Case Western Reserve Law Review

Volume 64 | Issue 1

2013

Tribute to Professor Calvin William Sharpe

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have only just begun. I value his friendship and look forward to learning more from him in the years to come.

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The retirement of my colleague, teacher, friend, and co-author Calvin William Sharpe saddens me. While I anticipate continued conversations on subjects of mutual interest, I know that those exchanges will be fewer and almost always from a distance. My sadness is all the more profound because health challenges have hastened Calvin's retirement, and I wish him the best in meeting those challenges.

Though otherwise an unhappy occasion, Calvin's retirement has afforded me the joy of rereading a number of his most important labor law articles. Reacquainting myself with these articles truly is a pleasure. I have the joy of rediscovering the powerful argument here, the paragraph constructed with both verve and crystalline clarity there. Even after those instances of disagreement over legal analysis or policy implications, I find myself getting up from my reading with a smile on my face.

Some of my pleasure might be characterized as nostalgic, reencounters with something enjoyable from my past. A second, unanticipated pleasure comes from the experience of looking at Calvin's work as a more integrated whole. Doing so has deepened my understanding of Calvin's beliefs, passions, and character, which has leavened my feelings of sadness and loss.

In several of his articles, Calvin focuses on how we might manage conflict to allow resolution with minimal cost and damage, while safeguarding fairness and other societal values. In both *NLRB Deferral to Grievance-Arbitration: A General Theory*[1] and *Integrity Review of Statutory Arbitration Awards*,[2] he considers, in two different contexts, how best to balance a preference for arbitration over litigation to resolve workplace disputes against a concern that an arbitrator may disregard important statutory rights. Regarding NLRB deferral to arbitration, he concludes that with a minimal amount of tweaking, the National Labor Relations Board has established appropriate rules governing when it will defer to arbitration notwithstanding important statutory interests that are at stake in the

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1. Calvin William Sharpe, *NLRB Deferral to Grievance-Arbitration: A General Theory*, 48 Ohio St. L.J. 595 (1987) [hereinafter Sharpe, *NLRB*].

2. Calvin William Sharpe, *Integrity Review of Statutory Arbitration Awards*, 54 Hastings L.J. 311 (2003) [hereinafter Sharpe, *Integrity Review*].

dispute.[3] By contrast, in *Integrity Review*, Calvin concludes that the standard of review applied by many courts to employment arbitration decisions is inadequately protective of statutory rights that promote workplace fairness. He therefore offers his own standard of substantive integrity review that is intended to assure that the arbitrator is mindful of statutory rights and societal interests.[4]

In two other articles, Calvin considers other possible misuses of power in labor disputes. In "*By Any Means Necessary"—Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act*,[5] he takes on the seemingly intractable problem of when concerted worker activity meant to advance "collective bargaining or other mutual aid or protection"[6] should lose its protection under the National Labor Relations Act[7] because the workers employed improper means. The scenarios present the prospect of multiple abuses of power. Workers might use improper tactics that cause undue harm. Employers, on the other hand, might, under the invocation of a work rule or a claim of insubordination or disloyalty punish behavior that the statute is meant to protect. Finally, either the National Labor Relations Board or judges sitting in review of a Board decision might impose their own beliefs about appropriate employee behavior without sufficient regard to the statute's invitation to conflict.[8] The United States Supreme Court's attempts to give guidance in this matter are vague and unhelpful.[9] In response to the

3. Sharpe, *NLRB supra* note 1, at 595–96.

4. Sharpe, *Integrity Review*, *supra* note 2, at 346–61. One important difference between labor arbitration and employment arbitration is that in the labor context, the choice of arbitration as the method for resolving disputes is bargained for and agreed to in the collective bargaining agreement, whereas it is typically imposed by the employer in the nonunion context of employment arbitration.

5. Calvin William Sharpe, *"By Any Means Necessary"—Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act*, 20 BERKELEY J. EMP. & LAB. L. 203 (1999) [hereinafter Sharpe, *"By Any Means Necessary"*].

