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In Memoriam: David Feller

Joseph R. Grodin†

Without David Feller the landscape of American labor law would be quite different, of that there is little doubt. As advocate, scholar, and arbitrator, he played a dominant role in shaping the way the United States Supreme Court came to view the institutions of collective bargaining and arbitration. The story of how he did that is a tribute to clear-headed thinking, unusual creativity, superb lawyering, and a good deal of chutzpah.

David himself told part of the story in remarks he called a “Fireside Chat” which he delivered to the 1994 annual meeting of the National Academy of Arbitrators.1 Briefly, it goes like this: David, after clerking for Chief Justice Vinson on the U.S. Supreme Court, went to work at the Chicago law firm of Arthur Goldberg, who had recently become legal counsel for the Steelworkers Union and the CIO and who became counsel for other unions as well. One of David’s assignments was to keep an eye on the Supreme Court docket and advance sheets for cases that might be of interest to their clients. One day he noticed in the advance sheets a decision of the Third Circuit in Westinghouse Salaried Employees v. Westinghouse Electric Co.,2 in which a union, after exhausting contractual grievance procedures (there was no arbitration clause) sued an employer for breach of the collective bargaining agreement when it docked some 4,000 employees a day’s pay for leaving work. The suit was under Section 301 of the Labor Management Relations Act,3 which provided for suits in federal courts to enforce collective bargaining agreements, but the Third Circuit held that the Union could not use Section 301 to enforce an obligation which, the court said, arose out of the collective bargaining agreement but became embodied in, and enforceable only through, the individual employment contracts of the workers.

The result was to render Section 301 virtually useless for unions, but

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David saw the decision (as perhaps only he could) as "an ideal vehicle to turn Section 301, which had been enacted as part of the Taft-Hartley Act to permit suits against unions, into a weapon to enforce collective bargaining agreements against employers." The lawyer for the plaintiff union had not planned to seek *certiorari*, but when David offered the services of the CIO legal department for free, he agreed. David's *cert* petition was granted, and David filed a brief with a long appendix written by the labor economist Jack Barbash, in an effort to persuade the Court as to the "true nature of a collective bargaining agreement and the union's interest in asserting the rights of individuals under such an agreement."

The effort did not succeed. A majority of the Supreme Court, though for differing reasons, agreed that Section 301 did not provide a basis for suits by unions to enforce individual rights under a collective agreement. As David puts it, "the effort to develop the law under section 301 ended up in a disaster, and we had mud on our faces." But the mud soon cleared. The First and Third Circuits disagreed about the implications of *Westinghouse* for a suit brought by a union under Section 301 to enforce an arbitration clause contained in a collective bargaining agreement, and the Supreme Court granted *certiorari* to resolve the conflict. David saw this as a potentially more significant issue than the one presented in *Westinghouse*, and his firm represented both unions before the court, with David writing the brief. The result was *Textile Workers Union v. Lincoln Mills*.

As the court framed the issue in *Lincoln Mills*, it was whether Section 301 was merely jurisdictional, giving federal courts jurisdiction of certain suits without regard to diversity of citizenship or the amount in controversy, or whether Section 301 authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements, including specific performance of agreements to arbitrate. Opting for the latter interpretation, Justice Douglas' opinion for the Court relied heavily upon federal policy favoring arbitration over strikes as a means of resolving grievances under the agreement.

*Lincoln Mills* had a mixed reception in the labor law-arbitration community; there were some who feared that it would open the door to intrusive regulation by the federal courts. But, says David, "[w]hat they didn't know was that *Lincoln Mills... was only a first step in a well-planned litigation strategy." Within 18 months of the *Lincoln Mills* decision, the three cases which ultimately became the *Steelworkers Trilogy* had been filed. The Goldberg firm was involved in all three cases, and David describes the strategizing which ultimately led to the three cases

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being argued to the Supreme Court consecutively, "and in precisely the order we wanted." Ordinarily, Arthur Goldberg would have argued the cases himself, but he was exhausted from a lengthy battle over use of the Taft-Hartley injunction against the steel strike of 1959, and so, as David puts it, "the Trilogy became my baby." Over a period of six hours of oral argument, half of it allotted to the union, David "had the opportunity, probably never to be repeated... to really attempt to educate the Court on the nature of the arbitration process."

And educate he did. The result was an astonishing victory for the autonomy of labor arbitration, beginning with a presumption in favor of arbitrability without regard to the merits of the particular grievance, and ending with a mandate for virtually complete deference to the judgment of the arbitrator in his role as factfinder and interpreter of the agreement in accordance with the "common law of the shop." The concerns of the labor/arbitrator establishment had clearly been put at rest.

