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THE LABOR ARBITRATOR'S SEVERAL ROLES

DENNIS R. NOLAN*
ROGER I. ABRAMS**

I. INTRODUCTION

Labor arbitrators, like other professionals, periodically debate their proper role. Role definition is critical because it determines the scope of a professional's work, the sources of decision-making authority, and the procedures to be used in fulfilling the role. In the case of labor arbitration, it matters a great deal whether the arbitrator is thought to be charged with making rules, with applying public policy, or simply with interpreting the terms of a collective bargaining agreement between an employer and a union.

In the past, most of this self-examination by arbitrators has come in response to outside pressures. Much was written on the subject just after the Second World War, for instance, because the expectations of labor and management about the arbitrator's tasks were changing dramatically.1 Another outpouring of scholarship in the 1960's followed the decisions of the United States Supreme Court and the National Labor Relations Board to defer to arbitral decisions on both private and public law issues.2

These debates on labor arbitration's proper role produced a strong consensus that arbitrators generally should not attempt to create rules for labor and management. Arbitrators, rather, should be responsive to the parties' own agreement. The debates failed to produce a generally acceptable description of the arbitrator's role,


* Professor of Law, University of South Carolina School of Law. A.B. 1967, Georgetown University; J.D. 1970, Harvard Law School; M.A. 1974, University of Wisconsin-Milwaukee.


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2. Id. at 615-21.
however. It is our belief that the definitional investigations failed primarily because they sought a single simple answer to a complex problem. Arbitration is a multi-faceted endeavor; it cannot be circumscribed by a one-dimensional measurement.

In this Article, we propose to review the positions asserted in the debates over the arbitrator's role; to show how some of these positions are illegitimate or fundamentally incompatible with the context within which arbitration operates, while others are simply incomplete; and to offer a new formulation of the arbitrator's job as a composite of several widely recognized roles. Tentative as it is, our approach to role definition describes the position of labor arbitration in the American system of industrial relations more accurately than any of the earlier attempts.

II. A Taxonomy of Arbitral Roles

Discussion of arbitral roles is hampered by the multiplicity of terms used by the many discussants. For ease of understanding, therefore, we will classify the grievance arbitrator's putative roles under three headings, reflecting the broad tasks envisioned by some participants in arbitration (and perhaps feared by other participants): the contract-shaping function; the interpretive function; and the public policy function. As will be seen, each of these categories contains more specific models of the arbitrator's role.

A. The Contract-Shaping Function

Until relatively recently the arbitrator was commonly perceived as a contract "shaper." We use that term in preference to the more common one of "impartial chairman" in order to encompass both of the ways in which arbitrators can influence the composition of the labor agreement while resolving grievances, namely as a mediator and as an agreement maker.

The contract-shaping function dominated conceptions of labor arbitration during most of the first half of this century. This dominance arose from practices in the main business in which arbitration was used during that period—the clothing industry. Beginning with the Protocol of Peace negotiated by Louis Brandeis in New York in

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3. One definitional statement should be made at this point: Our discussion focuses only on grievance arbitration, that is, arbitration of disputes arising after a contract has been negotiated. Totally different considerations would apply to any analysis of an arbitrator's role in interest arbitration, that is, arbitration of disputes over what terms should be included in the contract.
1910 and the justly famed Hart, Schaffner and Marx contract signed the following year in Chicago, clothing manufacturers and clothing workers' unions thrust major responsibilities on arbitrators, while giving them few guidelines to govern the exercise of those responsibilities.4

The distinctive aspects of clothing industry labor relations explain why the contract-shaping approach developed so successfully in that industry, and why it failed to spread to many other industries. Contract-shaping arbitration reflects a fundamental belief that arbitration is simply another step in collective bargaining. In the words of William Simkin, for many years the permanent arbitrator in the hosiery industry, "The only essential difference between direct negotiation and arbitration is that the area of persuasion is broadened to include the arbitrator."5

In the clothing industry before the Second World War, that belief not only made sense, it was almost the only sensible understanding of arbitration. The industry was composed of small, intensely competitive employers. Both labor and management were eager to eliminate wage competition and, once the union had organized the industry, cooperation was the general rule and consensus was the common objective. These small employers, and the unions representing their employees, had few formal rules and procedures. The owner of the plant typically made the labor relations decisions himself, and the union's authority was comparably centralized. Moreover, given the clothing market's extreme volatility and the equally mercurial labor union strength, neither side was willing to limit itself by a detailed contract negotiated at a given point in time.6 Therefore, collective bargaining agreements were extremely brief. The combination of the mutual desire to avoid strikes and the lack of detail in the agreements made it logical for labor and management to refer all types of disputes to the arbitrator. Some decision had to be made, and the arbitrator was the only decision-maker acceptable to both sides. With few guideposts and a broad scope of


authority, arbitrators had little choice but to help the parties shape their own agreement.7

Model 1: The Arbitrator as Mediator. These three factors—a common desire for consensus, a broad scope of arbitration, and a relative lack of contractual guideposts—virtually assured that the first labor arbitrators would function as mediators, seeking to bring the parties together rather than simply adjudicating disputes. John Williams set this pattern as the first neutral arbitrator under the Hart, Schaffner and Marx agreement.8 The most influential advocate of the mediation model, George Taylor, followed this pattern when he served as impartial chairman in the hosiery industry from 1931-1941. Taylor went on to serve as umpire between General Motors and the United Automobile Workers where he attempted, with temporary success, to function as a mediator in key disputes.9

Throughout his life, in a number of influential articles, Taylor vigorously supported the right of labor arbitrators to seek a mediated settlement whenever possible. (Indeed, he believed that mediation was often a necessity, not merely an option.) Taylor argued that, if arbitration is an extension of collective bargaining, then a meeting of the minds is an essential criterion for a sound settlement. He thought that mediation by an arbitrator differs little from a judge's settlement efforts in his chambers.10

Taylor was hardly alone in this position. Harry Shulman, Dean of the Yale Law School, served as umpire for Ford Motor Company and the United Auto Workers in the 1940's and 1950's. He believed his assignment was to help the parties improve their relationship by finding the common ground in any dispute.11 In the same fashion, Edwin Witte, a distinguished scholar of labor relations, argued that

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7. See Killingsworth & Wallen, supra note 4, at 72-73.
9. See Killingsworth & Wallen, supra note 4, at 63-64.
11. See Killingsworth & Wallen, supra note 4, at 67-68; cf. Shulman, Reason, Contract, and Law in Labor Relations, 68 HARV. L. REV. 999 (1955) (The arbitrator must do more than judge the debate, as would a trial judge, but must make an active and thorough investigation to discover all the facts and arrive at a decision which both parties will accept "cordially and willingly."')}
because settlement is better than adjudication, arbitrators should try to encourage settlement: "Where the arbitrator's standing is such that he can do so without endangering the entire arbitration provisions, the arbitrator may also properly try to pressure or shame the parties into settling disputes legitimately before him which they should have settled earlier."\(^\text{12}\)