6. 29 U.S.C. § 157 (2006).

7. The protection of a worker's right to engage in protected concerted activity is guaranteed by section 7 of the National Labor Relations Act. National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).

8. For another discussion of this last abuse of power, see JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 44–66 (1983).

9. The two Supreme Court cases are *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard Broad. Co.)*, 346 U.S. 464 (1953) (holding that the discharge of television station technicians who distributed handbills disparaging the television station and failing to identify the connection between the handbills and a labor dispute is permissible because the "disloyalty" of the technicians deprived them of section 7

uncertainty created by the case law, Calvin suggests a more certain standard that could guide employees, employers, the NLRB, and the courts by focusing on whether or not the means the employees adopted threatened "the long-term viability . . . of the enterprise, the labor-management relationship, or the employment relationship."[10]

Finally, in *"Judging in Good Faith"—Seeing Justice Marshall's Legacy Through a Labor Case*,[11] Calvin again considers misbehaving employees, this time turning his focus to a judge's temptation to be swayed by personal inclinations or preferences. Specifically, he considers how judges might misuse judicial discretion. He does this by examining Justice Thurgood Marshall's exercise of good faith in upholding the principle of exclusivity (the idea that once selected as the representative of a group of employees, a union is the exclusive bargaining representative) against the unfair labor practice charges of African American employees who—by organizing a community boycott of the employer—had circumvented their union's attempt to deal with their department store employer's alleged racial discrimination through the grievance-arbitration process.[12]

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protection) and *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (holding the discharge of employees who left work without permission, in violation of a plant rule, and in protest of unreasonably cold working conditions constitutes impermissible interference with section 7 rights).

10. Sharpe, *"By Any Means Necessary," supra* note 5, at 233.

11. Calvin William Sharpe, *"Judging in Good Faith"—Seeing Justice Marshall's Legacy Through a Labor Case*, 26 Ariz. St. L.J. 479 (1994).

12. The case in question is *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). Justice Marshall had reason to know that labor unions had a mixed history at best regarding racial fairness, though the union in *Emporium Capwell* appears to have been acting in good faith. Indeed, as an NAACP lawyer, Marshall had litigation experience against discriminating unions. Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961 (1994) (discussing Marshall's involvement in civil rights litigation, including, on pages 77–79, a case in which white railroad unions negotiated favorable conditions for white workers). Nevertheless, Marshall curbed any inclination to balance antidiscrimination law concerns against the demands of the National Labor Relations Act that might favor the discharged employees. Calvin uses that as a jumping-off point to explore the judicial obligation to judge in good faith. Calvin returned to *Emporium Capwell* in a co-authored book chapter. Calvin William Sharpe, Marion G. Crain & Reuel E. Schiller, *The Story of* Emporium Capwell: *Civil Rights, Collective Action, and the Constraints of Union Power*, *in* Labor Law Stories 241 (Laura J. Cooper & Catherine L. Fisk eds., 2005). In this second look at the case, Calvin and his co-authors acknowledge that Justice Marshall might not have felt sympathy for the dissenting African American workers and may not have felt discomfort at ruling against them given his distrust of direct action civil rights efforts in lieu of legal challenges to discrimination. *Id.* at 266. I am inclined to agree

All of these works demonstrate a concern with unconstrained power, whether the power of workers and their employers to harm each other in pursuit of their interests or the unchecked discretion of decision makers such as judges and arbitrators. They also convey Calvin's belief that, through a combination of rationality and such virtues as faithfulness to one's duty and a sense of integrity, conflict can be managed to limit the harm that might be done through misapplication of power. That Calvin repeatedly explored the power of these virtues is unsurprising given his temperament and his background: his father was a Methodist minister, and Calvin, in turn, contemplated a career in the ministry before choosing the law. The language that he employs—"good faith," "integrity," and "virtue,"—mirror my experience of Calvin as a colleague.

