perceptions of the sources of worker and employer rights, contrasting the philosophical foundations of traditional and non-traditional arbitral views. The values underlying those conceptions of workplace rights are then discussed as are the concepts of human rights and worker rights as human rights. The discussion then shifts to the consequences of using human rights standards to decide health and safety cases. The concluding section of the article addresses the need for change, particularly the need to incorporate human rights principles into U.S. labor arbitration, observations about how change can be accomplished, and recommendations for future research. ³

II. Sources of Worker and Employer Rights

A. Traditional Conceptions

Although labor arbitration in the United States was known and used (most notably in the clothing and coal industries) before World [*4] War II, ⁴ the War Labor Board (WLB), established in 1942, had the most powerful influence on the nature of modern labor arbitration. WLB alumni "shaped the field of labor arbitration" by forging what one distinguished arbitrator called "a body of principles that has withstood the test of time." ⁵ (The WLB also greatly increased the use of labor arbitration by persuading or ordering many employers to include a grievance-arbitration clause in their union contracts.)

The WLB's mission was to prevent interruptions of any work that contributed to the prosecution of the war and to resolve all labor disputes by peaceful means. The Board considered the final and binding resolution by an arbitrator of all workplace grievances essential to accomplishment of its mission. The goal was the maintenance of maximum production, not the establishment, protection or advancement of workers' rights. Because the grievance-arbitration system was utilized as a means to "maximize production to win the war," the WLB also stressed the "usefulness to the employer himself of a grievance machinery that ends in arbitration." ⁷ after the war, the WLB emphasized that "proper" grievance-arbitration procedures in labor-management contracts had "removed obstacles to high morale and maximum production." ⁸

In the pursuit of its mission the WLB applied the doctrine known as "industrial pluralism" which had become the dominant theory of labor and industrial relations mainly through the work of University of Wisconsin professor John R. Commons and his student William Leiserson who became an influential practitioner of the theory. Industrial pluralists denied that the interests of labor and management were inherently incompatible and believed that the [*5] conflicts of interest that did arise were susceptible to "adjustment." As described by a former WLB official:

Industrial pluralism rejects the inevitability of labor/capital strife. The theory instead posits a virtually mystical faith in collective bargaining as a labor relations problem solving device and treats the collective bargaining contract as the constitution of the private sector workplace. This constitution

provides governance in matters affecting wages, hours, and terms and conditions of employment, while preserving a proper sphere for management rights. The theory deems a contractual grievance procedure capped by arbitration as an extension of collective bargaining, generally enabling the parties in conference to interpret and apply the contract and settle issues between themselves. The premise is that problem solving ... is most likely to be achieved by the parties because, presumably, they are in the best position to understand the issues. By implication, there is an admonition to settle "at home" and to avoid courts and lawyers. ⁹

This theory was the basis, at least in part, of arbitral views of the sources and nature of worker and employer rights. Although the pluralists advocated joint labor-management determination in a system of self-governance, the "proper sphere for management rights" needed to be defined. In one obvious sense, determination of the scope of the joint determination would determine what rights each side had. In a deeper and more revealing sense, however, the determination of the scope of joint determination was itself the result of preconceptions about what worker and employer rights ought to be.

Leiserson's approach, for example, restricted unions to particular areas of enterprise policy which were deemed susceptible to joint determination in the interests of smooth production." ¹⁰ In his view, what were not susceptible to joint determination (in other words, what was within the sole discretion of management) were "production problems," that is, problems of machinery, materials and production methods. ¹¹ Consistent with the pluralist theory, the WLB established a protective "zone of managerial prerogative" within which it gave total deference to the unilateral exercise of employer discretion." ¹²

[*6] The presumption that there were certain rights inherent in management expanded employers' rights and drastically limited workers' rights. The presumption legitimized employers' hierarchical systems of workplace control. Despite theoretical talk of joint constitutions and joint sovereignty, it denied workers and their union representatives any participation in those most important matters at the core of entrepreneurial control on which not only their wages, hours and working conditions, but also the existence of their jobs, depended. ¹³

It also justified what became a critical arbitral assumption in contract administration: that management acts and the union may only react, that is, grieve the action. That, in turn, was a basis for the hallowed "obey now, grieve later rule" that favored management control and the need for efficiency, maintenance of discipline and order at the workplace and private property prerogatives over worker and union protests about working conditions. The rule permits employees to complain about their treatment but only in a way (and at a time) that does not interfere with any of management's functions. The notion that management acts and a union reacts gives employers the critical right of initiation as well as broad discretion in deciding how to assert its own interpretation of a contract. Workers (and a union), however, may not initiate action to assert their interpretation of a contract - doing so is impugned as "self-help" and is cause for discipline. ¹⁴

In addition, the presumption that certain rights are inherent in management was fashioned into the arbitral principle of "reserved management rights." One scholar calls it the "Genesis" theory in that "In the beginning" management had inherent power over the enterprise including unfettered discretion to control production and direct the workforce. ¹⁵ After the advent of unionization and collective

bargaining, management "reserved to itself" all those inherent powers that were not expressly given up in a collective bargaining agreement with a union. Consequently, collective bargaining contracts became the exclusive source of workers' rights whereas [*7] employers' most important rights had sources outside the contract, mainly in the values of those who presumed the "oughtness" of the reserved rights theory.

This conception of the sources of rights at the workplace was a value choice already consistent with the value choices made throughout U.S. labor history. As previously pointed out, employment law in the colonies, for example, was based on England's law of master and servant in which subordination to authority was essential, and combinations of laborers to secure higher wages or better working conditions were common crimes. Judges adopted the values of economic development, insured property and the freedom of its use as essential to economic development, and protected and promoted entrepreneurial and commercial groups but denied workers their human and civil rights to combine by inventing and applying doctrines of criminal conspiracy, illegal purpose, the labor injunction, and "yellow dog" contracts. They also applied freedom of contract principles to the employment relationship in ways that established the rule of employment at will, embodied the values of a market ideology and reapplied master-servant principles so that the master's authority was retained without imposing on employers the duties that masters owed their servants. ¹⁶

The values underlying common law employment doctrines are still embedded in U.S. beliefs about economic and workplace relations. The inherent management rights doctrine was a direct descendent of those values and, as such, exposes an inherent contradiction in the industrial pluralists' joint determination theory: that the parties who were supposedly to engage in mutual self-governance under a jointly negotiated "constitution" had not only unequal power but also unequal rights.

The pluralist conception of collective bargaining and labor arbitration also defined the role and authority of labor arbitrators. That definition was articulated most precisely by Harry Shulman "one of the most influential people in the history of American labor arbitration," ¹⁷ once characterized as a "demigod" by Archibald Cox [*8] then Solicitor General of the United States. ¹⁸ Shulman, who left the WLB staff to be the first umpire under the Ford Motor Co.-United Automobile Workers contract, was also a professor of law and Dean of the Yale Law School.

In what is still one of the most cited law review articles, ¹⁹ Shulman set forth his philosophy of labor arbitration which shaped the thinking of many of the nation's leading arbitrators. He was definite about the arbitrator's limited authority and function:

A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not. ²⁰

When implemented along with value judgments favoring inherent management rights, the wide-spread acceptance of Shulman's assertions about the role of labor arbitrators in this country further limited the recognition and exercise of workers' rights. It became standard arbitral doctrine that arbitrators were restricted to the interpretation and application of contract provisions; ²¹ had no authority to add to or in any other way change the parties' contract; were "creatures of the parties," ²² serving only them and the standards they establish ("authority, it is insisted, cannot rise above its source"); ²³ were committed to acceptance of the [*9] will of the contracting parties; ²⁴ and must uphold a "contractual mandate" even when it violates the arbitrator's "sense of fairness." ²⁵ The term "parties," moreover, referred only to the employer and the union that negotiated the contract, agreed to submit an issue to arbitration, and selected and paid the arbitrator. This approach, therefore, considered only collective interests and rights but not the rights of workers as individuals.

As "servants of the parties" ²⁶ arbitrators "are not employed to make the plant a better place to work"; "their job is to protect the principles and values, good or bad" set forth in the contract. Their overriding responsibility "is to preserve the parties' bargain, not to change it." ²⁷ This, in turn led to the conclusion that arbitration "is not a search for truth and justice" ²⁸ or "some abstract ideal of justness and fairness" but rather a search for the "mutual intent of the parties." ²⁹ As one arbitrator put it, management and unions had every right to create "their own private worlds." ³⁰

The pluralist doctrines continue to have a powerful influence on U.S. labor arbitration. Over the years, arbitrators, absent clear contractual limitations, have conceded broad authority to [*10] management. This includes what is to be produced and when and how it is to be produced; what work is to be done; the freedom to make technological change and to set and enforce production standards; to establish new jobs and job classifications; to eliminate jobs; to assign duties to employees; to hire or not to hire (except as limited by statute); to determine the size of crews; to schedule work; to require overtime work; to subcontract bargaining unit work if done in "good faith"; to establish and enforce plant rules; to lay off employees; to transfer, promote and demote employees; and to require job applicants to submit to a physical examination. ³¹

At a 1989 meeting of the National Academy of Arbitrators (NAA), two distinguished arbitrators asserted that the "reserved rights" theory - what they described as "the employer has all rights other than those it has contracted away" - "is so fundamental to bargaining relationships that it is seldom challenged." ³² They added, "Indeed, the management rights clause becomes irrelevant, once the arbitrator accepts the 'reserved rights' theory." They maintained that arbitrators choose to apply the reserved rights assumption because it preserves the parties' bargain. ³³

At that same meeting, a union attorney objected to "the exaggerated concern with management operational prerogative." ³⁴ He argued that the reserved rights doctrine could not be defended as an attempt to preserve the parties' bargain because it "has nothing to do with what the parties said, intended, or agreed to at the bargaining table." ³⁵ He correctly described the doctrine as an assumption that arbitrators make without any proof - an assumption "founded in the world view of arbitrators that the economy operates best when management makes the operational decisions." ³⁶ A management attorney countered that employers do not need arbitrators to bestow reserved rights upon them because

those rights are "simply a reality, a [*11] fact of life in our capitalist[] society - a right stemming from controlling the purse strings." ³⁷

B. Non-Traditional Arbitral Conceptions of the Sources of Workers' and Employers' Rights

In the early 1960s, Arthur Goldberg, then Secretary of Labor and later Supreme Court Justice, commented in a speech to the American Law Institute that he had "often wondered why the genius which produced a law of property rights or of commercial instruments failed utterly to produce a law of job rights." ³⁸ Although, common law values of property rights, contract, and free enterprise have dominated U.S. labor relations and U.S. labor arbitration, contrary non-traditional values have also had an influence.

In this article, the term "non-traditional" is used to characterize any arbitral reliance on a source of worker rights outside a collective bargaining agreement. In one of the earliest, most celebrated and most deplored and, subsequently, most debated examples, arbitrator Saul Wallen, in 1948, in *The Matter of the Coca-Cola Bottling Co. of Boston*, ³⁹ implied a limitation on an employer's right to discharge an employee despite the absence of any provision in the contract concerning discharge. Consistent with the reserved rights theory, the employer had taken the position that "management may discharge an employee if it is dissatisfied with him whether or not there is a sound basis for such dissatisfaction, unless there is an express provision of the contract which limits its discretion in this regard and makes its action reviewable by third parties." ⁴⁰

Arbitrator Wallen disagreed, however, and held that some obligations, although not expressed, "are implicit in the instrument's written terms." ⁴¹ He concluded that sustaining the company's claim of unlimited power to discharge would render meaningless several of the contract's important provisions (providing employees "a measure of job security" and the right to seek the adjustment of grievances), and [*12] that it would be unreasonable to conclude that the employer and union intended those provisions to be "so easily nullified." ⁴² Consequently, when Wallen considered the collective bargaining agreement as a whole, he found "that a limitation on the employer's right to discharge was created with the birth of the instrument." ⁴³ In essence, these workers had rights in addition to those set forth expressly in the collective bargaining agreement.

This was a controversial idea at the time and inspired a reserved right versus implied limitations (significantly not termed "implied rights") debate that has not ended. Although controversial, the implied rights concept is not radical because it is based on inferences drawn from existing contractual provisions rather than on a source of rights that is extra-contractual. Some distinguished arbitrators such as Archibald Cox recognized that "there are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive sources of rights and duties." ⁴⁴ What those other sources were remained unclear.