**Model 2: The Arbitrator as Agreement Maker.** The arbitrator's second role, Taylor believed, was to make an agreement for the parties when a mediated solution proved impossible. If mediation failed, the arbitrator would have to render a decision. In that sense he was, as one vivid description put it, a "mediator with a club."\(^\text{13}\) Most of those who viewed the arbitrator as a mediator regarded decision-making as a regrettable if sometimes necessary practice, but Taylor positively relished it, especially when the contract did not specifically address the disputed issue. Still, Taylor always maintained that the arbitrator's primary concern should be to ensure that his decision is acceptable to both parties.\(^\text{14}\)

Contract making through grievance arbitration was essential and inevitable, according to Taylor. Again and again he asserted that labor agreements were only "skeletons" and could not possibly be expected to resolve all grievances. For example, in an address to the annual meeting of the National Academy of Arbitrators in 1949, he denied that any "sharp line of distinction can be drawn between agreement-making and agreement-administration. . . . The labor contract is, in most particulars, no more than a skeleton understanding. The agreements there embodied frequently have to be given substance—they have to be amplified in grievance settlement—before a complete meeting of minds is achieved."\(^\text{15}\) Taylor's use of the passive voice should not hide his point: It is the arbitrator who has to give the skeleton substance; if grievance arbitration is an integral part of agreement-making, then the grievance arbitrator is also an agreement-maker.

Few have been quite so bold as Taylor in asserting the arbitrator's power, but similar ideas in more muted form have been extremely influential. Professor Archibald Cox wrote, in more elegant

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14. See W. Simkin, supra note 5; see also Taylor, *The Voluntary Arbitration of Labor Disputes*, supra note 10, at 791-94.
terms, of the need for arbitrators to fill in the "interstices" of the labor agreement;\(^\text{16}\) less elegantly, Justice Douglas later referred to the arbitrator's authority to fill in "gaps" in the agreement.\(^\text{17}\) Whatever the synonyms, these observers felt that, at least with respect to the open areas of the agreement, the arbitrator could and should make agreements where the parties themselves failed to do so.

**B. The Interpretive Function**

Although the contract-shaping grievance arbitrator was the dominant form for many years, an alternative model was well established long before the Hart, Schaffner, and Marx agreement was signed. A commission appointed by President Theodore Roosevelt to settle a major strike in the anthracite coal fields issued its report in 1903. The coal commission's report led to the establishment of a Board of Conciliation, which relied on a neutral umpire to resolve deadlocks. The Board conducted formal hearings on grievances, had a transcript made, and mailed the record to the umpire for a final decision.\(^\text{18}\) Thus the anthracite umpire was forced to act in a detached, almost appellate capacity. The procedure crafted by the parties clearly indicated that he was expected to interpret the agreement as literally as possible.

The automobile industry adopted the interpretive approach, after brief experimentation with the contract-shaping models, and virtually all of the major manufacturing industries quickly followed suit.\(^\text{19}\) Interpretation supplanted contract shaping as the dominant function of arbitration during the Second World War, when the War Labor Board decided that Board-ordered arbitration provisions would limit arbitrators to interpretation.\(^\text{20}\) Parties introduced to arbitration through the Board's processes usually retained similar provisions in their contracts after the War.\(^\text{21}\)


\(^{17}\) United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960) ("Gaps may be left to be filled in [by the arbitrator] by reference to the practices of the particular industry and of the various shops covered by the agreement."). Academics strive for ever more refined terms. Professor St. Antoine has used another synonym, stating that an arbitrator must fill in "lacunae." See infra text accompanying note 32.


\(^{19}\) See Killingsworth & Wallen, *supra* note 4, at 62-72.

\(^{20}\) Nolan & Abrams, *supra* note 1, at 572.

\(^{21}\) See id. at 575-77.
The characteristics of the interpretive system were almost the exact opposite of those that marked the contract-shaping models. Instead of treating arbitration as an extension of collective bargaining, interpretive arbitrators saw their role as part of a distinct procedure. Instead of negotiating brief "skeleton" contracts, parties negotiated lengthy agreements that attempted to address foreseeable issues. Instead of allowing a broad scope of arbitral authority, parties limited arbitrators to interpretation and application of their agreement.22

Just as the contract-shaping function was uniquely suited to the circumstances of the early clothing industry, so the interpretive function fit the circumstances of the mass-production industries at mid-century. In industries composed of a few large employers, relatively untroubled by price competition, management had no reason to share power with the unions voluntarily. Ownership, general management and direction of labor relations were separated, so that those who represented the employer at an arbitration hearing might well have lacked authority to settle a major grievance. Hard-fought negotiations produced detailed contracts, and employers insisted that arbitrators strictly enforce those agreements. The contracts, and the arbitral precedents that soon multiplied under those contracts, became the guideposts that made the interpretive model feasible; that model became inescapable when the parties went on to limit the arbitrator's authority and restrict the range of arbitrable issues.23

These factors resulted in an almost exclusive emphasis on the interpretive function of the arbitrator. As it evolved, that function was embodied in two new models, one treating the arbitrator as a judge and one as something more than a judge.

**Model 3: The Arbitrator as Judge.** It may seem strange that a dispute resolution process constructed as an alternative to litigation should use a judicial simile to describe the arbitrator's role. There may not be any inconsistency, however, because arbitration could well have been selected as an alternative to litigation for reasons of expertise, efficiency and economy rather than for any doubt about the appropriateness of judge-like interpretation as a method of resolving grievances. In any case, even in relatively early days, arbitrators, parties, and scholars often spoke of arbitration as a judicial

22. See Killingsworth & Wallen, supra note 4, at 61-62.
23. See id. at 73-75.
endeavor, one that required a decision interpreting or applying a contract on the basis of a record developed in an adversarial hearing.

The anthracite example has been mentioned, but equally striking statements can be found in the very clothing industry that fostered the contract-shaping approach. William Leiserson, a pioneering clothing industry arbitrator, described the arbitrator in 1924 as bound by the terms of the agreement, just as a judge is obliged to uphold the law, and he expressly rejected any rule-making authority. Twenty-five years later, at the same time Taylor was advocating the arbitrator's contract-shaping function, J. Noble Braden, an official of the American Arbitration Association, wrote several articles asserting that arbitrators were private judges employed solely to interpret the collective agreement. Braden sneeringly referred to Taylor's agreement-making arbitrator as "a sort of labor relations psychiatrist"—just as Professor Lon Fuller later described Taylor's arbitrator as a "labor relations physician"—and argued that, whether or not Taylor's model worked in some cases, "to call it arbitration is a misnomer." Fuller made the same point on a higher plane, claiming that "[t]he morality of arbitration lies in a decision according to the law of the contract."