If David had done nothing further in his career his place in the labor law hall of fame would have been assured, but it is precisely the remainder of his career that I find most interesting. In 1967, he argued on behalf of the United Brotherhood of Packing House Workers in Vaca v. Sipes. He succeeded in persuading the Court to overturn a state law judgment in favor of a member who complained that the union acted arbitrarily and with malice in refusing to take his grievance to arbitration under the collective bargaining agreement, but from his perspective "the opinion was less than satisfactory." A few years later David left the practice of law, joined the Boalt faculty, and proceeded to demonstrate how the court in Vaca got it wrong.

The result was A General Theory of the Collective Bargaining Agreement, a 193-page, 719 footnote tour de force. In David's view, the collective bargaining agreement should not be characterized as containing promises by the employer running in favor of individual employees, but as a judicially enforceable contract between the union and the employer, creating primarily an obligation on the part of the union not to strike, in return for an obligation on the part of the employer to comply with the contractual grievance and arbitration procedure. Therefore, the remedy for a union's breach of its duty of fair representation by failing arbitrarily to take a grievance to arbitration should not be, as the Vaca court held, opening the door to an individual suit by the employee on the agreement against both employer and the union, but an order requiring arbitration in accordance with the agreement. But General Theory went far beyond a critique of Vaca. Thirty years later, it is still the most complete and

persuasive overview of the collective agreement ever developed.

David's central values, in terms of the law, were the autonomy of the collective bargaining process and of arbitration. He saw both as uniquely American contributions to the law of the workplace. *Vaca* posed a threat to the autonomy of the arbitration process by allowing courts to interpret the agreement instead of the arbitrator, thus contravening the spirit of the *Trilogy*. But *Vaca*, in a way, was just the beginning. Four years later, in *Collyer Insulated Wire*, the NLRB embarked upon its policy of deferring unfair labor practice charges—first only refusal to bargain charges but later interference and discrimination charges as well—to arbitration when the conduct subject to the charge occurred during the term of an existing collective bargaining agreement. On the surface, this deferral policy appeared to enhance arbitration, but David saw in it a danger. While claims of contract violation and unfair labor practice claims may require resolution of the same or similar factual controversies, they are analytically distinct, and David's fear (well founded, in fact) was that arbitrators, instead of focusing upon their role as proctors of the bargain, would assume the role of public enforcer, to the detriment of the process. And after *Collyer* came *Hines v. Anchor Motor Express*, in which the Supreme Court eroded the principle of arbitral finality by holding that an arbitration award could be set aside if it was determined that the union had breached its duty of fair representation in the manner in which it represented the employee in arbitration.

But *Vaca*, *Collyer*, and *Hines* were still within the ambit of the labor law family. What happened, in addition to these developments, was that the entire legal landscape was changing. The legal regime from the adoption of the NLRA in 1935 through the mid-1960's was one in which the unionized workplace was regulated almost exclusively by the collective bargaining agreement implemented through arbitration. It was a regime of labor law. Since the mid-60's, the legal environment became infused with public employment law, in the form of anti-discrimination statutes, pension regulation, health and safety regulations, and the like, implemented through the courts, and employment law began to play an important role in the governance of the workplace. It was not that David was opposed to these laws. On the contrary, he had been active in the civil rights movement, assisting the NAACP with its appellate litigation, and was an advocate for legislation protective of working people. David was concerned, however, first that the collective bargaining process would have to share its governing role with the emerging public law, and second that public law would inevitably impinge upon the autonomy of the arbitration process, especially

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8. 192 NLRB 835 (1971).
if arbitrators began to look to external law in the decisions of grievances, a 
tendency which David strongly opposed. David expressed these concerns to the National Academy of Arbitrators in 1976, in a speech published under apocalyptic titles: The Coming End of Arbitration’s Golden Age,10 and Arbitration: The Days of its Glory are Numbered.11

David’s apprehensions about the future of labor arbitration were confirmed, in his view, by subsequent developments. In a 1993 speech to the Academy which he published under the gloomy title End of the Trilogy: The Declining State of Labor Arbitration,12 David observed a singular irony. The strategy of developing protection for labor arbitration through Section 301, in order to avoid the recalcitrance of federal courts under the Federal Arbitration Act proved, he asserted, to be “totally unnecessary for the result,” for the attitude of courts toward the enforceability of agreements to arbitrate under the Federal Arbitration Act had “completely reversed course.” Not only did labor arbitration cease to occupy a special status—Triology principles came to be applied to commercial arbitration as well, through the Federal Arbitration Act—but labor arbitration awards were actually receiving less deference than awards in commercial cases. There was a disturbing tendency, on the part of federal courts, to deny enforcement to labor arbitrations awards on the grounds either that the arbitrator had exceeded the scope of his authority under the agreement, or that the result was contrary to “public policy,” broadly and ambiguously defined. And, David suggested, that tendency was likely to be furthered by the Supreme Court’s change of course with respect to the arbitration of statutory claims. Instead of resisting such arbitration, as it had in the past, the court had come to embrace it, and, in Gilmer v. Interstate/Johnson Lane Corp.,13 to include within its embrace the arbitration of claims under a federal employment law statute, the Age Discrimination in Employment Act, pursuant to an arbitration clause imposed upon the employee as a condition of employment.