When he was general counsel of the United Steelworkers of America in 1956, Arthur Goldberg identified worker rights that existed independently of a contract and which were as entitled to fulfillment as management's reserved rights. Goldberg, however, did not identify the sources of those rights. He referred to the rights to strike, to organize, to safe and healthful working conditions, and "to a

fair share of the Company's income" as "Labor's Reserved Rights" and called them "inherent rights." ⁴⁵ It was "historical fiction," he argued, to maintain that "management's reserved rights were all embracing to the exclusion of any labor right" and denied that the contract was the grant of certain rights to workers who otherwise would have no rights. ⁴⁶

Although he complained that employers seeking greater efficiency were seen as "on the side of the angels," ⁴⁷ Goldberg readily [*13] agreed that management had "the exclusive right to manage the business" and that its reserved rights included determination of the products to be produced, machinery to be used; manufacturing methods, prices, plant layout, plant organization, and "innumerable other questions." ⁴⁸ He distinguished those "exclusive rights" about which a union had no "say" from the right to direct the labor force which he considered a "procedural right" based on "recognition of the fact that somebody must be boss" and run the plant. ⁴⁹

Goldberg argued that this right to direct did not "imply some right over and above labor's right" or "a second class role for the union" which could only grieve when it objected to an employer's action, and then only when that action involved contractual issues of wages, hours or working conditions. In order for Goldberg's "division of function" to work, however, arbitrators had to give no greater weight "to the directing force than to the objecting force." ⁵⁰

Goldberg's analysis implies that what he called the right to manage is comprised of unilateral reserved or inherent employer rights whereas the right to direct the workforce is a jointly controlled and equal right of management and labor. He did not explain how these rights should be balanced when an employer's exercise of a reserved right to manage conflicted with labor's rights in regard to wages, hours, and working conditions. ⁵¹ Goldberg said only that "the exercise of these [management] rights cannot diminish the rights of the worker and the union." ⁵²

Two years later, at a 1958 meeting of the National Academy of Arbitrators (NAA), Willard Wirtz, who would become Secretary of Labor during the Kennedy administration, asserted that neither institutional security, nor operative efficiency, nor the will of the majority was a sufficient reason "for disregarding certain independent individual interests." ⁵³ That was a rejection of the commonly held arbitral understanding that "parties" meant only employer and union. Wirtz's emphasis was on due process, which he defined as the exercise of any authority with a due regard to balancing individual and group interests. Wirtz advocated a role for the arbitrator that included a necessary element of independence. He maintained that whereas [*14] acceptability to the employer and union is a "legitimate consideration" it is "no ultimate standard." ⁵⁴ Labor arbitrators, Wirtz contended, had an obligation and the authority to protect individual rights and interests and, in doing so, "to look ... to standards that are unaffected by the individual's election of representatives and by the actions of those representatives." ⁵⁵ Wirtz's speech was a breakthrough call for the recognition of individual rights of workers in the grievance-arbitration process even when that meant "piercing the institutional, representative veil." ⁵⁶

In regard to the source of these individual rights, Wirtz went further than Goldberg by referring to a "broad base of democratic experience, written in the Magna Carta, the Bill of Rights, the proviso to Section 9(a) of the Wagner and Taft-Hartley Acts, *Steele v. Louisville & Nashville R.R.*, the AFL-CIO Ethical Practices Committee's operations, the UAW's 'good housekeeping' committee device, uncounted

Fourth of July orators, and uncountable homelier expressions." ⁵⁷ All of these were sources outside collective bargaining agreements.

In another speech to the NAA thirteen years later, Wirtz was even more definite not only about individual rights in labor arbitration, asserting that "only the individual matters," ⁵⁸ but also about the sources of the rights of individual workers:

But a good deal more than procedures comes from the uncommon law of arbitration that only the individual matters. Nothing else. Not the individual as a remote and uncertain beneficiary of something called progress or the **gross** national product. Not the individual as a sparrow to be fed by gorging the horses. No. The individual as the owner of rights and interests - job rights, personal rights, human rights - at least as much entitled to protection as a piece of real estate or machinery. The individual as somebody the system is designed for instead of the other way around. ⁵⁹

Wirtz's ideas were radical in that they struck at the fundamentals of the traditional arbitral view of the sources of worker rights, the role of the labor arbitrator and the preeminence of collective rights and interests. He identified a source of rights in each individual worker rather than only in the provisions of collective bargaining [*15] agreements. He told arbitrators they had an obligation to uphold those individual rights even when they conflicted with the institutional interests of the employers and unions that selected them and might not select them again. In the exercise of their decision-making, therefore, arbitrators could no longer be merely "creatures of the parties." The idea that the grievance-arbitration process was designed for individual workers, moreover, clashed with the traditional notion that the process was created and controlled by employers and unions and was intended to serve their collective interests. Finally, no one before Wirtz, at least within the confines of U.S. labor arbitration, had spoken of workers possessing human rights that were entitled to protection.

By 1971, when Wirtz addressed the NAA, Congress had passed several laws extending statutory protection for individuals at the workplace. Laws such as the Equal Pay Act of 1963, ⁶⁰ Title VII of the Civil Rights Act of 1964, ⁶¹ the Age Discrimination in Employment Act of 1967, ⁶² and the Occupational Safety and Health Act of 1970 ⁶³ emphasized individual rather than collective rights. The 1971 meeting of the NAA was devoted to the topic, "Arbitration and the Public Interest," that is, whether arbitrators should consider these and other "external" laws in deciding their cases.

In 1960, the Supreme Court in a series of landmark decisions commonly known as the "Steelworkers Trilogy" ⁶⁴ made labor arbitration the "darling of national labor policy." ⁶⁵ In those three decisions, the Court upheld the core principles of the pluralist theory of labor arbitration, so much that one commentator claimed that Shulman's article, Reason, Contract and Law in Labor Relations, "was more influential in conditioning the Supreme Court's thinking in the Steelworkers trilogy than Gunnar Myrdal's American Dilemma was in Brown v. Board of Education." ⁶⁶

[*16] The Supreme Court, parroting pluralist principles and citing Shulman's article, referred to the collective bargaining agreement as "more than a contract"; it "is an effort to erect a system of industrial

self-government"; ⁶⁷ the grievance-arbitration machinery "at the very heart of the system of industrial self-government;" ⁶⁸ and the arbitrator's award is "legitimate" only if it "draws its essence from the collective bargaining agreement." ⁶⁹ The Court went on to proclaim a federal labor policy that was "to promote industrial stabilization through the collective bargaining agreement." ⁷⁰ The Court added that a contractual arbitration procedure was "a major factor in achieving industrial peace." ⁷² The Supreme Court concluded that:

The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. ⁷³

The message to lower courts was clear: "the courts ... have no business weighing the merits of the grievance." That is exclusively and finally for the arbitrator to decide. ⁷⁴

It was an unprecedented grant of authority and autonomy to labor arbitrators. As one law professor-arbitrator pointed out, "In no other area of adjudication are courts asked to exercise their powers while they are denied any responsibility for scrutinizing the results they are to enforce." ⁷⁵ The labor arbitration policy created by the Supreme Court in the Steelworkers Trilogy made labor arbitration a substitute for the judiciary in the resolution of workplace disputes. Ironically the more that "private" labor arbitration was substituted for the courts, the greater arbitrators' responsibility for public policy [*17] and the greater the likelihood of controls to protect the public should arbitrators decline that responsibility. ⁷⁶ The decision to insulate arbitral judgments against judicial review, created "more rather than less reason" for arbitrators "to seek to preserve public policy rights protective of individual freedom and equality and ... dignity." ⁷⁷

The proliferation of "external" laws protecting employees' workplace rights, moreover, blurred the distinction (if there ever was a realistic distinction at the workplace) between public rights and private rights. Despite the pluralists' conviction that the obligations of public law were not to be worked into the arbitration process, ⁷⁸ federal and state law providing for the enforcement of labor arbitrators' awards meant that labor arbitrators also "participate in the coercive power of the state." ⁷⁹ As one non-arbitrator speaker told the NAA meeting in 1963, if labor arbitration insisted on operating as "a separate solar system unattached to the national labor policy" as set forth in court decisions, the exercise of arbitral power would amount to a "usurpation of judicial authority [and] a major step toward industrial anarchy." ⁸⁰ In 1967, a state judge told the NAA that "the worlds of public adjudication and private arbitration cannot live in isolation; no iron curtain separates them." ⁸¹

Jean T. McKelvey, the first woman president of the NAA, in her 1971 presidential address, *Sex and the Single Arbitrator*, explored how labor arbitrators decided contract grievances that involved alleged sex discrimination. She reported a "general arbitral reluctance to resolve questions of law which are intermingled with questions of contract interpretation." ⁸² She called this "negative attitude" toward administering the public policy against discrimination "alarming," "outmoded and irresponsible."

McKelvey warned that if arbitration [*18] "is to survive and to be 'relevant' to the emerging needs of a new social and economic order, it cannot simply remain as part of 'the Establishment'." ⁸³

At the same time that most arbitrators were using the collective bargaining contract as a shield against public policy, ⁸⁴ some arbitrators recognized that private institutions had an obligation to honor and uphold rights recognized by statute as well as by contract. At that same 1971 NAA meeting, for example, Wirtz urged arbitrators to shake free of "tired habits" and "rusty precedent" and to make suspect every hard and fast rule. Only then, could arbitration realize its potential "for meeting infinitely greater needs than those we have spent most of our professional lives putting it to." ⁸⁵

What was at stake in these fundamentally different conceptions of the labor arbitration process were the civil rights, constitutional rights, and human rights of workers, particularly workers who do not have the financial resources to pursue long and costly legal action and whose life experiences convinced them that such efforts would be futile anyway. It was unrealistic, therefore, for pluralist arbitrators to propose that when statutory issues are intertwined with contractual issues, arbitrators should consider only the contractual aspects, leaving it to the aggrieved worker or his or her union to pursue the statutory aspects in the judicial system.

The debate over the relevance of "external law," moreover, was conducted in a way that obscured the central issue: the conflict between individual worker rights, regardless of the sources of those rights, and the dominant conceptions concerning employer rights. As Arthur Goldberg pointed out, unlike management rights concepts, there has not been a developed coherent concept of the fundamental rights of employees at their workplaces despite the fact that people's work has the most direct affect on their lives. Julius Getman, at an NAA meeting almost thirty years ago, stated: "Just as we recognize that the possession of certain rights is crucial to political freedom, it should seem obvious that they or similar rights are also vital to industrial dignity and self respect." ⁸⁶

[*19] Although arbitrators readily adopted and applied extra-contractual common law principles in their contract language interpretation and discipline cases, most claim that other extra-contractual sources of rights, such as the Constitution and statutes governing the workplace, were beyond their authority to consider. ⁸⁷ One arbitrator told Getman that "to ask arbitrators even in the Bicentennial year, increasingly to incorporate fundamental freedoms and individual rights into an expanding concept of 'just cause' [for discipline] is to ask them ... to swallow a constitutional camel when they have been unable to agree upon ingesting the statutory gnat." ⁸⁸

That statement accurately summed up the prevailing attitude of labor arbitrators toward sources of workers' rights not set forth in collective bargaining agreements or implied from provisions in those agreements. The only community that mattered in the arbitration process was the industrial relations community not the larger society. Justice, therefore, is whatever produces the results that are in accord with the expectations of that industrial relations community, more specifically, the parties (employers and unions) that establish the laws governing that community. ⁸⁹

For traditional labor arbitrators, the "Golden Age of Arbitration" is the era of industrial self-government. ⁹⁰ The non-traditional conception of workers' rights in regard to their employers and their

unions, however, required a very different kind of arbitrator and arbitration process. As Clyde Summers put it, to enforce these workers' rights:

Arbitrators cannot conceive of themselves as being fundamentally servants of union and management, that union and management are their customers and their clientele, and that they are to serve the interests of those institutions ... arbitrators must take upon themselves a quite different role and responsibility. They must assume a responsibility beyond the union and the management. ⁹¹

[*20]

III. Value Judgments in Labor Arbitration

These sharply conflicting conceptions of workplace rights and justice, and their consequences cannot be fully understood without exploring the values that underlie each. Values are personal or societal conceptions of the ways things ought to be. They are beliefs that certain means or ends of action are desirable or undesirable. Values, therefore, have an "ought" or "should" character.

It has been accepted for a long time that values exist and do influence the decision-making process. In 1881, Oliver Wendell Holmes asserted in his classic *The Common Law*:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. ⁹²

In 1930, Jerome Frank in his own classic, *Law and the Modern Mind*, stated that the "vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case." ⁹³ Nine years earlier Supreme Court Justice Benjamin Cardozo, lecturing on the Nature of the Judicial Process, emphasized the influence of the decider's "likes and dislikes," "predilections and prejudices" as well as the entire "complex of instincts and emotions and habits and convictions which make the man [or the woman], whether he [or she] be litigant or judge." ⁹⁴ Cardozo also talked of "instincts," "traditional beliefs," "acquired convictions," "outlook on life," and "conceptions of social needs," pointing out that "in this mental background every problem finds its settings; we may try to see things as objectively as we please [, but] nonetheless, we can never see them with any eyes except our own." ⁹⁵ He added, "the decisions of the courts on economic and social questions depend upon their economic and social philosophies." ⁹⁶

Given that even labor arbitrators are human beings, it would seem at least odd to ask whether arbitrators have values that affect [*21] the decisions they reach. ⁹⁷ The subject certainly has been avoided over the years, possibly because arbitrators feared loss of respect and confidence if their decision-making

was understood to be influenced by their personal values. The search for values in arbitration decisions could also be perceived as undermining the integrity of the arbitration process by demonstrating that arbitrators were not coldly objective and impersonal in deciding disputes.