The contest between the contract-shaping and interpretive models is obviously one of long standing, with influential partisans on each side. As will be seen, however, Taylor's side had lost the contest even before he published his most powerful arguments. The interpretive models gained the upper hand by the end of the Second World War and never lost it.

Model 4: The Arbitrator as Contract Reader. University of Michigan law professor Theodore St. Antoine has offered a provocative variation on the third model, one which recognizes the arbitrator's judicial role but places him in an even more authoritative position. St. Antoine's model is not spelled out in detail, but even in abbreviated form it is so richly suggestive that it should be quoted in full:

30. See infra text accompanying notes 60-69.
The grievance arbitrator is the parties' designated definitive reader of their labor contract. What he reads is, by reason of their agreement and not by any peculiarity of the collective bargaining process, what they meant to write. "Gross error" or "misrepresentation" by this reader is a contradiction in terms. An award is other than the parties' own putative agreement only if the arbitrator is untrue to his charge, or dishonest, or unfair, or perhaps totally irrational. An arbitrator must find the essence of his award in the parties' agreement, but that may include, implicitly or explicitly, an authorization for him to draw upon a range of other sources, including statutory and decisional law . . . . By definition, the award is the parties' stipulated, adopted contract. 31

St. Antoine's contract reader thus seems to be both a judge, charged with interpreting an agreement, and more than a judge. A judge is limited to interpreting an agreement; an arbitrator may, in full fidelity to his charge, "read" into the agreement answers to questions the parties did not address—and those answers then become a part of the agreement. St. Antoine recognizes that most contracts prohibit the arbitrator from adding to or modifying the contract. At the same time he recognizes the "inherent tension (if not inconsistency)" between this limitation and the equally common provision that the award is to be "final and binding." "The arbitrator cannot be effective as the parties' surrogate for giving shape to their necessarily amorphous contract unless he is allowed to fill the inevitable lacunae." 32 Once the arbitrator has spoken, his decision becomes the contract on that point; the arbitrator's award is treated as if it were a written stipulation by the parties that gives their "definitive construction" of the contract. 33

C. The Public Policy Function

Both the contract-shaping and interpretive models treat arbitration as a purely private process. Although arbitration's origin in the collective bargaining agreement means that it is at least in part a creature of private parties, some commentators have asserted that arbitrators also fulfill a public function. One such commentator noted: "Although not a public tribunal 'imposed' by the law upon

32. Id. at 1153.
33. Id. at 1140.
the parties to the submission agreement, arbitration has the attributes of a public tribunal once the parties have created it.\textsuperscript{34} Specifically, an arbitrator applies some set of values whenever he engages in interpretation or contract shaping, and these values are likely to be public values. This may be done subconsciously, as the arbitrator searches his mind for possible meanings of such terms as "just cause" or "equal ability." Or it may be done consciously, as he strives to implement ideals of industrial democracy or labor peace.

Most of those who have considered this aspect of the arbitrator's role approve of the public policy function, though they differ as to its proper scope. In contrast, one provocative critic, Professor Katherine Stone, agrees that arbitrators do in fact apply extra-contractual values, but finds that practice manifestly undesirable.\textsuperscript{35} Whether one favors exercise of a public policy function seems to depend on whether one likes the policies arbitrators are likely to apply—just as one's attitude toward judicial review will be influenced by the substantive positions of the relevant courts and legislatures.

\textit{Model 5: The Arbitrator as Community Conscience}. An arbitrator brings community sentiments to bear on labor disputes in a number of ways. The simplest and least conscious way is through the application of his individual judgment. Personal values inevitably affect decisions. Even if the arbitrator views his task as purely interpretive, there is no way interpretation can be done mechanically; at some point, human judgment comes into play.\textsuperscript{36} No one is immune from outside influences and thus, to some degree, the arbitrator's values will reflect the community's values. Perhaps it would be more accurate to refer to the communities' values, because the arbitrator's judgment is influenced by the values of several different groups: the parties to the case; others in the industry; the general industrial relations community; the community of arbitrators; the broader society, and so on.

Given enough time and cases, the reflective arbitrator will group these values into a coherent system. Saul Wallen is a case in point. Over a career spanning twenty-two years and approximately


\textsuperscript{35} See infra notes 49-55 and accompanying text.

6200 decisions, Wallen outlined three broad goals that an arbitrator should advance, goals that encompassed distinct values: (1) equity and justice for all members of industrial society; (2) efficiency, productivity, and technological innovation; and (3) stable collective bargaining. However much these values were personal to Wallen, they were also the values of the communities with which he associated.

There is a second way in which an arbitrator, at least a conscientious one, will search for and use community values. Virtually any decision by an arbitrator will suppress, for a time, the conflict giving rise to the grievance, but more than temporary peace is required if the arbitrator really wishes to resolve the underlying conflict. Ralph Seward put it well in an address to the National Academy of Arbitrators more than thirty years ago. The arbitrator’s process, he said, “will be creative only insofar as he is successful in his search for the ‘deeper truth’—only insofar as he is 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 his own.” The conscientious arbitrator, in other words, will strive to find or articulate fundamental values shared by the parties in order to do his own job well. The parties’ values will almost certainly reflect broader community values.

A third way in which an arbitrator can apply community values is even more conscious—that is, by using those values even if they conflict with the terms of the agreement. The two most vigorous advocates of the community conscience model have been UCLA’s Professor Edgar A. Jones, Jr. and Professor David Beatty of the University of Toronto. In a lengthy article twenty years ago, Professor Jones praised the application of community values as a distinctive feature of labor arbitration. Jones predicted that as governmental bodies, such as the courts and the National Labor Relations Board, give arbitrators more room for the exercise of their discretion, there


38. Seward, Arbitration in the World Today, in THE PROFESSION OF LABOR ARBITRATION, supra note 10, at 66, 73 (speech delivered at the fourth annual meeting of the National Academy of Arbitrators in 1951).

39. As Professor Jones observed: “The unique contribution of the arbitral processes to the Anglo-American system of justice has been to focus upon a specific dispute and to reflect the contemporary conscience of the community in its resolution with both utility and integrity.” Jones, supra note 34, at 712.
will likely arise "a felt necessity for the arbitrator to reflect community attitudes of fairness, drawing on basic value commitments evidenced over a significant period of time . . . ."  

Professor Jones granted that the arbitrator should conform to the expressed intentions of the parties, but "only so long as that intent remains within the bounds of generally deducible public policy;" if it does not remain within those bounds, the arbitrator should instead apply "contemporary community attitudes of what is fair in procedure and equitable in result." According to Jones, the arbitrator learns those values both by his professional reading and discussion and by the arguments of the parties in the specific case. Over time, by a process of "accretionary changes in the totality of collective bargaining," the arbitrator’s decisions will bring the private agreements into conformity with community mores. This is no simple task, but Jones felt that it could and should be done, and done well.