David was deeply concerned over the Gilmer decision. He thought it both unfair to the employee and unwise in terms of the policies of the federal anti-discrimination laws to turn enforcement over to a private arbitrator on the basis of an adhesive agreement to arbitrate future claims. And, he believed it a risk to the integrity of the arbitration process, not only in the case of unrepresented employees but within the context of labor arbitration as well. The distinction between labor arbitration and other

arbitration was disappearing, he believed, and the arbitration of statutory claims would inevitably lead to broader judicial review.

In the last decade of his life, David fought a continuing war over the extension of Gilmer. First, there was one of the questions left open by the Court in that case—the scope of the exemption from the Federal Arbitration Act of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." That question came before the Court in Circuit City Stores, Inc. v. Adams and David was responsible for uncovering much of the legislative history that was presented to the Court in support of the proposition that the exemption should be given a broad interpretation. The legislative history was heavily relied upon, but unfortunately only by the dissenters. The majority considered the legislative history irrelevant to the determination of what they considered to be the "plain meaning" of the text—that it exempted only employees actually engaged in transportation across state lines.

David lost that battle, but he continued the fight, and the next battle he won, indeed almost single-handedly. In Alexander v. Gardner-Denver, the Court had held that an employee covered by a collective bargaining agreement with an arbitration clause could present his claim of racial discrimination under the agreement, lose, and still sue in court under Title VII. In part that holding rested on the Court's former view that arbitration was an inappropriate process for the vindication of statutory rights, but in part also upon the arbitrator's limited authority to decide contractual claims, which were analytically distinct from statutory claims, and in part upon the potential for tension, in the collective bargaining context, between individual and collective rights. The Court's opinion in Gilmer undercut the first rationale, but declined to overrule Alexander, instead distinguishing it on the other two grounds, plus a third (and virtually meaningless) ground, that Alexander was not decided under the FAA. This state of affairs led to conflicting decisions in the lower courts as to whether an arbitration provision construed to permit the arbitrator to decide statutory claims would be a bar to an employee proceeding under the statute.

The issue came before the Court in Wright v. Universal Maritime Service Corp. The Fourth Circuit had held, in an unpublished opinion, that an employee was obligated to arbitrate his disability discrimination claim rather than sue under the Americans with Disabilities Act, because the applicable collective bargaining agreement contained provisions which

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the court, rather generously applying the *Trilogy* presumption of arbitrability, interpreted to reach statutory as well as contract claims. Most of the briefs in the Supreme Court after it granted *certiorari* assumed that the Court was intent upon deciding whether the parties to a collective agreement could “waive” an individual’s right to sue under a statute, but David saw the matter differently. For him, there was a preliminary question as to whether the presumption of arbitrability should apply to statutory claims at all. Indeed, it was David’s view that the presumption should run the other way.\(^{19}\) He presented that view to the Court in an *amicus* brief on behalf of the National Academy of Arbitrators, thus offering the Court a way out of having to decide the precise impact of *Gilmer* on *Gardner-Denver*.

The Supreme Court bought into David’s proposal unanimously. Justice Scalia’s opinion for the Court reasoned (in accordance with David’s brief) that the presumption of arbitrability was based on the proposition that arbitrators are in a better position than courts to interpret the terms of a collective bargaining agreement, not the meaning of a federal statute; and that a presumption of non-arbitrability of statutory claims should apply instead:

> Although [waiver of a right to a statutory forum] is not a substantive right, and whether or not *Gardner-Denver*’s seemingly absolute prohibition of union waiver of employees’ federal forum rights survives *Gilmer, Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less than explicit waiver in a CBA.\(^{20}\)

Questions remain after *Wright*, including questions concerning the effect of an explicit agreement to arbitrate statutory claims, the effect of union authorization of individual *Gilmer* agreements between the employer and members of the bargaining unit, and whether either are bargainable issues. But those phenomena are still rare and for the time being, at least, David’s brief and the Court’s acceptance of it saved the day for the autonomy of the arbitration process, and for the core meaning of the *Trilogy*.

David was by nature an optimistic person, the ominous title of some of his articles notwithstanding. He was a pragmatist, and a realist. He fully recognized the role of differences in outlook among judges, as well as the role of considerations that might affect an opinion without judicial acknowledgment—the effect, for example, upon the question of arbitrability of statutory claims of the motivation on the part of overworked federal

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judges to divert cases from courts to arbitrators. But he never fell into the nihilistic view that the law is nothing more than the sum of judges' political predilections. Throughout his career—as advocate, arbitrator, teacher, and scholar—he displayed a faith in the role of reason, and in the efficacy of reasoned argument. He believed with conviction that an appellate advocate armed with careful preparation of facts and law can influence judicial decisions, and he proved it. Along with the Trilogy, the memory of that conviction, and of David's own extraordinary ability to carry it out, will be his greatest legacy.