The traditional arbitral position is that values play no significant role in decision-making because the outcome of each case is determined by its unique facts, the intent of the parties and specific contract language. There was objection to the publication of arbitration awards, for example, because it would result in the codification of precedents and the development of a common law based "on the fallacious assumption that the interpretation of one contract can be carried over the same or similar problems arising under the same or similar union agreements." ⁹⁸ When publishing houses "relentlessly printed arbitration awards," some arbitrators summarily dismissed the idea that this growing body of case precedent constituted a common law of arbitration with a, "nothing could be further from the truth." ⁹⁹ Those pluralist arbitrators who did acknowledge that values influenced their decisions insisted, however, that these values were not their own but were those of the unions and employers in dispute. Over fifty years ago one of the foremost pioneer arbitrators, Ralph Seward described labor arbitration as a method of settling disputes that "will reflect the basic values and ends of the disputants." ¹⁰⁰ He acknowledged the existence of "often unspoken" assumptions about "what is right and what is wrong" but said those were the "values and standards of the parties." ¹⁰¹ The arbitration process would be "creative," he maintained, only to the extent that arbitrators are "able to draw from the parties their basic concepts of justice or to work with them in the creation and development of mutually acceptable concepts, rather than sitting back and attempting to impose [the arbitrators'] own." ¹⁰²

[*22] Thirty years later one of the most respected arbitrator-professors in the NAA, David Feller, confirmed the view that the only values in the arbitration decision-making process were those of the parties. "The arbitrator, in reading a collective bargaining agreement, reads not only the words of the agreement, but also the commonly accepted standards which the parties may be assumed to have agreed upon even if they fail to express them in words." ¹⁰³ When a contract is silent, Feller allowed that arbitrators may find these unwritten values of the parties implied in a larger common law of industrial relations. ¹⁰⁴

Despite obvious straining to reject any implication that the values of arbitrators had any influence on their decisions (even in deciding disputes not covered by contract language), it was necessary for traditional pluralist arbitrators to persist in the assertion that they did not create rights "from silence or anywhere else." Instead, they claimed they recognized only the "underpinnings of the labor relationship" that were so well-accepted that they were beyond dispute - or, as one arbitrator put it, that go "without saying." ¹⁰⁵

If there ever were a case where the facts were undisputed, the negotiators' mutual intent was clear and also undisputed, and the pertinent contractual language was clear and unambiguous, then the decider's values most likely would have little or no significant effect. But in the real world of labor arbitration, findings of fact must be "drawn from a welter of conflicting testimony," ¹⁰⁶ contractual provisions are unclear and ambiguous, or the agreement is silent concerning the issue in dispute and mutual intent is disputed or never existed. In addition, in the words of Archibald Cox, "many of the most important questions of interpretation in collective bargaining are not soluble by reference to a fundamental

purpose of the collective bargaining agreement [because] management and labor often have conflicting objectives, and the interpretation put upon the [*23] contract may depend on which objective is chosen as the major premise." ¹⁰⁷

In other words, in the real world the labor arbitrator must choose "among several potentially applicable sets of principles" ¹⁰⁸ in resolving conflicts in testimony, interpreting and applying contractual language that is subject to more than one reasonable interpretation, in filling gaps in silent contracts, and giving priority to one party's objectives. This decision-making requirement of choosing from among alternative and often conflicting principles is the essence of the creative function of the labor arbitrator.

My own research has demonstrated that in making these choices "prevailing ideas about ethics, humanity, law, private property, economics, and the nature of the employer-worker relationship not only condition the thinking of arbitrators but also provide them with standards for judgment." ¹⁰⁹ These values also pre-position a decision-maker's approach to particular issues, thereby exerting a powerful influence on the outcomes of these cases. ¹¹⁰ Arbitrators, in exercising this prerogative of choice, are making judgments that reflect, among other things, their own political, social and economic philosophies. The standards for judgment that arbitrators use when they decide cases determine whether they see the workplace through the eyes of employees on the shop floor, in offices or classrooms, or from the perspective of those who manage those enterprises. As arbitrator Sylvester Garrett concluded, Shulman's statement (echoed by the Supreme Court in the Steelworkers Trilogy) that an arbitrator does not "sit to dispense his [or her] own brand of industrial justice" was a "pleasing euphemism" but "not entirely accurate." ¹¹¹

Decisions, including labor arbitration decisions, are human choices. Consequently, there is an important subjective element to the nature of the decision-making process. ¹¹² In his 1962 Presidential [*24] Address to the NAA, Gabriel Alexander cited students of jurisprudence, philosophy and business who agreed that this subjective process includes a "conscious determination of values and application of logic, and subconscious, or half-conscious leanings or predilections." ¹¹³ Because human choice is involved, every decision by a judge, an agency's administrative law judge, or an arbitrator is a value judgment. ¹¹⁴ Neutrality, therefore, means an absence of bias. It does not mean that each arbitrator has no assumptions about the nature of the enterprise and the place of employees in that enterprise. ¹¹⁵

There are limits to an arbitrator's discretionary power. The clearer and more comprehensive the contractual language at issue, for example, the less latitude for the exercise of subjective choice. Conversely, the potential influence of arbitral value choices increases in cases involving ambiguous contract language, in situations where the contract is silent concerning the specific issue in dispute, where the mutual intent of the parties is unclear or non-existent or where the pertinent contractual terms are stated in broad and general language. The standard contractual language requiring that an employer's discipline be administered for "just cause" is a good example. It has not been the parties who have defined "just cause" over the years but labor arbitrators exercising an "unvarnished element of discretionary judgment." ¹¹⁶

As far back as 1959, Archibald Cox told those attending the twelfth annual meeting of the NAA that

We may have been bemused by the precepts that justice requires deciding each case upon its merits and that no two contracts are quite the same, but surely we have not labored at the administration of collective bargaining agreements for almost two decades without arriving at some generalizations upon which the unbiased can agree even though partisan interests preclude unanimity. Perhaps only a few rules have developed, but I submit that there are attitudes, approaches, and even a number of flexible principles. ¹¹⁷

[*25] Arbitrators often had to invent or appropriate standards established elsewhere because none were provided by the parties in dispute. ¹¹⁸ Willard Wirtz pointed out, for example, that the procedural rules for the conduct of arbitration hearings "have been devised primarily by the arbitrators rather than by the parties." ¹¹⁹ These due process rules have been developed "almost exclusively" by arbitrators because collective bargaining agreements provide "remarkably meager guidance concerning procedural fairness at the hearing." ¹²⁰

No grand conclusions can be drawn, however, about what values arbitrators apply in their decision-making because of the limited research available on that subject. The available evidence reveals, however, a deference to management rights, management's goals of efficiency and productivity, and management's control and direction of the workforce. Arbitrator Garrett's 1985 review of texts on labor arbitration demonstrated what he called a "doctrinaire approach" that advanced the reserve management rights value judgment with "a substantial degree of uncritical acceptance." ¹²¹

The existence of this value in the decisions of labor arbitrators and the fact that it is a choice made by arbitrators from among alternative conflicting values lay behind Garrett's concern about why only the common law was considered by those arbitrators and not the National Labor Relations Act (NLRA) which since 1935 "has made all terms and conditions of employment subject to good faith collective bargaining." ¹²² A union attorney once asked the members of the NAA why arbitrators without reservation implied from the "mere existence of the grievance procedure" that employees must obey first and grieve later but did not imply from the existence of the standard contractual clause recognizing the union as the exclusive representative for collective bargaining that the NLRA's duty to bargain was part of the parties' obligations. ¹²³

As arbitrators Mittenthal and Bloch confirmed, however, arbitrators embrace the reserved rights doctrine "notwithstanding the [*26] silence of the contract." ¹²⁴ This is "the world view of arbitrators that the economy operates best when management makes the operational decisions." ¹²⁵ My research has focused on subjects that involved conflicting value choices and allowed the decider maximum freedom to exercise personal discretion in choosing from alternative values and outcomes. The two projects most relevant to this study addressed subcontracting (now euphemistically called "outsourcing"), ¹²⁶ because those cases raise issues of management rights and worker job security, and workplace health and safety disputes, ¹²⁷ because the fundamental clash between management's rights to operate the enterprise and workers' rights to a safe and healthful workplace was most likely to evoke arbitral value judgments.

The dominant value theme in the subcontracting cases was that management rights are necessary for the continued existence of the free enterprise system, and that the pursuit of efficiency is one of the most important and fundamental rights of management. The reasoning was based on the value judgment that free competition is worth more to society than it costs - a philosophy of progress wherein efficiency is the dominant concern. Arbitrator Arthur Ross summed up this value judgment in a decision giving priority to an employer's decision to make technological changes despite the harmful effect of those changes on the workers' contractual rights:

For better or worse, it is almost unchallenged in the United States that employers should be entitled to take full advantage of science and technology. The established doctrine is that dislocation should be anticipated and dealt with, but should not slow down the progress of technological change itself. Perhaps we have made a mistake in elevating economic progress to the status of an absolute, but this is a philosophical question which need not be answered here. It is sufficient to find that [the company's] computer installation was in line with current business practice and in accordance with prevailing ideology concerning the benefits of unrestricted technological change. ¹²⁸

Worker safety and health cases will be discussed in the next section of this article. Suffice it to say here, therefore, that, once again, the dominant value theme was that management's freedom to operate the enterprise and direct the workforce was deemed superior to all other [*27] rights including workers' right to a safe and healthful workplace. ¹²⁹ In his studies of values in the decisions of judges and arbitrators, law professor-arbitrator James Atleson found "a set of values" that include the following:

1. Continuity of production must be maintained and should be limited only when statutory language clearly protects employee interference.
2. Employees, unless controlled, will act irresponsibly.
3. Employees possess only limited status in the workplace, and, correspondingly, they owe a substantial measure of respect and deference to their employers.
4. The enterprise is under management's control, and great stress is placed upon the employer's property rights in directing the workplace.
5. Despite the participatory goals of the NLRA, employees cannot be full partners in the enterprise because such an arrangement would interfere with inherent and exclusive managerial rights. ¹³⁰

In his study of arbitral values in cases in which employers disciplined employees for swearing at their supervisors, Atleson found that "arbitrators ... uncritically accept hierarchical notions of order and control in what is traditionally championed as a joint, and contractual, endeavor." ¹³¹ The cases he examined raised questions about the status relationship between employers and employees that arbitrators answered by applying master-servant notions to the worker-supervisor relationship - a value judgment that the employer-employee relationship must necessarily be the unequal relationship of

superior and subordinate. Even without evidence that production would be affected, Atleson found that arbitrators' "immediate concern is always the avoidance of overt signs of militancy, expressions of equality, or a rejection of hierarchy." ¹³² Because none of these cases involved a refusal to follow management's orders, Atleson also concluded that the underlying arbitral value was that "disrespect for 'authority' is undesirable and also punishable." ¹³³

[*28] In all of these studies, labor arbitrators have made value judgments that reflect the interests of the dominant power at the workplace. Law professor and NAA member Robert Rabin, commenting on these studies of arbitral values, deplored the hierarchical and autocratic "vision" that treats workers "as children, or worse, as prisoners." ¹³⁴ He summed up the core of the difference between the traditional and non-traditional arbitral conceptions of the sources of workers' and employers' rights by emphasizing the "need to develop a model that gives due recognition to individual worth, yet harmonizes individualism with the basic need to get the work done." ¹³⁵

Human rights values represent moral choices that are rooted in conceptions of the dignity of the individual human being. Consequently, they are moral rights of the "highest order" ¹³⁶ and constitute standards for judgment more fundamental than common law, contractual, statutory, or even Constitutional standards. Human rights have been described as "a rare and valuable intellectual and moral resource in the struggle to right the balance between society (and the state) [and employers] and the individual." ¹³⁷

Human rights are a species of moral rights which all persons possess inherently, simply because they are human ¹³⁸ and not because these rights were earned or acquired by special enactments or contractual agreements, or conferred because of one's social or economic utility. Put another way, even if slavery (or racial discrimination of any sort) was permitted or even sanctioned by custom, common law, federal law, state law, executive order, or by collective bargaining contract, it would be a violation of core human rights principles: that every person possesses human rights equally; that every human being is sacred; that human beings are ends in themselves, not objects to be used for others' purposes; and that because every human being is sacred "certain things ought not to be done to any human being and certain other things ought to be done for every human being." ¹³⁹

[*29] In the employment context, therefore, employer-employee relations are more than economic in nature because workers are persons, and employers are obliged to refrain from actions that violate the rights that are needed not merely for life but for a "life of dignity": "violations of human rights deny one's humanity; they do not necessarily keep one from satisfying one's needs." ¹⁴⁰ Human rights are necessary to live a life worthy of a human being, that is, to live a fully human life. The widely-held presumption is that a human being is more than a piece of matter or an element in nature. ¹⁴¹ Human beings make choices based on reasoning and have their own purposes. They are not merely sensors of the world, responding only to stimuli. They are capable of controlling and changing their own lives and can affect the lives of others for better or worse. They engage in self-evaluation and in the evaluation of others. Humans' ability to reason makes them knowers, judges, creators, and communicators who can "put information together to form generalized truths about the world [and] use these truths to understand each new situation that arises." ¹⁴² They "are also able to reshape the world and to share their experiences of the world with one another in language, symbol and culture." ¹⁴³

These unique features make human beings special among all other beings. They should be treated accordingly as originators, shapers and builders of human communities. ¹⁴⁴ As Jack Donnelly has written, "Human rights represents a social choice of a particular moral vision of human potentiality, which rests on a particular substantive account of the minimum requirements of a life of dignity." ¹⁴⁵

The United Nations Universal Declaration of Human Rights (UDHR), ¹⁴⁶ the International Covenant on Cultural and Political Rights (ICCPR), ¹⁴⁷ and the International Covenant on Economic, [30] Social and Cultural Rights (ICESCR), ¹⁴⁸ the so-called International Bill of Human Rights, provide a widely-accepted list of internationally recognized human rights. A right most relevant to this article is the right to safe and healthful conditions of work (derived from the fundamental right to life and survival, that is, to physical security and subsistence). ¹⁴⁹

Human rights values do conflict with the dominant value in labor arbitration that employer rights and objectives take precedence over employee rights in the workplace - or as Clyde Summers has characterized it, the "deeply rooted conception of the employment relation as a dominant-servient relation rather than one of mutual rights and obligations." ¹⁵⁰ It is important to move beyond simply demonstrating the existence of these conflicting values to an analysis that will assess the relative merits of those alternative approaches in situations involving worker safety and health.