This position has a touch of the agnostic to it. So long as the arbitrator applies "contemporary community attitudes," Jones seems to be saying, it does not matter too much what those attitudes are. Professor Beatty, on the other hand, has recently given this position a particular ideological twist. Beatty criticizes what he terms the "reserved rights" theory of arbitration. According to this theory, the collective bargaining agreement can only be found in the written terms of the contract. The arbitrator thus cannot imply limitations of "fairness" or "reasonableness" on management’s decisions. The better view, according to Beatty, is the competing theory of "implied obligations." Under this theory, the arbitrator should look beyond the express terms of the contract and consider external standards, including the "common law of the shop . . . the customs and unwritten understandings, established practices and sound industrial relations standards."  

Professor Beatty adds to the implied obligations theory a specific set of values. He starts with the assumption that the relevant community attitudes are those of the political system, which he defines as "liberal democracy." Like Taylor and Jones, he finds it

40. Id. at 742-46.
41. Id. at 741.
42. Id. at 743.
44. Id. at 147-48.
45. Id. at 140-42.
inevitable that collective agreements will be written in the most general terms, leaving much to be added by the arbitrator. This does not set arbitrators loose to create purely subjective solutions. Instead, the arbitrator must arrive at solutions based on the underlying "theoretical precepts" and fundamental "morality" of the political system in which the arbitration is set.46

Professor Beatty concludes that the "reserved rights" theory is "utterly antagonistic to the 'spirit and intent' of our liberal theory of law from which the entire system of collective bargaining purports to draw its integrity."47 Accordingly, arbitrators faced with an appropriate dispute should draw from the community's political theory, reject the reserved rights theory and enforce the implied obligations.48

Model 6: The Arbitrator as a Running Dog. Professors Jones and Beatty believe the application of community values to grievance disputes is important to the arbitral process. Another observer is not so positive about the arbitrator's public policy role. Indeed, she strongly condemns it.

Writing in the *Yale Law Journal* in the "critical" mode, Katherine Stone describes modern labor arbitration as a creature of the "industrial pluralists," an influential group of labor relations theorists most active in the 1950's and 1960's.49 Professor Stone says the industrial pluralists wrongly assumed that the interests of labor and management were consistent and that a contractualist approach to labor relations would produce fair and harmonious results. For these theorists, the arbitrator should act as an impartial judge who can decide cases "in an apolitical way, above the conflict of forces that [go] into making the laws."50

For Stone, however, arbitral neutrality is a myth. In reality, labor peace, not neutrality, is the primary goal of the labor arbitrator. A judicial or interpretivist approach would not release the pressure behind the immediate grievance, so instead of interpreting the agreement, arbitrators of the industrial pluralist sort must intervene and apply the community value of labor peace. Arbitrators do this by deciding when tensions are building in the work force and then tailoring their decisions to ease those tensions. Thus, Stone finds,

46. *Id.* at 162.
47. *Id.* at 153.
48. *Id.* at 153-57.
50. *Id.* at 1559.
the "pluralists' arbitrator in practice does not even try to be a neutral interpreter of the collective agreement."51 Such an attempt would be doomed to failure anyway, because "[i]n a situation of constant conflict, there is no possibility of neutral intervention."52 Stone compresses this idea into a stern paragraph:

Neutral adjudication of disputes by an impartial arbitrator is also an untenable premise. The notion that an arbitrator can interpret and enforce shop rules in a neutral manner, above the power struggles that gave rise to the rules in the first place, was implausible even to the pluralists themselves. They see the role of arbitrators as guarantors of the smooth continuity of plant operations. Their interventionist methodology makes grievance resolution a continuation of the initial struggle that went into the negotiation in the first place.53

In Professor Stone's view, labor peace is a value that benefits bosses more than workers. "Thus by intervening to preserve order, arbitrators are not only nonneutral, they are acting consistently on the side of management."54 By applying the chosen value of the (management) community, therefore, arbitrators serve only one side, and the wrong side at that. With only slight exaggeration, Stone could be said to view the arbitrator's role as that of a running dog of the capitalists, who now use relatively subtle weapons in their campaign to oppress workers.55 Presumably Stone would be more kindly disposed toward arbitration if arbitrators chose to apply more proletarian values, but she makes it clear that she does not think that is possible under our contemporary system of labor relations.

III. A CRITIQUE OF THE TAXONOMY

A critique of these models is appropriate at this point. The evaluation can be relatively brief, because the limitations of some models are apparent, and others have already been critically analyzed in print.56 Any analysis must proceed from a recognition of

51. Id. at 1565 (emphasis added).
52. Id. at 1565.
53. Id. at 1566.
54. Id. at 1565.
55. To bolster her "running dog" theory of arbitration, Professor Stone suggests that the industrial pluralists were influenced by the "human relations school" of industrial relations. These theorists fostered the use of "manipulative strategies" to keep workers from using their collective power against the capitalists. Id. at 1509.
56. The contract-shaping models, for example, have been widely discussed. See Killingsworth & Wallen, supra note 4; Weiler, The Role of the Labour Arbitrator: Alternative
the reality of contemporary collective bargaining. In particular, several characteristics of current collective bargaining agreements must be considered:

(1) Labor and management now negotiate detailed collective bargaining agreements that attempt to provide rules for the resolution of normal labor relations problems.\(^5\)

(2) Almost all of these agreements restrict the scope of arbitration and limit the powers of the arbitrator.\(^6\)

(3) These agreements are drafted against a background of forty years of arbitral "common law"\(^7\) familiar to every experienced negotiator. Contracts that do not modify this common law must therefore be presumed to have accepted it.

In light of these factors it is apparent that some of the models of arbitral roles are untenable. Others are plausible and even necessary, but insufficient.

### A. The Contract-Shaping Models

The contract-shaping models fail to provide a satisfactory description of contemporary arbitration, for pragmatic as well as theoretical reasons.

Twenty years ago, two critical observers perceptively described the practical reasons for the failure of the contract-shaping model to spread much beyond the clothing industry.\(^8\) That approach, they concluded, was the product of an "unstructured" economic environment. Activist arbitrators suited the needs of the parties in that environment, but when arbitration came to mass-production industries organized in a more structured manner, such as automobiles,

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\(^{58}\) The best and most recent study of grievance and arbitration clauses is quite clear on this point. The scope of the grievance procedure is specified in 86% of the agreements. Of these, 79% used the "standard" form of grievance provision which defines grievances as including only disputes over the interpretation of the contract; only 13% contained the "broad" form which covers any dispute. The scope of arbitration is specified in 89% of the agreements, of which 35% list specific exclusions from arbitration. Seventy-nine percent of the agreements place restrictions on the arbitrator. Ninety percent of these prohibit the arbitrator from adding to, subtracting from, or modifying the agreement. Bureau of Nat'l Affairs, Inc., supra note 57, at 12-17.