All of these works also share a recognition that conflict is inevitable, but a hopeful belief that conflict can be productively managed in the interest of peaceful resolution of disputes. Calvin has dedicated not only his scholarship, but his life, to the pursuit of peace. His dedication to arbitration as a sensible and accessible means of dispute resolution is evident in the skill that he has developed as an arbitrator. In Cleveland, I have heard him referred to reverentially as "THE arbitrator." His talents as an arbitrator have been recognized by many. In 1991, Calvin became a member of the National Academy of Arbitrators, an organization comprised of the profession's best. His skill as an arbitrator has been sought widely by industry and labor groups, including the UAW International Public Review Board, the National Football League, and the National Basketball Association. It is perhaps a permissible play on words to suggest that, as a panel member for the NBA, Calvin served on the tallest, if not the highest, "court" in the land.[13]

Beyond being a model arbitrator, Calvin has also been something of an evangelist of arbitration in his scholarship, his teaching, and his service. A substantial portion of his scholarship has focused on arbitration. For many years, he taught a popular simulation course on collective bargaining and arbitration at our law school. He has served in leadership roles within the National Academy of Arbitrators as a member of its Board of Governors and Vice President. He has also encouraged his younger (in my case, only somewhat younger) colleagues to pick up the torch and become arbitrators.

Calvin's dedication to peace goes well beyond his involvement in arbitration. Within the United Methodist Church, he has served as a

with this second read of the case, but, even if it captures Justice Marshall's sentiments more accurately, it does not negate Calvin's insights about judicial behavior and the obligation to judge in good faith.

13. Obviously, "court" is a misnomer, but I beg your indulgence for the sake of the pun.

board member of JustPeace Center for Mediation and Conflict Transformation. At Case Western, he created and led the Center for the Interdisciplinary Study of Conflict and Dispute Resolution (CISCDR). As the director of CISCDR, Calvin greatly enriched the intellectual life of the law school, the university, and the Cleveland community by recruiting a remarkable array of both scholars and practitioners of alternative dispute resolution. True to the mission of CISCDR, Calvin drew speakers from a wide array of disciplines and experiences. Finally, within the law school, his has been a calm voice that always seeks resolution and reconciliation. In the twenty-five-plus years that I have known him, I have never heard him raise his voice in anger.

The rabbinic sages of the Talmud chose to end the Tractate Berakoth with a discussion of how scholars increase peace in the world.[14] Rabbi Eleazar, teaching in the name of Rabbi Hanina, considered a passage from the Prophet Isaiah, who wrote that "all thy children shall be taught of the Lord, and great shall be the peace of thy children."[15] Drawing on rabbinical technique of wordplay, Rabbi Eleazar noted that the Hebrew roots for the words "children" and "builders" are the same and argued that by substituting builders for children one sees that scholars are builders of peace.[16] The rabbis could have been describing Calvin Sharpe. Through his scholarship, his service, his teaching, and his example, he has been a builder of peace.

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I will leave to others who are writing as part of this tribute to Professor Calvin William Sharpe[1] the discussion of the significant contributions he has made to the legal community generally, to legal scholarship, to the law-teaching enterprise, and to Case Western

14. The Babylonian Talmud: Berakoth, tractate 64a (Rabbi Dr. I. Epstein ed., Maurice Simon trans., Socino Press 1948) (ca. 200). For an interesting commentary on this passage, see *Psalm 122: The Peace of Torah Scholars*, Rav Kook on the Torah, http://ravkooktorah.org/SHALOM59.htm (last visited Oct. 21, 2013) (discussing the commentary of Rabbi Abraham Kook, the first Ashkenazi Chief Rabbi of Palestine under the British Mandate).

15. Berakoth, *supra* note 14, at tractate 64a (teaching *Isaiah* 54:13).

16. *Id.*

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1. Calvin Sharpe served as the Galen J. Roush Professor of Law, Case Western Reserve University School of Law.