IV. Arbitral Case Decisions: Values & Standards for Judgment - Safety & Health Disputes

Almost twenty years ago, my study of the decisions of U.S. labor arbitrators in cases involving safety and health disputes revealed a fundamental clash between management's right to operate the enterprise and workers' rights to a safe and healthful workplace. ¹⁵¹ Although that study identified four major categories of safety and health cases, ¹⁵² the focus here will be on worker refusals to work for reasons of health and safety. An analysis of arbitral decisions in these refusal to work cases over the twenty years since that study confirms the findings of the original research.

The basic rule in these cases is the obey (work) first, grieve later principle. As previously discussed, that rule reflects the underlying [31] value judgment that management has the right to direct and control the workforce. Equally axiomatic in U.S. labor relations is that a threat to worker health and safety is an exception to the rule of obey first, grieve later. ¹⁵³ The original and updated studies found, however, that arbitrators do not except health and safety from this rule. They instead perceived these refusal to work cases as insubordination cases. Management's right to direct and control the workplace, therefore, becomes the starting point for arbitral decision-makers, and challenges to that right, that is, refusals to work, are insubordination. This approach downgrades workers' fears and concerns about their safety and health to the level of an excuse for not obeying an order to work.

This arbitral value judgment that an employer's authority should be dominant at the workplace has powerful detrimental consequences for workers' ability to protect their own lives, limbs, and health at the workplace. Although, technically, an employer carries the burden of proof in all discipline cases, treating these cases as insubordination cases puts the burden on the already discharged or otherwise disciplined workers and their representatives to prove to an arbitrator's satisfaction that the work

assignment, or equipment, or work environment was sufficiently hazardous to health and bodily integrity to justify the refusal to perform the work.

Arbitrators make this burden even more onerous for employees by imposing on them the most difficult standard of proof to meet, namely, objective proof. That standard requires workers to produce what arbitrators call "objective evidence of a dangerous condition," "demonstrative, objective or factual evidence" or "scientific evidence."¹⁵⁴ It is a standard of proof most difficult for workers to meet because they must act "without the benefit of any safety engineering or medical evidence as to the severity of the situation" or adequate information concerning workplace safety and health.¹⁵⁵

Arbitrators also impose on employees a "reasonable belief" standard of proof defined as "more than a mere presumption" or "some colorable basis in the facts of the work situation confronting [*32] [them]"¹⁵⁶ that justifies a belief that it would be unsafe. Although by definition reasonable belief would seem to require a lighter burden of proof, most often there is only a slight difference, if any, between that standard and what arbitrators require of workers under the objective proof standard. Arbitrators emphasize the factual basis, if any, for the perceived danger under both standards, and the facts required to substantiate a reasonable belief are often identical to those needed to demonstrate objective proof.¹⁵⁷

The least applied standard of proof is "good faith belief," defined by arbitrators as a fear that is "genuine," "sincere," "honest and not a subterfuge."¹⁵⁸ The actual use of this standard by arbitrators is so rare that there have been only two reported cases from 1945 through 2003 where an employee's good faith belief was the sole or even primary basis for justifying a refusal to obey a work reasons of health and safety.¹⁵⁹ A good faith belief is used more often as a basis for mitigating penalties imposed for insubordination.

The insubordination mode of analysis used in these refusal to work cases, with its associated heavy burden of proof on workers, is the result of arbitrators' value judgments that employers' freedom to operate the enterprise and direct the workforce are superior to all other rights including workers' right to a safe and healthful workplace. By their acceptance of this conception of the relative importance of employer and worker rights - even when the health and safety of human beings is involved - labor arbitrators in the U.S. become part of and help enforce an industrial relations system that maximizes employers' control of employee discipline and, thereby, minimizes employee interference with management's freedom to operate the enterprise.

The restraining effect on worker conduct is obvious, particularly to workers, because the risk of failing to meet their heavy burden of proof is high and the consequences potentially disastrous since insubordination of this sort is commonly considered just cause for discharge. More specifically, it confronts workers with a dilemma: to work and risk life, limb or health or to refuse to work and risk their [*33] jobs.¹⁶⁰ Their human rights are disrespected whichever choice they make.

An analysis of arbitration cases concerning the refusal to work for reasons of health and safety published since the original study revealed that nothing had changed. The burden of proof remains on workers and their union representatives "to demonstrate where work assignments are refused that the

work, indeed, is unlawful or unsafe, or detrimental to life, limb and health." ¹⁶¹ As one arbitrator put it, "They [employees] must follow instructions and grieve later, unless they are willing to take the chance that they can prove they had a reasonable belief that complying with the instructions would endanger their safety and health." In that case the "Grievant gambled and lost." ¹⁶²

The standard of proof, moreover, remains the onerous objective proof and reasonable belief with little difference between the two. Workers can win these cases despite heavy burdens and stringent standards of proof. ¹⁶³ In one case, for example the arbitrator found that a broken plug could "cause death or serious physical harm" that was "beyond the normal hazards inherent in the operation." ¹⁶⁴ Other employees were able to satisfy the objective proof standard by producing medical evidence of a "weakened back"; ¹⁶⁵ persuading an arbitrator that an injured wrist that deprived a worker of the use of his right arm justified his refusal to climb ladders and crawl in areas subject to "dust outs" which darkened one area "either to zero or inadequate visibility"; ¹⁶⁶ and presenting evidence (discovered after the [*34] suspensions) that the sludge workers were ordered to clean up contained traces of PCBs and three "deadly toxic" solvents. ¹⁶⁷

Other workers, however, could not prove that their assignments were actually unsafe "in an objective sense" such as the employee who despite "genuine fears and anxieties about working underground" had his discharge upheld because his union produced "no medical evidence to support that the Grievant's health might be impaired by so doing." ¹⁶⁸ In other cases where employees could not meet the required standard of proof, arbitrators claimed to be applying a "reasonable belief" standard but defined and applied that standard as if it were a synonym for objective proof. In the words of one arbitrator, "A 'reasonable' belief is not merely a subjective feeling. It is a demonstrably objective conclusion based upon some tangible evidence or hazard." ¹⁶⁹ A worker must produce "adequate support" for his or her belief ¹⁷⁰ or "objective, ascertainable evidence" ¹⁷¹ or a "showing by appropriate evidence" ¹⁷² or "the employee's belief must be factually supported according to an objective standard and such support must take the form of specific conditions and not vague, irrelevant, or general statements." ¹⁷³

Even when workers were able to meet this reasonable belief standard, it was clear that the circumstances involved constituted objective proof. In one case where "6700 pounds of material had fallen from the ceiling including the suspended ceiling, light fixtures, wiring, ductwork, and the old mesh-interlined plaster ceiling," walls had collapsed in the building only a year before, and building inspectors "could not guarantee the safety of the building," the arbitrator found that the employees "had reason to be frightened." ¹⁷⁴ Apparently the roof has to fall in before workers' refusals to work are justified. In another case where employees were required to "spiderman" their way into hoppers containing enough ash to bury [*35] them and where footing was "slippery," an arbitrator found that an employee met a reasonable belief standard of proof because a slab of ash fell on him inside a hopper; he had "heard that a man had once been buried in ash in a plant hopper"; and he had "never previously been inside a hopper." ¹⁷⁵

Arbitrators, in placing the burden of proof on workers in these cases, are relying on value judgments concerning reserved management rights, not upon specific contractual provisions. In making the burden of proof on workers as heavy as possible, these arbitrators not only confirm their choice of employers' rights over workers' rights, but also their desire to discourage challenges to the exercise of managerial

authority at the workplace. They have persisted, therefore, in treating these cases as insubordination cases. ¹⁷⁶ One arbitrator, for example, told a grievant, who had to work where asbestos particles "would more than likely, be in the air" because of asbestos removal work, that "nothing in the contract provided that the job [asbestos removal] should be halted while all employee doubts about safety are resolved." The arbitrator concluded that the worker's refusal to perform his assigned job was insubordination. ¹⁷⁷

In another case, the arbitrator implored the union to "recognize the peril to the Company and to the security of all the other employees if any employee at any time could refuse a work assignment and expect to be excused because he claimed he feared an injury or re-injury." ¹⁷⁸ He stressed that because the Company's ability to remain competitive is "just as important to the Bargaining Unit employees as it is to the Company," the Grievant "was doing a disservice to his fellow employees in refusing to operate in the manner in which he was directed." ¹⁷⁹ The arbitrator left no doubt about whose interests he considered paramount:

If the Arbitrator were to sustain the Grievance, he would be directing the Company to reduce the 28 pound requirement to the 18 pounds the Grievant argued was the amount he could handle [*36] safely and without fear of injury or re-injury. This, in effect, would then become the standard for all other operators of the Stevens Plater. This would mean production on the Stevens Plater would be reduced by approximately 37 percent. This means the fixed overhead costs would be divided over 37 percent fewer parts coming off the Stevens Plater and would mean the Company would have to try to get an increase in the price charged [to] the customer or lose the business. ¹⁸⁰

V. Workers' Rights as Human Rights: A Different Standard for Judgment

A worker was discharged for refusing to work under a furnace that had several glass leaks and electrode cooling problems. The arbitrator, recognizing that the employee was "afraid," stated that "humanitarian considerations would validate the argument made by the Union [that] the psychological as well as the physical well-being of the individual must be considered and neither can be ignored." ¹⁸¹ "Nonetheless," the arbitrator decided, "the Company has a business it must run in an efficient and productive manner [, and] recognizing the dangers associated with any kind of maintenance work in a large facility of this nature, ... the Company must be able to assign employees to such work." ¹⁸²

The long-standing dominance in the United States economic history of the proposition that management rights must take precedence over all else should not obscure a more humane value judgment, namely that nothing is more important at the workplace than human life and health. That is a human rights standard, not a management rights standard. Although no one called it a human rights standard at the time the Occupational Safety and Health Act ¹⁸³ (OSHA) was being debated, the legislative history of OSHA affirms that the primary goal of OSHA was worker safety and health, not management productivity or control. In a comment cited by the Supreme Court in its 1980 decision in *Whirlpool Corp. v. Marshall*, ¹⁸⁴ Senator Ralph Yarborough of Texas told his Senate colleagues: "We

are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who [*37] work in our plants and factories that they will go home after a day's work with their bodies intact." ¹⁸⁵ Then Secretary of Labor Willard Wirtz told Congress in 1968 that the proposed safety and health legislation was a victory for a new politics that rejected "human sacrifice for the development of progress," placed "higher value ... on a life, or a limb, or an eye," and asserted "the absolute priority of individual over institutional interests and of human over economic values." ¹⁸⁶

In the realm of human rights, physical security is a basic right, in the sense that it is essential for the exercise and enjoyment of all other rights. Without physical security, it is impossible to live life as a human being. Basic rights, including the right to physical security, constitute a moral minimum, "the lower limits on tolerable human conduct, individual and institutional." ¹⁸⁷ They define "the least that every person can demand and the least that every person, every government, and every corporation must be made to do." ¹⁸⁸ Their purpose is to eliminate or minimize the vulnerability that leaves people at the mercy of others who have the power to harm them. ¹⁸⁹

Human beings do not become something less than human beings when they enter the workplace, ¹⁹⁰ and, therefore, they have a right to [*38] protection of their physical security from those who can harm them there. Safety and health while at work are requisite component parts of most people's physical security. The right to safety and health has long been included in national and international human rights declarations, treaties, and laws. ¹⁹¹ Emily Spieler puts it powerfully: "It is in fact the right to life that we are talking about when we talk about work safety," and "the right to life is deeply embedded in every human rights declaration, and it is presumed in these declarations that individuals' lives must be protected from those who wield unequal power." ¹⁹²

The principle aim of human rights, therefore, is to challenge and change existing institutions, rules, practices, and dominant values. If arbitrators used a human rights standard rather than a management rights standard to decide cases involving refusal to work for reasons of health and safety, several important changes would result.

A necessary and fundamental change would be to make worker health and safety truly an exception to the obey now, grieve later rule in the literal sense that the rule would not apply at all to refusals to work for reasons of health and safety. It has become an arbitral mantra that health and safety are exceptions to the rule. In practice, however, arbitrators treat safety and health as affirmative defenses to insubordination charges in the context of disobedience to the rule. The management rights value judgment underlying that insubordination mode of decision-making is contrary to the human rights value affirming the sacredness of human life as more important to promote and protect than property rights or other interests such as profits, efficiency, cost-benefit analysis, management authority and economic progress.