\(^{59}\) See generally Abrams, supra note 36.

\(^{60}\) See generally Killingsworth & Wallen, supra note 4.
steel, and rubber, the parties chose, and arbitrators adopted, a different approach. Because virtually all of the industrial growth in this country since the 1930's has been in these "structured" industries, the contract-shaping arbitrator has become a rarity.\textsuperscript{61} Even when activist arbitrators were chosen for the structured industries, for example, George Taylor at General Motors Corporation and Harry Shulman at Ford Motor Company, their attempts to act as mediators and agreement makers were short-lived.\textsuperscript{62}

A second reason for the decline of the contract-shaping models is that they rested on the dubious assumptions that labor agreements were mere "skeletons" which had to be given substance by the arbitrator,\textsuperscript{63} and that arbitration is simply an extension of collective bargaining.\textsuperscript{64} Neither of these assumptions was completely valid even in the immediate post-war period when Taylor was arguing for his approach.\textsuperscript{65} They are certainly invalid today.

Intentionally or not, parties to collective agreements have done two things that have eliminated the legitimacy of the agreement-maker model and destroyed the efficacy of the mediatorial model. The first is that they have added substance to their agreements and have specified the arbitrator's tasks. Modern collective agreements, in their abundant detail, cannot fairly be termed "skeletons." To the contrary, they now provide sufficient guidance so that it is neither necessary nor proper for an arbitrator in a typical dispute to add anything to the contract. The "governmental nature" of the collective agreement—that is, its regulation of "diverse affairs of many people with conflicting interests over a substantial period of time"\textsuperscript{66}—ensures that some arbitral elaboration may be required now and then, but, as the parties have answered more policy questions themselves, there are fewer for the arbitrator to answer. Furthermore, parties to most agreements have carefully stated that arbitrators are limited to interpretation and are prohibited from adding to or modifying the agreement.

The second thing parties have done to minimize the contract-shaping function is to change the type of arbitrator designated in the agreement. The new type of arbitrator would find it virtually

\textsuperscript{61}. See id. at 72-76.
\textsuperscript{62}. See id. at 63-69.
\textsuperscript{63}. See supra note 7 and accompanying text.
\textsuperscript{64}. See supra note 5 and accompanying text.
\textsuperscript{65}. See Nolan & Abrams, supra note 4, at 419; see also Nolan & Abrams, supra note 1, at 571-72, 576, 579.
impossible to mediate successfully. Taylor understood that only a permanent arbitrator could know the parties well enough to judge whether an award would be acceptable to both sides, and only a person with that knowledge could be an effective mediator.\textsuperscript{67} Few agreements now provide for a permanent arbitrator, however.\textsuperscript{68} Similarly, only a tripartite arbitration panel allows for behind-the-scenes bargaining during grievance arbitration, but few agreements provide for such panels.\textsuperscript{69} In the face of contract provisions like these, most arbitrators lack a sufficiently durable association with the parties to do anything more than interpret the agreement.

These changes have undermined the fundamental assumptions of the contract-shaping models. By doing so, they have made the broad arbitral powers described by those models untenable. Any arbitrator claiming those powers would violate the expectations and intentions of the parties who employ him.\textsuperscript{70}

The final reason for the rejection of the contract-shaping models is the general recognition that mediation and arbitration involved fundamentally incompatible processes. As Lon Fuller observed, mediation and arbitration involve distinct purposes and thus distinct "moralities." "The morality of mediation lies in optimum settlement . . . . The morality of arbitration lies in a decision according to the law of the contract."\textsuperscript{71} Consequently, the procedures involved in mediation and arbitration will be fundamentally different. For example, while it would be appropriate for the mediator to consult privately with the parties to discover mutually acceptable terms, such a procedure would be wholly inappropriate for the arbitrator, whose role is confined to impartial interpretation of the contract terms. Further, arbitration and mediation involve different factual inquiries. The relevant facts are different "or, when they seem the same, are viewed in different aspects."\textsuperscript{72} Thus, if his attempts at mediation fail, the mediator will find it difficult to assume the role of arbitrator; to do so legitimately, he would have to "view

\begin{itemize}
\item \textsuperscript{67} See Taylor, \textit{The Voluntary Arbitration of Labor Disputes}, supra note 5, at 792; infra note 97 and accompanying text.
\item \textsuperscript{68} \textit{Bureau of Nat'L Affairs, Inc.}, supra note 57, at 16 (Five percent provide for a permanent arbitrator and two percent for a permanent arbitration board.).
\item \textsuperscript{69} \textit{Id.} at 17 (Seventy-five percent of collective agreements specify a single arbitrator.). In practice, many parties whose agreements provide for arbitration panels waive or ignore those provisions and permit the neutral arbitrator to act on his own. In still other cases the appointment of partisan arbitrators is a mere formality, for there is no private meeting of the arbitrators.
\item \textsuperscript{70} Abrams, supra note 36, at 564-70.
\item \textsuperscript{71} Fuller, supra note 27, at 23-24.
\item \textsuperscript{72} \textit{Id.} at 24.
\end{itemize}
the facts of the case in a completely new light, as if he had previously known nothing about them . . . [and] listen to proofs and arguments with an open mind. If he fails in this attempt, the integrity of adjudication is impaired.’’

The difficulties discussed by Fuller have been apparent to other arbitrators. They prompted the drafters of the arbitrators’ Code of Professional Responsibility to include several provisions about mediation. The most important of these bars the arbitrator from mediating if either party objects. Another emphasizes that, although an arbitrator can suggest that he mediate, “the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive” and “the suggestion should not be pursued unless both parties readily agree.’’

To be sure, there may be a few occasions when arbitrators will be invited to mediate or when they will discover an opportunity to do so without harm to the arbitration process. There will also be a few occasions when the arbitrator will be required to deal with a policy question the parties did not resolve, and will in that sense have to “shape” a small corner of the agreement. At most, these will be ancillary functions of the arbitrator. It is simply no longer accurate to describe the arbitrator’s role primarily in those terms.

**B. The Interpretive Models**

Little can be said in opposition to the basic judicial model because it most nearly describes what labor and management want of arbitrators, and what they get. Three points are worth making about the interpretive models, however. One is a caution against carrying the judicial approach to the extreme of a simplistic literalism. The second is a caution against viewing the contract “reader” as an agreement maker under another name. The final point is a caution against focusing on the interpretive function to the exclusion of other tasks.

Advocates of the contract-shaping models worried that a judicial approach to arbitration would lead to a rigidly literal reliance on the written terms of the collective agreement. Whatever the merits of literalism in the interpretation of statutes or bond indentures,

75. *Id.* § 2 F.2.c.
there is not much to be said in its favor when it comes to interpreting collective bargaining agreements. Collective agreements—often drafted without the assistance of a lawyer and typically under strict time pressures—may not bear the close analysis given to other documents. Moreover, labor and management rely, to a greater degree than do parties to non-relational contracts, on the binding nature of certain past practices and other implied obligations. By ignoring these considerations, the literalist may do as much harm as his opposite number, the contract-shaper.