[*39] At the workplace, therefore, when the basic human right to physical security collides with management rights, the resolution of that conflict of rights must occur outside of the context of the insubordination-oriented work-first, grieve-later rule. If arbitrators (or other decision-makers) resolve that conflict of rights in a human rights context, other fundamental changes must be made in the arbitral

approach to these cases. One of the most important would be to place on employers, rather than on employees, the burden of proving that workplaces were in fact safe or that work assignments did not in fact endanger the health or safety of their employees.

One would not know it from reading most arbitration opinions but employers in the U.S. already have an obligation under the law to "furnish to each [employee] employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees." ¹⁹³ The right to health and safety is expansive and defined broadly in OSHA: "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." ¹⁹⁴

It is revealing that, given the traditional arbitral justifications for management rights, including property rights, these same arbitrators find no duty on those exercising those property rights to prove that their workplaces are safe. Placing the burden on employees to prove a workplace unsafe or, more precisely, that a workplace is abnormally hazardous, presumes that employers' workplaces are as safe as can be expected, given the nature of the work. That reasoning releases employers from any obligation to eliminate long-standing safety or health-threatening problems and expresses an acceptance or toleration of those hazards to worker health and safety. (In other words, the standard of safety applied is whether the job is as safe, or unsafe, as it usually is). As Emily Spieler has pointed out "the toleration of higher levels of workplace risk permits a continuation of abusive conditions." ¹⁹⁵ This presumption of safe workplaces also means that workers who refuse to work, alleging reasons of health and safety "will be viewed as unreasonable, unless they can prove otherwise." ¹⁹⁶ The arbitral requirement that employees prove that [*40] threats to their health and safety are abnormal, imminent and serious, moreover, requires workers to delay refusing to work until they risk serious injury or even death. ¹⁹⁷

Placing the burden of proof on employers in these cases would shift the focus from employee behavior to employer responsibility. Adoption of the human rights value judgment would mean that decision-makers would perceive these refusal to work cases in their essence as employee safety and health matters, not as matters of insubordination and management rights. The burden of proof would be on the employers, who not only have a legal obligation to provide a workplace free from recognized hazards, but also have possession of and control over the property, machines, and processes that constitute the workplace. Requiring employers to meet the highest standard of proof (namely, that their workplaces are, in fact, safe and their work assignments, in fact, did not endanger worker health or safety) would confirm the sacredness and dignity of human life and its paramount importance - even at the workplace.

Workers have a human rights claim on their employers to do the best they can with available risk reduction technologies and methods to protect human life and limb at the workplace. Employers subject to a human rights standard would be required to install risk reduction technologies even though the cost of such technologies might exceed the benefits according to a purely economic analysis. This approach incorporates the moral and ethical superiority of preventing workplace death, injury, and illness, rather than requiring workers to prove they faced imminent serious and abnormal risks to their health and safety before their refusals to risk their physical security will be considered justified.

Obviously, it would be unrealistic to require employers to provide an absolutely risk-free workplace.

Workers do have a human right, however, "to work in an environment that is free of predictable, preventable and serious hazards." ¹⁹⁸ That human right at its most basic requires employers not to "create [] dangerous conditions, knowing that workers are likely to be seriously injured [when] the employer does so without regard for the serious and life threatening risks to workers." ¹⁹⁹ It is no accident when injuries or death result [*41] from this deliberate disrespect for human life. ²⁰⁰ (It is murder but that is a subject for another paper).

A human rights standard would also hold employers responsible for allowing dangerous conditions to exist (even if an employer did not intend to create those dangers) when those employers are aware of those dangers but choose not to eliminate or minimize them. Employers would not be held responsible where workplace hazards are unknown or unpreventable due to the current state of technology and information. Employers would be responsible, however, for providing employees (and potential employees) with complete and up-to-date information concerning any known workplace and job risks to health and safety.

If an employer successfully carried its burden of proof, then the worker or workers involved would be required to demonstrate a good faith belief that the workplace or work assignment was a threat to safety or health. If the employee successfully carries that burden, the grievance would be sustained. If not, the insubordination question could then be considered. This approach would give maximum respect to the human right to physical security. It would also prevent workers from being confronted with the unfair dilemma - to work and risk their health or safety or refuse to work and risk their jobs. Another way to avoid this dilemma would be to have employers propose discipline for workers who refuse a work assignment for reasons of health and safety but to permit those workers to remain on the job, performing other work until the issue of the proposed discipline is resolved in arbitration or otherwise.

The use of a human rights standard for judgment would also require fundamental changes in the current superior-subordinate conception of labor-management relations at the workplace. Whereas it would be preferable to have people's human rights respected and enforced at the workplace by all involved, workers have those human rights "whether the law is violated or not, whether the bargain is kept or not, [and] whether others comply with the demands of morality or not." ²⁰¹ Consequently, if those rights are not respected and enforced otherwise, enforcement through self-help is necessary and justified.

One of the most important rights that workers have for self-protection is the right to refuse work that they believe in good faith threatens their safety and health. Contrary to the current arbitral [*42] condemnation of worker self-help actions, exercise of the right to refuse hazardous work without retaliation is essential if employees are going to take control of their own lives where they work, particularly in regard to their basic human right to physical security. Without the exercise of the right to refuse unsafe work with impunity, workers' lives matter less than management authority, efficiency, productivity, or profit margins.

Under OSHA regulations, upheld by the Supreme Court in 1980, ²⁰² an employee has the right to refuse work assignments that pose a serious risk of death or injury. That is the "most narrowly defined and limited right, 'so strict a standard that it is rarely met by the employee.'" ²⁰³ The decision to limit so narrowly this right to refuse work reveals a greater concern with the maintenance of employer control

and authority at the workplace and a fear and distrust of workers' motives.

Spieler considers the right to be free from retaliation for refusal to perform dangerous work to be central to employees' right to achieve improved health and safety conditions at work. She also sees this right as a necessary component of the core human right to freedom of association (to organize and bargain collectively) "which presumes that workers should have the choice to 'stay and fight' rather than to quit." ²⁰⁴ A concerted refusal to work due to unsafe working conditions is protected under Section 7 of the NLRA. ²⁰⁵

In contrast to Section 7's protection of concerted activity in pursuit of a safe workplace, arbitrators have viewed concerted activity as an even more dangerous threat to management authority than refusals to work by individuals. Concerted refusals add an element of [*43] "collusion" to challenges to employer authority and interruptions of production. Lawful concerted activity includes a variety of actions, including but not limited to cessations of work whereby workers could protest unsafe or unhealthy working conditions. On what justifiable basis may workers be disciplined (including discharged from their jobs) for engaging in protest activity that is lawful? That punishes workers for protesting conditions that endanger their lives and health - that is, protesting against violations of their human right to physical security. The exercise at the workplace of the human right of freedom of association enables people to obtain sufficient power - power they would not have as isolated individuals - to make the claims of their human rights both known and effective so that respect for their rights is not dependent solely on the interests of their employers or others.

Despite arbitral abhorrence of employee self-help, many are convinced that "restrictions on the employee's ability to refuse hazardous work without fears of retaliation also contributes to the persistence of unsafe or unhealthy conditions" ²⁰⁶ and that without immunity from employer retaliation for engaging in self-help, "employees who value their jobs will 'keep their mouths shut and do what they are told.'" ²⁰⁷

All of this - applying a human rights standard rather than a management rights standard to refusal to work for reasons of health and safety cases; making these cases health and safety cases rather than insubordination cases; shifting to employers the burden of proof on the key safety or health issues and making that burden a heavy one; lightening the workers' burden to a good faith belief; and protecting workers' right to refuse hazardous work without employer retaliation - is antithetical to the authoritarian vision of the U.S. employment relationship and the values underlying it. It is also antithetical to the rules and values that arbitrators with the traditional view of the sources of worker and employer rights bring to these cases. Yet, only arbitral adoption of the value judgment that nothing is more important at the workplace than human life and health will satisfy the human rights standard.

[*44]

VI. Concluding Observations

In what has been recognized by the National Academy of Arbitrators (NAA) as one of the "classic" papers written about U.S. labor arbitration, David Feller called the "period of the Shulman view" the

"Golden Era of Arbitration." ²⁰⁸ In this Golden Age, collective bargaining agreements were the exclusive source of worker rights; rights of employees and employers were "governed by an autonomous, self-contained system of private law"; collective bargaining agreements were "statutes" setting forth the Parties' rules and standards; and labor arbitration existed to serve the interests of the parties by enforcing those rules and standards. The Golden Age of Arbitration, therefore, was the era of self-governance. ²⁰⁹

Feller traced the beginning of the Golden Age to a time "during or immediately after World War II" and the "beginning of its end" to the 1960s and the advent of federal statutes regulating various aspects of the terms and conditions of employment. ²¹⁰ Feller believed he was the first to use the phrase "external law" to distinguish "public law" from "the laws of the collective bargaining agreement as interpreted and applied by arbitrators." ²¹¹ In his view, "to the extent that collective bargaining agreements become less and less the exclusive source of the law governing the terms and conditions of employment, the role of traditional grievance arbitration was diminished." ²¹²

Revisiting that classic article at the 1994 meeting of the NAA, Feller pronounced "gone" arbitration as the "capstone of an autonomous system of industrial government," that traditional concept he had persuaded the Supreme Court to adopt in the Steelworkers Trilogy. ²¹³ Two years earlier, in his Presidential Address to the Academy, Anthony Sinicropi declared "lost" the "battle to protect labor arbitration and labor arbitrators from the mine field of public law." ²¹⁴ He assured those present that the core of their practice [*45] remained the interpretation of collective bargaining contracts, but allowed that "the traditional model of labor arbitration no longer provides a complete explanation of the process." ²¹⁵ Theodore St. Antoine in his NAA Presidential Address sympathized with those who lamented the passing of the "self-made world of labor relations, for the most part untouched by public law and regulation" but told them bluntly, "that day is gone." ²¹⁶

These laments to battles lost and golden eras gone by mourned the intrusion of external law into the traditional labor arbitration process because those laws were sources of workers' rights outside collective bargaining agreements, and that fact struck at the core of traditional U.S. labor arbitration. The decisions of labor arbitrators in cases concerning refusal to work for reasons of health and safety and the value judgments underlying those decisions, however, show no evidence of changes in the traditional conception of worker and employer rights. Lamentations for the passing of the traditional labor arbitration process are premature.

U.S. labor arbitration is historically rooted in pluralist values of inherent management rights, hierarchical systems of workplace control, rules such as obey now, grieve later, and of common law employment doctrines of property rights, contract and free enterprise. The U.S. Supreme Court, moreover, in the Steelworkers Trilogy ²¹⁷ established in law the principles of the pluralist theory. It will require a momentous change in these values and conceptions to have human rights principles become sources of worker and employer rights in U.S. labor arbitration. Yet, only arbitral adoption of the value judgment that nothing is more important at the workplace than human life will satisfy the human rights standard.

The quick answer, given U.S. labor history in general and the history of U.S. labor arbitration in

particular, is that it will never happen, and it is futile to try to make it happen. There are many good reasons to be pessimistic, but the ability of challengers to redefine a policy issue by presenting new perspectives on old issues and by [*46] questioning the values on which the prior resolution of those issues was based can help initiate change. This article attempts to do that.

Ultimately, arbitrators will determine whether change occurs because their decision-making function requires them to choose from among alternative and often conflicting principles and to create and appropriate standards for making those choices. Arbitrators, however, are unlikely initiators of change, particularly since the sine qua non for being an arbitrator is acceptability to the employers and unions that choose arbitrators. ²¹⁸ This institutional connection and the need to retain acceptability "exerts a gravitational pull toward the exercise of judgment which is appropriate and conventional." ²¹⁹ Put another way, "those arbitrators who are too far out of line in their images will find that the marketplace will take care of them in due course." ²²⁰

Acceptability also means expendability. Distinguished arbitrators over the years have been concerned that expendability would "restrain some arbitrators from giving expression to their deep convictions," ²²¹ or at least might prevent them from setting forth all the reasons for a decision as a "legitimate self-protection device." ²²² It generates a conservatism that discourages innovation or ground-breaking thought. Arbitrators, consequently, are not trail blazers. ²²³ As then Solicitor General of the U.S. Archibald Cox put it to the NAA in 1964, "is not arbitration likely to be more satisfying when you are following an established pattern than when you are breaking new ground?" ²²⁴

[*47] Arbitrators have not acknowledged candidly or investigated thoroughly the ramifications of the fact that their acceptability or expendability is determined by the same parties whose disputes they decide. ²²⁵ Change, therefore, most likely must be initiated elsewhere. Change from within the process is still a possibility. At the same time that arbitrators are sensitive to the intentions and desires of employers and unions, advocates for labor and management have full knowledge of the approaches and arguments that have been successful or unsuccessful with arbitrators. Justice Holmes advised lawyers that they would "need to know how judges behave." ²²⁶ If arbitrators are giving the parties what they want while the parties are trying to get what they want by conforming to the traditional practices and values of arbitrators, then the circle of unbroken conformity is complete.