Contract reading, an interpretive function, should not be confused with contract making. It is quite easy to miss the thin line between Professor St. Antoine's contract reader, who has the power to "read into" the agreement answers to questions the parties did not address, and Taylor's agreement maker. Careful arbitrators make the distinction, though, and believe it worth maintaining. The agreement maker treats the agreement as essentially unmade; he treats it as is his duty to complete the bargaining process. The contract reader, in contrast, may look beyond the document to find the true agreement but must in any case "find the essence of his award in the parties' agreement." If the contract reader goes beyond and tries to make an agreement rather than find it, he will suffer from the same lack of legitimacy that afflicts the agreement-making arbitrator.

Finally, while the importance of interpretation should not be underestimated, neither should it be overestimated. Interpretation is the essence of the arbitrator's job, but it is not all of his job. As noted, he may from time to time be called upon to help the parties shape the agreement. He may also be expected to apply public policies in rare cases. Despite these other tasks, interpretation must always be the primary function of the labor arbitrator.

76. See, e.g., Abrams, supra note 36, at 561-64.
77. Lon Fuller warned against both the contract shaping arbitrator and the literalist:
   The mediating form-free arbitrator and his opposite number, the stiffly literal judge, are equally threats to effective collective bargaining. The first may dissipate the benefits of careful negotiation and draftsmanship by disregarding the contract in the resolution of disputes. The second may dissipate those benefits by projecting into the agreement incongruent meanings, foreign to the thinking of those who created it.
Fuller, supra note 27, at 44.
78. See supra text accompanying notes 13-17.
79. See supra text accompanying notes 31-33.
80. See supra text accompanying notes 63-66.
C. The Public Policy Models

The public policy models share one major characteristic that distinguishes them from the contract-shaping models. Taylor and others who supported the contract-shaping approach believed that, because the parties left so many questions unanswered in their contracts, arbitrators had to give substance to the agreement and could do so without contradicting the intentions of the parties. They never suggested that an arbitrator could or should ignore clear limitations created by the parties. To do so, they argued, would harm rather than help the arbitration system. 81

The moderate forms of the community conscience model, which point out that arbitrators subconsciously apply public values when interpreting ambiguous terms and indirectly incorporate public values by seeking the parties' own values, are quite consistent with the more restrained contract-shaping and interpretive models. It would be hard to exclude these aspects of public values, because no one can avoid being influenced by others. Arbitrators do not live in a vacuum, and few parties would want one who did. Generally, the process of resolving ambiguities according to widely-held applicable principles should be welcomed by labor and management alike.

Consider an unexceptional discipline case. Suppose an employee is discharged for shouting obscenities at another employee. The agreement gives management the power to discipline or discharge "for just cause." Obviously the quoted phrase is not self-explanatory. An arbitrator faced with this case will have to apply some values in order to give concrete meaning to "just cause." He may have his own values, of course, but these will be influenced and supplemented by the values of others. He would certainly consider what the parties themselves have done in similar cases—the values of the shop. He may well consider what other parties in the industry have done and what other arbitrators have decided in comparable cases. Finally, he may be influenced by social attitudes. As the broadest community values change over time, so too will arbitrators' decisions. It would not be surprising to learn, for example, that twenty or thirty years ago the sex of the grievant would have been considered extremely relevant in a case like the one posed. A male

81. As Harry Shulman observed: "An arbitrator worthy of appointment in the first place must conscientiously respect the limits imposed on his jurisdiction, for otherwise he would not only betray his trust, but also undermine his own future usefulness and endanger the very system of self-government in which he works." Shulman, supra note 11, at 1008-09.
employee probably would have been treated more harshly for cursing a female employee than for using the same language toward another male. Today we expect the sexes to be treated similarly.  

Thus, to the extent the arbitrator's public policy function involves the interpretation of ambiguous language, subconscious or indirect application of community values is both inevitable and unobjectionable. The more extreme form of the community conscience model goes far beyond this modest activity, though. Only when the arbitrator is seen to apply "outside" values in opposition to those expressed in the contract does the public policy role become controversial. Apart from the fortuities of a particular case (when the winning party might not care too much why he won), almost every advocate would reject the suggestion that an arbitrator could overrule the agreement if he found it violative of some community value. They might doubt the arbitrator's ability to make such determinations and certainly would wonder whether public policies could work as well as negotiated principles. These worries pale in comparison with a more fundamental objection.

The greatest difficulty with the community conscience model of Professors Jones and Beatty is the same one besetting Taylor's contract-shaping arbitrator: lack of legitimacy. Every arbitrator is a creature of a contract, and the contract creating his office may and usually does limit his power to interpretation. Where, then, does he obtain the authority to overrule the parties' intentions by imposing his own values or those of some other group? It begs the question to assert, as Professor Jones does, that arbitration takes on the "attributes of a public tribunal" once the parties have created it.  

Where do those "attributes" come from, if not from the parties? Certainly not from the courts or legislatures. Nor is it sufficient to state, as Professor Beatty does, that, since collective bargaining was developed under a "liberal democratic" political system, arbitrators are free to take the most general philosophical precepts of that political system and apply them to particular grievances. Once

82. Compare Northwest Airlines, Inc., 41 Lab. Arb. (BNA) 360, 365 (1963) (Rohman, Arb.) ("Without a peradventure of a doubt, the vernacular of the shop need not be countenanced nor tolerated in the Company's general offices—and in the presence of ladies."); with Louisville Gas & Elec. Co., 81 Lab. Arb. (BNA) 730, 733 (1983) (Stonehouse, Arb.) ("Modern mores being what they are, crude language abounds in shops and offices. This is well illustrated by [the female employee's] reply to the remark, a four letter expletive, which coming from a lady would have shocked most people twenty years ago, but which is now, unfortunately, rather commonplace.").

83. See supra text accompanying note 34.

84. See Beatty, supra note 43.
again, if the parties have created and limited the arbitrator, whence comes the power to exceed their limitations?

There is no need to belabor the point. Some years ago, in a perceptive and persuasive analysis of arbitral roles, Professor Paul Weiler considered the community conscience model at length and concluded that it failed because of the intractable problems of: (1) accountability and legitimacy; (2) rationality and adequacy; and (3) effectiveness. Arbitrators, he concluded, were unable to solve these problems and thus they should not try to be policy makers.\footnote{See Weiler, supra note 56.}

Neither Jones nor Beatty offers any reason to reject Weiler's conclusions.

It is hard to know how seriously to take Professor Stone's "running dog" model. It is so perversely misguided that it borders on parody, yet nowhere in her article is there the slightest hint of levity. To begin with, she criticizes the interventionist, peace-at-any-price type of arbitrator as if that were the norm today. We have already mentioned that activist arbitrators were passé even as Taylor argued in their favor.\footnote{See supra text accompanying notes 61-63.}

Long ago two experienced arbitrators described more specifically how post-war labor relations specialists for both labor and management came to select arbitrators responsive to their expertise and eventually winnowed out the "human relations" arbitrators.\footnote{See Prasow & Peters, supra note 6, at 14.} The horse Stone is beating is not only dead, it has been buried for a third of a century, yet Professor Stone neither recognizes this nor admits that there might be other sorts of arbitrators in practice.

Had arbitrators tried to maintain labor peace by compromise awards, as Stone asserts they do, they would have failed. As hard as it is to avoid strikes and lockouts by holding parties to the terms they negotiated, it is harder still to do so by changing the meaning of those terms to appease the most immediately aggressive party. Arbitral compromises would only encourage still more extreme claims and threats,\footnote{Cf. T. Wolfe, Mau-Mauing the Flak Catchers, in RADICAL CHIC & MAU-MAUING THE FLAK CATCHERS 95 (1979) (use of extreme demands as a bargaining tactic).} and that in turn would destroy the value of the agreement itself. As one distinguished management attorney noted many years ago, "It is the small compromise that may start the process of disintegration and inequity—a disease that can spread very

85. See Weiler, supra note 56.
86. See supra text accompanying notes 61-63.
87. See Prasow & Peters, supra note 6, at 14.
rapidly once it gets started." If the counterproductive nature of peace-at-any-price arbitration awards is so readily apparent to the parties, why would they deliberately and repeatedly select arbitrators of that sort? Even if, as Stone contends, arbitration is simply a tool of management oppression, surely management would choose a better tool, one that would more effectively prevent strikes and still preserve the employer's contractual gains.

Stone's charges that arbitrators do not even try to be neutral interpreters and that "they are acting consistently on the side of management" are baffling. She cites no evidence for these charges, perhaps because none is available. Leaving aside our own knowledge of arbitrators, we suggest that the realities of arbitral selection make it virtually impossible for one acting as she describes to remain in business. Arbitrators are selected by the parties themselves. If arbitrators were so biased in management's favor, would unions continue to accept them or, indeed, would unions even continue to negotiate arbitration clauses? More to the point, if arbitrators act "consistently on the side of management," why do unions win so many awards?

In short, Stone's running dog model seems to be the product of an ideological imagination. It bears no relationship to the reality of contemporary labor relations.

D. A Reprise

None of the six models of the arbitrator's role we have discussed provides a satisfactory description. The two contract-shaping models retain a grain of relevance, but have been largely rejected for thirty years. The two interpretive models still accurately describe the essence of the arbitrator's job, but they neglect important additional elements. One of the public policy models, the optimistic one, fails to overcome critical questions about its legitimacy, while the other, Stone's pessimistic one, presents a false picture of the nature of the arbitration process.

Perhaps the biggest single reason for the failure of any of these models to explain contemporary arbitration is that each vainly attempted to capture a complex phenomenon in a single concept. Even George Taylor himself warned that "[g]rievance arbitration cannot be made to conform to any single, rigid pattern," but must instead "be developed in each case as a procedure that the parties

Every arbitration system must be adapted to its environment; environments necessarily differ from one industry to another and even from one company to another, and thus arbitration systems will differ. What is needed is a statement of the arbitrator's role which recognizes it as a composite of several roles, a composite of elements whose relative importance can vary widely according to the needs and wishes of the parties to a specific contract.

IV. THE LABOR ARBITRATOR’S SEVERAL ROLES

A proper conception of the labor arbitrator's function must be multi-faceted, reflecting all the roles required in any given case. Any attempt to describe his function by use of a single model will necessarily fail. We offer the following statement as a tentative and preliminary attempt at a more accurate description. Even this tentative statement is novel only in its entirety; its parts are familiar to all who have thought seriously about the nature of labor arbitration.

1. The labor arbitrator fills one or more of several potential roles.

2. The arbitrator's primary task is to interpret and apply the collective bargaining agreement.

Primacy of the interpretive function is established both by the agreement itself, which typically limits the arbitrator to interpretation of the agreement, and by the nature of the disputes brought before him. Every arbitration involves a charge, however awkwardly expressed, that the other party violated the agreement. Such a charge obviously obliges the arbitrator to decide what the agreement means and to apply that meaning to the facts of the case. Fidelity to the contract must always be his goal.

3. The arbitrator may occasionally perform the ancillary task of resolving a policy dispute left open in the agreement. When he does so, he should strive to make his decision as consistent as possible with the letter and spirit of the agreement.

While the arbitrator's primary task is interpretation, the parties may force on him other tasks. Labor and management may agree to submit a policy question to the arbitrator when they are unable to resolve it in negotiation even though their contract ostensibly limits

91. See Killingsworth & Wallen, supra note 4, at 80.
him to interpretation. One extraordinarily candid management representative described the process in an address to the National Academy of Arbitrators over twenty-five years ago:

Cases often get to arbitration because, to be frank about it, the parties really have no agreement on the specific matter, and can't negotiate one under existing circumstances. We all of us indulge in a happy fiction that grievance arbitration consists in the interpretation and application of the agreement. We caution the arbitrator neither to add to nor subtract from the contract. Then, having reached an impasse over a matter on which the agreement is silent, we go to arbitration asking the arbitrator to apply a nonexistent agreement. Maintaining the fiction he complies, because, being a realist, he knows as well as we do that a decision is imperative and that the parties in the circumstances cannot achieve agreement alone.92

Non-interpretive tasks are rare and distinctly secondary. Labor and management normally believe they have reached an agreement on disputed issues. They may now disagree on what that agreement was, but, even so, the arbitrator is called upon only to interpret their agreement. Policy decisions require special care because an extraneous contractual ruling may have unintended effects on parts of the contract. Thus the second part of this proposition: The arbitrator should seek to make his decision fit as easily as possible into the rest of the bargaining relationship.

4. Interpretation of the agreement may require recourse to sources of information outside the written document.

The negotiated terms may not constitute the entire agreement. Other documents may be incorporated by reference (as in the case of work rules or pension plans) or by implication (as in the case of a provision that tracks an anti-discrimination statute). Past practices may be incorporated in the agreement at the time it is signed, either expressly or impliedly, and practices may tacitly amend the agreement after it is signed. Similarly, understandings or practices not mentioned in the agreement itself may aid in the interpretation of general, vague, or apparently contradictory language. These may include implied terms, local or industry customs, and the arbitral common law.

To determine what the true agreement is and what it means,

therefore, the arbitrator may well have to look beyond the four corners of the formal agreement. Failure to do so would sacrifice the real intentions of the parties to a crabbed literalism.