Union advocates are the most likely to break out of this circle. Although unions in the United States have a long history of commitment to the protection and advancement of workers' rights, it is only recently that many union leaders and members have come to understand workers' rights as human rights. As unions come to perceive themselves as human rights organizations promoting and protecting such fundamental human rights as the right to freedom of association and collective bargaining, safe and healthful workplaces, and discrimination-free treatment, there will be a necessary carry-over to the grievance-arbitration process.

Raising human rights issues in the arbitration process will likely produce a response from the employer side, thereby ensuring that the issue will be on the record of the case. That is an important first step given the reluctance of arbitrators to consider any matter not raised by the parties at the hearing of a case. It will enable arbitrators to include human rights issues in their decision-making without going

beyond the confines of the record established by the parties.

[*48] Unions can also pursue human rights clauses in contract negotiations with employers. Human rights clauses in collective bargaining agreements could become as common as management rights clauses. Since traditional labor arbitrators limit workers' rights to those set forth in collective bargaining agreements, they will have to consider workers' human rights if those rights are written into contracts. ²²⁷

Contract language, for example, could constrain arbitrators in ways that enable workers to exercise their right to refuse hazardous assignments. Such language could define the circumstances in which refusal is justified, thereby setting forth explicit exceptions to which the work first, grieve later rule would not apply. Contracts could establish a "good faith" belief standard for workers to meet, rather than objective proof or reasonable doubt, and clearly place on employers the burden of providing a workplace free from recognized hazards as well as the burden of proving that its property, machines, and processes are safe. Contracts could also guarantee that workers not be required to perform work they believe in good faith would threaten their life or health, and that workers in those situations could be reassigned (without loss of pay, benefits or seniority) to another job and would be returned to their original job following abatement of the hazard.

In a recent case involving a refusal to work for reasons of health and safety, for example, an arbitrator reinstated a worker with full back pay and benefits because the employer's "vital interest" in uninterrupted production was outweighed by "a specific employee right" arising under the Basic Agreement stating that "No employee shall be required to lift more weight than he or she is physically capable of lifting." ²²⁸

In another case where the applicable contractual language required only that "an employee shall believe that there exists an unsafe condition," the arbitrator held that this was a subjective not an objective standard of proof and did not require the employee to be [*49] correct about the existence of the unsafe condition. ²²⁹ Given contractual language stating that a worker's "refusal to work on defective windows, or inadequate window cleaning equipment shall not be sufficient cause for discharging of employee," another arbitrator ruled that the union had no burden to prove that the equipment involved was unsafe but only that the employee was acting in good faith. As long as the worker acted in good faith, the arbitrator concluded, "it does not matter that the worker [was] wrong in his judgment about the adequacy of [the] equipment." ²³⁰

There is also much that can be done from outside the labor arbitration process to bring about change, particularly to introduce the human rights standard into arbitral decision-making. Sustained investigation of the common law of labor arbitration and its underlying values is essential. Every hard and fast rule must be suspect. The reluctance to investigate and discuss these rules may be because most of those who write about labor arbitration are labor arbitrators who might be reluctant to jeopardize their institutional connections. Whatever the reasons, this reluctance has led to the acceptance and repeated application of rules without questioning, or knowing, or caring about a rule's origin, about what the rule assumes about the "oughtness" of the power and rights relationship of employer and worker, or about whether a rule needs to be reexamined, reevaluated, modified or rejected. This has serious consequences for workers' rights because those unexamined rules and their underlying values

are at the foundation of the grievance-arbitration system of dispute resolution.

This article reassessed U.S. labor arbitration rules and values using human rights principles as standards of judgment. The amount of research that remains to be done in this area is enormous. Many subject areas that involve sources of rights come readily to mind such as: privacy at the workplace (including drug testing and surveillance); employee loyalty (or disloyalty); subcontracting ("outsourcing"); personal appearance; off-duty conduct; sexual harassment; gender, racial, religious and age discrimination; alcohol and drug-related matters; strike and picket line conduct; just cause; just cause and wrongful dismissal in non-union employment situations (the ultimate [*50] in reserved management rights); differences in the arbitration of private and public sector employment disputes; and the arbitration of statutory issues in non-union settings. The addition of an international comparative analysis would add another vital dimension to this research.

Almost forty years ago, an attorney addressing the NAA doubted that any member of the Academy "would approve the firing of a Negro employee in the deep South for drinking at a racially segregated water foundation ... regardless of the strength of the employer's defense grounded on an asserted need to maintain order and discipline." He took the position that "plant norms" and "business needs" must yield to "more compelling considerations." ²³¹

At a later meeting of the NAA, those "more compelling considerations" were defined as constitutional and civil rights that affected the "basic human quality" of a person. These employment discrimination cases involved fundamental rights that, some argued, were in such a different category that arbitrators needed to be "responsible to someone other than the parties." ²³²

There are still orders of rights in society, and there is still an unmet need for workplace justice. The right not to be discriminated against is a fundamental human right, as is the right to physical security. These and other basic human rights are the "more compelling considerations" to which other rights and interest must yield.

Several years ago, Lewis Maltby told the NAA that "the tragic shortcoming of American constitutional law is its failure to protect human rights in the workplace." ²³³ This article has demonstrated that U.S. labor arbitrators do not understand workers' rights to physical security as a basic human right. There can be no true workplace justice, however, without recognizing and respecting those rights of human beings that are more compelling than any other rights or interests at the workplace. That will occur only when U.S. labor [*51] arbitrators come to utilize human rights standards in their decision-making. Only then can there be a Golden Age of Arbitration.


Legal Topics:


For related research and practice materials, see the following legal topics:


Civil Procedure
Alternative Dispute Resolution
Arbitrations
General Overview
Contracts Law
Contract Interpretation
General Overview
Copyright Law
Ownership Interests
Works Made for Hire


FOOTNOTES:


n1. See, e.g., Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (2000).

n2. James A. **Gross**, Value Judgments in Arbitration: Their Impact on the Parties' Arguments and on the Arbitrators' Decisions, in *Arbitration 1997 the Next Fifty Years*, Proceedings of the Fiftieth Annual Meeting, National Academy of Arbitrators [hereinafter *Arbitration 1997*] 212, 218-19 (Joyce M. Najita ed, 1998).


n3. In the preparation of this paper, heavy reliance was placed on the annual proceedings of the National Academy of Arbitrators (NAA) because they are a major source of writing and thinking about labor arbitration by arbitrators, advocates, and scholars with preeminent stature in the profession. As one observer put it, "Perhaps the Academy's most enduring role has been to help create consensus among arbitrators with respect to fundamental principles." Tim Bornstein & Ann R. Gosline, *Half a Century of Arbitral Decisionmaking: Roots, Branches, Leaves, and Flowers*, in *Arbitration 1997*, supra note 2, at 193, 197. These NAA volumes, moreover, are widely used by practitioners of labor arbitration.


n4. For a comprehensive review of pre-WWII labor arbitration in the United States, see Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. Fla. L. Rev. 373 (1983); William P. Murphy, *The Presidential Address: The Academy at Forty*, in *Arbitration 1987 The Academy at Forty*, Proceedings of the Fortieth Annual Meeting, National Academy of Arbitrators [hereinafter *Arbitration 1987*] 1 (Gladys W. Gruenberg ed., 1988).


n5. The names of those arbitrators identified as most influential are listed in George Nicolau, *Presidential Address: The Challenge and the Prize*, in *Arbitration 1997*, supra note 2, at 1, 3; see also James B. Atleson, *Labor and the Wartime State* 57 (1998).


n6. Calvin William Sharpe, *Introduction*, 39 Case W. Res. L. Rev. 505, 511 n.20 (1989).


n7. National War Labor Board, *The Termination Report of the National War Labor Board: Industrial Disputes and Wage Stabilization in Wartime: January 12, 1942-December 31, 1945* (1947-48).

n8. Jack G. Day, Prologue, 39 Case W. Res. L. Rev. 515, 516 (1989).


n9. Id. at 515-16.

n10. Christopher L. Tomlins, The State and the Unions: Labor Relations Law, and the Organized Labor Movement in America, 1880-1960, at 80 (1985).


n11. Id.

n12. Atleson, *supra* note 5, at 71-72.

n13. Katherine Van Wezel Stone, The Post-War Paradigm in American Labor Law, 90 Yale L.J. 1509, 1558 (1981).

n14. James **Gross**, Substantive Due Process: The Standards for Judgment Must also Be Fair, in Arbitration 2002 Workplace Arbitration: A Process in evolution, Proceedings of the Fifty-Fifth Annual Meeting, National Academy of Arbitrators [hereinafter Arbitration 2002] 58 (Charles J. Coleman ed., 2003); Atleson, *supra* note 5, at 71-72.

n15. Atleson, *supra* note 5, at 91.

n16. For a fuller treatment of this U.S. employment history, see James A. **Gross**, The Common Law Employment Contract and Collective Bargaining: Values and Views of Rights and Justice, 23 New Zealand J. Indus. Rel. 63 (1998).

n17. Laura J. Cooper, Harry Shulman: Deciding Women's Grievances In Wartime, in Arbitration 1994 Controversy and Continuity, Proceedings of the Forty-Seventh Annual Meeting, National

Academy of Arbitrator, [hereinafter Arbitration 1994] 153, 155 (Gladys W. Gruenberg ed., 1995).

n18. Archibald Cox, Procedures and Creativity, in Labor Arbitration - Perspectives and Problems, Proceedings of the Seventeenth Annual Meeting, National Academy of Arbitrators [hereinafter Labor Arbitration - Perspectives and Problems] 252, 259 (Mark L. Kahn ed., 1964).

n19. Harry Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999 (1955).

n20. Id. at 1016.

n21. Edwin E. Witte, The Future of Labor Arbitration - A Challenge, in The Profession of Labor Arbitration: Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators 1948-1951 [hereinafter The Profession of Labor Arbitration] 1, 14 (Jean T. McKelvey ed., 1957).

n22. Richard Bloch, The Changing Face of Just Cause: One Standard or Many?, in Arbitration 2000 Workplace Justice and Efficiency in the Twenty-First Century, Proceedings of the Fifty-Third Annual Meeting, National Academy of Arbitrators [hereinafter Arbitration 2000] 20, 22 (Steven Briggs & Jay E. Grenig eds., 2001).

n23. W. Willard Wirtz, Due Process of Arbitration, in The Arbitrator and the Parties, Proceedings of the Eleventh Annual Meeting, National Academy of Arbitrators [hereinafter The Arbitrator and the Parties] 1, 4 (Jean T. McKelvey ed., 1958).

n24. W. Willard Wirtz, Arbitration is a Verb, in Arbitration and the Public Interest, Proceedings of the Twenty-Fourth Annual Meeting, National Academy of Arbitrators [hereinafter Arbitration and the Public Interest] 30, 34 (Gerald G. Somers & Barbara D. Dennis eds., 1971).

n25. Thomas G.S. Christensen, The Disguised Review of the Merits of Arbitration Awards, in Labor Arbitration at the Quarter Century Mark, Proceedings of the Twenty-Fifth Annual Meeting, National Academy of Arbitrators [hereinafter Labor Arbitration at the Quarter Century Mark] 99, 112 (Barbara

D. Dennis & Gerald G. Somers eds., 1973).

n26. Richard Mittenthal, Whither Arbitration?, in *Arbitration 1991 The Changing Face of Arbitration in Theory and Practice*, Proceedings of the Forty-Fourth Annual Meeting, National Academy of Arbitrators [hereinafter *Arbitration 1991*] 35, 43 (Gladys W. Gruenberg ed., 1992).

n27. Richard Mittenthal & Richard I. Bloch, *Arbitral Implications: Hearing the Sounds of Silence*, in *Arbitration 1989 The Arbitrator's Discretion During and After the Hearing*, Proceedings of the Forty-Second Annual Meeting, National Academy of Arbitrators [hereinafter *Arbitration 1989*] 65, 67 (Gladys W. Gruenberg ed., 1990) (emphasis in original).

n28. Stephen C. Vladeck, Comment, in *Labor Arbitration at the Quarter Century Mark*, *supra* note 25, at 81, 82.


n29. Charles C. Killingsworth, *The Presidential Address: Management Rights Revisited*, in *Arbitration and Social Change*, Proceedings of the Twenty-Second Annual Meeting, National Academy of Arbitrators [hereinafter *Arbitration and Social Change*] 1, 19 (Gerald G. Somers ed., 1970).


n30. John E. Dunsford, Comment, in *Arbitration - 1976*, Proceedings of the Twenty-Ninth Annual Meeting, National Academy of Arbitrators [hereinafter *Arbitration - 1976*] 71, 85 (Barbara D. Dennis & Gerald G. Somers eds., 1976).

n31. Frank Elkouri & Edna Elkouri, *How Arbitration Works* 631-834 (Alan Miles Ruben ed., 6th ed. 2003).

n32. Mittenthal & Bloch, *supra* note 27, at 69.


n33. *Id.* at 69-70. The authors acknowledge that "'reserved rights' guarantees a large measure of managerial flexibility by placing the burden on the union to point to some contract obligation, express or implied, that prohibits a particular management action." *Id.* at 70.

n34. Barry A. Macey, A Union Viewpoint, in *Arbitration* 1989, *supra* note 27, at 82, 84.

n35. *Id.*

n36. *Id.* at 91.