5. *When the arbitrator interprets the agreement, he acts as authorized agent of the parties. His interpretation is therefore final and binding as between the parties, absent any infidelity to his charter.*

This is, of course, a restatement of Professor St. Antoine's concept of the arbitrator as a contract reader. He does "read" the contract as if acting jointly for the parties. He is free to probe to find out what their agreement is, and his conclusion, once reached, must be accepted as accurate until the parties themselves change their agreement. The arbitrator's power to "read" is not unlimited, however. First of all it must always be a reading of an *agreement*, however broadly the concept of the agreement is understood. In Justice Douglas's terms, the award must always "draw its essence" from the agreement.93 The second limitation follows from the first. The arbitrator must be true to his charter from the parties. He "does not sit to dispense his own brand of industrial justice."94 If his words "manifest an infidelity" to this obligation, a court will refuse to enforce the award95 but, more important, the arbitrator will have done a disservice to the parties who selected him to resolve the dispute. Within those broad parameters, the arbitrator's authority is solid; between the parties, his decision is binding, however questionable one of them may find it.

6. *Interpretation may also require reference to the standards of relevant communities, but "outside" standards may not be used to defeat the intentions of the parties themselves.*

Certain portions of collective agreements, most notably the "just cause" requirement for discipline, may require reference to the mores of relevant communities. An arbitrator may appropriately consider those mores as a way of giving content to otherwise indeterminate phrases. The most relevant communities are the closest. The attitudes of the parties, perhaps as evidenced in past practices, should carry the most weight. If these are not clear, evidence might be supplied by other community attitudes with which the parties were familiar when they negotiated the agreement. Practices in the industry, particularly in the nearby plants of the same or

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94. Id.
95. Id.
other companies, would certainly be of interest, as would be the standards of the local industrial relations community. In a few cases, social mores might be used, as in the changing understanding of sex roles.

This is the moderate version of the community conscience model, in which the arbitrator acts as an agent for the transmission of community values when the parties have failed to state their own agreed values. It stands in contrast to the extreme version of the community conscience model because it leaves no room for the arbitrator to use his own or the communities' values to override the intentions of the parties.

The extreme version is at once illegitimate, incompetent, and destructive. It is illegitimate because it presumes an authority the arbitrator does not have; incompetent because there is no reason whatsoever to believe that an arbitrator can make a better choice of values than the parties themselves can; and destructive because it undercuts the presumption of mutual agreement on which contemporary collective bargaining rests. Harry Shulman made this point in one of his inimitable paragraphs:

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.96

For the same reasons, our statement of the arbitrator's public policy role denies that an arbitrator can or should use tenets such as "liberal democracy" or "labor peace," rather than the express or implied terms of the agreement, to resolve disputes.

7. While interpretation is the arbitrator's primary task, he may have occasion to facilitate a settlement.

There are many reasons why an arbitrator should generally avoid mediation. The functions of mediation and adjudication call for distinct skills which few people will possess in equal proportion. Successful mediation may require access to confidential information

96. Shulman, supra note 11, at 1016.
that an arbitrator would find hard to put out of his mind if he were later forced to make a decision. Even if the arbitrator were capable of wearing both hats, he may not be able to give that impression, and the appearance of objectivity is essential to the success of the arbitration system. As a mediator he might be forced to urge a particular position that strikes him as fair and reasonable; if he then arbitrates and ostensibly reaches the same position by a process of interpretation, the parties would be entitled to doubt whether the award embodied his considered judgment as to what the parties had agreed, or only his personal preference. The ad hoc arbitrator is at a particular disadvantage for "he has no way of knowing the parties' attitudes—what they want, what they expect, and what they will tolerate."  

Nevertheless, the arbitrator may, in rare cases, mediate without harm to his judicial role. The most obvious of these rare cases is by request of the parties who presumably know the risks involved. Other instances are more subtle. If the parties seem to be drawing together during the hearing, it would not be improper for the arbitrator to ask the parties if they would like a recess in order to discuss a settlement. Similarly, if a compromise position occurs to the arbitrator during the hearing, he might tactfully ask whether the possibility had been considered. Because of the chance that mediatorial efforts might interfere with adjudication or at least with the appearance of objectivity, no arbitrator should rush into mediation. To the contrary, the mediatorial role should be seen only as ancillary to the interpretive role.

8. Every arbitration system is created by two parties. It must be responsive to their needs and wishes, and must change with those needs and wishes.

Our last statement emphasizes the variability and flexibility of the arbitration process. To this point we have been speaking of arbitration in the abstract, of the general sort of arbitration arrangement. While this is a perfectly legitimate approach, we would not

98. See Code of Professional Responsibility, supra note 74, § 2 F.
99. Cf. id. § 2 F.2.c ("An arbitrator is not precluded from making a suggestion that he or she mediate. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.")
want to leave the impression that all arbitration systems are the same. Nothing could be further from the truth.

Particular parties develop an arbitration system based on their own experiences, their relative bargaining strength, and their own evaluation of the probable results of arbitration. Factors such as these are seldom the same in different bargaining relationships. It follows that arbitration systems will differ widely. Even when two different sets of negotiators use the same words, as when an existing arbitration clause is borrowed by the parties to a new bargaining relationship, each set will give those words an individual interpretation. One may be relatively formal, the other casual; one may expect a strictly judicial interpretation of the agreement, the other may welcome a mediated settlement; and so on.

Arbitration schemes will vary over time, as well. As the parties' experiences, relative strength, and expectations change, their arbitration system may well change. We know, for example, that two of the major automobile producers, Ford and General Motors, began with contract-shaping arbitration models and deliberately shifted to interpretive models.100

Arbitrators must recognize the variability and flexibility of arbitration systems. It would be inappropriate for an ad hoc arbitrator, for example, to insist on the same degree of formality in every hearing. It would also be inappropriate to refuse a joint request that he mediate simply because most parties want the arbitrator to be an interpreter. Arbitration belongs to the parties, and the arbitrator is only their chosen agent. To be an effective agent, he must carry out their wishes, not his own.

V. CONCLUSION

We noted earlier that our statement of the labor arbitrator's composite role was tentative and preliminary. No doubt many readers will already be thinking of modifications and additions. This is as it should be. We offer it now not because it is perfect, but because prior descriptions were too limited. Any view of arbitration which recognizes its multi-faceted nature should be an improvement.

An arbitrator is primarily an interpreter of the collective agreement, but he is not simply an interpreter. He may need to apply community values to eliminate ambiguities. He may be able to facilitate an agreed resolution of the dispute. Less frequently, he may be

100. See Killingsworth & Wallen, supra note 4, at 62-65, 67-68.
asked to mediate, to help the parties fill out their agreement, or even to apply external law which may conflict with the terms of the agreement. In short, the modern labor arbitrator fills several complementary roles. His task is thus at once more difficult and more challenging than envisioned in any of the single-role models.