n37. Susan B. Tabler, A Management Viewpoint, in *Arbitration* 1989, *supra* note 27, at 92, 92.


n38. Quoted in Harold A. Katz, Discussion, in *Labor Arbitration and Industrial Change*, Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators [hereinafter *Labor Arbitration and Industrial Change*] 223, 223 (Mark L. Kahn ed., 1963).


n39. Reproduced in Archibald Cox, *Cases on Labor Law* 583-91 (4th ed. 1958).


n40. *Id.* at 584.


n41. *Id.* at 585

n42. *Id.* at 585.

n43. *Id.*

n44. Archibald Cox, Reflections upon Labor Arbitration in the Light of the Lincoln Mills Case, in *Arbitration and the Law*, Proceedings of the Twelfth Annual Meeting, National Academy of Arbitrators [hereinafter *Arbitration and the Law*] 24, 44 (Jean T. McKelvey ed., 1959).


n45. Arthur J. Goldberg, Management's Reserved Rights: A Labor View, in Management Rights and the Arbitration Process, Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators, 118, 118-19 (Jean T. McKelvey ed., 1956).

n46. Id. at 119, 125.

n47. Id. at 122.


n48. Id. at 123.

n49. Id. at 120-21, 123-24.


n50. Id. at 121-22.

n51. Stone, *supra* note 13, at 1554.

n52. Goldberg, *supra* note 45, at 123.

n53. Wirtz, *supra* note 23, at 3.


n54. Id. at 36.


n55. Id. at 5.


n56. Id. at 35.

n57. Id. at 35.


n58. Wirtz, *supra* note 24, at 40.


n59. Id.


n60. 29 U.S.C. 206 (d)(1) (2000).


n61. 42 U.S.C. 2000(e) to 2000(e)-17 (2000).


n62. 29 U.S.C. 623 (2000).

n63. 29 U.S.C. 651-78 (2000).

n64. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

n65. Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators [hereinafter *The Arbitrator, the NLRB, and the Courts*] 1, 6 (Dallas L. Jones ed., 1967).


n66. Ben Rathbun, *Will Success Ruin the Arbitrators?*, in *Arbitration - 1975*, Proceedings of the Twenty-Eighth Annual Meeting, National Academy of Arbitrators [hereinafter *Arbitration - 1975*] 155, 168 (Barbara D. Dennis & Gerald G. Somers eds., 1976); see also *Brown v. Board of Education*, 347 U.S. 483 (1954); Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944); Shulman, *supra* note 18.

n67. Warrior & Gulf Navigation Co., 363 U.S. at 580-81.

n68. Id. at 581.


n69. Enterprise Wheel & Car Corp., 363 U.S. at 597.

n70. Warrior & Gulf Navigation Co., 363 U.S. at 578.


n71. Id.


n72. Id. at 581.

n73. Enterprise Wheel & Car Corp., 363 U.S. at 599.

n74. American Manufacturing Co., 363 U.S. at 568.

n75. Meltzer, *supra* note 65, at 11.

n76. James A. **Gross**, The Labor Arbitrator's Role: Tradition and Change, 25 Arb. J. 221, 233 (1970).

n77. Edgar A. Jones, Jr., The Role of Arbitration in State and National Labor Policy, in *Arbitration and the Public Interest*, *supra* note 24, at 42, 52.

n78. **Gross**, *supra* note 76, at 224.

¶n79. Robert G. Howlett, *The Role of Law in Arbitration: A Reprise*, in *Developments in American and Foreign Arbitration*, Proceedings of the Twenty-First Annual Meeting, National Academy of Arbitrators [hereinafter *Developments in American and Foreign Arbitration*] 64, 68 (Charles M. Rehmus ed., 1968).

¶n80. Katz, *supra* note 38, at 229-30.

¶n81. Matthew O. Tobriner, *An Appellate Judge's View of the Labor Arbitration Process: Due Process and the Arbitration Process*, in *The Arbitrator, the NLRB, and the Courts*, *supra* note 65, at 37, 46.

¶n82. Jean T. McKelvey, *The Presidential Address: Sex and the Single Arbitrator*, in *Arbitration and the Public Interest*, *supra* note 24, at 1, 18.

¶n83. *Id.* at 28.


¶n84. *Id.* at 29.

¶n85. Wirtz, *supra* note 24, at 41.


¶n86. Julius G. Getman, *What Price Employment? Arbitration, the Constitution, and Personal Freedom*, in *Arbitration - 1976*, *supra* note 30, at 61, 65 (emphasis in original).


¶n87. John E. Dunsford, *Comment*, in *Arbitration - 1976*, *supra* note 30, at 71, 80-81. As Dunsford put it, "the employment relationship cannot readily or realistically be equated with the relationship between government and its citizens." *Id.* at 84.


¶n88. James E. Jones, Jr., *Comment*, in *Arbitration - 1976*, *supra* note 30, at 85, 87.

n89. David E. Feller, Comment, in *Arbitration and the Public Interest*, supra note 24, at 78, 80-81.


n90. David E. Feller, The Coming End of Arbitration's Golden Age, in *Arbitration - 1976*, supra note 30, at 97, 107.

n91. Clyde Summers, The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation, in *Arbitration - 1974, Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators* [hereinafter *Arbitration - 1974*] 49, 51 (Barbara D. Dennis & Gerald G. Somers eds., 1975).


n92. Oliver Wendell Holmes, *The Common Law* 5 (Mark DeWolfe Howe ed., 1963).


n93. Jerome Frank, *Law and the Modern Mind* 104 (1970).


n94. Benjamin Cardozo, *The Nature of the Judicial Process* 167 (1921).

n95. *Id.* at 12-13.


n96. *Id.* at 171.

n97. James B. Atleson, *Arbitration: The Presence of Values in a Rational Decisionmaking System*, in *Arbitration 1997*, supra note 2, at 225, 226.


n98. James C. Hill, Discussion, in *The Arbitrator and the Parties*, supra note 23, at 100, 103. Hill allowed that "there is a 'common law' within a given bargaining relationship." *Id.*

n99. Mittenthal, *supra* note 26, at 41.

n100. Ralph T. Seward, *Arbitration in the World Today*, in *The Profession of Labor Arbitration*, *supra* note 21, at 66, 66.


n101. *Id.* at 72-73 (emphasis in original).


n102. *Id.* at 73 (emphasis in original).


n103. David E. Feller, *Remedies in Arbitration: Old Problems Revisited*, in *Arbitration Issues for the 1980s*, *Proceedings of the Thirty-Fourth Annual Meeting, National Academy of Arbitrators* [hereinafter *Arbitration Issues for the 1980s*] 109, 114 (James L. Stern & Barbara D. Dennis eds., 1982).

n104. *Id.* at 132.

n105. Mittenthal & Bloch, *supra* note 27, at 98.

n106. Edgar A. Jones, Jr., *The Decisional Thinking of Judges and Arbitrators as Triers of Fact*, in *Decisional Thinking of Arbitrators and Judges*, *Proceedings of the Thirty-Third Annual Meeting, National Academy of Arbitrators* [hereinafter *Decisional thinking of Arbitrators and Judges*] 45, 51 (James L. Stern & Barbara D. Dennis eds., 1981).


n107. Cox, *supra* note 44, at 51.


n108. Sylvester Garrett, *The Interpretive Process: Myths and Reality*, in *Arbitration 1985 Law and Practice*, *Proceedings of the Thirty-Eighth Annual Meeting, National Academy of Arbitrators* [hereinafter *Arbitration 1985*] 121, 145 (Walter J. Gershenfeld ed., 1986).


n109. **Gross**, supra note 2, at 219.

n110. James A. **Gross** & Patricia A. Greenfield, Arbitral Value Judgments in Health and Safety Disputes: Management Rights Over Workers' Rights, 34 Buff. L. Rev. 645, 645 (1985).


n111. Garrett, supra note 108, at 148.


n112. Gabriel Alexander, Reflections on Decision Making, in Collective Bargaining and the Arbitrator's Role, Proceedings of the Fifteenth Annual Meeting, National Academy of Arbitrators [hereinafter Collective Bargaining and the Arbitrator's Role] 1, 3 (Mark L. Kahn ed., 1962).


n113. Id. at 6.

n114. Robert Howlett, Comment, in Arbitration and the Expanding Role of Neutrals, Proceedings of the Twenty-Third Annual Meeting, National Academy of Arbitrators [hereinafter Arbitration and the Expanding Role of Neutrals] 175, 177 (Gerald G. Somers & Barbara D. Dennis eds., 1970).

n115. Atleson, supra note 97, at 227.

n116. John E. Dunsford, Arbitral Discretion: The Tests of Just Cause, in Arbitration 1989, supra note 27, at 23, 39.


n117. Cox, supra note 44, at 30.

n118. Arthur M. Ross, The Arbitration of Discharge Cases: What Happens After Reinstatement, in Critical Issues in Labor Arbitration, Proceedings of the Tenth Annual Meeting, National Academy of Arbitrators [hereinafter Critical Issues in Labor Arbitration] 21, 22 (Jean T. McKelvey ed., 1957).

n119. Wirtz, *supra* note 23, at 12.

n120. John E. Dunsford, *The Presidential Address: The Adversary System in Arbitration*, in *Arbitration* 1985, *supra* note 108, at 1, 18.


n121. Garrett, *supra* note 108, at 130.

n122. *Id.* at 133 (emphasis in original).


n123. Macey, *supra* note 34, at 90.

n124. Mittenthal & Bloch, *supra* note 27, at 70.

n125. Macey, *supra* note 34, at 91.


n126. James A. **Gross**, *Value Judgments in the Decisions of Labor Arbitrators*, 21 *Indus. & Lab. Rel. Rev.* 55 (1967).


n127. **Gross** & Greenfield, *supra* note 110.

n128. *Safeway Stores, Inc.*, 42 *Lab. Arb. Rep. (BNA)* 353, 358 (1964) (Ross, Arb).


n129. **Gross**, *supra* note 2, at 221.

n130. Atleson, *supra* note 97, at 226.

n131. James B. Atleson, *Obscenities in the Workplace: A Comment on Fair and Foul Expression and Status Relationships*, 34 *Buff. L. Rev.* 693, 716 (1985).

n132. *Id.* at 700, 711 (emphasis omitted).

n133. *Id.* at 714.


n134. Robert Rabin, *Some Comments on Obscenities, Health and Safety, and Workplace Values*, 34 *Buff. L. Rev.* 725, 727, 734 (1985).


n135. *Id.* at 730.

n136. Jack Donnelly, *Universal Human Rights in Theory and Practice* 12 (1989).


n137. *Id.* at 148.


n138. Michael J. Perry, *The Idea of Human Rights: Four Inquiries* 4-5 (1998).

n139. *Id.* Perry identifies the following as good for every human being: "affection, the cooperation of others, a place in the community, and help in trouble." *Id.* at 63. And the following are bad for every human being: murder, imprisonment, enslavement, starvation, torture, homelessness, racism, and friendlessness. *Id.* at 71. He points out that these beliefs about what is good and bad for every human being "are widely shared across cultures." *Id.*

n140. Donnelly, *supra* note 136, at 17.


n141. Jacques Maritain, *The Rights of Man and Natural Law* 2 (1943).

n142. David T. Ozar, *Rights: What They Are and Where They Came From*, in *Philosophical Issues in Human Rights: Theories and Applications* 9, 9-11 (Patricia Werhane et al. eds., 1986).


n143. *Id.*


n144. Maritain, *supra* note 141, at 4-7.


n145. Donnelly, *supra* note 136, at 17.

n146. G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. No. 2 at 71, U.N. Doc. A/810 (1948).

n147. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

n148. International Covenant on Economic, Social & Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

n149. Article 23.1 of the Universal Declaration of Human Rights, *supra* note 146, provides that "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Article 7(b) of the International Covenant on Economic, Social and Cultural Rights, *supra* note 148, provides that everyone has the right to "safe and healthy working conditions."

n150. Clyde Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. Pa. J. Lab. & Emp. L. 65, 78 (2000).

¶n151. **Gross & Greenfield**, supra note 110.

¶n152. These cases were divided into four major categories: refusal to work for reasons of health and safety; the formulation and implementation of safety rules; crew size determinations which raised safety issues; and disease and disability cases where safety was an important consideration. Id. at 646-47.

¶n153. Id. at 648 (citing Shulman's exceptions to his work first, grieve later rule: "when obedience to a management order would require commission of a criminal or otherwise unlawful act or create an 'unusual health hazard or other serious sacrifice'").

¶n154. Id. at 651-52 and cases cited therein.

¶n155. Robert E. Allen & Patricia Linenberger, The Employee's Right to Refuse Hazardous Work, 9 Employee Rel. L.J. 251, 268 (1983).

¶n156. **Gross & Greenfield**, supra note 110, at 652-53 and cases cited therein.

¶n157. Id.

¶n158. Id. at 654 and cases cited therein.

¶n159. Id. The two cases are: Public Serv. Co., 60 Lab. Arb. Rep. (BNA) 1017, 1026 (1973) (Willingham, Arb.) and Capital Bldg. Maintenance Servs., 100 Lab. Arb. Rep. (BNA) 887, 890 (1993) (Concepcion, Arb.).

¶n160. **Gross & Greenfield**, supra note 110, at 652-53 and cases cited therein.

✚n161. Columbus Coated Fabrics, 88-1 Lab. Arb. Awards (CCH) P 8150, at 3749 (1987) (Cohen, Arb.).

✚n162. Lancaster Electro Plating, 93 Lab. Arb. Rep. (BNA) 203, 206 (1989) (Bressler, Arb.); see also Clarksburg Casket Co., 113 Lab. Arb. Rep. (BNA) 449 (1999) (Hewitt, Arb.); CF Motor Trans., 103 Lab. Arb. Rep. (BNA) 303 (1994) (Johnson, Arb.); Terrence Cardinal Cooke Health Care Center, 93-1 Lab. Arb. Awards (CCH) P 3291 (1992) (Talmadge, Arb.); Northern Automatic Elec. Foundry, 90 Lab. Arb. Rep. (BNA) 620 (1987) (Poindexter, Arb.); Peabody Coal Co., 87 Lab. Arb. Rep. (BNA) 1002 (1986) (Volz, Arb.); Green Valley Produce Coop., 86-2 Lab. Arb. Awards (CCH) P 8474 (1986) (Concepcion, Arb.); Indianapolis Power & Light Co., 87 Lab. Arb. Rep. (BNA) 559 (1986) (Kates, Arb.).

✚n163. **Gross & Greenberg**, *supra* note 110, at 647.

✚n164. Beth Energy Mines, Inc., 87 Lab. Arb. Rep (BNA) 577, 581 (1986) (Hewitt, Arb.).

✚n165. A and C Trans. Trucking Co., 12 Lab. Arb. Info. Sys. (LRP) 1180, at XI-531 (1985) (Heekin, Arb.).

✚n166. Minn. Mining & Manuf. Co., 85 Lab. Arb. (BNA) 1179, 1180 (1985) (White, Arb.).

✚n167. Rapid Transit Dist., Lab. Arb. in Gov't (AAA), Nov. 15, 1998, P 4090, at 5 (Koven, Arb.).

✚n168. Stein, Inc., 114 Lab. Arb. Rep. (BNA) 1374, 1377 (2000) (Shanker, Arb.).

✚n169. Nat'l Rolling Mills, 370-1 Summ. of Lab. Arb. Awards (AAA), Jan. 15, 1990, at 1, 1 (Parker, Arb.).

✚n170. Boston Housing Author., Lab. Arb. in Gov't (AAA), May 15, 1998, P 4017 (Kennedy, Arb.).

✚n171. Matanuska Elec. Ass'n, 352-1 Summ. of Lab. Arb. Awards (AAA), July 15, 1988, at 1, 2 (McCaffree, Arb.).

✚n172. Lancaster Electro Plating, 93 Lab. Arb. Rep. (BNA) 203, 206 (1989) (Bressler, Arb.).

✚n173. Peabody Coal Co., 87 Lab. Arb. Rep. (BNA) 1002, 1007 (1986) (Volz, Arb.).

✚n174. Penn. Dep't of Pub. Welfare, 86 Lab. Arb. Rep. (BNA) 1032, 1036-37 (1986) (Spilker, Arb.).

✚n175. Indianapolis Power & Light Co., 87 Lab. Arb. Rep. (BNA) 559, 560, 562 (1986) (Kates, Arb.).

✚n176. See Terence Cardinal Cooke Health Care Center, 93-1 Lab. Arb. Awards (CCH) P 3291 (1992) (Talmadge, Arb.); Allied Health Care Prods., 94 Lab. Arb. Rep. (BNA) 178 (1990) (Cipolla, Arb.); Matanuska Elec. Ass'n, 352-1 Summ. of Lab. Arb. Awards (AAA), Jan. 15, 1988, at 1; Lucky Stores, 88-1 Lab. Arb. Awards (CCH) P 8292 (1988) (Wilmoth, Arb.); Peabody Coal Co., 87 Lab. Arb. Rep. (BNA) at 1002; Minn. Dep't of Corrections, 85 Lab. Arb. Rep. (BNA) 1185 (1985) (Gallagher, Arb.).

✚n177. Amoco Oil Co., 87 Lab. Arb. Rep. (BNA) 889, 893-94 (1986) (Schwartz, Arb.).

✚n178. Lancaster Electro Plating, 93 Lab. Arb. Rep. (BNA) 203, 206 (1989) (Bressler, Arb.).

✚n179. Id.

✚n180. Id. at 206-07.

✚n181. Knauf Fiber Glass, GmbH, 101 Lab. Arb. Rep. (BNA) 823, 827-28 (1993) (Ipavec, Arb.).

n182. Id. at 828.

n183. 29 U.S.C. 651-78 (2000).

n184. 445 U.S. 1, 12 (1980).

n185. Id. at 11-12 n.16 (1980) (quoting 116 Cong. Rec. 37, 625 (1970)).

n186. Charles Noble, *Liberalism at Work: The Rise and Fall of OSHA* 82 (1986) (quoting Occupational Safety and Health: Hearings on H.R. 14816 before the Select Subcomm. On Labor of the House Comm. On Educ. and Labor, 90th Cong. 17-18 (1968)).

n187. Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* ix (1980).

n188. Id.

n189. Id. at 18, 30.

n190. Patricia H. Werhane, *Persons, Rights, Corporations* 127-28 (1985) (quoting Thomas J. Peters & Robert H. Waterman, Jr., *In Search of Excellence* 235-36 (1982):

Are these men and women

Workers of the world?

or is it an overgrown nursery

with children - goosing, slapping, boys

giggling, snotty girls?

What is it about that entrance way,

those gates to the plant? Is it the

guards, the showing of your badge - the smell?

is there some invisible eye

that pierces you through and

transforms your being? Some aura

of ether, that brain and spirit washes you

and commands, "For eight hours

you shall be different."

What is it that instantaneously makes

a child out of a man?

Moments before he was a father, a husband,

an owner of property,

a voter, a lover, an adult.

When he spoke at least some listened.

Salesmen courted his favor.

Insurance men appealed to his family responsibility

and by chance the church sought his help


But that was before he shuffled past the guard,


climbed the steps,

hung up his coat and


took his place along the line).


n191. Emily A. Spieler, Risks and Rights, in *Workers' Rights as Human Rights* 78, 86-89 (James A. Gross, ed., 2003).


n192. *Id.* at 94.


n193. 29 U. S. C. 654 (a)(1) (2000).


n194. 29 U. S. C. 651(b).


n195. Spieler, *supra* note 191, at 115.


n196. Mark Harcourt & Sondra Harcourt, When Can an Employee Refuse Unsafe Work and Expect to be Protected from Discipline? Evidence from Canada, 53 *Indus. & Lab. Rel. Rev.* 684, 689, 701 (2000) (analyzing Canadian arbitration policies).


n197. *Id.*

n198. Spieler, *supra* note 191, at 99-105.

n199. *Id.* at 101; see *id.* at 101-02.

n200. *Id.* at 102-03.

n201. Donnelly, *supra* note 136, at 12.

n202. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980) (upholding OSHA regulations); see also

Thomas O. McGarity & Sidney A. Shapiro, *Workers At Risk: The Failed Promise of the Occupational Safety and Health Administration* 334-35 (1993).

n203. James A. **Gross**, *The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 *Chi-Kent L. Rev.* 351, 382 (1998) (quoting Brett R. Gordon, Comment, *Employee Involvement in the Enforcement of the Occupational Safety and Health Laws of Canada and the United States*, 15 *Comp. Lab. L.J.* 527, 539 (1994)).

n204. Spieler, *supra* note 191, at 99.

n205. 29 U. S. C. 157 (2000). The Supreme Court interprets Section 7 as requiring that an employee need show only good faith in refusing to perform an allegedly unsafe task. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Such a refusal by unionized employees, however, may run afoul of a no-strike clause in a collective bargaining agreement. The Supreme Court's interpretation of section 502 of the NLRA requires a union to present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists." *Gateway Coal Co. v. UMW*, 414 U.S. 368, 387 (1974) (citation omitted); see **Gross & Greenfield**, *supra* note 110, at 679-81.

n206. Allen & Linenberger, *supra* note 155, at 274.


n207. McGarity & Shapiro, *supra* note 202, at 336.

n208. Feller, *supra* note 90, at 102; see also David E. Feller, *Revisiting Three Classics*, in *Arbitration* 1994, *supra* note 17, at 169, 169-83.


n209. Feller, *supra* note 90, at 100, 107, 125.


n210. *Id.* at 108.


n211. Feller, *supra* note 208, at 172.


n212. *Id.* at 175. Feller feared that "Labor arbitrators will become junior adjudicators who should, perhaps, be given a first crack at difficult problems, but whose decisions must always be subject to correction and review by the authorities properly charged with interpreting and applying the law." Feller, *supra* note 90, at 121.


n213. Feller, *supra* note 208, at 179.

n214. Anthony V. Sinicropi, Presidential Address: The Future of Labor Arbitration: Problems, Prospects, and Opportunities, in *Arbitration 1992 Improving Arbitral and Advocacy Skills*, Proceedings of the Forty-Fifth Annual Meeting, National Academy of Arbitrators [hereinafter *Arbitration 1992*] 1, 13 (Gladys W. Gruenberg ed., 1993).

n215. *Id.* at 14.

n216. Theodore J. St. Antoine, Presidential Address: Contract Reading Revisited, in *Arbitration 2000*, *supra* note 22, at 1, 18.

n217. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960).

n218. Jean T. McKelvey, The National Academy after Twelve Years: Discussion, in *Challenges to Arbitration*, Proceedings of the Thirteenth Annual Meeting, National Academy of Arbitrators [hereinafter *Challenges to Arbitration*] 31, 33 (Jean T. McKelvey ed., 1960).

n219. Dunsford, *supra* note 116, at 27.

✚n220. Discussion, in *Arbitration 1982*, Proceedings of the Thirty-Fifth Annual Meeting, National Academy of Arbitrators 62, 63 (James L. Stern & Barbara D. Dennis eds., 1983) (comments of Neil Bernstein).

✚n221. Jesse Freidin, *The Status and Expendability of the Labor Arbitrator*, in *The Profession of Labor Arbitration*, supra note 21, at 52, 52.

✚n222. Richard Mittenthal, Comment, in *Arbitration 1997*, supra note 2, at 231, 234. One arbitrator speculated: "Perhaps if arbitrators were thus to make themselves as naked as these observations imply [disclosure of underlying arbitral viewpoints], they would be driven out of the profession by the parties whose oxen were gored." John Perry Horlacher, *Employee Job Rights Versus Employer Job Control: The Arbitrator's Choice*, in *Collective Bargaining and the Arbitrator's Role*, supra note 104, at 165, 195.

✚n223. Mittenthal & Bloch, supra note 27, at 67.

✚n224. Cox, supra note 18, at 262.

✚n225. Russell A. Smith, *The Presidential Address*, in *Problems of Proof in Arbitration*, Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators [hereinafter *Problems of Proof in Arbitration*] 74, 81 (Dallas L. Jones ed., 1967); see also Meltzer, supra note 65, at 3. Former NAA President George Nicolau asserted that "an arbitrator must have complete fearlessness and not give a damn about the reception of a decision which he feels is right." George Nicolau, *Presidential Address: The Challenge and the Prize*, in *Arbitration 1997*, supra note 21, at 1, 4.; see also James Oldham, *Our Fifty-Year Past: Rummaging and Ruminating*, in *Arbitration 1997*, supra note 21, at 31, 38. As arbitrator Oldham put it: "It is possible to live honorably in the profession as a full-time arbitrator, without pandering to either side. But it takes conscientious effort, and a stance on high moral ground to do so." *Id.*

✚n226. Morton Gabriel White, *Social Thought in America* 208 (1957).

✚n227. See, for example, the United Steelworkers of America justice and dignity provisions in Dee W. Gilliam, *Innocent Until Proven Guilty: The Union View*, in *Arbitration Promise and Practice*, Proceedings of the Thirty-Sixth Annual Meeting, National Academy of Arbitrators [hereinafter

Arbitration Promise and Practice] 77, 77-84 (James L. Stern & Barbara D. Dennis eds., 1984).

✚n228. A and C Trans. Trucking Co., 12 Lab. Arb. Info. Sys. (LRP) 1180, at XI-531 (1985) (Heekin, Arb.).

✚n229. USS-Minnesota Ore Works, 98 Lab. Arb. Rep. (BNA) 72, 76-77 (1991) (Neumeier, Arb.).

✚n230. Capital Bldg. Maint. Servs., 100 Lab. Arb. Rep. (BNA) 887, 888, 890 (1993) (Concepcion, Arb.).

✚n231. Bertram Diamond, Discussion, in Labor Arbitration - Perspectives and Problems, supra note 18, at 158, 162.

✚n232. Stephen Reinhardt, Comment, in Labor Arbitration at the Quarter Century Mark, supra note 25, at 204, 204, 206, 209; Discussion, in Labor Arbitration at the Quarter Century Mark, supra note 25, at 212, 216 (comments of William B. Gould).

✚n233. Lewis Maltby, Free Speech Rights in the Workplace: Employee Perspective, in Arbitration 1996 At the Crossroads, Proceedings of the Forty-Ninth Annual Meeting, National Academy of Arbitrators 49, 49 (Joyce M. Najita ed., 1997).